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

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

**Constitution** A set of fundamental laws that determines the central institutions and offices, and powers and duties of the state.
Finally, we consider various theories of political institutions and how they help us to understand the structure and operations of the modern state.

The major topics in this chapter are:

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

What a constitution is, and why we have them

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

Constitutions are sets of laws, but they are very special ones that lay out the most important institutions and offices of the state and define their formal powers (see briefing 4.1 and fact file 4.1). Consequently, they have four main features:

1. **Fundamental laws** Constitutions are laws about the political procedures to be followed in making laws. They are supreme laws, taking precedence over all others, and defining how all the others should be made. Some analysts call them ‘meta-rules’ (rules about how to make rules), but the German constitution calls them ‘the Basic Law’.
2. **Entrenched status** Constitutions have a special legal status. Unlike other laws, constitutions usually state the conditions under which the constitution can itself be changed. These conditions are often very demanding in ways that are intended to make sure that the change is not hasty or undemocratic, and that it has widespread support.
3. **Codified document** Constitutions are written down, often in a single document that presents the constitution in a systematic manner.
4. **Allocation of powers** Constitutions outline the proper relations between institutions and offices of the state, and between government and citizens. This is probably the most crucial part because it allocates powers
Constitutions vary so much that no two are likely to be the same in any particular respect. Some are long and detailed (India’s has 387 articles and nine schedules), some short (the USA’s has seven articles and twenty-seven amendments). Many are general, but others try to specify the kind of society and political system they aspire to – Sweden’s sets out specific regulations for social security and labour laws, Japan’s renounces war, and Croatia’s states that some rights can be restricted in case of war. Some are contained in a single document, some refer to other documents or to international agreements such as the UN Declaration of Human Rights (1948). Some have been changed comparatively frequently, others rarely. Some are old, some new. In a few cases, the constitution is said to be unwritten (Britain and Israel) but, in fact, it is better to refer to them as ‘uncodified’, because while much is written down, it is not consolidated in one main document.

It is easy to obtain the constitution of every nation in the world from websites (see p. 90) so no examples are provided here. In spite of their huge variety, most constitutions fall into four main parts:

- **Preamble** The preamble tends to be a declaration about nationhood and history, with references to important national events, symbols and aspirations. The preamble tends to be inspirational rather than legal or rational.
- **Fundamental rights (Bill of Rights)** A list of civil and political rights and statements about the limits of government powers. Some constitutions refer also to economic, social and cultural rights. Many of the newer constitutions simply adopt the 1948 UN Universal Declaration of Human Rights.
- **Institutions and offices of government** The main structures or institutions of government are described, together with their powers and duties. Usually this means the executive, legislative and judicial branches of national government, and sometimes lower levels of government as well.
- **Amendment** The procedures to be followed in amending the constitution.

and functions to government and specifies the rights and duties of governments and citizens – who can do what, to whom, and under what circumstances.

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

1. **Rule of law** According to Albert V. Dicey (1835–1922), the nineteenth-century British constitutional theorist, the rule of law underlies the idea of constitutionalism. The rule of law, not the arbitrary rule of powerful individuals, is the hallmark of democracy.
2. **Transfer of power** Democracies are marked by a peaceful transfer of power from one set of leaders or parties to another. Democratic constitutions typically state the conditions for this – how and when government is to be elected, by whom and for how long. The peaceful transfer of power is so important that some political scientists define a ‘democracy’ in these terms – e.g. there have been three successive free and peaceful elections.

3. **Separation of powers** and checks and balances According to classical political theory, democracy is best protected by creating separate branches of government with different functions and powers, each checking and balancing the power of the others in a system of checks and balances.

4. **Relations between government and citizens** At the heart of any democracy is the relationship between citizens and their government, so constitutions often include (or refer to) a Bill of Rights that enumerates the rights and responsibilities of citizens, and the limits of government power over them. Those who are suspicious of government in any shape or form see constitutions as setting clear limits on the power of government in order to guarantee the rights of the citizens.

5. **Locus of sovereignty** Since there must be a governing body or office capable of making authoritative decisions, constitutions usually specify who or what is to be the ultimate authority to make and enforce law.

6. **Government accountability** Democratic governments are accountable to their citizens, and constitutions normally try to pin down the mechanisms of this accountability – who is answerable to whom, and under what circumstances.
Constitutions are sometimes disputed because none is fully clear, consistent, unambiguous, or comprehensive. The last job of a constitution is to say who is to be the final arbiter of its meaning and how it may be changed.

### The separation of powers

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

### Executives

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

The executive branch of government, being at the top of the political pyramid, performs three main functions:

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

In most modern democracies the executive officer is called a president or prime minister. But, to complicate matters, presidents are not always political executives. For example, both the USA and Germany have presidents, but they do entirely different jobs. In America, the elected president is both the head of government and the head of state, which is an enormously powerful and important position, but the German president is only the head of state and a largely ceremonial figure who is, in some respects, rather like a constitutional monarch (see fact file 4.2). In what follows we are concerned mainly with the politically powerful presidents who, as both heads of state and government, are significant political figures, not ceremonial ones.
EXECUTIVES are the decision-making branch of government, and legislatures are the law-making branch. The term derives from the Latin words ‘legis’ (law) and ‘latio’ (bringing). Legislatures evolved from the assemblies that medieval monarchs called to agree to some royal action – to levy taxes or wage war. These assemblies started meeting regularly, and eventually came to be elected by all citizens of the state and so they acquired legitimacy as representative parliaments or assemblies (see fact file 4.3). Technically, a legislature is any law-making body, however constituted, but in a democracy the legislature gets its legitimacy from the fact that it is directly and popularly elected by citizens.
Legislatures are known by a variety of names – assemblies, parliaments, houses and chambers – but all amount to much the same thing: assemblies are meetings of elected representatives who meet to discuss public affairs; parliaments are ‘talking shops’; houses and chambers are the places where assemblies and parliaments meet – the House of Commons, the House of Representatives, the Chamber of Deputies.

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

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

For these reasons, there is a great debate about whether unicameralism is better than bicameralism (see controversy 4.1), but it turns out that most
One chamber or two?

<table>
<thead>
<tr>
<th>Pro-unicameralism</th>
<th>Pro-bicameralism</th>
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<tr>
<td><strong>Power</strong> is mainly located in one assembly. No confusion of roles, responsibilities, or accountability.</td>
<td><strong>Two chambers</strong> provide another set of checks and balances, with powers to delay, criticise, amend, or veto – a constitutional backstop.</td>
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<td><strong>No overlap or duplication between assemblies. Two assemblies can result in rivalry and even deadlock between the two.</strong></td>
<td><strong>Two forms of representation, usually direct election to the lower chamber, and another form of election (indirect) or appointment to the higher.</strong></td>
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<td><strong>There is room for only one elected, representative body. ‘If the second chamber agrees with the first, it is useless; if it disagrees it is dangerous’ (Abbé Sieyès).</strong></td>
<td><strong>A second chamber can reduce the workload of the first by considering legislation in detail, leaving the first chamber to deal with broad issues.</strong></td>
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<td><strong>Most legislatures are unicameral, and the number is increasing. Many new states have adopted unicameralism with apparent success, especially in Africa and the Middle East.</strong></td>
<td><strong>A majority of democracies have bicameral legislatures – Australia, Britain, Canada, France, India, Italy, Japan, Mexico, Brazil, the USA, South Africa and Switzerland.</strong></td>
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<td><strong>Unicameralism is particularly suitable for unitary states (three-quarters are unicameral).</strong></td>
<td><strong>Bicameralism is suited to federal systems, where territorial units of government within the state can be represented at the national level: 80 per cent of bicameral systems are in federal states.</strong></td>
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<td><strong>Costa Rica, Denmark, New Zealand and Sweden have abolished their second chambers, without apparent adverse effects.</strong></td>
<td><strong>Some claim the main defence of bicameralism is political – upper chambers are conservative bodies with the job of tempering the actions of the lower house.</strong></td>
</tr>
<tr>
<td><strong>Unicameralism seems to work best in small countries.</strong></td>
<td><strong>Bicameralism seems to work best in countries that are large or socially and ethnically diverse – it helps to resolve regional conflict.</strong></td>
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<td><strong>Second chambers with appointed members are often criticised as being places where ‘has-been politicians’ go to die.</strong></td>
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democracies are bicameral. This is because it is usually not too difficult to sort out a system that enables two houses to work together effectively. Whatever the abstract and theoretical problems may be, it is generally possible to solve them in a practical way.

**Strong and weak bicameralism**

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

Membership of the second house
Since democratic lower chambers are directly elected by the population, many upper chambers are constituted on a different basis. Most are not directly elected by the population as a whole, but are either indirectly elected or appointed, or some combination of both. Some upper chambers, however, are directly elected, usually in federal systems (see chapter 6) but on a different basis than the lower house. If they are directly elected at all, upper houses are often based on different geographical constituencies.

Tenure and size
The terms of tenure of upper houses are usually different. They are often elected for a longer term of office (five–nine years, rather than the three–five years of lower chambers). Upper chambers sometimes have an older qualifying age, and they are usually much smaller than lower ones.

Judiciaries
Should politicians be the final judge of how the constitution should be interpreted? The danger is that the government of the day will try to manipulate matters in its own interests. Therefore, constitutions are, in the words of David Hume (1711–76), a set of ‘institutions designed for knaves’. This does not presume that all politicians actually are knaves, but takes full account of the possibility that they might be, and that a constitution needs a safeguard against this danger. Since a constitution is primarily a legal document, it is argued that lawyers should be the final arbiter of it. Besides, judges (the judiciary) are often thought to be the best independent and incorruptible source of experience and wisdom on constitutional matters. This, in turn, requires judicial independence to protect judges from political interference and from the temptations of corruption. For this reason, judges are often appointed for life and paid well. Some
countries have created special constitutional courts, but most use their regular courts (see fact file 4.4).

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

1. It is difficult to guarantee the political independence of the judges. In many countries, senior judges are appointed by politicians and conservative politicians tend to appoint conservative judges while liberal politicians are more likely to appoint liberal ones. Nor are judges entirely immune from the social pressures of public opinion and the mass media. Most important, judges usually come from conservative social groups and deliver conservative political judgements. In short, it is claimed that judges are not, or cannot be, neutral.

2. In a democracy, so it is argued, the democratically elected legislature should have responsibility for interpreting the constitution, not an appointed and unrepresentative judiciary.

**Fact file 4.4**

**Judiciaries**

- The principle of judicial review was originally limited to the USA in the nineteenth century. It became more widely accepted in the twentieth century, especially in federal systems where the courts were used to settle disputes not only between branches of government but between federal and other levels of government as well.
- A few democracies, such as Belgium, Finland, The Netherlands and Switzerland, do not have judicial review.
- Some states (Israel, New Zealand, the UK) have judicial review in practice, but not in theory. In the UK, the binding nature of EU law has given the courts the role of judicial review.
- Special constitutional courts have been created in Austria, France, the EU, Germany, Greece, Chile, South Africa, Italy, Portugal and Spain, and many of the new democracies of central and eastern Europe.
- Judicial review is carried out by regular courts in most countries including Australia, Canada, Denmark, India, Italy, Japan, Sweden, and the USA.
- The Federal Constitutional Court of Germany has become one of the most active in the west, rejecting some 5 per cent of all legislation on constitutional grounds, and becoming involved in issues ranging from freedom of speech and abortion to federal–state relations and public finance. The European Court of Justice (ECJ) is also active and powerful in EU matters.
- Obudsmen (also known as Parliamentary Commissioners, Inspectors General and Public Protector) are found in many western European states and the EU, as well as Brazil, Croatia, the Czech Republic, Estonia, India, Israel, Latvia, New Zealand, Peru, South Africa and the USA.
Judges are involved in more than constitutional law. The meaning of other laws may also be ambiguous and disputed, and sometimes this has political implications – electoral law for example, or tax law with implications that affect government’s capacity to raise money for public services. In fact, some legislation is deliberately vague, because it was the only way out of political deadlock between competing groups. In such circumstances, it is the job of the courts to interpret the law and to decide how it should be applied to particular cases. In doing so, the courts may go beyond merely interpreting the law and actually modify or change it in subtle ways. In this respect, judges can play an important political role as the third branch of government.

**Judicial activism**

The role of the courts in government is tending to widen. The Supreme Court of the USA was not given power of constitutional review in the 1787 constitution, but had successfully claimed it by 1803. The USA then went through two notable periods of judicial activism in the 1930s (when it tried to stop Roosevelt’s New Deal legislation) and again in the 1950s (when it promoted racial integration). There is a general tendency now for the courts to take a more active role in government across the democratic world where the judiciary has the right of judicial review. The five main reasons for the expanding role of the courts are:

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

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