

RIGHTS, LIBERTIES,

CONSTITUTIONAL LAW FOR A CHANGING AMERICA

AND JUSTICE

8
EDITION



LEE EPSTEIN AND THOMAS G. WALKER



EIGHTH EDITION

CONSTITUTIONAL LAW FOR A CHANGING AMERICA

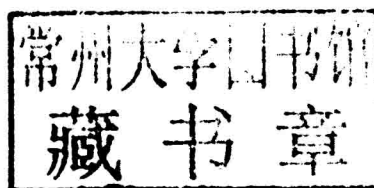
Rights, Liberties, and Justice

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PREFACE

Twenty-one 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 a fresh approach was needed because, as 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. These include 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 legal factors with the influences of the political process, we wrote one. In most respects, our book follows tradition: readers will find that we include excerpts from 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

the politics surrounding litigation. We include tables and figures on Court trends and other materials that bring out the rich legal, social, historical, economic, and political contexts in which the Court reaches its decisions. 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 constitutional law. As instructors, we find our subject inherently interesting—to us con law is exciting stuff. Many of the books available, 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. We describe the events that led to the suits and include photographs of litigants and relevant exhibits from the cases. Moreover, because students often ask us about the fates of particular litigants—for example, what happened to the “Scottsboro boys”?—and hearing that colleagues elsewhere are asked similar questions, we decided to attach “Aftermath” boxes to a select set of cases. In addition to providing final chapters to these stories, the focus on the human element leads to interesting discussions about the decisions’ impacts on the lives of ordinary Americans. 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.

Finally, to broaden students' perspectives on the U.S. legal system, we have added boxes on the laws and legal practices of other countries. Students and instructors can use these to compare and contrast U.S. Supreme Court decisions over a wide range of issues, such as the death penalty, prayer in schools, and libel, with policies developed in other countries. The use of foreign law sources in their opinions has sparked some dissension among the justices, and we have found that the material we include here inspires lively debates in our classes. We hope it will do so in yours as well.

Important Revisions

In preparing this eighth 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. Material on the boundaries of free expression has been reorganized so that we focus not only on the traditional topics of libel and obscenity but also on emerging areas of government concern—for example, cruelty and violence. To date, the government's efforts at regulating expression have not been especially successful. But whether the Court will stick to its position of defining only a limited number of categories of expression—notably, obscenity and libel—as beyond the reach of the First Amendment is anyone's guess.

The most significant changes are in the individual chapters. All have been thoroughly updated to include important opinions handed down through the 2011 term. Since Chief Justice Roberts took office in 2005, the Court has taken up many pressing issues of the day, including gun control (*District of Columbia v. Heller*), the use of the death penalty for child rapists (*Kennedy v. Louisiana*), the extent to which defendants have the right to confront witnesses against them (including *Davis v. Washington* and *Harmon v. Indiana*), and, as we just mentioned, cruelty and violence (*United States v. Stevens*; *Brown v. Entertainment Merchants Association*).

The chapters that follow contain discussions of these cases, along with many others from the Roberts Court. For example, Chapter 4 houses new material on government involvement in the internal affairs of religious organizations, with an excerpt from *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (2012). Chapter 5 provides expanded coverage of hateful and offensive speech and now includes an excerpt from *Snyder*

v. Phelps (2011)—an attempt by Westboro Baptist Church to win First Amendment protection for its anti-gay, anti-Catholic demonstrations at military funerals. We have updated Chapter 11 to include a discussion of the Court's reintroduction of the importance of physical intrusions in determining Fourth Amendment search and seizure violations, highlighted by an excerpt from the GPS tracking case of *United States v. Jones* (2012). And last but certainly not least, to Chapter 14's coverage of campaign finance issues we have added an excerpt from the Court's controversial decision in *Citizens United v. Federal Election Commission* (2010).

For the seventh edition, we made a change in our presentation of the case material: for each excerpted case, we noted key arguments made by the attorneys on both sides. Our goal was to highlight the array of important claims before the Court, and not simply those the justices chose to highlight. This addition proved popular with students and instructors alike, and so we have retained it in this new edition.

We have also retained and enhanced other features pertaining to case presentation that have proved to be useful. The Aftermath boxes not only remain but have increased in number—a testament to the positive feedback we have received. 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 continue to provide universal resource locators (URLs) to the full texts of the opinions and, where available, to a Web site containing audio recordings of oral arguments in many landmark cases. We have taken this step for much the same reason that we now highlight attorneys' arguments: reading decisions in their entirety and listening to oral arguments can help students to develop the important skill of differentiating between compelling and less compelling arguments. Finally, we continue to retain the historical flavor of the decisions, reprinting verbatim the original language used in *U.S. Reports* to introduce the justices' writings. Students will see that during most of its history the Court used the courtesy title "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.

We have made some cuts along the way as well. Most notably, adopters of previous editions will see that we've trimmed the number of appendixes in the "Reference Material" section. Because so much of the material they contained is now readily available from reliable sources on the Internet, we made the decision to delete them to make room for more case material and narrative.

Student and Instructor Resources

We continue to update and improve our Online Con Law Resource Center located at <http://clca.cqpress.com> and hope instructors find this a valuable resource for assigning supplemental cases and useful study aids, as well as for accessing helpful instructor resources. Through the supplemental case archive professors and students can access excerpts of important decisions that we mention in the text but that space limitations and other considerations counsel against excerpting. Cases included in the online archive are indicated by boldface italic type in the text, and a complete list appears in Appendix 4; in the archive these cases are introduced and excerpted in the same fashion as they are in the book. The archive now houses more than two hundred cases; we will continue to keep it current, adding important decisions as the Court hands them down.

The Online Resource Center also features some very handy study tools for students: a set of interactive flash cards for each chapter that will help students review key terms and concepts, and links to a wealth of data and background material from CQ Press's reference sources, such as *Guide to the U.S. Supreme Court*, *The Supreme Court A to Z*, and our *Supreme Court Compendium* (which we coauthored with the Harold J. Spaeth and Jeffrey A. Segal). Students can click to a bio of any justice, read a background piece on the origins of the Court, and view selected data tables on ideological means or on voting interagreements among justices by issue area. Also available are new hypothetical cases—sixteen for this volume—written by Stephen Daniels of the American Bar Foundation and Northwestern University and James Bowers of St. John Fisher College. These rich, detailed hypotheticals, tied

to specific chapters, are accompanied by both discussion and writing questions that will help spark conversation and serve as the basis for writing assignments.

We are grateful to Tim Johnson of the University of Minnesota for producing a great set of instructor's resources. In addition to a test bank that includes multiple-choice, short-answer, and hypothetical questions, he has created a set of discussion questions for each chapter. There are also case briefs for every case excerpted in the book and a full set of PowerPoint lecture slides. We'd also like to thank Rorie Spill Solberg of Oregon State University and Liane Kosaki of the University of Wisconsin–Madison for their Moot Court Simulation in the Resource Center. Instructors can choose hypothetical cases and utilize their guidelines so students can play the roles of counsel or chief or associate justice. Rorie and Liane also blog for the Resource Center, tying current news events and developments to content in *Constitutional Law for a Changing America*. We encourage all of our readers to check out "Without Prejudice" on the home page of the Resource Center.

Instructors can also download all the tables, figures, and charts from our book (in PowerPoint or JPG formats) for use during lecture. To access all of these resources, be sure to click on "instructor resources" once at clca.cqpress.com so you can register and start downloading.

Acknowledgments

Although the first edition of this volume was published twenty-one 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 seven, 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, Jack Knight at Duke University, Joseph A. Kobylka of Southern Methodist University, Jeffrey A. Segal of the State University of New York at Stony Brook, and our many

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Most of all, we acknowledge the contributions of our editors at CQ Press, Brenda Carter and Charisse Kiino. Brenda saw *Constitutional Law for a Changing America* through the first five editions; Charisse came on board on the fifth and worked with us throughout the eighth. Both are just terrific, somehow knowing

exactly when to steer us and when to steer clear. We are equally indebted to Carolyn Goldinger, our copy editor on the first four editions and on the sixth edition. Her imprint, without exaggeration, remains everywhere. Over the years, she made our prose more accessible, questioned our interpretation of certain events and opinions—and was all too often right—and made our tables and figures understandable. There is not a better copy editor in this business. Period.

For this edition, we express our sincere thanks to our new copy editor, Judy Selhorst. Judy continued the tradition of strong CQ Press editors. Her expertise and attention to detail not only enhanced our prose but worked to improve the accuracy and relevance of what we wrote. We also express many thanks to Nancy Loh for help with photo research and to Astrid Virding for her fine work as production editor.

Finally, we acknowledge the support of our home institutions and of our colleagues and friends. We are forever grateful to our former professors for instilling in us their genuine interest in and curiosity about things judicial and legal, and to our parents for their unequivocal support.

Shortly before the fifth edition went to press, we learned that the *Constitutional Law for a Changing America* volumes had won the award for teaching and mentoring presented by the Law and Courts section of the American Political Science Association. Each and every one of the editors and scholars we thank above deserves credit for whatever success our books have enjoyed. Any errors of omission or commission, however, 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 lepstein@law.usc.edu or polstw@emory.edu.

L.E., *Los Angeles*
T.G.W., *Atlanta*

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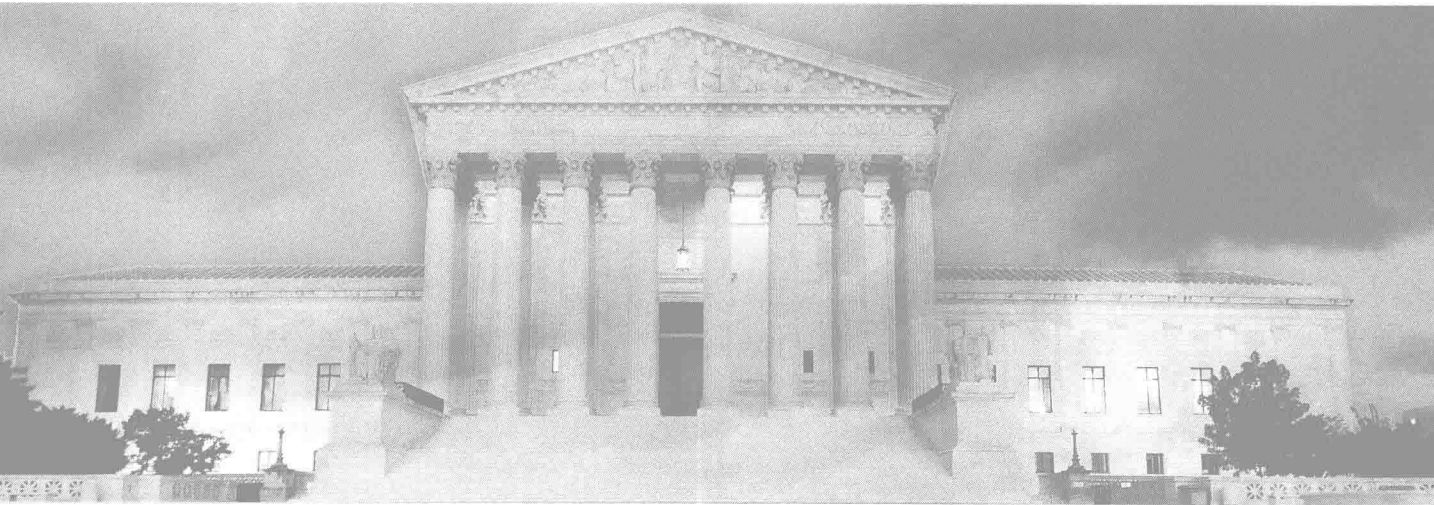
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The Supreme Court and the Constitution

PART I



The Living Constitution

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