

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.

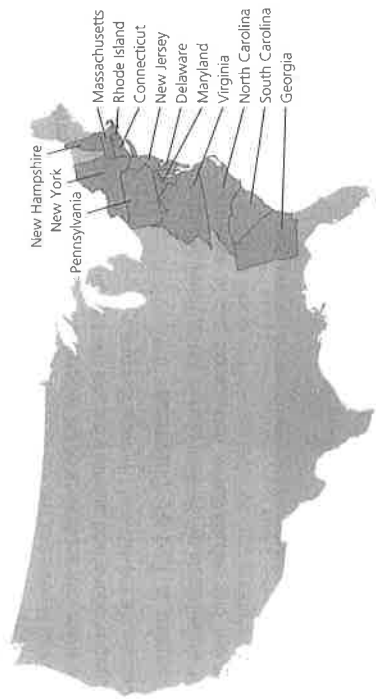


Figure 1.1 The 13 original British colonies

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.

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.

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 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.

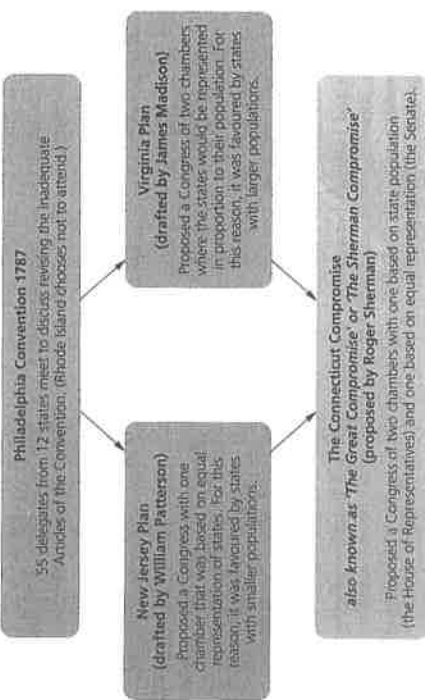


Figure 1.2 The debates at the Philadelphia Convention and the eventual resolution

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?

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.

Key term

Codification Process of writing down a constitution in one document.

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.

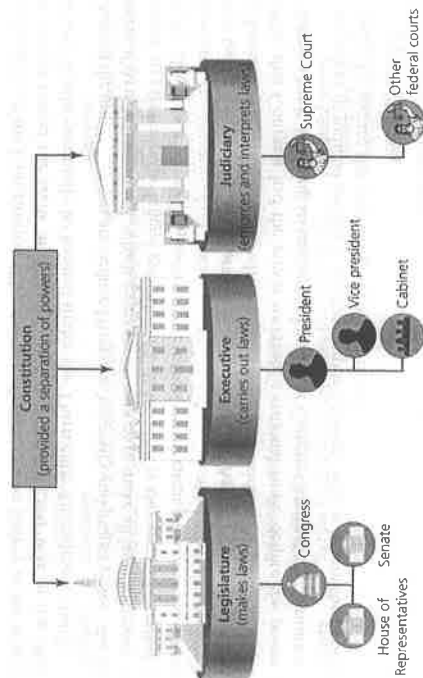


Figure 1.3 The three branches of the US government

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
Congress	Legislation Exclusive powers to legislate for the country Specific powers held by House of Representatives and the Senate (see Chapter 2 for more details) Economic 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 Defence Declaration of war Maintenance of army and navy Organisation and training of militia Judicial/constitutional Amendment of the Constitution (shared with states) Establishing courts that are subordinate to Supreme Court	Economic Interstate Commerce Clause Economic/Defence 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. Defence Power to draft citizens into the armed forces may be implied from Congress's enumerated powers to raise an army and navy.
President	Executive Head of the executive branch Nominates cabinet members, ambassadors and judges Grants pardons Defence Commander-in-chief of the army and navy Legislative Proposes measures to Congress Vetoes legislation	Defence Commander-in-chief of the United States Air Force (as no air force existed at the time, it was not included)
Judiciary	To rule on cases arising under the Constitution	Judicial review 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.

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.

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.

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.

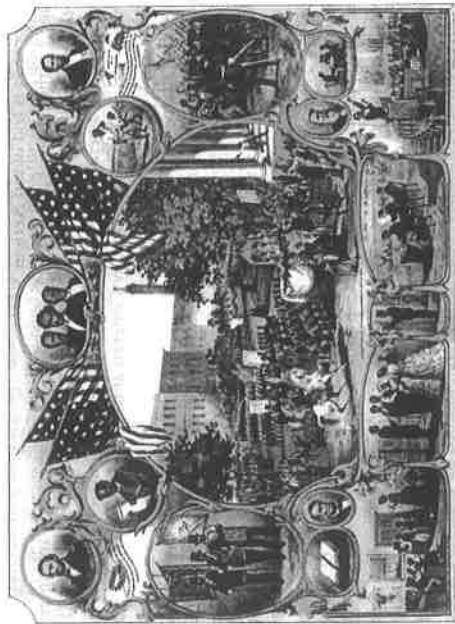
Many states had been reluctant to sign up to the new federal Constitution with its potentially centralised government. The Bill of Rights was in part designed to alleviate such concerns by explicitly protecting American citizens from a powerful centralised government.

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?

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 Eighteenth Amendment (1919), which prohibited the sale, transport and manufacture of alcohol. This ill-thought-out amendment was repealed by the Twenty-First Amendment (1933), 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.

Activity

Use the 'interactive constitution' section of the website of the National Constitution Center (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.

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.

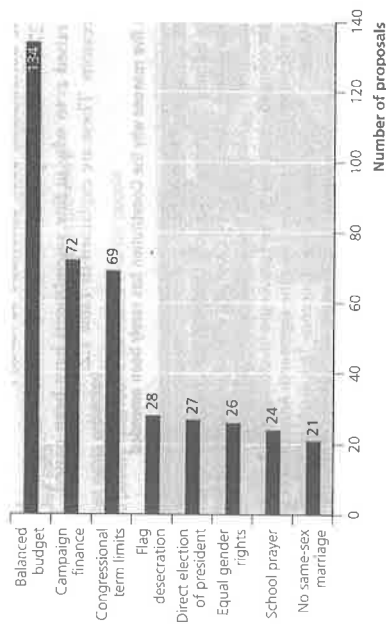


Figure 1.4 The eight most popular subjects of constitutional amendment proposals in Congress since 1999

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	The key features of the Constitution — separation of powers, checks and balances, bipartisanship and federalism (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: 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.
Protects states and upholds federalism	The Tenth Amendment makes clear the right of the states to have reserved powers as opposed to the federal government. Provision for a constitutional convention called by the states ensures against a veto being operated by Congress on the initiation of amendments.

Table 1.4 Disadvantages of the formal process

Disadvantages	Explanation and examples
Difficult to amend outdated provisions or to incorporate new ideas	The low amendment success rate means that well-thought-out amendments may also fail to pass. For example: Changing the Electoral College. 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. Equal rights amendment. 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. Balanced budget amendment. 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.
Goes against concept of majoritarian democracy	Modern democracy is based on the concept of majoritarian democracy and the supermajorities required to amend the constitution are therefore undemocratic. Proposed amendments such as the flag protection amendment (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. To block an amendment only 13 of 50 states have to oppose it. The aforementioned equal rights amendment 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.
Enhances the power of the (unelected) Supreme	The entrenched nature of the Constitution allows the nine (unelected) judges scope in interpreting what is and is not constitutional. The Supreme Court’s judgements have significantly (and controversially) altered the US Constitution. For example: Abortion. <i>Roe v Wade</i> (1973) saw the Court rule 7–2 in favour of a woman’s right to an abortion. Checking executive power. 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.
Court to make interpretative amendments	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). It is technically possible (although improbable) for the 13 smallest states to block an amendment proposal.
States with small populations have too much influence	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.

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.

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?

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.

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.

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

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').

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.

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.

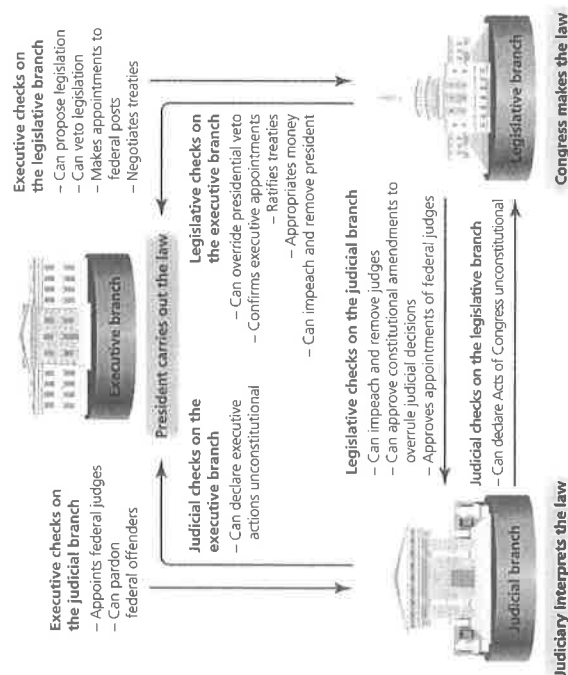


Figure 1.5 Checks and balances as laid out in the US Constitution

Checks on the powers of the president

Both Congress and the Supreme Court can exercise significant checks on the powers of the president.

- Congress can **amend, block or even reject items of legislation** recommended by the president. For example, in 2017 President Trump argued that he would 'repeal and replace' Obamacare but he was blocked by Congress. Congress can be especially effective at frustrating the passage of legislation desired by the president during times of divided government.
- Congress can **override the president's veto** with a two-thirds majority in both houses of Congress. For example, Congress overrode Obama's veto of the Justices Against Sponsors of Terrorism Act in 2016. However, the need for a supermajority makes it difficult for Congress to achieve this veto, as it requires bipartisan support and for members of one party to vote against their president. Since 1789 the president has vetoed more than 2,500 bills and Congress has overridden less than 5% of these.
- Congress has 'the power of the purse' and can **reject a budget submitted by the president**. For example, in late 2018 Congress could not agree with President Trump over the budget because the Democrat majority in the House disagreed with the President's funding measure on border security. This led to a federal government shutdown between December 2018 and January 2019 before the President and Congress finally resolved their differences and agreed on a budget. In an era of hyper-partisanship, it is now increasingly difficult to agree a budget when the government is divided. The 35-day shutdown was the longest in US history.
- Congress has the power to **declare war**, which it has used 11 times. This is a clear check on the president's power as commander-in-chief of the armed forces. The last formal use of this power was in 1941 when the USA entered the Second World War. However, since the mid-twentieth century Congress has found its check to be largely ineffective, as presidents have used their power as commander-in-chief to sideline Congress in the decision to use troops abroad. The War Powers Act of 1973 gave Congress the right to withdraw troops after 60 days if Congress had not voted to approve action. This has had some effect: notably, President Clinton was forced to withdraw troops from Somalia in 1994. In February 2020, the Senate passed a resolution to limit Trump's power to order military action against Iran without first seeking Congress's permission. However, the commander-in-chief authority has allowed presidents to act unilaterally without seeking a congressional vote and the president is particularly powerful in short-term actions (not covered by the War Powers Act), such as airstrikes.
- The Senate has the power to **ratify treaties**. This is a clear check on the president's power to negotiate treaties with foreign powers. Ratifying a treaty requires a two-thirds majority and there are numerous examples of the Senate exercising its power: for example, in 1999 the Senate rejected the Comprehensive Test Ban Treaty. However, presidents can bypass this congressional check by signing executive agreements with foreign powers: for instance, President Obama signed the Joint Comprehensive Plan of Action (JCPOA), a nuclear deal with Iran.
- The Senate has the power to **approve the appointment of judges**. This is a check on the president, who nominates all federal judges — to the trial courts, appeal courts and Supreme Court — and **cabinet members**. The Senate has the power to reject these nominations by a simple majority: for example in 1987 the Senate rejected President Reagan's nomination, Robert Bork, for a place on the Supreme Court. The threat of a Senate rejection is often as powerful, and more

Synoptic link

The judiciary also played a key role in upholding the 2020 presidential election result after President Trump questioned the validity of the results in a number of states. For more details see page 203.

frequent, than an actual one. For example, Andrew Puzder, Trump's choice in 2017 as secretary of labor, withdrew following concerns from Republican senators over his personal background and business record.

- Congress has the power to **investigate the executive branch**. Appearances by senior members of the executive branch at congressional committee hearings are a significant check on power. For example, the recently created CARES Act Oversight Commission will have oversight of the effectiveness of the federal government's implementation of the CARES (Coronavirus Aid, Relief, and Economic Security) Act (2020)
- Congress can **impeach**. Congress can bring impeachment proceedings against a president or other members of the executive branch. The Senate has the sole power to try all impeachments, with each case presided over by the vice president in their capacity as president of the Senate — except in cases where the president is being tried, when the Chief Justice of the United States presides. Andrew Johnson in 1868, Bill Clinton in 1998 and Donald Trump in both 2019 and 2021 have all been impeached by the House of Representatives and then acquitted by the Senate.
- The Supreme Court can **declare the executive's actions unconstitutional**. This power of **judicial review** is not mentioned in the Constitution and it might be said that the Supreme Court 'discovered' the power in the case of *Marbury v Madison* (1803). In 2014, in *National Labor Relations Board v Noel Canning*, the Court ruled that President Obama had acted unconstitutionally in making appointments to the National Labor Relations Board without the Senate's approval.

Synoptic link

There have been over 2,500 vetoes since 1789 and they are most likely to be issued in a divided government. It should be remembered that presidents only ever veto from a position of weakness when they have failed to persuade Congress to adapt or abandon the legislation they dislike. For more details on presidential vetoes, see Chapter 3 on the presidency.

Checks on the powers of Congress

The Founding Fathers also gave both the president and the judiciary significant checks on the powers of Congress, although as we shall see some of these powers are not actually found in the Constitution but were 'discovered'.

- The president can **veto legislation** and will do so for bills that they strongly dislike. Article I of the Constitution clearly places all legislative powers in the hands of Congress. Both houses are equal in that all bills must pass through all stages in both houses. Neither house can override the other and both houses must agree to the proposed law in exactly the same form before it can be sent to the president for consideration. For example, in May 2020, Trump vetoed the Iran War Powers regulation, which would have limited the President's ability to wage war against Iran. The veto is a blunt check and allows the president an almost final say on legislation, given how difficult Congress finds it to overturn a veto.
- The president can **use executive agreements** rather than treaties to negotiate with a foreign power and avoid the need for Senate ratification. For example, President Obama knew that Congress would not ratify any nuclear deal that he negotiated with Iran. He therefore signed the Joint Comprehensive Plan of Action (JCPOA) executive agreement with Iran. However, executive agreements can more easily be undone by subsequent presidents. President Trump was able to back out of two executive agreements: JCPOA and the Paris Accord, both signed by his predecessor. President Biden in turn revoked Trump's environmental actions by re-joining the Paris Accord. Foreign policy experts have predicted that something similar may happen in relation to Iran. (For more details on executive agreements, see page 134 in Chapter 3.)

- The Supreme Court can **declare Acts of Congress to be unconstitutional** using judicial review. *Fletcher v Peck* (1810) was the first instance of the Supreme Court declaring a state law unconstitutional. In 2013, in the case of *United States*

v Windsor, the Supreme Court declared the Defence of Marriage Act (1996) unconstitutional. By using its power of judicial review, the Court can, in effect, update the meaning of the Constitution.

Checks on the powers of the judiciary

The president and Congress both exercise checks on the powers of the judiciary.

- Congress can **propose constitutional amendments** to — in effect — overturn a decision of the Supreme Court. For example, in 1896 the Supreme Court declared federal income to be unconstitutional, but Congress proposed the Sixteenth Amendment granting Congress the power to levy income tax. It was ratified and became operational in 1913. However, the nature of the US Constitution makes it extremely difficult to amend. This makes the ability of Congress to propose constitutional amendments a weak and ineffective check on the judiciary's much more potent power of judicial review.
- Congress possesses the powers of **impeachment, trial and removal from office** of members of the judiciary found guilty of misconduct. Eight members of the judiciary have been successfully impeached. (For more details, see Chapter 4.)
- The **presidential pardon** can overturn judgements of the judiciary. It has become increasingly controversial owing to claims of abuse.

In focus

Checks and balances: a summary

It is really important to understand the checks and balances of the US Constitution. The Constitution creates a system of separate institutions that share powers, with each institution (or branch) checking the powers of the others. The major checks are as follows.

President

- 1 Can check Congress by vetoing a bill it has passed
- 2 Can check the federal courts by nominating judges and by the power of pardon

Congress

- 1 Can check the president by:
 - amending/delaying/rejecting the president's legislative proposals
 - overriding the president's veto
 - the power of the purse
 - refusing to approve the president's appointments (Senate only)
 - refusing to ratify the president's treaties (Senate only)
 - using impeachment and trial powers to remove the president from office
- 2 Can check the federal courts by:
 - proposing constitutional amendments to overturn a judicial decision
 - refusing to approve a person nominated to the federal courts (Senate only)

Judiciary

- 1 Can check Congress by declaring a law unconstitutional
- 2 Can check the president by declaring the president's actions — or the actions of any of the president's subordinates — unconstitutional

As well as these formal checks, there are also informal checks, such as Congress's check of investigation through its committee system.

Activity

The Federalist Papers are a collection of 85 articles and essays written by Alexander Hamilton, James Madison and John Jay under a collective pseudonym 'Publius' to promote the ratification of the Constitution. Search online for the Bill of Rights Institute (<https://billofrightsinstitute.org>) and read Federalist Paper no. 51. Outline the arguments that 'Publius' put forward for the importance of checks and balances in the US Constitution.

Key term

Bipartisanship Close cooperation between the two major parties to achieve desired political goals. In the US system of government, it may be crucial for political success.

Useful term

Divided government When the presidency is controlled by one party, and one or both houses of Congress are controlled by the other party.

Study tip

Try to keep up to date with what is happening in the US Constitution by following the news and reading any politics magazines your school subscribes to, such as *Politics Review* magazine which covers all the recent developments in US politics.

Bipartisanship

The third essential feature of the Constitution is bipartisanship. The Constitution makes no mention of political parties, but the separation of powers and the corresponding checks and balances between the three branches of the federal government — especially those between the legislature and the executive — mean that parties must cooperate. The framers of the Constitution hoped to encourage a spirit of **bipartisanship** and compromise between the president and Congress. Laws would be passed, treaties ratified, appointments confirmed and budgets fixed only when both parties worked together. Republican president George W. Bush managed to achieve his education reforms in 2001–02 because he worked with leading congressional Democrats such as Senator Edward Kennedy. However, this cooperation does not always happen and instead gridlock can be the result.



President George W. Bush and Senator Edward Kennedy discuss the President's education reforms in the Oval Office, August 2001

This raises the issue of **divided government**, a term used to refer to the situation in which one party controls the presidency and the other party controls one or both houses of Congress. Of late, this has become the norm. The 52 years between 1969 and 2021 have seen 36 years of divided government, and for 24 of those years the president's party controlled neither house. For only 15 years of this period did one party control the presidency and both houses of Congress: 1977–81 (Jimmy Carter) and 1993–95 (Bill Clinton) for the Democrats; January–June of 2001 and 2003–07 (George W. Bush) for the Republicans; 2009–11 (Barack Obama) for the Democrats and 2017–19 (Donald Trump) for the Republicans. However, it is also worth noting that divided government has not always been the norm. In the previous 48 years — from 1921 to 1969 — there was divided government for only ten years.

Impact of divided government on the effectiveness of checks and balances

There is no clear answer to the question of whether divided government makes government more or less effective — but there are convincing arguments on both sides. Some think that divided government leads to *more* effective government. Bills are scrutinised more closely, treaties checked more carefully, and nominees questioned more rigorously in the confirmation process. There is some evidence that when Congress and the president are of the same party, legislation, nominations, budgets, treaties and the like are nodded through without as much scrutiny as there should be. Not since 1935, for example, has the Senate rejected a treaty of a president of its own party. Only twice in the last 50 years has Congress overridden a veto of a president of its party.

Others, however, think that divided government leads to *less* effective government. Party polarisation has made bipartisanship more difficult to achieve because the ideological gulf between the two parties makes compromise difficult to reach. In the past, even in divided governments this gulf was less pronounced.

The 98th Congress (3 January 1983–3 January 1985) was similar to the 116th Congress (3 January 2019–3 January 2021). Both had a president who was up for re-election (President Reagan and President Trump respectively); both had a Senate controlled by the president's party (Republican) and a House of Representatives controlled by the opposition. However, despite obvious ideological differences the 98th Congress (1983–85) was able to come to enough bipartisan agreement to enact 667 laws, which included some major legislation:

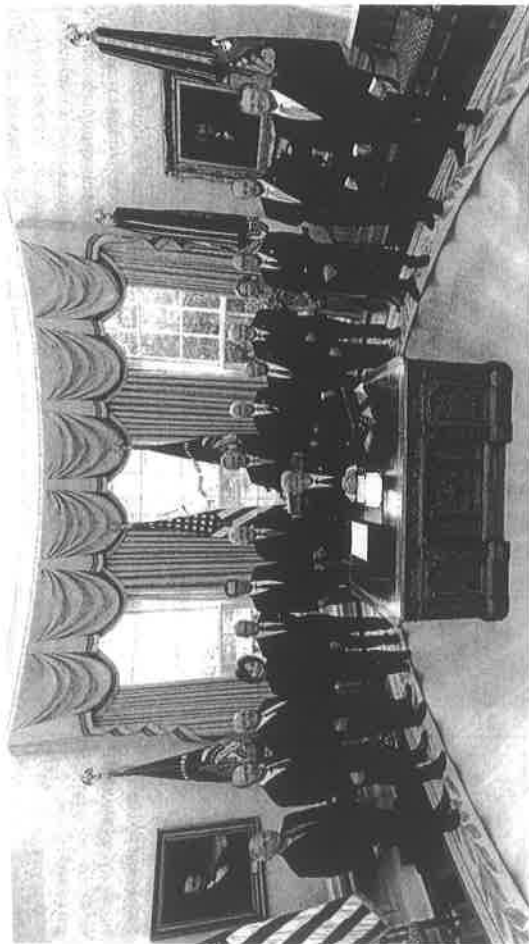
- **The declaration of Martin Luther King's birthday as a federal holiday.** This was of huge significance given the USA's history of race relations and civil rights.
- **The Comprehensive Crime Control Act (1984).** This was a major revision of the federal criminal code which increased penalties for drug trafficking and terrorism.

In contrast, the 116th United States Congress (2019–21) only passed 344 laws, making it one of the least productive Congresses of the last 50 years. During this period only four other Congresses have passed fewer laws and three of those were in the last ten years (the 112th, 113th and 114th Congresses). Nonetheless, the two parties did still find ways to cooperate and pass some important legislation, the most significant example being:

- **Coronavirus Aid, Relief and Economic Security (CARES) Act (2020).**

This saw Congress grant \$2.2 trillion of economic stimulus to the Covid-19 ravaged US economy.

In both the 98th and 116th Congresses, therefore, the Republicans and Democrats were able to pass legislation, but the 116th Congress passed significantly less legislation due to increased party polarisation in the intervening years. In 2020, it took a crisis that transcended the normal party disagreements to enable the most important piece of bipartisan legislation to be passed. Covid-19 was such a threat to American society and the economy that the two parties were able to put their philosophical differences to one side and cooperate in passing the CARES Act. In the modern era, such bipartisan legislation remains very much the exception rather than the rule.



President Trump, Vice President Pence and leading members of the administration at the signing of the Coronavirus Aid, Relief and Economic Security Act, March 2020

Activity

Go online and research the passage of the Coronavirus Aid, Relief and Economic Security (CARES) Act (2020).

- What compromises did both parties have to make to ensure the legislation passed?
- Divided government usually makes the passage of legislation a slow and laborious process. Outline the reasons why the CARES Act (2020) passed so quickly.

Debate

Does the US Constitution still work?

Yes

- Federalism has proved to be an excellent compromise between strong national government and state government diversity.
- The text has proved very adaptable to changes in US society.
- The demanding amendment process has usually prevented frequent and ill-conceived proposals for amendment.
- Rights and liberties of Americans have been protected.
- The Supreme Court's power of judicial review has made it even more adaptable through 'interpretative amendment'.

No

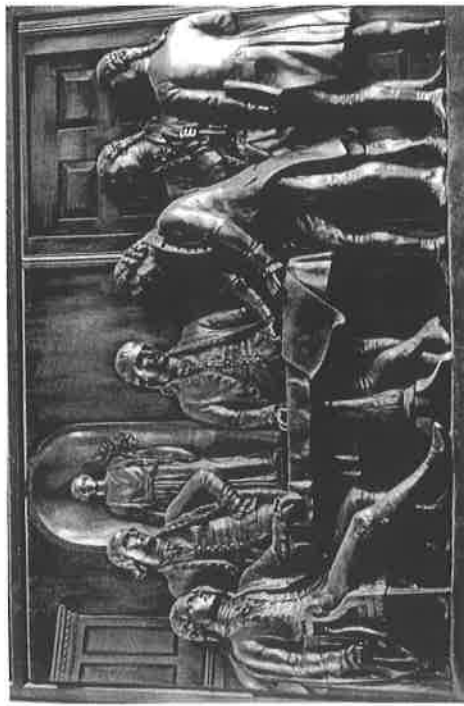
- The amendment process is too difficult, making it almost impossible to amend parts that are no longer applicable or to add parts that a majority desires.
- The power of judicial review gives the Supreme Court too much power to 'amend' its meaning.
- It is too negative, giving too much power to those who oppose change.
- Some parts make little sense in today's society (e.g. the Electoral College).
- Some parts do not work as the framers of the Constitution would have envisaged (e.g. war-making powers).

✎ Look over the points on both sides of the debate and consider which of these you view as more important and why.

Federalism and limited government

A fourth key feature of the Constitution is **federalism**. From the outset there was a tension between those who wanted a strong federal government, who believed it was needed for the United States to function, and those who wanted limited federal government, in order to allow individual states their own autonomy. Some were worried about handing over their newfound sovereignty from the British to a new federal government. The framers of the Constitution sought a 'middle ground', ensuring that federalism respected the desire for **limited government**, whereby government would do only what was essential, leaving the citizens' fundamental rights and freedoms as untouched as is possible in an organised and orderly society. Thus, the **principle** of limited government remains central to political debate about the proper scope of the federal government. One sees it today in debate over the federal government's role in such issues as healthcare provision, education, immigration and gun control legislation.

Federalism involves a degree of decentralisation, which has proved suitable for a country as large and diverse as the USA has become. Thus, out of the disunity of the Articles of Confederation came the *United States of America* — *E Pluribus Unum* — 'Out of many, one'.



Frieze depicting the signing of the US Constitution, on the Capitol building, Washington DC

To the framers of the Constitution, their newly devised federal system avoided both extremes — the extreme of disunity under the original articles and the extreme of over-centralisation under British rule.

Nowhere is the word 'federal' or 'federalism' mentioned in the Constitution. However, then, was it written into the document?

- It was written into the enumerated powers of the three branches of the federal government — Congress was 'to coin money', the president was to 'be commander-in-chief' and so on.
- It was included in the implied powers of the federal government. These are the powers that flow from, for example, the 'elastic clause' of the Constitution.

Key terms

Federalism Theory of government by which political power is divided between a national government and state governments, each having their own areas of substantive jurisdiction.

Limited government

Principle that the scope of federal government should be limited to that which is necessary for the common good of the people.

Principle A fundamental and 'organising' idea that runs throughout the US Constitution, e.g. democracy or accountability.

- The federal government and the states were given certain concurrent powers: for example, the power to tax.
- Furthermore, the Tenth Amendment reserved all remaining powers 'to the states and to the people'.
- Finally, the Supreme Court was to be the umpire of all disagreements between the federal and state governments.

The Constitution divides sovereignty between the federal and state governments, giving each distinct powers and concurrent powers (powers which are shared). See Figure 1.6 for details.

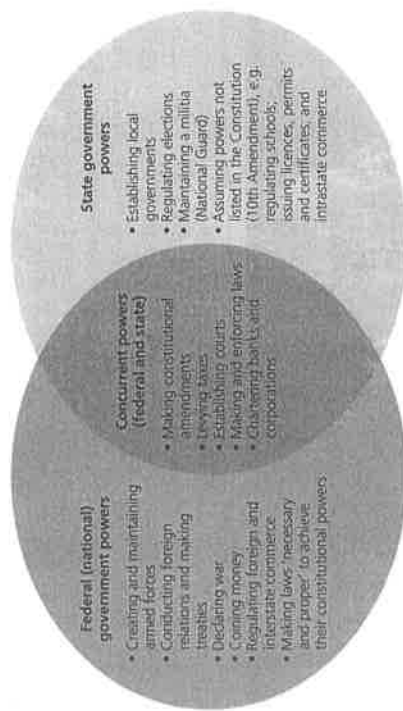


Figure 1.6 Federal and state powers as laid out in the US Constitution

Knowledge check

- 11 What are the key features of the US Constitution?
- 12 How many checks and balances of the US Constitution can you name, giving an example of each?
- 13 How does the effectiveness of checks and balances differ in united and divided government?
- 14 Define what federalism means in the US Constitution.

The main characteristics of US federalism

Federalism might not be explicitly mentioned in the US Constitution, but the division between national and state governments is made perfectly clear. A key feature of federalism is dual sovereignty (or a sharing of powers) between state and federal governments. Each is dominant in different areas, so for example the federal government is in control of defence, while the states control law and order. The Tenth Amendment was explicitly designed to protect the autonomy of the states by stating that any power not given to the federal government is reserved for the states or the people. The Constitution therefore guarantees the constitutional integrity of the states. The constitutional amendment process prevents any alteration to the power of the states unless two-thirds of the states consent.

By its very nature federalism involves a clear division of federal and state powers, with each level of government working largely separately and then cooperating when necessary. However, federalism is not a fixed concept and has changed over time. Federalism has evolved in three broad stages (see Figure 1.7).

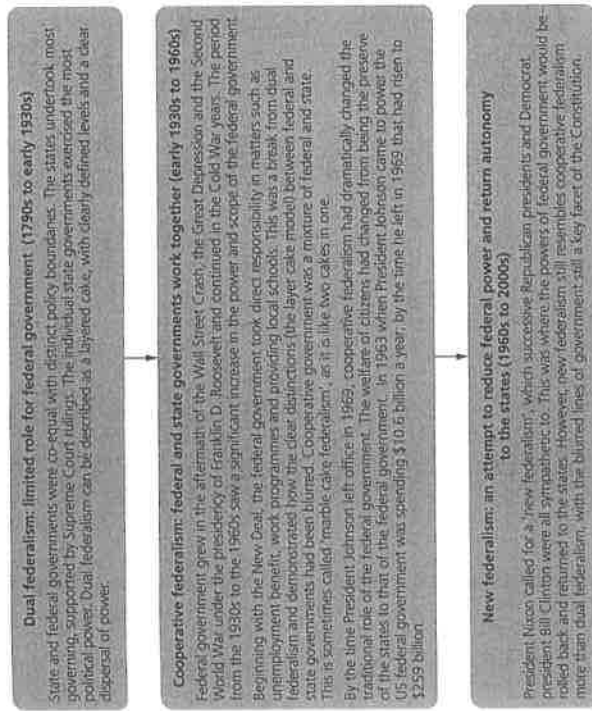


Figure 1.7 The three stages of federalism

Study tip

When considering federalism, be aware of how power has shifted from 1790 to the present day and be clear about the three phases. Know that, while dual federalism was clearly defined (the layer cake model) at federal and state levels, cooperative federalism was a mixture of federal and state governments where responsibilities were shared, but with federal government tending to dominate, and that this is true even of new federalism today.

Interpretations and debates around the US Constitution and federalism

The debates around the extent to which the USA remains federal today

The US Constitution protects states' rights but there is debate about how effectively it achieves this today. Federal encroachment (the increase in the power of the federal government at the expense of state governments) began in the cooperative federalism period, but it would be incorrect to think that the new federalism era has

Dual federalism



Layer cake federalism is based on a clear delineation of authority and programmes among the levels of government

Cooperative federalism



Marble cake federalism is based on a pragmatic mixing of authority and programmes among the national, state and local governments

Figure 1.8 American federalism: layer cake or marble cake?

Knowledge check

15 What is meant by 'layer cake' federalism and 'marble cake' federalism?

seen a return of power to the states. While it is true that the states have considerable autonomy in making their own laws, the argument that the federal government continues to encroach on the 'reserved powers' of the states is extremely compelling. However, it should also be remembered that for many US citizens the laws and policies adopted by their state will often be more important to their everyday lives than the laws and policies instigated by federal government. The different regions of the USA — of the South, the Midwest, the Northeast and the West — have their distinct cultures as well as racial, religious and ideological differences that are recognised in the federal system.

Arguments that the states retain autonomy and sovereignty

Laws vary across states

- **Criminal punishment.** The death penalty is legal in 29 states and has been abolished in 21 states. There are also five different methods of execution (lethal injection, electrocution, gas chamber, firing squad and hanging) that are used in the USA with not all states using them all.
- **Taxes.** In addition to federal taxation, taxation can also be set at state level. There are huge differences in the types of tax (e.g. sales tax and property tax) and seven states have 0% taxation while California has 13% taxation.
- **The legal status of marijuana.** Eleven states, the most recent being Illinois in 2020, have legalised the recreational use of cannabis, and it is legal for medicinal use in 33 states. Marijuana is illegal at a federal level and in cases where state and federal laws contradict, the federal government can enact the supremacy clause of Article VI of the Constitution. However, the federal government has continued to ignore recreational cannabis users, essentially allowing the states to decide their own laws. The Cole Memo in 2013 (during the Obama presidency) stated that the Justice Department would not enforce federal restrictions on marijuana when states had legalised it, except in certain criminal circumstances, such as firearms being involved. In 2018, the Cole memorandum was rescinded by the Trump administration, but in practice the Justice Department under Trump did little to change Obama's policy and the states continue to enjoy autonomy in their marijuana laws.

Healthcare

The states have power over the provision of medical insurance after the passage of Obamacare in 2010.

Electoral practices vary widely

Article I of the Constitution allows the states to run their own elections and there is a wide variety of election practices including the traditional paper ballot, the mail ballot and electronic voting. State governments are also allowed to set their own boundaries for the districts in their states.

Illegal immigration

In some states there are cities known as sanctuary cities in which local law enforcement agencies are prohibited by state law from helping federal immigration officials to identify illegal immigrants, unless those immigrants have been charged with a serious crime. In 2017 Trump issued an executive order which proposed that sanctuary cities would be at risk of losing various federal grants.

This was a significant threat, as such cities receive huge sums from the federal government to fund a whole range of programmes. However, in March 2018, the US Department of Justice sued the state of California over its sanctuary city laws and the rulings went against the Department of Justice, which reinforced the autonomy of the state.

The states have autonomy in the handling of national crises

It was the 50 state governors who decided how their states would react to the Covid-19 crisis.

- Covid-19 demonstrated the importance of the Tenth Amendment by which any power not explicitly granted to the federal government by the Constitution is left to the states or the people. Constitutionally, Covid-19 was treated in a similar way to natural disasters, whereby the elected governors take action as they feel appropriate. This was demonstrated at the beginning of the crisis when 32 state governors issued their own state of emergency before the national state of emergency issued by President Trump on 13 March 2020.
- With each state governor having autonomy, there was a variety of responses. Some were quick to act: the Republican Ohio governor Mike DeWine was the first governor to call for the state-wide closure of schools, while the Democrat California governor Gavin Newsom was the first to issue a state-wide order to close businesses. In contrast, seven states did not issue orders to stay at home for non-essential activities between March and April 2020 as their governors felt this was inappropriate for their particular states.
- Due to the negative effects on the economy, President Trump was keen to open the USA up from lockdown as soon as possible. However, as the public policy interest group the Brookings Institution concluded: 'No federal statute gives the president the authority to override state decisions... If governors choose to disregard his call to reopen their states, their decisions will be final.' It was the state governors who decided when their states came out of lockdowns as well as other practicalities such as school openings and the wearing of facemasks.

Supreme Court rulings support the states over federal government

Two recent examples can be found in the Obama presidency.

- Obama's healthcare reforms had implications for the federal-state relationship. The argument centred on the provision in law whereby people who could not afford to buy health insurance would be covered by an expansion of the federal-state Medicaid programme. States had to participate in this expansion or lose their federal funding for Medicaid, the federal government's largest grant programme. A number of states sued, arguing that this was a violation of the principles of federalism and therefore unconstitutional. They argued that this provision in the law amounted to coercion rather than persuasion. In *National Federation of Independent Business v Sebelius* (2012), the Supreme Court agreed, and struck down the Medicaid provision in the law — a victory for the states.
- *United States v Texas* (2016) saw the Supreme Court strike down President Obama's use of an executive order to implement his immigration reform programme, ruling it to be unconstitutional due to the cost to the states.



Anti-lockdown protestor holds a sign criticising Governor Mike DeWine's measures against Covid-19 in Ohio

Arguments that federal government is challenging state autonomy

Taxation and federal financing

State citizens have to pay federal income tax and the states themselves rely on support from federal government when their finances run low or in response to unexpected circumstances, such as natural disasters or stock market crashes. After Hurricane Katrina in 2005 the federal government gave approximately \$120 billion worth of aid, while after the stock market crash of 2008, Congress passed the American Recovery and Reinvestment Act in 2009, which provided \$787 billion of federal economic stimulus.

This dependence on federal government was again demonstrated during the Covid-19 pandemic. Although the state governors had considerable autonomy in handling the crisis, the states were very dependent on the economic relief package signed in March 2020.

Healthcare

Healthcare provision is heavily dependent on federal funding. In December 2003, George W. Bush signed into law the Medicare Prescription Drug Modernisation Act, a major expansion of Medicare which included a new prescription drug benefit. The measure was estimated to cost \$400 billion in its first ten years and was written to benefit American seniors. The only nod to new federalism was that Massachusetts governor, Mitt Romney, was allowed a Medicaid waiver to enable his state to introduce its own universal health insurance programme. Likewise, the Affordable Care Act (Obamacare) expanded Americans' health coverage options and saw the federal government providing most of the financing for subsidised coverage. While the *National Federation of Independent Business v Sebelius* (2012) ruling meant that states could not be compelled to expand Medicaid, all but 14 states have now expanded the programme and Medicaid enrolment increased by 34% between 2013 and 2019.

Federal government encroachment on numerous state issues

- Education.** The No Child Left Behind Act, signed into law by President Bush in January 2002, ushered in the most sweeping changes in federal education policy since the 1960s. In a major expansion of the federal government's role in education, the new law mandated that the states test children annually. It was a classic example of the 'marble cake' model, associated with cooperative federalism, with a mixing of authority between federal government and the states. Obama continued this policy, investing \$4 billion in the Race to the Top programme to boost education in the states.
- Homeland security and national defence.** Between 2001 and 2009, spending by the Department of Defense increased from \$290 million to \$651 million, an increase of 125%. This was the direct result of the 9/11 attacks by Islamic terrorist group al-Qaeda, the catalyst for President Bush's 'war on terror' which saw a significant increase in homeland security. The US Patriot Act (2001) gave the federal government significant new powers to detain people and hold information on them. Significantly, a new cabinet department of Homeland Security was created in a major federal response. Rather than individual states and localities formulating their own strategies, Homeland Security directed both states and cities on how to provide protection against potential terrorist attacks. This federal response to homeland security and national defence continued under presidents Obama and Trump.

Study tip

Medicare and Medicaid are both health insurance programmes administered by the US government.

Medicare is a federal programme that provides coverage for those aged over 65, or under 65 if they have a disability, no matter what their income.

Medicaid is a state and federal programme that provides health coverage for those who have a very low income.

Some people are eligible for both Medicare and Medicaid.

- Illegal immigration.** Trump's policy of building a Mexico border wall was also federal and saw 16 states file suits against the federal government. In May 2019, Judge Gilliam of the District Court (general trial courts of the federal judiciary) blocked funding of the wall on the grounds that the executive had overstepped its authority. However, in July 2019 in a 5–4 ruling the Supreme Court issued a stay to Gilliam's judgement, allowing the administration to continue construction while litigation continued. This is another example of federal government attempting to encroach on state autonomy.

Federal government encroachment on state autonomy during national crises While the state governors have considerable autonomy in the logistics of dealing with a natural disaster in their state, they nonetheless depend on federal government and the Federal Emergency Management Agency. For example:

- The federal government responded to Hurricane Katrina in 2005 with approximately \$120 billion of economic relief aid.
- Covid-19 has seen the federal government actively involved. The Coronavirus Aid, Relief, and Economic Security (CARES) Act (2020) was a \$2.2 trillion economic relief package which attempted to combat both the public health and economic impacts of the virus.

The sharing of responsibility in dealing with national crises is an example of the 'marble cake' federalism previously discussed.

Supreme Court rulings support federal government over the states

Although the Supreme Court case *National Federation of Independent Business v Sebelius* (2012) struck down the Medicaid provision in the law, it nonetheless upheld the Affordable Care Act, leaving the federal government with significant control over healthcare.

Debate

Is the USA still a federal nation?

Yes

- All citizens pay federal income tax and the states depend on financial support from the federal government.
- Healthcare provision is heavily dependent on federal funding with the majority of states providing Medicaid.
- The federal government has mandated parts of education policy.
- The Homeland Security department coordinates and controls responses to threats to the nation, e.g. terrorist threats and natural disasters.
- States depend on the federal government during national crises. The Federal Emergency Management Agency exists because the individual states cannot do what federal government can do.
- The Supreme Court has made rulings in favour of the federal government over the states.

No

- Laws vary significantly across states, including the legality of the death penalty, state taxes and the legal status of marijuana.
- States control the provision of medical insurance.
- Electoral practices vary significantly from state to state.
- Some states use sanctuary cities to prohibit local law officers from helping federal immigration officials.
- During national crises or national disasters such as Covid-19, state governors act in the best interests of their state.
- The Supreme Court has made rulings in favour of a state over the federal government, e.g. *United States v Texas* (2016).

Consider which of the arguments for and against the USA being a federal nation are more significant before coming to your conclusion.

Study tip

The three-fifths clause was merely a device to calculate the numbers of representatives each state could send to the House of Representatives. It did not give any enslaved people the vote; nor did it mean that a black American enslaved person was 'worth' three-fifths of a free white person.

The extent of democracy in the US Constitution

The Founding Fathers were men of property and status in the 13 colonies. Their attitude to democracy was consistent with their European contemporaries. They feared majority rule with its potential of a permanent majority (made up of the lower classes) riding roughshod over the minority (the 'natural' ruling class, to which they belonged). As Thomas Jefferson argued, 'an elective despotism was not the government we fought for', while James Madison worried that democracy in its purest representative form would allow 'the rights of the minor party [to] become insecure'. Democracy as we understand it in the twenty-first century presupposes equality between different genders, races and social classes. However, the Founding Fathers were white males who belonged to their own societal elite. Moreover, a number of them, including George Washington, Thomas Jefferson and James Madison, were enslavers.

The contemporary culture within the society of the 13 colonies naturally affected the structure of the Constitution as its framers sought to maximise their own interests. However, over time, the Constitution has become more democratic as it has evolved (see Table 1.5).

Table 1.5 The limits on constitutional democracy and how these have changed over time

Limits on democracy in the original Constitution	Explanation and examples
Only the House of Representatives was to be elected directly by the people. The electorate was limited to white property-owning males over the age of 25.	The USA has become more democratic and the electorate has expanded. The property qualification has been dropped and voting rights have been extended to all races and to women.
The number of congressmen allocated to states was based partly on population. States where slavery was legal were keen for enslaved people to be counted, but not as a whole person — they were counted as three-fifths of a person. (See Study tip, above.)	There have been improvements in the democratic rights of black Americans but it has been a slow process. The Thirteenth Amendment (1865) abolished slavery. The Fourteenth Amendment (1868) gave formerly enslaved people full citizenship. However, it was not until the Twenty-Fourth Amendment (1964), which prohibited poll taxes in elections for federal officials, and the Voting Rights Act (1965), which outlawed discrimination and literacy clauses, that all black Americans were finally able to vote.
The Senate was nominated by the state legislatures, not directly elected. This meant that considerable influence was invested in an unelected branch of the legislature. Of the Founding Fathers, only James Wilson favoured electing the Senate by a popular vote.	Throughout the nineteenth century there was growing dissatisfaction with the disconnection between the Senate and the people. This eventually led to the Seventeenth Amendment in 1913 and the direct election of Senators in 1914.
The president was elected by an Electoral College whose members were appointed by state legislatures.	Between 1800 and 1832 the state legislatures voted to provide for the direct election of members of the Electoral College. This is a more democratic system, but it remains possible for a candidate to lose the popular vote and still win the Electoral College. This has happened in 1824, 1876, 1888 and more recently in 2000 and 2016 (see Chapter 5 for more details).
The Constitution allows each state to draw up its own congressional boundaries for the districts of House of Representative seats.	In some states, the governing party of state legislatures draw up the boundaries of each district to give it an electoral advantage. This is known as gerrymandering (see p. 59).

Strengths and weaknesses of the US Constitution and its impact on US government today

Debating the strengths and weaknesses of the Constitution is not straightforward as so much depends on one's own political persuasion.

- Conservatives are likely to interpret the Constitution in a strict or literal fashion — they look at the original intentions of the Founding Fathers. They favour states' rights over the power of federal government.
- Liberals tend to interpret the Constitution in a loose fashion — reading elements into the document that they think the framers of the Constitution would approve of. They tend to favour the power of federal government over states' rights.

The US Constitution is difficult to amend

Arguments for this being a strength

If one looks at the history of the USA, the amendment process is clear and allows for flexibility whereby the Constitution can be changed. That it is difficult to do protects the Constitution from being changed in response to short-term trends. The Founding Fathers created a deliberately difficult process as they did not want it to be too easy for the Constitution to be altered. The US Constitution provides clarity about the rights of US citizens that are enforced by the Supreme Court, which regularly strikes down laws that are unconstitutional. While elements of the Constitution have been criticised as outdated and/or unhelpful, such as biennial elections to the House, the Electoral College and the right to gun ownership, amendments have lacked sufficient support ever to be passed.

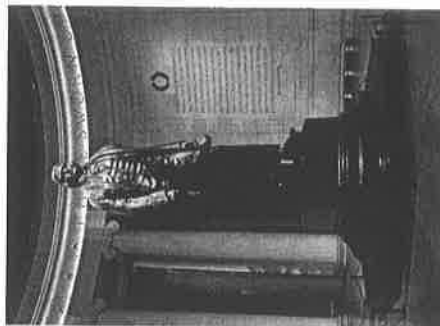
Arguments for this being a weakness

The need for Congress and the states to agree, and for supermajorities, makes the amendment process almost impossible. Over 12,000 amendments have been proposed since 1787 and only 27 have been successful. This 0.2% success rate is used by those who criticise how the 'tyranny of the minority' can frustrate the democratic will of the majority. It is also debatable whether the Founding Fathers would have favoured the current status quo. Founding Father and third president Thomas Jefferson argued that '[E]ach generation' should have the 'solemn opportunity' to update the constitution 'every nineteen or twenty years', thus allowing it to 'be handed on, with periodical repairs, from generation to generation, to the end of time'.

Vagueness of the Constitution

Arguments for this being a strength

The vagueness of the Constitution has allowed the Supreme Court to make interpretative judgements, ensuring that the Constitution remains relevant today. In *Roe v Wade* (1973) the Court announced that the Fourteenth Amendment right of 'liberty' included the right of a woman to terminate her pregnancy, one of the most important interpretative judgements that the Supreme Court has ever made.



The Jefferson Memorial in Washington DC

In *Obergefell v Hodges* (2015) the Court judged that the Fourteenth Amendment guarantees same-sex couples the right to marry, effectively making same-sex marriage legal in the 50 states. In *Carpenter v United States* (2018) the Court judged that acquiring cell phone location data amounts to a Fourth Amendment search and requires a warrant.

Arguments for this being a weakness

It can be claimed that the vagueness of the Constitution has allowed broader interpretation of the Constitution than the Founding Fathers would have envisaged. Conservatives argue that the Founding Fathers would not have supported same-sex marriage or abortion. They reason that if the Constitution is to be changed to allow such changes in the law, it should be done via constitutional amendments.

Likewise, the vagueness of Article II of the Constitution has allowed the president to dominate US government, particularly in the area of foreign policy, at the expense of Congress which has struggled to interpret its power as broadly.

Protection of rights in the US Constitution

Arguments for this being a strength

The Constitution has a strong system of rights protection. The Bill of Rights and the Fourteenth Amendment give legal protection to citizens, based on the liberal concept of individual freedom. Religious freedom, the right to bear arms and the rights of the accused are all good examples of how the Constitution protects liberty as well as protecting citizens from excessive government control.

However, while the Constitution was designed to protect natural rights, the Founding Fathers did not see all people as being equal. Slavery was legal and a number of Founding Fathers were enslavers, so in its original incarnation the Constitution was not democratic in the way we would recognise democracy in the twenty-first century. Black Americans and other minority groups such as the Hispanic population have spent much of American history battling for racial equality (as we shall discuss further in Chapter 4). Equal rights for minority groups such as homosexuals were also not recognised in the original Constitution. The death penalty remains controversial as for many it violates the Eighth Amendment, which states that punishments should not be 'cruel and unusual'.

Table 1.6 shows how the judicial, legislative and executive branches have changed the Constitution in response to changing cultural attitudes towards race and sexuality, while defending the original key features of the Constitution.

Table 1.6 Changes to the Constitution to improve protection of rights

Method	Example	Year
Constitutional amendment	The Fifteenth Amendment: Extended voters' rights to all races. However, the southern states introduced poll taxes and literacy tests for voters, which meant this amendment was a failure and minority races were still disenfranchised.	1870
Decision of the Supreme Court	<i>Brown v Board of Education of Topeka</i> : Declared segregated schools to be unconstitutional.	1954
Presidential leadership	President Eisenhower: Sent federal troops to Little Rock, Arkansas, to enforce racial desegregation.	1957

Method	Example	Year
Presidential leadership	President Kennedy: Created the Equal Opportunity Commission.	1961
Constitutional amendment	The Twenty-Fourth Amendment: Prevented voters' rights being denied for non-payment of poll tax.	1964
Legislation	Voting Rights Act: Ended literacy tests and other tests as requirements for voter registration.	1965
Decision of the Supreme Court	<i>Obergefell v Hodges</i> : The court judged that the Fourteenth Amendment guarantees same-sex couples the right to marry. The ruling effectively made same-sex marriage legal in the 50 states. While this was a victory for minority rights, critics argued that in effectively overturning the law in 12 states where same-sex marriage was illegal, the Court was encroaching on their democratic autonomy.	2015
Decision of the Supreme Court	<i>Carpenter v United States</i> : The Court judged that acquiring cell phone location data amounts to a Fourth Amendment search and would require a warrant. This is considered a landmark case concerning the protection of the right to privacy in the modern age.	2018

Arguments for this being a weakness

While much progress has been made in establishing the democratic rights of minority groups, exemplified in the election of the first black American president, Barack Obama, in 2009, the lack of rights protection is still considered a problem. The *Shelby County v Holder* (2013) Supreme Court ruling struck down section 4 of the Voting Rights Act of 1965, which included the controversial preclearance formula. Preclearance was created to ensure that states or localities with a history of discriminatory voting laws did not pass new restrictions that affected racial minority voting negatively.



President Obama and members of his administration meet civil rights leaders in 2013 to discuss safeguarding the right to vote following *Shelby County v Holder*

Study tip

When referring to rights and liberties protected, either formally or informally, in the US Constitution, aim to include the specific amendment number or the relevant court case and year.

The Supreme Court was clear that, while racial discrimination in voting was unconstitutional, so was preclearance as it exceeded Congress's power to enforce the Fourteenth and Fifteenth Amendments. Within days of the judgement Texas announced that a new voter identification law which had previously been blocked would now go into immediate effect. A number of other states followed suit and in 2019, Leigh Chapman, the director of the voting rights program at the Leadership Conference on Civil Rights, stated: 'Since Shelby, states have opened the floodgate to voter suppression and we've seen laws that have discriminated against voters of color all across the country.'

Likewise, the death of George Floyd in May 2020 was the catalyst for Black Lives Matter protests across the USA, which the *New York Times* has described as the largest social movement in US history, with the numbers who said they had protested estimated at between 15 and 26 million people of all races. For many, Floyd's death symbolised the institutional racism that exists within the USA (particularly within the police force) and the fact that the Constitution still has some way to go before the rights of all its citizens are guaranteed.



Thousands march in San Francisco in June 2020 to support the Black Lives Matter movement and protest against George Floyd's death at the hands of the Minneapolis police

The separation of powers

Arguments for this being a strength

The Constitution clearly creates a government of separated institutions sharing powers and it also limits the power of federal government over the states. The checks and balances between the three branches — executive, legislature and judiciary — coupled with the short election cycle of the House of Representatives ensure that the government has to work in the interests of the people whom it represents. Moreover, the overlap of powers between the executive and the legislature and between the two chambers of Congress means that there needs to be bipartisan cooperation between the parties, especially during divided government.

Arguments for this being a weakness

Some aspects of the Constitution do not work as the framers would have envisaged: for example, the growth of federal power at the expense of the states, and of presidential power in foreign policy at the expense of Congress. Moreover, the framers did not foresee the party polarisation of the late twentieth and early twenty-first centuries. This means that the Constitution has not worked as well as it could have, with gridlock involving government shutdowns when the president and Congress cannot agree on a budget. Similarly, while 6–7% of bills became law in the 1980s, this number has dropped to 2–3% because of the inability of the two parties to compromise regularly on legislation. In times of united government, oversight is typically weaker as Congress tends to be reluctant to criticise the president.

Comparing the US and UK constitutions

Study tip

Ensure that you are aware of the similarities as well as differences in all your comparative topics. It is easy but unwise just to focus on the differences.

Comparing the UK and US constitutions and the resulting impact on politics and government

A constitution is a framework within which a country's system of government is conducted — the rules that govern the relationship between the government and the governed. Constitutions establish the duties, powers and functions of the various institutions of government. They define the relationship between the state and the individual.

Their nature and sources

Both the UK and US constitutions are partly a product of the culture and societies that shaped them. The UK Constitution emerged by evolution; the US Constitution by revolution.

The USA has a codified constitution which is a single document of approximately 7,000 words containing most of the country's constitutional arrangements. The Supreme Court rulings supplement these written sources with interpretative amendments. Numerous sources also make up the UK Constitution, the most significant being statute law and authoritative works, such as A.V. Dicey's *Introduction to the Law of the Constitution* (1885) which explains how the British Constitution rests upon the 'twin pillars' of parliamentary sovereignty and the rule of law. Both constitutions contain **conventions**, so for example the US Constitution does not directly refer to the cabinet, but every president since 1789 has had one. Similarly, **conventions** are an important part of the UK Constitution, such as the expectation that the monarch will always give royal assent to laws passed by Parliament.

While both constitutions are written, only the USA has one codified document. No such equivalent exists with the UK Constitution, which has several sources such as statute law and common law. It is for this reason that the UK Constitution is described as uncodified. The US Constitution became effective in 1789, is entrenched in higher law, and has only been formally amended 27 times. In the UK, Parliament is always

Useful term

Conventions A

convention is an unwritten understanding concerning how something in both the UK and US Constitutions should be done which, although not legally enforceable, is almost universally observed. Conventions are therefore extremely influential in the operation of both political systems.