Chapter 1

Understanding the Constitution

In This Chapter

- Summarizing the Constitution's historical background
- Taking a look at distinguishing characteristics of the Constitution
- Appreciating the five components that make up the Constitution as a whole

Constitutional law is the study of how courts and other interpreters have given life and meaning to the United States Constitution. The Constitution and related law define the powers and limits of the national government — including how its three branches interact with each other and relate to state and local governmental authorities. Constitutional law also limits in many significant ways how governments at all levels interact with the people living within their boundaries. It protects key civil and criminal rights, including rights to avoid arbitrary and discriminatory treatment, protection for freedom of speech and religion, and guarantees of personal privacy.

In this book we explain the key details of constitutional law through summaries that make complicated legalese and technical details easily understandable and get right to the core of how the Constitution affects people in meaningful, practical ways. But before you delve into the specific topics in the following chapters, we give you an overview of that all-important document itself, the U.S. Constitution.

A country's (or a state's) constitution provides a framework for how governmental institutions will operate and how they will treat people. In a country like the United States, where the national constitution is the supreme legal authority, the U.S. Constitution becomes the yardstick against which to measure the validity of all other governmental actions — be they laws passed by Congress, the policies of local school boards, or the actions of an individual police officer.

Knowing a bit about the U.S. Constitution's history and why and how certain clauses were put in the document in the first place will help you make sense of the ways it has been interpreted. For instance, you can better understand search-warrant requirements or checks and balances if you know why the framers thought to include them.

This chapter begins with a brief summary of the historical background leading up to the proposal in 1787 of the constitutional plan we still use today. This brief bit of context makes clear that the Constitution's framers did not write on a clean slate — they started with what was already familiar, and they had specific ideas in mind as to what was needed. We then summarize nine key features making the U.S. Constitution distinct from the constitutions of other governments and even many other democracies. The last and most extensive section provides a tour of the five basic topics addressed by the various articles and amendments known collectively as the Constitution.

Looking at the Constitution's Creation

Many volumes of history and political commentary address the historical background leading up to the proposal of a new governing arrangement in 1787. Scholars fiercely debate whether the framers of the U.S. Constitution were uniquely learned and inspired visionaries, reactionary elites bent on looking out for themselves rather than protecting the masses, or something in between. Lucky for you, you don't need to know all the ins and outs of these ongoing discussions (though you may, like us, find them interesting if you look them up sometime).

Rather, to give you the essential historical perspective for understanding where the framers were coming from (which is an important factor in many areas of constitutional law), we present you with the following turbo-summary of the conventional account of the Constitution's historical background — in 373 words:

During and after the American Revolution (whose hostilities ended in 1781), American leaders recognized that they needed some kind of overarching national authority to undertake key activities. For six years, the states functioned in a loose confederation under a document called the *Articles of Confederation.* Almost immediately, the defects of the Articles became apparent:

- Each state had an equal vote in the legislative body operating under the Articles, which the states with the greater populations resented.
- Laws resulting from the Articles reflected awkward political compromises, and the lack of any executive authority made effectively carrying out legislative directives difficult.
- The government created by the Articles lacked taxing authority; it had to depend on voluntary financial contributions from states.

These defects couldn't be easily remedied, because the Articles of Confederation said that all 13 states had to unanimously agree to make fundamental changes in governmental procedures.

Meanwhile, states began to act in ways that alarmed the country's leaders. At times, inspired by popular uprisings, state legislatures interfered with the enforcement of debts and discriminated economically and legally against nonresidents. Some states engaged individually in foreign policy with England, France, and other powerful countries whose influence was feared by the leaders of the national government.

As disenchantment with the Articles of Confederation grew, states authorized delegates to meet to draft amendments. After an awkward start, the delegates at the 1787 Constitutional Convention ultimately decided to scrap the Articles of Confederation completely and instead propose a new Constitution, consisting of seven articles, for state ratification. Among other things, the new Constitution methodically responded in an almost checklist fashion to perceived defects in the Articles of Confederation. For example, the first power the framers gave to the new Congress was the power "To lay and collect Taxes." And the new document explicitly forbade the states to "enter into any Treaty, Alliance, or Confederation."

While they were at it, the framers also expressly forbade the new national government from engaging in many of the activities practiced by the despised English monarchy or their colonial representatives. As the following sections explain, the framers had certain specific areas of rights and governmental organization they felt needed to be addressed. They did so in pointed, though brief, fashion.

Understanding the Constitution's Key Features

The U.S. Constitution has certain key features that distinguish it from the constitutions of other countries (or even, for some of its key features, from those of U.S. states). In general, you can split these features into three categories: characteristics of the document itself, features relating to government power, and features pertaining to rights of the people. Different observers may disagree about the number and relative importance of these features, but we think all the following aspects belong on the short list. (We discuss several of these features in detail in Chapter 4, which covers the structure of the federal government.)

Setting up the document

The way the U.S. Constitution positions itself, words its provisions, and provides for its amendment set it apart from many other constitutions around the world (and even from some state constitutions):

- **Constitutional supremacy:** In the U.S., the provisions of the Constitution are the "supreme law of the land" and the ultimate benchmark for judging the validity of all laws adopted by Congress — and, indeed, all actions by government officials at the national, state, and local level.

  Relatively few countries — and even relatively few democracies — give their constitutions that power. For example, although England and the other former commonwealth countries have deeply rooted democratic traditions and are moving toward constitutional supremacy as part of European Union membership, these countries still emphasize "parliamentary supremacy." Under this theory, the laws passed by a country's legislature are preeminent, and their legality or constitutionality can't be questioned.

- **Relatively brief and general provisions:** Compared to the more modern constitutions of other countries and most American states, the provisions of the U.S. Constitution allocating governmental power and establishing individual rights are quite brief and general. This brevity fuels the ongoing issues about constitutional interpretation that we highlight in Chapter 2 and throughout this book. For instance, as you see in Chapter 8, the Supreme Court decided a number of cases turning the brief and general constitutional language guaranteeing that "life, liberty, and property" not be deprived "without due process of law" into detailed specifications for constitutionally adequate notice and hearings and powerful protections for some liberty rights related to privacy. In so doing, the Court has triggered some of the biggest fights over the legitimacy of its rulings.

  

  As one of many examples of its relative brevity and generality, the U.S. Constitution has three short provisions addressing taxation. In a single sentence, Article I, Section 8 gives Congress the power "To lay and collect Taxes, Duties, Imposts, and Excises." Article I, Section 9 prohibits Congress from taxing exports from any state. And the Sixteenth Amendment clarifies that the requirement in Article I that federal taxes be "uniform" does not rule out the current method of federal income taxation. Even though thousands of pages of law govern federal taxation, these details reside in tax statutes passed by Congress, regulations and other guidance issued by the Internal Revenue Service, and judicial decisions construing those statutes and regulations.

  By contrast, the 105-page California Constitution contains 32 articles, running some 18 pages, specifying a variety of details about state taxation. A California constitutional provision even provides special rules for the taxation of fruit and nut trees.

- **A relatively stable, but still changeable, constitution:** Article V of the U.S. Constitution allows the document to be amended only when a supermajority supports constitutional change over a sustained time period. Specifically, it takes two-thirds margins either in Congress or in the states to propose an amendment, which must then be ratified by three-fourths of the states.

  Requiring sustained support for constitutional change promotes the stability and supremacy of the Constitution. Constitutional values are immunized from normal majoritarian upheavals and short-term political pressures (a major reason why only 27 amendments have been created in our 220-plus years of experience with the Constitution). On the other hand, if the Constitution were not amendable (or, like the Articles of Confederation, could be amended only when the states *unanimously* concurred), pressures for change would eventually build up to the point where scrapping the existing Constitution in lieu of a new one would seem to be the only viable alternative. (After all, this is why the Articles of Confederation were ended, not amended, in 1789!)

The difficulty of amending the Constitution

In the 220-plus years since the framers replaced the Articles of Confederation with the Constitution, only 27 amendments have been adopted. Ten of these (the Bill of Rights) were adopted in one installment in 1791, and the remaining 17 were adopted between 1794 and 1992.

Some indication of the difficulty of adopting constitutional amendments is shown by the very low percentage of proposed amendments adopted. As many as 200 amendments are proposed in each two-year congressional term. Few, if any, of these proposals even make it out of a congressional committee — much less receive the two-thirds vote margin necessary to propose them for state ratification.

Another dimension of the difficulty of amending the Constitution is the number of high-profile and initially popular amendment proposals ending up in the dustbin of constitutional history. These scrapped proposals include a 1924 amendment that would have abolished child labor and the 1972 equal-rights amendment that would have explicitly prohibited gender discrimination. Over 300 amendments to overturn or significantly cut back on abortion rights recognized in *Roe v. Wade* have never made it out of Congress.

Yet the experience with the most recent constitutional amendment shows that good things come to those who wait. The Twenty-Seventh Amendment, which limits the power of members of Congress to raise their own salaries, was adopted 202 years after its initial proposal in 1790. (Most modern amendments put a time limit on ratification, but older amendments may not. It is, for example, theoretically possible that the 1924 child labor amendment could be adopted some day.)

Dividing and allocating government power

The U.S. Constitution is majorly concerned with how governmental power is allocated among competing power centers. It is not surprising, therefore, that the following key features of the Constitution relate to who exercises what governmental powers and what safeguards prevent abuse of government powers:

- **Popular sovereignty (power from the people):** The constitutional plan proposed in 1789 assumed that the true source of political power was the American people. As any school child knows, the preamble to the Constitution begins with the phrase "We the People . . . do ordain and establish this Constitution. . . ." The manner in which Articles I, II, and III proceed to vest legislative, executive, and judicial powers in the relevant institutions also emphasizes how power originates with the American people. The *vesting* metaphor implies that the people are the principal power holders, temporarily loaning power to act on their behalf to legislators, the president, and federal judges.

  This concept of "people power" may seem commonplace today. But it was radical in 1789, when political power was thought to originate from God, from divinely inspired kings, or from competing warlords.

- **Separation of national government powers:** Again departing from many of the world's democracies and other governments, the Constitution's framers separated legislative from executive functions (and judicial functions from both, for good measure). In most parliamentary government systems, by contrast, the political party or parties in the legislative majority also run the executive branch. Changing the status quo in a parliamentary democracy is easier than in the U.S., but power is concentrated.

  As you can see from our more detailed discussion on power allocation in Chapters 5 and 6, power concentration was something the U.S. Constitution's framers feared. Their decision to separate national powers and provide multiple means for the three federal government branches to "check and balance" each other generated ongoing disputes about divvying up a wide range of domestic and foreign-affairs powers.

- **Federalism:** Another key feature of the U.S. constitutional system is *federalism* — the system in which a strong national government shares powers with a competing level of strong state governments, headed by political officials chosen from different constituencies and reflecting different sets of interests. Again, federalist systems are relatively rare among the world's political systems. More common, even in populous democracies, is a system in which a strong central government is the main authority. This system doesn't face strong competing subnational political units; at most, one or more large cities exercise substantial powers delegated by the national government.

  The framers' decision to allocate power in a federalistic manner generated extensive disputes about the scope and limits of national-government power (as we cover in Chapter 5) and ongoing efforts to protect states' rights (the subject of Chapter 7).

Protecting people's rights

The entire Constitution (and the key features discussed in the preceding section) ultimately aims to protect the rights and liberties of the American people. "We the people" are the ultimate beneficiaries, for example, of assuring the Constitution's stability over time and limiting federal-government power.

The following three other key features of the Constitution are even more directly related to the rights of individuals and groups of citizens:

- **The rule of law:** The U.S. Constitution embodies "equal justice under law," a concept related to (but broader than) constitutional supremacy. This ideal, certainly not always realized in practice, holds that every American should be treated the same by government officials, regardless of their race, gender, income status, religion, or party affiliation. This commitment that America be "a nation of laws and not of men" (and women) assumes that governmental authorities will apply the same neutral legal principles in all similar cases. The commitment to equality under law has influenced many areas of constitutional interpretation, including the body of case law preventing governments from acting arbitrarily (as discussed in Chapter 8) or discriminating on the basis of race or gender (as detailed in Chapter 10).
- **Balancing majority rule and minority protection:** The governmental system established by the U.S. Constitution generally assumes that public policy should be what a majority of citizens wants. This commitment to majority rule is reflected in the commonplace constitutional provisions as to how a bill becomes a law. Ordinarily, a majority of legislators in the House and Senate (each of whom is, in turn, chosen by a majority of voters) can adopt legislation that becomes "the law of the land" with the active approval or at least grudging acquiescence of the president (also usually reflective of an electoral majority).

  

  Still, the U.S. Constitution balances this strong commitment to majority rule in several important ways:

  - Several supermajority requirements — for example, two-thirds vote margins for convicting officeholders of impeachable offenses, for overriding presidential vetoes, and for proposing constitutional amendments — give a determined minority the power to hold up significant action.
  - The Constitution (and especially the post-1789 amendments) significantly departs from majority rule by enshrining constitutional protections for unpopular minorities (such as criminal defendants) and equipping an independent, life-tenured federal judiciary to declare unconstitutional actions taken in the name of a strong majority. (Chapter 6 examines the many interesting and important issues surrounding judicial review and the general interaction

among the federal courts, Congress, and the president. And Parts II, III, and IV of this book are full of constitutional rules protecting minority rights — many of which would probably be opposed by a majority of Americans if put to a vote.)

- **Negative rights:** The U.S. Constitution generally prohibits governmental officials from doing bad things rather than requiring them to do good things. Unlike most modern constitutions of other countries, the U.S. Constitution is not a source of positive benefits or rights that Americans can expect from their government. You will not find in the U.S. Constitution a requirement that governments actively promote access to healthcare, guaranteed employment or housing, or any of the many positive guarantees associated with the modern welfare state. Instead, the Constitution gives the national government the power to create positive benefits if the people demand them from their officials.

  Most of the individual-rights provisions added to the Constitution after 1789 are phrased in the negative. (For example, governments may not abridge freedom of speech or deny equal protection of the laws). Even rights seemingly phrased in the positive boil down to prohibitions on governmental *interference* rather than an affirmative requirement that government spend money or otherwise act to assure the effective exercise of the right. (For example, for most of the time since its adoption in 1791, the Sixth-Amendment provision giving defendants "the assistance of counsel" merely meant that government could not thwart participation by counsel a defendant could afford to hire on his own. Only in the last several decades has a limited right to government-provided counsel been afforded to indigent defendants.)

The daring framers: Turning a philosopher's dream into a constitutional cornerstone

Until the American Constitution framers used the separation of powers as the key organizing principle for the federal government, it was mainly an Enlightenment-era philosopher's good idea. Specifically, it was a theory popularized by French social critic and political thinker Charles-Louis de Secondat, generally referred to as *Montesquieu.* Montesquieu's multivolume treatise published in the 1740s proposed separation of powers as an antidote to the corrupting tendencies he found inherent in various forms of government.

That the American framers were willing to stake the success of the national government on an idea that had not been tried on a large scale or in the modern era is some indicator of their visionary thinking and risk-taking propensities.

Appreciating the Five Main Topics Addressed by the Constitution

Even though the U.S. Constitution is usually thought of and printed as one document, its various provisions really address five distinct topics. Your understanding of the Constitution and the law that has sprung up around it will benefit from the following discussion, which identifies and elaborates a bit on these five main topics:

- **The seven articles:** Proposed in 1789 and ratified by the states in 1789, the articles establish a powerful, but also limited, national government and rules for the states.
- **The Bill of Rights:** Proposed as a package in 1789 by the first Congress to meet under the new Constitution, these first ten amendments establish important individual rights and declare two important principles about how the Constitution works.
- **The great post–Civil War amendments:** Ratified in 1868, the Thirteenth, Fourteenth, and Fifteenth Amendments abolish slavery and establish rights for newly freed slaves.
- **Voting-rights amendments:** The Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments, ratified from 1913 to 1971, expand voting rights by establishing certain groups' rights to vote.
- **Other amendments altering political procedures and power arrangements:** The other nine amendments (ratified as long ago as 1795 and as recently as 1992) reform other electoral and political practices or "clean up" perceived problems with previous constitutional provisions and interpretations.

In later chapters you get acquainted with the details of many of these constitutional provisions and amendments. For now, we want you to get familiar with the overall lay of the constitutional land.

Although almost every school-age child memorizes the preamble to the Constitution, it isn't considered a distinct topic. The preamble helps point to the intent of other constitutional provisions and memorably notes the framers' intent to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." However, it isn't an independent source of legally enforceable rights. It's probably a good thing for some national officials that they can't be sued for sowing disunion or detracting from our "domestic Tranquility!"

Hardly a slam-dunk: The tough and contentious fight to ratify the new Constitution

Because of its enduring power, the Constitution is sometimes mistakenly thought to be the product of an easy and obvious ratification process. Yet the fight to establish a substantially more powerful federal government was anything but easy. Shortly after the new constitutional plan was unveiled, a determined and brilliant group called the *Antifederalists* organized to oppose ratification. They wrote strong anonymous essays, published in colonial newspapers, comprehensively critiquing the proposed constitutional plan and warning that the new federal government would become too powerful. These criticisms were answered by leading constitutional proponents Alexander Hamilton, James Madison, and John Jay, in a series of 85 anonymous essays later collected as the *Federalist Papers*. (Modern Constitution interpreters often turn to these essays to determine "the intent of the framers," as we discuss in Chapter 2.)

The debate at the ratification conventions and in pamphlets and newspaper columns was heated. And the vote margins in some key states were very close. For example, a switch of 2 votes among New York's 57 delegates would've defeated that key state's ratification drive. Had 6 out of 168 delegates voted differently in the largest state, Virginia, the constitutional adoption drive would've been mortally wounded.

Even more interesting is that New York's close vote was achieved only by a promise that the first Congress meeting under the new Constitution would immediately set to work to adopt a bill of rights to limit the new government's potential to abuse individual liberties. In a very real sense, the promised amendments saved the day in a very fractious period.

The original seven articles: Establishing a new national government

The Constitution of 1789 consisted only of seven articles, with a variety of provisions. The first three articles establish a new national government composed of the familiar three branches (legislative, executive, and judicial). The fourth article sets forth how the states are to function with respect to each other and to the new national government in the new constitutional order. The remaining three articles establish the supremacy and legitimacy of the new Constitution.

Planting a strong federal oak with three branches (Articles I–III)

The framers proposing their bold constitutional experiment in 1787 intended to create a substantially more powerful, but nevertheless meaningfully limited, national governing entity. Both of these goals can be seen in the first three constitutional articles, which establish and empower governmental

structures to exercise legislative, executive, and judicial powers sufficient to carry out the new duties entrusted to the federal government. But the very division of the federal government into three separate and competing branches (and further splits of authority *within* the legislative and judicial branches) shows how the framers wanted to prevent governmental authority from becoming too concentrated (and, hence, too powerful).

The first three articles of the Constitution share significant things in common. They each begin with an initial section placing a portion of national-government power (legislative, executive, and judicial) in a different branch (the House and Senate, the president, and the federal courts). They then grant specific powers to the established branch, while imposing limitations on those powers.

Each of the three articles also protects the independence of the branch it establishes in two ways:

- First, each of the articles protects the branch it creates from retaliation by the others. For example, members of Congress can't be put in jail or required to pay damages for slanderous official statements, and Congress is disabled from reducing presidential or federal-judge salaries.
- Second, each of the articles provides ways for the branch it creates to check and balance the other two branches. Congress can, for example, impeach the president, other executive branch officials, or federal judges. The president, in turn, can veto legislation passed by Congress and pardon persons convicted in federal courts.

Prescribing state-to-state and state-to-federal government relationships (Article IV)

The pre-1789 world involved states relating to, and often competing with, each other in a loose confederation. Merely introducing a new federal government into the mix created issues about how the states would relate to the big new kid on the block. Beyond that, the framers of the new Constitution included provisions to reform state-to-state relationships.

To deal with how states would relate to the new federal government, Article IV protects existing states from having their boundaries changed without their permission and provides a mechanism for the admission of new states (Section 3). Article IV also obligates the new federal government to protect states from invasion by foreigners or Native Americans or domestic unrest within state borders, and to guarantee the states "a Republican Form of Government" (that is, one broadly representative of majority will).

The general lack of "individual rights" provisions in the Constitution of 1789

You would be forgiven if you associate *constitutional* with protection of individual rights. Most modern students are more familiar with the Constitution as a protector of freedom or against discrimination than as an allocator of government power.

So constitutional-law students are sometimes surprised that establishing individual rights was not a key concern to the framers drafting the constitutional reform proposal of 1789. True, the original seven articles did include a few important individual liberties. For example, Article I prevents Congress from suspending the *writ of habeas corpus* (a centuries-old English protection against arbitrary incarceration) and forbids both federal and state legislatures from passing *ex post facto* laws (that is, laws that unfairly go back in time and make something illegal that was legal when the defendant engaged in it). Article I also forbids state governments from impairing contract obligations; we cover the modern cases interpreting this important individual-liberty protection in Chapter 9.

Still, the vast majority of important individual-rights protections normally associated with the Constitution came after the original seven articles were adopted.

Article IV also addresses the pre-1789 problem of state-versus-state conflict. Article IV obligates each state to give "Full Faith and Credit to the public Acts, Records, and judicial Proceedings" of other states (Section 1), to grant out-of-state citizens "all Privileges and Immunities" a state provides to its own citizens (Section 2), and to return runaway slaves and fleeing felons to the state with a legal claim on them (also Section 2).

Promoting the supremacy and legitimacy of the new government and Constitution (Articles V–VII)

The last three articles of the initial Constitution contain several provisions addressing issues of federal and constitutional supremacy and legitimacy. To go a bit out of numerical order, the most important and direct of the supremacy provisions is the *supremacy clause* of Article VI, Clause 2. A single sentence declares three critical propositions:

- The Constitution is "the supreme Law of the Land" — trumping contrary provisions in state constitutions or laws.
- Federal laws and treaties (and, by later extension, administrative regulations adopted under federal laws) must also be consistent with the Constitution; if they are, they also trump state constitutions and laws.
- State judges are specifically required to enforce federal supremacy. The framers fully expected, and the modern reality bears out, that federal legal issues often arise and are vindicated in state proceedings with little or no involvement by the federal judiciary.

Other important provisions in the last three articles accomplish the supremacy and legitimacy of the federal government and new Constitution less directly:

- The relatively brief Article V provides two alternatives by which constitutional amendments can be *proposed* and two options for state *ratification* (that is, approval) of proposed amendments. Making it quite difficult but not impossible to amend the Constitution promotes the Constitution's supremacy (by making it largely immune from the politics and whims of temporary majorities) and legitimacy (by providing a mechanism for fundamental constitutional change when a supermajority consensus lasts over time).
- Article VI, Clause 1 states that the new government assumes all debts and prior engagements of the previous Articles of Confederation government. (After all, how legitimate would the new national government be if it shirked its predecessor's obligations?)
- Article VI, Clause 3 requires that all legislative, executive, and judicial officials of the national and state governments take oaths to support the new Constitution (and, therefore, the new national government it establishes).
- Article VII declares that the new Constitution became effective when two-thirds (9) of the 13 states ratified it. This requirement establishes the legitimacy of the new government by setting a requirement of supermajority support while at the same time fixing the old Articles of Confederation problem of requiring unanimity for constitutional change. (In reality, the Constitution's supporters did not just declare victory when they reached the 9-state margin; they pressed for and achieved ratification by all 13 original states.)

A meaningful difference among Articles I, II, and III

Articles I, II, and III differ significantly in their length and detail. In creating, empowering, and limiting Congress, Article I is the most extensive and detailed. Article II uses substantially less detail and verbiage in creating the presidency and executive branch, and the Article III provisions creating the federal judiciary are even more sketchy.

This difference reflects both the framers' perception that the legislative branch would be the most powerful and important one and the greater difficulty the framers had in achieving consensus about the design of the presidency and the federal courts. Indeed, until late in the Constitutional Convention the framers weren't sure that the new government needed lower federal courts. Many framers thought it would be enough to have state courts enforce federal legal rules under the supervision of the United States Supreme Court — the only federal court actually created by the Constitution.

The pragmatic framers: Fashioning protections against abuse

The framers of the Constitution of 1787 were not just big-picture visionaries. They were also savvy observers of the capacity of political officials to abuse power and act in self-serving ways, and they made sure that the Constitution would prevent some of that bad behavior.

For example, the framers penned several provisions dealing with financial abuse and conflict of interest. Article I, Section 6 prohibits any member of Congress from being appointed to an executive office that was created or given a salary increase during the member's legislative service. This provision obviously prevents legislative self-dealing, by preventing a powerful legislator from feathering his or her own nest. But, more subtly, the provision also helps legislators resist temptation from legislative leaders and the president, who might offer plum appointments as the price for supportive votes.

The constitutional-amendment provisions of Article V are a great example of how the pragmatic framers imposed more subtle, interlocking protections against a different kind of power abuse. Recognizing that the Congress would be unlikely to propose constitutional amendments undermining legislative powers, the framers provided a mechanism by which the states could hotwire around an uncooperative Congress (that is, by calling for a constitutional convention). Similarly, the framers recognized that state legislatures would not likely ratify constitutional amendments running contrary to their narrow power interests. That appears to be why the framers empowered Congress to choose to have constitutional amendments ratified in state conventions rather than in state legislative halls.

The Bill of Rights: Ten amendments against federal tyranny

Early in their efforts to secure ratification of the 1789 constitutional proposal, supporters ran into strong states-rights-based suspicions that the new federal government would become an instrument of oppression. A bill of rights was needed, skeptics argued, to guard against this abuse.

Initially, Constitution supporters argued that a bill of rights was unnecessary, dangerous, or both. The bill of rights was unnecessary, the argument went, because the federal government was limited to its enumerated powers. (Because nowhere in the Article I powers of Congress or elsewhere were any officials given power to suppress the rights of American citizens, disclaiming such a right was seen by some to be unnecessary.) Opponents of a bill of rights also argued that trying to list rights that could not be abridged by the federal government would create the dangerous implication that rights not listed were not intended to be protected and, therefore, could be suppressed!

Whatever the logic of these arguments, it became clear that several key states would not ratify the Constitution without a promise that a strong and detailed bill of rights would be added to the new Constitution as a series of amendments. Showing their practical streak once again, key framers (the most important of whom was James Madison) switched from being bill-of-rights opponents to instrumental players in the drafting and passage of the first ten amendments.

After months of successive rounds of committee drafts, congressional debates, and state-ratification deliberations, the Bill of Rights was added to the Constitution's original seven articles. We devote several chapters of this book to fully detailing the landmark cases and constitutional rules generated by its provisions, so for now we just provide a bare-bones breakdown of the protected rights and understandings, organized in three categories.

Protecting key civil rights and liberties against federal government encroachment

In order of their appearance in the new Bill of Rights amendments (ratified in 1791), the Constitution:

- Prohibits laws "respecting an establishment of religion" (First Amendment)
- Prevents laws prohibiting "the free exercise" of religion (First Amendment)
- Forbids restriction of "the freedom of speech, or of the press" (First Amendment)
- Outlaws impairing the rights of Americans to assemble "peaceably" and to petition government for "redress of grievances" (First Amendment)
- Protects the "right of the people to keep and bear Arms" (Second Amendment)
- Prevents Americans from being forced to give room and board to soldiers (Third Amendment)
- Prohibits depriving persons of "life, liberty, or property, without due process of law" (Fifth Amendment)
- Forbids the confiscation of private property for public use "without just compensation" (Fifth Amendment)
- Protects rights relating to trial by jury in civil cases (Seventh Amendment)

Preventing abuse of the criminal justice power

The Bill of Rights also obligates federal law-enforcement officials to afford distinct but interlocking protections to criminal suspects. Again, in numerical order, the Bill of Rights:

- Bans "unreasonable searches and seizures" and requires "probable cause" for search warrants (Fourth Amendment)
- Requires indictment by a grand jury before prosecution can begin for a capital or "otherwise infamous" crime (Fifth Amendment)
- Forbids "double jeopardy" (essentially, retrying a defendant "for the same offense" after having been found innocent) (Fifth Amendment)
- Outlaws self-incrimination (Fifth Amendment)
- Requires "speedy and public" trials (Sixth Amendment)
- Assures defendants of an impartial jury in the state and district where the crime was committed (Sixth Amendment)
- Requires that defendants be informed of accusations against them and be able to confront adverse witnesses and subpoena favorable ones (Sixth Amendment)
- Mandates that people accused of crimes "have the assistance of counsel" for their defense (Sixth Amendment)
- Forbids excessive bail and fines and "cruel and unusual punishments" (Eighth Amendment)

Clarifying important understandings about rights

The last two amendments in the Bill of Rights don't specify rights to be protected. The Ninth and Tenth Amendments instead act more like "rules of the road" for rights interpretation.

Specifically, the Ninth Amendment directly addresses the concern of the original Bill of Rights opponents that specifying some rights would inevitably leave others out in the cold. The Ninth Amendment reads in its entirety as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Thus, the Ninth Amendment presupposes that Americans enjoy other "natural rights" or implied fundamental rights beyond those expressly stated in the previous eight amendments or elsewhere in the Constitution.

Despite the clear intent of the Ninth Amendment to recognize non-express (implied) constitutional rights, the modern Court has not generally relied on the amendment when it has recognized implied rights. Some observers say that the Court doesn't rely on it because although the Ninth Amendment clarifies that there *are* implied rights beyond those textually stated, it doesn't explain *which* rights are preserved or even *which standards* to use in identifying them.

Slavery: One very important omission in the initial constitutional plan

In at least one sense, the Constitution's seven articles and the Bill of Rights are noteworthy for what they did *not* do — resolve deep-seated divisions over the keeping of human beings as slaves (primarily, but not completely, in the Southern states).

Despite the obvious inconsistency between slavery and the ringing phrase in the Declaration of Independence that "all men are created equal," the framers couldn't resolve the political stalemate over this hot-button issue. They therefore contented themselves with preserving the status quo (existing state of affairs).

Article I, Section 9 of the Constitution gave the federal government the power to abolish the importation of slaves — but not until 1808. Article IV obligated states to return runaway slaves to their masters. And the most callous-seeming provision relating to slavery is the "three-fifths" compromise of Article I, Section 2, which counts slaves as worth three-fifths of a free person for purposes of taxation and representation in the House of Representatives.

Instead, implied rights have been recognized on bases other than the Ninth Amendment. Chapter 13 shows how the Court has used Fifth- and Fourteenth-Amendment rights to "equal protection of the laws" to afford strong protection to fundamental implied rights to vote. Chapter 14 demonstrates that the Court strongly protects implied rights to privacy under the distinct "due process of law" language of these amendments.

The Tenth Amendment says that any powers not delegated to the federal government are given to state governments. This amendment may just clarify what's already implicit in the Constitution's approach to federal-government authority (as explored in Chapter 5). But the fact that the framers went to the trouble to emphasize residual state powers in the Bill of Rights shows the importance they placed on preserving strong state governments. (In Chapter 7, we detail the various judicial doctrines designed to protect the role of states as important policymakers in the American system.)

The Tenth Amendment ends by emphasizing that powers the Constitution does not grant to the national government yet specifically denies to the states are "reserved . . . to the people." Again, given the way the Constitution allocates power, this feature may be implicit and obvious, but its explicit inclusion in the Bill of Rights provides yet another reminder of the importance the framers placed on popular sovereignty (which, as noted earlier, is the principle that political power originates from the American people).

The great post–Civil War amendments: Limiting state governments

Before the Civil War, the U.S. Constitution was largely a scheme for establishing and controlling national power. But a major cause — if not *the* major cause — of the Civil War was the fight between Southern slave owners and Northern abolitionists. In the immediate aftermath of the Civil War, therefore, abolishing slavery and preventing the defeated slave-owning states from perpetuating racial discrimination became the focus of three constitutional amendments, acceptance of which became the price of readmission to the Union of the defeated Southern states.

As Chapter 10 explains, these Civil War Amendments continue to provide important protection for the voting and other rights of racial minorities. And, as Chapter 8 points out, the due-process clause in one of these amendments has become the basis for expanding to state and local governments almost all the individual-liberties protections of the Bill of Rights.

A detail of the post–Civil War amendments that's critical to the evolution of modern antidiscrimination law is that each of the amendments ends with a section giving Congress "the power to enforce, by appropriate legislation" the amendment's protections. This power makes the Congress a potential co-partner in establishing and perfecting constitutional protections. In fact, in the areas of school desegregation and voting rights, landmark congressional statutes have been more instrumental in ending discrimination as a practical matter than Court decisions have.

Prohibiting slavery

In one brief but profound sentence, the Thirteenth Amendment abolishes slavery and involuntary servitude in the United States. (Interestingly, the Thirteen Amendment is one of the few constitutional provisions interpreted to apply to private, nongovernmental behavior. As a result, it has some potential application to employer sweatshops and other extreme private working arrangements.)

Preventing mistreatment of newly freed slaves — and of many other Americans

The Fourteenth Amendment includes some one-time provisions designed to reintegrate the rebellious Southern states into the Union. For example, Section 3 prohibits persons from holding federal office if they violated a previous oath to support the Constitution; Section 4 deals with Civil War debts.

The lasting legacy of this amendment, however, are its broadly phrased provisions seeking to prevent state governments (and all local-government units operating under state authority) from perpetuating the racially discriminatory practices that had accompanied American slavery. In the modern era, these provisions have bloomed into robust and multifaceted protections against race discrimination. Beyond that, the modern Court and many public officials have used two Fourteenth Amendment provisions to erect numerous protections transcending the race-discrimination context. Specifically, the Fourteenth Amendment accomplishes the following:

- **It makes "all persons born or naturalized in the Unites States" citizens of the U.S. and the state in which they reside.** Originally intended to make freed slaves citizens, this language has become controversial in a different context, as a source of "birthright citizenship" for the children of undocumented aliens.
- **It forbids a state from making or enforcing a law "which shall abridge the privileges or immunities of citizens of the United States."** This language was a potentially fertile basis for making states give their citizens all the individual protections the Constitution requires from the national government. Narrow judicial readings of the language in the early post-ratification period, however, stunted this potential growth.
- **It prevents a state from depriving "any person of life, liberty, or property, without due process of law."** As Chapter 8 details, this due-process clause protects important procedural and substantive rights on its own say-so; further, the clause's protection of "liberty" also provides the basis for judicial decisions applying most of the Bill of Rights to state and local governments.
- **It outlaws state denials of "equal protection of the laws."** The source of strong modern protections against racial discrimination (including in affirmative-action programs), the equal-protection clause has spawned important barriers to other kinds of discrimination, including that based on gender, alienage, and paternal legitimacy.

Protecting minorities' right to vote

The Fifteenth Amendment, the last great post–Civil War amendment, focuses on protecting the voting rights of the newly freed slaves and other racial minorities. The Reconstruction Congress recognized that the best ongoing protection against state and local officials reverting to their old racist ways would be to make their political futures dependent in part upon the electoral muscle of racial minorities.

Voting-rights amendments: Expanding voting rights in other ways

Five later constitutional amendments expand voting rights by giving previously disenfranchised voters the right to vote or by eliminating practices standing in the way of their fully exercising voting power. In chronological order, these amendments of the Constitution

- Provide that U.S. Senators are chosen directly by their state's voters in general elections, rather than the previous practice of having Senators chosen by state legislatures (Seventeenth Amendment; 1913)
- Grant women the right to vote (Nineteenth Amendment; 1920)
- Give residents of the District of Columbia the right to name three electors, whose votes help elect the president and vice president (Twenty-Third Amendment; 1961)
- Prevent government from conditioning the right to vote in federal elections on payment of a "poll tax or other tax," eliminating a practice that some states used to indirectly deny African Americans and other minorities the right to vote due to their inability to pay the tax (Twenty-Fourth Amendment; 1964)
- Lower the voting age in federal and state elections to 18 (Twenty-Sixth Amendment; 1971)

Other amendments reforming political procedures or power arrangements

A variety of other constitutional amendments adjust power arrangements, especially between federal and state governments. Several of these power-altering amendments fix problems created by Court interpretations of other constitutional provisions, and one amendment cleans up problems from a previous constitutional amendment. Two of these nine amendments were adopted a few years after ratification of the Bill of Rights; the remainder was ratified during various reform periods in the 20th century.

All these amendments share a common theme of altering politics and power. And all these amendments show the ability of Americans to learn from experience (and sometimes from past constitutional mistakes).

Changing presidential elections

Four amendments reform perceived problems in the election of the president. This set of amendments makes the following changes:

- **Provides for the separate election of the president and vice president (Twelfth Amendment; 1804):** This amendment prevents a repetition of earlier, awkward elections in which the president and vice president were from different political parties (1796) and an upstart candidate almost took the presidency from his party's leader (1800).
- **Moves up the date on which a newly elected president assumes office (Twentieth Amendment; 1933):** This change reduces the time in which a "lame duck" current president who has not been reelected can continue to pursue policies that may not be representative of current political preferences.
- **Limits any president to two terms of office (Twenty-Second Amendment; 1951):** Although crucial to American recovery from the Great Depression of the 1930s and victory in World War II in the 1940s, Franklin Roosevelt's four terms as president created concerns that a popular president could extend his hold on power longer than is good for American democracy.
- **Provides for an orderly process for replacing a sitting president or vice president who dies or resigns in office or for temporarily replacing a president unable to fulfill presidential duties (Twenty-Fifth Amendment; 1967):** Cleaning up some ambiguities in the Constitution's Article II, this amendment provides that the vice president takes over in the case of presidential death, resignation or temporary incapacity; that a vacancy in the office of vice president can be filled by the president subject to congressional approval; and that the vice president and a majority of the cabinet can certify that the president is temporarily unable to serve, in which case the vice president takes over in the interim.

Limiting congressional prerogatives

The most recent amendment to the Constitution was proposed early in the country's founding but wasn't ratified until by 1992 by the requisite number of states. The Twenty-Seventh Amendment prevents members of Congress from raising their salaries until the voters have had a chance to react to proposed salary increases at the next election for members of the House.

Adjusting federal and state powers

Four amendments alter federal government powers, directly or indirectly affecting the balance of power between federal and state governments. This group of amendments

- **Reduces the ability of litigants to sue state governments in federal court (Eleventh Amendment; 1795):** Interestingly, this amendment directly reverses an early and unpopular Supreme Court decision.
- **Allows Congress to impose a federal income tax, even if state-by-state wealth differences mean that it is not apportioned by population (Sixteenth Amendment; 1913):** This amendment also reverses a Supreme Court decision invalidating a previous income tax as unconstitutional.
- **Established a national "Prohibition" policy banning "the manufacture, sale, or transportation of intoxicating liquors" (Eighteenth Amendment; 1919):** Leaders of the post–World War I temperance movement grew annoyed with the slow pace of nonconstitutional reform efforts and so pushed through this experiment in substantive national policy by constitutional amendment.
- **Repealed Prohibition and gave state governments special powers to regulate alcohol use within their jurisdictions (Twenty-First Amendment; 1933):** This amendment brought to a close America's 14-year experiment with alcohol prohibition. The policy, which did little to reduce alcohol abuse and sparked the growth of organized crime, is widely regarded as a failure — although some revisionist analysts disagree. Although Americans regularly propose constitutional amendments to adopt seemingly necessary social policies, opponents argue that experience with the Eighteenth and Twenty-First Amendments provides a cautionary tale about the inflexibility and wrongheadedness of this method.