

FIFTH EDITION

# American Constitutional Law **1**

Sources of Power and Restraint

Otis H. Stephens, Jr.

John M. Scheb II

# American Constitutional Law Volume I

## *Sources of Power and Restraint*

**FIFTH EDITION**

**OTIS H. STEPHENS, JR.**

*University of Tennessee, Knoxville*

**JOHN M. SCHEB II**

*University of Tennessee, Knoxville*



**WADSWORTH**  
CENGAGE Learning™

Australia • Brazil • Japan • Korea • Mexico • Singapore • Spain • United Kingdom • United States

**American Constitutional Law, Volume I:  
Sources of Power and Restraint,  
Fifth Edition****Otis H. Stephens, Jr., and John M. Scheb II**

Publisher: Suzanne Jeans

Executive Editor: Carolyn Merrill

Development Editor: Katie Hayes

Editorial Assistant: Angela Hodge

Marketing Manager: Lydia LeStar

Marketing Communications Manager:  
Heather Baxley

Content Project Manager: PreMediaGlobal

Art Director: Linda Helcher

Print Buyer: Fola Orekoya

Rights Acquisition Specialist: Jennifer  
Meyer-Dare

Production Service: PreMediaGlobal

Cover Designer: Dick Hannus

Compositor: PreMediaGlobal

© 2012, 2008, 2003 Wadsworth, Cengage Learning

ALL RIGHTS RESERVED. No part of this work covered by the copyright herein may be reproduced, transmitted, stored, or used in any form or by any means graphic, electronic, or mechanical, including but not limited to photocopying, recording, scanning, digitizing, taping, Web distribution, information networks, or information storage and retrieval systems, except as permitted under Section 107 or 108 of the 1976 United States Copyright Act, without the prior written permission of the publisher.

For product information and technology assistance, contact us at  
**Cengage Learning Customer & Sales Support, 1-800-354-9706.**

For permission to use material from this text or product,  
submit all requests online at **[www.cengage.com/permissions](http://www.cengage.com/permissions).**

Further permissions questions can be e-mailed to  
**[permissionrequest@cengage.com](mailto:permissionrequest@cengage.com).**

Library of Congress Control Number: 2010942618

ISBN-13: 978-0-495-91489-1

ISBN-10: 0-495-91489-4

**Wadsworth**20 Channel Center Street  
Boston, MA 02210  
USA

Cengage Learning is a leading provider of customized learning solutions with office locations around the globe, including Singapore, the United Kingdom, Australia, Mexico, Brazil and Japan. Locate your local office at **[international.cengage.com/region](http://international.cengage.com/region)**

Cengage Learning products are represented in Canada by  
Nelson Education, Ltd.

For your course and learning solutions, visit **[www.cengage.com](http://www.cengage.com).**

Purchase any of our products at your local college store or at our preferred online store **[www.cengagebrain.com](http://www.cengagebrain.com).**

**Instructors:** Please visit **[login.cengage.com](http://login.cengage.com)** and log in to access instructor-specific resources.



# About the Authors

Otis H. Stephens, Jr., is Alumni Distinguished Service Professor of Political Science and Resident Scholar of Constitutional Law in the College of Law at the University of Tennessee. He holds a Ph.D. in political science from Johns Hopkins University and a J.D. from the University of Tennessee. Professor Stephens is the author of *The Supreme Court and Confessions of Guilt* (1973); he is coauthor, with Gregory J. Rathjen, of *The Supreme Court and the Allocation of Constitutional Power* (1980), with Richard A. Glenn, of *Unreasonable Searches and Seizures: Rights and Liberties under the Law* (2006), and with John M. Scheb II, of *American Constitutional Law: Essays and Cases* (1988). He has contributed chapters to *Comparative Human Rights* (1976), *The Reagan Administration and Human Rights* (1985), and *American National Security and Civil Liberties in an Era of Terrorism* (2004). He has also authored or coauthored a number of articles in professional journals, including the *Georgetown Law Journal*, the *Journal of Public Law*, the *Tennessee Law Review*, the *Widener Journal of Public Law*, the *Southeastern Political Review*, and the *Criminal Law Bulletin*. Professor Stephens is also co-editor, along with John M. Scheb II and Kara E. Stooksbury, of *An Encyclopedia of American Civil Rights and Liberties* (2006). Professor Stephens teaches courses in constitutional law, Supreme Court decision making, law and public policy, and jurisprudence in the UT College of Law. Dr. Stephens is also a member of the Tennessee Bar and has been admitted to the Bar of the United States Supreme Court.

John M. Scheb II is Professor and Head of Political Science at the University of Tennessee, where he teaches graduate and undergraduate courses in American government, constitutional law, civil rights and liberties, administrative law, criminal law and procedure, the judicial process, and law in American society. Professor Scheb received his Ph.D. from the University of Florida in 1982. He has authored or coauthored numerous articles in professional journals, including the *Journal of Politics*, *American Politics Quarterly*, *Political Research Quarterly*, *Law and Policy*, *Judicature*, *State and Local Government Review*, *Social Science Quarterly*, *Political Behavior*, *Southeastern Political Review*, and the *Tennessee Law Review*. Professor Scheb has also coauthored six other textbooks: *American Constitutional Law: Essays and Cases* (1988), with Otis H. Stephens, Jr.; *An Introduction to the American Legal System*, 2nd edition (2010), with Judge John M. Scheb; *Criminal Law and Procedure*, 7th edition (2011), also with Judge John M. Scheb; *Law and the Administrative Process* (2005), also with Judge John M. Scheb; *Government and Politics in Tennessee* (2002), with William Lyons and Billy Stair; and *American Government: Politics and Political Culture*, 5th edition (2010), with William Lyons and Chapman Rackaway. He is also the co-editor, along with Otis H. Stephens, Jr., and Kara E. Stooksbury, of *An Encyclopedia of American Civil Rights and Liberties* (2006).



# Preface

American constitutional law, to paraphrase Charles Evans Hughes, is what the Supreme Court says it is. But of course it is much more than that. Constitutional law is constantly informed by numerous actors' understandings of the meaning of the United States Constitution. Lawyers, judges, politicians, academicians, and, of course, citizens all contribute to the dialogue that produces constitutional law. Consequently, the Constitution remains a vital part of American public life, continuously woven into the fabric of our history, politics, and culture. Our goal in writing this textbook is to illustrate this premise in the context of the most salient and important provisions of the Constitution.

Volumes I and II of *American Constitutional Law* contain thirteen chapters covering the entire range of topics in constitutional law. Volume I examines the institutional aspects of constitutional law; Volume II deals with civil rights and liberties. Each of the chapters includes an introductory essay providing the legal, historical, political, and cultural context of Supreme Court jurisprudence in a particular area of constitutional interpretation. Each introductory essay is followed by a set of edited Supreme Court decisions focusing on salient constitutional issues. In selecting and editing these cases, we have emphasized recent trends in major areas of constitutional interpretation. At the same time, we have included many landmark decisions, some of which retain importance as precedents while others illustrate the transient nature of constitutional interpretation.

## What's New in the Fifth Edition?

In preparing the fifth edition, we have endeavored to incorporate the important developments that have taken place during the four years since the fourth edition was completed. Over the last four years, the Court has rendered numerous consequential decisions across the entire range of constitutional law. We have attempted to acknowledge all, or nearly all, of them in our introductory essays and to incorporate a few of the most interesting and important ones into our set of edited cases. In Volume I, Chapter 1, we have added *Elk Grove Unified School District v. Newdow*, which involves the issue of standing in the context of a very interesting question about religion in public schools. In Volume I, Chapter 5, we have added *Granholm v. Heald*, which deals with a state law attacked as discriminating against interstate commerce. Many more new cases have been added to Volume II, which deals with civil rights and liberties. To maintain the book at a reasonable length, we have moved several edited cases to the companion Web site.

We have changed the title of Volume I, Chapter 4, to "The Administrative State and the Complexities of Modern Governance," which better reflects its contents. We have restored three edited decisions that did not appear in Chapter 4 in the last edition: *Bowsher v. Synar*, *Morrison v. Olson*, and *MWAA v. CAAN*. And we have moved two cases that were in the previous edition of Chapter 4, *Dow Chemical Company v. United States* and *Treasury Employees v. Von Raab*, to the companion Web site. Finally, we have moved *Wiener v. United States* to Chapter 3, where we think it is a better fit. The result is a set of cases that better reflect the key concerns of the chapter.

To make the book livelier and more visually appealing, we have added a number of recurring features that appear in shaded boxes. "Case in Point" summarizes an interesting Supreme Court decision of particular relevance to the chapter. "Sidebar" provides a brief overview of an important constitutional issue. "Supreme Court Perspectives" uses

quotations from justices' opinions to illustrate differing points of view on constitutional questions. And "Constitutional Foundations" contains excerpts from the Constitution, *The Federalist Papers*, and other classic documents. Here is a list of new features by chapter:

### **Chapter 1**

Case in Point: "A Supreme Court Decision Brings Down a President"

Sidebar: "Who Has Standing to Assert Environmental Concerns?"

Supreme Court Perspectives: "The Living Constitution"

Case in Point: "Can Congress Override Constitutional Interpretation via Statute?"

### **Chapter 2**

Supreme Court Perspectives: "Congressional Term Limits"

Constitutional Foundations: "The Enumerated Powers of Congress"

Case in Point: "The Scope of Congress's Implied Powers"

Case in Point: "The Constitutionality of the Federal Violence against Women Act of 1994"

Sidebar: "Health Care Reform: The Constitutional Controversy"

### **Chapter 3**

Constitutional Foundations: "Excerpt from Federalist Paper #70"

Sidebar: "Articles of Impeachment against President Richard M. Nixon"

Case in Point: "The Constitutionality of the Line-Item Veto"

Supreme Court Perspectives: "The President's Removal Powers"

### **Chapter 4**

Sidebar: "Perspectives on the Modern Administrative State"

Case in Point: "The Permissiveness of the Modern Court toward the Delegation of Legislative Power"

Supreme Court Perspectives: "The Antidelegation Doctrine"

Constitutional Foundations: "Excerpt from Federalist Paper #48"

### **Chapter 5**

Constitutional Foundations: "Excerpt from Federalist Paper #45"

Supreme Court Perspectives: "On Federalism"

Sidebar: "Does the National Government Have Exclusive Authority over Immigration?"

Case in Point: "The Supreme Court Upholds a Local Ordinance Restricting Solid Waste Disposal"

Finally, the instructors manual/test bank has been thoroughly updated by Kristin A. Wagers to reflect the changes in the new edition. The companion website for the book, available at [www.cengage.com/politicalscience/stephens/amconlawvol15e](http://www.cengage.com/politicalscience/stephens/amconlawvol15e), has also been updated and includes additional cases.

## **Acknowledgments**

In completing this new edition, we have benefitted from the encouragement and advice of our colleagues and students in the Department of Political Science and the College of Law at the University of Tennessee. In particular, we want to thank Tennessee law students Amy Coleman, Kristin A. Wagers, and Joseph Watson, for their tremendous assistance with legal research and proofreading the manuscript. Several law students



assisted in the editing of Supreme Court decisions excerpted in this edition, including Paige I. Bernick, Matthew Fink, Meghan Fowler, Robby Lockett, Jonathan May, Stuart Saylor, and Rachel Thomas. We wish them thank them publicly for the care and diligence they displayed.

We also wish to express our gratitude to the editorial team at Cengage, especially Carolyn O. Merrill, executive editor for political science, and Katie Hayes, associate development editor, for their ongoing support, assistance, and encouragement. We would also like to express our appreciation to the many scholars who reviewed this edition and its predecessors. Their comments, criticisms, and suggestions were extremely helpful. Finally, we wish to acknowledge the support provided by our wives, Mary Stephens and Sherilyn Scheb. This book is dedicated to them. Although many people contributed to the development and production of this book, we, as always, assume full responsibility for any errors that may appear herein.

Otis H. Stephens, Jr.  
John M. Scheb II  
Knoxville, Tennessee  
*December 1, 2010*



# Contents

Preface .....	x
<b>Introduction .....</b>	<b>1</b>
<b>What Is Constitutional Law? 1</b>	
Why Study Constitutional Law? 2	
<b>The Adoption and Ratification of the Constitution 2</b>	
The Articles of Confederation 2	
Shays's Rebellion 3	
The Annapolis Convention 4	
Delegates to the Philadelphia Convention 4	
The Constitutional Convention 5	
The Battle over Ratification 6	
<b>The Underlying Principles of the Constitution 7</b>	
The Rule of Law 8	
Separation of Powers 8	
Checks and Balances 8	
Judicial Review 10	
Federalism 10	
Individual Rights 10	
<b>The Enduring Constitution 10</b>	
Constitutional Democracy 11	
Built-in Flexibility 11	
Judicial Interpretation of the Constitution 11	
The Constitution and Modern Government 12	
The Constitution in Times of Crisis 13	
<b>Key Terms 13</b>	
<b>For Further Reading 13</b>	
 <b>CHAPTER 1</b>	
<b>The Supreme Court in the Constitutional System .....</b>	<b>16</b>
<b>Introduction 16</b>	
<b>The Courts: Crucibles of Constitutional Law 17</b>	
State Court Systems 17	
The Federal Court System 18	
Federal Court Jurisdiction 21	
<b>Crossing the Threshold: Access to Judicial Review 22</b>	
The Genesis of Constitutional Law Cases 23	
Standing 24	
Mootness 27	
Ripeness 28	
Exhaustion of Remedies 28	
The Doctrine of Abstention 28	
The Political Questions Doctrine 29	
<b>The Supreme Court's Decision Making Process 30</b>	
Case Selection 30	

Summary Decisions	31
Submission of Briefs	31
Oral Argument and Conference	32
Judgment and Opinion Assignment	32
Publication of Supreme Court Decisions	34
<b>The Development of Judicial Review</b>	<b>35</b>
<i>Marbury v. Madison</i>	35
Rejoinder to John Marshall	38
Early Development of Judicial Review	38
The <i>Dred Scott Case</i>	39
Judicial Review in the Latter Part of the Nineteenth Century	41
Judicial Review in the Twentieth Century	42
The Constitutional Revolution of 1937	43
The Impact of the Warren Court	44
The Burger and Rehnquist Courts	44
The Roberts Court	45
<b>The Art of Constitutional Interpretation</b>	<b>47</b>
Interpretivism and Originalism	48
Noninterpretivism	48
Natural Law	49
An Ongoing Dialogue	49
<b>Judicial Activism and Restraint</b>	<b>50</b>
The Doctrine of Strict Necessity	51
The Doctrine of Saving Construction	51
The Presumption of Constitutionality	52
The Narrowness Doctrine	52
Avoiding the Creation of New Principles	53
<i>Stare Decisis</i>	53
The Severability Doctrine	53
“Unconstitutional as Applied”	55
<b>External Constraints on Judicial Power</b>	<b>56</b>
Judicial Dependency on Congress	56
Restriction of the Supreme Court’s Jurisdiction	56
Constitutional Amendment	58
The Appointment Power	60
Impeachment	61
Enforcement of Judicial Decisions	62
<b>Explaining the Court’s Behavior</b>	<b>64</b>
Ideologies of the Justices	65
The Political Environment	66
The Internal Politics of the Court	66
<b>Conclusion</b>	<b>67</b>
<b>Key Terms</b>	<b>68</b>
<b>For Further Reading</b>	<b>68</b>
<i>Marbury v. Madison</i>	70
<i>Eakin v. Raub</i>	72
<i>Scott v. Sandford (The Dred Scott Case)</i>	74
<i>Ex Parte McCordle</i>	78
<i>Cooper v. Aaron</i>	79
<i>Baker v. Carr</i>	82
<i>Elk Grove Unified School District v. Newdow</i>	84



**CHAPTER 2****Congress and the Development of National Power ..... 88****Introduction 88****Structural Aspects of Congress 89**

- Bicameralism 89
- Qualifications of Members of Congress 90
- Congressional Terms 90
- The Term Limits Controversy 90
- Immunities of Members of Congress 91

**Constitutional Sources of Congressional Power 92**

- Article I, Section 8 92
- Other Enumerated Powers 94
- The Doctrine of Implied Powers 95

**The Power to Investigate 97**

- The Supreme Court Recognizes Congress's Power to Investigate 98
- Compulsory Process 99
- The Rights of Individuals Called before Congressional Committees 99

**Regulation of Interstate Commerce 100**

- Early Interpretation of the Commerce Clause 100
- Congress Exercises the Commerce Power 102
- Expansion of Federal Regulatory Power: 1937 and Beyond 105
- The Rehnquist Court's Restriction of Congressional Powers under the Commerce Clause 107
- The Tenth Amendment and the Commerce Clause 110

**Taxing and Spending Powers 112**

- Taxation as a Source of Congressional Power 112
- Federal Taxation as a Means of Regulation 113
- The Spending Power of Congress 114
- The Modern Approach 116
- Individual Rights as Restraints on the Taxing and Spending Powers 116

**Congressional Enforcement of Civil Rights and Liberties 117**

- The Voting Rights Act of 1965 117
- The Religious Freedom Restoration Act 119
- The Violence against Women Act 120

**Conclusion 120****Key Terms 120****For Further Reading 121**

- McCulloch v. Maryland* 121
- Watkins v. United States* 125
- Barenblatt v. United States* 128
- Gibbons v. Ogden* 130
- Hammer v. Dagenhart* 134
- Carter v. Carter Coal Company* 136
- National Labor Relations Board v. Jones & Laughlin Steel Corporation* 138
- Wickard v. Filburn* 143
- Heart of Atlanta Motel v. United States* 146
- Katzenbach v. McClung* 148
- United States v. Lopez* 149
- Gonzales v. Raich* 152
- United States v. Butler* 158
- Steward Machine Company v. Davis* 162
- South Dakota v. Dole* 165
- South Carolina v. Katzenbach* 168
- City of Boerne v. Flores* 171



<b>CHAPTER 3</b>	
<b>Constitutional Underpinnings of the Presidency .....</b>	<b>175</b>
<b>Introduction</b>	175
<b>Structural Aspects of the Presidency</b>	176
Presidential Terms	176
The Electoral College	177
Presidential Succession and Disability	179
Removal of the Chief Executive	180
<b>Theories of Presidential Power</b>	184
Enumerated and Inherent Powers	184
The Stewardship Theory	184
The Supreme Court Legitimizes Stewardship	185
The Outer Limits of Stewardship	186
<b>The Veto Power</b>	187
The Pocket Veto	187
The Line-Item Veto	188
<b>Appointment and Removal Powers</b>	189
The Removal Problem	190
<b>The Power to Grant Pardons</b>	192
Amnesties	193
<b>Executive Privilege</b>	194
The Watergate Tapes Controversy	194
Executive Privilege after the Nixon Tapes Case	195
<b>Presidential Immunity</b>	196
Immunity for Private Misconduct?	196
<b>Foreign Policy and International Relations</b>	197
The "Sole Organ" in the Field of International Relations?	197
Specifics of Conducting Foreign Affairs	199
<b>War Powers</b>	201
The Vietnam War	201
The War Powers Resolution	202
The Persian Gulf War of 1991	203
The War on Terrorism	203
Detention and Trial of Foreign Nationals Apprehended in the War on Terrorism	204
The War in Iraq	205
Domestic Affairs during Wartime	206
Peacetime Threats to National Security	207
<b>Conclusion</b>	209
<b>Key Terms</b>	210
<b>For Further Reading</b>	210
<i>Youngstown Sheet &amp; Tube Company v. Sawyer</i>	211
<i>Wiener v. United States</i>	217
<i>United States v. Nixon</i>	219
<i>Clinton v. Jones</i>	221
<i>United States v. Curtiss-Wright Export Corporation</i>	227
<i>Dames &amp; Moore v. Regan</i>	230
<i>The Prize Cases</i>	234
<i>Korematsu v. United States</i>	236
<i>Hamdan v. Rumsfeld</i>	239
<i>United States v. U.S. District Court</i>	244

**CHAPTER 4****The Administrative State and the Complexities of Modern Governance . . . . . 250****Introduction 250**

From Classical to Modern Liberalism 251

**The Delegation of Legislative Power 252**

Concern for Representative Government 253

Concern for the Separation of Powers 254

Delegation in the Context of Foreign Affairs 254

Delegation in the Domestic Context 255

The Permissiveness of the Modern Court 256

**Additional Separation of Powers Concerns 260****Congressional Control of Administrative Actions 262**

The Legislative Veto 262

**Presidential Control of the Bureaucracy 264**

Appointment and Removal Powers 264

Executive Orders 265

The Executive Role in the Budgetary Process 266

The Power of Impoundment 266

**Judicial Oversight over the Administrative State 268**

Interpreting Statutory Authority 268

Due Process of Law 269

**Agency Actions and Individual Rights 271**

Fourth Amendment Concerns 271

Self-Incrimination Concerns 272

Public Access to Agency Information 272

The Rights of Public Employees 273

**Conclusion 274****Key Terms 274****For Further Reading 274***J. W. Hampton & Company v. United States* 275*Schechter Poultry Corporation v. United States* 276*Bowsher v. Synar* 280*Mistretta v. United States* 285*Whitman v. American Trucking Associations* 288*Immigration and Naturalization Service v. Chadha* 291*Gonzales v. Oregon* 297*Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council* 303*Goldberg v. Kelly* 305*Mathews v. Eldridge* 308**CHAPTER 5****The Dynamics of the Federal System . . . . . 312****Introduction 312****Development of the Federal System 313**

National Supremacy versus States' Rights 314

*Chisholm v. Georgia* 314

The Marshall Court Establishes National Supremacy 315

The Taney Court: Renewed Emphasis on States' Rights 316

Aftermath of the Civil War 316

The Heyday of Dual Federalism: 1890–1937 317

The Constitutional Revolution of 1937 318



<b>Nation-Centered Federalism</b>	319
The Preemption Doctrine	320
From Cooperative to Coercive Federalism	320
Using National Power to Further Civil Rights and Liberties	320
<b>The Resurgence of States' Rights</b>	322
The Tenth Amendment Roller Coaster	323
The Eleventh Amendment Redux	324
<b>The Commerce Clause and State Regulatory Authority</b>	326
<i>Gibbons v. Ogden</i>	328
The <i>Cooley</i> Case	328
State Regulation of Interstate Commerce: Divergent Perspectives	329
The Nation as an Economic Unit	330
Regulation of Alcoholic Beverages	331
State Attempts to Conserve Their Natural Resources	333
The "Market Participant" Exception	333
Continuing Controversy over the Dormant Commerce Clause	334
<b>State Taxing Power</b>	335
Intergovernmental Tax Immunity	335
The Imports-Exports Clause	337
The Rise and Fall of the Original Package Doctrine	338
Other Taxation Issues	339
<b>Interstate Relations</b>	339
The Full Faith and Credit Clause	340
The Privileges and Immunities Clause	341
The Rendition Clause	343
Interstate Compacts	343
<b>Conclusion</b>	345
<b>Key Terms</b>	346
<b>For Further Reading</b>	346
<i>Chisholm v. Georgia</i>	346
<i>United States v. Darby</i>	349
<i>National League of Cities v. Usery</i>	352
<i>Garcia v. San Antonio Metropolitan Transit Authority</i>	355
<i>Printz v. United States</i>	359
<i>Tennessee v. Lane</i>	365
<i>Cooley v. Board of Port Wardens</i>	371
<i>Oregon Waste Systems v. Department of Environmental Quality</i>	373
<i>Granholm v. Heald</i>	377
<b>Appendix A</b> The Constitution of the United States of America .....	A-1
<b>Appendix B</b> Chronology of Justices of the United States Supreme Court .....	B-1
<b>Appendix C</b> Supreme Court Justices by Appointing President, State Appointed from, and Political Party .....	C-1
<b>Appendix D</b> Glossary .....	D-1
<b>Appendix E</b> Internet Resources .....	E-1
<b>Table of Cases</b> .....	T-1
<b>Index</b> .....	I-1



## CHAPTER OUTLINE

What Is Constitutional Law?

The Adoption and  
Ratification of the  
Constitution

The Underlying  
Principles of the  
Constitution

The Enduring Constitution

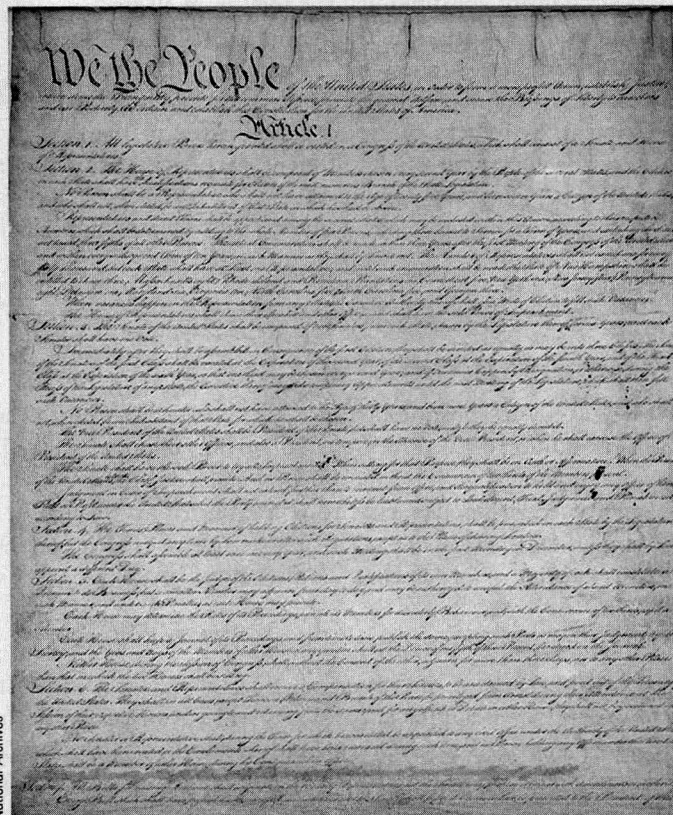
Key Terms

For Further Reading

# Introduction

*"The Constitution ... shall be the supreme Law of the Land...."*

—Article VI, U.S. Constitution



National Archives

## What Is Constitutional Law?

American constitutional law refers to the principles of the U.S. Constitution as they relate to the organization, powers, and limits of government and to the relationship between government and the American people. American constitutional law has two basic components: the institutional dimension and the civil rights/civil liberties dimension. The former area embraces issues of presidential, congressional, and judicial power, as well as questions of state versus national authority and problems of interstate relations. The latter area involves claims of personal freedom and legal and political equality, usually asserted in opposition to exercises of governmental power. These components are equally important and are given more or less equal emphasis in this book.

The Constitution is not a self-executing document. It is only through **interpretation** in the context of live disputes over real-world issues that the Constitution

takes on continuing meaning, force, and relevance. Interpretation is the process by which the abstract principles of the Constitution are given operational meaning. Most important are the interpretations rendered by the U.S. Supreme Court. Although Congress, the president, and lower courts participate in deciding what the Constitution means, the Supreme Court's interpretations of the nation's charter are the most authoritative. Thus, constitutional law consists primarily of the Supreme Court's decisions applying the Constitution to a broad range of social, economic, and political issues.

### Why Study Constitutional Law?

Questions of constitutional law may seem abstract, remote, or even hopelessly esoteric to the average citizen. In reality, however, the Constitution touches the lives of ordinary Americans in countless ways, many of which are revealed in this book. In constitutional law one sees all of the theoretical and philosophical questions underlying our political system, as well as the great public issues of the day, acted out in a series of real-life dramas. Questions of constitutional law are therefore too important to be reserved exclusively to judges, lawyers, and scholars. Every citizen, and certainly every student of American government, ought to have at least a rudimentary understanding of constitutional law.

## The Adoption and Ratification of the Constitution

The study of constitutional law begins logically with the adoption and ratification of the Constitution itself. The Constitution was adopted in 1787 by a convention of delegates representing twelve of the thirteen states in the Union at that time. Fifty-five delegates convened at Independence Hall in Philadelphia during the hot summer of 1787 to devise a plan for a successful national government. The delegates went to Philadelphia because the existing arrangements had proved to be anything but successful.

### The Articles of Confederation

Since the end of the American Revolution, the United States had been governed by a weak national authority consisting only of the Congress and a few administrators. This arrangement had been formalized under the **Articles of Confederation**, proposed to the States by Congress in 1777 but not ratified until 1781. At this stage in its history, the United States was hardly a nation at all, but rather a mere collection of independent states, each jealous and suspicious of the others. Most ominous of all was the ever-present threat of the European colonial powers, which still had designs on the New World and were ready to intervene should the U.S. government collapse.

The Articles of Confederation were adopted to provide the basis for a "perpetual union" among the states, but the system of government established by the Articles proved to be dysfunctional. Congress, the sole organ of the government under the Articles, was a **unicameral** (one-house) **legislature** in which each state had one vote. A supermajority of nine states was required for Congress to adopt any significant measure, making it virtually impossible for it to act decisively.

Under the Articles of Confederation, Congress had no power to tax and was reduced to requisitioning funds from the states, which were less than magnanimous. During the first two years under the Articles, Congress received less than \$1.5 million of the more than \$10 million it requested from the states. This was especially problematic as Congress tried to fund the Continental Army, which was still at war with the British until the Peace of Paris was signed in 1783. After the Peace, Congress struggled to repay the

massive war debt it had incurred; the states, for the most part, treated the national debt as somebody else's problem.

Perhaps most significantly, Congress lacked the authority to regulate **interstate commerce**. It was therefore powerless to prevent the states from engaging in trade protectionism that prevented the emergence of an integrated national economy and exacerbated the depressed and unstable economy that existed in the wake of the Revolutionary War. Commercial regulations varied widely among the states. The states sought to safe-guard their interests by instituting **protective tariffs** and fees. A tariff is a charge made on a product being brought into a country, or in this case, a state. The purpose of a tariff is to protect those in the state who wish to produce and sell that product. Of course, when one state instituted a tariff, it was predictable that other states would retaliate with tariffs of their own. As a result, farmers in New Jersey had to pay a fee to cross the Hudson River en route to sell their products in New York City. This frustrated the development of a national economy and depressed economic growth. Although Congress could coin money, the states were not prohibited from issuing their own currency, which further inhibited interstate economic activity.

Under the Articles, there was no presidency to provide leadership and speak for the new nation with a unified voice. This omission was, of course, deliberate, because many Americans feared a restoration of the monarchy. As a consequence, states began to develop their own foreign policies; some even entered into negotiations with other countries.

The Articles of Confederation provided for no national court system to settle disputes between states or parties residing in different states. The lack of predictable enforcement of contracts between parties in different states inhibited interstate economic activity. The fact that no one could look to any overarching authority to settle disputes or provide leadership contributed to the sense of disunity.

Finally, by their own terms, the Articles could not be amended except by unanimous consent of the states. Any state could veto a proposed change in the confederation. In 1781, Congress proposed an amendment to the states authorizing the imposition of a 5 percent duty on imports and goods condemned by prize cases. Twelve states agreed to this modest tax proposal, but Rhode Island refused to give its consent, thus blocking the revenue measure. In 1783, Congress initiated another effort to obtain taxing power, but New York's refusal to support this amendment in 1786 killed the proposal. In 1784, Congress attempted to persuade the states to grant it the power to regulate navigation, an important aspect of commerce, but again, the effort came to nothing. Under the Articles of Confederation, the national government was thus ineffectual.

Meanwhile, much to the delight of the European colonial powers, the "perpetual union" was disintegrating. In the absence of leadership by Congress, the states, facing this dire situation, began to take the initiative. At the instigation of James Madison of Virginia and Maryland leaders including future Supreme Court Justice Samuel Chase, a conference was convened at Mt. Vernon, George Washington's home, in the spring of 1785 to address conflicts between the two states over navigation of the Potomac. Virginia and Maryland later came to a "working agreement" over navigation of Chesapeake Bay and some of its tributaries. In this connection they requested the cooperation of Pennsylvania and Delaware. Thus efforts at cooperative action by the states were under way by the mid-1780s. These first steps in the direction of state-initiated joint action significantly influenced the movement toward a more concerted effort to revise the Articles of Confederation.

## Shays's Rebellion

By 1786 it was widely recognized that the Articles of Confederation were in serious need of repair, if not replacement. This recognition was reinforced by a historic confrontation that occurred in Massachusetts during late 1786 and early 1787. Daniel Shays, a veteran



of the Battle of Bunker Hill, led a ragtag army composed primarily of disgruntled farmers in a rebellion against state tax collectors and courts. The object of **Shays's rebellion** was to prevent foreclosure on numerous farms whose owners were bankrupt. Unable to put down the rebellion by itself, the Massachusetts state government requested assistance from the national confederation. Congress adopted a plan to raise an army, but most states were unwilling to provide the necessary funds. Shays's army succeeded in taking over a considerable area of western Massachusetts until it was defeated by a band of mercenaries hired by wealthy citizens who feared a popular uprising. The inability of the national government to respond effectively to Shays's rebellion was the single most important event in generating broad support for a constitutional convention.

### The Annapolis Convention

In the meantime, early in 1786, Virginia, led by James Madison and Edmund Randolph, initiated a process for convening a meeting to which all the states were invited for the purpose of considering ways to resolve growing problems of interstate commerce. On the first Monday in September, the date on which the meeting was scheduled to begin in Annapolis, Maryland, delegates from only five states had assembled. While the Annapolis Convention resolved nothing, Alexander Hamilton of New York wrote the Report of the Convention, including a recommendation to Congress to call a convention for the purpose of revising the Articles of Confederation. Led by Virginia, six states over the next several months appointed "deputies" to an informally proposed convention to meet in Philadelphia in May, 1787, to undertake revision of the Articles of Confederation. Responding to this initiative, Congress, on February 21, 1787, issued the call for a federal convention to meet in Philadelphia "for the sole and express purpose of revising the Articles of Confederation." All the states were invited to send delegations, each of which would have an equal vote at the convention. The delegates were chosen by their respective state legislatures. Only Rhode Island refused to participate.

### Delegates to the Philadelphia Convention

The states chose a total of seventy-four delegates to the Philadelphia Convention of 1787. The fifty-five delegates who ultimately attended were drawn, for the most part, from the nation's elite: landowners, lawyers, bankers, manufacturers, physicians, and businessmen. The delegates were, on the whole, highly educated men of wealth and influence. Some commentators, most notably Charles A. Beard, have suggested that the delegates to the **Constitutional Convention of 1787** were motivated primarily by their own upper-class economic interests, interests that would be threatened by political instability. In Beard's view, the overriding motivation of the delegates was the protection of private property rights against actions of the state legislatures.

Other commentators have argued that the delegates were first and foremost practical politicians who were concerned both about the economic interests of their respective states and about their common nationality. Certainly those who gathered in Philadelphia were aware that whatever document they produced would have to be approved by their respective states. Their goal was to design an effective system of national government that could win popular approval in a nation that had just fought a revolution and was still highly suspicious of centralized power.

Like most of their fellow citizens, the delegates to the Constitutional Convention were sensitive to the dangers of concentrated power and were thus committed to the Lockean notion of **limited government**. Although most of the Framers of the Constitution were not democrats in the modern sense, they did subscribe (at least in principle) to the idea of **popular sovereignty**. Thus they were also committed to the goal of **representative**