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CONSTITUTIONAL LAW FOR A CHANGING AMERICA

# A SHORT COURSE *Fifth Edition*

*Lee Epstein* AND *Thomas G. Walker*



FIFTH EDITION

CONSTITUTIONAL LAW FOR A CHANGING AMERICA

# A Short Course

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# **Constitutional Law for a Changing America**

To my niece and nephews  
Alexandra, Brian, Jason, and Zach—L. E.  
To Nicole—T. G. W.

## PREFACE

 ver the past two decades or so, constitutional law texts for political science courses have experienced a radical change. At one time, relatively short volumes, containing either excerpts from landmark cases or narratives of them, dominated the market. Now, large, almost mammoth books abound—some in a single volume, others in two volumes, but all designed for a two-semester sequence.

This trend, while fitting compatibly with the needs of many instructors, bypassed others, including those who teach institutional powers, civil liberties, rights, and justice in a single academic term and those who prefer a shorter core text. *Constitutional Law for a Changing America: A Short Course* was designed as an alternative text for these instructors. The first edition appeared in 1996. Its positive reception encouraged us to prepare the second, third, and fourth editions, and now the fifth.

Like its predecessors, this edition of *A Short Course* seeks to combine the best features of the traditional, concise volumes—it interweaves excerpts of the Court's most important decisions and narratives of major developments in the law. For example, our discussion of the right to counsel offers not only the landmark decision *Gideon v. Wainwright* (1963) but also an account of the critical cases preceding *Gideon*, such as *Powell v. Alabama* (1932), and those following it, such as *Scott v. Illinois* (1979).

At the same time, we thought it important to move beyond the traditional texts and write a book that reflects the exciting nature of constitutional law. In doing so, we were not without guidance. For two decades we have been producing *Constitutional Law for a Changing America*, now in its seventh edition. This two-volume book, we believe, provides an accessible yet sophisticated and contemporary take on the subject.

*A Short Course*, then, although presenting cases and other materials in ways quite distinct from our two-volume book, maintains some of its most desirable features. First, we approach constitutional law, as we do in *Constitutional Law for a Changing America*, from a political science perspective, demonstrating how political and social forces—not just legal factors—influence the development of the law. The justices carry out their duties in the context of the political, economic, and social environment that surrounds them. Accordingly, throughout *A Short Course*, we highlight how relevant political events, personnel changes on the Court, interest groups, and even public opinion may have affected the justices' decisions, in addition to traditional legal considerations, such as precedent, text, and history.

Second, just as our two-volume set seeks to animate the subject, so too does *A Short Course*. To us and, we suspect, most instructors, constitutional law is an



exciting subject, but we realize that some students may not (at least initially) share our enthusiasm. To whet their appetites, we develop the human side of landmark litigation. Where possible, we include photographs of litigants and places that figured prominently in cases. For each excerpted case, we provide a detailed description, in accessible prose, of the dispute that gave rise to the suit. Students are spared the task of digging out facts from Court opinions and can plunge ahead to the ruling with the contours of the dispute firmly in mind. We also present information about the political environment surrounding various cases in tables, figures, and boxes that supplement the narrative and case excerpts.

Third, because many adopters of *Constitutional Law for a Changing America* have commented favorably on the supporting material we provide in those volumes, we maintain that feature in *A Short Course*. Along these lines, chapter 2, “Understanding the Supreme Court,” reviews not only the procedures the Court uses to decide cases but also the various legal and extralegal approaches scholars have invoked to understand and explain why the Court rules as it does. The back of the book contains a wealth of reference material, including texts of the U.S. Constitution and *Federalist Paper*, No. 78; descriptions of the Court’s history and the justices who have served on it; and even an example of how to brief a case.

Fourth, this edition of *A Short Course* takes advantage of the expanding resources available to students of constitutional law that can be found on the Internet. With each excerpted opinion we provide locations on the Internet where students may read the full, unabridged decision. We also alert students whenever the oral arguments for a case have been made available on the Internet by the Oyez Project.

With each edition we attempt to enhance the coverage and accessibility of the material, and this one is no exception. We have thoroughly updated every chapter with an eye toward exposing students to all the major developments in constitutional law. In chapter 20, “Voting and Representation,” for example, we added a section on contemporary restrictions on voting rights, including an excerpt of *Crawford v. Marion County* (2008) (the voter ID case). We also revised the material on campaign regulations to attend to the Court’s landmark ruling in *Citizens United v. Federal Election Commission* (2010), in which the majority held that Congress cannot limit corporate

funding of independent political broadcasts in elections. Along similar lines, instructors who have used *A Short Course* in the past will notice a new section in the chapter on freedom of speech—one that covers the speech rights of students and includes an excerpt of *Morse v. Frederick* (2007) (the “Bong Hits 4 Jesus” case).

These are but a few examples of the many changes we have made throughout the book. At the same time, we retain two innovative features from previous editions. The first is a series of “Aftermath” boxes sprinkled throughout the text. These boxes are a response to our own experiences in the classroom when confronted with questions such as: “Whatever happened to Ernesto Miranda?” The Aftermath boxes discuss what occurred after the Supreme Court handed down its decision. In addition to providing human interest material, they lead to interesting discussions about the Court’s impact on the lives of ordinary Americans. We hope these materials demonstrate to students that Supreme Court cases are more than merely legal names and citations; they involve real people involved in real disputes.

A second major change was our effort to respond to an inevitable question facing any author of a constitutional law text: Which Supreme Court cases should be included? Other than classic decisions such as *Marbury v. Madison*, instructors have differing ideas about which cases best illustrate the various points of constitutional law. Each has his or her list of personal favorites, but given the page limitations of a printed book, not every instructor’s preferences can be satisfied.

We have attempted to overcome this problem by creating, and regularly updating, an electronic archive of more than three hundred supplemental Supreme Court decisions. These cases are excerpted using the same format as the case excerpts that appear in this printed volume. The archive allows instructors to use additional cases or to substitute favorite cases for those that appear in the printed text. The archive also provides an efficient source of material for students who want to read more deeply into the law and for instructors who wish to direct their students to an easily accessible information source for paper assignments. The cases included in the archive are identified in the text in bold italic type and are listed in Appendix 10. The archive can be accessed on the Internet at: <http://clca.cqpress.com>.

We keep the electronic archive current between printed editions. Instructors and students no longer must wait until the next edition is published to have

ready access to recent rulings presented in a format designed for classroom use.

## ACKNOWLEDGMENTS

The roots of this fifth edition of *A Short Course* extend back to our two-volume book. As a consequence, those who influenced the development of the original version of *Constitutional Law for a Changing America* influenced this project as well. We are particularly grateful to Joanne Daniels, Brenda Carter, and Charisse Kiino. Joanne, a former editor at CQ Press, conceived of a constitutional law book that would be accessible, sophisticated, and contemporary. She brought the concept to our attention and helped us develop it. Brenda guided us through the completion of the project and its subsequent editions and urged us to go forward with *A Short Course*. Her support for our projects has been constant and strong, and her advice always wise. Charisse, our current editor, brought new enthusiasm and ideas to this book. Her responsiveness to our needs and requests has been extraordinary. Working with her has been a joy.

Other members of the CQ Press team also deserve our thanks and praise. Neither of us is quite sure what we would do without Carolyn Goldinger. To say she has copyedited nearly every edition of the volumes in the *Constitutional Law for a Changing America* series is true enough. But she has done so much more than perfect our writing and check our facts. On each edition she edits, Carolyn contributes many ideas for presentation and content. There is not a better copy editor in this business. Period. We are especially grateful for the efforts of our production editor, Laura Stewart. Dwain Smith deserves thanks for his work on the case archive and the ancillaries created by Timothy

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Over the years, we have also benefited from the suggestions of numerous scholars who read our manuscripts, offered suggestions, provided data, or shared their thoughts about constitutional law. We are especially grateful to Judith A. Baer, Ralph Baker, Lawrence Baum, Robert W. Bennett, John Brigham, Steven G. Calabresi, Gregory A. Caldeira, Bradley C. Canon, Robert A. Carp, Phillip J. Cooper, Sue Davis, Jolly Emrey, John Fliter, John B. Gates, Leslie Goldstein, Edward V. Heck, Jack Knight, Joseph F. Kobylka, John A. Maltese, John O. McGinnis, Kevin McGuire, Wayne McIntosh, Susan Mezey, Richard L. Pacelle Jr., Martin H. Redish, C. K. Rowland, Jeffrey A. Segal, Donald Songer, Harold Spaeth, and Harry P. Stumpf. We would like to thank John Brigham of the University of Massachusetts, Paula A. Franzese of Barnard College, Lori Cox Han of Austin College, and Gordon P. Henderson of Widener University for their suggestions on previous editions. We are also grateful to those instructors and students who have used *Constitutional Law for a Changing America* and sent us comments and suggestions, especially Akiba J. Covitz, Alec C. Ewald, and Neil Snortland.

Finally, we acknowledge the encouragement 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 home institutions for providing substantial support of our efforts.

Any errors of omission or commission, of course, 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](mailto:lepstein@law.usc.edu) or [polstw@emory.edu](mailto:polstw@emory.edu).



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# **PART I    The U.S. Constitution**

An Introduction to the U.S. Constitution

1. THE LIVING CONSTITUTION

2. UNDERSTANDING THE SUPREME COURT