



# Characteristic Features of the Constitution of the United States of America

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## Absztrakt

**Aim:** The aim of this study is to review the specific features of the Constitution of the United States of America, in view of the historical circumstances of its creation, and its topicality. The author stresses that the US Constitution and its interpretation have changed in the light of changing economic, political and social circumstances.

**Methodology:** The author of the study has used the historical and comparative method in writing the paper. It has been considered how and to what extent this constitution has been and is being taken into account today outside the United States, particularly in European countries.

**Findings:** The authors, the ‘Founding Fathers’ of the Constitution of the United States of America agreed that the Constitution should provide the legal basis i.e. the guarantee of the separation and balance of powers. The principle of separation of powers implies the creation of three separate institutions of equal importance in the exercise of power. The checks and balances enshrined in the Constitution ensure balanced exercise of power. In addition to widespread presidential power, the preeminent role of the Supreme Court is according to our view the most distinctive feature of the constitutional system of the United States of America.

**Value:** In Hungary, this study provides a complex introduction to the Constitution of the United States of America. This includes the sources of the Constitution, the original text of the Constitution and its Amendments.

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## Introduction

1. In this paper, we would like to give an overview of the specificities of the Constitution of the United States of America (USA), with a special focus on its historical aspects. The Constitution of the United States of America was adopted and entered into force more than two hundred years ago. Nevertheless, this constitution, although amended and supplemented, has not lost its force in the first half of the 21st century. Continuity, provided that the social, economic and political conditions underpinning the functioning of the State have not changed in substance, is an essential element in the functioning of the State, let us add of the ‘good state’.

In addition to continuity, two other important features of the Constitution of the United States of America should, in our view, be mentioned. On the one hand, it is necessary to emphasise that in preparing the US Constitution, the ‘Founding Fathers’, the framers, built on a centuries-old, and even millennia-old tradition of constitution making in terms of content. On the other hand, it should be stressed that the founding fathers took into account the specificities of British constitutionalism, or more precisely constitutional thinking, notwithstanding the fact that the United Kingdom did not and does not have a written constitution.

In this regard, we believe that the Constitution of the United States of America can be regarded as an organic written constitution, which can be realistically understood primarily in the light of the federal Supreme Court’s interpretation, which changes and changes from era to era, sometimes even decade to decade.

2. We would like to point out that only two written constitutions in Europe,<sup>1</sup> the Norwegian constitution of 1814<sup>2</sup> and the Luxembourg constitution of 1868,<sup>3</sup> still

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1 In the case of England, which has no written constitution, Cromwell’s *Instrument of Government* of 1653 can be seen as an attempt to create a written constitution. See G. Jellinek, 1914.

2 The Norwegian constitution (Grunnlov), adopted in 1814 and amended several times since then, proclaimed the independence of the country and provided for the abolition of absolutism, absolute monarchy. A personal union between Norway and Sweden in the same year, which lasted until 1905, maintained the constitution in force. See Herlitz, 1969.

3 The adoption of the Luxembourg constitution was made possible by the Constitution of May 1867. The adoption of the Luxembourg constitution took place in the year following the Treaty of London, signed on 11 June 1867, which confirmed Luxembourg’s independence on 9 June 1815. As in Norway, the constitution was not affected by the termination of the personal union of the Grand Duchy of Luxembourg with the Kingdom of the Netherlands (German Lowlands) on 13 November 1890, and was not amended.

in force today, have a history of well over a hundred years. The Constitution of the United States of America, adopted in 1787, has been in force for more than 200 years in an almost unchanged form, apart from a few amendments that are not considered crucial, such as the direct election of senators.

In 1878, the eminent British statesman of the 19th century, William Ewart Gladstone (1809–1898), not without reason, called the American Constitution, in comparison with the unwritten British constitution, ‘*the most wonderful work that human mind and will ever produced*’.<sup>4</sup>

Gladstone’s oft-quoted assessment, however, gives the mistaken impression that the US Constitution, like Pallas Athena, sprang from the minds of the American people in full-bloodedness. The constitution, like the unwritten British constitution, was the result of slow, thoughtful and often painful development, as James Madison alluded to many years after the constitution was adopted (see Beck, 1924).

The Declaration of Independence is of paramount importance among the predecessors of this still deeply revered piece of legislation. Thomas Jefferson, who played a prominent role in drafting the Declaration of Independence at the Second Continental Congress held in Philadelphia on 4 July 1776, was a masterpiece in both oratory and legal terms.<sup>5</sup> Containing principles rooted in natural law, such as equality between men, the right to life, the right to liberty, the right to establish a new government, and the right to revolt against a government that does not respect fundamental rights – the preamble uses the term ‘self-evident truth’ – the authors of the Declaration of Independence consider *ius naturale* or *ius naturae* to be higher law, compared to positive law (Corwin, 1928; Morton White, 1978).

Following the 1783 Paris Peace Treaty, which ended the War of Independence and recognised the sovereignty of the United States, and established a solid foundation for an internal state order between England and the United States, and England and France,<sup>6</sup> which had been allied with the latter since 1778. The

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4 William Ewart Gladstone (1809–1898) put it this way when comparing the British Constitution with the American Constitution: ‘*As the British Constitution is the most subtle organism which has proceeded from progressive history so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man.*’

5 In addition to Jefferson, the committee appointed by the Continental Congress to draft the Declaration of Independence included John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston. As background, Richard Henry Lee, on behalf of the State of Virginia, submitted three resolutions to the Continental Congress on 7 June 1776. The first proposal stated that the Confederate colonies would form ‘free and independent states’. The resolution declaring independence was adopted by the Continental Congress on 2 July. On the basis of this resolution, a commission was set up to prepare the drafting of the Declaration of Independence.

6 Corwin gives a thorough overview of the relationship between the 13 American colonies and France. See Corwin, 1916.

13 former colonies differed in no small measure in their internal systems of government.

As an autonomous colony, Connecticut and Rhode Island could choose their own governor and council under the colonial charter. The colonies of Maryland and Pennsylvania, on the other hand, were endowments of the King of England. Therefore, the governor, the members of the council and the heads of the main administrative offices were elected by the owners.

In the nine royal colonies, the sovereign monarch appointed the governor and the heads of the most important state institutions. A common feature of the colonies' system of state-government was that they had a House of Commons, a legislative body elected on the basis of a different wealth census for each colony.

The Articles of Confederation, adopted on 4 October 1776 and considered the first US Constitution, united the 13 independent states into a loose confederation. This confederation, known as a 'league', was not actually established until 1781, after years of ratification of the Act.

However, the Articles of Confederation did not provide the constitutional basis for a state that could function effectively in the economic, financial and foreign affairs spheres, and that could ensure the unity of the judiciary (judging, adjudication). The Congress, which was essentially a government under the Articles of Confederation, could not in fact legislate.

The Congress voted only on recommendations and had no means of implementing the resolutions adopted. The slightest modification or alteration of the Articles of Confederation was possible only with the consent of all the states. It became an increasingly urgent task to lay the constitutional foundations for a new federal state structure to replace the League of States.

## Historical overview

3. After several months, in May 1787, the Constitutional Convention finally met in Philadelphia, with delegates from all the member states except Rhode Island, 55 in number. George Washington presided at the Philadelphia Convention. Although their mandate from Congress was limited to revising the Articles of Confederation, the delegates worked intensively and constructively for four months to draft a new constitution.

Like the Declaration of Independence, which declared the right to life, liberty and the pursuit of happiness<sup>7</sup> as a fundamental human right under natural law,

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7 The pursuit of happiness is closely related to the concept of property. The development of this relationship is analysed by Scott (1977).

enumerated the grievances of the colonies against the British monarchy and declared the secession of the USA from England, the Constitution is not the work of one man but, in the words of James Madison, ‘the work of many heads and hands’.<sup>8</sup> Among the Founding Fathers, of course, were George Washington, Alexander Hamilton, Benjamin Franklin and especially James Madison, who played a crucial role in the drafting and writing of the Constitution.

The Founding Fathers were well known to the political thinkers and philosophers of state of ancient and modern Europe, such as Plato, Aristotle, Marcus Tullius Cicero, Sallustius, Tacitus, Plutarch, Edward Coke, James Harrington, Algernon Sidney, John Milton, John Locke, Johannes Althusius, Hugo Grotius, Samuel Pufendorf, Christian Wolff, William Blackstone, Jean Jacques Burlamaqui, Emer de Vattel and especially Montesquieu.

The intellectual preparators of the American Revolution also played an important role in the preparation of the Constitution. As early as 1754, Benjamin Franklin proposed that the colonies should have representation in the British Parliament. But James Wilson, author of *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), denied that the London Parliament could have even the slightest power in the colonies. By formulating the principle of no taxation without representation, he rejects the possibility of the British Parliament making laws for the colonies. However, Wilson does not deny that there is a public law relationship between the British monarchy and the colonies. Alexander Hamilton, the author of *A Full Vindication of the Measures of Congress* (1774) and *The Farmer Refuted* (1775), shares Wilson’s views, denying Parliament’s right to legislate and advocating absolute loyalty to the king.

John Adams, the first vice-president and second president of the USA, plays a prominent role in the preparation and legal – let’s add, natural law – foundation of the Constitution. We would like to point out that, even in the literature of the 21st century, we believe that the real importance of John Adams in the long process of constitution-making is not sufficiently recognised.

Adams in his articles *Novanglus or a History of the Dispute with America from its Origin, in 1754, to the Present Time*, published in 1775, does not dispute the right of Parliament to legislate for the colonies in the field of trade. In all other areas, however, and especially in the field of finance, the colonial legislatures are competent. John Adams, in *Thoughts on Government*, published in 1776,

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8 ‘You give me credit to which I have so claim in calling me ‘the writer of the Constitution of the U.S.’ This was not, like the fabled Goddess of Wisdom, the offspring of a single brain. It ought to be regarded as the work of many heads and many hands.’ Madison put it this way in a letter to W. Cogswell (See Writings of James Madison, 1910.)

even advocated the idea of a British balanced government. It is only later that he replaces the idea of balancing of estates, based on the idea of order, with the theory of balancing of interests (rich vs. poor).

It should be emphasized that John Adams is the author of the first draft of the first constitution of the independent Commonwealth of Massachusetts, which had a great influence on the constitutions of the other colonies. A committed believer in natural law, the politician and theorist ascribed a prominent role to the proposition of *A Government of Laws and not of Men*.

4. Drafting the text of the constitution was no easy task, despite the fact that the Founding Fathers could build on the works of these thinkers. They also had at their disposal the constitutions already adopted and in force in each Member State.

The views of the framers of the constitution, which came into force on 4 March 1789, differed in a number of respects. Alexander Hamilton and his followers favoured a constitutional order in which a ‘political aristocracy’ would be given a privileged position in the government of the state through life tenure. New Jersey delegate Paterson would have been content with some modification of the Articles of Confederation. James Madison, Randolph, and the delegates of Virginia were in favour of a strong federal system with a dominant role for the states and their citizens.

The Union’s founding law, which Madison says is ‘the most outstanding of all commentaries on human nature’, is the result of a compromise. There was no disagreement among the delegates on the issue that the constitution should enshrine popular sovereignty based on the principle of limited power (*imperium limitatum*), as Aristotle had known it since his time, and provide the basis for a separation and balance of powers. The theory of checks and balances, which we believe is still useful today, was developed by Adams in his three-volume *A Defence of the Constitutions of Government of the USA* (1787–1788), published in London, reflecting Turgot’s criticisms of 1778.

5. The Union’s fundamental freedoms are not yet included in the first draft of the Union’s basic law. This seems rightly surprising, since the Virginia *Bill of Rights* of 12 June 1776 called them the ‘*basis & foundation of government*’. The *Bill of Rights*, which regulates, among other things, freedom of religion and speech, the right to trial by jury, the right to bear arms, and the right to prosecute, played an important role in the ratification debates of the states that adopted the Union’s founding law.

But ratification has proved far from easy. Between October 1787 and August 1788, three New York newspapers published essays signed by Publius and

written by Hamilton, Madison and John Jay, with the aim of facilitating the ratification process. These essays were published in two volumes in 1788 under the title *The Federalist*.

The states of New York, Virginia and Massachusetts have made the adoption and ratification of the Union's constitution conditional on the inclusion of birthrights, or principal absolute rights as William Blackstone put it. The first 10 amendments to the Constitution were adopted in 1789 and finally entered into force in 1791, forming a practical whole with the text of the Constitution.

It is worth noting that James Madison was the most committed advocate of the *Bill of Rights*, but he also counted on the support of Thomas Jefferson. In his speech in the House of Representatives on 8 June 1789, he stressed that, despite the ratification of the Constitution, the majority of delegates insisted on the inclusion of the 'great rights of mankind' in the text of the Constitution.

Several delegates, including George Mason, fearing the emergence of a strong central power, suggested that the *Bill of Rights* should be included in the text of the constitution. However, this proposal was rejected. Roger Sherman, a delegate from the State of Connecticut, representing those who opposed the inclusion of the *Bill of Rights* in the text of the Constitution, argued that the *State Declarations of Rights* adopted by each state, which were retained in force by the Union's constitution, provided adequate safeguards and guarantees. In the end, the view of James Madison won out. As this was the first time that the text of the Union's constitution had been amended, the question was how this should be done. Madison proposed nine additions, the text of which would be incorporated into the text of the Constitution.

The nine amendments proposed by James Madison were increased to 17 by the House of Representatives, which the Senate summarised in 12 amendments. Ten were finally ratified on 2 October 1789. On 15 December 1791, the ratified amendments became part of the Constitution, collectively known as the *Bill of Rights*. The legislatures of Massachusetts, Connecticut and Georgia did not ratify the *Bill of Rights* until 1940.

Ratification gave the Bill of Rights normative force, by making it part of the Union's 'super law', the Constitution. The elevation of the *Bill of Rights* to the level of a constitution represents a fundamental departure from the French *Déclaration des Droits de l'Homme et du Citoyen*. The *Declaration of the Rights of Man and of the Citizen* may be a more elegant formulation of rights than the *American Bill of Rights*, but they are political maxims of abstract purity rather than norms binding on all, which have become part of the substantive law. The freedoms enshrined in the *Bill of Rights* have become norms sanctioned by state power, not requiring further specification, but, it should be added, interpretation.

Chief Justice Earl Warren rightly declared that the *Bill of Rights* should become ‘the heart of all constitutions’.

The political significance and weight of the *Bill of Rights* is illustrated by the fact that the First Amendment guaranteeing freedom of speech was the decisive weapon in the fight against the *Sedition Act* passed by the Federalist-majority Congress in 1798. Against the *Sedition Act*, which was used to silence printers critical of the government, including Philadelphia printer and publisher William Duane, outraged citizens appealed to Congress to invoke the First Amendment guaranteeing freedom of speech.

The Supreme Court has not reviewed the unconstitutionality of this law. The law was repealed following the electoral defeat of the Federalist Party in 1800, which sought to increase central power by all means. The interpretation of the fundamental freedoms in the *Bill of Rights* has been the subject of much debate over the last 200 years. The role of the Supreme Court in interpreting the *Bill of Rights* has been slow to develop. The first Supreme Court decision on the *Bill of Rights* dates from 1833.

6. In its preamble, the Union’s founding treaty refers to the people as the Constitution’s authors. According to Article I, the depository of legislative power is the Congress, which consists of the Chamber of Deputies and the Senate. The members of the Assembly are elected by the people every two years. The members of the Senate, two from each state, originally elected by the legislatures of each state, are elected by the people of each state for a term of six years under the XVII Amendment adopted in 1913. The Senate is a federal body of the United States and plays a very important role in the foreign affairs of the federal government and in domestic policy. It should be noted that the Senate bears no resemblance to the English House of Lords.

The vertical structure of the federal state is inextricably linked to the horizontal division of power in terms of the separation and separation of powers. Thus, the principle of balancing the power of government by placing several parts of it in different hands, which goes back to John Locke and Montesquieu, is an integral part of the US system of government. What is often overlooked, in our view, is the fact that the principle of separation of powers, as enshrined in the Constitution, did not imply the creation of three independent branches of state power.

The principle of the separation of powers effectively means that three separate institutions have been created, each with an equal role in the exercise of power. The aim is to prevent the emergence of authoritarianism. As Madison writes so eloquently in his essay in *The Federalist 47*: ‘*The union of power in the same hand, whether it be one, several, or numerous (...) can only mean tyranny itself.*’ The Supreme Court has invalidated several laws enacted by Congress on the



basis of the principle of separation of powers.<sup>9</sup> The separation of powers continues to serve the same function in the first decades of this century as it did when it was enshrined in the Constitution.

The checks and balances enshrined in the Union's Constitution ensure a balanced exercise of power. However, despite the technique of coordinated powers developed later, the question arises as to whether the traditional US state organisation in the third decade of the 21st century, in which conflict between Congress and the presidency is not uncommon, is an appropriate basis for the governance of a world power (Sunstein, 1995). There is no doubt that the president has considerably broader powers than the text of the Constitution would suggest. At the same time, it cannot be said that the expansion of presidential power over the past two centuries has been carried out in an illegitimate manner, in violation of the Constitution.

## Changes in the interpretation of the Constitution

7. In drafting the Constitution, the Founding Fathers were clear about the role and powers of Congress. But they did not have a clear picture of the executive branch, as evidenced by the fact that there was considerable disagreement over the scope of that power. It was only in the final stages of deliberations that agreement was reached on the need to enshrine the principles of a monistic executive in the Union's constitution. This monistic conception is reflected in Article II, Section 1 of the Constitution, which confers executive power on the President of the United States.

The powers of the President are relatively narrowly defined in the Constitution. The President's powers include the management of foreign policy. According to Thomas Jefferson, '*The transaction of business with foreign nations is executive altogether*'. This applies in particular to the conclusion of international treaties (Corwin, 1917), partly subject to the approval of the Senate. The president's powers also include the scrupulous execution of the laws, the appointment of federal officers and judges of the federal courts, and the exercise of the power of pardon. The president is the commander-in-chief of the army. He has veto power over laws passed by Congress, although the veto power may be overridden by Congress by a two-thirds majority. Laws other than the Constitution may give the President certain powers.

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9 The decision in *Marbury v. Madison* was a significant step in the recognition of the Supreme Court, or the judicial branch of power, as a branch of equal weight. On the role of John Marshall, see. Friedman, 1988.

Following the Enlightenment ideals, the Founding Fathers did not intend to create a strong executive. There is no doubt, however, that the direction of constitutional development has drifted away from the original intention over time. The interpretation of the text of the constitution, which is fragmentary and not entirely clear in some respects, led to the adoption of the so-called ‘inherent powers’ of the president relatively early on.

## Supreme Court

8. Undoubtedly the most original and most European, and even today the most influential component of the US Constitution worldwide, is the judicial power, the third branch of power, which was greatly expanded by the Judiciary Act of 1789 to the benefit of the federal courts, and in particular the Supreme Court.

The idea that there should be some form of legal guarantee of the effective application of the rules contained in the text of the constitution (the basic law) and of monitoring their implementation was raised long before. The Pennsylvania State Constitution of 1776 provides for the establishment of a Council of Censors. Its function is to monitor and supervise the ‘constitutional conduct’ of the representatives of the State. Alongside the broad powers of the President, the prominent role of the Supreme Court is the most intrinsic feature of the US Constitution and constitutional system.

The members of the Supreme Court, who call each other ‘brothers’ (brethren), carry out their duties without age restrictions and enjoy a very special social prestige. William Howard Taft, formerly President of the United States, became Chief Justice of the Supreme Court eight years after his term as President (1921–1930), which illustrates the exceptional stature of the Supreme Court. The Supreme Court has made a significant contribution to preventing the US Constitution from becoming rigid by issuing important rulings. Through its conservative and progressive jurisprudence and decisions, the Supreme Court has played a major role in the creation of a welfare state based on liberty and equality. On more than one occasion, the Supreme Court has been in conflict with Congress and the President. The conflict between the Supreme Court and President Franklin Delano Roosevelt during the *New Deal* years is still well known.

The controversy led to the President’s desire to increase the number of Supreme Court justices in the *Court Packing Plan*, published on 5 February 1937, to remove an obstacle to the implementation of the *New Deal*.<sup>10</sup> But the idea of

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10 The number of members of the Supreme Court was set at nine, or restored to that number, by an act passed in 1869.

increasing the number of Supreme Court justices was defeated by public opposition, which did not want to change the structure of the highly prestigious institution. Congress was also opposed to the inevitable increase in the political weight of the judicial branch, which the proposed reform would undoubtedly have led to.<sup>11</sup>

9. It was not the intention of the Founding Fathers to give the judicial branch of power the role that it has acquired over time as the constitution has evolved and the political situation has changed. Under Article III, Section 2, of the Union's Constitution, the courts are empowered to review merely 'cases and controversies' by the yardstick of law, not by the abstract review of norms. Under Article VI(2), the Constitution is the supreme law of the land.

This clause gives the Supreme Court a prominent role in the US constitutional system. Obviously, a constitution can become the fundamental law of a country only if the legislative and executive branches of government cannot enact rules and provisions that are contrary to the constitution. Hamilton, in his famous essay 78 in *The Federalist Papers*, set out the principles according to which the courts should become the 'guardians' of the spirit of the Constitution. It follows that the courts should have the power to invalidate laws that are contrary to the Constitution.

The idea of constitutional review of laws originated with Edward Coke, who formulated it in England in the early 17th century (Plucknett, 1926; Corwin, 1976; Thorne, 1985). In the aforementioned *Marbury v. Madison*, Chief Justice John Marshall, who presided over the Supreme Court for 34 years between 1801 and 1835, justified the review of laws for constitutionality and the possibility of their annulment in the event of their unconstitutionality as follows (Corwin, 1914). The Constitution, as the highest law rooted in the will of the people, allows the power of the state, the executive, to be exercised only within certain limits. In the event of conflict, a rule or provision contrary to the Constitution cannot be considered law and cannot be applied by the courts, the interpreters and defenders of the law.<sup>12</sup>

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11 Jeremy Bentham, who in his famous *Introduction to the Principles of Morals and Legislation*, published in 1789, considered the United States to be one of the most, if not the most, enlightened nations on the globe, described the Senate as a poor imitation of the House of Lords (Hart, 1982). Bentham also criticises the US for not seeking, like England, to codify its legal system (see op. cit.). On the codification of the US legal system, see Földi & Hamza, 2023. and Hamza, 2009.

12 At the time of the decision in *Marbury v. Madison*, 39 of the 55 delegates to the Philadelphia Convention were still alive. Charles Pinckney, South Carolina's delegate, was the only one to object to the decision. See Warren, 1937.

In the US, judicial review is not exclusively the preserve of the Supreme Court.<sup>13</sup> The highest court of each state also has the power to review the constitutionality of norms passed by the state legislature. In addition to the Union's constitution, the constitutions of the individual states also serve as a yardstick for constitutional review. The supreme courts of the Member States may annul rules or provisions which are contrary to the constitution of the State concerned.

In this context, we would like to point out that the constitutions of individual states are far from being as stable and permanent as the fundamental law of the Union. For example, Louisiana had 11 constitutions, Georgia 10 and South Carolina 7. Of the 50 states, only 18 state legislatures have not adopted more than one constitution. It is worth noting that Massachusetts' constitution, adopted in 1780, is the oldest. However, it has been amended and supplemented very frequently, 116 times so far.

**10.** Each state's constitution regulates essentially the same issues as the Union's constitution (Friedman, 1988). It first provides for the state's governmental structure, then for fundamental freedoms. Within the system of state constitutions, Part 3 is made up of what is known as 'super-legislation', which is very diverse in terms of the subject matter of the legislation. Super-legislation involves the inclusion in the text of the constitution of provisions that would otherwise be subject to traditional, and therefore non-constitutional, legislation. Their inclusion in the text of the Constitution is motivated by economic or political reasons.

There is no doubt that the Union's basic law also contains provisions that have features in common with superlegislation. One such is the provision in Article I, Section 9, concerning the imposition of various taxes and duties. The now repealed Amendment XVIII on alcohol prohibition can also be considered super-legislation in the view of some US constitutional lawyers. Super-legislation of a detailed regulatory nature, motivated by the particular economic and political situation of a particular era, often leads to the amendment of the constitution of a state or even the adoption of a new constitution.

The supreme courts of the individual states have played an important role in judicial review, which is a pillar of the US constitutional system. In the period 1871–1900, the State Supreme Courts were often more active and more inventive than the federal Supreme Court. The due process principle, based on

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13 The relationship between judicial review and policy as exercised by the Supreme Court is analysed in detail by Choper. He points out that judicial review often comes into conflict with the majority principle. See Choper, 1980. The nomination of Supreme Court justices by the US President is very often (also) politically motivated. For example, on the political background to the nomination of Joseph Story, see Dowd, 1965.

the Amendment XIV to the Constitution of 1868, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of his liberty or property, without due process of law, is primarily the province of the courts of the states, and has been widely interpreted by extension.

The same applies to the judicial application of the doctrine of freedom of contract, which is also based on Amendment XIV. Judicial review has perhaps played an even greater role in the practice of the courts of the individual states in the twentieth century than it did in the last third of the nineteenth century. This tendency is illustrated by the fact that, for example, in New York State, between 1906 and 1938, the courts considered 451 statutes passed by the state legislature as constitutional and 136 as unconstitutional (Smith, 1952).

## Judicial power

11. In the US, the occasional conflict between the judicial power and the other two branches of power does not mean that there has not been a tendency for there to be a harmony between the branches. It should be stressed that prominent Supreme Court justices such as Holmes, Hughes, Stone, Cardozo, Brandeis and Frankfurter, regardless of their ideological orientation, were prominent precisely because they had a keen sense of political events.<sup>14</sup> In their case, it is not too much to speak of a kind of judicial statesmanship. In this sense, judicial law-making is not in contradiction with the political will expressed through a series of referrals in the norms adopted by Congress and the legislatures of the individual states.

In this context, the famous saying of the Chief Justice of the Supreme Court, Charles Evans Hughes – *‘We are under a Constitution, but the Constitution is what the judges say it is’* (Schurman, 1908) – does not refer to the antagonism between the branches of power, but on the contrary, to the unity that tends to emerge between them.<sup>15</sup> According to Chief Justice John Marshall, *‘A constitution is framed for ages to come and is designed to approach immortality as nearly as human institutions can approach it’*.<sup>16</sup>

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14 Fordham, in a lecture delivered in New York in 1957, points out that one of the most important elements of the constitution’s timelessness is the authoritative interpretation of the courts. See Fordham, 1970.

15 For a good overview of the politically motivated decisions of the Supreme Court, see Koopmans (1988). For an overview of the judicial activism of the Supreme Court, see Belz (1971), Semonche (1978) and Gillman (1993).

16 John Marshall put it this way in the much-debated *Cohens v. Virginia* decision in 1821. Cf. Brennan, 1992.

## Summary overview

**12.** The Constitution of the United States of America, drafted by the Founding Fathers on the basis of the works of both classical antiquity and the eminent philosophers of state of modern Europe, takes as the basis for political legitimacy the social consensus of Marcus Tullius Cicero's *De re publica*, the 'consensus omnium bonorum'. This principle, already formulated by Thomas Jefferson and Alexander Hamilton, is the cornerstone of the US constitutional order, which has provided and continues to provide the state with a unique stability in world history.

The words of Louis Dembitz Brandeis, who shortly afterwards became one of the most liberal judges of the Supreme Court, in 1915, are still valid today.<sup>17</sup>

**13.** The analysis of the Constitution of the United States of America is mostly characterised by a philosophical approach. Historical and legal approaches are often overshadowed in research. There is also often a lack of ethical analysis of the constitution. An analysis of the Constitution on several levels provides an objective picture of the development, evolution and current state of the US constitutional system. This applies in particular to the question of the separation of powers.

In the US constitution, the state is declared to identify itself with the 'res populi', based on the idea of popular sovereignty. The relationship between the people and the state becomes close, even inseparable, at the level of the constitution, and the state must strengthen it by all means through legislation. John Adams, who helped to draft the Constitution of the United States of America, refers explicitly to this. The US Constitution contains many elements that were already known from Plato and Aristotle. The most significant difference between Plato's and Aristotle's philosophy of the state and the US Constitution is that the US Constitution presupposes the fundamental equality of all men and citizens.

The most important element of the theory of equality expressed in the US Constitution, or more precisely in the constitutional order that has evolved over the

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<sup>17</sup> *'I see no need to amend our Constitution. It has not lost its capacity for expansion to meet new conditions unless interpreted by rigid minds which have no such capacity. Instead of amending the Constitution, I would amend men's economic and social ideas. Law has always been a narrowing, conservatizing profession. What we must do in America is not to attack our judges, but to educate them.'* See Corwin, 1948. Edward S. Corwin (1878–1963), whose works are often referred to in the preparation of this paper, was not a lawyer. Nevertheless, his work has had a profound influence on the interpretation of the Constitution of the United States of America. Nevertheless, for 32 years, Corwin, who did not study law, was one of the ten authors most often cited and quoted by the Supreme Court and its members in their decisions. See Loss, 1976.

decades and can now be considered stable, is that all people, regardless of their ethnicity and social status, enjoy the same legal status. The US constitution is closely linked to reality and is not characterised by abstract concepts. The state needs harmony between all social strata and groups in order to function. The requirement of public agreement, concordia, consensus, reflects the idea of integrating ideas and social reality, making the state ‘everyone’s business’, a *res populi*, following Marcus Tullius Cicero. It is important to point out that the consensus of the citizens, the *consensus omnium*, also ensures the possibility of amending the constitution.

Thomas Jefferson and James Madison, who were also involved in the drafting of the constitutional system of the United States of America, were in the fullest agreement on the flexibility of the constitution. In the US Constitution, the state is closely linked to society. The protection of property is given a prominent place in the constitution. The framers of the Constitution shared the view of John Locke, who saw the protection of property as one of, if not the most important, functions of the state.

The protection of the Community interest through legal action is also an essential element of the Constitution. At the end of the 18th century, American constitutionalists were mindful of the centuries-old tradition of constitutionalism, whether considered conservative or progressive by their contemporaries. This can be seen in particular in their adherence to tradition and their unconditional rejection of tyranny on the part of the executive.

The constitution of the United States of America and its interpretation, which is an example to be followed and emulated in the constitution-making of the 21st century, both outside Europe and in Europe, expresses republicanism, the acceptance of the idea of liberty, the ideal of the inviolability of private property, and the doctrine and ideal of proportional social and political equality. The constitution, which incorporates economic, political and moral elements, builds a bridge between society and the state, separating the state from government, while providing strong legal guarantees for this separation.

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