LEARNING MADE EASY

2nd Edition

U.S. Constitution

for dummies®

A Wiley Brand

Trace the evolution of the Constitution

Recognize the power of the U.S. Supreme Court

Details on recent Supreme Court decisions

Dr. Michael Arnheim

Constitutional expert

U.S. Constitution

for dummies®
A Wiley Brand

U.S. Constitution

2nd Edition

by Dr. Michael Arnheim
Constitutional expert

for dummies®
A Wiley Brand

U.S. Constitution For Dummies®, 2nd Edition

Published by: **John Wiley & Sons, Inc.,** 111 River Street, Hoboken, NJ 07030-5774, www.wiley.com

Published simultaneously in Canada

For general information on our other products and services, please contact our Customer Care Department within the U.S. at 877-762-2974, outside the U.S. at 317-572-3993, or fax 317-572-4002. For technical support, please visit https://hub.wiley.com/community/support/dummies.

Wiley publishes in a variety of print and electronic formats and by print-on-demand. Some material included with standard print versions of this book may not be included in e-books or in print-on-demand. If this book refers to media such as a CD or DVD that is not included in the version you purchased, you may download this material at http://booksupport.wiley.com. For more information about Wiley products, visit www.wiley.com.

Library of Congress Control Number: 2018941628

ISBN: 978-1-119-38729-9; ISBN 978-1-119-38736-7 (ebk); ISBN 978-1-119-38748-0 (ebk)

Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1

Contents at a Glance

Introduction 1

Part 1: Getting Started with the U.S. Constitution 5

CHAPTER 1: Identifying the Main Principles and Controversies of the Constitution 7

CHAPTER 2: Probing Underlying Concepts: Big Thinkers, Big Thoughts 17

CHAPTER 3: Untangling Some Confusion and Ambiguities 31

CHAPTER 4: Catching a Bird's-Eye View of the Constitution 43

CHAPTER 5: Changing the Constitution by Amendment and Interpretation 53

Part 2: We the People: How the United States Is Governed 65

CHAPTER 6: Scrutinizing Sovereignty: Who Rules America? 67

CHAPTER 7: Defining Federalism 79

CHAPTER 8: Separation of Powers: Checking and Balancing 89

CHAPTER 9: Doing Business: The Commerce Clause 107

Part 3: Assessing the Three Engines of Government: The President, Congress, and the Judiciary 117

CHAPTER 10: Examining the Role of the President 119

CHAPTER 11: Giving Everyone a Voice: The House of Representatives and the Senate 143

CHAPTER 12: "Saying What the Law Is": The Judicial System 163

CHAPTER 13: You're Fired! Investigating the Impeachment Process 181

Part 4: Guaranteeing Important Rights: The Bill of Rights 195

CHAPTER 14: The First Amendment: Freedom of Religion, Speech, and Assembly 197

CHAPTER 15: The Second Amendment: Bearing Arms. 211

CHAPTER 16: The Third and Fourth Amendments: Protecting Citizens from Government Forces 223

CHAPTER 17: Taking the Fifth — and a Bit of the Fourteenth 239

CHAPTER 18: Regulating Crime and Punishment: The Sixth through Eighth Amendments 257

CHAPTER 19: Analyzing an "Inkblot" and a "Truism": The Ninth and Tenth Amendments 275

Part 5: Addressing Liberties and Modifying the Government: More Amendments 287
CHAPTER 20: States' Rights, Elections, and Slavery: The Eleventh through Thirteenth Amendments 289
CHAPTER 21: The Fourteenth Amendment: Ensuring Equal Protection 303
CHAPTER 22: Starts, Stops, and Clarifications: Amendments since 1870 319

Part 6: The Part of Tens 337
CHAPTER 23: Ten Landmark Constitutional Cases 339
CHAPTER 24: Ten Influential Supreme Court Justices 353
CHAPTER 25: Two Sides of Five Constitutional Conundrums 365

Appendix: Constitution of the United States of America 379

Index 403

Table of Contents

INTRODUCTION 1
About This Book 1
Conventions Used in This Book 2
Icons Used in This Book 2
Beyond the Book 3
Where to Go from Here 3

PART 1: GETTING STARTED WITH THE U.S. CONSTITUTION 5

CHAPTER 1: Identifying the Main Principles and Controversies of the Constitution 7
Defining "Constitution" 8
Knowing When and Why the Constitution Was Created 8
Summarizing the Main Principles of the Constitution 10
Identifying Some Areas of Controversy 13

CHAPTER 2: Probing Underlying Concepts: Big Thinkers, Big Thoughts 17
Building on Magna Carta 18
Respecting the Rule of Law (or the Rule of Lawyers?) 20
Analyzing the Concepts Underlying the Declaration of Independence 21
Invoking the law of nature 24
Securing "unalienable Rights" 24
"Deriving their just powers from the consent of the governed" 26
Establishing a Republic 27
Getting rid of the king 28
Leaving democracy out of the U.S. Constitution 28

CHAPTER 3: Untangling Some Confusion and Ambiguities 31
Listing Some Sources of Confusion 32
Discarding Out-of-Date Ideas? 33
Clarifying Uncertainties 35
Giving Some Important Principles the Silent Treatment 35
Interpreting the Constitution 38
Changing the Constitution 38
Identifying methods of interpretation 39

CHAPTER 4: **Catching a Bird's-Eye View of the Constitution** 43
Presenting the Preamble: "We the People . . ." 44
Article I: Setting Up the Congress 45
Magnifying the commerce power 45
(Mis)interpreting the "necessary and proper" clause 46
Article II: Hailing the Chief 46
Listing presidential powers and duties 48
Identifying the real issues 48
Article III: Understating Judicial Power 49
Article IV: Getting Along with the Neighbors — and Uncle Sam 50
Article V: Changing versus Amending the Constitution 51
Article VI: Fudging Federalism 52
Article VII: Ratifying the Constitution 52

CHAPTER 5: **Changing the Constitution by Amendment and Interpretation** 53
Noting the Four Paths to an Amendment 54
Explaining What Happens in Practice 55
Listing the Amendments 58
Debating the Need for Judge-Made Law 59
Dissenting views to restricting change 59
Maintaining proper amendment procedure 60
Sampling judge-made amendments 61

PART 2: WE THE PEOPLE: HOW THE UNITED STATES IS GOVERNED 65

CHAPTER 6: **Scrutinizing Sovereignty: Who Rules America?** 67
Introducing "We the People" 68
Ordaining and establishing a Constitution 68
Resolving to preserve democracy 69
Defining democracy 71
Testing for democracy today 72
Hailing the Chief 73
Congress: Flexing Its Lawmaking Muscle 74
Giving the States Their Due 75
The High Court: Saying What the Law Is 76
Uncovering Conspiracies 77

CHAPTER 7: **Defining Federalism** 79
Tracing the Origins of U.S. Federalism 79
Analyzing the founding documents 80
Forming "a more perfect Union" 81

Defining sovereignty 82
Can a state secede from the union? 83
Testing State Sovereignty: Some Recent Supreme Court Decisions 84
Foreign Affairs: Looking at the Influence of Treaties 88

CHAPTER 8: **Separation of Powers: Checking and Balancing** 89
No Moonlighting for the President 90
Keeping the Branches Apart 92
Membership 93
Functions 94
Checking and Balancing 97
Keeping each branch in line 97
Considering the judiciary's special position 99
Pondering the legality of executive orders 101
Examples of executive orders 101
Reviewing administrative regulations 103
Trumping the President 103

CHAPTER 9: **Doing Business: The Commerce Clause** 107
How the Commerce Clause Was Born 108
Interpreting the Commerce Clause 108
Hunting Down the Dormant Commerce Clause 109
Looking at double taxation and the Dormant Commerce Clause 109
Passing judgment 110
Tracing the Changing Meaning of the Commerce Clause 111
Protecting freedom of contract 112
Introducing the Four Horsemen and the Three Musketeers 112
Signaling the feds' control of the economy 113
Using the Commerce Clause to advance civil rights 114
Turning back the federal tide? 115
"Appropriating state police powers under the guise of regulating commerce" 115
Taking a step backward 115
Missing an opportunity? 116

PART 3: ASSESSING THE THREE ENGINES OF GOVERNMENT: THE PRESIDENT, CONGRESS, AND THE JUDICIARY 117

CHAPTER 10: **Examining the Role of the President** 119
Being "eligible to the Office of President" 119
Interpreting "natural born Citizen" 120
Looking at the two-term rule 122

Picking a President 123
Examining the modern electoral system 124
Exploding some myths about the Electoral College 125
Canning the President 128
Signing, Vetoing, and Pocketing Legislation 129
Appointing Key Positions 130
Hailing the Chief: The President's Administration 131
Uncovering the secrets of Cabinet secretaries 132
Unmasking the imperial presidency 133
Unlocking the Executive Office of the President 134
Selling the President's legislative program 135
Battling Executive Privilege 137
Making War versus Declaring War 138
Controlling the President through the War Powers Act of 1973 140
Preventing presidential precedents? 141

CHAPTER 11: **Giving Everyone a Voice: The House of Representatives and the Senate** 143
Making the Laws That Govern the Land 144
One function, two houses 144
Keeping the President in the loop 145
Visiting the People's House 146
Representing the U.S. population 146
Respecting the power of the Speaker 146
Controlling the nation's purse strings 151
Deciding disputed presidential elections 152
Impeaching the President and other civil officers 153
Declaring war 153
Getting to Know the Senate 154
Electing a senator 155
Presiding over the Senate 156
Advising and consenting 157
Passing Legislation 157
Tracking a bill's progress 158
Examining congressional committees 160

CHAPTER 12: **"Saying What the Law Is": The Judicial System** 163
Examining the Courts' Function 164
Defining jurisdiction 164
Applying the law 165
Appointments and Elections: Becoming a Judge 165
Judging the election process 166
Considering whether elections taint the judiciary 167

Understanding Judicial Independence without Accountability. 168
Bypassing term limits and salary concerns 169
Grappling with issues the Constitution doesn't address 170
Making the Judiciary Paramount: Judicial Review 171
Understanding the nature of judicial review 172
Tracing the origins of judicial review 173
Noting Jefferson's response to *Marbury v. Madison* 174
Considering alternatives for solving constitutional conflicts 174
Watching the Supreme Court's power seep into politics 175
Casting the Swing Vote 176
Labeling Supreme Court Justices 178
Stare decisis/free exercise of power 178
Judicial activism/judicial restraint 179

CHAPTER 13: **You're Fired! Investigating the Impeachment Process** 181
There's Nothing Peachy about Impeachment 182
"High Crimes and Misdemeanors": What Impeachment Is and Isn't 182
Defining impeachment 183
Can you be impeached for something that isn't a crime at all? 183
Explaining the Impeachment Process 185
Playing grand jury and prosecutor: The role of the House 185
Trying the articles of impeachment: The role of the Senate 186
Understanding the Implications of Impeachment 187
Impeaching isn't the same as convicting 187
Keeping Congress out of the fray 187
Impeaching for poor private conduct 188
Ducking impeachment with a pardon? 189
Tracking Impeachment in Action 190
A look at Johnson, Nixon, and Clinton 190
Judging the judges 192
Removing State Officials from Office 192
Impeaching governors 193
Total recall, or terminating a governor 193

PART 4: GUARANTEEING IMPORTANT RIGHTS: THE BILL OF RIGHTS 195

CHAPTER 14: **The First Amendment: Freedom of Religion, Speech, and Assembly** 197
Considering the Amendment's Wording 198
Prohibiting Congress from taking away rights 198
Applying the amendment to the states 198

Separating Church and State 199
Assuring the Free Exercise of Religion 201
Looking at belief and practice 201
Adopting a strict scrutiny test 202
Guaranteeing Freedom of Expression 203
Denying protection to speech creating a "clear and present danger" 204
Allowing obscenity to be seen? 205
Using and abusing the right to freedom of the press 206
Letting money talk 207
Leaking Classified Information 208
Having Your Cake 209
Protecting the Right to Assemble and Petition 209

CHAPTER 15: **The Second Amendment: Bearing Arms** 211
Debating Interpretation: Individual versus State Rights 212
Breaking Down the Amendment's Clauses 213
Understanding the states' rights interpretation 214
Explaining "the right of the people" 216
Upholding Individual Rights: *D.C. v. Heller* 217
Considering the Continuation of the Debate 219
Clarifying the results 220
Continuing debate 221

CHAPTER 16: **The Third and Fourth Amendments: Protecting Citizens from Government Forces** 223
Keeping the Feds Out of Your House 223
Keeping the Government Off Your Back 226
Prohibiting "unreasonable searches and seizures" 227
Excluding evidence 230
Rewriting the Fourth Amendment 233
Defining "probable cause" 235
Forbidding police fishing expeditions 236
Searching people or premises without a warrant? 237

CHAPTER 17: **Taking the Fifth — and a Bit of the Fourteenth** 239
Invoking the "Great Right" against Self-Incrimination 240
Peeking Behind the Closed Doors of the Grand Jury 241
Deciding whether to indict 242
Victimizing suspects or protecting victims? 243
Avoiding Double Jeopardy 244
Applying the principle 244
Allowing for an end to litigation 244
Jeopardizing "life or limb" 245

Agonizing over Due Process 246
Trying to define the term 246
Triggering due process 247
Wrestling with substantive due process 248
Opening Up the Incorporation Debate 251
Does the Bill of Rights apply to the states? 251
Watching selective incorporation in action 252
Taking Private Property 254
Recognizing eminent domain 254
Losing protection 255

CHAPTER 18: **Regulating Crime and Punishment: The Sixth through Eighth Amendments** 257

Outlining Defendants' Rights in Criminal Prosecutions: The Sixth Amendment 258
Having the same rights in a state and federal trial 259
How speedy is a speedy trial? 259
Appreciating the need for a public trial 260
Guaranteeing trial by jury 261
Being "informed of the nature and cause of the accusation" 263
Confronting adverse witnesses 263
Compelling witnesses to attend 264
Demanding the right to counsel 264
Guaranteeing Jury Trials in Civil Suits: The Seventh Amendment 265
Prohibiting "Cruel and Unusual Punishments": The Eighth Amendment 266
Banning excessive bail 267
Removing excessive fines 268
Barring "cruel and unusual punishments" 268
Debating the death penalty 271

CHAPTER 19: **Analyzing an "Inkblot" and a "Truism": The Ninth and Tenth Amendments** 275

Reading the Constitution: The Ninth Amendment 276
Considering the Tenth Amendment 279
Analyzing the wording 279
Balancing power between federal and state governments 280
Determining the limits of federal power 281
Puzzling over "prohibited" powers 282
Disentangling states' rights from individual rights 284
Giving the Tenth Amendment its due 286

PART 5: ADDRESSING LIBERTIES AND MODIFYING THE GOVERNMENT: MORE AMENDMENTS 287

CHAPTER 20: States' Rights, Elections, and Slavery: The Eleventh through Thirteenth Amendments 289

The Eleventh Amendment: Asserting State Sovereign Immunity? 290
Overruling the Supreme Court 290
Interpreting the Eleventh Amendment 290
Cleaning Up the Framers' Political Mess: The Twelfth Amendment 292
Electing the President: The original rules 292
Understanding politics 1796 style 293
Tying and vying with your running mate: The 1800 election 293
Preventing future chaos 294
Removing the Blot of Slavery: The Thirteenth Amendment 294
Tracking the debate on slavery 295
Sliding into secession 296
Considering the Corwin amendment 297
Graduating from emancipation to abolition 298
Introducing an entirely different thirteenth amendment 299

CHAPTER 21: The Fourteenth Amendment: Ensuring Equal Protection 303

Defining Citizenship 304
Understanding States' Obligations 306
Disentangling state citizenship 307
Analyzing "privileges or immunities" 307
Achieving "Equal Justice Under Law" — Or Not 309
Age discrimination 310
Capital punishment 310
Racial segregation 311
School busing 311
Affirmative action 312
Gerrymandering 314
Disqualifying Confederates from Office 316
Repudiating Confederate Debts 316
Empowering Congress 316

CHAPTER 22: Starts, Stops, and Clarifications: Amendments since 1870 319

Removing Race Qualifications for Voting: The Fifteenth Amendment 320
Letting Uncle Sam Raid Your Piggy Bank: The Sixteenth Amendment 322

Electing the Senate: The Seventeenth Amendment 322
Outlawing Liquor: The Eighteenth Amendment 324
Giving Women the Vote: The Nineteenth Amendment 324
Moving Out of the Horse and Buggy Age: The Twentieth Amendment 325
Repealing Prohibition: The Twenty-First Amendment 326
Taking George Washington's Lead: The Twenty-Second Amendment 327
Enfranchising the Nation's Capital: The Twenty-Third Amendment 328
Banning Tax Barriers to Voting: The Twenty-Fourth Amendment 330
Succeeding to the Presidency: The Twenty-Fifth Amendment 331
Succeeding as President or Acting President? 331
Replacing the Veep 332
Acting as President 333
Lowering the Voting Age: The Twenty-Sixth Amendment 333
Limiting Congressional Pay Raises: The Twenty-Seventh Amendment 334

PART 6: THE PART OF TENS 337

CHAPTER 23: **Ten Landmark Constitutional Cases** 339
Marbury v. Madison (1803) 339
Brown v. Board of Education (1954) 341
Grutter v. Bollinger and *Gratz v. Bollinger* (2003) 342
Kelo v. City of New London (2005) 344
Clinton v. Jones (1997) 345
Roe v. Wade (1973) 345
Citizens United v. Federal Election Commission (FEC) (2010) 346
Obergefell v. Hodges (2015) 348
Glossip v. Gross (2015) 348
Riley v. California (2014) 350

CHAPTER 24: **Ten Influential Supreme Court Justices** 353
John Marshall 354
Oliver Wendell Holmes, Jr. 355
Hugo Black 355
Earl Warren 356
Thurgood Marshall 357
John Paul Stevens 358
Sandra Day O'Connor 359
Antonin Scalia 360
Anthony Kennedy 361
John Roberts 362

CHAPTER 25: **Two Sides of Five Constitutional Conundrums** 365
Is the Constitution Outdated? 366
Should the Electoral College Be Abolished? 367
Does the U.S. Supreme Court Have Too Much Power? 370
Is the United States a Democracy? 373
Does the President Have Too Much Power? 374

APPENDIX: CONSTITUTION OF THE UNITED STATES OF AMERICA 379

INDEX 403

Introduction

Okay, so you bought this book (or you got it as a present, or you borrowed it, or you're browsing through it in a bookstore). Obviously, you have some interest in the U.S. Constitution, but maybe you're afraid the Constitution isn't really that interesting.

Well, you're in luck. Even if you don't find the Constitution itself to be the most riveting read, it's a never-ending source of debates and arguments. And we all know how interesting debates and arguments can be!

About This Book

This book explains the Constitution simply and thoroughly, including all the juicy controversy it evokes. Whether you're a student, a lawyer, or just a concerned citizen, I hope you find it to be both a good read and a great resource.

You don't have to read this book from cover to cover, and you don't have to read the chapters in order. I've written each chapter so it can be understood on its own; if it refers to topics that aren't covered in that chapter, I tell you where to find information about that topic elsewhere in the book. Using the Table of Contents or the Index, feel free to identify topics of the greatest interest to you, and dive in wherever you want. Even if you dive into the middle or end first, I promise I won't let you get lost.

I cover the entire Constitution in this book, but I don't give each article or amendment equal attention. That's because some parts are more important, more difficult to understand, more controversial, or more relevant to modern society than others. If I believe a particular part of the Constitution requires or deserves more explanation than another, I give it lots of real estate in the pages that follow. Parts that are easier to understand or less important to your 21st-century life get less space in the book.

Throughout the book, I offer not just facts but also a variety of opinions about constitutional issues that have created debate for more than 200 years. In some cases, the opinions belong to Supreme Court justices, advocates for or against specific rights, or any number of other sources. In other cases, the opinions are my own — and I alert you to that fact. I may sometimes try to persuade you of the

rightness or wrongness of a certain opinion, but you're welcome to disagree — that's the fun and the privilege of becoming a more informed citizen!

Conventions Used in This Book

Whenever I quote or refer to a specific part of the Constitution, I tell you the name of that part. You'll often see this reference in the form of an *article*, a *section*, and maybe a *clause* — for example, Article I, Section 8, Clause 3. If you turn to the Appendix at the back of the book, where the text of the Constitution is provided, you can see that it's broken into seven articles, some of which are divided into sections. If a section contains more than one paragraph, I refer to each paragraph as a clause. So if you're looking for Clause 3 within Section 8 of Article I, just find the third paragraph in that section.

The amendments to the Constitution appear in the Appendix after the main body of the document (and after the list of people who signed it). It's pretty easy to locate an amendment, as long as you aren't too rusty on Roman numerals.

When you see the term *the Constitution*, it always refers to the U.S. Constitution. Each of the 50 states also has its own constitution, but if I'm referring to one of those, I include the state name (such as *the Virginia Constitution*). Similarly, when I refer to *the Supreme Court*, *the high court*, or just *the Court*, that means the U.S. Supreme Court. If I refer to a state supreme court, I always give the name of the state concerned (such as *the Texas Supreme Court*).

You can't learn about the Constitution without being introduced to some legal, political, and other jargon, but I do my best in this book to ease you into the constitutional vocabulary. If I use a term that I suspect may not be familiar to you, I put that term in italic and provide a definition or explanation nearby.

Icons Used in This Book

Throughout this book, you find small pictures in the margins. These *icons* highlight paragraphs that contain certain types of information. Here's what each icon means:

The Constitution is nothing if not controversial, and this icon highlights paragraphs that explain what all the debate is about. If you want to know why people can't seem to figure out what this document means even after 200-plus years, head toward these icons.

IN MY OPINION

Where there's debate, there are opinions, and I won't pretend not to have some of my own. Where you see this icon, you'll know that I'm offering my perspective on the subject at hand, and I don't necessarily expect you to agree!

REMEMBER

The Remember icon sits beside paragraphs that contain information that's worth committing to memory. Even if you're not studying for an exam on the Constitution, you may want to read these paragraphs twice.

TECHNICAL STUFF

This icon denotes material that may fall into the "too much information" category for some readers. If you like to know lots of details about a topic, the information in these paragraphs may thrill you. If details aren't your thing, feel free to skip these paragraphs altogether.

Beyond the Book

To gain some additional insight into the U.S. Constitution, beyond the written words of this book, head to `www.dummies.com/cheatsheet/usconstitution` for an easily accessible reference guide.

Where to Go from Here

That depends on why you're reading this book. If you're a student who needs help understanding how and why the Constitution was created, what it says, and why it's still so important, I'd suggest that you start at the beginning.

If you picked up this book because you want to understand the debate about a certain issue (such as gun rights), check the Table of Contents or Index and flip to the chapter where that debate is explored. (In the case of gun rights, that'd be Chapter 15.)

If you're planning to start a campaign to impeach a government official who rubs you entirely the wrong way, perhaps Chapter 13 will be your cup of tea.

If you want to very quickly get a sense of why constitutional issues can cause tempers to flare, flip to Chapter 25 and read about just five of the many debates that keep people talking.

The law as stated in this book is correct, to the best of my knowledge, as of Presidents' Day, February 19, 2018.

1 Getting Started with the U.S. Constitution

IN THIS PART . . .

Uncover the ideas on which the Constitution was based.

Find out how the Constitution was originally ratified in 1788.

Gain insight into some of the more confusing aspects of the Constitution.

See how the Constitution has undergone some fundamental changes without formal amendment.

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

REMEMBER

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 Framer.

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."

IN MY OPINION

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:

CONTROVERSY

  - **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

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!

IN THIS CHAPTER

- Recognizing the influence of Magna Carta
- Adhering to the rule of law
- Examining the central ideas that undergird the Declaration of Independence
- Writing republicanism into the founding documents

Chapter 2

Probing Underlying Concepts: Big Thinkers, Big Thoughts

The United States started out as 13 British colonies that overthrew the British yoke — which was no joke at all! The American Revolution and the War of Independence led to the birth of a new nation and a new form of government enshrined in a written constitution — which, with a number of changes, has survived for more than 200 years.

Although the United States was born out of a bitter struggle with Britain, the leading citizens of the new nation — including the Framers of the Constitution (see Chapter 1) — were of British stock. They were educated men steeped in English law and familiar with British political institutions and philosophy.

No wonder, then, that the U.S. Constitution drew on these British sources — but no wonder either that it departed from British traditions in some major ways too, sometimes deliberately and sometimes accidentally.

In this chapter, I discuss some of the British constitutional documents, political writings, and doctrines that were most venerated by the Founders of the United States, including:

- Magna Carta
- Habeas corpus
- The rule of law
- Natural law
- The consent of the governed
- Republicanism

Building on Magna Carta

Magna Carta (Latin for "Great Charter") is a document dating back to the year 1215 containing a number of concessions made by King John of England to his rebellious barons.

What relevance could this kind of document possibly have to the United States nearly eight centuries later? The Founding Fathers used Magna Carta as a justification for the Declaration of Independence and later as a precedent for some features of the U.S. Constitution.

Such is the veneration accorded this document in the United States that in 1957 the American Bar Association erected a memorial to Magna Carta in England. And a 1297 reissue of Magna Carta (sold at auction in 2007 for $21.3 million!) sits in a glass case in the National Archives rotunda in Washington, D.C. — right beside the original texts of the Declaration of Independence and the U.S. Constitution.

If you take the trouble to read Magna Carta, you'll probably find it just about as riveting as a phonebook — even if you speak Latin at home, because that is the language in which Magna Carta is written.

The good bits of Magna Carta are few and far between. Here's the most quoted provision:

> *No free man shall be arrested or imprisoned, or deprived of his rights or property, or outlawed or exiled . . . except by the lawful judgment of his equals or by the law of the land.*

Here are a few examples of ways Magna Carta may have influenced the Founding Fathers, as evidenced in the Declaration of Independence and the U.S. Constitution:


REMEMBER

- **Taxation without representation:** Did Magna Carta prohibit taxation without representation? Clause 12 of the original promised "no scutage or aid shall be imposed on our kingdom, except by the common council of our kingdom." *Scutage* and *aid* were two feudal taxes on knights and barons alone. But did this mean that a tax could be imposed only with the consent of those subject to it? Possibly. The American patriots sure thought so. When in 1765 the British Parliament passed the Stamp Act taxing everything from newspapers to playing cards and dice, the Massachusetts Assembly declared the act "against the Magna Carta and the natural rights of Englishmen, and therefore . . . null and void." I discuss the concept of "the consent of the governed" in connection with the Declaration of Independence later in the chapter.
- **Trial by jury:** Did Magna Carta — in particular the clause quoted earlier in this section — guarantee trial by jury? The clause supposedly guaranteed everyone the right to be tried by their "equals," or fellow citizens. In fact, this right took a lot longer to be established in England — and it has now largely been lost there, except in cases of serious crime. But the right to a jury trial sure is alive and well in the United States and is enshrined in the Sixth and Seventh amendments to the Constitution, which I deal with in Chapter 18.
- **Habeas corpus:** Did Magna Carta guarantee *habeas corpus* — the right to take legal action to end unlawful detention? Not exactly, but Magna Carta was a trailblazer for this later right. The passage from Magna Carta quoted earlier in this section promises that nobody is to be imprisoned except after a proper trial. But this right didn't become available right away. As late as 1628, King Charles I had five knights imprisoned "by his majesty's special commandment." Habeas corpus became a major issue in the ensuing English Revolution, resulting in Charles I's execution. Habeas corpus was eventually incorporated into statute in 1679.

  This important privilege (not a right) is now enshrined in Article I, Section 9 of the U.S. Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Habeas corpus became a hot-button issue in the final year of the Bush Administration with regard to detention in Guantanamo Bay: *Boumediene v. Bush* (2008).

Respecting the Rule of Law (or the Rule of Lawyers?)

The rule of law is commonly regarded as a fundamental principle of the Western world, and of the United States in particular. The phrase *rule of law* sounds impressive. But what exactly does it mean?

At its simplest, the rule of law just means that nobody is above the law. This principle was used as a stick to beat the old absolute monarchs of Europe — like King Louis XIV of France, who famously boasted, "I am the state," or even the weak Louis XVI, who is reported as asserting, "It's legal because I wish it."

The counterblast to such exorbitant claims was put by the English political philosopher James Harrington as "the empire of laws and not of men." John Adams adapted this concept slightly and introduced it into the Massachusetts Constitution of 1780 as "A government of laws and not of men." In its most euphonious form, it became "A government not of men but of laws." This high-sounding ideal was echoed by Chief Justice John Marshall in the leading case of *Marbury v. Madison* (see Chapter 23).

REMEMBER

But how can law rule? Laws are just words on paper. They are therefore subject to interpretation — by courts, judges, and lawyers (who argue their interpretations of laws to the courts and hope that their interpretations will be accepted). An anonymous wag put his finger on this truth and retorted that what the Founding Fathers were really likely to establish was "A government not of laws, but of lawyers."

This throwaway line has proved prophetic, and even some Supreme Court justices have admitted that the meaning of the U.S. Constitution changes in accordance with the changing views of the Court. In the words of Chief Justice Charles Evans Hughes, "We are under a Constitution, but the Constitution is what the judges say it is."

IN MY OPINION

This oft-quoted remark comes from a speech that Hughes gave as governor of New York in 1907, long before becoming a Supreme Court justice. But he was already pompous enough to add, "and the judiciary is the safeguard of our liberty and our property under the Constitution." Susette Kelo, who nearly lost her lovely salmon-pink Victorian cottage because of a particularly unjust decision by the U.S. Supreme Court in 2005, would probably not agree with Hughes's comment! (See my discussion of eminent domain in Chapter 17.)

The principle of the rule of law doesn't figure in the U.S. Constitution in so many words. The closest thing to the rule of law that appears in the Constitution is the Supremacy Clause in Article VI, which reads as follows:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

This clause clearly places federal law above state law, but does it give the U.S. Constitution higher status than the rest of federal law? Article V sure makes it difficult to amend the Constitution, but that in itself doesn't prove that the Constitution trumps all other laws.

Chief Justice John Marshall, in the case of *Marbury v. Madison*, went to great lengths to show that the Constitution has higher status than any other law and that "a law repugnant to the Constitution is void." This was a new judge-made principle and enabled the Supreme Court to arrogate to itself the power of judicial review — which was to become its strongest weapon against the other branches of the federal government. See Chapter 23 for a full discussion of *Marbury v. Madison.*

The power of the Supreme Court to strike down laws found to be unconstitutional is now taken for granted. But was that the intention of the Founding Fathers? Thomas Jefferson objected strongly to the way the Supreme Court "usurped" the right "of exclusively explaining the Constitution," commenting that, "The Constitution on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."

A more accurate prediction about the Constitution would be hard to find!

Analyzing the Concepts Underlying the Declaration of Independence

The American colonists had an ambivalent attitude toward the British Constitution. Their leaders steeped themselves in the traditions of the British Constitution and generally identified with the revolutionary spirit that had led to the execution of one king — Charles I in 1649 — and the expulsion of another — James II in 1689. They regarded themselves as entitled to the same rights as natural-born Englishmen but found themselves treated at best as second-class subjects.

At first they appealed to King George III for redress of their grievances. But when their heartfelt pleas fell on deaf ears, they decided to throw off the British yoke altogether and declare their independence.

But on what basis could they justify this revolutionary step? Although they felt excluded from the British Constitution — because they were denied a voice in the British Parliament — they invoked the principles underlying Britain's embryonic democratic system, most notably the principles of "No taxation without representation" and "Government by consent of the governed."

Thomas Jefferson took just 17 days to construct the case for American independence in the Declaration of Independence, whose rolling prose and unforgettable phrases were based on a blend of traditional British principles with some European ideas. See Figure 2-1 for a look at some who helped construct the Declaration of Independence.

The Declaration of Independence, adopted on July 4, 1776, by the Second Continental Congress, marks the birth of the United States as a new nation — or does it? Upon closer inspection, the Declaration actually announces the birth of not one but 13 new nations — each of the former colonies being a separate nation. See Chapter 7 for more on this aspect of the Declaration.

FIGURE 2-1: An idealized reconstruction of Benjamin Franklin, John Adams, and Thomas Jefferson composing the Declaration of Independence. The Declaration was mainly the work of Jefferson.

Source: Jean Leon Gerome Ferris

But, whether the Declaration announced one birth or a litter of 13, it was a document essentially justifying the throwing off of British colonial rule.

The Founding Fathers were not natural revolutionaries. They were educated, well-to-do men of property and pillars of society who wouldn't normally have been mixed up in violence or war. So, what impelled these solid citizens to become involved in a bloody conflict that lasted six years?


REMEMBER

The slogan that first rallied opposition to Britain was "No taxation without representation." The American colonies had elected legislatures, but the British Parliament could override these colonial legislatures and pass laws without consulting them. The Stamp Act of 1765 was an example of this: It slapped a tax on everything from newspapers to playing cards and dice — without any consultation with the colonists. The high-handedness of this action rankled the colonists.

Did the colonists have a legal right to consent to decisions that affected them? Not under the British Constitution as understood at the time. So the colonists had to look elsewhere.

England had itself had a revolution — or two revolutions, to be precise — in the 17th century. The colonists naturally found themselves drawn to the rhetoric of those revolutionaries, who had relied a good deal on Magna Carta, to which they gave a very broad interpretation.

But Magna Carta wasn't enough on its own to justify throwing off the British colonial yoke. Magna Carta belonged to a bygone feudal age. Most of the rights contained in Magna Carta were concessions made by King John to the barons and didn't apply to ordinary people. During the English revolutions of the 17th century, the opponents of the Crown glamorized and reinterpreted Magna Carta in ways that were not always very convincing. The American Founders adopted the same expansive approach to Magna Carta, but they also used the following concepts that are reflected in the Declaration of Independence:

- Natural law
- "[U]nalienable Rights"
- Consent of the governed
- Republicanism

Invoking the law of nature

The Declaration of Independence opens with a claim on behalf of the American "people" to "the separate and equal station to which the Laws of Nature and of Nature's God entitle them."

The concept of the law of nature (or natural law) goes back to ancient Greece and Rome, and it was commonly equated with the law of God (or divine law) and also with the law of nations.


REMEMBER

Natural law theory said that man-made law — or *positive law* — was valid only if it conformed to the moral standards laid down by natural law, which was rational, universal, unchanging, and everlasting. The only problem with natural law was that there was no agreement about its content, as it was unwritten and existed only in the minds of its adherents. For example, was slavery in accordance with natural law? Some natural law advocates said yes, others no.

The Declaration of Independence claimed that the American states were entitled to independence from Britain on the basis of the supposed natural law principle that each nation, or "people," has the right to national self-determination. That supposed principle formed no part of the British Constitution — and was not even recognized in international law (with major modifications) until the 20th century.

Securing "unalienable Rights"

Natural law was popular among educated Americans in the late 18th century. But the problem with natural law was that those who supported it could disagree violently about its content. So, although the Founders relied on natural law, it provided a pretty shaky foundation for American independence. The Declaration of Independence is on firmer ground when it declares that it's the people's right — and even their duty — to overthrow a despotic government and to replace it with a government that will protect their "unalienable Rights."

This assertion is proclaimed in ringing tones:

> *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.*

These are just about the most sacred words of any American founding documents, but we need to delve just a little beneath their surface. Let's take a look at some of these rolling phrases:

- **We hold these truths to be self-evident:** This is an admission that these "truths" can't be proved.
- **All men are created equal:** How could this statement be reconciled with slavery? Thomas Jefferson himself, the author of the Declaration of Independence, was a slave owner, as were many other Founding Fathers. Similar wording in the Massachusetts Constitution of 1780 led to a legal challenge to slavery in the state courts, which effectively ended slavery in that state. But slavery was legally abolished throughout the nation only with the ratification of the Thirteenth Amendment in 1865 (see Chapter 20).


CONTROVERSY

- **Creator:** Does the appearance of this word — and the appeal "to the Supreme Judge of the world" later on in the Declaration of Independence — mean that the United States is based on acceptance of religious belief? The last verse of the U.S. national anthem, "The Star-Spangled Banner," contains the words "And this be our motto: 'In God is our trust'." The motto "In God We Trust" has appeared on the penny since 1909, and since 1956 it has been the official national motto of the United States. But is this public display of religious belief in accordance with the First Amendment? I discuss this important subject in Chapter 14.
- **Unalienable Rights:** The word *unalienable* — in modern English, *inalienable* — refers to something that can't be taken away, or even given away. Inalienable rights are therefore fundamental rights that automatically belong to every human being. They can be seen as God-given rights or as rights conferred by natural law — similar therefore to what are commonly labeled *natural rights.* Not everybody believes that such rights actually exist. The British philosopher Jeremy Bentham famously declared, "The idea of rights is nonsense and the idea of natural rights is nonsense upon stilts."
- **Life, Liberty and the pursuit of Happiness:** This phrase is a variant on the phrase "lives, liberty, and property" that appeared in the Articles of Association of the First Continental Congress in 1774. *The pursuit of Happiness* is broader than *property* and harder to pin down. In the case of *Loving v. Virginia,* decided in 1967, the U.S. Supreme Court struck down a Virginia statute outlawing interracial marriage, on the ground that "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

  Even the term *Liberty* is hard to define. In *Meyer v. Nebraska,* the U.S. Supreme Court decided in 1923 that a Nebraska law banning the use of a foreign language as the medium of instruction to kids in grade school was unconstitutional and a denial of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Justice Anthony Kennedy commented in 2000 that, had *Meyer*'s case been decided more recently, it probably would have been based not on the Fourteenth Amendment but rather on the First Amendment's protection of freedom of speech, belief, and religion.

"Deriving their just powers from the consent of the governed"

The Declaration of Independence goes on like this:

> *[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.*

In other words:


REMEMBER

- The purpose of government is to safeguard the rights of the people.
- The only legitimate type of government is one based on popular consent.

What exactly is meant by "consent of the governed"? By putting these words into the Declaration of Independence, Thomas Jefferson gave early notice that the government of the new United States was to be based on consent. New state constitutions soon followed suit, with elected governors and legislatures. And the government of the United States itself was designed on the same pattern, although it was at first confined, under the Articles of Confederation, to a Congress made up of delegates appointed by the state legislatures. (I discuss the Articles of Confederation later in this chapter.)

But how genuine was the claim that the governments set up by the American patriots did, indeed, govern by consent of the governed? It doesn't take much scrutiny to see that the American Revolution was not a democratic revolution. Instead, it was the overthrow of a colonial power by a wealthy elite, who then naturally stepped into the shoes of their former colonial masters.

In fact, the Framers never claimed to be democrats, and the word *democracy* doesn't appear anywhere in the U.S. Constitution (see Chapter 1). In establishment circles in the American colonies — as in England — *democracy* was a dirty word:

- John Adams, the future president, attacked the proposals of the radical Thomas Paine as "so democratical, without any restraint or even an attempt at equilibrium or counterpoise, that it must produce confusion and every evil work."
- James Madison, often described as "Father of the Constitution" and also a future president, was no fan of democracy either. Indeed, he attacked it in even stronger terms than the more conservative Adams. Here's what Madison said about democracy:

» *Democracy is the most vile form of government . . . democracies have ever been spectacles of turbulence and contention: have ever been found incompatible with personal security or the rights of property: and have in general been as short in their lives as they have been violent in their deaths.*

The Founders just didn't trust the ordinary people and deliberately kept them at arm's length, as can be seen from the way they drafted the Articles of Confederation and then the U.S. Constitution. Keep reading to see what I mean.

Establishing a Republic

The Founding Fathers weren't democrats, so what were they? The concept that they embraced was *republicanism.* John Adams — the same John Adams who attacked democracy — waxed lyrical in his praise of republicanism. Here's how Adams defined it:

> *A government, in which all men, rich and poor, magistrates and subjects, officers and people, masters and servants, the first citizen and the last, are equally subject to the laws.*

As you start reading this definition, you get the impression that it's going to be egalitarian — based on the equality of all people. But the last phrase gives the game away. Republicanism, according to this definition, isn't about any power that the people *have* but about a power that they are *under.* In a republic, says Adams, everybody is equally under the law.

This definition of republicanism ties in with Adams's better-known statement of the goal aimed at by the newly independent states. As I note earlier in the chapter, this objective was so fundamental to Adams that he incorporated it into the Massachusetts state constitution: "A government of laws and not of men."


REMEMBER

Adams's ideal was not one of people power at all. Rather, his ideal was one in which the people were subservient to laws made by an elite group (of which he was a prominent member) — with the last word on the interpretation of those laws going to judges drawn from the same elite group.

Democracy doesn't figure in the U.S. Constitution at all — but republicanism sure does. Article IV, Section 4 says:

> *The United States shall guarantee to every State in this Union a Republican Form of Government.*