



4 Constitutions

Although the citizens of a given state may feel that theirs is the only or the best way of doing things, there is nothing natural or God-given about having a president rather than a prime minister, a unitary rather than a federal system, or two legislative assemblies rather than one. In fact, it is probably true to say that every modern democracy (chapter 2) has a unique set of government institutions, and combines them in unique ways. It is certainly true that there is no agreed formula or set of rules that will produce a democracy; each country follows its own special path and makes its own particular arrangements.

The particular configuration of institutions in any given state is defined by its **constitution**. This is the most basic set of laws that establishes the shape and form of the political structure. We start this chapter, therefore, by considering the nature and purpose of constitutions – what they are and why we have them. Constitutions try to create a complex set of **checks and balances** between the different branches of government, so that no one institution or person has too much power. We then introduce the three main branches of government – the executive, legislative and the judiciary – and outline their basic purpose and design. Constitutions, however, are only the beginning, not the end, of the story of comparative politics, so we also discuss the limits of constitutionalism and why it is necessary to go beyond formal laws to understand how democracies work in practice.

Constitution A set of fundamental laws that determines the central institutions and offices, and powers and duties of the state.

Finally, we consider various theories of political institutions and how they help us to understand the structure and operations of the modern state.

The major topics in this chapter are:

- What a constitution is, and why we have them
- The division of powers
- The limits of constitutionalism
- Constitutional and institutional theories.

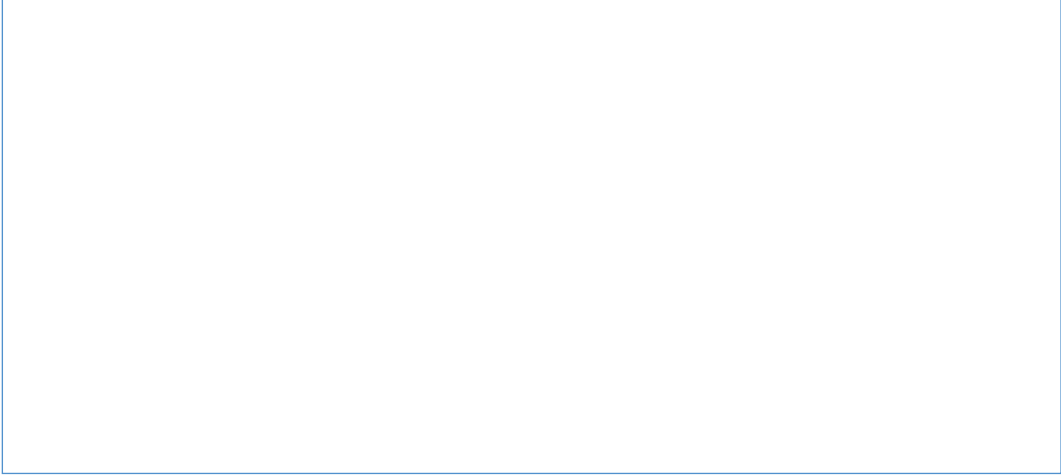
■ **What a constitution is, and why we have them**

In some respects government is like a game; before the players can even take the field to compete, they need to agree on a set of rules that decide how the game is to be played. Constitutions are the rules of the political game – who can vote, who can stand for office, what powers they are to have, the rights and duties of citizens and so on. Without these basic rules politics would degenerate into arbitrariness, brute force, or anarchy. If the rules work well, we tend to take them for granted and concentrate on the day-to-day game of politics, just as we take the rules of our favourite sport for granted and concentrate on today's match. Nonetheless, constitutions are important because they have a profound influence over how the game of politics is played, and therefore over the outcome of the game – who gets what, and when? For this reason, some theories of politics place great importance on constitutions, and on the political institutions that they create and shape.



Because constitutions are so important, they are often the focus of fierce political battles between different groups who want to frame the rules in their own interest. Democratic constitutions therefore try to impose rules that are fair and impartial to all groups and interests in society, so that all can compete on a ‘level playing field’. They try to do this by incorporating a set of seven basic principles:

1. *Rule of law* According to Albert V. Dicey (1835–1922), the nineteenth-century British constitutional theorist, the rule of law underlies the idea of constitutionalism. The rule of law, not the arbitrary rule of powerful individuals, is the hallmark of democracy.



2. *Transfer of power* Democracies are marked by a peaceful transfer of power from one set of leaders or parties to another. Democratic constitutions typically state the conditions for this – how and when government is to be elected, by whom and for how long. The peaceful transfer of power is so important that some political scientists define a ‘democracy’ in these terms – e.g. there have been three successive free and peaceful elections.
3. **Separation of powers** and *checks and balances* According to classical political theory, democracy is best protected by creating separate branches of government with different functions and powers, each checking and balancing the power of the others in a system of checks and balances.

Separation of powers The doctrine that political power should be divided among several bodies or officers of the state as a precaution against too much concentration of power.

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■ The separation of powers

Democratic constitutions attempt to create limited (not autocratic or totalitarian) government that is accountable to, and responsive to the will of, its citizens. According to classical political theory (John Locke (1632–1704), Montesquieu (1689–1755) and the *Federalist Papers* (1777–8) in the USA), this is best achieved by dividing power between the executive, legislative and judicial branches of government, and by creating checks and balances between them so that no one branch can become too powerful.

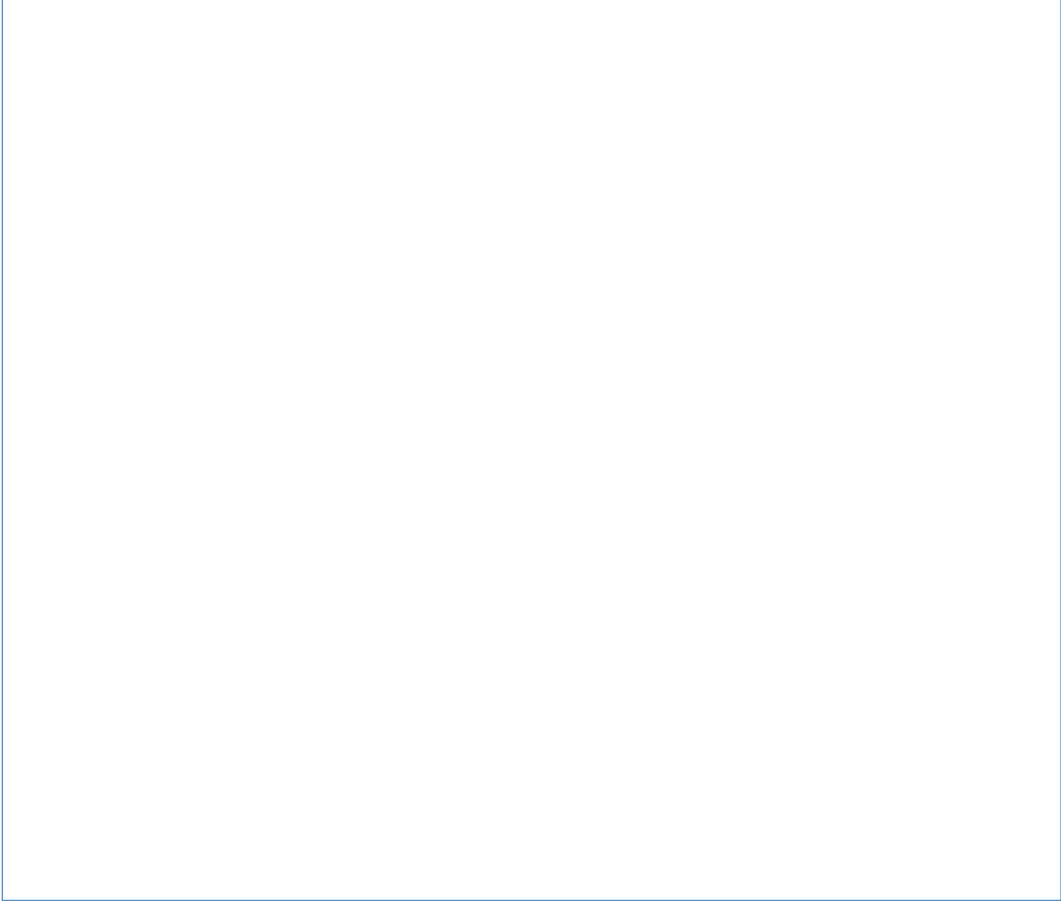
Executives

Most large organisations have a person, or small group, to take final decisions, decide policies and take ultimate responsibility. Businesses have company chairmen and chief executive officers (CEOs). Governments have political executives (from the Latin term ‘to carry out’) who do the same job, and who are usually known as presidents or prime ministers – President Obama of the USA, Prime Minister Aso of Japan, Chancellor Merkel of Germany, Prime Minister Singh of India, President Bachelet of Chile, President Khama of Botswana and so on. The **executive** branch of government, being at the top of the political pyramid, performs three main functions:

Executive The branch of government mainly responsible for initiating government action, making and implementing public policy, and coordinating the activities of the state.

1. *Decision-making* – initiating government action and formulating public policy
2. *Implementation* – executives implement (apply) their policies, which means they must also run the main departments and bureaucracies of state
3. *Coordination* – coordination and integration of the complex affairs of state.

In most modern democracies the executive officer is called a president or prime minister. But, to complicate matters, presidents are not always political executives. For example, both the USA and Germany have presidents, but they do entirely different jobs. In America, the elected president is both the head of government and the head of state, which is an enormously powerful and important position, but the German president is only the head of state and a largely ceremonial figure who is, in some respects, rather like a constitutional monarch (see [fact file 4.2](#)). In what follows we are concerned mainly with the politically powerful presidents who, as both heads of state and government, are significant political figures, not ceremonial ones.



Legislatures

Executives are the decision-making branch of government, and **legislatures** are the law-making branch. The term derives from the Latin words ‘legis’ (law) and ‘latio’ (bringing). Legislatures evolved from the assemblies that medieval monarchs called to agree to

Legislature The branch of government mainly responsible for discussing and passing legislation, and keeping watch on the executive.

some royal action – to levy taxes or wage war. These assemblies started meeting regularly, and eventually came to be elected by all citizens of the state and so they acquired legitimacy as representative parliaments or assemblies (see fact file 4.3). Technically, a legislature is any law-making body, however constituted, but in a democracy the legislature gets its legitimacy from the fact that it is directly and popularly elected by citizens.



Legislatures are known by a variety of names – assemblies, parliaments, houses and chambers – but all amount to much the same thing: assemblies are meetings of elected representatives who meet to discuss public affairs; parliaments are ‘talking shops’; houses and chambers are the places where assemblies and parliaments meet – the House of Commons, the House of Representatives, the Chamber of Deputies.

Legislatures may be formed by one (unicameral) or two (bicameral) houses. If we remember that democratic government is already divided between three main branches, one might well ask why the legislative body should be further divided into two chambers. Indeed, two chambers may only complicate matters:

- Which of the two is to be the stronger and have the last word if they disagree?
- If the first is elected in a democratic fashion, how is the second to be constituted, and if it is also elected won’t it inevitably clash with the first?

For these reasons, there is a great debate about whether unicameralism is better than bicameralism (see [controversy 4.1](#)), but it turns out that most

CONTROVERSY 4.1

<i>One chamber or two?</i>	
Pro-unicameralism	Pro-bicameralism
<ul style="list-style-type: none"> Power is mainly located in one assembly. No confusion of roles, responsibilities, or accountability. 	<ul style="list-style-type: none"> Two chambers provide another set of checks and balances, with powers to delay, criticise, amend, or veto – a constitutional backstop.
<ul style="list-style-type: none"> No overlap or duplication between assemblies. Two assemblies can result in rivalry and even deadlock between the two. 	<ul style="list-style-type: none"> Two forms of representation, usually direct election to the lower chamber, and another form of election (indirect) or appointment to the higher.

democracies are bicameral. This is because it is usually not too difficult to sort out a system that enables two houses to work together effectively. Whatever the abstract and theoretical problems may be, it is generally possible to solve them in a practical way.

Strong and weak bicameralism

Bicameral legislatures come in two forms: *weak* and *strong*. In the strong systems, both assemblies are of equal strength, but since this is a recipe for

conflict – even deadlock – there are rather few cases of successful strong bicameralism. Many of them are found in federal systems (see chapter 6), including Australia, Belgium, Germany, Switzerland and the USA. Most bicameral systems are ‘weak’, which means that one assembly is more powerful than the other. To complicate matters the stronger (first chamber) is usually known as the ‘lower house’, while the weaker (second chamber) is the ‘upper house’, usually called the Senate (after the American Senate). Weak bicameralism is also known as ‘asymmetric bicameralism’ – i.e. the two houses are of unequal power. Typically in weak bicameral systems, the lower house initiates legislation and controls financial matters and the upper house has limited powers to delay and recommend amendments.

Judiciaries

Should politicians be the final judge of how the constitution should be interpreted? The danger is that the government of the day will try to manipulate matters in its own interests. Therefore, constitutions are, in the words of David Hume (1711–76), a set of ‘institutions designed for knaves’. This does not presume that all politicians actually are knaves, but takes full account of the possibility that they might be, and that a constitution needs a safeguard against this danger. Since a constitution is primarily a legal document, it is argued that lawyers should be the final arbiter

of it. Besides, judges (the **judiciary**) are often thought to be the best independent and incorruptible source of experience and wisdom on constitutional matters. This, in turn, requires judicial independence to protect judges from political interference and from the temptations of corruption. For this reason, judges are often appointed for life and paid well. Some

Judiciary The branch of government mainly responsible for the authoritative interpretation and application of law.

Judicial review The binding power of the courts to provide an authoritative interpretation of laws, including constitutional law, and to overturn executive or legislative actions they hold to be illegal or unconstitutional.

countries have created special constitutional courts, but most use their regular courts (see fact file 4.4).

Not all democratic countries accept the principle of **judicial review** of the constitution. Some reject it, for two main reasons:

1. It is difficult to guarantee the political independence of the judges. In many countries, senior judges are appointed by politicians and conservative politicians tend to appoint conservative judges while liberal politicians are more likely to appoint liberal ones. Nor are judges entirely immune from the social pressures of public opinion and the mass media. Most important, judges usually come from conservative social groups and deliver conservative political judgements. In short, it is claimed that judges are not, or cannot be, neutral.
2. In a democracy, so it is argued, the democratically elected legislature should have responsibility for interpreting the constitution, not an appointed and unrepresentative judiciary.

Fact file 4.4

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Judicial activism

The role of the courts in government is tending to widen. The Supreme Court of the USA was not given power of constitutional review in the 1787 constitution, but had successfully claimed it by 1803.

The USA then went through two notable periods of **judicial activism** in the 1930s (when it tried to stop Roosevelt's New Deal legislation) and again in the 1950s (when it promoted racial integration). There is a general tendency now for the courts to take a more active role in government across the democratic world where the judiciary has the right of judicial review. The five main reasons for the expanding role of the courts are:

Judicial activism Involves the courts taking a broad and active view of their role as interpreters of the constitution and reviewers of executive and legislative action.

- An increasing volume of legislation and government actions
- The increasing complexity of government machinery, which means that there is greater chance of conflict between branches and levels of government, especially in federal systems or when new supra-national governments (e.g. the EU) are being developed
- An increasing emphasis on the rule of law and the rights of citizens, and the need to write these down in the legal form, such as in a Charter or Bill of Rights
- A willingness to use the courts (the 'culture of litigation') as a means of resolving conflict
- Possibly, an unwillingness or inability of politicians to deal with difficult political issues; they may be happy to pass on some political 'hot potatoes', especially moral issues, to the courts.

There are problems with judicial activism as there are with judicial review of the constitution. Striking down legislation and choosing between different interpretations of the law can amount to policy making, and sometimes even small differences of legal interpretation of the law can have large policy ramifications. Should judges have this power? And when there is a conflict between elected government and the courts, who should win?

Ombudsman A state official appointed to receive complaints and investigate claims about maladministration.

Unitary and federal states

We shall discuss **federal states** and unitary government at greater length in chapter 6, but it is appropriate to make an

Federal states Federal states combine a central authority with a degree of constitutionally defined autonomy for sub-central, territorial units of government.

important constitutional point here. In federal systems, power is divided not only between the executive, legislative and judicial branches of government, but also between territorial units

of government. These territorial units – states, or regions, or provinces – often have substantial powers and rights that are guaranteed by the constitution. In some ways, therefore, federalism is another form of the division of powers within the state – a geographical division between geographical areas, to complement the political division between the executive, legislative and judicial branches. Moreover, the territorial units of federal systems often repeat the division of powers found at the federal level because each unit has its own executive, legislative and judicial branches of government.

Unitary states In unitary states the central government is the only sovereign body. It does not share constitutional authority with any sub-central units of government.

This distinguishes federal from **unitary states**. In a unitary system, national government ultimately controls all layers of government below it, and can reform, reorganise, or abolish units of local or regional government without any special constitutional restraint. In federal systems, the rights and powers and existence of the federal units are protected by the constitution.