

SEVENTH EDITION



CONSTITUTIONAL LAW FOR A CHANGING AMERICA

# Institutional Powers and Constraints

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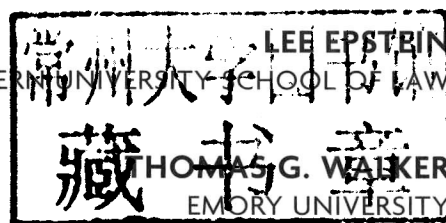
LEE EPSTEIN AND THOMAS G. WALKER

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CONSTITUTIONAL LAW FOR A CHANGING AMERICA

# Institutional Powers and Constraints

NORTHWESTERN UNIVERSITY SCHOOL OF LAW



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# **Constitutional Law for a Changing America**

*In honor of our parents*  
Ann and Kenneth Spole  
Josephine and George Walker

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## PREFACE

**E**ighteen 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 scientists 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 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 incorporate tables and figures on Court trends and other materials that bring out the rich legal, social, 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 public law. As instructors, we find our subject inherently interesting—to us, public law is exciting stuff. Many constitutional law books, 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. We describe the events that led to the suits and include photographs of litigants and relevant exhibits from the cases. Moreover, because students and colleagues often ask us about the fate of particular litigants—for example, what happened to Fred Korematsu?—we attached “Aftermath” boxes to a select number of cases. In addition to providing a coda to the cases, the human element can lead to interesting discussions about the impact of decisions on the lives of 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 find material designed to enhance their understanding of the law, such as information on the Supreme Court's decision-making process, the structure of the federal judiciary, and briefing court cases. Also included are a glossary of legal terms and brief biographies of 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 on issues such as judicial review, privileges and immunities for legislators, and the separation of powers system with policies developed in other countries. The use of foreign law sources in their opinions has sparked some disagreement among the justices. But the material we include here also has inspired lively debates in our classes, and we hope it will do the same in yours as well.

In preparing the seventh 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 important opinions handed down through the 2008 term, but readers will find more than just updating. We tried to bring a fresh eye to each chapter, which mostly involved clarifying existing material. Our discussion of jurisdiction in chapter 2 provides an example. We found that our students wanted to know more about the arguments for and against Congress's authority to remove the Court's appellate jurisdiction. Thinking that other instructors also might find more material useful, we added some. We did the same for standing to sue, also in chapter 2, and on many other topics throughout the book. To provide one more example, in chapter 5 we reconfigured the section on the war on terrorism with the goal of bringing greater clarity to the steps the president (and Congress) took and the Court's decisions in response.

Finally, in perhaps the most significant change to our presentation of the cases, we now note arguments made by the attorneys on both sides. This new feature helps highlight the array of important claims before the Court, and not simply those the justices chose to highlight. Our students have found the arguments quite interesting, and we hope that other instructors will find them equally valuable.

At the same time, we have retained those features pertaining to case presentation that have proved to

be useful. We continue to excerpt concurring and dissenting opinions; in fact, almost every case analyzed in the text now includes one 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 URLs to the full text of the opinions and, where available, the URL 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 title. 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.

## ANCILLARIES

We also continue to make changes in our presentation of the case material. As professors who regularly teach courses on constitutional law, we are the first to acknowledge that no one book—not even ours!—can possibly contain excerpts of each and every significant Supreme Court decision; the constraints of time and space 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, each year we add to our case archive located at <http://clca.cqpress.com/>. Through this archive professors and students can access important decisions not included 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. Archived cases are identified in the text in bold italic type and are listed in the back of the book. The archive currently houses about 80 cases relevant to *Institutional Powers and Constraints*, as well as hundreds

pertaining to our *Rights, Liberties, and Justice* and *Short Course* volumes. In addition, our intention to keep the text up-to-date is intact. Each year we will post on the companion Web site important opinions issued by the Court since the book's publication.

Instructors visiting the case archive will find yet another valuable resource. It now features a very handy study tool for students—a set of interactive flashcards for each chapter that will help students review terms and concepts.

We are grateful to Tim Johnson of the University of Minnesota for producing a great set of instructor 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 with this edition, a full set of PowerPoint lecture slides. Instructors can also download all the tables, figures, and charts from our book (in PowerPoint or JPG formats) for use during lecture. Once on the companion Web site at [clca.cqpress.com](http://clca.cqpress.com), click on “instructor resources” to register and start downloading.

## ACKNOWLEDGMENTS

Although the first edition of this volume was published only eighteen 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 six, 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, and our many colleagues who reviewed and commented on previous editions: 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, John A. Maltese, Kevin McGuire, Wayne McIntosh, Susan Mezey, Richard J. Pacelle

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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 onboard for the fifth and worked with us throughout the seventh. 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 six of the seven editions, including this one. Her imprint is, without exaggeration, *everywhere*. Over the years, she has 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. We also express our gratitude to Joan Gossett, a senior production editor at CQ, who not only got the trains to run on time but also located the terrific photos scattered throughout the book. In a hundred different ways she eased our burden, and we cannot thank her enough. We are thrilled with the new interior design of the book. It is more sophisticated and crisper than past editions. Plus, there is now plenty of room to jot notes in the margins! For this improvement, we are in Debra Naylor's debt.

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.

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 scholars and editors 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 [lee-epstein@northwestern.edu](mailto:lee-epstein@northwestern.edu) or [polstw@emory.edu](mailto:polstw@emory.edu).

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