

CONSTITUTIONAL LAW FOR A CHANGING AMERICA

LEE EPSTEIN AND THOMAS G. WALKER

RIGHTS,
LIBERTIES,
AND
JUSTICE

*Fourth
Edition*



CONSTITUTIONAL LAW FOR A CHANGING AMERICA

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PREFACE

Nine years have passed since *Constitutional Law for a Changing America: Rights, Liberties, and Justice* made its debut in a discipline already supplied with many fine casebooks by law professors, historians, and social scientists. We believed then, as we do now, that there was a need for a fresh approach because, as political science professors who regularly teach courses on public law, and as scholars concerned with judicial processes, we saw a growing disparity between what we taught and what our research taught us.

We had adopted books for our classes that focused primarily on Supreme Court decisions and how the Court applied the resulting legal precedents to subsequent disputes, but as scholars we understood that to know the law is to know only part of the story. A host of political factors—internal and external—influence the Court’s decisions and shape the development of constitutional law. Among the more significant forces at work are the ways lawyers and interest groups frame legal disputes, the ideological and behavioral propensities of the justices, the politics of judicial selection, public opinion, and the positions elected officials take, to name just a few.

Because we thought no existing book adequately combined the lessons of the legal model with the influences of the political process, we wrote one. In most respects, our book follows tradition: readers will find, for example, that we include the classic cases that best illustrate the development of constitutional law. But our focus is

different, as is the appearance of this volume. We emphasize the arguments raised by lawyers and interest groups and include tables and figures on Court trends, profiles of influential justices and organizations, and other materials that bring out the rich political context in which decisions are reached. As a result, students and instructors will find this work both similar to and different from casebooks they may have read before.

Integrating traditional teaching and research concerns was only one of our goals. Another was to animate the subject of public law. As instructors, we find our subject inherently interesting—to us public law is exciting stuff. The typical constitutional law book, however, could not be less inviting in design, presentation, or prose. That kind of book seems to dampen enthusiasm. We have written a book that we hope mirrors the excitement we feel for our subject. Along with cases excerpted in the traditional manner, we have included descriptions of the events that led to the suits, photographs of litigants, and relevant exhibits from the cases. We hope these materials demonstrate to students that Supreme Court cases are more than just legal names and citations, that they involve real people engaged in real disputes. Readers will also find material designed to enhance their understanding of the law, such as information on the Supreme Court decisionmaking process, the structure of the federal judiciary, and briefing court cases. Also included are a glossary of legal terms and brief biographical information on each justice.

In preparing this fourth edition, we have strengthened the distinctive features of the earlier versions by making changes at all three levels of the book—organization, chapters, and cases. In response to the comments of many instructors and questions from our students, we added a new chapter on the Second Amendment, which the Supreme Court has all but neglected. Considering the renewed scholarly interest and battles in the political arena over gun control, we too found ourselves scrambling in class to address students' questions and were forced to rely on supplemental material. The new chapter eliminates that problem.

The most significant changes are in the individual chapters. All have been thoroughly updated to include significant opinions handed down during the 1997–1998, 1998–1999, and 1999–2000 terms. Where relevant, we also updated the narrative to take into account recent events in the legal and political environments. The chapter on criminal rights, for example, now includes a discussion of the Court's reaffirmation of *Miranda v. Arizona*; the chapter on discrimination describes recent events surrounding debates over affirmative action and gay and lesbian rights; and the chapters discussing freedom of expression, obscenity and libel, and privacy delve even deeper into legal issues associated with the "information age," especially the astronomical growth of the World Wide Web.

Finally, we made two kinds of changes in our presentation of the case material. First, to broaden students' perspective on the U.S. legal system, we added boxes on the laws and legal practices of other countries. Students and instructors now will be able to compare and contrast U.S. Supreme Court decisions over a wide range of issues—including the death penalty, prayer in school, and libel—with policies developed in other countries. This material already has provided fodder for lively debates in our classes, and we hope it will in yours as well. Second, finding ourselves increasingly confronted with questions from students about the fate of particular litigants—for example, what happened to Ernesto Miranda?—and hearing the same from colleagues elsewhere, we decided to attach "Aftermath" boxes to a select set of cases. In ad-

dition to providing human interest material, they can lead to interesting discussions about the impact of decisions on the lives of "ordinary" Americans.

Also worth noting, we retained and enhanced the changes we made in the third edition pertaining to case presentation. We continue to excerpt concurring and dissenting opinions; in fact, virtually all cases analyzed in the text now include one or the other or both. Although these opinions lack the force of precedent, they are useful in helping students to see alternative points of view. We also provide universal resource locators (URLs) to the full text of the opinions and, where available, to a Web site containing oral arguments in many landmark cases. We took this step because we recognize how rewarding it can be to read decisions in their entirety and to listen to oral arguments. Doing so, we believe, helps students to develop an important skill—differentiating between viable and less-viable arguments. Finally, we continue to retain the historical flavor of the decisions, reprinting verbatim the original language used in the *U.S. Reports* to introduce the justices' writings. Students will see that during most of its history the Court used the term "Mr." to refer to justices, as in "Mr. Justice Holmes delivered the opinion of the Court" or "Mr. Justice Harlan, dissenting." In 1980 the Court dropped the "Mr." This point may seem minor, but we think it is evidence that the justices, like other Americans, updated their usage to reflect fundamental changes in American society—in this case, the emergence of women as a force in the legal profession and shortly thereafter on the Court itself.

One thing has not changed—our intention to keep the text up to date. Each year we will produce a print supplement containing the important opinions issued by the Court since this book's publication. The first supplement for this volume, with cases from the 2000–2001 term, will appear in October 2001. (Contact the Marketing Department at CQ Press, 202-887-6363, for further information.) To make the most recent opinions available before publication of the print supplement, we also maintain a Web site—navigate to: <http://clca.cqpress.com>—that includes excerpts of cases from the Court's current term or the term just ended.

ACKNOWLEDGMENTS

Although the first edition of this volume was published only nine years ago, it had been in the works for many more. During those developmental years, numerous people provided guidance, but none as much as Joanne Daniels, a former editor at CQ Press. It was Joanne who conceived of a constitutional law book that would be accessible, sophisticated, and contemporary. And it was Joanne who brought that concept to our attention and helped us develop it into a book. We are forever in her debt.

Because this new edition charts the same course as the first three, we remain grateful to all of those who had a hand in the previous editions. They include David Tarr and Jeanne Ferris at CQ Press, Joseph A. Kobylka of Southern Methodist University, and our many colleagues who reviewed and commented on them: Judith A. Baer, Ralph Baker, Lawrence Baum, John Brigham, Gregory A. Caldeira, Bradley C. Canon, Robert A. Carp, Phillip J. Cooper, Sue Davis, John Fliter, John B. Gates, Edward V. Heck, Kevin McGuire, Wayne McIntosh, John A. Maltese, Susan Mezey, Richard J. Pacelle Jr., C. K. Rowland, Donald R. Songer, and Harry P. Stumpf. Most of all, we wish to acknowledge the contributions of our editor at CQ Press, Brenda Carter, who has seen *Constitutional Law for a Changing America* through three editions. There are many things we could say about Brenda—all positive—but perhaps this best summarizes our feelings: we cannot think of one editor, not one, in this business with whom we would rather work. Somehow she knows exactly when to steer us and when to steer clear.

We also remain extremely grateful to our copy editor, Carolyn Goldinger. She has worked with us since the first edition, and her imprint is, without exaggeration, every-

where. She continues to make our prose more accessible, to question our interpretation of certain events and opinions—and is all too often right—and to make our tables and figures understandable. We thank Talia Greenberg, Scott Kuzner, and Tom Roche for tracking down new illustrations for this edition and Gwenda Larsen for her superior organizational skills.

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Any errors of omission or commission remain our sole responsibility. We encourage students and instructors alike to comment on the book and to inform us of any errors. Contact us at: epstein@artsci.wustl.edu or polstw@emory.edu.

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