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The History of Constitutional Law: Inside and Outside

This is a book about the way social conditions affect the path of constitutional law. In particular, my goal is to document the relationship between various political, cultural, and social phenomena and the way the Supreme Court decides constitutional questions. That evidence will help us understand when, how, and why political, cultural, and social events shape the content of American constitutional law.

At its core, this book argues for a middle ground between two intellectual traditions in the study of Supreme Court decision making. Political scientists often reduce legal decision making into the kind of unidimensional, partisan cleavage that characterizes legislative policy making. Lawyers and legal academics, on the other hand, typically organize constitutional law into doctrines focused on the legal analysis or procedures that guide judicial decision making. I argue that constitutional decision making is more complex than a simple, traditional left-right political cleavage, but neither is it a collection of substantive doctrines that can only (or best) be understood through the perspective of legal argumentation and the substantive problems that arise in the law. Rather, because constitutional law is a form of higher-order politics, the terms of debates in constitutional cases before the Court are different from other kinds of political debates.

What I argue is that constitutional decision making is best characterized by a small handful of political cleavages that correspond to substantive elements of constitutional politics. That is, judges' views on how to resolve constitutional disputes are multidimensional. I show in this book that while there are systematic, consistent, political patterns in how judges decide constitutional cases, the substantive and legal context in which a case is framed matters for how the judges decide these questions. One way in which social conditions influence the path of constitutional law is through the role they play in shaping the nature of the cases that

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come before the courts. For example, when crime rates increase, criminals and law enforcement officials behave differently, giving rise to new kinds of disputes and constitutional questions. Moreover, as I document in this book, social, political, and cultural events shape not just what kinds of cases judges decide but also the context in which they decide those cases and, thereby, the political cleavages that characterize constitutional decision making.

By approaching the history of constitutional decision making as I do, one can uncover historical patterns and empirical phenomena that do not emerge from more traditional historical analyses. For example, I show substantively nuanced but systematic patterns in Supreme Court justices' preferences across seemingly unrelated areas of the law. By combining historical and substantive richness with rigorous social-scientific methods of analysis, I suggest a middle ground between historical description and parsimonious explanation. In addition, the analytic techniques I employ facilitate the construction of counter-factual examples on which claims about causal factors in historical events necessarily must rely.

To illustrate how this process plays out, consider a salient yet instructive example.

1.1 A MOTIVATING EXAMPLE

Perhaps one of the most widely discussed events in the history of American constitutional law is Justice Owen Roberts' decision to vote to uphold a Washington State minimum wage law in 1937. The justices were closely divided, splitting 5-4 in favor of the legislation. However, what made the decision notable was that a year earlier, the same justices had voted, again 5-4, to *strike down* a New York minimum wage law. In the short period of time between those two cases, Justice Roberts had seemingly changed his mind about the constitutionality of state-enacted minimum wage laws. Why the sudden change of opinion? Why, in the context of Progressive efforts to regulate the economy and recovery from the Great Depression, had he changed his opinion about such an important constitutional matter?

Among social scientists and many legal academics, a popular account, which has been called the *externalist* account, attributes Justice Roberts' change in vote to the politics of the time. In November 1936, after the Court had invalidated the New York law, New Deal Democrats won a landslide election. Following that election, in February 1937, President Roosevelt announced the so-called "Court-packing plan," which was a legislative proposal that would allow the president to appoint additional justices to the Supreme Court. The legislation's purported goal was to

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alleviate workload pressure the justices faced. According to Roosevelt, the justices faced large caseloads, and the aging of some of the older justices made it difficult for them to keep up with their work. (The justices denied this allegation in testimony to Congress.)

However, despite the public presentation, most politicians and the media perceived the legislation's true aim to be more political. The true motivation for the legislation was to dilute the votes of those justices who opposed federal economic regulation and recovery efforts. Specifically, there were four justices, known pejoratively as the "Four Horsemen," who had either ideological or doctrinal opposition to the New Deal Democrats' legislative agenda. By giving Roosevelt the power to appoint additional justices, who would surely be more supportive of his agenda, the legislation would nullify their ability to invalidate New Deal legislation.

Just weeks later, the Court announced its decision upholding the Washington State law. The sequencing of these events led contemporary observers and scholars during the decades since, to attribute Justice Roberts' switch in vote to a political calculation that if the Court continued to block progressive economic legislation, a constitutional crisis could erupt as the Democrats would use control of the government to undermine judicial power altogether. Subsequently dubbed the "switch in time that saved nine," Justice Roberts' change in opinion has emerged as a quintessential example of strategic calculation at the Court in anticipation of the broader political climate in which the justices operate. That is, the events of 1937 are seen, in this view, as an example of how constitutional law can be driven by politics and inter-institutional dynamics.

However, this account has been challenged by some who favor an account of Justice Roberts' change in opinion that is driven more by forces internal to the law. In this view, which has been called the *internalist* account, the difference between Justice Roberts' vote in 1936 and his vote in 1937 is time and the corresponding evolution in doctrine that was taking place. Constitutional law had been evolving during the early decades of the twentieth century and, in this view, by the time the Washington State law made it to the Court, the doctrinal connections among related areas of law had been made in such a way as to establish the foundations for permitting states to regulate wages (for a canonical discussion of these developments in constitutional law, see Cushman 1998).

What is more, not only do these internally based accounts document a clear pattern in the steady progression of doctrine, they also make note of historical facts that undermine the plausibility of the more political story. Specifically, Cushman (1998, 18) points out that Justice Roberts' vote

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could not be attributed to a reaction to the Court-packing plan, because he actually cast his vote in December 1936. The Court-packing plan had been held in close confidence by Roosevelt and his advisors, and it was not possible that Roberts was aware of the proposal. Thus, in the internal account's view, there are both reasons to see the change in Justice Roberts' vote as a part of a doctrinal process that had been taking place for a number of years and reasons to doubt the external account's emphasis on strategic political calculation in response to the Court-packing plan.

Of course, it is possible that Roberts was sensitive to the broader climate, including the Democrats' electoral victory in November 1936 and the great deal of criticism of the Court that had been taking place during the election year (see, for example Clark 2011). Despite that possibility, one thing is clear, the notion that Roberts' vote can be understood as a calculation in direct response to the Court-packing plan.

In this book, I provide an approach to the history of constitutional law that yields a new understanding of the switch in time as well as broad, more regular patterns in the evolution of law. As I show in the following chapters, the path of American constitutional law can be understood as a process whereby social conditions shape how cases are presented to the Court and, in turn, the dimension of conflict along which the justices divide.

I show, for example, that the change in Justice Roberts' vote in the minimum wage laws can be explained by a shift in how the question was presented to and framed by the justices. In 1936, the justices viewed the question more as a matter of the appropriate policies to deal with the on-going crisis that began with the Great Depression, voting along a dimension that corresponded to the justices' tastes for government authority in economic regulation. However, by 1937, a conscious decision was made by the lawyers litigating the case to recast the question as a matter of the appropriate degree of deference to states in matters of such regulation. Indeed, the Court's opinions in the later case reflect this shift. And, I show later that Justice Roberts' vote reflects a broader, systematic pattern in which Justice Roberts was more likely to side with the progressive members of the Court in cases that were dominantly about matters of federalism.

In this book, I argue that in order to understand the path of constitutional law through American history, we must examine broad, systematic forces that come from outside of the Court and the ways in which they shape the internal dynamics among the justices themselves. Regarding the switch-in-time example, then, the model of constitutional law development I adopt is one of a middle ground between the externalist and internalist accounts. In my view, the switch can be understood as

1.2 *A Model of Legal Development*

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part of an internal evolution, but that internal evolution itself was fueled by forces from outside of the Court. Social conditions met with clever lawyering to provide Justice Roberts both the will and the way to revisit his earlier stance on the matter of state minimum wage laws.

The question remains, how typical are examples such as this? How precisely do external social conditions systematically interact with internal decision making to shape law? How can we document such patterns?

1.2 A MODEL OF LEGAL DEVELOPMENT

These questions raise a set of challenges that I hope to address here. The first question goes to the heart of my over arching goal: how do we approach history from a social-scientific, quantitative, analytic, historical perspective? One claim I make is that inference from empirical observation – historical or otherwise – must be grounded in a theory of the underlying process. Biologists often make inferences about the purpose of an animal's attributes or behavior that are valid because they share an underlying theory of evolution. Social scientists, in contrast to natural scientists, are less likely to share a theory of human behavior that can be used to interpret choices we observe individuals make. It is therefore incumbent upon the analyst to specify how a process is purported to operate before evaluating what patterns in the data mean. This is no less true of studies of the law than any other area of social science.

To document the path of constitutional law and its interaction with internal and external social and political forces, I adopt a fairly simple but straight-forward model of the judicial process.¹ I focus the US Supreme Court, but the essential process I outline here applies to any court that might be engaged in law development, such as state courts of last resort or the US courts of appeal. There are five elements to this model. First, social conditions give rise to disputes that generate cases. Those cases are of a limited set of types. Second, a case's type determines what kind of preference cleavage it creates among judges. Third, I argue that judicial preferences are multidimensional, and judges may line up differently in any given case, according to which dimensions are activated by the case. Fourth, the location of the median justice determines which disposition the Court chooses for each case (i.e., which litigant wins). Fifth, after

¹ I use the term model here in an informal sense. While throughout the book I rely on formalized models of various aspects of the judicial process, my overarching perspective is less formal and instead simply meant to outline the broad structure I use to evaluate and describe the path of constitutional law.

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deciding on a disposition, the justices engage in collegial interaction to determine the content of the various opinions that will be written.

The factors that influence the path of constitutional law, given this model of judicial decision making, vary along two dimensions of interest here. The first concerns the nature of the causal force. At its crux, the challenge facing social-scientific history is about the balance between understanding general patterns that in the long run describe society versus a commitment to understanding the uniqueness of particular events. Often, this is framed as a tension between structure and agency (or contingency). Structure refers to the broad forces that push behavior into a common pattern, whereas agency refers to the particular features of individual actors and time-specific context that ultimately determine one's choices when structure is (as it usually is) not completely determinative.

The reason this distinction is particularly relevant for social-scientific history is that by its very nature, historical inquiry seeks to understand how events that take place over time relate to one another. When we consider the history of the law, on one hand, there is good reason to believe large structural forces have significant consequences for the development of law over time. The procedures by which courts resolve individual cases are generally constant, or at least well understood by the individuals within those institutions, and so create substantial incentives for litigants who bring cases (e.g., Baird 2004), judges who select which cases to resolve (e.g., Callander and Clark 2017; Beim, Clark, and Patty 2017), and how rules are built over time (e.g., Gennaioli and Shleifer 2007; Lax 2007; Kornhauser 1992a). At the same time, particular events taking place both at the courts and beyond can have dramatic effects on the creation of consequential precedents. Consider the “separate but equal” doctrine articulated in *Plessy v. Ferguson* or the wide discretion given to Congress to regulate commerce after the constitutional confrontation between FDR and the Supreme Court during the New Deal era. Obviously, those examples are historically salient and highly dependent upon particular contingencies and conditions when they took place. Thus, the question becomes, how does one develop a historical account of the development of constitutional law that is both grounded in rigorous theory about the effects of institutions and politics – i.e., that is grounded in general first principles – while also accounting for the most significant and substantively important events in the course of legal development?

A number of examples from other contexts provide some guidance. For example, Greif's (2006) study of the emergence of institutions for trade in the Medieval era suggests that one way of understanding seemingly unique, consequential events is as the culmination of processes that take

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place slowly over time under the force of structural factors. Greif shows how economic behavior among traders created incentives for them to build institutions that could facilitate cooperation. Greif's account places specific contingencies – the technological and economic conditions at the time – at the center of the causal path driving the establishment of new institutions. Those institutions would then subsequently have powerful systematic influences on commerce and trading behavior. In other words, specific contingencies can be accounted for as part of a systematic theory when that theory accounts for the ways in which structural incentives can recursively reinforce (or undermine) themselves, ultimately leading to periods of stability or seemingly abrupt changes (e.g., Pierson 2000; Page et al. 2006; Weingast 2005). The role for each of these types of considerations depends, seemingly obviously, on the goals of the historical analysis.

The second dimension of factors that shape constitutional law is the locus of analytic attention. One class of theories of constitutional decision making emphasize *internal* politics. That is, the primary driving force behind judicial decisions and the content of constitutional law is located within the judiciary itself. The justices' own ideological and legal views, the decision-making institutions, existing doctrine, and the like constitute the best perspective for understanding why the courts shape constitutional law as they do. Some work in both traditional behavioral and institutional as well as doctrinal perspectives on constitutional law emphasizes these internal forces. One of the most successful theories of judicial decision making, the Attitudinal Model (Segal and Spaeth 2002), specifically emphasizes judicial attitudes over forces external to the courts. Many legal histories emphasize the path of doctrine and interpretation within the courts.

Another class of theories, however, places the locus of analytic attention outside of the courts. Constitutional litigation is driven in this view by the emergence of conflicts or disputes from real-world interactions among people. That litigation forms the basis for the cases that the courts confront and therefore sets the agenda for constitutional decision making. In conjunction with electoral politics, which influence the individual justices who serve on the courts, the content of the legislation they interpret, and the institutional incentives the justices face, those social conditions also shape the ways in which the justices approach cases and the decisions they make. These approaches have much in common with sociological and functionalist theories, which emphasize the influence of social and political forces (e.g., Horwitz 1992).

Putting together these two dimensions of historical analyses – the nature and locus of influences on the law – we can summarize the various

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Table 1.1. *Examples of factors influencing constitutional law.*

Nature		
	Structural	Contingent
Locus	<i>Judicial Institutions</i>	<i>Judicial Behavior</i>
	Internal Collegial courts with majority rule	Individual preferences
	<i>Social Structure</i>	<i>Social Conditions</i>
	External Separation of powers	Electoral politics

Each cell shows examples of factors influencing constitutional decision making, according to their locus (internal v. external) and nature (structural v. contingent).

approaches to constitutional history as follows. One class of explanations for the path of constitutional law is *Judicial Institutions*. This class of explanation focuses on structural factors located within the courts. These factors include the rule that American law-making courts, such as the Supreme Court, are collegial (i.e., composed of multiple judges) and decide cases by majority rule. Another class of explanations, which we might call *Judicial Behavior*, focuses on contingent factors located within the courts. These factors include many of the causal explanations that occupy much of the research on judicial decision making, such as the profile of preferences among the justices who serve on the Supreme Court at any given time. I label the third class of explanations *Social Conditions*, which focuses on particular contingencies outside of the courts at any given point in time. For example, the electoral environment and economic conditions, which affect the cases that come to the courts, are typical examples of causal factors that drive the path of constitutional law from this perspective. Finally, *Social Structure* explanations focus on structural, institutional forces that exist beyond the courts. Theories of the separation of powers, which emphasize institutional checks and balances or federalism, focus on the effects of the constitutional structure and elite-level politics on how judges resolve constitutional cases. Table 1.1 summarizes these types of explanations and provides examples of the types of factors that influence constitutional law from the perspective of each.

Returning, then, to my five-step model of constitutional decision making, we can consider the stages at which we expect different theoretical approaches to judicial politics to affect the path of constitutional law. Structural-internal forces will be likely to affect the collective decision

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making among the justices at the Court. Contingent-internal forces will be likely to affect how individual justices view particular cases – i.e., the extent to which the preference cleavage activated by a case matters for how the justices’ align themselves when voting. Structural-external forces will be likely to affect how litigants, lawyers, and other branches of government interact with the Court. Contingent-external forces will be likely to affect the kinds of cases and disputes that make their way to the Court. Of course, there will be ways in which multiple kinds of forces influence various aspects of the judicial process, but this rough organization imposes modest structure on how we should interpret various empirical patterns in constitutional decision making.

I.3 EXPLANATION OR DESCRIPTION?

I wrote above that articulating a model of the judicial process is the first challenge to addressing questions about how the law systematically evolves with social conditions. A second challenge – indeed, perhaps one more daunting – requires me to adopt a perspective on what the historical record *can* tell us about the role social conditions play in shaping the law. Contemporary political science has witnessed renewed attention being paid to the validity of our claims about causal relationships among potential influences. In light of that revolution, I must be clear about what in my analysis I intend to be explanatory (and, therefore causal in nature) and what I intend to be merely descriptive. Both description and explanation have important roles in documenting the history of constitutional law, but their utility depends in part on drawing crisp lines between which is which.

My goal is to strike something of a middle ground. Part of the challenge is that a sixth element of the model of judicial decision making I lay out above is that judicial opinions subsequently affect the way in which people behave and the kinds of disputes that arise in society. With that step, we necessarily have a circular path whereby, roughly speaking, judicial decisions affect social conditions, which affect judicial decisions.² That circularity is going to pose a significant challenge to studying the effects of either judicial decisions or social conditions. As a consequence, much of what I am able to accomplish in this book is descriptive in nature. I will show systematic patterns in how judges decide cases and how social conditions are related to those decisions.

² Along with two co-authors, I have argued that the decision to step in and resolve a legal question itself can be influenced by the justices’ expectations about how the Court’s decision will influence future litigation (Beim, Clark, and Patty 2017).

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However, as we will see, historical accidents and careful empirical designs can occasionally allow some insight into the question, how much are social forces affecting the path of law? For example, during the late nineteenth century, the Second Industrial Revolution contributed to a significant change in the American economy. Large corporations emerged that reached across wide geographical areas, crossing state boundaries. Middle management emerged as a common form of industrial organization. In turn, new types of commercial conflicts arose, and the federal government's role in economic regulation took on a qualitatively different form. While the unification of the national economy was affected by the structure and content of American law at the time, there were certainly effects that were attributable to the exogenous changes in technology, such as the development of railroads. Similarly, the human rights atrocities of the mid-twentieth century had an effect on how the justices evaluated constitutional questions, as did the rise of terrorism in the early twenty-first century. In subsequent chapters, I exploit these and other events to show how constitutional law is shaped by social conditions more systematically.

The consequence is that the analyses in this book, taken together, illustrate the connections among political and social forces and the path of constitutional law. Taken together, I believe they jointly provide evidence for my claim that constitutional law must be understood as a product of the history of American society but also illustrate empirical patterns for which no existing theory of law-making can fully account. Therein lies the goal of my analytic-historical approach. It is neither fully analytic nor fully historical but rather a blend of two intellectual traditions that can provide new fodder for students of law in myriad disciplines.

1.4 THE SCOPE OF THIS PROJECT

My goal is to document the way in which social and political forces, both inside and outside of the Court, are related to and affect the path of constitutional law. This is an admittedly ambitious objective, and I hope to make a meaningful contribution to how scholars understand the body of constitutional law. As such, I study a variety of institutional features of the Supreme Court, focusing typically on the preferences of the justices who serve on the Supreme Court, the relationship between the Court and other branches of government, and the Court's internal procedures.

As the above description of my model of the judicial process makes clear, though, I do not have a particular model of the *content* of the opinions the justices produce. In subsequent chapters, I often focus on the relative conservatism or liberalism of the median justice as a proxy