



CHAPTER ONE

The Constitution's Vision and Values

Our founding document establishes a general framework for effective governance of a nation destined to grow and change. It fixes the basic structure of government and some of its important procedures while expressing our commitment to certain core values: liberty, equality, and democracy. This chapter provides an initial grounding in the words and vision of the Constitution and its Framers. The next chapter turns to the role of courts in constitutional interpretation.

THE FOUNDING CONTEXT

As Dr. Martin Luther King observed in his *I Have a Dream* speech, “[w]hen the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.” Dr. King was right to link these two documents. The Constitution was drafted and ratified against the backdrop of the recent war for independence from Great Britain, and the Declaration expressed Americans’ aspirations for the kind of government they sought:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes

destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration thus expresses a background understanding among the Founding generation that equality, liberty, and opportunity (“the pursuit of Happiness”) were fundamental rights; that legitimate government depends on the consent of the governed; and that the powers of government should be organized to enable it to affirmatively “secure” and “effect” the rights and liberties of the people.

At the same time, in its allegations against the King, the Declaration also identified some of the key principles limiting governmental authority. Among the acts justifying America’s secession from the British Empire were the King’s interference with judicial independence and trial by jury, his elevation of military authority over civilian control, his refusal to respect popular election and legislative authority, and, perhaps most famously, his imposition of taxation without representation.

The Constitution, now more than two hundred years old, was not the first attempt by the thirteen colonies to create a nation. The Articles of Confederation were ratified in 1781, but they failed after only a half-dozen years. A key reason for the failure was that the Articles did not create a national government capable of dealing with the economic and international issues of the times. Not only was the national government’s power limited, but two of the three branches—the executive and the judiciary—did not even exist. The desire to create a national government capable of confronting unforeseen and unforeseeable problems was a central motivation behind the Constitution.

The Framers were part of a bold but pragmatic generation. They knew they were creating a nation that would change in important ways over time. The very decision to ratify the proposed Constitution reflected their recognition that America was an expanding nation where commerce and not merely agrarian traditions would play an increasing role. Moreover, the structure of the Constitution reflected the Framers’ comfort with innovation as well as their determination to ensure that the government would have sufficient power to deal with the nation’s problems as they arose.

At the same time, the Framers understood that dividing power—horizontally within the national government and vertically between the national

government and the states—would help protect individual liberty against government abuse. “Ambition must be made to counteract ambition,” James Madison famously wrote, if we are to have “security against a gradual concentration of [power] in the same department.”¹ By creating a national government with three interdependent branches, the Framers sought to enlarge the government’s capabilities while also limiting the potential for abuse through a system of checks and balances. And by maintaining a federal system, the Framers contemplated “a double security [for] the rights of the people,” as the national and state governments “will control each other, at the same time that each will be controlled by itself.”²

Moreover, although classical republican theory saw the size and diversity of the growing nation as a threat to self-government, Madison argued that these features provide additional protection for individual liberty. In a large, heterogeneous society with a “multiplicity of interests” among its citizens, “the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”³ To be sure, the minority group of primary concern to the Founders may have been wealthy creditors and landowners. And one reason for the system of checks and balances may have been to safeguard property rights by making redistributive measures difficult to enact. But, as a general principle, the republican theory that informs our Constitution is one that values pluralism and diversity, and protects individual rights of all kinds against government abuse.

THE 1789 CONSTITUTION

Even before the addition of any amendments, the Constitution expresses fundamental commitments to democracy, equality, and individual liberty, and to a robust but carefully calibrated system of government power commensurate with the nation’s needs. These values are reflected in the text.

The Preamble

The Constitution’s opening words describe its ambitions. As the Supreme Court recognized early on, the source of the Constitution’s power is the people: “The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States.’”⁴ Thus,

democratic self-determination is the source of the Constitution's legitimacy, and the Constitution signaled the transformation of the "league of friendship" among sovereign states under the Articles of Confederation⁵ into a single nation governed by "the people of the United States."

The language the Constitution uses to describe its purposes is far more capacious than the immediate economic and geopolitical exigencies that prompted the Constitutional Convention. The Constitution aims to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty." These phrases could not then, and cannot now, be defined with precision. But the fact that the phrases are repeated in the text of the Constitution—the Spending Clause of Article I, for example, declares Congress's power to "provide for the common Defence and general Welfare," and the Fifth Amendment prohibits deprivations of "liberty" without due process of law—shows that they were intended to be given real effect.

Government power to address the nation's needs

By expanding the powers of the federal government beyond their limited scope under the Articles of Confederation, the Constitution significantly enhanced the power of government to address the nation's needs. And by creating distinct legislative, executive, and judicial branches within a framework of separated powers, the Framers moderated the exercise of national power through a complex system of checks and balances.

In Article I, the Framers enumerated a broad array of congressional powers—among them, the power to tax and spend for the general welfare, the power to regulate commerce among the states and with foreign nations, the power to establish post offices and roads to link the new nation together, the power to promote scientific progress and innovation through a system of intellectual property, and the power to establish a process for naturalization to welcome immigrants. Further, Article I authorizes Congress to make all laws "necessary and proper" for executing the enumerated legislative powers and all other powers vested in the national government. At the same time, the Framers circumscribed these lawmaking powers through mechanisms such as the presidential veto, judicial power to decide constitutional cases, and the fragmentation of Congress into two chambers, the House and Senate.

Article II creates the office of the President and assigns the President the duty to “take Care that the Laws be faithfully executed.” The President also has the power to appoint the principal officers of the government, including federal judges. Article II designates the President as Commander in Chief of the armed forces and assigns the President various diplomatic and foreign policy functions. Importantly, the Constitution makes clear that the exercise of all those powers must be shared with Congress. For example, while the President has the power to make treaties and to appoint ambassadors, both require the approval of the Senate, as do all appointments of judges and other principal officers. And while the President serves as Commander in Chief, Article I assigns Congress the power to declare war, to raise and support armies, to provide and maintain a navy, to makes rules concerning captures, and to make rules governing land and naval forces.

Article III establishes an independent judiciary with life tenure and protected compensation. The Framers defined the judicial power so that the federal courts would decide cases, such as disputes between states or their respective citizens, that help to ensure uniform application of federal law. In addition, Article III assigns federal courts the power to decide cases arising under the Constitution, a function we discuss throughout this book. As with legislative and executive power, the Framers situated the judicial power within various checks and balances, including presidential appointment and Senate confirmation of federal judges, Congress’s impeachment power, and a degree of legislative control over the lower courts and the Supreme Court’s appellate jurisdiction.

Liberty and protection against government oppression

In addition to the need for a more effective national government, the Framers were well aware of the awesome power of government to suppress dissent and restrict liberty. Although many of the liberty-protecting features of the 1789 Constitution are structural, the Framers also thought it appropriate to include several specific protections against government abuse. For example, Article III, Section 2 guarantees all defendants in federal criminal cases the right to trial by jury. The Founding generation understood the jury to be a key bulwark against government suppression of dissent.⁶

In addition, Article I, Section 9 guarantees access to habeas corpus and prohibits the enactment of bills of attainder or ex post facto laws that might

target dissidents. Further, it is significant that even before the Constitution was amended or interpreted to impose general constraints on state governments, Article I, Section 10 prohibited states from passing bills of attainder or ex post facto laws. By creating an independent judiciary, the Framers also sought to ensure that individual rights would not be entirely dependent on current popular will.

Despite its many commitments to individual liberty, the original Constitution was deeply flawed in its express recognition and permission of slavery. Article I, Section 9 prohibited Congress from banning the slave trade until 1808; the Three-Fifths Clause of Article I, Section 2 accounted for slavery in allocating seats in the House of Representatives and the Electoral College; and the Fugitive Slave Clause of Article IV, Section 2 conscripted non-slave states into returning escaped slaves into bondage. Given the glaring incongruity between slavery and the “Blessings of Liberty” mentioned in the Preamble, it is unsurprising that the most far-reaching transformations in our constitutional history—through the amendment process and through judicial, legislative, and popular interpretation—have sought to remedy the Framers’ failure to fully secure the promises of liberty and equality.

Democracy and opportunity

The Constitution also responds to democratic values that were central to the Framers’ complaints about the British Crown. The qualifications clauses of Article I, for example, set out the exclusive eligibility criteria for members of Congress. They require only that Representatives and Senators be citizens of the United States, residents of the state they represent, and over the age of twenty-five and thirty, respectively. In this respect, the Constitution marked a clear departure from hereditary and class-based leadership, and from many existing state constitutions that restricted eligibility for elected office. Notably, the Framers expressly rejected proposals that would have conditioned eligibility for Congress on property ownership. As Madison explained, “the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.”⁷

The prohibition on titles of nobility in Article I, Section 10 and the prohibition on any religious test for public office in Article VI similarly disclaim the idea that family background or faith should affect citizens’ ability to

participate equally in public life. Further, Article IV, Section 4 requires the United States to guarantee to every state a republican form of government.

To be sure, the 1789 Constitution in some ways did not fully implement democratic values. For example, in order to avoid a potentially fractious disagreement over eligibility to vote, the Framers left the definition of suffrage to the states. This meant that a majority of Americans were excluded from full participation in self-government based on their race, sex, wealth, literacy, social status, or other criteria that we now understand to be illegitimate in a democratic society. And, of course, the express legalization of slavery could not be reconciled with the ideal of a democratic nation dedicated to freedom and equality.

THE BILL OF RIGHTS

Beyond the original Constitution, subsequent amendments express commitments to a series of fundamental values, beginning with the Bill of Rights. For several reasons, the Framers in 1787 had declined to include a written bill of rights in the Constitution. First, it was broadly understood that fundamental rights of individual liberty were, as the Declaration of Independence had asserted, “inalienable, indefeasible rights inherent in all people by virtue of their humanity”⁸ and not dependent upon any express declaration. A bill of rights was thought unnecessary because it would merely affirm the natural existence of rights already in force.⁹ A second concern was that a written bill of rights would not, as a practical matter, restrain the will of popular majorities. In a self-governing republic, some argued, respect for individual rights and liberties depends primarily on the checks and balances in a well-structured government and on the virtue of the people and their representatives. Third, many feared that any enumeration of rights would be incomplete and, in future generations, would be vulnerable to the inference that the Constitution does not protect rights that are not enumerated. “Thus a bill of rights might operate as a snare, rather than a protection” when it provides “an enumeration of a great many [rights], but an omission of some.”¹⁰

Important as these arguments were, several states, including Massachusetts and Virginia, refused to ratify the Constitution without an assurance that it would include a national bill of rights. Proponents of such a bill answered the foregoing concerns with compelling arguments of their own. First, they

argued, the omission of a bill of rights rendered those rights insecure and ever-vulnerable to factious majorities or unscrupulous leaders who might refuse to recognize their authority. Incorporating rights into the constitutional text would help safeguard their permanence and vitality.

Second, enforcement of a bill of rights would be greatly aided by independent courts that “will consider themselves in a peculiar manner the guardians of those rights” and that “will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution.”¹¹ The concept of judicial review, though somewhat controversial at the time, provided an important answer to the objection that a written bill of rights would have little practical effect.

Third, the practical importance of a bill of rights also included its educative function. Madison, who initially opposed the idea of a bill of rights, later acknowledged that stating rights explicitly in the Constitution would have “a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community . . . [and thereby serve as] one mean to controul the majority from those acts to which they might be otherwise inclined.”¹²

Given the widely shared understanding among the Founding generation that individual rights and liberties are “not annexed to us by parchments and seals” but rather “founded on the immutable maxims of reason and justice,”¹³ the concern that enumerating some rights would leave others unprotected had particular weight. In response, Thomas Jefferson argued in a letter to James Madison that “[i]f we cannot secure all our rights, let us secure what we can.”¹⁴ Although Madison did not disagree, he thought it crucial to address the concern directly. In 1789, as part of the bill of rights he presented for consideration in the House of Representatives, Madison proposed a specific provision to make clear that the bill of rights did not comprise an exhaustive list of fundamental rights. That provision, ratified as the Ninth Amendment, states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁵

With this understanding of the context leading to adoption of the Bill of Rights, let us now look briefly at its familiar provisions. Some provisions focus on individual dignity and autonomy—for example, the First Amendment’s protection of the free exercise of religion and the Sixth Amendment’s guarantee of trial rights for criminal defendants. Other provisions promote

democratic accountability and control—for example, the First Amendment's protection of the rights of assembly and petitioning the government for redress of grievances. Many provisions in the Bill of Rights contribute to both values. Freedom of speech, for example, furthers both individual dignity and collective democratic activity. So too does the Fourth Amendment's protection against unreasonable searches and seizures, which reflected the Framers' distrust of the King's use of general warrants to attack political dissidents. The militia clause of the Second Amendment and the jury clauses of the Fifth, Sixth, and Seventh Amendments also serve to ensure citizen participation in critical government activity, thereby reinforcing the democratic character of individual rights protections.

Like the original Constitution, the Bill of Rights uses language with varying levels of specificity. Some protections have determinate language—for example, the twenty dollar threshold for the Seventh Amendment right to a jury trial and the warrant requirements specified in the Fourth Amendment. However, other provisions use general language—for example, the Fourth Amendment protection against “unreasonable” searches and seizures, the Fifth Amendment guarantee of “due process of law,” and the Eighth Amendment prohibition on “cruel and unusual punishments.” The open-textured quality of these phrases is significant because the Framers could have specified, for example, the particular punishments they intended to forbid under the Eighth Amendment. But they chose not to do so, leaving open the punishments that might offend human dignity in the future. The Framers' choice of general language again demonstrates their concern that a written enumeration of rights should not unduly limit the scope of inalienable rights and liberties we possess.

THE RECONSTRUCTION AMENDMENTS: AMERICA'S SECOND FOUNDING

The amendments ratified after the Civil War worked profound changes in the Constitution. For eight decades, the nation had struggled with the issue of slavery, adopting various legislative compromises and accommodations that, like the slavery provisions in the 1789 Constitution, proved inherently unstable. The Supreme Court's infamous pro-slavery decisions purporting to resolve the issue only inflamed it further,¹⁶ underscoring the impossibility of

any legal or political middle ground. The failure of the Founding-era Constitution to abolish slavery was no mere imperfection; it eventually imperiled the very existence of the Union. As Abraham Lincoln observed in his 1858 *House Divided* speech, the growing nation “cannot endure permanently half slave and half free. . . . It will become all one thing, or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward, till it shall become alike lawful in all the States, old as well as new—North as well as South.”

The Constitution’s most forceful and explicit commitments to human freedom, dignity, and equality emerged from the Civil War, the deadliest conflict in American history. Over four grueling years, what began as a war to preserve the Union became also a war to end slavery. In fact, ending slavery, at least in Confederate territory, became a vital element of the Union strategy to win the war. This was the premise of President Lincoln’s Emancipation Proclamation, declaring all slaves in rebel-controlled areas to be “forever free” and calling on the new freedmen to “be received into the armed service of the United States.” Some 180,000 black men—over one-fifth of the nation’s black male population under age forty-five—served in the Union army and, through their service and sacrifice, “played a crucial role not only in winning the Civil War, but in defining the war’s consequences.”¹⁷ Having borne arms and given their lives for the Union cause, black soldiers earned for black people throughout the nation not only freedom from bondage, but also a new stature, a new sense of worth and potential, and an incontrovertible claim to be included among “We the People of the United States.”

When it came time to memorialize the accomplishments of the war, the Reconstruction Congress moved quickly and decisively to ban slavery. But the constitutional transformation went much further, amounting to what many have called America’s Second Founding.

Ratified in December of 1865, eight months after Appomattox, the Thirteenth Amendment declares: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”¹⁸ The words the Framers chose are noteworthy in several respects. First, the amendment prohibits not only “slavery,” the immediate concern of the Civil War, but also “involuntary servitude,” a term “of larger

meaning than slavery.”¹⁹ Second, the prohibition applies not only “within the United States” but also in “any place subject to their jurisdiction,” including U.S. territories. Third, the prohibition is phrased as a direct injunction against slavery and involuntary servitude; it is not limited to state action.²⁰

Taken together, the sweeping terms of the Thirteenth Amendment forbid debt peonage and other arrangements, whether private or public, that replicate the conditions of slavery,²¹ and they signal the amendment’s applicability beyond the specific context of state-sanctioned enslavement of black Americans. As the Supreme Court observed early on, the amendment “forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.”²² Through the broad language chosen by the Framers, the Thirteenth Amendment expresses a fundamental commitment to human freedom.

Further, the Thirteenth Amendment contains a second sentence: “Congress shall have power to enforce this article by appropriate legislation.”²³ The novelty of this provision (and the parallel enforcement provisions of the Fourteenth and Fifteenth Amendments) deserves emphasis. Up to this point, no provision in the Constitution had expressly assigned to Congress the power to enforce a constitutional guarantee, and the first twelve amendments were adopted largely to limit the scope of federal authority.²⁴ Now, instead of limiting federal power in order to protect individual rights, the Framers sought to protect individual rights by *expanding* federal power. And instead of leaving enforcement of the ban on slavery and involuntary servitude up to the courts, the Framers—many of whom had witnessed the debacle of *Dred Scott*²⁵—envisioned that Congress would play a leading role.

Signaling the breadth of the new power, the Framers chose the familiar phrase “Congress shall have power” used throughout the Constitution to define broad grants of lawmaking authority.²⁶ Moreover, the reference to “appropriate legislation” echoes the term that Chief Justice Marshall used in *McCulloch v. Maryland* to define the expansive scope of Congress’s power under the Necessary and Proper Clause.²⁷ As the Supreme Court has made clear, Congress’s enforcement power under the Thirteenth Amendment extends not only to state action but also to private conduct, and not only to eradicating slavery but also to “determin[ing] what are the badges and the incidents of slavery, and . . . translat[ing] that determination into effective legislation.”²⁸

With this new power, the Reconstruction Congress took aim at the Black Codes enacted by many southern states to keep newly freed blacks from exercising basic civil rights. Four months after the Thirteenth Amendment was ratified, Congress passed the Civil Rights Act of 1866 over President Johnson's veto.²⁹ The act provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." It further declared that all citizens "shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

Before and after the Civil Rights Act was passed, however, there were doubts as to whether it exceeded Congress's power under the Thirteenth Amendment. To resolve those doubts, Congress considered a series of new proposals that would eventually become the Fourteenth Amendment in 1868. Although the immediate object of the Fourteenth Amendment was to place the Civil Rights Act on a secure constitutional footing, the Framers once again chose general language to establish a set of fundamental principles with broader applicability.

The first sentence of the Fourteenth Amendment declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."³⁰ With these words—"the first explicit *constitutional* definition of American citizenship"³¹—the Fourteenth Amendment overturned the *Dred Scott* decision and significantly expanded the political community comprising the new post-war nation. Importantly, this definition of citizenship "codified a profound nationalization of American identity."³² Whereas national citizenship was widely thought to be derivative of state citizenship before the Civil War, the Fourteenth Amendment nationalizes our political identity as "citizens of the United States" and makes the federal government the ultimate guarantor of our most fundamental rights.

The Fourteenth Amendment goes on to say: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"³³ Whereas the Bill of Rights protects individual

liberty against national power, the Privileges or Immunities Clause protects the fundamental rights of American citizens against *state* power. Further, the leading sponsors of the Fourteenth Amendment explained that, in addition to the rights specified in the Civil Rights Act of 1866, the “privileges” and “immunities” of American citizens include the various rights and freedoms protected by the Bill of Rights.³⁴ In choosing to use general language, the Framers of the Fourteenth Amendment—like the Founding-era Framers before them—also understood that the fundamental rights we possess cannot be exhaustively enumerated and thus left the scope of such rights open to future interpretation.³⁵ The same is true of the general wording of the Fourteenth Amendment’s additional injunctions: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”³⁶ The extension of due process and equal protection guarantees to all “persons,” not only to citizens, further illustrates the Framers’ intent to establish broad principles that transcend the specific applications encompassed at the time of their enactment.

As with the Thirteenth Amendment, the Fourteenth Amendment gives Congress the “power to enforce, by appropriate legislation, the provisions of this article.”³⁷ Through this enforcement clause, “the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.”³⁸ By authorizing Congress to enforce explicit limitations on state power, the Fourteenth Amendment fundamentally revised the balance of power between the federal government and the states. As the principal author of the amendment observed, “the powers of the States have been limited and the powers of Congress extended.”³⁹ Equally important, the enforcement clause altered the horizontal separation of powers by empowering Congress, independently of the courts, to give concrete, practical meaning to the broadly worded guarantees of citizenship and its “privileges or immunities,” “due process of law,” and “equal protection of the laws.” Not only did the Framers understand that these general principles would require interpretation in order to be made effective; they recognized that the process of interpretation and application must include both judicial elaboration and democratic lawmaking if the principles are to retain their vitality over time.

The last of the Reconstruction Amendments was ratified in 1870. The Fifteenth Amendment provides: “The right of citizens of the United States

to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”⁴⁰ The amendment also empowers Congress “to enforce this article by appropriate legislation.”⁴¹ The Fourteenth Amendment had indirectly supported black suffrage by including a federal apportionment penalty for state denial of the franchise to any adult male citizen.⁴² But the Fourteenth Amendment’s core guarantee of equal citizenship was thought at the time to apply only to *civil* rights as distinguished from the *political* right of voting.⁴³ To secure black suffrage and thereby integrate the national political community, the Reconstruction Congress, with President Grant’s vigorous support, adopted the Fifteenth Amendment. And yet, by banning voting discrimination “on account of race, color, or previous condition of servitude,” the Framers again chose broad language transcending the specific context of enactment. As the Supreme Court has explained, the term “race” was understood during the Reconstruction era to apply not only to black Americans but also to ethnic and even some religious minorities.⁴⁴

For all that was accomplished during Reconstruction, however, the task of giving practical effect to the Constitution’s bold promises has been and continues to be a challenging work-in-progress. Moreover, at its inception, the constitutional commitment to equal citizenship was not fully realized: the Fourteenth Amendment secured the status of women as citizens, but the rights of citizenship did not yet disturb the laws of coverture or otherwise protect women against gender discrimination. Indeed, the federal apportionment provision of the Fourteenth Amendment wrote gender inequality into the Constitution by privileging the vote of adult “male citizens.”⁴⁵ Although women had played leading roles in the struggle for abolition and black suffrage, it would be another fifty years before their own right to equal suffrage gained constitutional recognition, and still another fifty years before women began to enjoy more fully the promise of equal citizenship.

Despite these shortcomings, the Reconstruction Amendments fundamentally transformed both substantive rights and constitutional structure. They established broad principles of liberty and equality, and they codified the nationalization of citizenship and its privileges and immunities. They limited state power while enhancing federal power in order to protect individual rights. And they created a framework of overlapping legislative and judicial power in the enforcement of constitutional rights. Through the Thirteenth,

Fourteenth, and Fifteenth Amendments, the nation forged from the crucible of war the central tenets of its Second Founding.

POST-RECONSTRUCTION AMENDMENTS

Since Reconstruction, many constitutional amendments have been more narrowly targeted. For example, the Eighteenth Amendment adopted prohibition, and the Twenty-First Amendment repealed it. The Twentieth Amendment changed the date of the presidential inauguration. The Twenty-Second Amendment limits the President to two terms in office. The Twenty-Fifth Amendment addresses presidential succession in the event of death, resignation, or incapacity. And the Twenty-Seventh Amendment regulates congressional pay.

Even so, several twentieth-century amendments expand constitutional rights and modify constitutional structure in ways that reflect and deepen the principles of the Reconstruction Amendments. Four amendments removed additional barriers to voting and political participation. With language parallel to the Fifteenth Amendment, the Nineteenth Amendment secured equal voting rights for women in 1920, “mark[ing] the single biggest democratizing event in American history.”⁴⁶ The Twenty-Third Amendment enfranchised citizens of the District of Columbia in national elections for President and Vice President. The Twenty-Fourth Amendment abolished the poll tax in elections for federal office. And the Twenty-Sixth Amendment lowered the age qualification for voting to eighteen years old.

Moreover, several amendments continued the nationalization of the American polity and the expansion of congressional power. The Sixteenth Amendment authorized Congress to use the taxing power as a vehicle for national redistribution, overruling an 1895 precedent that invalidated a progressive federal income tax.⁴⁷ The Seventeenth Amendment superseded the Article I provision for election of Senators by state legislatures and instead mandates the direct election of Senators by statewide popular vote, thereby reducing the power of the states and increasing the democratic accountability of Congress. In addition, each of the four voting rights amendments just mentioned includes a congressional enforcement provision equivalent to those in the Reconstruction Amendments.

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Overall, the Constitution is a profoundly visionary document. It advanced a new model of effective governance and democratic rule. Its text and structure express general principles that further the guiding purposes stated in the Preamble. And the amendment process has enlarged our basic commitments to liberty, equality, and democracy. Our Constitution thus reflects, in a spare outline, the moral trajectory of a nation continually striving for greater justice.

Importantly, during each major transformation, the Framers memorialized their constitutional understandings with broad language setting forth expansive principles open to future interpretation. While the Constitution in 1789 made clear that the national government is one of enumerated powers, the Framers included the Necessary and Proper Clause in order to give Congress wide latitude to execute those powers and thereby meet the nation's needs. The debate over whether to include a national bill of rights reveals as much about the Framers' thinking on fundamental rights as the rights they ultimately chose to specify. In the end, the enumeration of certain rights left open the recognition and protection of others retained by the people, and many of the enumerated rights were themselves phrased as general principles applicable to the challenges and concerns of each new generation. Similarly, the Reconstruction-era Framers established broad and powerful principles that went beyond the goal of ending slavery and securing equal citizenship for black Americans. The authors of the Reconstruction Amendments committed the nation to new promises of liberty, equality, and citizenship, but they did not pretend to know all that those principles would entail. As the country has matured, these broad principles have naturally been the subject of ongoing debate. Each generation has sought to remain faithful to these constitutional commitments through a process of interpretation and enforcement by Congress and the courts. Those institutions, in turn, have been informed by public deliberation and engagement.

With this brief overview of the Constitution's vision and values, we now turn to the subject of constitutional interpretation. As the next chapter will make clear, our central theme is that the practice of constitutional interpretation must be faithful to what the Constitution is: not a legal code, not a lawyer's contract, but a basic charter of government whose practical meaning arises from the continual adaptation of its enduring text and principles to the conditions and challenges facing each generation.