Table of Contents

TABLES AND FIGURES V

PREFACE IX

ACKNOWLEDGMENTS XV

A NOTE ON AUTHORSHIP XVII

TABLE OF CASES XXIX

PART I. LAW AND POLITICAL JURISPRUDENCE IN A GLOBALIZED SOCIETY

Chapter 1. The Politics of Law and Courts in Society 3
Legal Systems 5
Civil Law 5
In Comparative Perspective: Major Global Legal Systems 8
Common Law 10
Ideological Legal Systems 13
Religious Legal Systems 14
Customary and "Mixed" Legal Systems 17
In Comparative Perspective: China's Written Constitution Without Constitutionalism 19
Legal Systems and Globalization 21
The Nature and Sources of Law 22
Public Law 24
Constitutional Law 25
Administrative Law 26
Criminal Law 28
Private Law 29
Contract Law 29
Tort Law 31
The Role of Courts in Contemporary Society 32
Mediators of Conflict 32
Creators of Legal Expectations 33
Guardians of Individual and Minority Rights 34
Contemporary Controversies over Courts: The Politics of Secret Foreign Intelligence Surveillance Court During the Trump Administration 36
Therapeutic (Problem-Solving) Agents 38
Contemporary Controversies over Courts: Veteran Treatment Courts 41
Policymakers 43
Chapter Summary 44
Key Questions for Review and Critical Analysis 44
Web Links 45
Selected Readings 45

Chapter 2. The Politics of Law and Jurisprudence 53
Classical Theories of Jurisprudence 56
Natural Law 56
Legal Positivism 59
"Constitutional Morality" 61
In Comparative Perspective: Law, Morality, and Same-Sex Marriages 64
Sociological Jurisprudence and Legal Realism 67
Contemporary Theories of Jurisprudence 70
Economics in Law and Pragmatism 71
Feminist Jurisprudence 73
Contemporary Controversies over Courts: The Politics of Title IX, Sexual Assault on Campus, and Feminist Legal Reform 75
Critical Legal Studies and Critical Race Theory 79
Contemporary Controversies over Courts: Is Cannibalism Ever Legally Justified? 82
Chapter Summary 83
Key Questions for Review and Critical Analysis 84
Web Links 84
Selected Readings 85

PART II. JUDICIAL ORGANIZATION AND ADMINISTRATIVE PROCESSES

Chapter 3. Judicial Organization and Administration 95
The Origins of U.S. Courts 97
The 1789 Judiciary Act 100
The Federal Judiciary's Evolution 101
Contemporary Judicial Federalism: State and Federal Courts 103
State Trial and Tribal Courts 107
Single-Tier vs. Two-Tier Trial Courts 108
Limited Jurisdiction Courts 110
General Jurisdiction Courts 111
Tribal Courts 112
Intermediate State Appellate Courts 113
State Courts of Last Resort 114
Federal Courts 115
U.S. District Courts 116
U.S. Magistrate Judges 118
U.S. Bankruptcy Courts 119
Other Specialized Lower Federal Courts and Tribunals 120
U.S. Courts of Appeals 122
U.S. Courts of Appeals with Limited Jurisdiction 124
U.S. Supreme Court 124
In Comparative Perspective: Constitutional Courts in Europe 129
The Politics of Judicial Administration 133
State Court Administration 133
Federal Court Administration 134
Judicial Administration Reform 135
Chapter Summary 136
Key Questions for Review and Critical Analysis 137

Web Links 137
Selected Readings 138

Chapter 4. Judicial Selection and Removal 147
Staffing State Courts 150
Merit Judicial Selection Systems 151
Judicial Election and Appointment Systems 153
Staying on the Bench 156
The Politics of Judicial Campaigns 157
In Comparative Perspective: Are Judges "Politicians in Robes" or Not? 160
Staffing Federal Courts 166
The Framers and Judicial Selection 166
Ideology or Merit? 167
The Nomination Process 171
Initial Vetting of Nominees 172
Contemporary Controversies over Courts: The Federalist Society's Role in Federal Judicial Selection 174
The American Bar Association and Its Ratings 177
Senatorial Courtesy and the "Blue Slip" 178
The Confirmation Process 180
The Confirmation Politics of Evaluating the Nominee's Merits 181
Contemporary Controversies over Courts: The (Constitutional) Hardball Politics of Federal Judicial Selection 183
The Politics of Organized Interests, the Media, and Public Hearings 187
The Battle over Robert Bork's 1987 Nomination 188
Senate Confirmation Hearings and Reporting the Nomination 191
Senatorial Obstruction and Delay 192
Is the Confirmation Process "Broken"? 193
Toward a Representative Bench and a Career Judiciary? 196
A Representative Bench? 196
In Comparative Perspective: The Career Judiciary in Japan 201
Leaving the Bench 203
Chapter Summary 207
Key Questions for Review and Critical Analysis 208
Web Links 208
Selected Readings 209

PART III. ACCESS TO COURTS AND JUDICIAL DECISION-MAKING

Chapter 5. The Practice of Law 225
The Rise of the American Legal Profession 225
Contemporary Legal Education and Bar Admission 229
U.S. Law School Education 232
In Comparative Perspective: Legal Education and Lawyers in Western Democracies 232
Professional Ethics 242
Bar Admissions 243
After Bar Passage: Trends in Diversity and Employment Inequality 245

The Business of Legal Practice ... 246
Lawyers as Counselors and Advocates ... 248
Legal Employment Trends and Salaries ... 248
Legal Practice Areas ... 251
Private Practice ... 251
Government Attorneys ... 257
Business and Industry Law Practice: The Role of In-House Counsel ... 258
Public Interest Lawyers and Legal Academia ... 258
Alternative Legal Careers ... 260
Access to Lawyers and Equal Justice ... 260
The Right to Counsel in Criminal Cases ... 261
Legal Representation in Civil Litigation ... 266
Contemporary Controversies over Courts: The Right to Counsel and "Pay-as-You-Go" Justice ... 267
Government-Subsidized Legal Aid ... 269
Pro Se Representation ... 270
Pro Bono Legal Services ... 272
Chapter Summary ... 272
Key Questions for Review and Critical Analysis ... 274
Web Links ... 274
Selected Readings ... 275

Chapter 6. Access to Courts and Justice ... 289
Formal Barriers ... 291
The Constitution's Article III "Cases" or "Controversies" Requirement ... 292
The Procedural Rules of Courts ... 292
Discretionary Barriers ... 294
Contemporary Controversies over Courts: Tactics for Constitutional Avoidance: "Passive Virtues" or "Subtle Vices"? ... 294
The Standing Doctrine ... 297
Contemporary Controversies over Courts: Animal Rights, Standing & Justice ... 298
The Timing Doctrines: Mootness and Ripeness ... 303
The Political Question Doctrine ... 305
Organized Interests and Strategic Litigation ... 307
Interest Group Politics and Litigation Strategies ... 308
In Comparative Perspective: Comparative Constitutional Law, Interest Group Litigation, and Capital Punishment ... 312
Chapter Summary ... 314
Key Questions for Review and Critical Analysis ... 315
Web Links ... 315
Selected Readings ... 315

Chapter 7. Trial Courts: The Criminal Justice System ... 323
The Adversarial Process ... 325
"Truth" or "Fight" Theory? ... 327
Adversarial or Inquisitorial Justice? ... 327
The "Crime Control" and "Due Process" Models of Criminal Justice ... 330
Criminal Law and the Justice System ... 332
The Criminal Trial and Appeal Process ... 333

Prosecutorial Discretion: From Arrest to Formal Arraignment 335
Initial Appearance 336
Preliminary Hearings and Grand Jury Indictments 337
Formal Arraignment 339
Plea Bargaining 340
Contemporary Controversies over Courts: Plea Bargaining, the Right to Counsel, and Global Trends 343
The Jury's Role 345
The Democratic Politics of Citizen Juries 346
In Comparative Perspective: The Evolution of the Common Law Jury Across the Globe 347
The Types of Criminal Cases Juries Can Hear 350
Selecting an Impartial Jury from a Cross-Section of the Community 350
Jury Size and Unanimity of Jury Verdicts 352
The Problem of Jury Nullification and Hung Juries 353
Proposals to Reform the Jury Process 354
The Politics of the Post-Trial Sentencing Process 355
The Growth of Determinate Sentencing 359
Post-Trial Motions and Appeals 364
Chapter Summary 364
Key Questions for Review and Critical Analysis 365
Web Links 366
Selected Readings 366

Chapter 8. Trial Courts: The Civil Justice System 377
Adversarial Civil Justice 379
A "Litigation Explosion"? 380
Types of Civil Cases 384
The Parties to Civil Actions 386
Class Action Lawsuits 387
Third-Party Litigation Funding 390
Burden of Proof, Legal Remedies, and Damages 391
Civil Lawsuits: The Trial and Appeal Process 392
Contemporary Controversies over Courts: The Dispute Pyramid 393
The Decision to Litigate 397
Filing Civil Actions: Pleadings and Motion Practice 400
Notice Pleading vs. Fact Pleading 401
Motions of Dismissal and Summary Judgment 402
The Discovery Process and Pretrial Conferences 403
Pretrial Conferences 404
Trial, Judgment, and Appeal 405
The Politics of Tort and Civil Litigation Reform 409
Contemporary Controversies over Courts: The Roberts Court and Class Action Lawsuits 412
Alternative Dispute Resolution 416
In Comparative Perspective: The Global Expansion of ADR 422
Chapter Summary 424
Key Questions for Review and Critical Analysis 425
Web Links 425
Selected Readings 426

PART IV. JUDICIAL POLICYMAKING

Chapter 9. The Appellate Court Process 437
The Appellate Court Decision-Making Process 441
Agenda Setting 442
Oral Argument 444
Judicial Conferences 447
Strategic Consensus Building and Opinion Assignment 448
Opinion Writing 450
Concurrences and Dissents 453
Unpublished Opinions 455
Studying Judicial Decision-Making 455
The Attitudinal Model 459
New Institutionalism 462
Strategic Choice Theory 464
Future Directions of Judicial Behavior Research 466
Legal Formalism and Traditional Legal Reasoning 467
The Law and Politics of Legal Precedent 468
Contemporary Controversies over Courts: Law, Precedent and Courts 472
Statutory and Constitutional Interpretation 479
Statutory Construction 479
Constitutional Interpretation 484
Contemporary Controversies over Courts: How Should Judges Interpret the U.S. Constitution? 486
Chapter Summary 489
Key Questions for Review and Critical Analysis 490
Web Links 490
Selected Readings 491

Chapter 10. The Scope and Limits of Judicial Power 503
Judicial Policymaking 507
"Judicial Activism" and "Judicial Restraint" 507
In Comparative Perspective: The European Court of Justice and the Globalization of Judicial Power 510
State Judicial Policymaking 514
"Equal" and "Adequate" Public School Funding in the States 515
Federal Judicial Policymaking 521
Capital Punishment 522
Abortion 527
The Impact of Judicial Decisions 536
Brown v. Board of Education (1954) and School Desegregation Politics 539
The Politics of LGBT Rights and Same-Sex Marriages 542
The Limitations of Judicial Power 548
Internal Constraints 548
External Restraints 549
Restraints Imposed by Legislatures 550
Restraints Imposed by the Executive Branch 554
Restraints Imposed by Public Opinion 555
Contemporary Controversies over Courts: Do Courts Forge Major Social Change? 556

Concluding Thoughts 561
Chapter Summary 563
Key Questions for Review and Critical Analysis 564
Web Links 565
Selected Readings 565

Glossary 579

Appendix A. Legal Research Sources and Strategies 595

Appendix B. Membership of the Supreme Court of the United States 601

About the Authors 607

INDEX 609