

Table of Contents

FOREWORD	V
PREFACE	IX
COPYRIGHT ACKNOWLEDGMENTS.....	XXI
TABLE OF CASES	XLIII
TABLE OF AUTHORITIES	XLVII

PART I. INTRODUCTORY METHODOLOGY

Chapter 1. Introduction to the Economic Analysis of Law	3
Introduction.....	3
I. Common Features of Economic Analysis	3
A. Subdisciplines of Economic Analysis	5
B. Our Methodological Approach.....	9
II. Foundational Principles of Economic Analysis	10
A. Individual Rationality.....	11
B. Institutions Matter	14
C. Agency Costs	16
D. Methodological Individualism.....	16
E. Free Riding and Forced Riding.....	17
F. Structuring Appropriate Micro-Foundations	18
G. Marginal Analysis	18
H. Politics as an Exchange Model	19
I. <i>Pareto Optimality</i> Versus <i>Kaldor-Hicks Efficiency</i> and the Holdout Problem	20
III. The Problem of Reciprocal Costs (or Externalities) and the Coase Theorem.....	22
IV. Applications: Three Case Studies.....	24
A. The Rational and the Reasonable.....	25
B. Is Voting Irrational?.....	26
1. An Expressive Theory of Voting.....	28
2. A Cost Function of Voting.....	28
3. Possibilities of Strategic Electoral Voting	28
4. Group-Based Model of Vote Mobilization	29
5. Voting as a Game of Cat and Mouse	29
6. The Voter as Minimax-Regret Strategist.....	30
C. Is Legislative Logrolling Good or Bad?	31
Conclusion.....	32
Chapter 2. Elements of Price Theory	33
Introduction.....	33
I. Three Essential Insights	33
II. Supply, Demand, and Regulatory Intervention	36
A. Setting Price Above Market Clearance	39
B. Setting Price Below Market Clearance.....	41
C. Setting Quantity Below Market Clearance	43

D.	Setting Quantity Above Market Clearance.....	44
III.	Additional Price-Theoretic Concepts.....	46
A.	Price Elasticities.....	47
B.	Competitive Versus Noncompetitive Markets.....	49
C.	Profits and Rents.....	54
D.	Opportunity Cost, Ordinary Profit, and Economic Profit.....	55
E.	Production Schedules, Indifference Curves, and Budget Constraints.....	56
IV.	General Equilibrium and Welfare Economics.....	63

PART II. COMMON LAW APPLICATIONS

Chapter 3. Tort Law (Part 1).....	69
Introduction.....	69
I. The Unilateral Care Accident Model.....	73
A. Liability Rules.....	76
B. The Learned Hand Test for Negligence.....	78
C. Comparing Strict Liability and Negligence.....	80
II. The Bilateral Care Model of Accidents.....	82
A. The Least-Cost Avoider Rule.....	82
B. Negligence.....	84
C. Varying Costs of Care and the “Reasonable Person” Standard.....	86
D. Contributory Negligence.....	88
1. Negligence with Contributory Negligence (with a Comment on Assumption of Risk).....	88
a. A Comment on <i>Assumption of Risk</i>	89
2. Strict Liability with Contributory Negligence.....	90
3. Sequential Accidents.....	91
4. Last Clear Chance and Strategic Negligence.....	94
E. Comparative Negligence.....	95
III. Applications.....	98
A. Darnell Michaels v. Tandem Skydiving.....	98
Questions.....	100
B. Tarasoff v. Regents of the University of California.....	101
Questions.....	106
IV. Chapter 3 Appendix.....	107
Chapter 4. Tort Law (Part 2).....	113
Introduction.....	113
I. Extensions of the Basic Accident Model.....	113
A. Causation.....	113
1. Cause in Fact.....	113
2. Scope of Liability (or Proximate Cause).....	116
3. Uncertain Breach of Duty or Causation (and <i>res ipsa loquitur</i>).....	117
Discussion Questions.....	120
B. Activity Levels.....	121
C. Further Considerations.....	124
1. Liability Insurance (and Moral Hazard).....	124
2. Litigation Costs.....	125
3. The Problem of the Judgment-Proof Defendant.....	126

4.	Punitive Damages	127
	Discussion Questions.....	129
II.	Products Liability.....	130
A.	Overview of Products Liability Law	130
B.	The Economics of Product-Related Accidents.....	132
1.	Equilibrium Output and Price for Dangerous Products	132
2.	Manufacturer and Consumer Care Choices	136
3.	The Impact of Consumer Perceptions of Risk.....	137
C.	Regulation Versus Tort Law for Controlling Product Risk	138
III.	Other Areas of Tort Law	139
A.	Medical Malpractice	140
B.	Environmental Accidents	141
C.	Workplace Accidents.....	142
IV.	Applications.....	143
A.	Darnell Michaels v. Tandem Skydiving <i>Revisited</i>	143
	Question	143
B.	Mary Waters v. Calvert’s Colors Painting	144
Chapter 5. Contract Law (Part 1).....		147
	Introduction.....	147
I.	Defining Enforceable Contracts	151
A.	Mental Incapacity or Incompetence	153
B.	Renegotiation and the Problem of Economic Duress.....	154
	Discussion Questions	158
C.	Mistake and the Duty to Disclose	158
1.	Some Examples of Unilateral Mistake	160
2.	Purely Distributive Versus Socially Valuable Information	162
3.	Casual Versus Deliberate Acquisition	164
4.	Unilateral Mistake, Mutual Mistake, and Misunderstanding.....	166
	Questions and Comments.....	167
D.	Unconscionability and Undue Influence.....	168
	Questions and Comments	171
II.	Breach of Contract	176
A.	The Efficient-Damages Remedy	177
1.	Quantifying Expectancy Damages.....	178
2.	Efficient Breach and the Coase Theorem	181
B.	Other Damage Measures	183
C.	Efficient Breach and Reliance.....	183
D.	Consequential Damages and Unavoidably High Reliance	186
III.	Applications.....	187
Chapter 6. Contract Law (Part 2).....		191
	Introduction.....	191
I.	Breach of Contract Extensions	191
A.	Mitigation of Damages	191
B.	Impracticability	193
1.	Efficient Risk Sharing and Insurance	194
2.	Commercial Impracticability.....	197
II.	Alternative Contract Remedies: Specific Performance and Liquidated Damages.....	200

A.	General Framing.....	200
1.	Tort Analogy Revisited: Some Ancient Codes.....	202
B.	Distribution of the Gains.....	204
1.	The Coase Theorem Revisited: The Problem of Rent Dissipation.....	205
	Questions.....	206
2.	Subjective Value and Breach.....	206
	Questions and Comments.....	209
3.	Liquidated Damage Clauses as Self-Enforcing Contracts.....	210
	Questions and Comments.....	213
III.	Other Forms of Self-Enforcing Contracts.....	213
A.	Warranties.....	213
B.	Long-Term Contracts.....	214
C.	Non-Compete Clauses.....	216
IV.	Applications.....	218
Chapter 7. Property Law (Part 1).....		221
	Introduction.....	221
I.	The Nature of Property Rights.....	222
A.	The Definition of Property Rights.....	222
B.	Property Rights, Externalities, and Coasian Bargaining.....	225
1.	The Rancher and the Farmer.....	225
2.	Reciprocal Externalities and Coming to the Harm.....	226
C.	The Emergence of Property Rights.....	227
1.	Primitive Property Rights.....	227
2.	Whaling Norms.....	228
3.	The Gold Rush.....	229
4.	Homestead Laws.....	230
5.	The Rule of First Possession.....	231
II.	Consensual Transfers of Property.....	232
A.	Property Transfer.....	232
1.	Land Title Systems.....	234
2.	Title Systems in the United States.....	237
3.	Title Systems and Economic Development.....	239
B.	Leasing.....	239
1.	Are Leases Contracts?.....	239
2.	The Rental Externality and the Law of Waste.....	241
3.	Sharecropping Contracts.....	243
	Questions and Comments.....	244
C.	Joint Ownership.....	245
1.	Partition Versus Consolidation of Property Rights: Two Sides of the Anti-Commons Coin.....	246
	Questions and Comments.....	248
III.	Non-Consensual Transfers of Property.....	249
A.	Control of Externalities.....	249
1.	Pigouvian Taxes.....	249
2.	The Coasian Perspective.....	251
3.	The Impact of Transaction Costs.....	253
4.	Property Rules Versus Liability Rules.....	254
5.	Boomer v. Atlantic Cement Co.....	257

- 6. Trespass and Nuisance Law (with a Comment on Easements by Necessity, Implication, and Prescription).....258
 - a. Easements by Necessity, Implication, and Prescription.....259
 - b. Return to the Cathedral: *Trespass* and *Nuisance* Revisited.....260
- 7. Zoning, Land-Use Covenants, and Property-Tax Funded Schooling.....261
 - Questions and Comments.....264
- B. Adverse Possession.....264
- C. Transfer of Property Through Inheritance.....266
 - Synopsis267
- IV. Applications.....267
- Chapter 8. Property Law (Part 2).....273**
 - Introduction.....273
 - I. Eminent Domain.....273
 - A. Public Use.....274
 - 1. The Free-Rider Problem.....274
 - 2. The Holdout Problem.....275
 - 3. An Economic Theory of Public Use.....276
 - Questions and Comments.....281
 - B. Just Compensation.....281
 - 1. Just Compensation Equals Fair Market Value.....281
 - 2. Compensation as Insurance.....284
 - 3. Compensation and Land-Use Incentives.....285
 - Questions and Comments.....287
 - II. Regulatory Takings287
 - A. Legal Tests for Compensation.....288
 - Questions and Comments290
 - B. An Economic Theory of Regulatory Takings292
 - Questions.....295
 - III. A Summing Up: The General Transaction Structure.....295
 - IV. Applications.....301

PART III. EXTENDED APPLICATIONS

- Chapter 9. Criminal Law307**
 - Introduction.....307
 - I. Why Do We Have a System of Criminal Law?.....310
 - A. The Role of Intent310
 - B. Imperfect Detection314
 - C. Criminal Sanctions and the General Transaction Structure.....316
 - Questions and Comments317
 - II. The Economic Theory of Criminal Law318
 - A. The Supply of Crime318
 - B. Optimal Punishment320
 - 1. Fixed Probability of Apprehension321
 - a. Fines Alone321
 - b. Fines and Imprisonment.....324
 - Questions and Comments326
 - c. Probation and Parole.....327

2.	Optimally Chosen Probability of Apprehension	328
a.	Fines Only.....	328
b.	Fines and Imprisonment	329
c.	Why Are Actual Fines Not Maximal?	330
	Questions and Comments.....	334
C.	Repeat Offenders.....	335
D.	The Insanity Defense.....	337
E.	Specific Deterrence (Including Incapacitation)	338
F.	Some Empirical Evidence.....	339
1.	Testing the Deterrent Effect of Punishment	339
2.	The Effect of the Business Cycle on Crime Rates	341
III.	Extensions of the Basic Theory.....	342
A.	Corruption of Law Enforcement Officers.....	342
B.	Entrapment, Solicitation, and Inducement to Commit Criminal Acts.....	343
C.	The Death Penalty.....	344
D.	Gun Laws and Crime.....	348
	Questions and Comments.....	350
IV.	Applications	351
Chapter 10. Legal Process		357
	Introduction.....	357
I.	The Civil Adjudicatory Process	359
A.	The Settlement-Trial Decision	360
1.	The Mutual Optimism Model.....	361
2.	The Asymmetric Information Model	362
B.	Procedural Rules and Legal Costs.....	364
1.	Judgment as a Matter of Law and Summary Judgment.....	365
2.	The Burden of Proof.....	366
3.	Discovery.....	367
4.	The English Rule Versus the American Rule.....	368
a.	Settlement Under the English Rule	368
b.	Filing Suit Under the English Rule.....	370
c.	Compliance with Legal Standards.....	370
d.	Evidence on the Impact of the English Rule.....	370
5.	Federal Rules of Civil Procedure Rule 68: Offer of Judgment.....	371
C.	Frivolous Suits.....	373
1.	How NEV Suits Can Succeed	374
2.	Ways of Discouraging NEVs.....	375
D.	Contingency Fees for Lawyers	377
1.	Rationale for Contingency Fees.....	378
2.	The Impact of Contingency Fees	379
E.	Class Action Litigation.....	381
F.	Court Delay	383
G.	Judicial Error.....	385
1.	Standard of Proof.....	386
2.	Appeals	389
H.	The Lawmaking Function of the Judicial Process	389
1.	The Social Versus Private Value of Lawsuits	390

- 2. Evolution of the Law 391
 - a. The Selection of Cases for Trial 392
 - b. Does the Common Law Evolve Toward Efficiency? 393
 - i. Why Do Judges Supply Efficient Common Law? 393
 - ii. A Demand Side Analysis of Common Law Efficiency 394
 - iii. Supply Side Redux: Judicial Competition and Common Law Efficiency 397
- II. Criminal Procedure 400
 - A. Is Criminal Law a Regulatory System or a Market? 400
 - B. Plea Bargaining 401
 - 1. Economic Models of Plea Bargaining 402
 - 2. The Impact of Plea Bargaining on Deterrence 404
 - 3. A Comparative View 404
 - C. The Bail System 405
 - D. Sentencing Guidelines and Judicial Discretion 406
 - E. Three Issues of Criminal Procedure 408
 - 1. The Privilege Against Self-Incrimination 408
 - 2. The Prohibition Against Unreasonable Searches and Seizures 409
 - 3. Asset Forfeiture Laws 411
- III. Applications 412

PART IV. PUBLIC CHOICE METHODOLOGIES

- Chapter 11. Interest Group Theory (Part 1) 417**
 - Introduction 417
 - I. Public and Private Interest Models of Government 419
 - A. Rents, Quasi-Rents, and Rent Seeking 423
 - II. The Economic Theory of Regulation 425
 - A. Attorney Licensing 427
 - B. Steel Tariffs and Rent Seeking Revisited: The Elusive Welfare Loss Triangle 429
 - C. Free Riding and the Logic of Collective Action 431
 - 1. Information Costs, Rational Ignorance, and the Timing of Payoffs ... 431
 - 2. Group Size Revisited 433
 - 3. Implications for Government Policy 433
 - D. The Geometry of Rent Seeking 434
 - 1. The Rise and Decline of Nations 438
 - E. Rent Seeking in Equilibrium: The Case of Campaign Finance Reform 442
 - F. Rent Extraction 444
 - G. Bootleggers and Baptists 445
 - III. Toward a General Model of Regulation 445
 - A. The Wilson-Hayes Matrix 446
 - B. Minimum Winning Coalitions and Negative Legislative Checkpoints 449
 - IV. Applications: Interest Group Theory and Law 451
 - A. *Lochner v. New York* 452
 - Discussion Questions 455
 - Discussion Questions 457
 - B. *West Coast Hotel v. Parrish* 458
 - C. *United States v. Carolene Products* 459
 - Discussion Questions 463

Chapter 12. Interest Group Theory (Part 2)	465
Introduction	465
I. Law & Economics and Public Choice Compared and Contrasted	465
A. Law & Economics and Public Choice Contrasted: The Case of Eminent Domain and “Just Compensation”.....	468
1. A Law and Economics Analysis of Eminent Domain and Just Compensation.....	468
2. An Alternative Public Choice Analysis of Eminent Domain and Just Compensation.....	469
B. The Economics of Rules Versus Standards in Financial Regulation.....	470
1. Financial Crises and Too-Big-to-Fail Banks.....	471
2. Interest Groups and the Post-Financial Crisis Regulatory Regime	475
C. International and Private Rulemaking Bodies	479
II. Normative Debates over Interest Group Theory and Interest-Group-Theory-Based Legal Scholarship.....	481
A. The Problem of Baselines	482
B. The Problem of Testability	484
III. Applications: Interest Group Theory and Law.....	485
A. North Carolina State Board of Dental Examiners v. Federal Trade Commission.....	485
Discussion Questions	492
B. Sensational Smiles v. Mullen.....	494
Discussion Questions	496
 Chapter 13. Social Choice (Part 1)	 499
Introduction	499
I. The Problem of Social Choice.....	501
A. Foundations: Majority Versus Plurality Rule	501
B. The Median Voter Theorem.....	502
C. Rationality Revisited: Cyclical and Non-Cyclical Preferences.....	506
D. Cycling, Path Dependence, and Agenda Setting	510
E. A Brief Comment on Arrow’s Theorem	512
F. Implications for Institutional Reform: Veto Gates (Negative Legislative Checkpoints) and Minimum Winning Coalitions	514
1. Congressional Practices that Affect Transformation of Preferences into Outputs.....	514
2. Social Choice Implications for Institutional Competence as Between Congress and the Judiciary	515
II. Institutions Reconsidered: The Fallacy of Composition, the Isolation Fallacy and the Problem of Timing.....	517
A. The Fallacy of Composition	517
B. Implications for Collective Decision Making	518
C. The Problem of the Empty Core Among Private Actors	519
D. Legislative Cycling: Location of Toxic-Waste Disposal Facility.....	524
E. Why So Much Stability? Connecting Interest Group Theory and the Problem of Cycling.....	525
F. A Preliminary Comparison Between Legislatures and Appellate Courts.....	528

III. Case and Statutory Illustrations.....	531
A. “Macro” Cycling: Cycling over Proposed Bankruptcy Legislation in the Nineteenth Century	531
Discussion Questions	538
B. “Micro” Cycling: Cycling Inside Bankruptcy	539
Discussion Questions	540
Chapter 14. Social Choice (Part 2).....	541
Introduction.....	541
I. Institutional Adaptation and Arrow’s Theorem.....	542
A. A Social Choice Analysis of Parliamentary Rules	542
1. Dimensionality and Symmetry: The Foundations of Cycling	544
2. Return to Parliamentary Rules.....	546
B. A Comment on Baselines	550
II. Arrow’s Theorem	550
A. A Closer Look at Arrow’s Theorem	551
B. A More Detailed Application.....	554
C. Summary.....	562
III. Cycling with Fewer Participants: Multi-Criterial Decision Making.....	565
IV. Applications.....	568
V. Appendix A: Single Peakedness Versus Multipeakedness, and Unidimensionality Versus Multidimensionality	571
Chapter 15. Game Theory (Part 1).....	575
Introduction.....	575
I. The Single-Period Prisoners’ Dilemma.....	578
A. The Basic Game	578
B. The Prisoners’ Dilemma in a World of Organized Crime	581
II. The Iterated Prisoners’ Dilemma: The Case of Precedent.....	582
A. The Single-Period Judicial Prisoners’ Dilemma	582
B. The Iterated Judicial Prisoners’ Dilemma	585
1. Tit for Tat Strategies: From Committed Pacifist to Grim Trigger.....	587
2. Trigger Strategy Equilibrium	590
3. Bayes’ Theorem: The Importance of Updating Information.....	591
4. Quality-Adjusted Pricing as Affecting Success or Failure of Cartels...	592
5. Extensive Form Games and Subgame Perfection	593
6. Backward Induction and Unraveling.....	594
7. Questions and Comments.....	595
C. Is the Prisoners’ Dilemma Good or Bad?.....	596
III. Applications.....	599
<i>Jacobson v. Massachusetts</i>	599
Discussion Questions	602
Questions	604
<i>Citizens United v. Federal Communications Commission</i>	604
Questions	609
Discussion Questions	614
Chapter 16. Game Theory (Part 2).....	617
Introduction.....	617
I. Games with More than One Pure Nash Strategy Equilibrium.....	617

A.	The Driving Game	618
1.	Regulation Versus Standards.....	623
a.	Three Stories of Mediums of Exchange: The Dollar and Euro, the Maria Theresa Thaler, and Bitcoin.....	623
	Questions and Comments.....	626
b.	States of Incorporation and Contractual Choice of Law.....	627
c.	Securities Exchanges	628
2.	Overcoming Positive Network Externalities.....	629
B.	The Battle of the Sexes	631
C.	The Game of Chicken (or Hawk-Dove)	635
1.	The Basic Game	635
2.	Non-Myopic Equilibrium	637
3.	Cultural and Historical Illustrations	639
II.	Applications	640
A.	Comparing the Driving Game and the Battle of the Sexes	640
B.	Takings Reconsidered	641
1.	Susette Kelo v. City of New London, Connecticut.....	643
2.	Mayor of Baltimore City v. Valsamaki.....	647
	<i>Mayor and City Council of Baltimore City v. Valsamaki</i>	649
	Questions and Comments	651

PART V. INSTITUTIONAL APPLICATIONS

Chapter 17. The Legislature (Part 1)	655	
Introduction	655	
I.	Models of Legislation and Legislative Bargaining	656
A.	The Legal Process School	656
1.	Discussion	659
B.	The Wilson-Hayes Model Revisited	659
1.	The Static Bargaining Model.....	660
a.	The Demand Side.....	661
b.	The Supply Side	664
i.	Credit Claiming.....	665
ii.	Conflict Avoidance	666
iii.	Comparing State and Federal Legislative Processes.....	668
c.	Delegation.....	670
d.	The Matrix Revisited.....	671
2.	The Dynamic Legislative Bargaining Model.....	672
a.	Substantive Bargaining.....	673
3.	Assessing the Static and Dynamic Wilson-Hayes Model	675
II.	Applications: Constitutional Judicial Review of Interest-Group Legislation.....	675
	Discussion Questions.....	683
Chapter 18. The Legislature (Part 2)	685	
Introduction	685	
I.	Scholars Expressing Skepticism About the Legislative Process	687
A.	Textual Minimalists	687
1.	Kenneth Shepsle.....	687
2.	Judge Frank Easterbrook.....	689
	Questions and Comments	693

- B. Legislative Skeptics Influenced by the Legal Process School..... 695
 - 1. Judge Richard Posner..... 695
 - 2. McNollgast..... 698
 - Questions 699
- C. Professor Jonathan Macey: An Integration 699
 - Discussion Questions 701
- II. Scholars Embracing a More Optimistic View of the Legislative Process..... 702
 - A. Farber and Frickey 702
 - Questions and Comments 704
 - B. William Eskridge 705
 - C. Einer Elhauge 707
 - Questions and Comments 711
- III. Other Connections..... 716
 - A. Hart and Sacks Revisited..... 716
 - B. Coase Revisited..... 716
- IV. Application..... 717
 - A. Statutory Interpretation and Interest-Group Dynamics..... 717
 - Mississippi Poultry Ass’n, Inc. v. Madigan*..... 718
 - Mississippi Poultry Ass’n v. Madigan (En Banc)*..... 723
 - Discussion Questions 728

Chapter 19. The Executive Branch and Agencies (Part 1) 731

- Introduction..... 731
- I. The Median Voter Theorem Meets Non-Median Presidential Candidates 734
 - A. The Median Voter Theorem Revisited..... 735
 - 1. Predicting Complete Convergence in a Single-Stage Election 735
 - 2. Predicting Policy Divergence in a Two-Stage Election 737
 - 3. Complexities in the Two-Stage Model..... 739
 - a. The Voter Probability Distribution Function 739
 - b. Non-Uniform Electoral Turnout (or Challenging the Assumptions of a Single Dimensional Scale) 740
 - c. Two-Stage Presidential Elections as a Multi-Period Game 742
 - d. Turnout and Dimensionality 742
 - e. Did Election 2016 Affect the Dimensionality of Presidential Politics? 744
 - B. Presidential Politics and Regulatory Policy Revisited..... 748
- II. Delegation..... 750
 - A. Congressional Control of Delegated Authority 750
 - B. Positive Theories of Delegation 752
 - C. Congressional Responses to Agency Drift 754
- III. Judicial Review of Agency Action 759
 - A. Influence of Regulatory Theories on Courts..... 759
 - B. Courts and Administrative Rulemaking 762
- IV. Applications..... 765
 - A. Deference to Agency Decision Making..... 765
 - Chevron U.S.A. Inc. v. Natural Resources Defense Council*..... 765
 - United States v. Mead Corp.* 767
 - National Cable and Telecommunications Ass’n v. Brand X Internet Services* 770
 - King v. Burwell*..... 772

Discussion Questions777

Chapter 20. The Executive Branch and Agencies (Part 2)..... 781

Introduction781

I. What Do Bureaucrats Maximize?.....781

A. The Agency-Expansion Hypothesis783

B. The Agency-Autonomy Hypothesis.....787

C. Congressional Control Model790

D. Monitoring by the Public796

II. Characteristics of Agency Behavior.....798

A. Systematic Bias in Decision Making.....798

B. Marginality and Cost Externalization.....801

C. Selection Bias and Commitment to Regulatory Mission802

D. Executive Branch Response to Agency Costs.....804

III. Applications: Deference to Agency Decisions Whether to Regulate.....806

FDA v. Brown & Williamson Tobacco Corp......807

Massachusetts v. EPA.....810

Utility Air Regulatory Group v. EPA.....817

Discussion Questions.....822

Chapter 21. The Judiciary (Part 1) 827

Introduction827

I. Models of Judicial Decision Making.....828

A. Judicial Rationality828

1. What Do Judges Maximize?.....829

2. The Attitudinal Model: Sincere Versus Strategic Voting on the Supreme Court.....832

II. Economic Models of Stare Decisis.....837

A. Internal Foundations Revisited: The Game Theoretical Origins of Stare Decisis837

B. A Comment on the Scope of Opinions and the Importance of Legal Materiality.....838

C. The Game Theoretical Origins of Pyramidal Courts840

Questions and Comments.....842

D. External Foundations of Stare Decisis842

1. Stare Decisis and the Pure-Strategy Nash Equilibrium Game843

2. Stare Decisis as a Means of Stabilizing Battle of the Sexes Games843

3. Stare Decisis and the Risk of Entrenching Inferior Technologies845

4. Macey’s Critique and the Use of Stare Decisis in Promoting Judicial Specialization847

5. A Comment on the Condorcet Jury Theorem and the Nature of Judicial Reliance.....848

Questions and Comments.....850

E. An Interest-Group Perspective on Precedent850

F. Attitudinal Accounts of Stare Decisis851

III. Holding and Dictum.....853

IV. Applications856

A. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).....856

Planned Parenthood of Southeastern Pennsylvania v. Casey.....856

B.	Lawrence v. Texas, 539 U.S. 558 (2003)	865
C.	Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017)	872
	Questions.....	873
Chapter 22. The Judiciary (Part 2)		877
	Introduction.....	877
I.	A Social Choice Analysis of Individual Case Decision-Making Rules.....	877
A.	Social Choice Revisited	878
1.	Kassel v. Consolidated Freightways	880
2.	Planned Parenthood v. Casey	883
3.	Arizona v. Fulminante	887
B.	Normative Implications of Supreme Court Voting Anomalies	888
C.	A Social Choice Account of Supreme Court Voting Rules	892
	Comments and Questions	896
II.	Macro-Analysis of Supreme Court Voting Rules: A Social Choice Account of Horizontal Stare Decisis and Standing.....	897
A.	Ways of Criticizing the Court: The Social Choice Case Against Strict Stare Decisis	898
B.	Constitutional Process: A Positive Social Choice Account of Stare Decisis and Standing.....	899
	Questions and Comments	903
III.	A Social Choice Analysis of Tiers of Scrutiny	903
IV.	Case Illustrations.....	908
A.	Bush v. Gore.....	909
1.	The Bush v. Gore Timeline	909
2.	A Social Choice Analysis of Bush v. Gore	915
	Discussion Questions.....	920
B.	Adarand v. Pena	920
	Discussion Questions	925
C.	Gonzales v. Carhart	926
	Discussion Questions	926
Chapter 23. Constitutions (Part 1)		929
	Introduction.....	929
I.	Buchanan and Tullock, the Calculus of Consent	931
A.	The Logical Foundations of Constitutional Democracy.....	932
1.	Stages of Constitutional Decision Making	932
2.	Normative Foundations of Constitutional Decision-Making Rules: The Primacy of Unanimity	933
	Discussion Questions.....	936
B.	Specific Features of Constitutional Design	937
C.	Limitations to the Buchanan and Tullock Decision-Making Model	939
1.	Representative Democracy.....	939
2.	Bicameralism.....	941
a.	The Theory of Minimum Winning Coalitions Revisited.....	942
b.	Levmore's Alternative Account of Bicameralism	943
c.	Bicameralism in Historical Perspective: The Seventeenth Amendment.....	944
II.	Supermajority Rules, Fundamental Rights, and Exit	946
A.	Supermajority Rules in the U.S. Constitution	946

1.	An Economic Model of Supermajority Rules	947
	Questions and Comments	948
B.	Fundamental Rights as Effectively Restoring Constitutional Unanimity.....	949
C.	Exit as an Alternative to Unanimity	950
	Questions and Comments.....	951
III.	Executive Powers.....	953
A.	Executive Veto as “Tricameralism”	953
B.	The Executive Veto in Practice.....	955
C.	Executive Veto and Legislative Bargaining.....	955
D.	A Comment on Coalition Formation in Parliamentary Versus Presidential Voting Regimes.....	958
IV.	Separation of Parties, Not Powers	959
V.	Applications	964
A.	INS v. Chadha.....	964
	Discussion Questions	972
B.	National Labor Relations Board v. Noel Canning.....	974
	Discussion Questions	981
	Chapter 24. Constitutions (Part 2).....	987
	Introduction	987
I.	The Judiciary and Judicial Review	987
A.	The Basic Framing.....	987
B.	The Independent Judiciary in Practice.....	990
II.	Federalism	991
A.	Static Federalism: The Matching Problem	992
B.	Dynamic Federalism: Jurisdictional Competition	993
C.	Competitive Federalism and Choice of Law.....	995
D.	The Franchise Theory of Federalism	998
E.	Application of Constitutional Federalism to Legal Doctrine.....	1000
	1. The Anti-Commandeering Doctrine	1000
	2. The Dormant Commerce Clause Doctrine	1002
F.	Preserving Federalism.....	1003
III.	Direct Democracy.....	1010
IV.	Constitutional Amendment.....	1014
V.	Application.....	1018
	Discussion Questions.....	1027
	INDEX.....	1029