

Contents

Preface xvii

Acknowledgments xxi

Part One

THE NATURE OF JUDGING

Chapter 1. Political Jurisprudence	3
CIVIL AND COMMON LAW SYSTEMS	4
<i>The Civil Law</i>	5
<i>The Common Law</i>	6
CONCEPTUALIZATION OF LAW: SCHOOL OF JURISPRUDENCE	7
<i>Natural Law</i>	7
<i>Legal Positivism</i>	8
<i>The Debate</i>	8
THE INSTITUTIONALIZATION OF DECLARATORY THEORY	11
EMERGING CHALLENGES: SOCIOLOGICAL JURISPRUDENCE AND LEGAL REALISM	13
CONTEMPORARY SCHOLARSHIP: THE DEBATE CONTINUES	16
<i>Realism's Progeny and Critics</i>	16
<i>Social Science and the Growth of Political Jurisprudence</i>	18
WHAT IS TO COME	19
<i>Selected References</i>	20
READINGS	
1.1 Sir William Blackstone, <i>COMMENTARIES ON THE LAWS OF ENGLAND</i>	22

1.2 Alexander Hamilton, <i>The Federalist</i> , No.78	23
1.3 Alexis de Tocqueville, <i>JUDICIAL POWER IN THE UNITED STATES</i>	24
1.4 Oliver Wendell Holmes, Jr., <i>THE PATH OF THE LAW</i>	27
1.5 Benjamin N. Cardozo, <i>THE NATURE OF THE JUDICIAL PROCESS</i>	30
1.6 Mary E. Becker, <i>OBSCURING THE STRUGGLE: SEX DISCRIMINATION, SOCIAL SECURITY, AND STONE, SEIDMAN, SUNSTEIN, AND TUSHNET'S CONSTITUTIONAL LAW</i>	34
Chapter 2. Courts in Constitutional Democracies	38
THE ORIGINS OF COURTS	38
<i>Distinctive Characteristics of Judicial Processes</i>	40
THE ROLES OF COURTS	44
<i>Resolving Disputes</i>	44
<i>Making Policy</i>	45
<i>Monitoring Governmental Action</i>	46
<i>Judicial Review in the United States</i>	47
<i>Judicial Review Abroad</i>	48
<i>To What Extent Does Judicial Review Present a Paradox?</i>	51
THE EXPANSION OF JUDICIAL POWER?	53
SELECTED REFERENCES	56
READINGS	
2.1 Lynn Mather, <i>THE FIRED FOOTBALL COACH (OR, HOW TRIAL COURTS MAKE POLICY)</i>	58
2.2 <i>Marbury v. Madison</i> (1803)	61
2.3 <i>Eakin v. Raub</i> (1825)	65
2.4 Robert A. Dahl, <i>DECISION MAKING IN A DEMOCRACY: THE SUPREME COURT AS A NATIONAL POLICY MAKER</i>	67
2.5 D. Casper, <i>THE SUPREME COURT AND NATIONAL POLICY MAKING</i>	70

Part Two

THE AMERICAN LEGAL SYSTEM

Chapter 3. Judicial Organization	77
ESTABLISHING THE U.S. LEGAL SYSTEM	77
<i>Article III</i>	77

<i>The Judiciary Act of 1789</i>	79
<i>Judicial Federalism</i>	81
TODAY'S SYSTEM OF FEDERAL COURTS	82
<i>The U.S. Supreme Court</i>	86
<i>Reforming the Federal Courts: The Caseload "Problem"</i>	88
STATE COURTS	90
A NEW JUDICIAL FEDERALISM	92
<i>Reviewing the Decisions of State Supreme Courts</i>	92
<i>Issuing Injunctions</i>	96
<i>Restricting Habeas Corpus</i>	97
<i>Limiting Exceptions to the Eleventh Amendment</i>	99
SELECTED REFERENCES	100
READINGS	
3.1 Judiciary Act of 1789, section 25	103
3.2 Jonathan Matthew Lohen, <i>INSIDE APPELLATE COURTS</i>	103
3.3 C. K. Rowland and Robert Carp, <i>POLITICS AND JUDGMENT ON THE FEDERAL DISTRICT COURTS</i>	109
3.4 Charles E. Wyzanski, Jr., <i>THE IMPORTANCE OF THE TRIAL JUDGE</i>	113
3.5 J. Woodford Howard, Jr., <i>LITIGATION FLOW IN THREE UNITED STATES COURTS OF APPEALS</i>	115
3.6 Victor Williams, <i>SOLUTIONS TO FEDERAL JUDICIAL GRIDLOCK, versus John O. Newman, 1,000 JUDGES—THE LIMIT FOR AN EFFECTIVE FEDERAL JUDICIARY</i>	117
3.7 Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler, <i>THE EVOLUTION OF STATE SUPREME COURTS</i>	121
3.8 William J. Brennan, <i>GUARDIANS OF OUR LIBERTIES—STATE COURTS NO LESS THAN FEDERAL</i>	129
3.9 <i>Goodrich v. Department of Public Health</i>	132
Chapter 4. Judicial Selection and Retention	141
SELECTION OF FEDERAL JUDGES	142
<i>Presidential Considerations</i>	144
<i>Professional Qualifications</i>	146
<i>Confirmation</i>	147
<i>The Behavior of Judicial Appointees</i>	151
JUDICIAL SELECTION IN THE STATES	152
<i>Debates over States Selection Systems</i>	154

DISCIPLINING JUDGES	155
<i>Federal Judges</i> 156	
<i>State Judges</i> 157	
SELECTED REFERENCES	159
READINGS	
4.1 Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, and Sara Schiavoni, <i>THE COMPOSITION OF THE FEDERAL JUDICIARY</i>	162
4.2 Sheldon Goldman, <i>PICKING FEDERAL JUDGES (WITH A POSTSCRIPT ON THE GEORGE W. BUSH ADMINISTRATION)</i>	164
4.3 Neil Lewis, <i>PARTISANSHIP AND THE APPOINTMENT OF FEDERAL JUDGES</i>	172
4.4 Jason M. Roberts, <i>PARTIES, PRESIDENTS, AND PROCEDURES</i>	179
4.5 Gregory A. Caldeira and John R. Wright, <i>LOBBYING FOR JUSTICE</i>	186
4.6 Jeffrey A. Segal, Richard J Timpone, Robert M. Howard, <i>BUYER BEWARE? PRESIDENTIAL SUCCESS THROUGH SUPREME COURT APPOINTMENTS</i>	193
4.7 Thomas G. Walker and Deborah J. Barrow, <i>THE DIVERSIFICATION OF THE FEDERAL BENCH: POLICY AND PROCESS RAMIFICATIONS</i>	198
4.8 Thurgood Marshall, <i>COMMENTS ON THE MISSOURI PLAN</i>	205
4.9 John T. Wold and John H. Culver, <i>THE DEFEAT OF THE CALIFORNIA JUSTICES</i>	209
Chapter 5. The Bar	212
BECOMING AN ATTORNEY	212
<i>Admission to the Bar</i> 213	
THE LAWYER'S WORK	215
<i>Development of the Bar</i> 215	
<i>The Contemporary Practice of Law</i> 216	
CHALLENGES CONFRONTING THE LEGAL PROFESSION	218
SELECTED REFERENCES	219
READINGS	
5.1 Scott Turow, <i>ONE L: AN INSIDE ACCOUNT OF LIFE IN THE FIRST YEAR AT HARVARD LAW SCHOOL</i>	221
5.2 Austin Sarat and William L. F. Felstiner, <i>LAW AND STRATEGY IN THE DIVORCE LAWYER'S OFFICE</i>	229
5.3 Abraham S. Blumberg, <i>THE PRACTICE OF LAW AS A CONFIDENCE GAME</i>	236

5.4 F. Lee Bailey, <i>THE DEFENSE NEVER RESTS</i>	240
5.5 Sandra Day O'Connor, <i>PROFESSIONALISM</i>	245

Part Three

JUDICIAL POWER

Chapter 6. Access to Judicial Power	253
FORMAL BARRIERS TO ENTRY IN THE AMERICAN LEGAL SYSTEM	253
<i>Jurisdiction</i>	254
<i>Case or Controversy</i>	256
<i>Advisory Opinions</i>	256
<i>Standing</i>	261
<i>Formal Barriers to Access as Gatekeeping Devices</i>	264
INFORMAL BARRIERS TO ENTRY	265
ACCESSING THE LEGAL SYSTEM: WHO USES THE COURTS?	266
<i>The Strategies of Interest Groups</i>	268
<i>The Influence of Interest Groups</i>	272
SELECTED REFERENCES	273
READINGS	
6.1 THE WASHINGTON ADMINISTRATION'S REQUEST FOR AN ADVISORY OPINION AND THE JUSTICES' RESPONSE	276
6.2 <i>Roe v. Wade</i> (1973) <i>VERSUS</i> <i>DeFunis v. Odegaard</i> (1974)	278
6.3 <i>Baker v. Carr</i> (1962)	281
6.4 Marc Galanter, <i>WHY THE "HAVES" COME OUT AHEAD: SPECULATIONS ON THE LIMITS OF SOCIAL CHANGE</i>	285
6.5 Clement E. Vose, <i>LITIGATION AS A FORM OF PRESSURE GROUP ACTIVITY</i>	291
6.6 Gregory A. Caldeira and John R. Wright, <i>ORGANIZED INTERESTS AND AGENDA SETTING IN THE U.S. SUPREME COURT</i>	295
Chapter 7. Instruments of Judicial Power	299
WRITS OF CERTIORARI	300
DECISIONS, OPINIONS, AND ORDERS	301
THE INJUNCTION	302
<i>Injunctions and Positive Action</i>	304
THE CONTEMPT POWER	306

THE WRIT OF HABEAS CORPUS	308
SELECTED REFERENCES	309
READINGS	
7.1 Texas v. Hopwood (1996)	311
7.2 Madsen v. Women's Health Center, Inc. (1994)	312
7.3 Wyatt v. Stickney (1971) AND Wyatt v. Stickney (1972)	317
7.4 Illinois v. Allen (1970)	324
Chapter 8. Limitations on Judicial Power	329
INTERNAL CHECKS	329
INSTITUTIONAL CHECKS	331
CHECKS IMPOSED BY THE AMERICAN SYSTEM OF SEPARATED INSTITUTIONS	334
<i>Political Checks by Executives</i>	335
<i>Legislative Restrictions</i>	337
CHECKS FROM THE STATES	340
CHECKS FROM THE PEOPLE	342
SELECTED REFERENCES	344
READINGS	
8.1 Webster v. Reproductive Health Services (1989)	346
8.2 Lee Epstein and Jack Knight, <i>THE CHOICES JUSTICES MAKE</i>	349
8.3 Jeffrey A. Segal, Donald R. Songer, and Charles M. Cameron, <i>DECISION MAKING ON THE U.S. COURTS OF APPEALS</i>	354
8.4 ANDREW JACKSON'S VETO OF THE BANK BILL	358
8.5 ABRAHAM LINCOLN'S FIRST INAUGURAL ADDRESS, MARCH 4, 1861	359
8.6 Franklin D. Roosevelt, <i>REORGANIZING THE FEDERAL JUDICIARY</i>	360
8.7 GEORGE W. BUSH'S STATEMENT ON SAME-SEX MARRIAGES (2004)	363
8.8 Ex Parte McCardle (1869)	364
8.9 James H. Kuklinski and John E. Stanga, <i>POLITICAL PARTICIPATION AND GOVERNMENT RESPONSIVENESS: THE BEHAVIOR OF CALIFORNIA SUPERIOR COURTS</i>	366
8.10 James L. Gibson, Gregory A. Caldeira, and Vanessa Baird, <i>ON THE LEGITIMACY OF NATIONAL HIGH COURTS</i>	370

Part Four

JUDICIAL DECISION MAKING

Chapter 9. Fact Finding in the Courts	381
THE ADVERSARIAL PROCESS	382
JURIES	383
<i>Jury Trials</i>	384
<i>The Critics and the Defenders of Juries</i>	388
<i>Standards for Fact Finding</i>	389
<i>Adjudicative Facts</i>	390
<i>Legislative Facts and Public Issues</i>	390
<i>Social and Economic Data</i>	391
<i>Contemporary Use of Social Science Evidence: The Death Penalty Cases</i>	394
SELECTED REFERENCES	396
READINGS	
9.1 Marvin E. Frankel, <i>THE ADVERSARY JUDGE: THE EXPERIENCE OF THE TRIAL JUDGE</i>	398
9.2 Hans Zeisel and Harry Kalven, Jr., <i>THE AMERICAN EXPERIMENT</i>	402
9.3 Geoffrey Norman, <i>JUROR FUROR</i>	406
9.4 Clarence Darrow, <i>HOW TO PICK A JURY</i>	410
9.5 Amitai Etzioni, <i>SCIENCE: THREATENING THE JURY TRIAL</i>	412
9.6 Michael Saks, <i>THE LIMITS OF SCIENTIFIC JURY SELECTION</i>	417
9.7 Paul Butler, <i>BLACK JURORS: RIGHT TO ACQUIT?</i>	419
9.8 Tracey Gilstrap Weiss, <i>THE GREAT DEMOCRATIZING PRINCIPLE: THE EFFECT ON SOUTH AFRICA OF PLANNING A DEMOCRACY WITHOUT A JURY SYSTEM</i>	423
9.9 <i>MCCLESKEY V. KEMP</i> (1987)	427
9.10 David C. Baldus, <i>THE DEATH PENALTY DIALOGUE BETWEEN LAW AND SOCIAL SCIENCE</i>	433
9.11 John C. Jeffries, Jr., <i>LEWIS F. POWELL, JR.</i>	436
Chapter 10. Precedents and Legal Reasoning	438
REASONING BY EXAMPLE	439
RATION DECIDENDI VERSUS DICTA	440
<i>Dicta</i>	441

TREATMENT OF PRECEDENT	443
<i>Distinguishing a Precedent</i>	444
<i>Limiting a Precedent</i>	444
<i>Ignoring a Precedent</i>	445
<i>Overruling a Precedent</i>	446
<i>Extending a Precedent</i>	447
PRECEDENTS AND DECISION MAKING	448
SELECTED REFERENCES	449
READINGS	
10.1 Edward H. Levi, <i>AN INTRODUCTION TO LEGAL REASONING</i>	451
10.2 Lief H. Carter, <i>REASON IN LAW</i>	454
10.3 <i>MACPHERSON V. BUICK MOTOR CO.</i> (1916)	459
10.4 Briefs Filed in <i>U.S. TERM LIMITS V. THORNTON</i> (1995)	462
10.5 <i>PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY</i> (1992)	467
10.6 Jeffrey A. Segal and Harold J. Spaeth, <i>THE INFLUENCE OF STARE DECISIS ON THE VOTES OF UNITED STATES SUPREME COURT JUSTICES</i> , versus Jack Knight and Lee Epstein, <i>THE NORM OF STARE DECISIS</i>	476
10.7 Lewis F. Powell, Jr., <i>STARE DECISIS AND JUDICIAL RESTRAINT</i>	484
10.8 Ronald Kahn, <i>INSTITUTIONAL NORMS AND SUPREME COURT DECISION MAKING: THE REHNQUIST COURT ON PRIVACY AND RELIGION</i>	487
Chapter 11. Statutory Interpretation	491
PLAIN MEANING AND THE PROBLEM OF AMBIGUITY	491
DEALING WITH AMBIGUITY: THEORIES OF STATUTORY INTERPRETATION	493
<i>Legislative Intent</i>	494
<i>Legislative Purpose</i>	495
<i>The New Textualism</i>	496
<i>Dynamic Statutory Interpretation</i>	497
PRACTICAL MATTERS IN STATUTORY INTERPRETATION	498
STATUTORY LAW AND JUDICIAL LAW MAKING	500
SELECTED REFERENCES	501
READINGS	
11.1 Felix Frankfurter, <i>SOME REFLECTIONS ON THE READING OF STATUTES</i>	503

11.2 <i>SMITH V. UNITED STATES</i> (1993)	507
11.3 <i>UNITED STEELWORKERS V. WEBER</i> (1979)	510
11.4 Richard A. Posner, <i>THE FEDERAL COURTS</i>	524
11.5 Henry M. Hart, Jr., and Albert M. Sachs, <i>THE LEGAL PROCESS</i>	527
11.6 <i>CONROY V. ANISKOFF</i> (1993)	530
11.7 Frank H. Easterbrook, <i>STATUTES' DOMAINS</i>	531
11.8 William N. Eskridge, Jr., <i>DYNAMIC STATUTORY INTERPRETATION</i>	535
Chapter 12. Constitutional Interpretation	539
CONSTITUTIONAL TEXTS, CONSTITUTIONS, AND CONSTITUTIONALISM	539
WHAT IS TO BE INTERPRETED?	541
WHO SHALL INTERPRET?	542
HOW SHOULD JUDGES INTERPRET THE CONSTITUTION? INTERPRETIVE STYLE IN THE UNITED STATES	544
MODES OF INTERPRETATION	545
<i>The Text</i>	545
<i>Stare Decisis and Doctrinal Analysis</i>	545
<i>Original Intent or Understanding</i>	547
<i>Structural Analysis</i>	550
<i>Purposive Analysis</i>	551
<i>Polls of Other Jurisdictions</i>	554
<i>Polls of Courts Abroad</i>	555
<i>Balancing of Interests</i>	556
<i>Cost-Benefit Analysis</i>	556
CONSTITUTIONAL INTERPRETATION AS A FORM OF STATECRAFT	557
SELECTED REFERENCES	558
READINGS	
12.1 <i>UNITED STATES V. NIXON</i> (1974)	561
12.2 Antonin Scalia, <i>ORIGINALISM: THE LESSER EVIL</i>	566
12.3 Robert H. Bork, <i>THE TEMPTING OF AMERICA</i>	571
12.4 Thurgood Marshall, <i>REFLECTIONS ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION</i>	579
12.5 <i>THE STATE V. MAKWANYANE</i> (1995)	582
12.6 <i>UNITED STATES V. LEON</i> (1984)	585

12.7 Laurence H. Tribe v. Frank H. Easterbrook, <i>ECONOMIC REASONING AND CONSTITUTIONAL INTERPRETATION</i>	591
12.8 William Rehnquist, <i>THE NOTION OF A LIVING CONSTITUTION</i>	600
12.9 Ronald Dworkin, <i>TAKING RIGHTS SERIOUSLY</i>	605
Chapter 13. The Processes of Judicial Decision Making	617
TRIAL COURTS	617
INTERMEDIATE APPELLATE COURTS	620
STATE SUPREME COURTS	622
THE U.S. SUPREME COURT	623
Case Selection	624
Factors Affecting Selection of Cases	627
Oral Argument	630
The Judicial Conference	632
Writing Opinions	634
Negotiating and Bargaining	636
Voting on the Merits	639
SELECTED REFERENCES	644
READINGS	
13.1 Charles Nesson and Associates, <i>CRITICAL ISSUES IN THE COURTROOM: EXPLORING A HYPOTHETICAL CASE</i>	648
13.2 James Eisenstein and Herbert Jacob, <i>FELONY JUSTICE</i>	657
13.3 Frank B. Cross and Emerson H. Tiller, <i>JUDICIAL PARTISANSHIP AND OBEDIENCE TO LEGAL DOCTRINE: WHISTLEBLOWING ON THE FEDERAL COURTS OF APPEALS</i>	660
13.4 Melinda Gann Hall, <i>CONSTITUENT INFLUENCE IN STATE SUPREME COURTS</i>	665
13.5 H. W. Perry, <i>DECIDING TO DECIDE</i>	670
13.6 David J. Danelski, <i>THE INFLUENCE OF THE CHIEF JUSTICE IN THE DECISIONAL PROCESS</i>	675
13.7 Paul J. Wahlbeck, James F. Spriggs, and Forrest Maltzman, <i>MARSHALLING THE COURT: BARGAINING AND ACCOMMODATION ON THE UNITED STATES SUPREME COURT</i>	684

Chapter 14. The Impact of Judicial Decisions	691
COMPLIANCE AND IMPACT	691
ANTICIPATED CONSEQUENCES	694
ACTUAL CONSEQUENCES	696
EXPLAINING AND ASSESSING EFFECTS	699
SELECTED REFERENCES	703
READINGS	
14.1 Bradley C. Canon and Charles A. Johnson, <i>JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT</i>	706
14.2 Elliot E. Slotnick and Jennifer A. Segal, <i>TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR?</i>	714
14.3 BAKER V. CARR (1962)	722
14.4 Louis Fisher, <i>LEGISLATIVE VETOES, PHOENIX STYLE</i>	725
14.5 Gerald N. Rosenberg, <i>THE HOLLOW HOPE: CAN COURTS GENERATE SOCIAL CHANGE?</i>	727
14.6 Michael McCann, <i>REFORM LITIGATION ON TRIAL: REVIEW OF THE HOLLOW HOPE</i>	743
14.7 Valerie J. Hoekstra, <i>PUBLIC REACTION TO SUPREME COURT DECISIONS</i>	751
 Case Index	759
Subject Index	763