

## CHAPTER 1

### The Basics: Each Branch Has a Job Description—and Two Bosses

I talk to people about the Constitution a lot. What strikes me is that everyone knows they have rights. They know there is something called the Constitution that contains those rights. They know that the Constitution says how people get into office, and that it has some rules about what the president, members of Congress, and other officials can and can't do. But when an issue of constitutional law comes up on the news—such as whether the president can pardon himself, or whether he can drop stealth bombs somewhere without Congress first declaring war, or whether only Congress can decide to separate children from their mothers at the US border—the first question that pops up is, *Is that legal under the Constitution?*

This chapter gets out a few basic ideas about how to approach questions of constitutional law—ideas that are explored more deeply in later chapters. The chapter divides constitutional law into two axes and suggests that the first thing you do in thinking about a constitutional law question is to decide which camp it falls into: a rights-based constitutional law issue or a structural constitutional law issue. This chapter then lays out a few things about both axes.

Second, it introduces the concept of plain-language reading. I tell my first-year law students that they will be learning *how to read*. “Huh? We’ve known how to read since we were six!” Sure, that’s true, in the sense that

students come to law school knowing cognitively how to translate black-and-white marks on a page into words. But what I mean by *read* is different. It requires you to isolate phrases, then individual words, and then figure out as many interpretations of those words as possible. Once you have the various options on the table, you can start to prioritize the options and choose which is best—or at least how to argue for one over the other on behalf of a client. This is a *skill*, and one that is becoming increasingly rare in a world of information overload, texts, tweets, and sound bites.

Third, this chapter introduces a handful of core constitutional ideas that operate as guideposts for deciding which interpretations of important words are the best ones. Those concepts include the separation of powers, checks and balances, and the truism that the respective powers of government overlap and blur.

Fourth, this chapter explains in commonsense terms how the government gets its power in the first place—that it comes from “We the People,” not some piece of paper—and why that matters for our enduring democratic legacy.

One of the two constitutional axes—the one we hear a lot about in the news media and on cable TV shows—is the so-called rights-based Constitution.\* The Constitution gives certain rights to every citizen and to some noncitizens. It’s as if we each walk around with a backpack containing a bundle of rights that we can pull out to defend ourselves if the government does something to us that the Constitution says it is not supposed to do. The possession of a constitutional right isn’t a “goodie” from the government.

\* There is a third axis, which is the separation of the federal government from that of the individual states. The proper demarcation between the balancing of federal and state power is known as federalism, and it is a critical component of ensuring accountability for elected officials. Chapter 9 discusses what the Constitution says about the states.

Say the government tries to take away our property, or mucks around with something we are lawfully trying to do (like speak about religion) because it dislikes a particular political view. We can reach into our respective backpacks and pull out a constitutional right—as if it were a badge—and get the government to stop. We might even use our “rights badges” to get money from the government to compensate us for its violation of those rights. We get these things by going to court and persuading a judge to issue a piece of paper called an order, which directs the government to either do something or stop doing something, or to pay us money damages to make us whole again.

It also happens that the bare knowledge of the threat of a lawsuit may force the government to act a certain way because it doesn’t want to get pinged with a court order saying it violated a right. So, for example, if a person is arrested, the police officer will read him what is known as *Miranda* warnings, explaining that he has the right to remain silent, etcetera. This speech derives from a Supreme Court case holding that the Constitution requires police officers to do that when they arrest people! If an officer doesn’t do it, she won’t go to jail, but she might get in trouble in court—trouble that could ultimately result in her having to pay the person she arrested some money. Or the court just might throw out the arrestee’s conviction later because the officer messed up. That’s a bad outcome for law enforcement: it means a lot of time and effort down the drain, in addition to the fact that a bad guy is back on the streets without having paid his dues for breaking the law. Either way, the threat of a lawsuit to enforce constitutional rights creates an incentive for the police to avoid violating those rights. The existence of rights under the Constitution is accordingly important for purposes of forcing government to do the right thing without being reminded each time.

The Constitution was ratified in 1787, but most provisions governing individual rights were added in 1791. (Others came later.) The list of amendments to the original Constitution (the Bill of Rights) is

where one finds the rights to free speech, assembly, and religion (First Amendment); the right to bear arms (Second Amendment); the right to be free of unreasonable searches and seizures (Fourth Amendment); the due process clauses (I frankly didn't realize there were two due process clauses—in the Fifth and Fourteenth Amendments—until I was out of law school), and so on.

Before we talk more about rights, let me share one basic thing about the law that many people don't really "get." Before anyone can go before a court, they need what is called a cause of action. In order to possibly get relief from a judge, one must prove that a list of particular things occurred that broke a law. For example, there are laws establishing what turns an agreement into a contract that can be enforced in court. Jane must prove that she has a contract with Joe to renovate a kitchen before she can sue Joe for failing to renovate the kitchen after she gave Joe money. There are rules that define what it means to have a contract; let's call those rules laws. If Jane just happened to give Joe money on a generous whim without a contract or other cause of action requiring him to renovate Jane's kitchen in exchange for that money, she can't sue Joe to get the money back. It doesn't matter how "unfair" it is that Joe refuses to give Jane's money back—maybe she was half asleep when she opened her checkbook and confused Joe for her *doppelgänger* grown son. She can complain to Joe, or to her sister, or to her neighbor, but she can't formally complain to a judge. In general, people can't just run to a judge and gripe about anything that bothers them; there has to be a law stating that a certain complaint amounts to something that gives rise to a legitimate legal claim in court. That law can come from a statute or, historically speaking, from a line of prior decisions by courts.

Somewhat amazingly, the Constitution is *not* one of those laws that uniformly gives citizens a cause of action to sue if their rights are violated. A person cannot walk into court and wave around the Consti-

tuition whenever the government does something that might offend it. Only some—not all—of the Bill of Rights can be enforced in a court. If a person is upset with a federal official—say, an FBI agent who raided that person's office and took his laptop—that person would have to look to Supreme Court cases to see if he can use the Constitution to get money from the government. The Supreme Court created causes of action against federal officials in a series of decisions resolving individual cases. The ability to sue a federal official for violating a constitutional right is known as a *Bivens* action, named after the first case in which the Supreme Court held that an individual could sue federal officers for violating Fourth Amendment rights.<sup>2</sup>

However, if the raid was conducted by state or local officials—say, the county sheriff or a city police officer—*Bivens* would not apply. To sue a state or local official, the person whose office was raided would use a statute passed by Congress.<sup>3</sup> A statute is a separate source of law (remember the others, so far, are the Constitution or decisions by courts, known as case law) that, in this instance, contains a law allowing people to file lawsuits to enforce their individual constitutional rights against state or local officials. Such lawsuits are known as 1983 actions because of the numerical section of the US code that contains that particular law. Prior to the enactment of that law, which was passed in reaction to police tolerance of hateful activities in the South by the Ku Klux Klan, people could not sue in court to obtain relief for state and local officials' violations of their constitutional rights. There was, in other words, no such cause of action.

The next axis of constitutional law concerns itself with the Constitution's structure.

The Supreme Court's decisions regarding the structural Constitution seek to ensure that the federal government is erected and operates

according to the architectural blueprint set forth in the Constitution. That blueprint lays out rules for how the United States government must function. In theory, those rules make the US government impervious to dictators. If a would-be dictator tries to take over, he will inevitably bump up against structural barriers. Ultimately, he will lose his power grab *not* because the American people are smart enough to elect only good people but because *the system* will (or should) inevitably force unethical, power-hungry people out of power one way or another. The structural Constitution assumes that human beings will continue to act like human beings—meaning some will seek more power regardless of the external costs. The structural axis of constitutional law kicks *in* when it needs to kick *out* those people who are trying to violate democratic norms.

Think of an ice-cream shop. The owner might set up the structure of the business to include a general manager, an assistant manager, individual workers, and maybe a contractor or two to maintain the equipment. That structure will include a system of wages, hours, and benefits and criteria for termination (such as stealing) and possibly even for receiving bonuses for a job well done. It might have a security system and a detailed method for counting and depositing money and for keeping track of inventories so that the owner can get ahead of employee theft.

Surrounding that system are various state and local laws governing food safety, permitting, noise ordinances, and whatnot. The people who come and go into the system (the employees) might change, but the system itself will endure—possibly with a few tweaks along the line. The idea is that, if the ice-cream shop is to be sustaining and profitable, there must be a system in place to guard against abuses and to reward those who follow the rules. Those rewards could simply include the ability to keep a job.

Of course, we can assume the shop owner takes care to hire ethical people. But if a dishonest one slips through the cracks, the ice-cream

shop's organizational structure will continue to function to ensure that the operation survives. An employee who is stealing \$100 from the cash register every week might be caught by surveillance cameras, or by another employee who sees him and tattles, or by an outside accounting firm who notices that the books aren't balanced and the shortfall always occurs on that guy's shift. There are many ways that the structure of the organization will catch and do away with troublemakers. The shop owner doesn't have to lose sleep simply hoping he got lucky and took on only ethical people. The organizational structure is critical to ensuring that the shop stays open.

The Constitution has a structure that's like an ice-cream shop but a lot more complicated. The Constitution does not put a single person in charge. It is decidedly not a hierarchy with upper management at the top. The framers instead took the job description of a monarch and broke it into three parts—it gave each part, or branch, a distinct task. It then gave each branch some tools to oversee or check how the other two are doing. It's ingenious, really, as it doesn't have many analogues in everyday life. By comparison, most organizations that we encounter—like corporations, schools, and churches—are designed as pyramid-like hierarchies. Only a few innovative companies have attempted to disseminate power *among* the members of an organization.

In 2014, for example, the online shoe and clothing retailer Zappos implemented a holacracy, getting rid of bosses and titles. Workers instead began tracking strategy decisions and results on an app. The shift was risky and bred confusion because people weren't sure what they were supposed to do. Human resource personnel couldn't ascertain salaries without job titles, and there was nobody higher in the chain of demand to make the hard calls. In 2016, Zappos reportedly experienced huge attrition rates.<sup>4</sup> Let's face it: people tend to like pecking orders.

Although the Constitution does not establish a straight-up hierarchy, its blueprint for government is vital to ensuring that bad apples don't last long. The animating principle behind the Constitution's structure is well-known. It's called the separation of powers. Although the term *separation of powers* is nowhere in the Constitution's text, the idea stems from a rejection of England's King George III and the model of an all-powerful sovereign who can exercise his authority arbitrarily and with virtual impunity. If the government is separated into three branches, the theory goes, no one branch has all the power, and tyranny—which the framers thought was inherent and unavoidable in human nature—can be evaded. Unlike under Zappo's holacracy, there are hierarchies within each branch of government, and everyone at the top of each branch gets a boss: the other two branches. Each branch checks the other two branches' powers, and if those powers have somehow gotten off-kilter, the system operates to rebalance the dynamic so that power is more equally distributed among the three branches.

This parallel notion of checks and balances derives from the separation of powers.

Once again, the term *checks and balances* is not in the Constitution. Yet it functions as a foundational tenet of American democracy. Each branch supervises the other two branches, so everyone's papers get graded, so to speak. No government actor is unaccountable. No more kings.

Another way to think about the separation of powers is to treat the Constitution like a company's employee manual. It gives each branch a job to do. The branches' job descriptions are set forth in one of three articles of the Constitution. Each branch has articulated ways of stopping bad behavior if things get out of sync within the other branches—at least in theory. Following is a chart a colleague shared with me.

By nature of a particular branch's power, the chart refers primarily to the contents of what are known as the vesting clauses of the Consti-

Power	LEGISLATIVE Article I	EXECUTIVE Article II	JUDICIAL Article III
Nature	Make laws	Implement laws	Apply laws; resolve cases and controversies
Body	Congress	President and executive officers	Supreme Court and lower courts
Selection	Elected by state (Senate) or district (House)	Electoral College	Presidential appointment with Senate consent; life tenure and salary protection
Checks	<b>Executive:</b> Veto, pardon power, prosecutorial discretion <b>Judicial:</b> Judicial review	<b>Legislative:</b> Impeachment, veto override, budget control, oversight, statutory limitations <b>Judicial:</b> Judicial review	<b>Legislative:</b> Impeachment, amendment, and jurisdiction <b>Executive:</b> Appointment, removal, pardon power, prosecutorial discretion

tution. To visualize the vesting clauses' function, imagine a sovereign dressed in lavish finery, scepter in hand, "knighting" Congress with the pronouncement "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The sovereign's official secretary might memorialize her words in ink on a roll of parchment under the heading, "Article I, Section 1 of the Constitution."

Now imagine that the sovereign directs under Article II that "[t]he executive Power shall be vested in a President of the United States of America." And finally, she announces that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," a proclamation that winds up in Article III of the Constitution.

Note for a moment that something is conspicuously missing from the vesting clauses' language: a written definition of what each power means. The Constitution does not define the terms *legislative*, *executive*, or *judicial*. This is where the notion of careful reading comes in.

Strange as it sounds, reading the Constitution is a lot like reading poetry. Why? Because poetry requires careful focus on individual words as well as analyses of competing meanings. Consider the following poem by Wallace Stevens. I have bolded the words (including the title) that are particularly important to the point I'm trying to make here.

### The Snow Man

One must have a mind of winter  
 To regard the frost and the boughs  
 Of the pine-trees crusted with snow;  
 And have been cold a long time  
 To behold the junipers shagged with ice,  
 The spruces rough in the distant glitter  
 Of the January sun; and not to think  
 Of any misery in the sound of the wind,  
 In the sound of a few leaves,

Which is the sound of the land  
 Full of the same wind  
 That is blowing in the same bare place

For the listener, who listens in the snow,  
 And, nothing himself, beholds  
 Nothing that is not there and the nothing that is.

What does this poem mean? One interpretation is that a person—"one"—who "regards" or observes nature must do so disinterestedly; the frost and snow on the trees do not reasonably reflect human emotions like misery. A "mind of winter" instead knows that nature is just nature, e.g., a "pine-tree encrusted in snow," "boughs covered in frost," or "junipers shagged with ice." Everything exists in black-or-white terms: A snowman is just a pile of snow. It is not a person, and it doesn't have a soul. The poem's title—"The Snow Man"—refers to wads of snow stacked on top of each other in someone's front yard. Or, shifting the meaning slightly, the snow man could be a crude description of a person who happens to spend a lot of time amid the snow—someone who has "been cold a long time" and is used to it.

Of the poem's words could mean something more abstract, erecting a metaphor for a cold, disinterested person. Someone who is icy and devoid of emotion as he goes through life. For this interpretation, the word *not* is critical. In other words, one would have to be pretty coldhearted—to have "a mind of winter"—to *not* look at the barren landscape, with its sparse leaves, and think of human emotions like "misery." Under this interpretation, the *listener* has an active approach to nature and constantly seeks a deeper meaning in it. The word *misery* activates a very human feeling rather than deactivating it, as the prior interpretation would aim to do.

A related question in reading this poem has to do with the broader takeaway message. On one hand, the poem endorses an approach to life that is like that of the disinterested snow man: that is, taking life at face value for what it is and is not, and not reading into things too much. On the other hand, the poem could be read as saying that people should not live as if freezing and desperate for emotional warmth. We should look for human emotion—even in a barren landscape—and constantly listen for what nature aims to teach us about the art of living. We might even find a third reading—that is, don't sweat the small stuff. Live in a way

that is akin to nature. Focus on the moment. Be mindful, authentic, and honest with every breath.

Let's next consider the notion of context. Imagine that the reader of the poem is a marketing executive seeking to push a client's aromatherapy products. The last interpretive option outlined happens to jive with the message behind today's multibillion-dollar wellness industry. Live in the moment, people! A person looking for this message in her personal or professional life is more likely to find it embedded in the poem. The context in which a reader approaches poetry will deeply affect which reading she adopts as the best one.

We could go on with the various possible meanings of this short poem. Inevitably, whether one reading is better might turn on factors beyond the text itself—such as the reader's personality and experience, the weather, current events, or whether profit margins hang in the balance. The bottom line is that there is no single, correct, enduring answer to the precise meaning of this particular text.

Reading the Constitution works in much the same way. The text contains a handful of clues but nothing definitive or exhaustive. Additionally, context and purpose matters. As with reading a poem, we start with the language itself. We might construe "All legislative Powers" to literally mean *all*—in other words, that Congress has a mandatory lock on the legislative power. Nobody but Congress can exercise it. We might also read the term *legislative* as necessarily having a meaning that is separate and distinct from the other two. In other words, whatever the legislative power is, it does not include the unique powers of the judicial or executive branches, and so forth. They are all mutually exclusive.

But it should come as no surprise by now that the term *legislative* is not defined in the Constitution, and there is no list on the door of the constitutional fridge. A person applying the term's plain meaning might naturally think of *legislative* as meaning lawmaking, and a law as meaning something that governs or limits the behavior of individu-

als or entities. A law against trespass limits my ability to drive a truck through someone's backyard as a shortcut on the way to work. Laws against negligence also constrain such behavior to the extent that tires end up damaging lawns or knocking over personal property such as a bird feeder. The Constitution seems to say that only Congress can do such a thing as make laws for the federal government; neither the courts nor the president can.

Beyond that, someone reading the vesting clause language for the first time and assigning its plain meaning might assume that *judicial* has something to do with judges and trials and disputes among individual parties. We have all seen courtroom dramas or *Judge Judy* on TV, or have participated in jury duty or a real-life lawsuit. We can envision a courtroom with two tables at which each side sits. The sides—called parties—have a dispute. They can't resolve it, so they go to court. The judge has the power—the power of the government, to be precise—to resolve the dispute with something we call a judgment. A judgment is a decision pertaining to those two parties. It doesn't bind anybody else.

Note that in no circumstance does the court—or *can* the court—simply say, "I hereby pronounce a rule for everyone in this courtroom that the hotel owner must pay you money if you had a contract with this particular luxury hotel that remains unpaid." This would smack of lawmaking. Judicial decisions are not legislation; they are generally backward-focused, and they resolve fights about things that happened in the past. Lawmaking is generally forward-focused, and it sets forth rules aimed at managing or restricting conduct that has yet to occur.

Last, let's talk about *executive* power—the power of the president of the United States.

And again, let's do it first from the standpoint of attempting to divine the plain meaning of the words of the Constitution. The term *executive* sounds a lot like the word *execute*, which in turn assumes that there

is some separate body of something that needs executing. A teenager might execute her chores after school. In order to do that, she needs to know what the chores are. With respect to the Constitution, the words *execute* or *executive* do not help in this regard. But Article II does contain a couple of clues. Article II, Section 3 provides that the president “shall take Care that the Laws be faithfully executed.” This language confirms that laws come from somewhere else—let’s assume for now that it is Congress—and the president must (i.e., *shall*) take care to execute them faithfully. He cannot ignore them, at least in theory. (Remember we need a police officer for words to mean more than the parchment they were written on.)

As for Congress, among its many expressed powers (such as the power to establish post offices and the power to declare war), Article I gives it “clean up” authority that, by virtue of the powers it implies, is grander than the legislature’s delineated powers combined. Congress can “make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” This is known as the Necessary and Proper Clause.<sup>5</sup> Congress, therefore, makes the laws that the executive branch must take care to faithfully execute, and the president is at the helm of the executive branch. To revert to the teenager scenario, Mom makes up the list of chores for the teen to execute. Now remember—if the teen fails to do that, Mom had better be prepared to impose a consequence, or the chores will quickly become meaningless and remain undone.

So far, the Constitution’s text appears pretty straightforward regarding the structure of the federal government. Affording each branch an exclusive job description is a logical approach, which is respectful of the framers’ original words and neatly ensures that each of the three major federal players stays in its respective sandbox. Mom makes the laws; the teen executes them. If there is a dispute about the meaning of the

law (does “clean the bathroom” include scrubbing toilets or just wiping down the sink?) perhaps the dispute can be brought to Dad, the arbiter or judge. When Dad resolves the dispute (likely in Mom’s favor—but let’s set aside judicial bias for now), the entire family respects and adheres to that judgment, or rule of law. If the teenager refuses, then the ante is upped—maybe her phone goes away for a week—until she is willing to adopt the family’s norm of adhering to parental decision-making. From the standpoint of the US Constitution’s separation of powers, however, things rapidly get tricky.

Fast-forward from 1791—where we last left off—to 2019. A drive through downtown Washington, DC, takes tourists past numerous national monuments and the many structures that house the Smithsonian Institution; along the Potomac River; past the Capitol, where Congress does its work; by the White House; and alongside a number of courthouses, including the United States Supreme Court. In less than an hour, the tour touches down on all three points in the system of separated powers. Many of these places are along Independence or Constitution Avenues (two key thoroughfares in downtown Washington, DC), which also have many gray marble buildings housing federal agencies, such as the Department of Justice (DOJ) and the Department of the Treasury. (Keep in mind that federal agencies with the word *department* in their names are each headed by a secretary who is appointed by the president and confirmed by the Senate. Taken together, the secretaries form the president’s cabinet.)

As a matter of common sense, it is reasonable to assume that the existence of these buildings must mean that the agencies’ collective job is to help the president take care that the laws are faithfully executed and otherwise effectuate his *executive* authority under Article II. Like the legislative authority, the executive power under the Constitution has a handful of components that are expressly stated, such as the power to veto legislation or command the armed forces, but otherwise undefined.



Generally speaking, if we read the president's job description, it is fair to assume that everyone who works for him is confined to executive and take-care duties, right?

Wrong. Federal agencies in fact dip their toes into each of the three constitutional sandboxes—they execute laws, to be sure, but they also make them and adjudicate them. A bit of history helps explain why. With the stock market crash of the 1920s, President Franklin Delano Roosevelt decided that the economy was massively underregulated. The idea was that if the government played a greater role in managing the economy by passing rules of the road for banks and other players in financial markets, future fiscal catastrophes and consequential mass suffering could be avoided. Aided by a compliant Congress, an alphabet soup of federal agencies was born in the 1930s.<sup>6</sup>

Federal agencies have thus been around for nearly a century, and they are here to stay—which presents a problem for someone who wants to stick to the plain language of the Constitution. If the vesting clauses mean what they say, agencies that make laws (Congress's job) and adjudicate disputes (judges' job) are unconstitutional from the point of view of the Constitution's architectural blueprint. Put another way, if agencies are located within the umbrella of the executive branch (since they are headed by individuals hired and largely fired by the president), but exercise powers that exclusively belong to the other branches, then their activities violate the basic structure of the Constitution every working day of the week.

In these circumstances, under the system of separated powers and its implied checks and balances, it would be up to the other two branches to tamp down what appears to be a power grab by the executive branch. How the other branches do this is a question that sends us back to the handy chart provided on page 41.

By this point, we have walked through the first three topics of this chapter: the two axes of constitutional law (rights-based constitutional law

versus structural constitutional law); how lawyers must learn to "read" ambiguous language; and how constitutional law is guided by foundational concepts that include the separation of powers, the system of checks and balances, and the blurring of powers within a branch (despite a constitutional job description that is much narrower). The chapter's final task is to explain what the power of the US government really means. For this, we must dabble a bit in theory.

Here's a question of everyday life that you may not yet have pondered: Why do we even bother to pay attention to what the government says we can and cannot do? The simple answer is that we don't want to get in trouble. Every driver has gazed in a rearview mirror to see a cop car with flashing lights. An irritating *blip-blip* follows—an order to pull over and produce a license and automobile registration to check. Most of us go along with this scenario, even though it's pretty stressful, it delays plans, and it may trigger a fine or points on a driver's license. We cooperate because a police officer has powers that ordinary people do not, i.e., the power to make arrests and put people in jail. Which nobody wants to experience.

Note, however, that this system is very different from one in which a subject fear of government brutality governs individual behavior. As Americans, we generally do not fear that the government will arbitrarily throw us in jail based on our political views or the company we keep. We are a society in which "the rule of law" governs. What that means is that we as a society have agreed on a series of rules of conduct. If we comply with those rules, we can stay out of trouble. If we don't, we agree that the government can take steps to hold us accountable.

What is important to keep in mind in this regard is that we generally trust the legitimacy of government. Legitimacy is an important concept here. We have all had bosses or teachers or family members whom we respect; we go along with their way of doing things because it matters to us if they are displeased. On the flipside, we have all had people in our

lives whom we do not respect—the professor or boss or colleague who lays down a rule that is immediately shrugged off. “That guy is a total joke,” we say.

There are numerous reasons why we might respect one person in a position of authority but ignore another. We respect those who have a legitimate claim to authority—if the lady who shushes you during a ballet performance is the theater manager, you are more likely to pay attention than if she is just a grouchy person in the seat behind you who gets annoyed with your coughing. The same holds true for government. It’s considered legitimate “if the people to whom its orders are directed believe that the structure, procedures, acts, decisions, policies, officials, or leaders of government possess the quality of ‘rightness,’ propriety, or moral goodness—the right, in short, to make binding rules.”<sup>7</sup>

In my theater example, one reason why a patron is more likely to comply with a manager’s shushing than an angry bystander’s is that the manager is employed by the theater. We are guests of the theater, and the manager has been given the authority to enforce the rules of her employer.

Where, by contrast, does the government’s power actually come from in America? In a monarchy, the sovereign’s power theoretically comes from God. If a warrior won a battle against an incumbent monarch on the bloody shores of England, the notion was that God anointed that person to be the king. It’s not unlike the Catholic pope, who is—again in theory—chosen by God to lead the Church on earth. The pope is deeply revered and deferred to because he is handpicked by God.<sup>8</sup>

Our government, by contrast, is secular. We have the so-called separation of church and state—another concept that’s nowhere explicit in the Constitution (but considered implicit in the First Amendment’s text)—which keeps government from interfering with religion and vice versa. In short, God has nothing to do with why police in America can throw you in jail.

We should think pragmatically of the federal Constitution as simply a piece of paper. It isn’t a source of divine power. It is not a *source* of power at all. States constitutions aren’t either. A constitution is just a set of rules for how power must be shared and executed. The power comes from somewhere else. Although we won’t get deep into constitutional theory here, most readers will instinctively know what that somewhere else is. The US government’s power comes from the people. The ability of the people to elect and replace representatives via valid electoral processes is a key reason why Americans treat our government as legitimate. It is arguably why many of us go along with a routine traffic stop without much ado over the authority of police officers to interrupt our daily lives.

This is all precisely as it was meant to be. Having fled a tyrannical monarchy, the framers of the Constitution wanted a government *by the people*—meaning a government that accordingly responds to *the people*. It is the Constitution’s opening salvo: “*We the People* of the United States . . . do ordain and establish this Constitution for the United States of America” (emphasis mine).<sup>9</sup> The concept of “*We the People*” is scattered throughout Supreme Court case law interpreting the Constitution as well.<sup>10</sup> The Declaration of Independence likewise provides that “to secure these rights, Governments are instituted among Men, deriving their just powers *from the consent of the governed*,” and “whenever any Form of Government becomes destructive of these ends, it is the Right of *the People* to alter or abolish it” (emphasis mine).<sup>11</sup>

In Federalist No. 49—one of a series of papers in which three of the Constitution’s framers promoted its ratification—James Madison explained that “the people are the only legitimate fountain of power.”<sup>12</sup> Alexander Hamilton relatedly emphasized in Federalist No. 78 that elected representatives cannot act in a manner that contradicts the Constitution. “To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves.”<sup>13</sup>

Ultimately, however, the founders did not craft a true democracy, whereby citizens would assemble and participate personally in elections. The Constitution's drafters were worried that a direct democracy would allow irrational, ideological, or political factions to effectively take over, with no means of putting things back on track. The founders instead opted for a republic, whereby power is run through a small number of presumably wiser government representatives.<sup>14</sup> As Madison explained in Federalist No. 37, "The genius of republican liberty seems to demand on one side, not only that all power should be derived from the People, but that those intrusted with it should be kept in dependence on the People."<sup>15</sup> The Supreme Court has repeatedly reinforced that our republican government can only exercise delegated powers that are channeled from the people through the Constitution. "To hold otherwise is to overthrow the basis of our constitutional law."<sup>16</sup>

Of course, problems occur when the people's representatives cease to respond to their constituents—if that part of the republic breaks down, so does the system as a whole. It is therefore no cliché to say that the people must hold elected representatives accountable for violations of the Constitution. The idea that the government's power flows from the people means that those who exercise power in the people's name *must* be reciprocally accountable to them. The mechanism for such accountability lies in the Constitution, which reflects a consensus that "We the People" agreed on certain terms, which operate to check against the illegitimate exercise of power.<sup>17</sup>

Importantly, the Constitution binds generations to this way of doing business.

If a generation of Americans comes along and happens to allow elected representatives to flout the Constitution's terms, then the structure for holding government accountable to the people could fall apart for good. It's like a no-jumping-on-the-couch rule for children. If a parent allows

the kid to jump—just this once—then the no-jumping rule ceases to exist. The child knows this instinctively. She knows that the parent is no longer a *legitimate* authoritarian, with respect to the rules of the couch, at least.

Similarly, if the people ignore representatives' failure to uphold the Constitution—or even the norms underlying the Constitution—just this once, future officeholders will understand that they can get away with violating the same rules and norms in the future. This theoretical use-it-or-lose-it concept is immeasurably important. If you don't *use* the rights and rules that the Constitution provides, you will lose them.

If you take nothing else away from this book, I hope you take away an appreciation for how we cannot take the Constitution for granted. It works only insofar as we enforce it—that is, we throw our elected leaders out of office if they ignore the terms of their representation—and that we do this consistently, from generation to generation, so that our children are not left with a replacement that is far inferior.