

IN THIS CHAPTER

- » Understanding what a constitution is
- » Finding out who created the U.S. Constitution, and why
- » Breaking down the Constitution's chief tenets
- » Introducing some constitutional problems

Chapter **1**

Identifying the Main Principles and Controversies of the Constitution

Most of the stuff written about the Constitution is boring and hard to understand. But it doesn't have to be. And frankly, it shouldn't be, because the Constitution is pretty important — yes, important to *you* in your daily life.

In this book, I do my best to explain the Constitution in simple language. And in this chapter, I offer a broad introduction to the Constitution: what it is, who created it, the principles it does and doesn't discuss, and the areas of controversy that keep it in the headlines even today.

Defining “Constitution”

First, what exactly *is* a constitution? Okay, here goes. A constitution is a sort of super-law that regulates the way a country or state is run. How helpful is that as a definition? Not very? So let’s be more specific, and this time let’s focus specifically on the Constitution of the United States.

The U.S. Constitution is the supreme law of the nation controlling the following main features (plus a few more):

- » The functions and powers of the different branches of the government: the President, the Congress, and the courts
- » The way in which the President and the Congress are elected and how federal judges are appointed
- » The way government officials — including the President and the judges — can be fired
- » The relationship between the federal government and the states
- » Your rights as a citizen or inhabitant of the United States



The word “constitution” can mean *either* the physical paper document *or* constitutional law as defined by the U.S. Supreme Court, which includes a number of features that don’t actually appear in the document, such as the rights to privacy, abortion, and gay marriage. These additional features are mainly a product of the so-called “living constitution” approach to the Constitution (as a document), which believes that the Constitution needs to be constantly reinterpreted to take account of changes in prevailing social, political, and moral values. On the other hand, strict constructionists, textualists, and originalists interpret the Constitution (as a document) sticking closely to the perceived original meaning of the words in question. I discuss the different approaches to constitutional interpretation in Chapter 3.

Knowing When and Why the Constitution Was Created

The Constitution emerged from a meeting called the Philadelphia Convention, which took place in 1787. (That meeting has since come to be known also as the *Constitutional Convention*.) The Convention was held because the *Articles of Confederation* — the document that had been serving as the country’s first

governing constitution — were considered to be weak and problematic (see Chapter 2). The stated goal of the Convention was to revise the Articles of Confederation, but the outcome was much more than a mere revision: It was a new form of government. See Figure 1-1 for a look at a scene from the Convention.



FIGURE 1-1:
George Washington presiding over the Constitutional Convention, 1787.

Source: Howard Chandler — *The Indian Reporter*

The 55 delegates to the Philadelphia Convention came to be known as the *Framers* of the Constitution. They represented 12 of the 13 states (Rhode Island didn't send a delegate), and they included some familiar names, such as George Washington, Alexander Hamilton, and James Madison.

The Convention lasted from May 25 to September 17, 1787. In the end, only 39 of the 55 delegates actually signed the Constitution. Three delegates refused to sign it, and the rest had left the Convention before the signing took place.

For the Constitution to take effect, it had to be *ratified* — or confirmed — by nine states. Special conventions were summoned in each state, and the Delaware, New Jersey, and Georgia conventions ratified the Constitution unanimously. But some of the other states saw a pretty fierce battle for ratification. In New York, for example, the Constitution was ratified only by 30 votes to 27.

Ratification was achieved in 1788, and the Constitution took effect with the swearing in of President George Washington and Vice President John Adams on April 30, 1789.

DISTINGUISHING THE FOUNDERS FROM THE FRAMERS

The term *Founding Fathers* was (probably) coined by President Warren G. Harding about 100 years ago. *Founding Fathers*, or simply *Founders*, refers to the political leaders of the struggle for American independence against Britain. It includes the American leaders in the Revolutionary War, the signatories of the Declaration of Independence, and also the Framers of the Constitution (or simply, *Framers*).

The Founders include George Washington, Benjamin Franklin, Alexander Hamilton, John Jay, John Adams, Thomas Jefferson, James Madison, James Monroe, Patrick Henry, and Tom Paine.

The term *Founding Fathers* overlaps somewhat with the term *Framers of the Constitution*, but the two terms are not identical in meaning. The term *Founders* is much broader than the term *Framers* because it covers all the leaders in the fight for American independence, including all the delegates to the Philadelphia Convention who drafted the Constitution. So all the Framers were Founders, but not all the Founders were Framers!

Thomas Jefferson, for example, drafted the Declaration of Independence and was one of the leading Founders of the United States. But he was not involved in the drafting of the Constitution because he was on official business in France at the time. So Jefferson was a very prominent Founder, but he was not a Framers.

Summarizing the Main Principles of the Constitution

In broad strokes, here are the principles you find in the Constitution:

- » **Liberty:** The Framers of the Constitution aimed to establish a form of government that gave the people as much individual freedom as possible, by guaranteeing them
 - Religious freedom
 - Freedom of speech
 - Freedom to defend themselves with arms
- » **Federalism:** The United States started out as 13 separate British colonies, which banded together to throw off the British yoke. At first, in 1777, the

colonies formed a loose alliance under the so-called *Articles of Confederation* (not to be confused with the similarly named Confederacy proclaimed by the seceding southern states in the 1860s). But the need for a stronger central government resulted in the drafting of the U.S. Constitution, which was ratified in its original, unamended form in 1788. The Constitution established a *federal* system of government, which gave the central or federal government certain clearly defined and limited powers, reserving the remaining powers to the states or to the people.

» **Separation of powers:** The Framers of the Constitution were very anxious to prevent any one person or institution from becoming too powerful. So the Constitution keeps the three branches of government separate. These branches are the Executive (the President), Legislative (Congress), and Judicial (the law courts). But a system of “checks and balances” cuts across this separation. So, for example, Congress passes laws, but the President can veto them. Similarly, the President has the power to appoint Cabinet officers and federal judges, but his appointments are subject to the “advice and consent” of the Senate. And the Supreme Court can check any perceived abuse of the power of Congress by striking down laws that the Court rules are unconstitutional.

» **Due process:** “Due process of law” is one of the main buzz phrases of the Constitution — according to the Supreme Court. You may assume that this phrase would refer simply to *procedure*, or how things should be done, like whether or not you are allowed a jury trial. But the Supreme Court has widened its interpretation of the phrase greatly to include *substantive due process*, or what rights the Constitution actually confers or protects. As a result, the Court has interpreted the Constitution as guaranteeing a bunch of controversial “fundamental rights,” including

- An expansion of the rights of those suspected or accused of crimes
- An expansion of minority rights
- Privacy
- Abortion

Here are some of the principles you may assume are addressed in the Constitution, but aren't:

» **Democracy:** The words *democracy* and *democratic* don't figure anywhere in the text of the Constitution. In its original form, the Constitution was not democratic, and the House of Representatives was the only directly elected part of the federal government. The Constitution became democratic as a result of the rise of President Andrew Jackson's Democratic Party in the 1830s (see Chapter 6).

» **Equality:** Equality was also not one of the principles of the Constitution in its original form.

- Slavery formed an integral part of the Constitution until the Civil War. For example, Article IV, Section 2, Clause 3 provided in its original, unamended form that runaway slaves who escaped from a slave state to a free state had to be “delivered up” to their original owners. The whole structure of the House of Representatives also depended on slavery. In its original form, Article I, Section 2 of the Constitution apportioned the representation of the various states according to the numbers of their free population — plus three-fifths of their slaves. This “three-fifths rule” cynically used the slave population (who of course didn’t have the right to vote) to give the slave states more representation in the House than they would otherwise have had.
- Women didn’t have the right to vote in the U.S. as a whole until 1920, though some states had allowed women to vote before then.

THE FEDERALIST PAPERS

When the U.S. Constitution emerged from the Philadelphia Convention after being signed by delegates from each of the 12 participating states, it still had to be ratified, or confirmed, by the states, each of which summoned a special convention for this purpose. Fierce controversy reigned.

In October 1787, Alexander Hamilton, a leading member of the Convention and a dedicated upholder of the Constitution, started publishing a series of articles explaining and justifying the Constitution. Hamilton got James Madison, another leading Convention delegate, to join him. John Jay, another Founding Father (although not a Convention delegate) also contributed some articles.

The series of articles was titled *The Federalist* and was described as “a Collection of Essays written in favor of the New Constitution.” Hamilton himself wrote 51 of the 85 articles, Madison contributed 27, and Jay wrote 5.

Although they were written before the Constitution took effect, these essays show tremendous insight into the problems of government and have been cited ever since as embodying an authoritative interpretation of the Constitution.

- To this day, the interpretation of the anti-discrimination (or equal treatment) amendments to the Constitution remains highly controversial. The most controversial amendment is the Fourteenth, which can be invoked either in support of affirmative action or in opposition to it. Those Supreme Court justices who support affirmative action see it as a necessary part of the anti-discriminatory thrust of the Due Process Clause of the Fourteenth Amendment, while those justices who oppose affirmative action see it as itself just another form of discrimination.

Identifying Some Areas of Controversy

The whole text of the Constitution takes up just a few pages of print; see the Appendix if you don't believe me. So why do you need to read a book this long in order to understand it? The old-fashioned language of the Constitution sometimes needs to be explained. And there are a few — actually surprisingly few — genuine ambiguities in the text. But, for the most part, you can blame it on the lawyers and the judges — particularly the U.S. Supreme Court — who have made a major production out of a pretty simple, straightforward document.

How come there's such major disagreement about what the Constitution means? There are essentially three reasons:

- » **Old-fashioned language:** The English language has changed since the horse-and-buggy era when most of the Constitution was written (but perhaps not as much as you may think). Consider the following examples:
 - Article III, Section 3 contains the phrase "Aid and Comfort" in connection with committing treason. Does this mean that you'll go to jail if you give the enemy milk and cookies? Not quite. The phrase was lifted straight out of the old English Treason Act of 1351. The word *comfort* comes from a Latin root meaning *to strengthen*. So, giving the enemy "Aid and Comfort" means actively assisting the enemy and strengthening him, whether by means of arms, money, or intelligence.
 - The biggest changes have occurred in punctuation. So, for example, the Fifth Amendment ends with this prohibition: *nor shall private property be taken for public use, without just compensation*. Some commentators have claimed to notice a smudge in the original handwritten version of the Bill of Rights, which they take to be a comma between "taken" and "for," making "for public use" a bracketed phrase. They conclude from this that the Constitution allows the government to take private property for purposes other than "for public use."



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Even if there's meant to be an additional comma in there, this interpretation is plainly wrong. First, in the 18th century commas were strewn around much more liberally than today, without affecting the meaning. Second, the idea that the government can just take private property whenever it feels like it goes clean against the whole tone and tenor of the Constitution.

» **Ambiguity:** There are a few passages in the Constitution where the meaning is genuinely in doubt. Here are two examples:

- **Do individuals have the right “to keep and bear Arms”?** The Supreme Court says yes, but the wording of the Second Amendment is not at all clear. I discuss this important question in Chapters 12 and 15.
- **If the President dies, does the Vice President become President or only Acting President?** Article II, Section 1 of the Constitution is genuinely ambiguous. The Twenty-Fifth Amendment, which came along only in 1967, says that in these circumstances the Veep does become President. But the problem was actually solved in practice by John Tyler, back in 1841. See Chapters 10 and 22 for all the details.

» **Interpretation:** Many of the disputes about the meaning of the Constitution arise out of different approaches to constitutional interpretations by justices of the Supreme Court. Here are just a few of the most controversial constitutional issues:

- **Can Congress pass any laws it likes?** The Supreme Court says no. But some commentators disagree with this interpretation and read Article I, Section 8 of the Constitution very widely. In particular, they interpret the power of Congress to “pay the Debts and provide for the common Defence and general Welfare of the United States” as meaning that Congress can pass any laws it likes. This reading is almost certainly wrong, and James Madison said so himself. I tackle this question particularly in Chapter 9.
- **Does the President have the power to lock up “enemy combatants” and deny them access to the U.S. courts?** In the 2008 case *Boumediene v. Bush*, by a majority of 5 to 4, the U.S. Supreme Court said no. However, in June 2012 the Court declined, without comment, to take up appeals filed on behalf of seven Guantanamo detainees who claimed that they had not had a “meaningful opportunity” to challenge their detention.
- **Is the death penalty kosher?** Yes, but it does depend on the method used. Lethal injection is now the favored method — and the Supreme Court says it’s not “cruel and unusual punishment.” But the Supreme Court has also held that it’s unconstitutional to execute minors and the mentally ill. In *Glossip v. Gross* (2015), the Supreme Court held by a majority of 5 to 4 that the use of the drug midazolam was not unconstitutional. Justice Breyer used his dissent to launch an attack on the constitutionality of capital punishment of any kind. “Welcome to Groundhog Day” was Justice Scalia’s sarcastic response, referring to earlier attacks on capital



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punishment in cases such as *Furman v. Georgia* (1972), in which a 5–4 majority succeeded in temporarily banning the death penalty as unconstitutional. In April 2017, the Supreme Court was again confronted with a problem with midazolam, which its manufacturers were no longer prepared to supply for the purpose of execution. The state of Arkansas was anxious to execute a number of death-row inmates before its stock of midazolam reached its expiration date. Newly appointed Justice Neil Gorsuch formed part of the 5–4 majority allowing all but one of the executions to go ahead.

- **Can a school district assign students to public high schools on the basis of race alone?** In 2007, by 5 votes to 4, the Supreme Court said no. Writing for the majority, Chief Justice John Roberts held that “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Why, then, we may ask, do school districts in a number of states still require parents to fill out a form asking “What race(s) do you consider your child?” The form often lists more than 50 “races” to choose from. The short answer to my question posed above is simply that the school districts concerned have not yet reached the goal of a color-blind educational policy.
- **Is gay marriage constitutional?** Marriage doesn’t figure in the U.S. Constitution at all. It was considered to be a matter for individual states to decide. But in *Obergefell v. Hodges* (2015), by a majority of 5 to 4 the U.S. Supreme Court ruled that marriage is a fundamental right guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The ruling requires all states to issue marriage licenses to same-sex couples and to recognize same-sex marriages solemnized in other jurisdictions. In his dissenting opinion, Justice Scalia scathingly characterized the majority opinion as “lacking even a thin veneer of law” and as descending “to the mystical aphorisms of the fortune cookie.” See Chapter 23 for more on this case.
- **Are states allowed to secede from the Union?** The Supreme Court says no. The last time secession was tried, it took a civil war to end it. Since that time a number of groups have advocated the secession of a state, a city, or a tribe, but no serious attempt has been made. (One such group, the Alaskan Independence Party, hit the news during the 2008 election campaign because of alleged links with Sarah Palin, the Republican vice presidential candidate.)

This is just the tip of the iceberg when it comes to constitutional controversies, and I devote a good deal of space in this book to sifting through them and offering my own humble opinions of the Supreme Court’s interpretations. If the Constitution weren’t a source of so much debate within the halls of government, perhaps it wouldn’t be nearly as interesting to read and learn about. Luckily for you, that isn’t the case!

