Constitutionalism within Times of Change: Authority, Society and Democracy

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Abstract
This article, following classical methodological patterns, as well as their evolution framework, identifies key features of the two most predominant constitutionalism traditions — political and legal, simultaneously drawing indispensable red lines with regard to correlation of the doctrine and a Fundamental Law itself. Respectively, the features have been rendered as the very elements of constitutionalism's role within times of change — i. e., over the aforementioned time frames and transition states in between — whereas the doctrine's capacity to answer so-called "questions of constitutionalism" constitutes its underlying response mechanism. The article addresses the phenomena of authority, society and democracy in their modern perception, and makes crucial points upon the constitutionalism's effect on their sheer structures.

Key Words: Constitution, constitutionalism, traditions of constitutionalism, mixed government, separation of powers, judicial review, arbitrary judgement, representative democracy

Introduction

Change — be it a habitual pair of socks substitution or the November 3, 2020 United States presidential election — is a necessary element for individual, societal, and consequently — nationwide, evolution and move forward. Careful analysis of the works on political and constitutional crises, particularly done by Xenophon Contiades,[1] Julia Azari and Seth Masket,[2] leads to a logical conclusion that one of the most powerful, stable and therefore effective among various forms of norms and rules is a constitution, in large part created with intent to establish order and minimize the possibility of failure of the new nation. Well-nigh perfect conditions for its proper functioning is constitutional order — a social order, comprising political, economical, communal and spiritual-cultural systems, in a constitutional form of enshrinement. Thus, it would be reasonable to state that the inevitable and intrinsic nature of transformation is already

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1   Xenophon Contiades, "Constitutions in the Global Financial Crisis: A Comparative Analysis." *Oxon: Routledge* (2016): 53.

2   Julia Azari, Seth Masket. "The 4 Types of Constitutional Crises." *FiveThirtyEight* (February 2017).

implicitly presumed within these constitutional structures, with all (or, rather, the most archetypal and indispensable—as a system) the tools and precautions it entails.

However, the main issue arises in a discussion of the role of a doctrine that effectively constitutes a government's authority determination by a Fundamental Law—debatably, constitutionalism—over specific time frames and transition states in between (i. e., times of change). The entire significance of such an approach manifests itself prevalently through a large-scale observation, as change is an ongoing, almost habitual process. This is regardless of how striking single phenomena, such as a COVID-19 pandemic or other crisis, may seem. They are not able to bring about substantial modifications to the operation of the aforementioned concepts, nor of the constitutionalism without the necessary mechanisms laid out in the article. However implicit it may be, therefore, the value of the referred kind of change shall not be underestimated, though can be seen only by means of categorical deconstruction and practical application.

Accordingly, the following effect thereof on authority, society and democracy themselves is also a subject of discussion. In a further development of constitutional science, as well as of the ways the latter could be applicable within governmental affairs, this article, again—using as examples real constitutions and doctrines,—will delve into exactly these points at issue.

Particularly, by dint of, first, explicating the very essence of the term "constitutionalism" and its distinction from merely a constitution; second, formulating and examining the part that the constitutionalism plays within times of change abstractly (including the question of how the mechanism and / or the essence of the doctrine reacts and responds to these changes); third, rendering this role and these reactions onto the three phenomena—authority, society and democracy.

1.　Constitutionalism and a Constitution

Primarily, in order to identify the conceptual network that is going to be at the base of the entire article and to answer all of the posed questions as well, the concept of constitutionalism should be comprehensively defined.

Following the notion of strong political, besides legal, inclinations of constitution and its surroundings, we would undoubtedly start with the description of constitutionalism offered by American political scientist and constitutional scholar David Fellman in his eponymous work:

> "… Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials. … Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the

limitations on power and the procedures which are set out in the
supreme, constitutional law of the community. It may therefore
be said that the touchstone of constitutionalism is the concept of
limited government under a higher law."[3]

To grasp these points more clearly, let us discuss two constitutional uses:
prescriptive and descriptive. An American law professor Gerhard Casper captured this
aspect of the term in noting,

"Constitutionalism has both descriptive and prescriptive
connotations. Used descriptively, it refers chiefly to the historical
struggle for constitutional recognition of the people's right to
'consent' and certain other rights, freedoms, and privileges.
Used prescriptively, its meaning incorporates those features of
government seen as the essential elements of the… Constitution."[4]

Hence, in the context of this article, the prescriptive use includes features
constructing the role of constitutionalism within concrete periods of its development as
well as within transitions in between, while the descriptive one captures the doctrine's
reaction to changes (its capacity to adapt as society and science develop).

Starting with the former, for the sake of avoiding confusion—we should initially
pinpoint crucial differences between the studies of constitutions and constitutionalism.

One way of looking at them is from a historical analyst standpoint. Studying
the early history of American constitutionalism, legal historian Christian G. Fritz in
his work "American Sovereigns: The People and America's Constitutional Tradition
Before the Civil War," views so-called *'constitutional questions'* as those involving the
analysis of how the Constitution was interpreted and applied to distribute power and
authority as the new nation struggled with problems of war and peace, fundraising
and representation. However, these political and constitutional controversies also
posed *'questions of constitutionalism'*—how to identify the collective sovereign, what
powers the sovereign possessed, and how one recognized when that sovereign acted.
Unlike constitutional questions, Fritz notes, questions of constitutionalism could not
be answered by reference to given constitutional text or even judicial opinions. Rather,
they were open-ended questions drawing upon competing views Americans developed
after Independence about the sovereignty of the people and the ongoing role of the
people to monitor the constitutional order that rested on their sovereign authority.[5]

Furthermore, as discussed by a Ukrainian professor Yurii Todika it is vital to
understand that the existence of a constitution does not necessarily mean the existence

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3   David Fellman, "Constitutionalism" (1973–74). *Wayback Machine* 1 (June 2006): 485.

4   Gerhard Casper, "Constitutionalism". *Encyclopedia of the American Constitution* 2 (1986): 473.

5   Christian G. Fritz, "American Sovereigns: The People and America's Constitutional Tradition
     Before the Civil War." *Cambridge University Press* (2008): 6.

of constitutionalism as a mass political movement interested in assuring a democratic constitutional order in the country. The relationship between the constitution and constitutionalism is closely related to the problem of the constitutionality of the constitution itself, i. e. to what extent the constitutional text corresponds with the principles of humanism, justice, democracy and the protection of the rights and freedoms of the individual.[6]

Similar to the distinction drawn by Fritz, British constitutional scholar A. V. Dicey, while assessing Britain's unwritten constitution, noted a difference between the *'conventions of the constitution'* and the *'law of the constitution.'* "Introduction to the Study of the Law of the Constitution" stipulates that the essential differentiation between the two concepts was that the law of the constitution was made up of "rules enforced or recognized by the Courts," making up "a body of 'laws' in the proper sense of that term." In contrast, the conventions of the constitution consisted "of customs, practices, maxims, or precepts which are not enforced or recognized by the Courts" but "make up a body not of laws, but of constitutional or political ethics."[7]

2. The Key Traditions of Constitutionalism

Indeed, the above-mentioned distinctions imply a much broader content of constitutionalism, such that, once again — prescriptively, at least two major traditions have been articulated since the origin of the theory of mixed government[8] conjured up in ancient thought. Generally, constitutional traditions differ as to what precisely counts as an arbitrary act[9] and which mechanisms offer the best defense against arbitrary acts occurring. The latter aspect undoubtedly has been subjected to change mostly — throughout the entire evolutionary period of constitutionalism. In addition, in constitutional law science it has been the threshold for categorization, of which the generality of peculiarities are assembled in the form of the next key traditions.

Indeed, as opposed to European, American or British constitutional traditions, the work applies those of not pertaining to specific countries or continents. Particularly, the classical republican tradition, as related by its neorepublican interpreters of political constitutionalism, identifies arbitrariness with domination of the ruled by their rulers and seeks to avoid it by establishing a condition of political equality characterized by a balance of power between all the relevant groups and parties within a polity, so that

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6   Olha Sovhiria, Nataliia Shuklina. "Constitutional law of Ukraine." *Yurincom Inter* 2 (2012): 105.

7   A. V. Dicey, "Introduction to the Study of the Law of the Constitution". *Wayback Machine*, 8th ed. (London: Macmillan 1914) (April 2004): Part III: The Connection between the law of the constitution and the conventions of the constitution; Ch. 14.

8   In the article, the term "mixed government" is chiefly alluded to as a model of constitutionalism, which provides mechanisms whereby no individual, body, or group could rule alone.

9   Alternatively, an arbitrary judgment, referring to David Fellman's description: Fellman, "Constitutionalism," 485.

no one can rule without consulting the interests of the ruled. The more modern, liberal tradition identifies arbitrariness with interference with individual rights and seeks to establish protections for them via the separation of powers and a judicially protected constitution.[10]

Although political theorists and scientists disagree on whether these two traditions are complementary, mutually entailed or incompatible, features of both of them could significantly aid further in this work during the role of constitutionalism within times of change (and, consequently, in the mechanisms capturing the doctrine's reaction to changes) identification.

2.1.   *Political Constitutionalism*

Each tradition is present within most democracies and can be found side by side in many constitutions. The first tradition focuses on the design and functioning of the democratic process, including the selection of electoral systems and the choice between presidential or parliamentary forms of government, of unitary or federal arrangements, and of unicameralism or bicameralism. In particular, the development of 'political constitutionalism' can be viewed as a transition *"from mixed government to representative democracy,"* as suggested by British political scientist Richard Bellamy.[11]

The theory of mixed government originated with ancient thought and the classification of political systems on the basis of whether one, a few, or many ruled. Although elements of the theory can be found in Aristotle's "Politics,"[12] the *locus classicus* is Book VI of Polybius's "Histories,"[13] whose arguments were then in part expanded and modified by Niccolò Machiavelli's "Discorsi."[14]

These works roughly outline three main points underlying this classic theory of mixed government.

1. Arbitrary power was defined as the capacity of one individual or group to dominate another — that is, to possess the ability to rule them without consulting their interests.

    To be dominated in such an arbitrary way was to be reduced to the condition of a slave who must act as his or her master wills. Overcoming arbitrariness so conceived requires that a condition of political equality exists among all citizens. Only then will no one person or group be able to think or act as the master of others.

10   Richard Bellamy, "Constitutionalism." *Encyclopedia Britannica* (July 2019).

11   Bellamy, "Constitutionalism."

12   Steven B. Smith, "The Mixed Regime and the Rule of Law: Aristotle, Politics, VII." *Open Yale Courses* (September 2006).

13   Polybius, "The Histories." *The Loeb Classical Library Edition*, vol. III (1922–1927): Fragments of Book VI.

14   Machiavelli, Niccolò, "Discourses on Livy." *The University of Chicago Press* (1996).

2. The means to minimize such domination was to ensure that no one could rule without the support of at least one other individual or body.
    The aim was to mix social classes and factions in decision-making to ensure that their interests were given equal consideration, with each being forced to "hear the other side." To quote another republican motto, "The price of liberty is eternal vigilance," with each group watching over the others to ensure that none of them dominated the other by ignoring their concerns.
3. The balance to be achieved was one that aspired to harmonize different social interests and maintain the stability of the polity, preventing so far as was possible the inevitable degeneration into one of the corrupt forms of government.

Thus, mixed government provides a model of constitutionalism according to the institutions that structure the way decisions are taken.

The 17th and 18th centuries, however, brought three primary changes to the doctrine. The first was the development of the separation of powers as a variation on the doctrine of mixed government. The theory of mixed government involves no clear distinction between the different branches of government. Executive, legislative, and especially judicial tasks were shared between the different social classes and exercised by all the government bodies. Indeed, the popular element exercised certain legislative and judicial functions directly through plebiscites and as jurors.

The second change was in the type of "balance" mixed government was supposed to achieve. The classic theory took the idea of the "body" politic literally. Just as bodily health is meant to rely on a sound physical constitution and a balanced diet and way of life, so the health of the polity depended on a sound constitution that achieved a "natural" balance between the various organs and "humors" of the political body. As we saw, in line with this organic imagery, the aim was to hold off the inevitable degeneration and corruption of the system. Balance was a static equilibrium, designed to maintain the *status quo*.[15]

Nevertheless, the 17th and 18th centuries saw a new, more dynamic notion of balance, inspired by Newtonian physics and based on mechanics and physical forces. In this concept, balance could involve a harnessing of opposed forces, holding them in a dynamic equilibrium that combined and increased their joint power. The change can be seen in the notion of the "balance of trade," which went from being an equal exchange of goods between states to a competition between trading nations that encouraged their mutual productivity and innovation. In this account, the "cycle of life," where growth was followed by decay, became replaced by the idea of progress, in which change and transformation had positive connotations.

The third development drew on the first two. This was the idea that political balance now consisted of the competition between government and a "loyal" opposition. As parties evolved from simple factions and patronage networks among rivals for office to electoral machines defined as much by ideology and social composition as by the

15   Bellamy, "Constitutionalism."

personal ambitions and interests of the political class, they became the organs of this new type of balance. In keeping with the older theory of mixed government, one of the virtues of parties was their ability to mix different political and social classes and interests, and combine them around a common program.

Indeed, just as economic competition led rival firms to compete over price, innovation, and the exploration of untapped markets, so electoral competition led rival parties to compete over policy efficiency and effectiveness, devise novel forms of delivery, and focus on areas appealing to different sections of the electorate. This modern form of political constitutionalism has proven constitutional in both form and substance. Equal votes, majority rule, a good-faith pursuit of the common good and competitive party elections offer a mechanism for impartially and equitably weighing and combining the views of millions of citizens about the nature of the public good. And in making politicians popularly accountable, it gives them an incentive to rule in non-arbitrary ways that respond to the concerns of the different minorities that form any working majority, thereby upholding both rights and the public interest rather than their own interests.

2.2. *Legal Constitutionalism*

Although the detailing of all these procedural mechanisms and the relations between them usually forms the bulk of most constitutional documents, nobody would deny that the systems of most democracies are far from perfect, such that their constitutional importance has come to be eclipsed—in legal circles particularly—by the second tradition. This view emphasizes the specification and judicial protection of the different competences of the political system and of constitutionally entrenched rights by a constitutional court. Notably, the transition *"from the separation of powers to rights and judicial review"*—once again, under Richard Bellamy's paper "Constitutionalism"— characterizes the *'legal constitutionalism'* evolution.[16]

According to Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789,

> "Any society in which the guarantee of rights is not assured, nor the
> separation of powers determined, has no constitution."[17]

Though widely accepted today, this view was novel at the time, shaped by the experience of the English, American, and French revolutions.

The underlying rationale of this separation (as widely accepted—Book 11, Chapter 6 of Montesquieu's "The Spirit of the Laws"[18] offered a definitive statement of the

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16   Bellamy, "Constitutionalism."

17   Declaration of the Rights of Man—Approved by the National Assembly of France, August 26, 1789. *The Avalon Project* (2008).

18   Montesquieu, "The Spirit of the Laws" | Part 2, Books 11–12 | Summary. *Course Hero* (2016).

doctrine, even though his account still bore the hallmarks of its origins in the system of mixed government, and even though only the Federalist Papers[19] had it emerge in its mature form)[20] is that individuals or groups should not be "judges in their own cause." The division between the three branches aims to ensure that those who formulate the laws are distinct from those entrusted with their interpretation, application, and enforcement. In this way, lawmakers are subject to the same laws and therefore have an incentive to avoid self-interested legislation as well as to frame it in general terms, which will be equally applicable to all. These laws then guide the decisions of the executive and judiciary, who, because they are similarly subject to the law, also have good reason to act in an impartial manner.

Separating functions also brings the efficiency gains associated with the division of labor. In particular, the activity of the legislature is made less cumbersome through delegating more short-term decisions to an executive branch capable of acting with greater coherence and dispatch.

Notwithstanding, altogether four other theoretical developments accompanied the shift from mixed government to the separation of powers that changed its character.

1. Mixed government had been challenged earlier by theorists of sovereignty, such as Jean Bodin and Thomas Hobbes, who regarded the idea of dividing power as incoherent.[21]

   The separation of powers came into being in a context shaped by the notion that at some level power had to be concentrated, and, in the context of the English, American, and French revolutions, the natural assumption was to shift the sovereign power of the monarch to the people as a whole.

2. The notion of the people as a whole was likewise new.

   Previously, the "people" had simply meant the "commoners" or the "many." The whole people became the authors of the constitution, which, as the embodiment of their will, became sovereign over the will of any subdivision of the people, including the majority.

3. As a corollary, constitutions became entrenched written documents expressing a "higher" law, which could be amended only by the people as a whole or by some supermajority that could plausibly be said to represent their will.

4. Notions of rights became key aspects of the constitution.

   Initially rights were no more an intrinsic part of the separation of powers than they had been of mixed government. The Bill of Rights was an appendix to the U. S. Constitution, which had previously been confined to describing the system of government. Nevertheless, the securing of individual rights gradually became the goal of all constitutional arrangements.[22]

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19   Alexander Hamilton, John Jay, James Madison, "The Federalist Papers" Nos. 41–50 (1788). *Library of Congress* (August 2019).

20   Bellamy, "Constitutionalism."

21   Wil Waluchow, "Constitutionalism." *The Stanford Encyclopedia of Philosophy* (Spring 2018).

22   Bellamy, "Constitutionalism."

As accurately and repeatedly noted by Richard Bellamy, the distinctiveness of judicial functions was weak in the doctrine of mixed government and slow to emerge in the theory of the separation of powers.[23] However, making a legal document sovereign— only challenged by the sovereignty of the people as a whole—inevitably empowered the judiciary, particularly given the comparative length of judicial appointments and their relative isolation from electoral pressures by contrast to the other branches. The judiciary now decided the competences of the various branches of government, including their own, and set limits not only to the processes of government but also to its goals with regard to individual rights.

The two most notable instances in this context are bound to Chief Justices of the United States who played an important role in the development of American constitutionalism—John Marshall and Earl Warren.

John Marshall, the 4th Chief Justice, upheld the principle of judicial review in the 1803 landmark case *Marbury v. Madison*, whereby the Supreme Court could strike down federal and state laws if they conflicted with the Constitution.[24] By establishing the principle of the supremacy and the finality of judicial review, the *Marshall Court* helped to implement the ideology of separation of powers and to cement the position of the American judiciary as an independent and co-equal branch of government.

On the other hand, Earl Warren, the 14th Chief Justice, greatly extended civil rights and civil liberties of all Americans through a series of landmark rulings. The *Warren Court*[25] started a liberal Constitutional Revolution by bringing "one man, one vote" to the United States, tearing apart racial segregation and state laws banning interracial marriage, extending the coverage of Bill of Rights, providing criminal defendants' rights to an attorney and to self-incrimination (Miranda warnings), and so on.

3. Times of Change

Assuredly, these features have come to define modern constitutionalism and are reflected in all the constitutional arrangements of postwar democracies, simultaneously coexisting with forms of political constitutionalism and mixed government. Accordingly, they also construct the overall role of constitutionalism within these periods and transitions of its development.

Addressing the issue of identifying the mechanism of the doctrine's response to changes, we hold that just as constitutional order is capable of responding to the necessity of shifts (including radical ones, such as crises portrayed in my early essay), constitutionalism with its underlying premises respectively reacts to the calls of authority, society and democracy on its own accord, continually answering so-called "questions of constitutionalism."

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23   Bellamy, "Constitutionalism."

24   Marbury v. Madison, 5 U.S. 137 (1803). *Justia.*

25   Warren Court (1953–1969). *Wikipedia — the Free Encyclopedia.*

Unsurprisingly, execution of the above-mentioned procedures, features and mechanisms in reality poses a myriad of questionable and oft-contradictory circumstances, which in turn conveniently can be presented as advantages and disadvantages according to the critics of both traditions.

With that said, as to authority, and given that arguably no working constitutional government has not also been a working democracy, few analysts believe that constitutions alone can restrain a genuinely tyrannical government. Rather, the aim is to prevent democratic governments from falling below their self-professed standards of showing equal concern and respect to all. Therefore, a legal constitution is seen as a corrective to — even a foundation for — a working political constitution.[26]

Then again, as legal constitutionalism spread, establishing itself not just in former authoritarian regimes but also in the United Kingdom and Commonwealth countries where political constitutionalism had hitherto held sway alone, some scholars highlighted drawbacks. Critics of legal constitutionalism have argued that hegemonic groups fearing political challenges to their position have introduced it. They contend that whereas political constitutionalism responds to majority views for enhanced and more equal public good, legal constitutionalism has inhibited such reforms on grounds of their interfering with individual property and other rights. Of course, important exceptions exist, with the progressive rulings of the *Warren Court* (1953–69)[27] in the United States offering an apparent contrast to the free market decisions of the *Lochner era* (1897–1937).[28]

As to society, democratic governments are sometimes said to be prone to overreacting to emergencies, sacrificing civil rights to security, and pandering to either electorally important, yet unrepresentative, minorities or the populist sentiments of the majority. Insulated from such pressures, a court can be more impartial while constitutional law binds its judgments. However, others contend that these supposed advantages turn out to be disadvantageous. Turning to the courts offers an alternative to entering the political realm, yet access is more restricted than voting and the costs of pursuing a case can be as prohibitive for most ordinary citizens as founding a new party. Hence, legal recourse makes it possible for those with deep pockets to fasten onto a single issue that affects their interests without the necessity of winning others to their point of view.

Courts may be restricted to following the law as set forth by the legislature or in the constitution in their judgments, but it is also often argued that the intentions of the drafters of a constitution are unlikely to be consistent or knowable and may well be inappropriate as scientific or societal conditions change. Some observers argue that being bound by the past favors the *status quo* and those who are privileged by current arrangements, thereby hindering progressive reform. If the principles behind the constitution are universal and timeless, then it can be applied to any situation. Yet

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26   Bellamy, "Constitutionalism."

27   Warren Court (1953–1969). *Wikipedia — the Free Encyclopedia.*

28   Lochner Era (1897–1937). *Wikipedia — the Free Encyclopedia.*

it would be a grave error even for me to overlook that many legal philosophers—no less than citizens—disagree on whether such principles exist, let alone what they might require in particular cases. Those who believe that political constitutionalism consults popular views directly often discount the notion that appealing to a popular consensus will resolve that problem. Critics of judicial review have argued, then, that it risks becoming arbitrary rather than being a block on arbitrariness.[29]

Conclusion

The doctrine that a government's authority is determined by a constitution—constitutionalism—has had an utmost effect on the structures of authority, society and democracy throughout the passage of their transformation and up until formation of the modern constitutional arrangements. In this article, having clarified the nature of constitutionalism as a principle and its correlation with simply a constitution beforehand, through the lens of the most predominant traditions thereof we have unfolded the essential points assembling constitutionalism's role within those periods.

Although disagreement over the merits of legal and political constitutionalism remains a central element of 21st-century political discourse, their extant features and mechanisms still form a major bulk of encircling authoritarian, societal and democratic phenomena premises within times of change.

Bibliography

Azari, Julia; Masket, Seth. "The 4 Types of Constitutional Crises." *Five Thirty-Eight* (February 2017). Accessed June 12, 2021. https://fivethirtyeight.com/features/constitutional-crisis/.

Bellamy, Richard. "Constitutionalism." *Encyclopedia Britannica* (July 2019). Accessed June 12, 2021. https://www.britannica.com/topic/constitutionalism.

Casper, Gerhard. "Constitutionalism." *Encyclopedia of the American Constitution*, vol. 2 (1986): 473.

Fritz, Christian G. "American Sovereigns: The People and America's Constitutional Tradition Before the Civil War." *Cambridge University Press* (2008).

Contiades, Xenophon. "Constitutions in the Global Financial Crisis: A Comparative Analysis." *Oxon: Routledge* (2016).

Declaration of the Rights of Man—Approved by the National Assembly of France, August 26, 1789. *The Avalon Project* (2008). Accessed June 20, 2021. https://avalon.law.yale.edu/18th_century/rightsof.asp.

Dicey, A. V. "Introduction to the Study of the Law of the Constitution." *Wayback Machine*, 8th ed. (London: Macmillan 1914) (April 2004): Part III: The Connection between the law of the constitution and the conventions of the constitution; Ch.

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29   Bellamy, "Constitutionalism."

14. Accessed June 12, 2021. https://web.archive.org/web/20040408171308/http://www.constitution.org/cmt/avd/law_con.htm.

Fellman, David. "Constitutionalism" (1973–74). *Wayback Machine* 1 (June 2006): 485, 491–92. Accessed June 12, 2021. https://web.archive.org/web/20060623044421/http://etext.lib.virginia.edu/cgi-local/DHI/dhi.cgi?id=dv1–61.

Hamilton, Alexander; Jay, John; Madison, James. "The Federalist Papers" Nos. 41–50. *Library of Congress* (August 2019). Accessed June 20, 2021. https://guides.loc.gov/federalist-papers/text-41–50#s-lg-box-wrapper-25493412.

Lochner Era (1897–1937). Accessed June 20, 2021. *Wikipedia — the Free Encyclopedia.* https://en.wikipedia.org/wiki/Lochner_era.

Machiavelli, Niccolò. "Discourses on Livy." *The University of Chicago Press* translated by Harvey C. Mansfield and Nathan Tarcov (1996). Accessed June 20, 2021. https://identityhunters.files.wordpress.com/2017/07/niccolo-machiavelli-discourses-of-livy.pdf.

Marbury v. Madison, 5 U.S. 137 (1803). *Justia.* Accessed June 20, 2021. https://supreme.justia.com/cases/federal/us/5/137/#tab-opinion-1958607.

Montesquieu. "The Spirit of the Laws" Part 2, Books 11–12. *Course Hero* (2016). Accessed June 12, 2021. https://www.coursehero.com/lit/The-Spirit-of-the-Laws/part-2-books-11–12-summary/.

Polybius. "The Histories." *The Loeb Classical Library Edition*, vol. III (1922–1927): Fragments of Book VI. Accessed June 12, 2021. https://penelope.uchicago.edu/Thayer/e/roman/texts/polybius/6*.html.

Sovhiria, Olha; Shuklina, Nataliia. "Constitutional law of Ukraine." *Yurincom Inter*, vol. 2 (2012).

Smith, Steven B. "The Mixed Regime and the Rule of Law: Aristotle, Politics, VII." *Open Yale Courses* (September 2006). Accessed June 12, 2021. https://oyc.yale.edu/political-science/plsc-114/lecture-9.

Waluchow, Wil. "Constitutionalism." *The Stanford Encyclopedia of Philosophy* (Spring 2018). Accessed June 12, 2021. https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/.

Warren Court (1953–1969). *Wikipedia — the Free Encyclopedia*. Accessed June 20, 2021. https://en.wikipedia.org/wiki/Warren_Court.

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Конституціоналізм в Часи Змін: Вплив, Суспільство і Демократія

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Анотація

Ця стаття, відповідно до класичних методологічних прийомів та їх розвитку, визначає основні ознаки двох основних конституційних традицій — політичної та правничої, одночасно вимальовуючи необхідні червоні лінії з огляду на відповідність доктрини Основному Законові. Ці ознаки визначаються як основні елементи ролі конституціоналізму в часи змін, де здатність доктрини дати відповідь на "питання конституціоналізму" є основою його реакційного механізму. У статті оглядаються феномени впливу, суспільства та демократії у їх сучасному розумінні та робляться необхідні висновки щодо впливу конституціоналізму на їх змінну структуру.

Ключові слова: Конституція, конституціоналізм, традиції конституціоналізму, змішана форма правління, поділ влад, конституційний контроль, дискреційні повноваження, представницька демократія