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# Constitutional Law for a Changing America

## Institutional Powers and Constraints

9th Edition

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## PREFACE

**A** QUARTER CENTURY has 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 the judicial process, 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—both 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 that 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, historical, 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 also 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. To broaden students’ perspective on the U.S. legal system, we also 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.

### KEY REVISIONS

In preparing this ninth 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 2014–2015 term. Since Chief Justice John G. Roberts took office in 2005, the Court has taken up many pressing issues of the day, including, of course, health care: we have included excerpts of *National Federation of Business v. Sebelius* (2012) in chapters 7 and 8, as we did in the last edition. For this edition, we have added four more Roberts Court cases. The first is *Zivotofsky v. Kerry* (2015), which seems to present a very small and narrow question about the place of birth on passports. In fact, though, it is a fascinating case pitting legislative versus executive power. *National Labor Relations Board v. Canning* (2014) asks the Court to address novel questions about the president’s appointment power, and *Horne v. Department of Agriculture* (2015) raises equally interesting issues about the takings clause of the Fifth Amendment. Last but not least is *Hollingsworth v. Perry* (2013): the substantive question in this case was whether California could constitutionally ban same-sex marriage. The Court never got around to answering that question (though two years later it would go on to invalidate such bans), but it held that the defenders of the ban did not have standing. The debate between the justices in the majority and in dissent in *Perry*, though, is so interesting that we excerpt the case in chapter 2 (“The Judiciary”).

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 discussions of federalism (chapter 6) and the commerce clause (chapter 7) provide examples. In the last edition, we reworked some of this material to highlight new developments. Here we continue along the same path, moving even more of the commerce material to chapter 7 and adding more basic federalism material (including an excerpt of *Coyle v. Smith*) to chapter 6. We also reorganized the discussion of standing in chapter 2 to reflect a recent spate of suits (including *Perry*) induced by the government’s unwillingness to defend its laws.

We have retained and enhanced those features pertaining to case presentation that have proved to be useful. We continue to provide key arguments made by the attorneys on both sides. Readers will also notice excerpts of both 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.

## STUDENT AND INSTRUCTOR RESOURCES

We continue to update and improve our Online Con Law Resource Center located at <https://edge.sagepub.com/conlaw> and hope instructors find this a valuable resource for assigning supplemental cases and useful study aids, as well as for accessing helpful instructor resources. Through the supplemental case archive professors and students can access excerpts of important decisions that we mention in the text but that space limitations and other considerations counsel against excerpting. Cases included in the online archive are indicated by boldface italic type in the text; the Online Case Archive list at the end of the book for a complete list of those cases. In the archive these cases are introduced and excerpted in the same fashion as they are in the book. The archive now houses more than two hundred cases; we will continue to keep it current, adding important decisions as the Court hands them down.

The Online Resource Center also features some very handy study tools for students, including a set of interactive flash cards for each chapter that will help students review key terms and concepts, and links to a wealth of data and background material from CQ Press’s reference sources, such as *Guide to the U.S. Supreme Court*, *The Supreme Court A to Z*, and our *Supreme Court Compendium* (which we coauthored with Harold J. Spaeth and Jeffrey A. Segal). Students

can click to a bio of any justice, read a background piece on the origins of the Court, and view selected data tables on ideological means or on voting inter-agreements among justices by issue area. Also available are new hypothetical cases—sixteen for this volume—written by Stephen Daniels of the American Bar Foundation and Northwestern University, and James Bowers of St. John Fisher College. These rich, detailed hypotheticals, tied to specific chapters, are accompanied by both discussion and writing questions that will help spark conversation and serve as the basis for writing assignments.

We are grateful to Tim Johnson of the University of Minnesota for producing a great set of instructor’s 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 a full set of PowerPoint lecture slides. We would also like to thank Jeremy Buchman of Oregon State University, Rorie Spill Solberg of Oregon State University, and Liane Kosaki of the University of Wisconsin–Madison for their Moot Court Simulation in the Resource Center. Instructors can choose hypothetical cases and utilize their guidelines so students can play the roles of counsel or chief or associate justice. Rorie and Liane also blog for the Resource Center, tying current news events and developments to content in *Constitutional Law for a Changing America*.

Instructors can download all the tables, figures, and charts from our book (in PowerPoint or JPG formats) for use during lectures. To access all of these resources, be sure to click on “instructor resources” at [clca.cqpress.com](http://clca.cqpress.com) so you can register and start downloading.

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Because this new edition charts the same course as the first eight, 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, Jeffrey A. Segal of the State University of New York at Stony Brook, and our many colleagues who reviewed and commented on our work: Judith A. Baer, Ralph Baker, Lawrence Baum, John Brigham, Gregory A. Caldeira, Bradley C. Canon, Robert A. Carp, James Cauthen, Phillip J. Cooper, Sue Davis, John Fliter, John Forren, John B. Gates, Edward V. Heck, Joshua Kaplan, Peter Kierst, David Korman, Cynthia Lebow, John A. Maltese, Wendy Martinek, Kevin McGuire, Wayne McIntosh, Susan Mezey, Richard J. Pacelle Jr., C. K. Rowland, Chris Shortell, Joseph Smith, Donald R. Songer, Harry P. Stumpf, and Artemus Ward. We are also indebted to the many scholars who took the time to send us suggestions, including (again) Greg Caldeira, as well as Akiba J. Covitz, Jolly Emrey, Alec C. Ewald, Leslie Goldstein, and Neil Snortland. Many thanks also go to Jeff Segal for his frank appraisal of the earlier volumes; to Segal (again), Rebecca Brown, David Cruz, Micheal Giles, Linda Greenhouse, Dennis Hutchinson, Adam Liptak, and Judges Frank H. Easterbrook and Richard A. Posner for their willingness to share their expertise in all matters of constitutional law; to Judith Baer and Leslie Goldstein for their help with the revision of the discrimination chapter in previous editions and their answers to innumerable e-mail messages; to Jack Knight for his comments on the drafts of several chapters; and to Harold J. Spaeth for his wonderful Supreme Court Database.

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There is not a better copy editor in this business. Period.

For this edition, we express our sincere thanks to our new copy editor, Alison Hope. Her attention to detail not only enhanced our prose but worked to improve the accuracy and relevance of what we wrote. Her efficiency and technical expertise are exemplary. We also express many thanks to Veronica Stapleton Hooper, our project editor; and to Raquel Christie for her wonderful assistance in acquiring photographs.

Finally, we acknowledge the support of our home institutions and of our colleagues and friends. 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 editors and scholars 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 [epstein@wust.edu](mailto:epstein@wust.edu) or [polstw@emory.edu](mailto:polstw@emory.edu).

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