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UNDERSTANDING CONSTITUTIONAL LAW

T H I R D E D I T I O N

■

Norman Redlich
John Attanasio
Joel K. Goldstein



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Bernard Schwartz co-authored the first edition of this book. He died on December 23, 1997 and accordingly did not work on this edition. He was a giant among those who follow the Supreme Court's work and who interpret the Constitution. His influence is present in these pages and he is greatly missed.

Joel Goldstein is primarily responsible for the first seven chapters which Bernard Schwartz had prepared in the first edition. John Attanasio and Norman Redlich prepared chapters 8 to 17.

Norman Redlich
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Chapter 1

THE CONSTITUTION AND CONSTITUTIONAL ARGUMENT

INTRODUCTION

Understanding constitutional law is an ambitious undertaking. The subject is complex and can be viewed from different angles. An effort to understand constitutional law may profitably consider the Constitution, the events leading to it, its operation in practice, the interaction of the various institutions it created, and the rules, principles and doctrines which are known as constitutional law.

This chapter introduces the notion of a Constitution and describes in broad terms the historical events leading up to the ratification of our Constitution. It then discusses structural arrangements used to control government. Section 1.04 addresses the need for constitutional interpretation and some theories regarding it. Section 1.05 explores different types of constitutional arguments commonly employed.

§ 1.01 CONSTITUTIONS

The word “constitution” is used in several different senses. At times it describes the basic rules, written and unwritten, which create and control government. Alternatively, “Constitution” may denote a document which contains those rules which provide the framework for government. Both senses of the word apply to the American system. Unlike the British constitution, our Constitution is a written document which delegates and defines governmental power.

The Constitution’s primary purpose is to create and limit national government.¹ As such, constitutional government signifies an arrangement in which institutions of state are subject to, not superior to, law. Under American constitutional assumptions, “We the People of the United States”² delegated power to the Constitution which allocated it among the governing institutions it created. A singular feature of our Constitution is that its text can be formally changed only with great difficulty. Formal amendment requires some super majority support and ratification by three-fourths of the states.³ Only 27 constitutional amendments have been ratified, and ten of those came in a package shortly after the Constitution itself

¹ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

² U.S. Const., pmbl.

³ U.S. Const. art. V.

was adopted. In essence, the Constitution's terms are placed outside the reach of normal political action.

The English scholar, Sir Kenneth C. Wheare, observed that "[i]f we investigate the origins of modern Constitutions, we find that, practically without exception, they were drawn up and adopted because people wished to make a fresh start, so far as the statement of their system of government was concerned."⁴ The experience in the United States was no exception.

§ 1.02 RATIFYING THE CONSTITUTION

The Constitution represented a "fresh start" after the initial period under the Articles of Confederation. The thirteen colonies had ratified the Articles after the Revolutionary War concluded in 1781. The Articles created a weak national government. States retained their sovereignty and all powers not "expressly delegated" to the United States.⁵ The national government consisted of Congress; there was no executive or judiciary. Congress had limited power. It could not tax or regulate interstate commerce.

With the benefits of hindsight, it is not difficult to understand the problems the new nation experienced. Without an executive and judiciary, the national government lacked any means to enforce federal law. "Congress simply could not make anyone, except soldiers, do anything," wrote historian Leonard Levy. "It acted on the states, not on people."⁶ Some States adopted protectionist laws which predictably spawned retaliatory measures. These measures eroded any semblance of national unity. Shays' Rebellion in the fall-winter of 1786-87 raised the spectre of anarchy and persuaded many of the need for a stronger national government.⁷

The Constitutional Convention convened in Philadelphia on May 25, 1787, specifically to consider changes to the Articles of Confederation. Under the terms of the Articles, any change required unanimous consent. Five days later, the Convention voted to create a national government comprised of legislative, executive, and judicial branches. Thus, within a few days of gathering, the delegates decided to abandon, rather than salvage, the Articles.⁸ The vote was not unanimous; Connecticut opposed the motion and New York was divided.⁹ Under the terms of the Articles, the motion failed. But those who met in Philadelphia were no longer proceeding under the prior arrangement. Edwin M. Yoder, Jr., a keen constitutional historian, observed, "The fifty-five framers performed radical surgery with a clearer notion of need than mandate from the constituents

⁴ K. C. Wheare, *Modern Constitutions* 6 (1966).

⁵ Articles of Confederation, 1777 art. II, in U.S.C. at XLVII (2000).

⁶ Leonard W. Levy, *Introduction: American Constitutional History, 1776-1789* in *The Framing and Ratification of the Constitution* 6 (Leonard W. Levy and Dennis S. Mahoney eds., 1987).

⁷ Stanley Elkins and Eric McKittrick, *The Founding Fathers: Young Men of the Revolution*, 76 Pol. Sci. Q. 181 (1961).

⁸ Levy, *supra* note 6, at 11.

⁹ Clinton L. Rossiter, 1787: The Grand Convention 172 (1987).