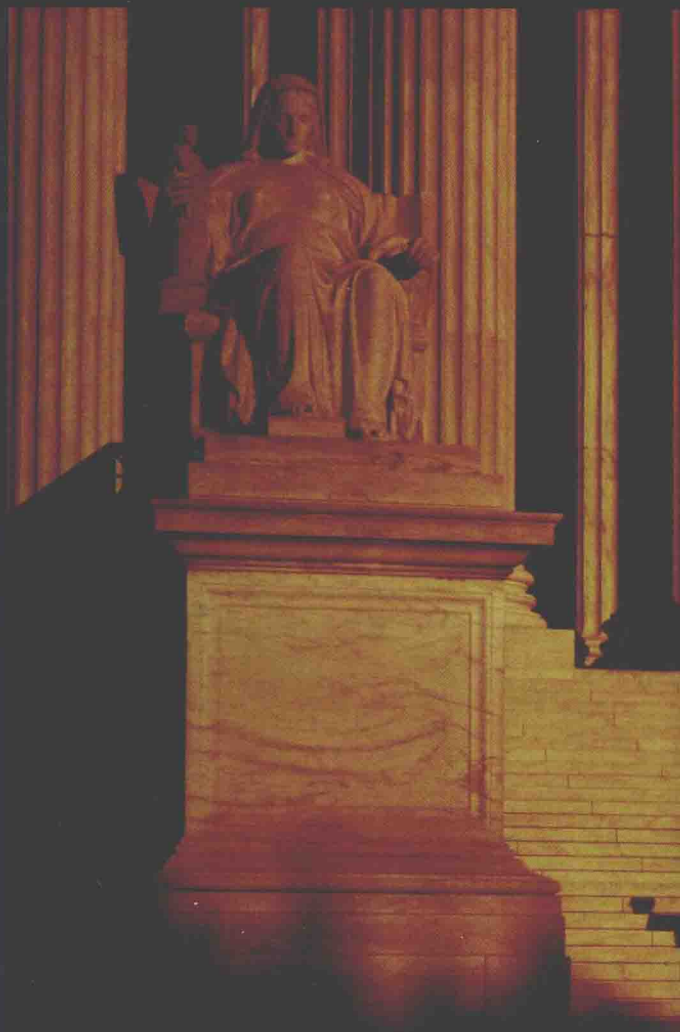


# CONSTITUTIONAL LAW FOR A CHANGING AMERICA

LEE EPSTEIN AND THOMAS G. WALKER

INSTITUTIONAL  
POWERS  
AND  
CONSTRAINTS

*Fourth  
Edition*



# CONSTITUTIONAL LAW FOR A CHANGING AMERICA

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INSTITUTIONAL POWERS AND CONSTRAINTS

FOURTH EDITION

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A DIVISION OF  
CONGRESSIONAL QUARTERLY INC.  
WASHINGTON, D.C.

CQ Press

A Division of Congressional Quarterly Inc.

1414 22nd Street, N.W.

Washington, D.C. 20037

(202) 822-1475; (800) 638-1710

www.cqpress.com

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∞ The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992.

Printed and bound in the United States of America

05 04 03 02 01 5 4 3 2 1

Interior Design: Kachergis Book Design, Pittsboro, North Carolina

Cover Design: Gary Gore, Nashville, Tennessee

LIBRARY OF CONGRESS CATALOGING-IN-PUBLICATION DATA

Epstein, Lee, 1958–

Constitutional law for a changing America. Institutional powers and constraints / Lee Epstein, Thomas G. Walker.— 4th ed.

p. cm.

Includes bibliographical references and indexes.

ISBN 1-56802-543-2

1. Constitutional law—United States—Cases. I. Walker, Thomas

G. II. Title.

KF4548 .E67 2001

342.73—dc21

2001000450

## PREFACE

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Nine 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 on 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. We emphasize the arguments raised by lawyers and interest groups and include tables and figures on Court trends, profiles of influential justices, 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, relevant exhibits from the cases, drawings, cartoons, and photographs of litigants. 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. In addition, readers will find material designed to enhance their understanding of the law, such as information on the Supreme Court’s 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 the fourth edition, we have strengthened the distinctive features of the earlier versions by making changes at two levels of the book—chapters and cases. Individual chapters have been thoroughly updated to include significant opinions handed down during the 1997–2000 (through January) terms. Where relevant, we also updated the narrative to take into account recent events in the legal and political environments. The chapter on the executive, for example, now includes a discussion of the 2000 presidential election, with an excerpt of *Bush v. Gore* (2000) located in the appendix; the chapter on federalism contains an in-depth analysis of the Court's recent decisions in the area of sovereign immunity.

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 to selected chapters on laws and how they are applied in other countries. Students and instructors now will be able to compare and contrast U.S. policies and court decisions over a wide range of issues—including privileges and immunities for legislators, executive selection, and the separation of powers—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, often finding ourselves 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 some of the cases. In addition to providing human interest material, they can lead to interesting discussions about the impact of decisions on the lives of particular litigants.

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 these steps because we recognize how rewarding it can be to read decisions in their entirety. We also believe that, by listening to oral arguments, students can 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 produce a print supplement containing the important opinions issued by the Court since this book's publication. The first supplement for this edition, with cases handed down in the 2001 term, will appear in October 2001. (Contact the Sales Department at CQ Press, 202-887-8608, for further information.) To make the most recent opinions available before publication of the print supplement, we also maintain a Web site that includes excerpts of cases from the Court's current term or the term just ended. Go to: <http://clca.cqpress.com> and navigate to the Free Resources area.

#### 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 endeavors. They include David Tarr and Jeanne Ferris at CQ Press, Joseph A. Kobyłka of Southern Methodist University, and our many colleagues who reviewed and commented on our book: 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 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, *everywhere*. 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 Tom Roche for tracking down new illustrations for this edition.

Many thanks also go to Jeffrey A. Segal for his frank appraisal of the earlier works and his willingness to discuss even half-baked ideas for changes; to Jack Knight for his comments on the drafts of several chapters; and to Harold J. Spaeth for his wonderful dataset.

Our home institutions provided substantial support, not complaining when presented with astronomical telephone bills, postal fees, and copying expenses. For this and all the moral support they provide, we thank all of our colleagues and staffs.

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. Walker expresses his special thanks to Aimee and Emily for always being there, and Epstein thanks her husband, Jay, for enduring all that he does not have to (but does, anyway), without complaining (much).

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](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**



