AMERICAN CONSTITUTIONALISM

in the AGE OF DEMOCRACY

On the 20th century
Government

- We distinguish between forms of government on the basis of its **organizational structure** and the **degree of control** exercised over the society.

Democracy is a form of govt in which eligible citizens participate equally—either directly or indirectly through representatives.
DEMOCRACY & SUFFRAGE
the Power of Law

Congress & Transformations on Social and Economic issues
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

Limited SUFFRAGE

- Wealthy people
- Parliaments

NOT
MAIN SOCIAL CLASSES

Rules of society change

Democratic Values

At the beginning of the 20th century, electoral suffrage was limited to wealthy people and parliaments did not deal in practice with the main social issues. This situation was destined to change soon after the beginning of the 20th century, when the enlargement of suffrage – especially after the First World War – brought on a quick and unprepared transition toward democracy.
Suffrage - the term is sometimes used for ANY right to VOTE – Not only political vote

active suffrage, as distinct from passive suffrage which is the right to stand for election

Suffrage is often conceived in terms of elections for representatives. However, suffrage applies equally to referenda and initiatives.

The utility of suffrage is reduced when important questions are decided unilaterally without extensive, conscientious, full disclosure and public review.
Voting on issues by REFERENDUM may also be available.

- For example, in **Switzerland** this is permitted **at all levels of government**.
- **USA** - some **STAES** such as California and Washington have exercised their **shared sovereignty** to offer citizens the opportunity to write, propose, and vote on referendums and initiatives;
- **USA** - other **STATES** and the **federal government** have not.
- **Referendums in the United Kingdom** are rare.

Suffrage is granted to **qualifying citizens**:

- it depends on the government’s decision
- once they have reached the **voting age**.
- **Resident non-citizens can vote** in some countries, which may be restricted to citizens of closely linked countries (e.g., **Commonwealth citizens** and **European Union citizens**) or to certain offices or questions.
In general, throughout the first half of the 20th century, western constitutionalism was involved in a transformation: from a legal structure of government and of the protection of individual rights consistent with the values of liberal tradition, to a new structure, consistent with democratic values and based on the exigencies of new social classes breaking into the political scenario. Liberal constitutionalism was therefore transformed into a new democratic constitutionalism.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY
On the 20th century

Transformations against:

- Social differences
- Inequalities-injustices

Through economic & legislative tolls

Rules of society
Democratic Values

new democratic constitutionalism was characterized by the acknowledgment of the role of society – with its structures and organizations – and by the relevance of social differences and inequalities as injustices to be faced by the state through economic and legislative tools.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

Transformations

SUFFRAGE increased

- Abolishment of slavery
- No racial discrimination
- Vote for every citizens (female)

Rule of society

Democratic Values

In the United States of America and in the United Kingdom – where suffrage had already progressively increased throughout the 19th century and also thanks to the positive conclusion of the First World War – the impact of democratization was not dramatic, even though it brought on a fundamental transformation of the political frame, as well as in government and social policies.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

Transformations

SUFFRAGE increased

DRAMATIC

- Mass movements
- Dictatorship
- Demolition of constitutionalism

Rule of society
Democratic Values

In the rest of Europe the same transition happened through more radical forms, also due to the political and economic crises in countries defeated in the Second World War. Moreover, the increase in suffrage caused the formation of mass political parties and mass movements everywhere, sometimes radically antagonistic to the values of constitutionalism itself.

The important innovations in the features of European constitutionalism, the criticism against the old constitutional structures and social discontent often helped dictatorships spread throughout Europe, for example in Italy and Germany, triggering a process of demolition of constitutionalism itself.
## CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

### On the 20th century

<table>
<thead>
<tr>
<th>Amendment</th>
<th>Description</th>
<th>Date Passed</th>
<th>Date Ratified</th>
<th>Time Frame</th>
</tr>
</thead>
<tbody>
<tr>
<td>13th</td>
<td>Abolishes slavery, and involuntary servitude, except as punishment for a crime</td>
<td>January 31, 1865</td>
<td>December 6, 1865</td>
<td>309 days</td>
</tr>
<tr>
<td>14th</td>
<td>Defines citizenship, contains the Privileges or Immunities Clause, the Due Process Clause, the Equal Protection Clause, and deals with post–Civil War issues</td>
<td>June 13, 1866</td>
<td>July 9, 1868</td>
<td>2 years, 26 days</td>
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<td>15th</td>
<td>Prohibits the denial of the right to vote based on race, color or previous condition of servitude</td>
<td>February 26, 1869</td>
<td>February 3, 1870</td>
<td>342 days</td>
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<tr>
<td>19th</td>
<td>Prohibits the denial of the right to vote based on sex</td>
<td>June 4, 1919</td>
<td>August 18, 1920</td>
<td>1 year, 75 days</td>
</tr>
</tbody>
</table>
AMENDMENT XIII

Section I
Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section II
Congress shall have power to enforce this article by appropriate legislation.

| 13th | Abolishes slavery, and involuntary servitude, except as punishment for a crime | January 31, 1865 | December 6, 1865 | 309 days |
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

AMENDMENT XIV

Section I
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section V
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<table>
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<tr>
<th>Amendment</th>
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Prof. Adabella Gratani
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

Transformations

SUFFRAGE increased

- constitutionalism – as a system of rules and constraints on power
- democracy – as a system to express the power of the people through the majority rule

brings rationalization of democratic pressures into the constitutional standards.

So that called democratic constitutionalism

Rule of society

Democratic Values
Plessy v. Ferguson (May 18, 1896)

Louisiana enacted the Separate Car Act, which required separate railway cars for blacks and whites. In 1892, Homer Plessy – who was seven-eighths Caucasian – agreed to participate in a test to challenge the Act. He was solicited by the Comite des Citoyens (Committee of Citizens), a group of New Orleans residents who sought to repeal the Act. They asked Plessy, who was technically black under Louisiana law, to sit in a "whites only" car of a Louisiana train. When Plessy was told to vacate the whites-only car, he refused and was arrested.

Do you think that the XIIIth and XIVth Amendments, which respectively prohibit slavery and guarantee the same rights to all the American were violated in this case?

The Court held that the state law was constitutional, and that:

1. The majority upheld state-imposed racial segregation.
2. Separate treatment did not imply the inferiority of African Americans.
3. There was not a meaningful difference in quality between the white and black railway cars.
4. In short, segregation did not in itself constitute unlawful discrimination.
5. In dissent, John Marshall Harlan argued that the Constitution have to be color-blind
6. And that the United States had no class system. Accordingly, all citizens should have equal access to civil rights.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

WE HAVE TO WAIT FOR XVth AMENDMENT

AMENDMENT XV

Section I
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section II
The Congress shall have power to enforce this article by appropriate legislation.

| 15th Amendment | Prohibits the denial of the right to vote based on race, color or previous condition of servitude | February 26, 1869 | February 3, 1870 | 342 days |
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

WE HAVE TO WAIT FOR XIXth AMENDMENT

Section I
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section II
Congress shall have power to enforce this article by appropriate legislation.

| 19th Amendment | Prohibits the denial of the right to vote based on sex | June 4, 1919 | August 18, 1920 | 1 year, 75 days |
The Court held that there were no violation to the Amendments.
✓ The XIVth Amendment only banned the states from depriving blacks of equal rights;
✓ it did not guarantee that all citizens, regardless of race, should receive equal economic privileges by the state.
✓ Any rights guaranteed by the Privileges or Immunities Clause were limited to areas controlled by the federal government
✓ Justice Stephen Johnson Field dissented arguing that the XIVth Amendment could not be construed as only protecting former slaves. Rather, he believed that it incorporated strands of common-law doctrine and needed to be interpreted outside the Civil War context. This position would later become widely accepted.

Slaughter-House Case (April 14, 1873)

Louisiana passed a law that restricted slaughterhouse operations in New Orleans to a single Corporation. No other areas around the city were permitted for slaughtering animals over the next 25 years, and existing slaughterhouses would be closed. A group of butchers argued that they would lose their right to practice their trade and earn a livelihood under the monopoly.

Do you think that monopoly created involuntary servitude in violation of the XIIIth Amendment? and abridged privileges or immunities, denied equal protection of the laws, and deprived them of liberty and property without due process of law in violation of the XIVth Amendment?

THIS CASE helped to define the basis of the difference between Democratic system & Constitutionalism system.
Allgeyer v. Louisiana (March 1, 1897)

A Louisiana statute prohibited foreign (out-of-state) insurance corporations from conducting business in Louisiana without maintaining at least one place of business and an authorized agent in the State. Louisiana implemented the statute as an exercise of its police powers, intending to protect its citizens from deceitful insurance companies. Allgeyer & Company violated this statute by purchasing insurance from a firm based in the State of New York.

Do you think avoiding commerce directly with other Federal State’s Insurance Corporation violated the XIVth Amendment? (interpreted to restrain the freedom to contract, as compressed citizens rights by substantive due process).

In a unanimous decision, the Court found that:
✔ the Louisiana statute deprived Allgeyer & Company of its liberty without due process under the XIV Amendment.
✔ The XIV Amendment extends broadly to protect individuals from restrictions on their freedom to contract in pursuit of one’s livelihood or vocation.
✔ each potential deprivation of liberty by the state needed to be evaluated on a case-by-case basis.
DEMOCRACY & «DUE OF PROCESS»

The Supreme Court v. Congress

COURTS AND CONGRESS NOT ALLIES
In United States constitutional law, **substantive due process** (XIVth Amendment) is a principle allowing courts to protect certain fundamental rights from government interference, even if procedural protections are present or the rights are not specifically mentioned elsewhere in the US Constitution.

This case helped to define the basis for the difference between Democratic system & Constitutionalism system.
COURTS AND CONGRESS NOT ALLIES

POWER IN CONFLICT
Social & Economic issues
Moral tradition

This case helped to define the basis of the difference between Democratic system & Constitutionalism system.

Substantive due process (XIVth Amendment)
ASPECTS OF DUE PROCESS OF LAW

Two-Fold Aspects of Due Process of Law

PROCEDURAL DUE PROCESS

Refers to the method or manner by which the law is enforced

SUBSTANTIVE DUE PROCESS

Requires that the law itself, not merely the procedures by which the law would be enforced, is fair, reasonable, and just
The Court held that the railroad’s Fourteenth Amendment rights were not violated. ✓

The Due Process clause required the states to award just compensation when taking private property for public use. ✓

– the "just compensation" requirement of the Fifth Amendment – through the Due Process clause of the Fourteenth Amendment and applied that requirement to the states

This case helped to define the basis of the difference between Democratic system & Constitutionalism system

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Chicago, Burlington & Quincy Railroad Company v. Chicago
(March 1, 1897)

The City of Chicago wanted to connect two disjoint sections of Rockwell Street between 18th and 19th Streets, over private property. This property was owned by various individuals but also included a right-of-way owned by the Chicago, Burlington, and Quincy Railroad Corporation. To accomplish this, the city petitioned in Cook County Circuit Court to have the necessary land condemned. The land was condemned. The individuals were awarded compensation, while the railroad was awarded just one dollar.

Do you think that the losing property by Railroad Corporation was made under the respect of the Due Process clause of the Fourteenth Amendment?

The Court held that the railroad's Fourteenth Amendment rights were not violated.

✓ the Due Process clause required the states to award just compensation when taking private property for public use.

✓ – the "just compensation" requirement of the Fifth Amendment – through the Due Process clause of the Fourteenth Amendment and applied that requirement to the states

Prof. Adabella Gratani
Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.

The Court considered whether just compensation had in fact been given to the railroad and, based on a review of the Illinois Constitution and the 1872 Act, the Court held that the State had adequately compensated the railroad for its right-of-way.

Justice David Brewer dissented from this ruling, asserting that the railroad had been deprived of “valuable property without any, or at least only nominal, compensation.”

This case marked the first time that the Court 'incorporated' a specific provision of the Bill of Rights.
THIS CASE helped to define the basis of the difference between Democratic system & Constitutionalism system.

Lochner v. New York (April 17, 1905)

Lochner ERA
- New Social classes
- New Economic era
- Free contract & respect of rights

JUDICIAL REVIEW
Against the violation of the Due of Process
The state of New York enacted a statute known as the Bakeshop Act, which forbade bakers to work more than 60 hours a week or 10 hours a day. Lochner was accused of permitting an employee to work more than 60 hours in one week. While Lochner did not challenge his first conviction, he appealed, but was denied in state court.

Do you think that to fix maximum hours to work violeted the XIV th Amendment? (interpreted to restrain the freedom to contract, so the rights encompassed by substantive due process).

The Court invalidated the New York law.

✓ The majority maintained that the statute interfered with the freedom of contract, and thus the XIV Amendment's right to liberty afforded to employer and employee.
✓ The majority reasoned that the Bakeshop Act had no rational basis because long working hours did not dramatically undermine the health of employees, and baking is not particularly dangerous.
✓ Justice Harlan in his dissent articulated reasoning that would inform later decisions in the post-Lochner era.
✓ Rather than requiring the government to prove that a law had a rational basis, he would require the party challenging the law to prove that the test was not met. (This is the current rule.)

Lochner v. New York (April 17, 1905)
THIS CASE helped to define the basis of the difference between Democratic system & Constitutionalism system

Lochner v. New York (April 17, 1905)

- The **Lochner era** is a period in American legal history from 1897 (Allergy case) to 1937

- **Supreme Court of the United States** is said to have made it a common practice "to strike down economic regulations adopted by a State based on Court's own notions of the most appropriate means for the State to implement its considered policies"

- Courts uses his interpretation of substantive due process to strike down laws held to be infringing on economic liberty or private contract rights.

- The Supreme Court during the Lochner era has been described as "play[ing] a judicially activist but politically conservative role", who invalidates state and federal legislation that inhibited business or otherwise limited the free market, including laws on minimum wage, federal (but not state) child labor laws, regulations of banking, insurance and transportation industries.
The 

Lochner era ended when the Court's tendency to invalidate labor and market regulations came into direct conflict with Congress's regulatory efforts in the New Deal.

The New Deal was a series of programs, public work projects, financial reforms, and regulations enacted by President Franklin D. Roosevelt in the United States between 1933 and 1936. It responded to needs for relief, reform, and recovery from the Great Depression.

Since the 1930s, Lochner has been widely discredited as a product of a "bygone era". Lochner is seen as "the symbol, indeed the quintessence, of judicial usurpation of power".

Chief Justice, John Roberts said, "You go to a case like the Lochner case, you can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law", concluding that the Lochner court substituted its own judgment for the legislature's findings.
The beginning of the era so that called Lockner is usually marked earlier, with the Court's decision in *Allgeyer v. Louisiana* (1897), and its end marked forty years later in the case of *West Coast Hotel Co. v. Parrish* (1937), which overturned an earlier *Lochner*-era decision.
West Coast Hotel Company v. Parrish (March 29, 1937)

Under Washington state law, the Industrial Welfare Committee and Supervisor of Women in Industry set a minimum wage of $14.50 for each work week of 48 hours. Elsie Parrish, an employee of the West Coast Hotel Company, received an amount less than this wage. Parrish brought a suit to recover the difference between the wages paid to her and the minimum wage fixed by state law. In ruling for the hotel, the lower court relied on Adkins v. Children's Hospital (1923), in which the Court struck down a minimum wage law for working women.

Do you think that a minimum wage law for women violated the Due Process Clause of the XV Amendment, as applied to the states by the XIV Amendment?

The Court held that the establishment of minimum wages for women was constitutional.
- Echoing Muller v. Oregon (1908), the majority ruled that the state may use its police power to restrict the individual freedom to contract.
- The decision overruled Adkins and marked the Court's departure from the expansive view of the freedom to contract.
- In dissent, Justice George Sutherland implicitly criticized Roberts for changing sides and argued that politics and public opinion should not impact the Court's understanding of the Constitution.
DEMOCRACY & «DUE OF PROCESS»

The President Growing Powers v. Congress
Roosevelt’s popularity allowed him to bring another fundamental change to the American constitutional practice. Indeed, he was able to strengthen the power of the presidency against the Congress, as no other President before him had ever done – although in many aspects, the development of a modern presidency had already started with the Theodore Roosevelt administration.

Firstly, in 1921 the Congress passed the *Budget and Accounting Act*, conferring on the President the power to introduce federal budget proposals to the Congress. The continuous increase in the public debt, due to the First World War but also to the electoral necessities of the congressmen, convinced the Congress that it needed strong presidential leadership to control spending.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

The INNOVATION of the President ROOSEVELT over the Congress

The Budget & Accounting Act, 1921

system, introduced in 1921, allowed the President to guide and prepare the legislative business. The Congress remained free to alter and reshape the appropriations, but within the framework of a proposal coming from the President, and taking into account the financial variables as pointed out by the President.

Act of 1921 created the Bureau of the Budget which would eventually grow in terms of staff and functions, becoming under the Roosevelt presidency the very core of the political address of the presidency, coordinating all the other branches of the administration.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

The Budget & Accounting Act, 1921

The INNOVATION of the President ROOSEVELT over the Congress

1. The veto power on legislation was enormously aggrandized (Roosevelt adopted more than 400 vetoes during his four terms as president), thus forcing the Congress to seek bargains with the President's politics.

2. The presidential executive orders. Originally, they were instructions sent by the president to his administration for the correct execution of its function. With the shift to the modern presidency, the executive orders started to introduce substantive legislation — often under a delegation by an act of Congress, but also without any specific authorization, only deriving from the constitutional duties of the executive branch, a regulatory power — performed through the comprehensive means of executive orders.

3. The federal administration increased in terms of officials, competences and budget.
The New Deal was a series of programs, public work projects, financial reforms, and regulations enacted by President Franklin D. Roosevelt in the United States between 1933 and 1936. It responded to needs for relief, reform, and recovery from the Great Depression.

The use of media by Roosevelt

The “court-packing plan”

The achievement obtained by Roosevelt in the struggle against the Court, and his success in the recovery of the American economy, were not the only reasons for his enormous political consensus, validated by his re-election in four subsequent elections (1932, 1936, 1940, 1944). He was the first President to understand the significance of the dialogue with the people and the use of the media: indeed, his use of the radio for entering into American families’ homes was an innovative tool in American politics.

The Supreme Court’s reaction did not delay. It struck down the first acts of the New Deal. According to the Court, those acts contrasted both with states’ competences and with economic liberal principles, with the latter being violated by the deep public intervention in the economy. This resistance of the Supreme Court brought on a struggle with Roosevelt that threatened to introduce norms for the removal of judges and the appointments of additional members of the Court (so called “court-packing plan”). In the end, the Court changed its jurisprudence and resolved to uphold the measures of the New Deal. The consequences in constitutional law were relevant: they allowed the possibility of involvement of the executive branch in the legislative process, through delegate legislative powers, and the enlargement of the competences of the Federal Government.
CONSERVATIVE & PROGRESSIVE POWER OF THE SUPREM COURT

Supreme COURT v. Congress
In the first half of the 20th century, American society was still conservative in many aspects, and was characterized by inequalities among people and among the states.

The "Four Horsemen"
(in allusion to the Four Horsemen of the Apocalypse) was the nickname given by the press to four conservative members of the United States Supreme Court during the 1932–1937 terms, who opposed the New Deal agenda of President Franklin D. Roosevelt.

They were opposed by the liberal "Three Musketeers"—Justices Louis Brandeis, Benjamin Cardozo, and Harlan Stone.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

SUPREME COURT

- voided the *Agricultural Adjustment Act* of 1933 (*United States v. Butler*, 297 U.S. 1 [1936]), along with the Federal Farm Bankruptcy Act, the Railroad Act, and the Coal Mining Act.

- In *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), the Four together with Roberts voided legislation regulating the coal industry;


- The court had also struck down the *National Industrial Recovery Act* in *Schechter Poultry Corp. v. United States* 295 U.S. 495 (1935) the previous May.

COURTS AND CONGRESS NOT ALLIES
The Four Horsemen were vehemently opposed to the New Deal policies for unemployment and economic recovery, and they invalidated state laws regulating labor and business relations.

These actions led many observers to the conclusion that the court was likely to be obstructive to all legislative efforts to cope with the depression, and to remain wedded to the precedents of the Lochner era.

Some academics argued that the court's aversion to "regulated capitalism"

The result of these dynamics was a crisis; the 1935 term was labeled by Stone "one of the most disastrous in [the court's] history." New Dealers decried the court's actions as "economic dictatorship".

LET’S SEE "the switch in time that saved nine" a landmark minimum wage case in March 1937 known as West Coast Hotel v. Parrish
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

The turning point in the development of protection of fundamental rights occurred with the appointment of Chief Justice Earl Warren (1953–1969), who adhered to the approach of an evolving construction of the constitution and of the 14th amendment.

The Warren Court began to strike down this legislation through the application of one of the tools provided by the 14th amendment, the equal protection clause. The landmark decision was Brown v. Board of Education of Topeka (1954), in which the court declared unconstitutional the division of white and black people in the school systems, and imposed on the states the order to grant equal conditions to all students.

In Loving v. Virginia (1967),
the court struck down state law provisions prohibiting interracial marriages: the court affirmed the principle that the equal protection clause – which in general can be interpreted as authorizing distinctions provided by the law when founded on actual differing conditions and situations – cannot be interpreted as authorizing race-based distinctions.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY
On the 20th century

Chief Justice Earl Warren (1953–1969)

During the years of the Warren Court, many other cases brought fundamental changes to the traditional structure of conservative American society. This created a deep conflict in political and social opinion. Even legal scholars raised criticism against the activism of the Warren Court.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

In the following years, the civil rights movements and the new political vision of President Lyndon Johnson brought the introduction of new federal legislation, providing a high level of equality and federal controls over state legislation (the Civil Rights Act 1964).
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY
On the 20th century

Incorporation test
- Evaluation of the origin of RIGHTS
- THEIR belonging to the traditions (nation's scheme of ORDERED LIBERTY)

Living constitution
- Fundamental RIGHTS without reference in national tradition
- Moral value
- Idea of rational justice

Do you remember?

Supreme Court: in the very first decisions, the Court took care to apply incorporation through a specific test, that is the evaluation of the origin of the rights and their belonging to the national constitutional tradition (the "nation's scheme of ordered liberty", as the Court says, which means that the fundamental right must be "deeply rooted in the nation's history and tradition").

the Court also began to use a different approach, that we can name free incorporation, or the "living constitution" theory. This is when the Court decides to incorporate a fundamental right without a previous test and without any reference to the national tradition, but only on the basis of moral value or of an idea of rational justice.
CONSTITUTIONALISM IN THE AGE OF **DEMOCRACY**

On the 20th century

Incorporation test

- Evaluation of the origin of RIGHTS
- THEIR belonging to the traditions (nation’s scheme of ORDERED LIBERTY)

Do you remember?

*Chief Justice Earl Warren (1953–1969)*

The interpretation of the constitution must be consistent with the original understandings of the framers.

...what has happened in *Loving v. Virginia* (1967), in the famous decision in *Roe v. Wade* (1973), about the right to abortion, and in the very recent *Hobereff v. Hodges* (2015), about same-sex marriages, where the Court found in the due process clause a duty to protect the dignity of human beings.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY
On the 20th century

Living constitution
- Fundamental RIGHTS without reference in national tradition
- Moral value
- Idea of rational justice

The “living constitution” approach, on the contrary, is based on the denial of the chains of history, and on the construction of the constitution considered as a living body, also open to international law principles and comparative law standards, in order to address new issues and claims arising in the society.
DEMOCRACY & ELECTORAL SYSTEM
On the 20th century

- Improvement of EQUALITY
- Political Transparency
- Regulation of the electoral process

**Electoral Process**

**GERRYMANDERING**

The Supreme Court also offered an important contribution to the improvement of equality and political transparency in the regulation of the electoral process, especially at the state level.

Gerrymandering is the practice, carried out by state legislatures, to draw electoral districts according to voting predictions, in order to predetermine the outcomes of elections.

It takes its name from the then Governor of Massachusetts Elbridge Gerry, who in 1812 signed a bill that redrew Senate election districts to benefit his party. The word “Gerrymander” was used for the first time in the Boston Gazette as a portmanteau of the Governor’s surname (Gerry) and the word salamander. This linguistic blend was due to the fact that one of the new districts near Boston, as remapped by the aforementioned bill, was said to have the shape of a mythological salamander.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY
On the 20th century

Transformations
SUFFRAGE increased

- Improvement of EQUALITY
- Political Transparency
- Regulation of the electoral process

Electoral Process
GERRYMANDERING

Rules of society
Democratic Values

The Supreme Court also offered an important contribution to the improvement of equality and political transparency in the regulation of the electoral process, especially at the state level.
Electoral Process

**GERRYMANDERING**

"Gerry" e "salamander"

Governator of *Massachusetts* Elbridge Gerry

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The most important goals of gerrymandering are to maximize the effect of the votes received by the candidate and to minimize the effect of the votes gained by his/her opponent.

Typically used by the political party that has the power to redraw the electoral districts, gerrymandering is mainly perceived to favor ruling incumbents. This practice is most common in those countries where elected politicians are responsible for (or have an influence on) defining the boundaries of their constituencies.
Electoral Process

GERRYMANDERING
“Gerry” e “salamander”
Governor of Massachusetts Elbridge Gerry

Without Redistricting, Unequal Voting Power

District A
32 voters → 1 representative

District B
2 voters → 1 representative

Do you remember?
Electoral Process

GERRYMANDERING
“Gerry” e “salamander”
Governor of Massachusetts Elbridge Gerry

“packing” partisans into a few districts
“cracking” partisans across many districts
“packing” blue voters into a few districts
Electoral Process

GERRYMANDERING
“Gerry” e “salamander”
Governor of *Massachusetts* Elbridge Gerry

“Redistricting Districts for countable votes

“As a mapmaker, I can have more of an impact on an election than a campaign ... more of an impact than a candidate. When I, as a mapmaker, have more of an impact on an election than the voters ... the system is out of whack.” – David Winston

“cracking” partisans across many districts

“packing” blue voters into a few districts

“cracking” red voters across many districts
Electoral Process

**GERRYMANDERING**

“Gerry” e “salamander”
Governor of Massachusetts Elbridge Gerry

- Redrawn Districts must be...
  - Equal in population
  - Absent/present of different etnies
  - Preserve county and municipal boundaries
  - Preserve Community Interests
  - Babys, school, services for families
  - Industries, services for workers
  - Agriculturs, services for environmental
  - Centre offices, services different
  - Desert area, with no population or few
  - and so on

Redistricting Districts for countable votes

“As a mapmaker, I can have more of an impact on an election than a campaign ... more of an impact than a candidate. When I, as a mapmaker, have more of an impact on an election than the voters ... the system is out of whack.” – David Winston

- Every 10 years a census is taken and the census bureau redistributes the 435 congressional members (Reapportionment).
  - Also occurs at the state level
- When a state gains or loses seats districts are redrawn.
  This is done by the states (Redistricting).
Electoral Process
GERRYMANDERING
“Gerry” e “salamander”
Governor of Massachusetts Elbridge Gerry

If you were to create four evenly spaced Congressional districts, how might you do it?

Redistricting Districts for countable votes
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

Electoral Process

GERRYMANDERING

“Gerry” e “salamander”
Governor of Massachusetts Elbridge Gerry

Redistricting Districts for countable votes

Redrawing the districts creates only one “packed” district of 14 blue voters – the rest are “cracked” between the other three districts.

There are two main gerrymandering techniques: packing and cracking.

- Packing concentrates opposition in only one district.
- Cracking “dilutes” the opposition, so it becomes a minority.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

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Redistricting Districts for countable votes

Illinois - 4th District
The unusual “earmuff” shape connects two Hispanic neighborhoods while remaining contiguous by following Interstate 294.

Arizona - 2nd District
This district was drawn to separate the Hopi and the Navajo tribes, due to historic tensions. In order to comply with redistricting laws, the district had to be contiguous, but avoid including Navajo land.

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Electoral Process
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Redistricting 101: Why do we redraw districts?

- There are 435 Representatives in the U.S. House of Representatives, 16 from Ohio; this number is set by law.
- The US Supreme Court has said all legislative districts should have roughly the same population. This is called “one person, one vote.”
- Every 10 years the US Census is conducted to measure population changes.
- The year following the Census, districts are redrawn to account for population changes. States can gain or lose representatives, depending on population shifts.
- Ohio districts were gerrymandered following the 2010 election.
Electoral Process
GERRYMANDERING
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Governor of Massachusetts Elbridge Gerry

Why is gerrymandering legal*?

• Gerrymandering has not yet been declared unconstitutional but there is a Wisconsin case that is now before the US Supreme Court, Whitford v. Gill.

The plaintiff, Bill Whitford, argues that the Wisconsin state legislative map violates the Fourteenth Amendment’s guarantee of equal protection.

• In November 2016, a three judge panel determined that the map was unconstitutional because it was intended to severely impede the weight of individual citizens’ votes on the basis of their political affiliation. The appeal is now before the U.S. Supreme Court.

*While not illegal, many consider gerrymandering undemocratic.
Electoral Process

GERRYMANDERING

“Gerry” e “salamander”
Governor of *Massachusetts* Elbridge Gerry

Redistricting Districts for countable votes

*Sub. H.B. 369 Congressional Map*
*December 14, 2011*
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY
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Electoral Process
GERRYMANDERING
“Gerry” e “salamander”
Governor of Massachusetts Elbridge Gerry

• The influence of technology is why we need to do this NOW!
  • In 2000 and before, gerrymanderers were able to influence voting results by 10%
  • In 2010, thanks to advances in technology and information gathering, gerrymandering was able to influence the vote by over 20%
  • In 2020, due to further advances of technology, gerrymanderers will be able to influence the vote by over 35%!
  • That is negating 1/3 of all votes cast - which makes Ohio no longer a “democracy”.

Redistricting Districts for countable votes

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GERRYMANDERING

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Redistricting Districts for countable votes

The Fair Districts = Fair Elections Proposal
(The rules governing redistricting)

- Congressional districts would be drawn by a bipartisan body, the Ohio Redistricting Commission, the same body that will draw state legislative districts under the new rules approved by voters in 2015. Requires both parties to agree to a map and prevents rigging districts in one party’s favor.
- Maps cannot be drawn to favor or disfavor a political party or candidate. Prevents gerrymandering, “sweetheart deals,” or guaranteed “safe seats” favoring a party.
- Districts must keep communities together and be compact. Prevents oddly-shaped districts that pack/crack communities. Maps must minimize the splitting of counties, municipalities, and townships, and may not marginalize minority communities.
- The district map-drawing process must be open, transparent, and accountable to the public. The Commission must release proposed district maps for public testimony and accept public submissions.
Electoral Process

GERRYMANDERING

“Gerry” e “salamander”
Governor of Massachusetts Elbridge Gerry

For & against racial district

Redistricting Districts for countable votes

In the southern states, gerrymandering was mainly aimed at dividing black communities in several electoral districts, in order to reduce their relevance in the elections of the state’s legislative bodies, as well as in the elections of the representatives and the senators in Congress.

The practice was heavily fought by the adoption in 1965 of the Voting Rights Act, a landmark federal legislation that prohibited many forms of racial discrimination in states’ legislation. Furthermore, starting in the 1920s, the Supreme Court declared that the practice of gerrymandering was against the equal protection clause, and imposed a strict judicial review of this kind of legislation. In reality, the practice has never stopped. In recent years, furthermore, the Supreme Court issued a surprising decision, Shelby County v. Holder (2013),
Electoral Process

How many female Judges?
How many black male/female?

The Supreme Court's Biggest Decisions in 2019

Conservative Bloc:
- Roberts
- Kavanaugh
- Alito
- Gorsuch
- Thomas

Liberal Bloc:
- Sotomayor
- Ginsburg
- Kagan
- Breyer

Redistricting Districts for countable votes
A similar path occurred in the field of regulation of campaign financing. In order to limit and control private contributions to political campaigns, in 1971 Congress passed the Federal Election Campaign Act, providing a set of limits to individual contributions and of duties of disclosure, aimed at granting transparency of private contributions.

The INNOVATION of the President **ROOSVELT** over the Congress

**CHANGE THE IDEA OF PRESIDENTIALISM AND THE SEPARATION OF POWER**

The Roosevelt presidency — the economic crisis of 1929 to the Second World War — significantly changed the features of American presidentialism.

Presidency in the legislative function, indeed, created an innovative form of cooperation between the branches. The presidential government was therefore interpreted as a system of separated institutions sharing powers.
ON CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

The INNOVATION of the President TRUMAN over the Congress

PRESIDENTIALISM AND CONGRESS: THE SEPARATION OF POWERS

Nonetheless, immediately after the end of the war, during the first months of Truman’s presidency, the Congress decided to reaffirm its role in the government and to reduce the President’s functions, returning to a more balanced dualism between the executive and legislative branches.

new Republican majority effectively faced Truman’s presidency, passing a set of legislations that forced the President to use veto power several times, in a dualist dialectic typical of the presidential system of government.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

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The INNOVATION of the Presidents
KENNEDY
JOHNSON
NIXON

over the Congress

PRESIDENTIALISM AND CONGRESS: THE SEPARATION OF POWERS

During the Kennedy and Johnson administrations, the presidency was able to regain control over the legislative business of the Congress.

the Republican President Richard Nixon tried to affirm an aggressive vision of the role of the President in the system of government. According to his vision, the President had not only the power to veto congressional legislation, but also the power to refuse the application of legislative provisions inconsistent with his political vision.

Nixon’s involvement in the Watergate scandal brought back the power of Congress to impeach, a tool that since the impeachment of Andrew Johnson, in 1868, had never been used against another President. In order to avoid this judgment, Nixon decided to resign. It was the beginning of a new phase of congressional predominance, starting with the passage of the Congressional Budget and Impoundment Control Act (1974), which returned many powers related to public finance back to Congress.
PRESIDENT VETO to annul law
Congress (2/3) to annul Veto
Supreme Court to annul laws of Congress
The INNOVATION of the Presidents
KENNEDY
JOHNSON.
NIXON
over the Congress

PRESIDENTIALISM AND CONGRESS: THE SEPARATION OF POWERS

The Supreme Court struck down these types of legislative provisions, inconsistent, in its vision, with the original meaning of the legislative process (INS v. Chadha, 1983). However, the Congress continues to this day to approve delegations under these conditions.

ABOUT THE DUTY FOR THE PRESIDENT TO
UNDERLINE LAW AFTER VETO WITH THE
MAJORITY OF CONGRESS 2/3
INS v. CHADHA (June 23, 1983)

In one section of the Immigration and Nationality Act, Congress authorized either House of Congress to invalidate and suspend deportation rulings of the United States Attorney General. Chadha had stayed in the U.S. past his visa deadline. Though Chadha conceded that he was deportable, an immigration judge suspended his deportation. The House of Representatives voted without debate or recorded vote to deport Chadha. This case was decided together with United States House of Representatives v. Chadha and United States Senate v. Chadha.

Do you think that the Immigration and Nationality Act, which allowed a one-House veto of executive actions, violate the separation of powers doctrine?

The Court held that the particular section of the Act in question did violate the Constitution. Recounting the debates of the Constitutional Convention over issues of bicameralism and separation of powers, Chief Justice Burger concluded that even though the Act would have enhanced governmental efficiency, it violated the "explicit constitutional standards" regarding lawmaking and congressional authority.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

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The INNOVATION of the Presidents REGAN, CLINTON over the Congress

PRESIDENTIALISM AND CONGRESS: THE SEPARATION OF POWERS

During Clinton’s administration, a relevant moment was the passage of the Line Item Veto Act (1996). The passage of the Act represented a fundamental victory for the presidential side, because it allowed the President to veto single provisions of a bill – a power available to the governors in many constitutions of the states.

The Supreme Court, however, struck down this Act: once again, as in the case of the legislative veto, the aim of the Court was to protect the original formulation of the Constitution (Clinton v. City of New York, 1998) and maintain the balance between the branches, avoiding the prevalence of one over the other. According to the Court:

» If there is to be a new procedure in which the President will play a different role in determining the final text of what may "become a law", such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.

The unconstitutionality of the partial veto

Prof. Adabella Gratani
CLINTON v. CITY OF NEW YORK (June 25, 1988)

About inconstutionality of two cancellations, made by President Clinton, under the Line Item Veto Act.

- In the City of New York, **two hospital associations**, a hospital, and two health care unions, challenged the President's cancellation of a provision in the Balanced Budget Act of 1997 which relinquished the Federal Government's ability to **recoup nearly $2.6 billion in taxes** levied against Medicaid providers by the State of New York.
- In the Snake River farmer's cooperative and one of its individual members challenged the President's **cancellation of a provision of the Taxpayer Relief Act of 1997**. The provision permitted some food refiners and processors to defer recognition of their capital gains in exchange for selling their stock to eligible farmers' cooperatives.
- After a district court held the Act unconstitutional, the Supreme Court granted certiorari on expedited appeal.

In a 6-to-3 decision the Court first established that both the City of New York, and its affiliates, and the farmers' cooperative suffered sufficiently immediate and concrete injuries to sustain their standing to challenge the President's actions. The Court then explained that under the Presentment Clause, legislation that passes both Houses of Congress must either be entirely approved (i.e. signed) or rejected (i.e. vetoed) by the President. The Court held that by canceling only selected portions of the bills at issue, under authority granted him by the Act, the President in effect "amended" the laws before him. Such discretion, the Court concluded, violated the "finely wrought" legislative procedures of Article I as envisioned by the Framers.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

The INNOVATION of the Presidents
BUSH, OBAMA, TRUMP
over the Congress

PRESIDENTIALISM AND CONGRESS: THE SEPARATION OF POWER

The consequence of this judgment was the abandonment, in the last presidencies of George W. Bush and Barack Obama, of veto power, which was used in very few cases if compared with the wide use of their predecessors, and the parallel development of other tools of resistance against the Congress.

The Trump administration, which has started to echo the electoral campaign's populist tone, seems destined to reproduce a sharp dualism between the presidency and the Congress, confirming the trend which occurred in the last administrations.
AGENCIES

The first independent agencies were established by the Congress after the Civil War, when a growth in industry and business took place in America and a need to ensure fair competition and price control emerged. The first independent agency was the Interstate Commerce Commission (ICC), set up in 1887 to regulate trucking industries and to ensure fair competition and rates in this sector. The Commission was eventually divided in 1995 into new more structured commissions (the Federal Trade Commission is an example).

A few more examples of current independent federal agencies include: Central Intelligence Agency (CIA);
DEMOCRACY

PRESIDENTIAL DEMOCRACY

SEMI PRESIDENTIAL DEMOCRACY

PARLIAMENTARY DEMOCRACY
Democracy is a form of govt in which eligible citizens participate equally—either directly or indirectly through representatives.

There are two types of democracy:
1. Parliamentary form of Democracy
2. Presidential form of Democracy

Let’s see the Difference between:
- Presidential Government
- Parliamentary Government
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY

On the 20th century

Presidential Democracy

(Sometimes called Congressional)

- a democratic form of government in which a president is chosen to be the leader
- The executive branch exists separately from the legislature (to which it is generally not accountable).

Semi-presidential system is where a constitution includes a popularly elected fixed-term president and a prime minister and cabinet who are collectively responsible to the legislature.
CONSTITUTIONALISM IN THE AGE OF DEMOCRACY
On the 20th century

In a Parliamentary Democracy

• Parliament, the legislature the people elect, makes and enforces the laws of the country.

• The leader is often called a prime minister (or premier), and the prime minister is a member of parliament.

• The prime minister is usually chosen by the political party that wins a majority of representatives (or seats) in the parliament.

• The Prime minister is the head of the govt.
SUMMARY

Difference between
- Presidential Government
- Parliamentary Government