1993

Justice vs. Law: Courts and Politics in American Society

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JUSTICE VS. LAW

COURTS AND POLITICS IN AMERICAN SOCIETY

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THE FREE PRESS
A Division of Macmillan, Inc.
NEW YORK

Maxwell Macmillan Canada
TORONTO

Maxwell Macmillan International
NEW YORK OXFORD SINGAPORE SYDNEY

The Free Press
A Division of Macmillan, Inc.
866 Third Avenue, New York, NY 10022

Maxwell Macmillan Canada, Inc.
1200 Eglinton Avenue East
Suite 200
Don Mills, Ontario M3C 3N1

Macmillan, Inc. is part of the Maxwell Communication Group of Companies.

Printed in the United States of America

printing number
1 2 3 4 5 6 7 8 9 10

Library of Congress Cataloging-in-Publication Data

Hickok, Eugene W.
Justice vs. law : courts and politics in American society/Eugene W. Hickok, Gary L. McDowell.
p. cm.
Includes bibliographical references and index.
ISBN 0-02-920529-8
1. United States. Supreme Court. 2. Political questions and judicial power—United States. 3. Law and politics. I. McDowell, Gary L. II. Title. III. Title: Justice versus law.
KF8748.H53 1993
340'. 115—dc20 93–21691
CIP

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PREFACE

The courts of America are an institution of paradox. On the one hand, they are intimately involved in the daily affairs of the people, yet on the other, they carry out their duties largely behind a veil of public ignorance. Few outside the legal profession even pretend to understand the intricacies of the judicial process; jurisprudence is as mystical a subject as the general public can imagine. "Thus it happens," as Henry Home wrote in the eighteenth century, "that the knowledge of the law, like the mysteries of some Pagan Deity, is confined to its votaries; as if others were in duty bound to blind and implicit submission."

The purpose of this book is to pull back that veil and to reveal the mysteries for what they are: ordinary institutional contrivances designed to shape and direct the politics of the nation. As a result, the judicial process is inevitably a forum wherein differing visions of the just society come into conflict. While the cases and controversies that come before the courts are contests between two reasonably well defined adverse litigants, each with a personal stake in the resolution of the dispute, the judgments handed down often go far beyond those litigants and affect American society and politics in the broadest sense.

When Jane Roe sued to have the right to abort an unwanted fetus it was a very personal matter; the result, however, was very public. American politics and law have been consumed with *Roe* v. *Wade* ever since.

When the motion picture industry endeavored to protect copyrights against easy duplication by video cassette recorders, the reason was narrow in the sense of protecting the rights of individuals. The result, however, had an impact in nearly every living room in America.

When the California Coastal Commission sought to protect public access to beaches by easements against property owners, it

was trying to serve the public interest, not harm individual homeowners. Yet those homeowners saw it differently: they sued that such a public policy unconstitutionally deprived them of their property without just compensation as required by the Constitution. They won, thereby transforming public policy by asserting their rights in court.

Similarly, when a little girl named Linda Brown sued the school board of Topeka, Kansas, four decades ago so that she could attend the public school of her choice regardless of her race, the resolution of *Brown* v. *Board of Education* changed the face of American society.

The examples can be multiplied without end—from the death penalty, to rights of parental visitation, to police procedure, to school assignments. The fact is, judicial decisions shape public policy. But they do more: They also define public understanding not only as to the nature and extent of judicial power, but concerning the substantive issues of law and public policy as well.

Since the beginning of the American republic, the courts have been the scene where the great public tugs-of-war have taken place. The question of whether Congress had the power to establish a national bank that so divided the Federalists and the Jeffersonians; the question of slavery that nearly shattered the union; the advent of economic liberalism and the progressive efforts to tame the social aftereffects of the industrial revolution; the Great Depression and FDR's New Deal; and, of course, the civil rights movement of the 1960s all had their days in court.

To suggest that courts are political bodies is not to disparage them; they are political bodies in the highest sense of the word. They are institutions designed to maintain the rule of law; without them, as Alexander Hamilton once put it, "the laws are a dead letter." Thus what courts do—and how they do it—is of primary importance to the political health of the nation.

The great French commentator on America, Alexis de Tocqueville, once noted that in a very important sense, the courts are essential to the maintenance of the idea that law transcends the passions and the politics of the moment; the courts in America, Tocqueville sagely observed, wield enormous power, but it is a power derived only from their "moral force." As Hamilton said in

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The Federalist, the judges neither brandish the sword nor control the purse strings of the nation; their power is the power of disinterested judgment. For the courts to work as planned, they must have the political respect of the people; without it, their power will vanish.

In recent years, the courts have tottered ever nearer the abyss of public disrespect. The courts have become not merely arenas where concrete cases and controversies (albeit with social implications) are decided but places where abstract legal theories are pushed by this side and that. Through the judicial process has come, as Judge Robert Bork so tellingly described it, a battle for the legal culture of America.

Through the cases brought, the briefs filed, and the arguments made, ideological plaintiffs have endeavored to supplant the status quo with new visions of the just society. While the individual adverse litigant is still necessary as a threshold matter to get into court, once there individual considerations all too often fade into insignificance. The cause becomes more important than the case. The goal is to replace a concern for concrete constitutional rights with a concern for judicially decreed constitutional values. As one lawyer has observed, this new emphasis on "public law litigation" is intended to reflect "doubt as to whether the status quo is in fact just." The object is simple: "The goal of this new mode of litigation is the creation of a *new* status quo."

The average person may well wonder why the courts and not the legislatures for so tough a task. The answer is that to the advocates of this new regime the people cannot be trusted; popular government is to be supplanted by judicial decree as shaped and directed by scholarly legal theories. In this view, the role of the courts has to be more than merely resolving disputes; the proper role is one that will give vent to what one writer has called the ethos of the polity. Old fashioned sorts might think this "ethos" would have some connection with popular judgments of right and wrong, justice and injustice. Not so: "the expressive function of the Court . . . must sometimes be in advance of and even in contrast to, the largely inchoate notions of the people generally." As the current dean of Stanford Law School once put it, the contemporary theories of law pouring from the law schools are in truth

"advocacy scholarship—amicus briefs designed to persuade the court to adopt our various notions of the public good."

What informs this new constitutional moralism is an intended blurring of the question of legality and the question of justice. The litigation strategies employed are all designed to show that, in the words of one famous Federal judge, there need be "no theoretical gulf between law and morality." By infusing law with moral theory, the average judge can be expected to practice what the legal theorists preach. Politically, however, the price is high. With judges unable to give an account of their decisions except to say that they are based on what the judge thinks just, without any clear textual warrant for such a view, it has become increasingly clear that the courts have begun to behave as political institutions not in the highest but in the lowest sense of the word.

While the legal moralists have gained control of much of the law over the past thirty years or so, they carried out their program largely shielded from public view by what Henry Home called "a cloud of obscure words, and terms of art, a language perfectly unknown, except to those of the profession." Shielded, that is, until Ronald Reagan undertook to change things during his two terms in the White House. Weary of judicial activism, Reagan promised the people to appoint judges "who would act like judges, and not like a bunch of sociology majors." The result was a political battle of the first order, reaching its bloodiest skirmish in the nomination of Robert H. Bork to the Supreme Court in 1987. The Bork nomination changed, probably forever, the way the American people view the nature and extent of judicial power in American politics.

Yet still the public understanding of the courts and their role under the Constitution remains more confused than clear. The goal of this book is to correct that situation.

This book is designed to examine the nature and extent of judicial power in the United States. It is meant to introduce the nontechnical reader to the intricacies of the judicial process: the structure and organization of the courts; the important implications—and politics—of judicial selection; the impact the procedures of the courts have on the substantive outcomes of litigation; and especially the intimate relationship between the rule of men

and the rule of law. Taken together, these various areas reveal a marked movement in our courts away from what one might call principled judicial decision making toward a more pragmatic approach. Rather than deciding cases on the basis of concrete principles understood as neutrally transcending the case at hand, the contemporary judge all too frequently opts for attempting to individualize justice for the case before him. Moral subjectivity all too often nudges legal objectivity out of the way.

In order to achieve its goal of exposing and explaining the current state of judicial power, the book begins with an analysis of a case called *DeShanney* v. *Winnebago County.* In this case, stemming from the awful crime of child abuse, one can see in microcosm all of the important aspects of judicial power—the effect of personnel on the direction of the law; the demands placed on judges by a written Constitution; the relationship between procedure and substance the distinction between the private law of tort at the state level and the public law of the Constitution at the national level; certain aspects of American civil procedure and the legal profession; and ultimately the limits of the demands of justice under the rule of law.