

CONSTITUTIONAL LAW  
FOR A CHANGING AMERICA

# INSTITUTIONAL POWERS AND CONSTRAINTS

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LEE EPSTEIN and THOMAS G. WALKER

*of the United States in order  
common defence, promote the  
Welfare, and  
Constitution for the United  
America*

*We the People of the United States  
do hereby ordain and establish this Constitution for the  
ourselves and our Posterity, to provide for the common defence, promote  
domestic Tranquillity, secure the Blessings of Liberty to our*

WINNER OF  
APSA LAW AND  
COURTS' TEACHING  
AND MENTORING  
AWARD

FIFTH EDITION

# CONSTITUTIONAL LAW FOR A CHANGING AMERICA

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FIFTH EDITION

LEE EPSTEIN

Washington University

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Emory University



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# PREFACE

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Twelve years have passed since *Constitutional Law for a Changing America: Institutional Powers and Constraints* 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 the politics surrounding litigation, for example, and include tables and figures on Court trends, profiles of influential justices and organizations, and other materials that bring out the rich legal, social, 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 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 can only 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. Moreover, finding ourselves increasingly confronted with questions from students about the fate of particular litigants—for example, what happened to Fred Korematsu?—and hearing the same from colleagues elsewhere, we decided to attach “Aftermath” boxes to a select set of cases. In addition to providing human interest material, they can lead to interesting discussions about the impact of decisions on the lives of “ordinary” Americans. We hope these materials demonstrate to students that Supreme Court cases involve real people engaged in real disputes and are not merely legal names and citations.

Readers will also find material designed to enhance their understanding of the law, such as information on the Supreme Court decision-making 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. Finally, to broaden students' perspective 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 issues such as judicial review, privileges and immunities for legislators, and the separation of powers system with policies developed in other countries. This material has inspired lively debates in our classes, and we hope it will in yours as well.

In preparing this fifth edition, we have strengthened the distinctive features of the earlier versions by making changes at two levels of the book—chapters and cases. We thoroughly updated individual chapters to include significant opinions since publication of the previous edition. Where relevant, we also updated the narrative to take into account recent events in the legal and political environments. The chapter on the separation of powers, for example, now includes a full discussion of the government's war on terrorism. We supply documents detailing Congress's authorization for the use of military force against Iraq and identify steps President George W. Bush has taken in response, as well as others for which he has not obtained congressional approval. Some of these, of course, implicate the authority of the ordinary courts, such as the establishment of military tribunals to try noncitizens suspected of terrorism. The Supreme Court has not yet ruled on these corresponding issues (though September 11–related cases are now making their way to the High Court), but during World War II, in *Ex parte Quirin*, it permitted a military commission to try the “Nazi saboteurs” who landed on Long Island intending to attack manufacturing and transportation sites. In light of the current relevance of this case, we have excerpted it in the section on presidential war powers.

Finally, we made a change in our presentation of the case material. As professors who regularly teach courses on rights, liberties, and justice we are the first to acknowledge that no one book—not even our own!—can possibly

contain excerpts of each and every significant Supreme Court decision; the constraints of space and semesters simply prohibit that. As a result, we had to make choices—often hard ones. Recognizing that some instructors would enjoy greater flexibility in deciding the cases on which to focus, we have created a case archive located at [www.cqpress.com/college/clca.htm](http://www.cqpress.com/college/clca.htm). Through this archive professors and students can access important decisions that we do not include in the book. But we do more than provide full-text versions online. We have excerpted each decision to match the focus and streamlining we provide for cases in the book. Cases included in the archive are identified in the text in bold italic type; they also are listed in Appendix 10. Currently, as the appendix indicates, the archive houses about seventy cases relevant to *Institutional Powers and Constraints*, as well as hundreds pertaining to our *Rights, Liberties, and Justice* and *Short Course* volumes. We will keep it current, and will add important decisions as the Court hands them down. Our intention to keep the text up to date is still intact. Each year we will post on the companion Web site important opinions issued by the Court since the book's publication.

Also worth noting, we retained and enhanced other features pertaining to case presentation that have proved to be useful. 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.

## ACKNOWLEDGMENTS

Although the first edition of this volume was published only twelve 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 the idea 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 four, 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 Washington University, Joseph A. Kobylka of Southern Methodist University, Jeffrey A. Segal of the State University of New York at Stony Brook, 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. We are also grateful to the many scholars who took time out of their busy schedules to write us with suggestions, including (again) Gregory Caldeira, as well as Akiba J. Covitz, Alec C. Ewald, Leslie Goldstein, and Neil Snortland. 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 all five 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. Also working with us on this fifth edition was Charisse Kiino, another wonder-

ful editor at CQ. Charisse too was terrific about keeping us on our toes but not stepping (too hard) on them.

We remain indebted to Carolyn Goldinger. She worked as our copy editor on the first four editions, and her imprint remains, without exaggeration, *everywhere*. 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. Talia Greenberg, our copy editor for this edition, picked up where Carolyn left off, tightening the narrative, urging us to add (and eliminate) material where appropriate, and detecting numerous inconsistencies and repetitions. We are extremely grateful for all her hard work and patience. We also thank Lorna Notsch for her superior organizational skills.

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Finally, we acknowledge the support of our friends and families. 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.

As we were working on this edition we learned that the *Constitutional Law for a Changing America* volumes had won the 2003 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, though, 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](mailto:epstein@artsci.wustl.edu) or [polstw@emory.edu](mailto:polstw@emory.edu).

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**PART I**  
**THE U.S. CONSTITUTION**

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**AN INTRODUCTION TO THE  
U.S. CONSTITUTION**

**1. UNDERSTANDING THE  
U.S. SUPREME COURT**

