COURTS, JUDGES, & POLITICS

AN INTRODUCTION TO THE JUDICIAL PROCESS

FOURTH EDITION

WALTER F. MURPHY
C. HERMAN PRITCHETT

Courts, Judges, and Politics

An Introduction to the Judicial Process

Fourth Edition

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To Justice William Brennan, Jr.
Defender of the Constitutional Faith

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Preface

More than a quarter of a century ago, we developed this book out of a need for teaching materials on the judicial process. In 1961, Random House scattered the first edition to students and faculty. As in each of the intervening editions, we have responded to constant bombardments of judicial opinions and scholarly literature by making drastic changes in the specific cases and readings included here. We have, however, barely altered the basic framework of the book as we originally conceived it. The judiciary, as George Washington wrote to Chief Justice John Jay in 1789, is "the Key-stone of our political fabric," and the essence of its political functions remain pretty much constant, even as the forms of those functions change.

Indeed, the importance of courts and judges in the American political system has, if anything, increased over the decades. Most issues of domestic public policy, from affirmative action to abortion, to questions of the authority of the police and the rights of the criminally accused, to public endorsements of religious symbols, regularly—almost daily—come before the courts, as do broader problems of political structure such as federal regulation of campaign financing, federal control over state action, and congressional control over administrative discretion. Even the current Supreme Court, headed by a Chief Justice and largely staffed by associate justices who label themselves apostles of judicial self-restraint, finds itself deeply immersed in public policy. As we try to show, such immersion is not the result of judicial willfulness or misplaced ambition, but an inevitable part of the American political system.

We have chosen the materials in this book to illustrate the processes by which judges, especially, but by no means exclusively, those of the United States Supreme Court, play policy-making roles. Each

chapter begins with an essay by the editors that endeavors to put the chapter's readings into an analytical focus. As far as possible, we have chosen selections that present alternative points of view—that, in effect, debate each other and perhaps the editors as well. Our reprinting a particular piece does not imply that we agree with it, only that we think it raises an important point that intelligent people must consider. Similarly, our placement of articles in debates is not meant to indicate what conclusions we believe students should draw. Our strategy has been to place first the selection that states a thesis, then to follow with a critique of that thesis.

As in previous editions, Part One offers an introduction to the judiciary's participation in the resolution of social conflict—an intrinsically political function. Part Two deals with the organization and staffing of courts, while Part Three examines judicial power—access to, instruments of, and limitations on that power. Part Four examines the distinctive methods that characterize judicial decision making, and Part Five concludes with analyses of the proper functions of judges in a constitutional democracy.

One note about style: In editing cases we have cut many references to cases and similar material and all citations to those sources. To save space and the burden of skipping over ellipses we have not marked such excisions. Our use of ellipses indicates that we have cut substantive matter rather than documentation.

As usual, our debts are as numerous as they are large. We are obliged to Rosemary A. Little of the Firestone Library and her assistants Melissa Hendrich and Lisa Parrish for speedy and efficient help in locating legal esoterica; to John E. Finn, Esq., now of the University of Michigan, for watching over the manuscript like a good shepherd; to Brenda Rodriguez and JoAnn Visnyiczke of Trenton, N. J., for preparing the text of the third edition to be translated into the fourth; to Stacie Scofield of Princeton University for cheerful patience in photocopying and rephotocopying materials; to Nancy Grandjean for help in preparing the table of cases; to Prof. Jennifer Nedelsky, formerly of Princeton University now of the Law School of the University of Toronto, for reading and commenting on part of the manuscript; to Susan Llewellyn for painstaking copyediting; to Robert B. Dishman (University of New Hampshire), George H. Gadbois, Jr. (University of Kentucky), Jill Norgren (John Jay College of Criminal Justice), and Harold J. Spaeth (Michigan State University) for trenchant critiques of the third edition and careful readings of the manuscript of the fourth. Our students were kind enough to register their views about what needed to be done. We have taken some, but not all, of their advice.

We also record our obligation to Bertrand W. Lummus and Lisa Moore of Random House for encouraging us to undertake this fourth edition.

We, of course, take full, if reluctant, responsibility for errors of commission and omission. For these and other failings that might go unnoticed except by our wives, we ask forgiveness and firmly resolve to do penance, sin no more, and mend, if not our lives, future editions.

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July 4, 1985

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PART ONE

Jurisprudence and Social Conflict

1
Political Jurisprudence

The title of this book may seem irreverent; surveys of public opinion indicate that Americans think a linkage between courts and politics is a bad thing. But we do not use the term "politics" in a pejorative sense to refer to jobbery or partisan manipulations. Quite the contrary. We use the word in much the same way Aristotle did, that is, as one of the most important and possibly noble of human undertakings: the processes concerned with the authoritative determination of a society's goals and ideals, mobilization of its resources to achieve those goals and ideals, and distribution of rights, duties, costs, benefits, rewards, and punishments among members of that society.

Obviously courts and judges are major participants in these processes. But much conventional wisdom has held that their role, though essential, is secondary and subsidiary to that of the real policy-forming instruments of government, the executive and the legislature. Judges, some writers have said, do not create or originate. They merely interpret and apply "the Law" as promulgated in constitutions, statutes, and previous decisions.

But interpretation and application of "the Law" are far from being automatic processes. "The Law," after all, is not "a brooding omnipresence in the sky," but something that other humans have found and made and probably not completely found or made. Thus judges have to make choices, often hard choices, in determining what the law is. Some constitutional clauses, like those of the Fifth and Fourteenth Amendments that forbid the federal and state governments to deprive a person of "life, liberty, or property, without due process of law," cry out for interpretation that goes far beyond parsing sentences or searching for largely lost legislative history to discover specific intentions of particular framers. Statutes are frequently no less general in their commands. The Sherman Antitrust Act, for example, forbids "every contract, combination in the form of trust or otherwise, or conspiracy

in restraint of trade." In fact, however, all contracts restrain trade to some extent, if only by limiting alternative agreements. Thus it should have come as no surprise that shortly after the Sherman Act became law, the Supreme Court ruled that, for the statute to be enforceable, judges had to read into it a "rule of reason." The Act could mean only that "unreasonable" restraints of trade were unlawful.

In the context of interpretation and discretion, some authors differentiate between broad or vague clauses, like those in the Fifth and Fourteenth Amendments, and more specific ones, such as the Third Amendment's prohibition against quartering troops in unwilling civilians' homes during peace. The first kind of clause obviously confers far greater discretion on judges than does the second. As Justice Felix Frankfurter explained the "two clause" theory in *United States v. Lovett* (1946), constitutional issues arising from broad standards of fairness written into the Constitution permit relatively wide play for individual legal judgments. But specific provisions adopted to prevent the recurrence of historic grievances were defined by history, and judges must respect those limits.

Along with discretion, judges also have power that fits nicely into Harold Lasswell's definition of politics as "who gets what, when, and how." Individual judicial decisions determine a great deal about who gets what from and pays what to the governmental system. Who owes taxes or military service, who is entitled to pensions, unemployment benefits, or welfare are matters that judges frequently decide, just as in civil (noncriminal) disputes between individuals, judges determine who owns a piece of property or what obligations a contract imposes, or how much Citizen A must pay Citizen B for damaging his car.

As later chapters show in some detail, the effects of judicial decisions that apparently concern only two private citizens or a single citizen and a governmental agency may ripple out to include large segments of the population, perhaps even the nation as a whole. Insofar as judicial decisions relate to the legitimate power of governmental officials vis-à-vis each other or private citizens, those rulings may preserve or alter existing structures of authority—the formal and informal means by which a polity is governed. Insofar as judges in justifying their decisions announce fundamental principles, they may affect a nation's ideals and ultimate goals.

SCHOOLS OF JURISPRUDENCE

On reflection, much of what we have just said may seem to consist of truisms. Who could deny such plain reality? The answer is that a venerable legal tradition denies that a judge should properly function as more than "the mouth of the law." Judicial decisions, so this tradition argues, affect public policy only if "the Law" so commands.

Sir William Blackstone (1723–1780) was among the more eloquent writers who denied that wise and virtuous judges exercised real discretion. Blackstone's influence has been great in part because he was restating an already established and respected point of view. In part, that influence has also been due to his stating a comforting hope as an actual fact; that is, that the word "law" connotes something known, something sure, something solid on which people can lean in time of trouble. The true function of judges, he explained in his *Commentaries on the Laws of England,* was only to "declare" the law. Judges were "the depositories of the law; the living oracles who are bound by oath to decide according to the law of the land." Their task, Blackstone stressed, was not to decide cases according to their private ideas or values, nor were they "delegated to pronounce a new law, but to maintain and expound the old one." (Reading 1.1.)

SOCIOLOGICAL JURISPRUDENCE AND JUDICIAL REALISM

While some practicing politicians, judges, and scholars have accepted the declaratory theory of judging, others have angrily attacked it. In England, Jeremy Bentham (1748–1832) spent much of his time ridiculing Blackstone. In America, Thomas Jefferson bitterly attacked Chief Justice John Marshall's claims to be a Blackstonian judge, by merely applying objectively the Constitution and statutes of the United States. In Marshall's hands, Jefferson complained, the Constitution was "a thing of putty" and the law "nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice." What Jefferson perceived was that the concepts embodied in the Constitution were broad and that Marshall was interpreting those concepts as would a stolid, conservative Federalist.

Several generations later, Oliver Wendell Holmes, Jr. (1841–1935), accepted judicial lawmaking as a fact of life, but he did so without Jefferson's partisan rancor. Indeed, Holmes contended that "the Law" had no existence apart from the decisions of courts. In a famous and influential sentence he wrote: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." (Reading 1.4.) Nor were judges moved merely by logic. As he explained:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[1]

[1] *The Common Law* (Boston: Little, Brown, 1881), p. 1.

The appointment of Holmes to the Supreme Court in 1903 gave him the best pulpit in the land for announcing and amplifying his conception of the judicial function and for challenging the declaratory theory. He not only opposed many specific decisions of the Court but spoke out against his brethren's claims that they were not choosing among competing political values and public policies. When by a five-to-four vote the justices held unconstitutional a ten-hour statute for bakers in New York, Holmes charged that the decision was based not on law but upon an economic theory—moreover, "an economic theory which a large part of the country does not entertain." When the Court struck down a state tax in *Baldwin v. Missouri* (1930), Holmes in his last dissent denied that the Fourteenth Amendment "was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions."

Holmes thought that the future of the law belonged to "the man of statistics and the master of economics." Roscoe Pound (1870–1964), who was to become dean of the Harvard Law School, believed that it was sociology that would shape the development of the law, and he is regarded as the founder of sociological jurisprudence in the United States. His principal concern centered on the relationships between the legal system and the society of which it is a part. Pound saw legal development as the product of a series of adjustments made necessary by the function of law as a controlling and stabilizing force in a constantly changing society. Law, he argued, cannot control society if it does not satisfy fundamental social needs for both stability and change. Because understanding the precise nature of those needs depends heavily upon sociological knowledge and analysis, Pound concluded that lawyers and judges had to broaden their thinking to include comprehension of the actual effects of legal rules on society. Indeed, he came to see the study of law as one of the social sciences, living in union—or sin—with economics, history, sociology, and political science.

As did Holmes, Pound stressed the critical significance of the judge in providing the really creative element in law. He believed that, historically, legislation had failed to meet the requirements of social change; moreover, the complex conditions of modern life made legislators incapable of drafting statutes that could effectively encompass all eventualities. Judges, deciding on a case by case basis were in a better position than legislators to achieve the continual adjustment needed if a legal system was to harmonize rather than clash with its larger social system. But, Pound emphasized, to play that creative role judges had to abandon Blackstone's "slot machine theory" of judicial decision making and acquire the learning necessary to become informed "social engineers."

Justice Benjamin N. Cardozo (1870–1938) agreed with Pound about the nature of law and the creative tasks of judges. While he was