SECOND EDITION

CONSTITUTIONAL LAW FOR A CHANGING AMERICA

RIGHTS, LIBERTIES, AND JUSTICE

LEE EPSTEIN AND THOMAS G. WALKER

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PREFACE

Three 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 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 were teaching 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 knew that the law is only one slice of the pie. 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 that 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 taken by elected officials, 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—and even the appearance of this volume—is different. We emphasize the arguments raised by lawyers and interest groups, and we include tables and figures on Court trends, profiles of influential justices and organizations, 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 full descriptions of the events that led to the suits, photographs of litigants, and relevant ex-

hibits from the cases. 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. Readers will also find reference material designed to enhance their understanding of the law—information on the Supreme Court decision-making process, the structure of the federal judiciary, material on briefing court cases, a glossary of legal terms, and biographical information on the justices.

In preparing this second edition, we have strengthened the distinctive features of the first. Readers will find changes at all three levels of the book—overall organization, chapters, and cases. Beginning with the organization of the volume, we restructured the material on Supreme Court decision making, adding new information on legal and political approaches and creating a separate chapter, "Approaches to Supreme Court Decision Making." This addition eliminates the need for supplemental readings on the various theories that have been offered to explain Court decisions. The new chapter also sets the stage for an important theme developed throughout the book—many factors, not just precedent, influence the direction and content of Court decisions. Another organizational change involved the "Freedom of Expression" chapter. It is now divided into three chapters dealing, respectively, with speech, press, and obscenity and libel, which should make for more manageable reading and instruction.

Readers will find the most significant changes within individual chapters. All the chapters have been thoroughly updated, containing opinions handed down during the 1991, 1992, and 1993 terms. In some, we have added a few oldies but goodies, including *Duncan v. Louisiana, Sherbert v. Verner,* and *Goldman v. Weinberger.* Where relevant, we also updated the narrative to take into account recent events in the legal and political environments. The chapter on obscenity and libel, for example, now includes a discussion of feminist arguments against pornography; hate speech also plays a prominent role in our examination of freedom of expression.

Several chapters have been completely revised—with "Religion: Exercise and Establishment" the most prominent example. There, we rewrote the Free Exercise section to emphasize major doctrinal changes occurring over the past three decades and to highlight the interaction between Congress and the Court. Readers will also find changes in the Establishment section. There, we modified the chronological approach to stress instead the substance of the cases.

In the privacy chapter we streamlined the discussion of cases outside the reproductive realm, while reorganizing the material on abortion. Excerpts on reproductive choice now focus exclusively on the legal standard articulated in *Roe v. Wade;* they demonstrate how the *Roe* standard has changed over time and speculate on why alterations have occurred. In making this change, we do not neglect cases involving parental consent and funding of abortions: they receive treatment in the narrative. And abortion protest—a subject of contemporary concern—receives coverage in the Freedom of Expression chapter.

Finally, readers will note two kinds of changes in our presentation of Court cases. First, we added excerpts from many dissenting and concurring 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. Second, to retain the historical flavor of the decisions, we reprinted verbatim the original language used in the *U.S. Reports* to introduce opinions. 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, have 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 with an annual supplement containing the latest important opinions. A separate volume, the supplement will be packaged with the text (the first will appear in August 1995), and will be cumulative until the next edition of the book is published. Making the supplement available at the beginning of the fall semester means the new cases can be included in the syllabus whether the course is taught in the fall or spring.

ACKNOWLEDGMENTS

Although the first edition of this volume was published only three 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.

Since this new edition charts the same course as the original volume, we remain grateful to all of those who had a hand in the first. They include David Tarr and Jeanne Ferris at CQ Press, Joseph A. Kobylka of Southern Methodist University, and our many colleagues who reviewed and commented on it: Judith A. Baer, Ralph Baker, Lawrence Baum, John Brigham, Gregory A. Caldeira, Robert A. Carp, Phillip J. Cooper, John B. Gates, Wayne McIntosh, John A. Maltese, Richard J. Pacelle, Jr., C. K. Rowland, and Donald R. Songer.

We have accumulated equally as many, if not more, debts in producing this edition. First and foremost, we owe much to two editors at CQ Press, Brenda Carter and Carolyn Goldinger. Brenda brought a (much needed) fresh eye to the project. She had many ideas about the direction the revision should take and managed to convey them in such a way as to make them seem like ours, not hers. But we know better and herein acknowledge her major contribution to the volume. In the preface to the previous edition, we said that Carolyn Goldinger, our copy editor, was "nothing short of a saint," and her halo has not slipped. Her imprint is everywhere: she managed to translate our (too often) jargonistic writing into accessible prose; she (correctly) questioned our interpretation of certain events and opinions; she even made our tables and figures understandable. We also are grateful to Jamie R. Holland for her skill and persistence in tracking down elusive photographs.

We thank our colleagues who offered valuable suggestions for revision: Bradley C. Canon, Sue Davis, John Fliter, Edward V. Heck, Kevin McGuire, Susan Mezey, and Harry P. Stumpf. Many thanks go to Jeffrey A. Segal for his frank appraisal of the earlier work and his willingness to discuss even half-baked ideas for changes. Jack Knight, who read drafts of several chapters, also deserves special acknowledgment.

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 our department chairs, John Sprague (Washington University) and Harvey E. Klehr (Emory University).

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 to 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.

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PART I

THE LIVING CONSTITUTION

IN MAY 1787 the Founders of our nation met in Philadelphia "for the sole and express purpose of revising the Articles of Confederation," but within a month they dramatically altered their mission. Viewing the articles as unworkable, they decided to start afresh. What emerged just four months later, on September 17, was an entirely new government scheme embodied in the U.S. Constitution.

The Framers were quite pleased with their handiwork, so much so that after they completed it, they "adjourned to City Tavern, dined together and took cordial leave of each other."[1] Most of the delegates were ready to go home after the long, hot summer in Philadelphia. And they did so, confident that the new document would receive speedy passage by the states. At first, it appeared as if their optimism was justified. As Table I-1 depicts, before the year was out four states had ratified the Constitution—three by unanimous votes. But after January 1788, "the pace . . . slowed considerably."[2] By this time, a movement opposed to ratification was growing and marshaling arguments to deter state convention delegates. Most of all, these opponents, the so-called Anti-Federalists, feared the Constitution's new balance of power. They believed that strong state governments provided the only "sure defense of their liberties against a potentially tyrannical central authority," and that the Constitution tipped the scales in favor of federal power.[3] These fears were countered by the Federalists, who favored passage of the Constitution. Although their arguments and writings took many forms, among the most important was a series of eighty-five articles published in New York newspapers, under the pen name Publius. Written by John Jay, James Madison, and Alexander Hamilton, *The Federalist Papers* continues to provide insight into the objectives and intent of the Founders.

Debates between the Federalists and their opponents often were highly philosophical in tone, with emphasis on the appropriate roles and powers of national institutions. In the states, however, ratification drives were full of the stuff of ordinary politics. Massachusetts provides a case in point. According to one account, the following events transpired there:

> Of the 355 delegates, 60 percent or more probably came to Boston on January 9 opposed. If the Federalists were to have any chance at all, they would need the hearty support of Samuel Adams, their already legendary Revolutionary

1. *1787,* compiled by historians of the Independence National Historical Park (New York: Exeter Books, 1987), 191.

2. Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* (St. Paul, Minn.: West Publishing, 1990), 177.

3. Melvin I. Urofsky, *A March of Liberty* (New York: Knopf, 1988), 96–98.

TABLE 1-1 The Ratification of the Constitution

State	*Date of Action*	*Decision*	*Margin*
Delaware	December 7, 1787	ratified	30:0
Pennsylvania	December 12, 1787	ratified	46:23
New Jersey	December 18, 1787	ratified	38:0
Georgia	December 31, 1787	ratified	26:0
Connecticut	January 8, 1788	ratified	128:40
Massachusetts	February 6, 1788	ratified with amendments	187:168
Maryland	April 26, 1788	ratified	63:11
South Carolina	May 23, 1788	ratified with amendments	149:73
New Hampshire	June 21, 1788	ratified with amendments	57:47
Virginia	June 25, 1788	ratified with amendments	89:79
New York	July 26, 1788	ratified with amendments	30:27
North Carolina	August 2, 1788	rejected	184:84
	November 21, 1789	ratified with amendments	194:77
Rhode Island	May 29, 1790	ratified with amendments	34:32

SOURCE: Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* (St. Paul, Minn.: West Publishing, 1990), 216.

hero, and of governor John Hancock, of Declaration immortality. Adams was tepid; Hancock, aloof and cool, preferring to wait and see which way the political tides might flow.

After three weeks of heated debate a delegation headed by Adams climbed Beacon Hill to knock on the door of the wealthy and gouty Hancock. They proposed that the governor declare for ratification on condition that a series of amendments be tacked on for the consideration of the Congress.

The price for Hancock's support? The presidency, if Virginia failed to ratify or if Washington declined to serve. Otherwise, the vice presidency or, some say, the promise of Bowdoin's support in the next governor's race.

Hancock agreed to the bribe and, his feet swathed in bandages, was carried theatrically to the rostrum to make his "Conciliatory Proposition" as though it were his own brainchild. Adams, still the darling of both sides, seconded the resolution to consider the amendments, and a few days later added several of his own.

The Constitution carried on February 6, 187 to 168, making Massachusetts the sixth state to ratify.[4]

This compromise, the call for a bill of rights, caught on. As one scholar noted, "It worked so well that Madison now advocated its use wherever the vote promised to be close."[5] As it turned out, he and other Federalists needed to do so quite often: as Table 1-1 indicates, of the nine states ratifying after January 1788, sev-en recommended that the new Congress consider amendments. Indeed, New York and Virginia probably would not have agreed to the Constitution without such an addition; Virginia actually called for a second constitutional convention for that purpose. Other states began devising their own wish lists—enumerations of specific rights they wanted put into the document.

Why were states so reluctant to ratify the Constitution without a bill of rights? Some viewed the new government scheme with downright suspicion, bemoaning "the great and extensive powers granted to the new government over the lives, liberties, and property of every citizen."[6] But more tended to agree with Thomas Jefferson's sentiment expressed in a letter to Madison:

4. J. T. Keenan, *The Constitution of the United States: An Unfolding Story*, 2d ed. (Chicago: Dorsey Press, 1988), 32–33.

5. Alpheus T. Mason, *The States Rights Debate*, 2d ed. (New York: Oxford University Press, 1972), 92–93.

6. Address of the Albany Antifederal Committee, April 26, 1788, quoted in Farber and Sherry, *American Constitution*, 180.

> I like the organization of the government into legislative, Judiciary, and Executive.... I will now add what I do not like ... the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of press, protection against standing armies....[7]

What Jefferson's remark suggests is that many thought well of the new system of government, but were troubled by the lack of a declaration of rights. Remember that at the time, Americans clearly understood concepts of *fundamental* and *inalienable* rights, those that inherently belonged to them and that no government could deny. Even England, the country with which they had fought a war for their freedom, had such guarantees. The Magna Charta of 1215 and the Bill of Rights of 1689 gave Britons the right to a jury trial, to protection against cruel and unusual punishments, and so forth. Moreover, after the Revolution, virtually every state constitution included a philosophical statement about the relationship between citizens and their government and/or a listing of fifteen to twenty inalienable rights such as religious freedom and electoral independence. Small wonder that the call for such a statement or enumeration of rights became a battle cry for those opposed to ratification. It was so widespread, we might ask why the Framers failed to include it in the original document. Did they not anticipate the reaction?

Records of the 1787 constitutional debates indicate that, in fact, the delegates considered specific individual guarantees on at least four separate occasions.[8] On August 20 Charles Pinckney submitted a proposal that included several guarantees, such as freedom of the press and the eradication of religious tests, but the various committees never considered his plan. On three separate occasions toward the closing days of the convention, September 12, 14, and 16, some tried, again without success, to convince the delegates to enumerate specific guarantees. At one point, George Mason averred that a bill of rights "would give great quiet to the people; and with the aid of the state delegations, a bill might be prepared in a few hours." This motion was unanimously defeated by those remaining in attendance. On the convention's last day, Edmund Randolph made a desperate plea that the delegates allow the states to submit amendments and then convene a second convention. To this, Pinckney responded, "Conventions are serious things, and ought not to be repeated."

Why these suggestions received such unwelcome receptions by the majority of delegates is a matter of scholarly debate. Some suggest that the pleas came too late, that the Framers wanted to complete their mission by September 15 and "were not physically or psychologically prepared to stay on in Philadelphia even an extra day."[9] Others disagree, arguing that the Framers were more concerned with the structure of government than with individual rights,[10] and that the plan they devised—one based on enumerated, not unlimited powers—would foreclose the need for a bill of rights. Hamilton wrote, "The Constitution is itself ... a Bill of Rights."[11] Under it the government could exercise only those functions specifically bestowed upon it; all remaining rights lay with the people. He also asserted that "independent of those which relate to the structure of government," the Constitution did, in fact, contain some of the more necessary specific guarantees.[12] For example, Article I, Section 9, prohibits bills of attainder, ex post facto laws, and the suspension of writs of habeas corpus. Hamilton and others further argued that the specification of rights was not only unnecessary, but also could "even be dangerous" because no such listing could be inclusive.[13] As James

7. Quoted in Alpheus T. Mason and D. Grier Stephenson, Jr., *American Constitutional Law,* 10th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1993), 349.

8. The following discussion comes from Farber and Sherry, *American Constitution,* 221–222. This book reprints verbatim debates over the Constitution and the Bill of Rights.

9. *1787,* 183.

10. Gerald Gunther, *Individual Rights in Constitutional Law,* 4th ed. (Mineola, N.Y.: Foundation Press, 1986), 72.

11. *The Federalist Papers,* No. 84, Isaac Kramnick, ed. (New York: Penguin Books, 1987), 477.

12. Ibid., 473.

13. Ibid., 476.