

**PEARSON EDEXCEL** A LEVEL



# US GOVERNMENT AND POLITICS

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## Special features

### Objectives

A summary of the learning objectives for each chapter.

### Synoptic link

Links between concepts that occur in more than one area of the specification.

### Study tip

Revision advice such as common mistakes, pitfalls and key points to remember.

### Discussion point

Interesting questions to be used as the basis for class discussions or homework.

### In focus

Outlines of key events and examples that relate to the course content.

### Debate

The two sides of a controversial question set out to hone evaluation skills.

### Key terms and Useful terms

Concise definitions of key terms (in the specification) and useful terms (for understanding) where they first appear.

### Activity

Short tasks designed to research or utilise data that will help extend your application of material.

### Knowledge check

Short questions to assess comprehension of the subject.

### Summary

A summary at the end of the chapter against which you can check your knowledge.

### References

Books referred to within the chapter.

### Further reading

Books, articles and websites that are relevant to the chapter.

### Practice questions

Revision questions at the end of each chapter.

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# 1

# The US Constitution and federalism

The American **Constitution** was ratified in 1789 and remains the major source of authority for the USA's political system. If one examines the core institutions of the United States:

- the presidency
- Congress
- the Supreme Court
- federalism
- the election process

each shows the continuing influence of the Constitution. For students of the US political system, the resilience of the Constitution is remarkable and requires explanation.

## Objectives

This chapter will inform you about:

- the historical origins of the Constitution
- the nature and key features of the Constitution
- the amendment process and why the Constitution has been amended so infrequently
- the debates concerning the extent to which the USA remains federal today
- the extent of democracy within the Constitution today
- the similarities and differences between the US and UK constitutions
- the extent to which the rational, cultural and structural approaches can be used to account for these similarities and differences.

## Key term

**Constitution** The US Constitution is contained in a single document (hence the term 'codified constitution') that was created just after the country gained independence. The Constitution contains a set of laws that are superior to all other laws, sometimes described as higher laws, and which cannot be amended except by a special procedure. It is for this reason that the Constitution is described as entrenched.

*Scene at the Signing of the Constitution of the United States, a painting by Howard Chandler Christy*



## The historical setting of the Constitution

How did it all start? Students of A Level Politics need to know something of the origins of the country. The 13 original British colonies were strung out along the eastern seaboard of America (see Figure 1.1). All had written charters setting out their form of government and the rights of the colonists. Democracy was limited. Although each colony had a governor, a legislature and a judiciary, each also had a property qualification for voting, from which women and black people were excluded. Yet, despite their shortcomings, the colonies provided a blueprint for what was to come.

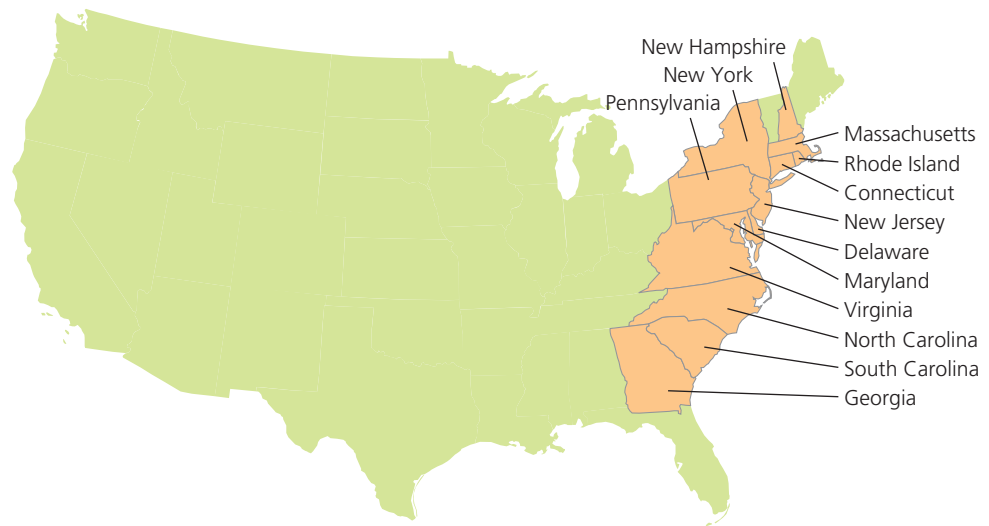


Figure 1.1 The 13 original British colonies

## The War of Independence

In the view of the British government, the American colonies existed principally for the economic benefit of the mother country. The colonists were obliged to pay tax to Britain, but they had no representation in the British Parliament. This led to growing resentment. Bostonian patriot James Otis declared: 'Taxation without representation is tyranny!' As Britain tried to tighten its grip on the colonies' economic affairs in the 1770s, revolution became inevitable. In 1776 the 13 colonies signed the Declaration of Independence, which led to a war and the eventual defeat of the British in 1783.

### Useful terms

**Confederacy** A league or loose collection of independent states in which the national government lacks significant powers.

**Articles of Confederation** The compact between the 13 original states that formed the new nation in 1781. It was replaced by the US Constitution in 1789.

## The origins of the Constitution

### The Confederacy

If the 13 colonies were no longer to be ruled by the British, what would the future hold? The initial vision was that of a **confederacy** — a 'league of friendship' or loose collection of independent states rather than a national government. This was agreed in the **Articles of Confederation** and ratified by the 13 independent states by March 1781. This confederation was a feeble affair with no executive branch, no judiciary and a legislature that was little more than a talking shop. The most significant fact about the government created by the Articles of Confederation was that it was weak. Thus, the ex-colonists had succeeded in gaining their independence but had failed to form a nation, and by this failure they almost turned their victory into defeat.

## The Philadelphia Convention

Many of the leaders of the Revolutionary War, such as George Washington and Alexander Hamilton, believed that a strong central government was essential. The states were squabbling rather than co-operating on issues such as currency and commerce, and the leaders feared the reappearance of the British if they remained divided.

In 1787, 55 delegates representing 12 of the 13 states (Rhode Island refused to send delegates) met for the Philadelphia Convention. The delegates concluded that the Confederacy was structurally flawed and weak, but were fearful that stronger forms of government could lead to the trampling underfoot of citizens' rights and liberties. So began the tentative process of forming an entirely new type of government — one that had a strong centre while still preserving states' rights and individual liberties. The answer was a federal constitution, a bill of rights and an intricate set of checks and balances between the different levels and branches of government. However, these constitutional framers did not speak with one voice and there were disagreements over the two plans that were considered at the convention: the New Jersey Plan and the Virginia Plan.

The impasse was broken with the Connecticut Compromise (see Figure 1.2) and a new constitution was born. The Compromise devised a new form of government — a federal form of government, one in which some political power rests with the national (known as the federal) government, but other, equally important, powers rest with the state government.



Roger Sherman and Oliver Ellsworth drafting the Connecticut Compromise in 1787



### Study tip

It is important that you understand the phrase 'equally important' when discussing federal and state power. A common mistake of students is to assume that federal powers are superior to state powers, when the Constitution is clear that they are of equal importance.

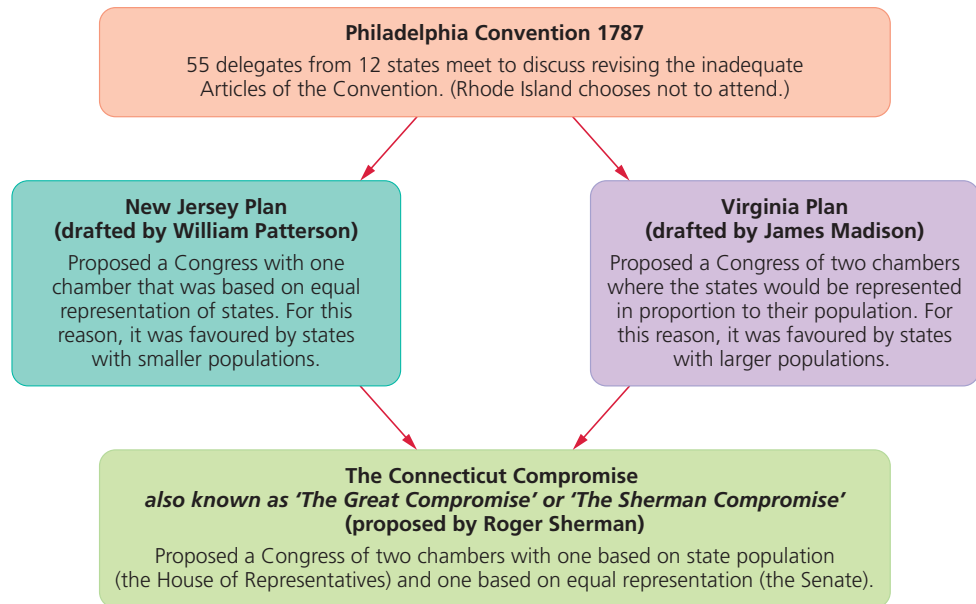


Figure 1.2 The debates at the Philadelphia Convention and the eventual resolution

### Discussion point

Evaluate who compromised more: supporters of the New Jersey Plan or the Virginia Plan?

Three key areas to discuss are:

- 1 What were the original proposals of each side?
- 2 How close was the final plan to each set of proposals?
- 3 How significant do you think the compromises made by each set of supporters were?

### Knowledge check

- 1 When and where was the US Constitution drawn up?

### Key term

**Codification** Process of writing down a constitution in one document.

## The nature of the US Constitution

On 17 September 1787, the task of writing the new Constitution was finished and the constitutional framework — the powers — of the three branches of the federal (i.e. national) government were codified and completed.

### Codification

There are three key features that we need to understand about the nature of the United States Constitution. First, it is a codified constitution. **Codification** is the process of drawing up a systematic and authoritative collection of rules. The US Constitution is the collected and authoritative set of rules of American government and politics. By definition, a codified constitution is also a written constitution, although, as we shall see later, not everything about the ordering of American government and politics is to be found within the Constitution.



## The constitutional framework

The Constitution set out the machinery of government and created three branches of the federal government, to ensure a separation of powers. These three branches are:

- the **legislature** (to make the laws)
- the **executive** (to carry out the laws)
- the **judiciary** (to enforce and interpret the laws)

### The division of powers (Articles I–III)

The first three articles of the Constitution explained how the three branches of the US government (federal/national government) would work and what powers they would have.

**Article I** established Congress as the national legislature, defining its membership, the qualifications and method of election of its members, as well as its powers. Under Article I, Section 8, Congress was given specific powers such as those to ‘coin money’ and ‘declare war’.

**Article II** decided — somewhat surprisingly — on a singular (rather than a plural) executive by vesting all executive power in the hands of ‘a President’. The president would be chosen indirectly by an Electoral College.

**Article III** established the United States Supreme Court (though Congress quickly added trial and appeal courts). Although the role was not explicitly granted, the Court was to be the umpire of the Constitution, implied in the **supremacy clause** of Article VI and the provision in Article III itself that the Court’s judicial power applies to ‘all Cases...arising under this Constitution’. The Court would make this more explicit in its landmark decision of *Marbury v Madison* in 1803 (which we will discuss further on pages 190–91).

These three articles contain what are called the **enumerated (or delegated) powers** granted to the federal government. This means that the federal government does not possess unlimited power, but only the power it is given in the Constitution.

#### Useful term

##### Supremacy clause

The portion of Article VI which states that the Constitution, as well as treaties and federal laws, ‘shall be the supreme law of the Land’.

#### Key term

##### Enumerated powers

Powers delegated to the federal government under the Constitution. Mostly these are enumerated in the first three articles of the Constitution.

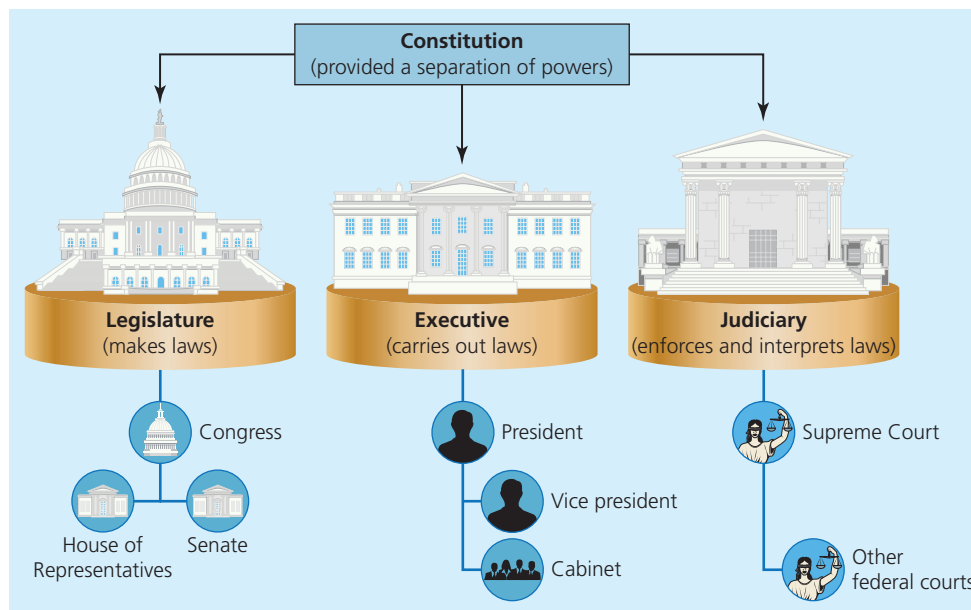


Figure 1.3 The three branches of the US government

### Synoptic link

The US Constitution was explicitly designed by the Founding Fathers. By contrast, the UK Constitution has gradually evolved over centuries. In the UK, all sovereignty lies with Parliament, which makes it much easier to change and develop the Constitution by a simple Act of Parliament. In the USA, the constitutional amendment process was made deliberately difficult so that the Constitution could not be changed easily or on a whim. We will look at the similarities and differences between the US and UK constitutions on pages 35–44.

### Discussion point

Evaluate the reasons why the Founding Fathers separated the three branches of the US government.

Three key areas to discuss are:

- 1 What were the historical events that shaped the rationale for creating three branches?
- 2 What advantages did this separation provide?
- 3 What might the alternatives have been?

## Vagueness of the Constitution

The Constitution is a blend of specificity and vagueness:

- The vagueness allowed delegates to compromise at the Philadelphia Convention.
- The vagueness is an advantage as it has allowed the Constitution to evolve without formal amendment.
- However, as we shall discuss further in Chapter 4, the lack of clarity has also led to significant conflict and disputes over what should be classed as constitutional.

Our discussion of the US Constitution so far has focused on the enumerated powers, but not everything in the Constitution is quite so cut and dried. There are also *implied powers* — powers of the federal government that the Constitution does not explicitly mention, but which are reasonably implied by the enumerated powers. However, the lack of clarity has meant that there have been numerous disagreements over aspects of the Constitution. The absence of comment on slavery in the original document sowed the seeds of division for the American Civil War in the 1860s. Slavery would eventually be banned under the Thirteenth Amendment (1865).

Many of the implied powers are deduced from the ‘necessary and proper clause’, the final clause of Article I, Section 8, which empowers Congress to make all laws ‘necessary and proper’ to carry out the federal government’s duties. This is also sometimes called the ‘elastic clause’ as it allows the powers of the federal government to be stretched beyond the enumerated powers. The elastic clause has been a cause of controversy where it has been used to expand the power of the federal government. An important early example of the elastic clause in action was when the Supreme Court ruled, in *McCulloch v Maryland* (1819), that Congress had the power to create a national bank, despite the power of creating a bank not being an enumerated power of Congress under the Constitution.

The power of judicial review is another implied power. This is where the Supreme Court can declare the following unconstitutional:

- Acts of Congress
- actions of the executive
- Acts or actions of state governments

This power of the Supreme Court is not enumerated in the Constitution but was ‘found’ in the 1803 case of *Marbury v Madison*. This was the first time that the Supreme Court had declared a state law unconstitutional (see Chapter 4 for more details).

### Synoptic link

*Marbury v Madison* (1803) is a crucial case because it was the first judicial review of a federal law, and in the ruling the Supreme Court ‘discovered’ its ability to be arbiter of the Constitution. In practical terms this means that the Supreme Court decides what is or is not constitutional, which means that it can veto an Act of Congress, an executive order from a president, or a local or state law.

**Table 1.1** Some important enumerated and implied powers

	Enumerated powers	Implied powers
<b>Congress</b>	<b>Legislation</b> Exclusive powers to legislate for the country Specific powers held by House of Representatives and the Senate (see Chapter 2 for more details) <b>Economic</b> Tax and duty collection Borrowing money on behalf of US government Establishing currency and coin Setting weights and measures Establishing Post Offices Regulation of commerce: nationally and internationally <b>Defence</b> Declaration of war Maintenance of army and navy Organisation and training of militia <b>Judicial/constitutional</b> Amendment of the Constitution (shared with states) Establishing courts that are subordinate to Supreme Court	<b>Economic</b> Interstate Commerce Clause <b>Economic/Defence</b> Congress was also given the power to ‘provide for the common defence and general welfare of the United States’. This implied that Congress had the power to levy and collect taxes to provide for the defence of the USA. <b>Defence</b> Power to draft citizens into the armed forces may be implied from Congress’s enumerated powers to raise an army and navy.
<b>President</b>	<b>Executive</b> Head of the executive branch Nominates cabinet members, ambassadors and judges Grants pardons <b>Defence</b> Commander-in-chief of the army and navy <b>Legislative</b> Proposes measures to Congress Vetoes legislation	<b>Defence</b> Commander-in-chief of the United States Air Force (as no air force existed at the time, it was not included)
<b>Judiciary</b>	To rule on cases arising under the Constitution	<b>Judicial review</b> To declare Acts of Congress or actions of the executive (or Acts or actions of state governments) unconstitutional

### Activity

Create your own diagram to show how each branch of government is checked and balanced by the other branches.

### Study tip

Remember that it is acceptable to use the term 'House' (with a capital H) when referring to the House of Representatives.

### Useful terms

#### **Reserved powers**

Powers not delegated to the federal government, or prohibited by it to the states, are set aside for the states and the people.

#### **Concurrent powers**

Powers possessed by both the federal and state governments.

### Key term

**Entrenchment** The application of extra, legal, safeguards to a constitutional provision to make it more difficult to amend or abolish it.

## Reserved powers

We have seen that the Constitution delegated certain powers to the federal government alone. However, the Constitution also includes **reserved powers** — powers that are reserved to the states alone or to the people.

This provision is held in the Tenth Amendment, which was added to the original Constitution in 1791:

*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.*

This reiterates that the federal government is a government of limited and enumerated powers, and that if powers are not delegated specifically to the federal government, they fall to the individual states themselves or to the people.

## Concurrent powers

**Concurrent powers** of the Constitution are those powers shared by the federal and state governments, such as collecting taxes, building roads and maintaining courts.

Alongside the specific granting of powers there is the supremacy clause of Article VI, mentioned earlier. This enshrines into the Constitution a key feature of US government which asserts the supremacy of national law. In this clause, the Constitution provides that the laws passed by the federal government under its constitutional powers are the supreme laws of the land. Therefore, any legitimate national law automatically supersedes any conflicting state law.

## Entrenchment

So far, we have been introduced to two important features of the Constitution — codification and its blend of specificity and vagueness. Its third important feature is **entrenchment**, which leads us into a consideration of the processes required for amending (protecting) the Constitution.

Entrenchment means that the US Constitution is difficult to amend because the document is protected by law — specifically **Article V** — which outlines the amendment process. Amending the Constitution is (as we shall explore further in the next section) a complicated process requiring supermajorities at both congressional and state level. Entrenchment ensured that it was possible for the US Constitution to be changed in response to emerging developments but that the process was sufficiently robust to prevent the Constitution being changed frequently on the whim of fashion and circumstance. In this regard the framers of the Constitution have been successful — there have been only 27 amendments (see pages 360–66). The first ten of these form the Bill of Rights and were ratified in 1791.



## In focus

### The nature of the Constitution

- 1 It is a codified constitution.
- 2 The constitutional framework (powers) of the US branches of government is a blend of specificity and vagueness.
- 3 Its provisions are entrenched.

## The amendment process

The Founding Fathers, while realising the likely need to amend the Constitution, wanted to make doing so a difficult process. Therefore, they created a two-stage process requiring supermajorities of more than 50%, such as a two-thirds or three-quarters majority.

- The process is laid out in **Article V**.
- Stage 1 is the proposal and stage 2 is the ratification (the signing and agreement of the amendment).
- Constitutional amendments can be proposed either by Congress or by a national constitutional convention called by Congress at the request of two-thirds of the state legislatures.
- All constitutional amendments thus far have been proposed by Congress.
- No national constitutional convention has ever been called, although in 1992, 32 state legislatures had petitioned Congress for a convention to propose a balanced budget amendment — just two states short of the required two-thirds.

Once an amendment has been successfully proposed, it is sent to the states for ratification. An amendment can be ratified either by three-quarters of the state legislatures or by state constitutional conventions in three-quarters of the states. Of the 27 amendments added to the Constitution, only one has been ratified by state constitutional conventions — the Twenty-First Amendment, which repealed the Eighteenth Amendment and thus ended the prohibition of alcohol. Of the 33 amendments passed to them for ratification by Congress, the states have ratified 27. Thus, once an amendment has been successfully proposed by Congress, it stands a good chance of finding its way into the Constitution.

The need for two-thirds majorities in both houses of Congress to propose a constitutional amendment plus the need for ratification by three-quarters of the state legislatures is such a high hurdle that no significant amendment has been successfully proposed and ratified since 1992.

### The Bill of Rights and later amendments

Of the 27 amendments to the Constitution, the first ten were proposed together by Congress in September 1789 and were ratified by three-quarters of the states by 1791. Collectively they are known as the Bill of Rights.

Many states had been reluctant to sign up to the new federal Constitution with its potentially centralised government. The Bill of Rights was in part designed to alleviate such concerns by explicitly protecting American citizens from a powerful centralised government.

## In focus

### Selected amendments to the Constitution

#### Amendments 1–10: the Bill of Rights (1791)

First: Freedom of religion, speech, the press, and assembly

Second: Right to keep and bear arms

Third: No quartering of troops in private homes

Fourth: Unreasonable searches and seizures prohibited

Fifth: Rights of accused persons

Sixth: Rights of trial

Seventh: Common-law suits

Eighth: Excessive bail, and cruel and unusual punishments prohibited

Ninth: Unenumerated rights protected

Tenth: Undelegated powers reserved to the states or to the people



Celebration of the Fifteenth Amendment, giving the right to vote to formerly enslaved people in 1870

#### Other important amendments

Twelfth (1804): revised the process for electing the president and vice president

Thirteenth to Fifteenth (1865–70): proposed and ratified immediately after the Civil War to end slavery and guarantee civil rights

Sixteenth (1913): allowed the federal government to impose income tax

Seventeenth (1913): made the Senate an elected house

Nineteenth (1920): gave women the right to vote.

Twenty-Second (1951): limited the president to a maximum of two terms in office.

Twenty-Fifth (1967): dealt with issue of presidential disability and succession, following the assassination of President Kennedy in 1963.

Twenty-Sixth (1971): lowered the voting age to 18.

## Discussion point

Evaluate which are the five most important amendments to the US Constitution.

Three key areas to discuss are:

- 1 What proportion of the population did each amendment affect?
- 2 How significant an impact on the rights of a citizen was the change in each amendment?
- 3 Which amendments have had the biggest impact on US history?

## Activity

Use the 'interactive constitution' section of the website of the National Constitution Center ([constitutioncenter.org](http://constitutioncenter.org)) to look at the debate articles for one of the constitutional amendments. Read the debate articles presented and write a 500-word piece (250 words on each side of the debate) concerning one of the amendments.

## Why has the Constitution been amended so rarely?

With only 27 amendments passed, and only 17 of those in the last 210 years, the question is raised as to why so few amendments have been passed. There are five significant reasons. These are explained in Table 1.2.

**Table 1.2** The five reasons why the Constitution has rarely been amended

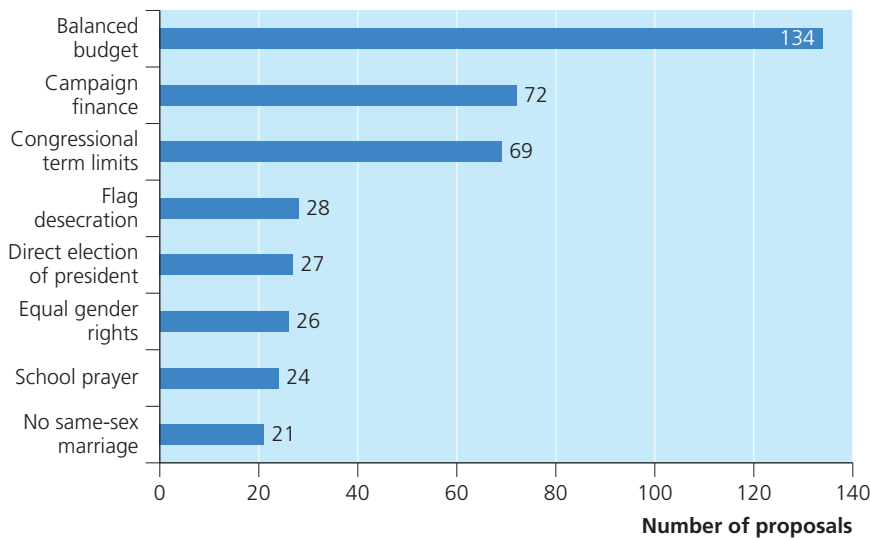
Reason	Explanation
The Founding Fathers created a deliberately difficult process and did not want it changed on the whim of fashion and circumstance.	The need for both Congress and the states to agree, and the need for supermajorities, make the amendment process difficult. Hundreds of amendments have been initiated, but very few have made it successfully through the process. This has (so far) prevented frivolous amendments to the Constitution. The only example of this happening was the <b>Eighteenth Amendment (1919)</b> , which prohibited the sale, transport and manufacture of alcohol. This ill-thought-out amendment was repealed by the <b>Twenty-First Amendment (1933)</b> , which was passed by a state constitutional convention.
Structural changes to Congress and party polarisation have made passing amendments considerably harder in the modern era.	The first Congress (1789–91) was a very different Congress from the one we know today as there were only 65 congressmen in the House of Representatives and 26 senators in the Senate. Therefore only 44 members of the House and 18 members of the Senate needed to agree for a proposal to pass the first stage of the amendment process. In the modern era there are 435 members of the House and 100 members of the Senate, which therefore requires far more people to agree to vote for a proposed amendment. Likewise, the two main parties of Congress, the Democrats and Republicans, are polarised on most issues, which makes it very difficult for them to agree on a proposal.
The vagueness of the document created by the Founding Fathers has allowed it to evolve without formal amendment.	An example of this vagueness is Congress's power 'to provide for the common defence and general welfare' of the United States. Another example is Congress's expansive interpretation of the commerce clause of the Constitution, which grants Congress a great deal of legislative authority on commerce. (For more details of this, see <i>McCulloch v Maryland</i> (1819).)
The Supreme Court's power of judicial review	This power allows the Court to interpret the Constitution and thereby, in effect, change the meaning of words written over two centuries ago — to make what one might call 'interpretative amendments' rather than formal amendments. For example, the Court can state what the phrase in the Eighth Amendment which forbids 'cruel and unusual punishments' means today. (For more detail, see Chapter 4.)
Americans are cautious about tampering with the Constitution	Americans have become cautious of tampering with their Constitution and hold it in high esteem. The difficulties concerning prohibition (the Eighteenth and Twenty-First Amendments) demonstrated the drawbacks of amendment.

The Founding Fathers designed the Constitution so that it could be amended, but made the process sufficiently complex that it could not be done easily or without significant consent. The amendment process is so challenging that it is statistically extremely difficult for any proposed amendment to pass. Most proposed constitutional amendments will fall at the first hurdle — in either the House of Representatives or the Senate.

Of the 12,000 amendments that have been proposed since the original Constitution was written in 1787, only 33 have gone to the states for ratification and only 27 have made it into the Constitution itself. This represents around 0.2% of all proposals.

### The advantages and disadvantages of the formal amendment process

Despite the difficulty of changing the constitution, the idea of trying to get constitutional amendments passed remains popular. Figure 1.4 demonstrates the most popular subjects of constitutional amendment proposals in Congress.



**Figure 1.4** The eight most popular subjects of constitutional amendment proposals in Congress since 1999

Students in the UK will often argue that the difficulty of passing formal amendments is a failing of the Constitution. However, this betrays a cultural bias, automatically assuming that the UK system (where major constitutional change is much easier) is superior. The inflexibility of the US Constitution also has advantages and you should not make the mistake of thinking there is only one way to interpret it.

There are both advantages and disadvantages of the formal process and these are laid out in Tables 1.3 and 1.4.

**Table 1.3** Advantages of the formal process

Advantages	Explanation and examples
Protects the Constitution	<p>The key features of the Constitution — <b>separation of powers, checks and balances, bipartisanship and federalism</b> (see pages 14–24) — were ideals of the Founding Fathers that were intended to be almost completely immune from amendment. The republican ideals forbidding arbitrary rule such as dictatorship or monarchy are the key to the political system that the Constitution created. For example:</p> <ul style="list-style-type: none"><li>• President Trump described the checks and balances of the Constitution as ‘archaic’ when they frustrated his attempts to govern as he wished. The Constitution’s separation of powers was deliberately designed to limit the power of the president, Congress and the Supreme Court. That he was frustrated by the key features of the Constitution demonstrated that they are working.</li></ul>
Protects states and upholds federalism	<p>The Tenth Amendment makes clear the right of the states to have reserved powers as opposed to the federal government.</p> <p>Provision for a constitutional convention called by the states ensures against a veto being operated by Congress on the initiation of amendments.</p>



Advantages	Explanation and examples
Requires broad support	<p>Supermajorities require genuine consensus before the Constitution is amended.</p> <p>In a country as geographically vast and politically and culturally diverse as the USA, it makes sense that any changes to the Constitution should have broad support. For example:</p> <ul style="list-style-type: none"> <li>For liberals, repealing the Second Amendment (the right to bear arms) might seem a good example of repealing an archaic part of the Constitution. However, in a YouGov poll in 2018 only around a fifth of Americans supported this.</li> </ul> <p>Amendments can only be successful if there is bipartisan agreement at both national and state levels. If one looks at the subjects listed for amendment reform in Figure 1.4, they are all contentious topics that lack broad support (e.g. direct election of the president, rather than the Electoral College).</p>
Prevents ill-thought-out amendments	<p>The lengthy and complicated process is not perfect, as the passing of the Eighteenth Amendment (prohibiting the sale, transport and manufacture of alcohol) demonstrated. However, this is the <i>only</i> example that critics can cite since 1788.</p>

**Table 1.4 Disadvantages of the formal process**

Disadvantages	Explanation and examples
Difficult to amend outdated provisions or to incorporate new ideas	<p>The low amendment success rate means that well-thought-out amendments may also fail to pass. For example:</p> <ul style="list-style-type: none"> <li><b>Changing the Electoral College.</b> The Electoral College has elected two presidents who lost the popular vote (George W. Bush in 2000 and Donald Trump in 2016) in the last 20 years. The Electoral College was designed as a safeguard against popular democracy, a concern of the eighteenth century which is completely at odds with modern liberal democracy. There have been several attempts to amend the Electoral College, but all have failed to pass Congress.</li> <li><b>Equal rights amendment.</b> Despite a broad consensus regarding women's rights, an equal rights amendment has still not been passed. Although it had successfully passed Congress by 1972, it failed to be supported by the required number of states by 1982.</li> <li><b>Balanced budget amendment.</b> From 1999 to 2018 there were 134 attempts to pass a balanced budget amendment. In 2018, although a majority of the House voted for it, the vote fell short of the necessary two-thirds majority.</li> </ul>
Goes against concept of majoritarian democracy	<p>Modern democracy is based on the concept of majoritarian democracy and the supermajorities required to amend the constitution are therefore undemocratic.</p> <p>Proposed amendments such as the <b>flag protection amendment</b> (making it constitutionally illegal to desecrate the US flag) have received over 50% of the vote in Congress but fell short of the required supermajority.</p> <p>To block an amendment only 13 of 50 states have to oppose it. The aforementioned <b>equal rights amendment</b> passed Congress but fell short of receiving enough state support (only 37 states ratified the amendment, one short of the required 38). This has been cited as an example of the 'tyranny of the minority', as 13 states, which represented just 24% of the US population at the time, were able to prevent an amendment that the majority wanted.</p>
Enhances the power of the (unelected) Supreme Court to make interpretative amendments	<p>The entrenched nature of the Constitution allows the nine (unelected) judges scope in interpreting what is and is not constitutional.</p> <p>The Supreme Court's judgements have significantly (and controversially) altered the US Constitution. For example:</p> <ul style="list-style-type: none"> <li><b>Abortion.</b> <i>Roe v Wade</i> (1973) saw the Court rule 7–2 in favour of a woman's right to an abortion.</li> <li><b>Checking executive power.</b> In <i>Hamdan v Rumsfeld</i> (2006) and <i>Boumediene v Bush</i> (2008) the Court ruled 5–4 that George W. Bush's administration did not have legal authority to try suspected terrorists held at Guantánamo Bay in military tribunals.</li> </ul> <p>The Supreme Court's decisions can be overturned by constitutional amendment but this has only happened once (the Sixteenth Amendment of 1913 which allows Congress to levy income tax).</p>
States with small populations have too much influence	<p>It is technically possible (although improbable) for the 13 smallest states to block an amendment proposal.</p>
Mistakes are still made	<p>The lengthy and complicated process nonetheless allowed the Eighteenth Amendment prohibiting alcohol to be passed in 1918. However, this mistake was corrected in 1933 when the Twenty-First Amendment (passed by state constitutional convention) repealed the Eighteenth Amendment.</p>

### Synoptic link

While the Constitution is codified and entrenched, its actual meaning is open to interpretation by the nine (unelected) judges of the Supreme Court. In Chapter 4 we discuss the effects of these interpretations in some key judgements which have significantly altered the Constitution.

### Study tip

In order to discuss amending the US Constitution, you will also need to understand and be able to explain the Supreme Court's power of judicial review.

### Discussion point

Evaluate the view that the nature of the formal process of amendment is a strength of the Constitution.

Three key areas to discuss are:

- 1 The extent to which the formal process is there to protect the nature of the Constitution and preserve the intent of the Founding Fathers.
- 2 The extent to which the formal process makes the amendment process extremely difficult and prevents it from adapting to the times.
- 3 What effect would a simpler amendment process have on the nature of the Constitution?

### Knowledge check

- 2 Define the three branches of government and their responsibilities.
- 3 Which branch of government can declare Acts of Congress unconstitutional?
- 4 Which branch of government grants pardons?
- 5 Which branch of government has the power of impeachment?
- 6 What are the reserved powers?
- 7 What does entrenchment mean?
- 8 Define the steps required to amend the US Constitution.
- 9 What does the Second Amendment protect?
- 10 Why is the Tenth Amendment so important?

## The key features of the US Constitution

At the core of the Constitution are four fundamental and foundational ideas:

- the separation of powers
- checks and balances
- bipartisanship
- federalism

The following sections will consider each of these features, together with linked ideas of federalism and limited government.

### Key term

#### Separation of powers

A theory of government whereby political power is distributed among the legislature, the executive and the judiciary, each acting both independently and interdependently.

### Separation of powers

The first key feature is the **separation of powers**. The Founding Fathers were influenced by the writings of the French political philosopher Montesquieu who argued for a separation of powers into legislative, executive and judicial branches in order to avoid tyranny. This idea was written into the Constitution.

The Founding Fathers had the idea that each of these three independent, yet co-equal branches should check the power of the others. It was decided that no person could be in more than one branch of the federal government ('the ineligibility

clause' of Article I). This was demonstrated when, in 2020, Senator Kamala Harris was elected vice president and therefore had to resign from the Senate. In this sense, the three branches — the institutions of government — are entirely separate.

However, the term 'separation of powers' is misleading, for it is the *institutions* that are separate, not the *powers*. Professor Richard Neustadt was most helpful in clearing up this potential confusion. Neustadt (1960) wrote:

*The Constitutional Convention of 1787 is supposed to have created a government of 'separated powers'. It did nothing of the sort. Rather, it created a government of separated institutions sharing powers.*

So, for the Patient Protection and Affordable Care Act — or 'Obamacare' — to become, and remain, law, all three branches of government had to agree, for each of them has *shared* power. And what is true for law making is true for pretty much everything else. It can make the exercise of political power problematic, but that is what the framers of the Constitution wanted. Given their experience of rule from Great Britain, they had learned to distrust unchecked political power. As Cronin and Genovese (1998) put it: 'Leadership [in America] is difficult precisely because the Framers of the Constitution wanted it to be so.' The Constitution is a power-averse document.

### Study tip

Be careful not to confuse the word 'legislature' (a noun, as in 'the legislature') with the word 'legislative' (an adjective, as in 'the legislative process').

## In focus

### Obama's healthcare reform (2010)

To see how the three branches of the federal government — Congress, the president and the Supreme Court — are all required to play a part in the governance of the United States, let us see how President Obama's landmark healthcare reform, the Patient Protection and Affordable Care Act ('Obamacare') became law, and what happened once it did.

- 1 Both houses of Congress had to pass the healthcare reform bill, in identical forms. This is because both houses have equal legislative power. After almost a year of trying, this finally occurred on 21 March 2010.
- 2 For the bill to become law, the President needed to sign it, which Obama did on 23 March 2010. It was now the job of the executive branch of government to carry out the law by rolling out the provisions it made for healthcare and healthcare insurance. Thus, the Patient Protection and Affordable Care Act — 'Obamacare' — finally became law.
- 3 However, some opponents of the new law thought it was unconstitutional — in other words, that part of it was not permitted by the US Constitution. Resolving that dispute was the job of the courts, and ultimately the US Supreme Court. So almost exactly two years after the law became effective, lawyers from both sides argued their case before the nine justices of the Supreme Court. Then, on 28 June 2012, the Court announced its decision, essentially upholding the law's provisions.



President Barack Obama signs into law the historic Patient Protection and Affordable Care Act, March 2010

So, the concept is best thought of as the doctrine of 'shared powers'. And those 'shared powers' constitute a series of checks and balances, for the Founding Fathers set up an intricate system whereby each branch of the federal government would check and balance the other two.

### Study tip

Although we often talk of the separation of powers in the USA, it is more accurate to refer to shared powers and separate personnel. For example, law making involves the cooperation of both president and Congress.

### Key term

#### Checks and balances

A system of government that gives each branch — legislative, executive and judicial — the means partially to control the power exercised by the other branches.

### Exceptions to the rule of the separation of powers

There are two key exceptions to the rule of the separation of powers:

- While members of the executive are not generally members of the legislature, the vice president is the exception. Although they cannot represent a state in the Senate, the vice president is the president of the Senate with the power to preside over the Senate and has the casting vote in a tie. There have been 268 casting votes made by 36 vice presidents (12 did not cast a vote). Vice President Mike Pence cast 13 tie-breaking votes in his 4-year term in office.
- The president's power of pardon is a judicial rather than an executive power, making it a constitutional anomaly.

### Checks and balances

The second essential feature of the Constitution is **checks and balances**. This gives each branch of the federal government — the legislature, the executive and the judiciary — the means partially to control the power of the other branches, largely to resist encroachments on its own powers and to maintain democratic government. The main checks and balances exercised by each branch are detailed in Figure 1.5.

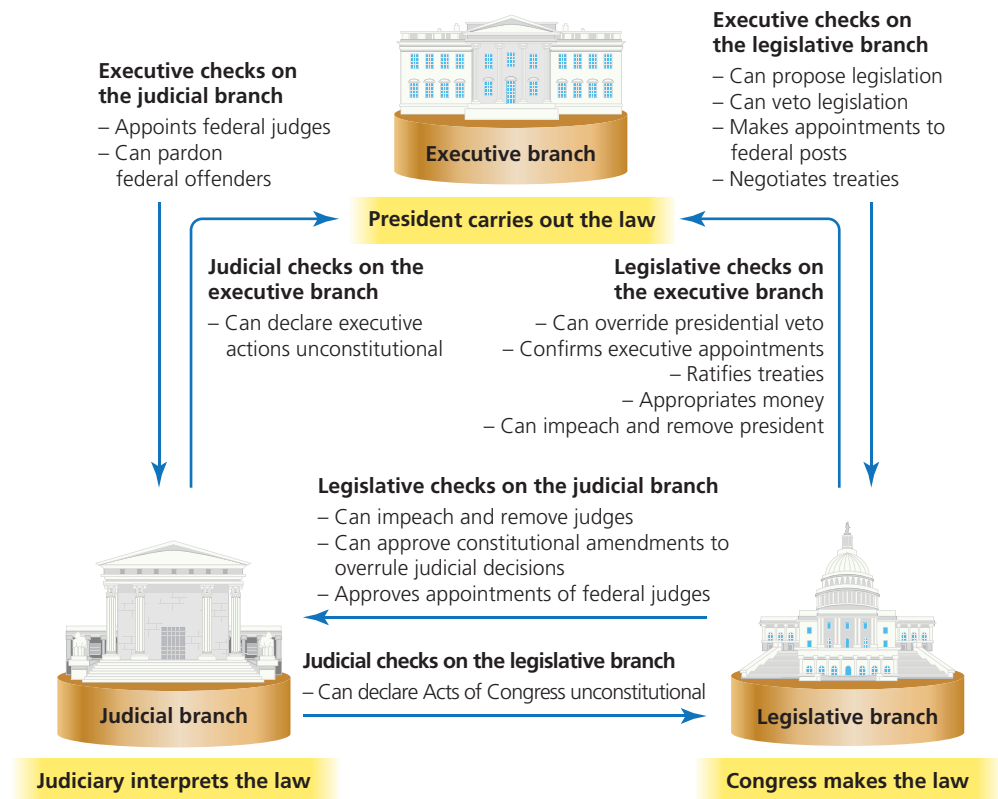


Figure 1.5 Checks and balances as laid out in the US Constitution