

Keeping Faith: Chapter 1 - The Constitution's Vision and Values

I. Background and Context

The Founding Era

- The Constitution 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.
- It was drafted and ratified against the backdrop of the recent war for independence from Great Britain, and the Declaration of Independence expressed Americans' aspirations for the kind of government they sought: "We hold these truths to be self-evident, that all men are created equal"
- The Constitution 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 six years, because they did not establish a national government capable of dealing with the economic and international issues of the times.
- The Framers knew they were creating a nation that would change in important ways over time. The structure of the Constitution reflected their 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.
- 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.

II. Structure

The Preamble

- The Preamble is explicit that the Constitution is enacted by "the people," not the states.
- The Preamble's sweeping language – "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty" – cannot 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" —shows that they were intended to be given real effect.

The Three Branches of Government

- In Article I, the Framers enumerated a broad array of congressional powers, and it authorizes Congress to make all laws "necessary and proper" for executing the enumerated legislative powers and all other powers vested in the national government. But they also limited these powers via the presidential veto, judicial review, and the fragmentation of Congress into two chambers.
- Article II establishes the presidency 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. It designates the President as Commander in Chief of the armed forces, but the Constitution makes clear that the exercise of all those powers must be shared with Congress. For example, the President has the power to make treaties and to appoint ambassadors, but 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, and to make rules governing land and naval forces.
- Article III establishes an independent judiciary with life tenure.

III. Fundamental Values

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: Article III, Section 2 guarantees all defendants in federal criminal cases the right to trial by jury; 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. In addition, by creating an independent Judiciary, the Framers also sought to ensure that individual rights would not be entirely dependent on current popular will.

The Blight of Slavery

- 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.

Democracy and Opportunity

- The Constitution also responds to democratic values that were central to the Framers' complaints about the British Crown. 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.
- The 1789 Constitution in some ways did not fully implement democratic values. For example, it left the definition of suffrage to the states, which 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. And the express legalization of slavery could not be reconciled with the ideal of a democratic nation dedicated to freedom and equality.

IV. The Bill of Rights

- Beyond the original Constitution, subsequent amendments express commitments to a series of fundamental values, beginning with the Bill of Rights. Some provisions focus on individual dignity and autonomy (e.g., the First Amendment's protection of the free exercise of religion and the Sixth Amendment's guarantee of trial rights for criminal defendants), while others promote democratic accountability and control (e.g., 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 furthers both individual dignity and collective democratic activity.
- Like the original Constitution, the Bill of Rights uses language with varying levels of specificity. Some protections have determinate language (e.g., the twenty dollar threshold for the Seventh Amendment right to a jury trial and the warrant requirements specified in the Fourth Amendment). Other provisions, however, use general language (e.g., 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.

V. The Reconstruction Amendments: America's Second Founding

The Reconstruction of the Union

- The Constitution's most forceful and explicit commitments to human freedom, dignity, and equality emerged from the Civil War. What began as a war to preserve the Union became also a war to end slavery. The Reconstruction of the nation after that war resulted in a new and greatly improved, though still imperfect, constitutional order.

The Thirteenth Amendment

- The Thirteenth Amendment provides: "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."
- The Thirteenth Amendment contains a second sentence: "Congress shall have power to enforce this article by appropriate legislation." No previous provision 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. 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 envisioned that Congress would play a leading role.

The Fourteenth Amendment

- The first sentence of the Fourteenth Amendment provides: "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." 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" 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.
- 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 cannot be exhaustively enumerated and thus left the scope of such rights open to future interpretation. 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." 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.
- 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. 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."

The Fifteenth Amendment

- 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." The amendment also empowers Congress "to enforce this article by appropriate legislation."

The Unfinished Business of Constructing a More Perfect Union

- 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 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." 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.

VI. Post-Reconstruction Amendments

Enhancing Democracy

- 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. 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.

National Power to Address the Nations' Needs

- 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. 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.

VII. A Visionary Document

- 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. 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.