

SCHEB

We the People of the United States, in order to form a more perfect Union, to establish Justice, to insure domestic Tranquillity, provide for the common defence and our Posterity, do ordain and establish this Constitution.

and our Posterity, all
Article I.
Section 1. All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and seven Years a Citizen of the United States, and who, when elected, shall not, when elected, have attained to the Age of twenty five Years, and seven Years a Citizen of the United States, and who, when elected, shall not, when elected, have attained to the Age of twenty five Years, and seven Years a Citizen of the United States.

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American

Constitutional

Law

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may relate to Military or Naval Affairs, or such other Affairs as in the Judgment of either House may be deemed proper to withhold from the Publick View: And the Yeas and Nays in each House shall be entered on its Journal, and the same shall be published from time to time.

American Constitutional Law

THIRD

**THIRD
EDITION**

AMERICAN CONSTITUTIONAL LAW

THIRD EDITION

OTIS H. STEPHENS, JR.
University of Tennessee, Knoxville

JOHN M. SCHEB II
University of Tennessee, Knoxville

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**Dedicated with love
to Mary Stephens
and Sherilyn Scheb**

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 influenced by numerous actors' understandings of the meaning of the U.S. 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.

This book contains thirteen chapters covering the entire range of topics in constitutional law. Each of the chapters includes an extended 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.

Although the Supreme Court plays a very important role in American politics, its function is limited to deciding cases that pose legal questions. Accordingly, its political decisions are rendered in legal terms. Because it is both a legal and a political institution, a complete understanding of the Court

requires some knowledge of both law and politics. While political discourse is familiar to most college students, the legal world can seem rather bewildering. Terms such as *habeas corpus*, *ex parte*, *subpoena duces tecum*, and *certiorari* leave the impression that one must master an entirely new language just to know what is going on, much less achieve a sophisticated understanding. Although we do not believe that a complete mastery of legal terminology is necessary to glean the political from the legal, we recognize that understanding the work of the Supreme Court is a complex task. We have tried to minimize this complexity by deleting as much technical terminology as possible from the judicial opinions excerpted in this book without damaging the integrity of those opinions. Nevertheless, despite our attempts at editing out distracting citations, technical terms, and mere verbiage, the task of understanding Supreme Court decisions remains formidable. It is one that requires concentration, patience, and above all the determination to grasp what may at times seem hopelessly abstruse. We firmly believe that all students of American politics, indeed all citizens, should make the effort.

In preparing the third edition, we have endeavored to incorporate the significant developments that have taken place in American constitutional law during the four years since the second edition was completed. Chief among these is the Rehnquist Court's continuing commitment to redraw the boundaries between national and state power through its interpretation of the Commerce Clause and the Tenth and Eleventh Amendments. As to the most recent developments, we have given specific attention

to the Supreme Court's dramatic and controversial decision in *Bush v. Gore* (2000) and to the constitutional questions raised by the "war on terrorism" following the catastrophic attacks of September 11, 2001.

In recent years state appellate courts have played an increasingly important role in American constitutional development by selectively extending state constitutional protections beyond those provided by the federal Constitution as interpreted by the U.S. Supreme Court. Throughout this book we acknowledge the importance of this "new judicial federalism." In this edition, we have taken the additional step of including two recent state supreme court decisions, *Powell v. State* (Ga. 1998) and *Baker v. State* (Vt. 1999), illustrating this important trend.

In completing this new edition, we have benefited 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 wish to thank John Barbrey, Keith Clement, Daniel Hull, and Melanie Morris, who assisted us during their tenure as graduate students in political science at the University of Tennessee. We also acknowledge the valuable assistance of University of Tennessee

law students Kim Lane, Allison Major, Richard Major, Linda Noe, and Patricia Trentham.

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We would also like to express our appreciation to the many scholars who reviewed this edition and its predecessors, a list of whom appears on the following page. 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, of course, assume full responsibility for any errors that may appear herein.

Otis H. Stephens, Jr.
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Knoxville, Tennessee
May 10, 2002

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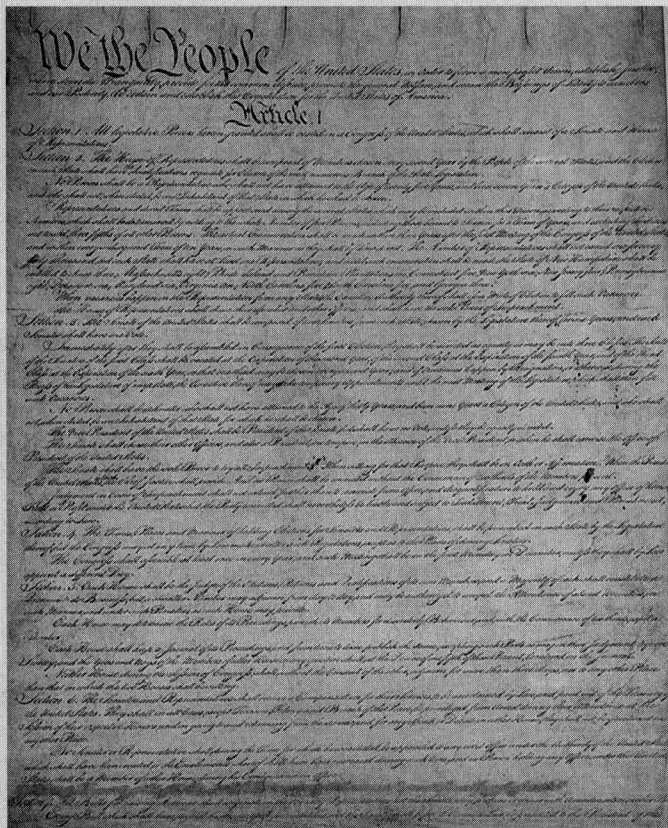
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INTRODUCTION

Chapter Outline

- What Is Constitutional Law?
- The Adoption and Ratification of the Constitution
- The Underlying Principles of the Constitution
- The Living Constitution
- Key Terms
- For Further Reading



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

—Article VI, U.S. Constitution

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 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 United States 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 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 power 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 protect 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. Under the Articles of Confederation, the national government was ineffectual. Meanwhile, much to the delight of the European colonial powers, the “perpetual union” was disintegrating.

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 seminal event