Contents

List of figures page xiv
List of tables xviii
Acknowledgments xx

1 The History of Constitutional Law: Inside and Outside 1
  1.1 A Motivating Example 2
  1.2 A Model of Legal Development 5
  1.3 Explanation or Description? 9
  1.4 The Scope of this Project 10
  1.5 A Roadmap to the Book 11

2 Modeling Constitutional Doctrine 15
  2.1 Studying Constitutional Law: Approaches and Barriers 15
    2.1.1 The US Constitution, Its Elements, and Judicial Interpretation 16
    2.1.2 Political Science Approaches to Constitutional Law 19
    2.1.3 Political Development and the Law 21
    2.1.4 Case-Space Modeling of the Law 23
    2.1.5 A Scholarly Divide 25
  2.2 The Theory of Latent Political Dimensions 29
    2.2.1 Politics as an Organization of the Law 29
    2.2.2 Microfoundations and Macropatterns 34
    2.2.3 From Microtheories to Political Cleavages and Macropatterns 43
  2.3 Conclusion 45

3 An Empirical Model of Constitutional Decision Making 47
  3.1 Modeling Judicial Topics and Voting 48
Table of Contents

3.2 A Model of Judicial Voting 50
  3.2.1 Derivations of Statistical Models of Voting 51
  3.2.2 Extending the Model to Multiple Dimensions 60
3.3 A Model of Case Topics 63
3.4 A Unified Model 68
3.5 Conclusion 74

4 The Cases, Votes, and Opinions 77
  4.1 The Constitutional Cases 78
  4.2 The Justices and their Votes 84
  4.3 The Opinions 88
  4.4 Conclusion 93

5 Patterns in Constitutional Law 99
  5.1 The Topics of Constitutional Law 99
    5.1.1 Selecting Dimensionality 100
    5.1.2 The Dimensions 102
  5.2 The Preference Dimensions of Constitutional Law 116
    5.2.1 The Justices and their Preferences 116
    5.2.2 The Cases and Cleavages 128
  5.3 Legal Issues and Political Cleavages 134
    5.3.1 Interpreting Preference Dimensions 134
    5.3.2 The Dimension We Do Not Find 137
  5.4 Conclusion 138

6 From Civil War to Regulation and Federal Power 143
  6.1 Constitutional Law Before the Civil War 145
  6.2 Post-bellum Politics and the Shrinking World 152
    6.2.1 Macropatterns of Industrialization in Constitutional Law 154
    6.2.2 Decision Making and the Politics of Ideological Divides 165
    6.2.3 Politics Beyond the Court 172
    6.2.4 Politics Inside and Outside the Court 177
  6.3 From War to Crisis to Political Realignment 178
    6.3.1 Macropatterns in Constitutional Law, 1920–1940 180
    6.3.2 Regulating the Economy 186
    6.3.3 Regulating the Individual 208
    6.3.4 Internal and External Forces, Structure, and Contingency 216
  6.4 Conclusion 220

7 War, Security, and Culture Clash 223
  7.1 The End of Dual Federalism: Civil Rights, Civil Liberties, and Crime 226
# Contents

7.1.1 Civil Liberties, Civil Rights, and Federalism 231  
7.1.2 Federalizing Criminal Law 236  
7.1.3 Federalism and Transition 245  
7.2 From Transition to Culture Revolution 246  
7.2.1 Civil Liberties and Federalism 249  
7.2.2 Social Strife and Constitutional Law 260  
7.2.3 Social Change and Constitutional Decision Making 274  
7.3 Culture War and Conservative Revolution 275  
7.3.1 Law and Order: From the Cold War to the War on Drugs to the War on Terrorism 279  
7.3.2 Individual Freedom, Privacy, and Culture Clash 290  
7.4 The End of an Era? 299  
8 Conclusion 302  
8.1 Lessons Learned 303  
8.1.1 Social Organization and the Law 304  
8.1.2 Electoral Politics and the Path of Constitutional Law 306  
8.1.3 Path Dependence and Reinforcing Institutions 311  
8.2 Remaining Puzzles 313  
8.2.1 There’s More to Constitutional Law than Politics 313  
8.2.2 Is This Social Science? 317  
8.3 American Politics and Analytic History 319  

Appendix: Constitutional Law Cases, 1876–2012 323  
Bibliography 407  
Index 423