

THE THEORIES ON THE COLLISION OF TRADITIONAL AND JUDICIAL CONSTITUTIONALISM IN THE UNITED STATES OF AMERICA

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Abstract

The phenomenon of judicial supremacy is subjected to criticism of the traditional views on the constitutionalism in the USA. It seems that the clash between the concept of separation of powers on the one hand vs. the role of the courts in interpreting the "invisible constitution" on the other hand still occupies the American scientific community. There is still an impression that it is not ready to propose fundamental changes in the system, so today the judicial supremacy, as a replacement for the judicial review of constitutionality, is considered as the guardian of the Constitution, guardian of the individual rights and guardian of the rights of the minorities. These are basically the values of which no one wants to give up, no matter how much the ambition of the judicial power and its involvement in the political gaps is being criticized.

This paper will provide an overview of several theoretical perspectives aimed at conforming judicial review of constitutionality, even though its radical extension in the form of judicial supremacy, judicial activism and judicial paramountcy and the established system of organization of powers.

Keywords: *Judicial activism, Judicial constitutionalism, Judicial self-restrained, "Living Constitution", Legal pragmatism, Judicial minimalism, The original intent theory, Theory of original meaning*

I. INTRODUCTION

Judicial supremacy is a reality and a phenomenon completely accepted in the constitutional law literature of the USA. The modern constitutional theory has no doubts that not only the establishment, but the nurturing of the practice of the Supreme Court of the United States to step into the realm of legislation, to act as a third legislature, and to directly set the direction for the other branches of the government. Presented in this way, the activity of the Supreme Court of the United States is completely incompatible with the "romantic" notions of the principle of separation of powers, and thus the notions of traditional constitutionalism. Science uses different terms to denote this phenomenon. Thus, the terms judicial supremacy, judicial activism, judicial paramountcy, juristocracy, government by judiciary refer to the same phenomenon which in

* Jelena Trajkovska Hristovska, PhD., Associate Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Law Faculty. e-mail: j.trajkovskahristovska@pf.ukim.edu.mk

essence is a deviation of the principle of separation of powers and the traditional understanding of the mutual restriction of the branches of the government.

The problem of counter-majoritarian difficulty concerning judicial supremacy is the only one covered in the area of interest of the modern constitutional science. On the contrary, the real confrontation with the fact of the role of the judges in controlling and nullification of the laws passed by democratically elected representatives of the Congress, in turn, imposes the need to find a mechanism to overcome this pathology in the system and to find a solution through which the will of the citizens will be reflected in the decisions of the court. Therefore, it seems that today the modern constitutional theory in the USA is preoccupied with trying to find a solution to this problem, that is, a solution how to conform the judicial supremacy to the rule of the citizens and the will of the legislature.

II. THEORY OF JUDICIAL SELF-RESTRAINT

The theory of judicial self-restraint incorporates several views, and the term judicial self-restraint has several meanings. Richard Posner emphasizes that the term self-restraint covers the obligation of the courts in the decision-making process to apply the positive law (legalism, formalism or "court bound by the law"), the right of the courts to invoke decisions and established practise of other bodies when deciding in a particular case (principle of compromise or "syndrome of modesty") and restraint, i.e. self-restraint when proclaiming the adopted laws as unconstitutional¹. All three meanings of the aforementioned term refer to the separate techniques that the court may apply while trying to avoid the nullification of the laws that it needs to apply. However, James Bradley Thayer's theory of judicial self-restraint is the precursor of all the aforementioned methods that can be used to self-restraint the court, and to curb it in the process of unjustifiably overtaking on the powers of the Congress in the modern US constitutionalism. The clear separation of the inaccurate (unconstitutional) from the irrational, that is, what is wrong and contrary to the Constitution from what constitutes an abuse of discretionary authority of the court has the central part in his theory.

To achieve this, Thayer demands the court to conduct itself in a manner that it would not evaluate a law as unconstitutional, except in specific cases where the contradiction between the legal norm and the Constitution is so obvious that it should not be discussed at all². In essence, this means that judges who are not firmly convinced of the unconstitutionality of the law will not intend for its nullification and non-application. Namely, the judges who consider that the law to be applied is unconstitutional, but they are not completely sure about that, that is, according to Thayer's formula are "not open for rational question" will not qualify it as unconstitutional. A variation on the topic is the recognition of the constitutionality of the law, i.e. the absence of doubt in its unconstitutionality, the so-called *benefit of the doubt doctrine*, which establishes the obligation of the courts, as long as possible, to interpret the law as if it complies with the Constitution. The doctrine of *presumption of constitutionality of the law* is similar, according to which the law should not be declared unconstitutional as long as there is a possibility to be interpreted as in compliance with the Constitution, i.e. in case of doubt or more possible interpretations, the interpretation according to which the law complies with the Constitution

¹ *Rise and Fall of Judicial Self-Restraint*. Richard. A. Posner. California Law Review. vol. 100. 2012. No. 3. p. 521

² the theory set in the terminology of U.S. criminal law is equated with the highest, 4th degree of conviction for a particular court decision "beyond a reasonable doubt."

should be taken into account³. Later, the so-called Thayerism will be recognized in the views of its successor, according to which the so-called *reasonable test* that the law must overcome for its constitutionality to be determined, will be modified in A. Bickel's *rule of the clear mistake*⁴.

Thayer seeks the necessity of such behaviour of the courts in:

- Lack of constitutional basis for nullification and non-application of the laws by the courts. The judicial review institute is an innovation by the USA and as such requires constant judicial restraint and self-restraint in exercising this acquired and not original authority.
- The effect of the adopted law occurs immediately after its entry into force and before its application in a particular case to be questioned before the courts. This means that the legislator is obliged to make an independent assessment of its constitutionality before adopting the law.
- Issues related to the powers of other branches of the government inevitably require the inclusion of not only legal but also political criteria in the decision-making process. Therefore, the judicial self-restraint is necessary, as well as the acceptance of the self-restraint doctrine, especially when they are faced with a political issue.
- Finally, in conditions where the courts would take care exclusively of the constitutionality of the laws and not of their application, the legislator will be placed in a subordinate position when adopting laws, taking into account the reaction of the court. This will reduce the constitutional powers of the Congress, and its role will be trivialized⁵.

The legal doctrine of judicial self-restraint in the decision-making process of James Bradley Thayer will be accepted and elaborated by *Justice Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter* and *Alexander Bickel*.

The philosophy of *Justice Oliver Wendell Holmes* of judicial self-restraint in the decision-making process about the constitutionality of the law may probably be best illustrated in his statement, "If my fellow citizens want to go to hell, it is my duty to help them."⁶

Justice Oliver Wendell Holmes accepts the doctrine of judicial self-restraint in the process of assessing the constitutionality of the laws and raises it to the level of value that a judge should possess, just like the founder of this doctrine, but unlike Thayer, he does not recognize the potential and capacity of the legislature before the adoption of the law to assess its compliance with the Constitution. He is not convinced of the possibility of the legislator to rationally assess the constitutionality of the law and starts from the premise that the adopted law is a concentrated expression of political decisions. The law is only an expression of the balance of political power in society⁷. Unlike his predecessor, who claims that political criteria are unavoidable in deciding on constitutional matters and forces judges into non-application of the laws they deem unconstitutional, Holmes believes that the judges guided by these political criteria will nullify

³ *Kontrola ustavnosti zakona*. Gaso Mijanovic. Sarajevo. 1965. p 261.

⁴ Bickel Alexander. *The Least Dangerous Branch –The Supreme Court at the Bar of Politics*. Yale University Press. 1986. p. 35

⁵ *Origin and Scope of the American Doctrine of Constitutional Law*, James B. Thayer, 7HARV. L. REV. 129, 144 (1893),p. 155 Quoted from *The Rise and Fall of Judicial Self-Restraint*. Richard. A. Posner. California Law Review. vol. 100. 2012. No. 3. p. 523

⁶ *Justice Holmes and the Metaphysics of Judicial Restraint*. David Luban. Duke Law Journal. 1998. Vol. 44:449. p 489 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3270>.

⁷ *The Rise and Fall of Judicial Self-Restraint*. Richard. A. Posner. California Law Review. vol. 100. 2012. No. 3. p.526

laws that are not in line with their political affiliation. That is why *Holmes* compares the judicial self-restraint and restraint in evaluating the constitutionality of the laws as a value, with the trait and characteristic of a soldier, i.e. "obedience and blindly accepted duty in conditions where he understands very little, in plan and strategy for which he has no knowledge and tactics whose meaning and purpose he does not recognize"⁸. Namely, the level of self-restraint and its radical extension is most adequately reflected in Holmes' scepticism towards the legislator's ability to create a constitutional law, i.e. the statement, "Personally, I am convinced that if the masses know more, they will not want that result, but my opinion is irrelevant"⁹ and finally through the ruling in *Buck v. Bell* from 1927 which allows the sterilization of persons with mental retardation "for the protection of the health of the nation" with the final word "three generations of imbeciles are enough"¹⁰. Finally, the practice that Holmes develops is included in the category of adherents to the self-restraint doctrine through the application of the positive law or proponents to the claim for "a court bound by the right of the legislature."

Unlike Holmes, Louis Brandeis accepts the thesis of judicial self-restraint in assessing the constitutionality of the laws, by avoiding deciding on constitutional matters, refusing to give advisory opinions on the meaning of the constitutional norms, and exclusion of the court in deciding on political issues. The doctrine of "*Constitutional avoidance*" dictates the federal courts to avoid deciding on constitutional matters when another legal act may be applied in the particular case. Thus, the Supreme Court directs the lower courts to dare to make their decision in a particular case with the direct application of the Constitution, only as a last resort. In this manner, Brandeis states that the only way out of a situation where a judge has to "bow" to his duties at the expense of making a morally good and desirable decision (Holmes' doctrine of full subordination to positive law) is to approach the application of another legal act and thus avoid the application of the Constitution and the decision-making on constitutional matters. Brandeis determines the behaviour of the Supreme Court of the United States following the "constitutional avoidance doctrine" in the ruling in the case of *Ashwander v Tennessee Valliey Authority* (1936)¹¹. According to this ruling

- the court will not decide in advance on constitutional matters unless it is necessary,
- the court will not interpret the constitutional rule beyond what the particular case requires,
- the court will not be involved in deciding on constitutional matters if it is possible to apply another specific act to adjudicate in the particular case,

⁸. *Justice Holms and the Metaphysics of Judicial Restraint*. David Luban. Duke Law Journal. 1998. Vol. 44:449. p. 489 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3270>.

⁹Ibid. p 492

¹⁰The verdict, explained by Justice Holmes, refers to a request to determine the unconstitutionality of the Eugenic sterilization Statute adopted in Virginia, which provided for the mandatory sterilization of "incompetent and mentally retarded persons" for the "protection and health of the nation". The US Supreme Court has found no violation of the principle of Due Process of Law or the Equal Protection Clause of the Constitution of the United States and, guided by the self-restraint doctrine, in this case, does not uphold the lawsuit and establishes the application of existing legislation. See ruling:

Buck v. Bell. 1927. http://www.law.cornell.edu/supct/html/historics/USSC_CR_0274_0200_ZO.html

¹¹See ruling *Ashwander v Tennessee Valliey Authority*. from 1937

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=297&invol=288>

- the court will not be involved in assessing the constitutionality of the law if the person who files the lawsuit before the court does not prove that he/she suffers damage due to the application of the law,
- the court will not decide on the constitutionality of the law if the person filing the lawsuit before the court has had any benefit from its application.

Alexander Bickel is a supporter of the judicial self-restraint theory in assessing the constitutionality of the laws and a follower of James Bradley Thayer. In "*The Least Dangerous Branch*", Bickel tries to theoretically justify a judicial review of constitutionality, which is an innovation in the USA, but also the most controversial "undemocratic and deviant institution of the American democracy"¹². For him, the least dangerous branch of the government is an extremely powerful court. The authority to interpret the constitutionality of the actions of other branches of the government, federal and to the states, is what separates the Supreme Court of the United States from the other institutions¹³. Bickel emphasizes that this authority of the Supreme Court does not derive from any kind of explicit constitutional provision, and the authority to determine the meaning and application of the constitution is not even mentioned in the document itself¹⁴.

For Bickel, the basic argument for judicial review of constitutionality in the USA is the fact that the constitutional audit practised by the Supreme Court of the United States is a counter-majoritarian difficulty i.e. counter-majoritarian force in the government organization system. According to Kronman's interpretations of Alexander Bickel's "Philosophy of Thought", the Supreme Court's authority to assess the constitutionality of the operation of the legislative and executive branch essentially means obstructing the will of citizens' representatives, here and now¹⁵, that is, "practising control in the name of the majority, but against it"¹⁶. The judicial review of the constitutionality of the laws is based on the fact that the Supreme Court, as an existing minority, has the right to effectively veto the decisions of the existing majority. Therefore, similar to Louis Brandeis, Bickel concludes that the so-called "counter-majoritarian brake" is a form of distrust of the legislature and over time will tend to weaken the democratic process¹⁷. However, the "mystical function" of the Supreme Court of the United States, although it does not derive expressis verbis from the constitutional text, with all its shortcomings, which Bickel finds in the counter-majoritarian difficulty and shifting the principle of separation of powers, has an extremely important meaning. Namely, in addition to the so-called brake function in the system, the Supreme Court of the United States also performs the function of ensuring the legitimacy of the output of the legislative activity. Quoting *Charles L. L. Black*, Bickel emphasized that judicial review of constitutionality meant not only that the Court could avoid its application in a particular case, but also that the Court in its practice affirmed the constitutionality of laws more often. Hence, *Bickel* concludes that in this manner the Supreme Court of the United States is a "promoter and custodian of the values of the American society," and unlike executive and legislative branch that prefer to act at a given time, the Supreme Court

¹²Bickel Alexander. *The Least Dangerous Branch –The Supreme Court at the Bar of Politics*. Yale University Press. 1986. p. 17

¹³Bickel. Cit.p.1

¹⁴. ibid

¹⁵*Alexander Bickel's Philosophy of Prudence*. Antony Townsend Kronman. *The Yale Law Journal*. Vol.94.no. 7.1 985. p. 1567

¹⁶Bickel.cip.p 17

¹⁷Bickel.cip.p21

acts in a long-term through its decisions¹⁸. *Kronman* elaborates this in details by emphasizing the fact that to a certain extent and direction, all branches of the government nurture the same values of the system. However, the legislative and the executive branch are under constant pressure to achieve immediate results, and it is human nature to prefer the results that can be achieved "now" than those that need to be achieved in the long run. The judiciary is interested in the values that need to be preserved in the long run, i.e. its primary task is to articulate the "moral unity" of the nation¹⁹.

For *Bickel*, judicial review of constitutionality is a counter-majoritarian institution, but he still favours the judicial review. The institution of judicial oversight "must play its role" and in the process of reviewing constitutionality, the Court must guide and educate other branches of the government. Judicial oversight is only one element in the constitutional scheme with the task of sharpening and promoting a system of lasting values even in situations where there is no national consensus. Through its function, the Supreme Court seeks to directly participate in shaping the moral vision towards which the nation strives, which is rooted in the moral and legal tradition and the Constitution. Therefore, according to *Bickel*, the court is an educator in the sense that it should show where the personal beliefs of the citizens lead. To achieve this, the so-called passive virtue is needed as a modality and a means of overcoming the clash with the will of the majority. Essentially passive virtue is techniques and means, a set of perceptual and judgmental abilities to assess a legal situation, to obtain it in time, and the court to resist a public pressure²⁰. These techniques are a rejection of jurisdiction to decide in a particular case, refusal to decide on the merits that the case refers to a political issue, refusal to enter into a decision-making process for a constitutional matter when the case can be resolved without completely accepting parties' requests etc. For *Kronman*, the broader meaning of the term *passive virtues* exceeds the usual techniques of judicial self-restraint in the process of assessing the constitutionality of laws and covers the forms of practical wisdom, the modalities of thinking whose practice is necessary for its functioning²¹.

Finally, *Thayerism* as a doctrine of judicial self-restraint and restraint in assessing the constitutionality of the laws has ceased to exist due to *Alexander Bickel's* theory. *Posner* points out that the terms "judicial restraint" and "judicial self-restraint" still exist as unexplained terms, in the same way, that the terms "*judicial activism*" and "*judicial supremacy*" are followed by the shadow of uncertainty and ambiguity though with a pejorative meaning²². It seems that the formulas, techniques and criteria, which are subordinated to the Doctrine of Self-Restraint for the Nullification of Laws are different. The tide of proposed modalities that the court can use in an attempt to distance itself and limit itself to a decision-making process for constitutional matters begins with the *James B. Thayer* school in the last decade of the 19th century, which even today continues to provoke the scientific community in the United States. The various directions that constitutional law in the USA develops as modern constitutional theories such as: originality, learning about the "living" Constitution, the Constitution in exile, judicial minimalism, judicial pragmatism, etc. are the most adequate proof of this.

¹⁸Bickel. cit. p. 26

¹⁹*Alexander Bickel's Philosophy of Prudence*. Antony Townsend Kronman. The Yale Law Journal. Vol. 94. no. 7. 1985. p. 1577

²⁰. Bickel. p. 68

²¹*Alexander Bickel's Philosophy of Prudence*. Antony Townsend Kronman. The Yale Law Journal. Vol.94.no 7.1 985. p. 1585

²². *The Rise and Fall of Judicial Self-Restraint*. Richard. A. Posner. California Law Review. vol. 100. 2012. No. 3. p.533

III. POSITIVIST INTERPRETIVE THEORIES

Positivist interpretive theories try to determine the meaning of the constitutional norms regardless of whether the established meaning of the norms in a given historical context is desired. These theoretical views are based on the understanding that the meaning of the Constitution is fixed and determined at the time of its adoption²³. The adherents to the so-called originalist theories about the meaning of the constitutional provisions point out that in modern terms the ones who interpret the Constitution should be guided by the meaning of the words and grammatical rules that were applied at the time of its adoption. These rules are the most relevant and should be followed as such because they are historically unsurpassed.

Whittington points out that the originalist theories are implicitly embedded in the design of the written Constitution²⁴. He points out that the adoption of the written Constitution is justified by the desire to fix and establish certain principles and to place them hierarchically above the others. Originalist theories are related precisely to that particular constitutional text, and it is precisely this constitutional text that should guide the judges as the entity interpreting the Constitution in determining the intention of the constitutors. The jurisprudence of originalism recognizes and emphasizes the Constitution as an instruction from the constitutor and the citizens, whereas the task of the one interpreting it is to determine what that instruction represents and to apply it in a particular case. Therefore, Whittington points out that, although as old as the Constitution itself, originalism is an opportunity to avoid judicial supremacy. He points out that the exercise of the authority to assess the constitutionality of laws, the authority to nullify legally valid laws can only be determined by the Constitution. The right of the courts to veto laws is not an authority determined by the Constitution. Therefore, as soon as the judge rejects the originalism and is not guided by the original meaning of the Constitution while interpreting the constitutional norms, the authority for judicial review of the constitutionality of the laws is questioned, as in the precedent case of *Marbury v. Madison*. Hence, Whittington states that the one who interprets the Constitution must be bound by the "language" and "intention" of the constitutors. The connection between the language and the intention of the constitutor indicates the direction in which the interpretation should be conducted²⁵. Originalism as a positivist interpretive theory implies that judges do not want to be free to incorporate their own political values and ideals into the Constitution. The goals and values of the authority created by the Constitution should be the constant basis of the constitutional law and not those who are subordinated to it and bound by it²⁶.

The Constitutional theory in the USA categorizes two positivist interpretive theories: Theory of Original Intention and the Purpose to be Achieved by the Adopted Constitutional Norm, the so-called (*The original intent theory*), and the Theory of the Original Meaning of the Constitution.

- The Original Intent Theory and the goal to be achieved by the adopted constitutional norm is based on the view that there is a specific intention of the author to determine the meaning of the words and the language used to draft the constitutional text. *McGinnis* and *Rappaport* emphasize that "judges should use the provisions of the

²³*Original methods originalism: A New Theory of Interpretation and the Case against Construction*. John O McGinnis & Michael B. Rappaport. Northwestern University Law Review. Vol. 103 no. 2.2009. p. 754

²⁴*Originalism Within the living Constitution*. Keith E Whittington. American Constitution society for law and policy paper. 2007. p. 1

²⁵*Originalism Within the living Constitution*. Keith E Whittington. American Constitution society for law and policy paper. 2007. p. 3

²⁶. *ibid*

Constitution in the sense and intent with which they were understood by the entity that adopted them”²⁷. The adherents to the aforementioned interpretative theory point out that the Constitution is imperfect and that even interpretations of the constitutional norms with good faith can often lead to unfortunate and undesirable results. However, the so-called *The original intent theory* "requires fidelity to the written Constitution in a way that is understood and accepted by those who have adopted it." Whittington, as a supporter of these theoretical understandings, emphasizes that it cannot be expected the Constitution to offer answers to all questions. Anyone who interprets the constitutional norms should be confronted with the fact that the Constitution will remain silent and its provisions will not provide answers to many questions related to the policies that are created in modern conditions. Therefore, as a method, originalism should contribute to understanding the written Constitution in the manner by which the provisions were understood and accepted by the constitutors. When this is not possible, new constitutional action should be undertaken²⁸.

- The theory of the original meaning of the Constitution refers to the interpretation of the constitutional norms in a way that it is equal to how the meaning of the norm would be understood by a person who spoke the language and used the constitutional terminology at the time of adoption of the Constitution.

Finally, the application of originalism as a positivist interpretive theory in an attempt to prevent the application of the constructivist method in interpreting constitutional norms is what is in the focus of the constitutional law in the USA. Namely, the supporters of the constructivist method point to the necessity of its application in all legal situations in which the constitutional norm that should be applied is unclear or ambiguous. In such circumstances, the judges are faced with legal regulation of a case that has not been regulated by the Constitution and was not in the area of interest of the constitutor. Therefore, the application of any variation to the originalist method is impossible. However, proponents of originalism point to the fact that originalism offers an alternative method of interpreting the *ambiguous* and unclear constitutional norms, which does not include the application of unconstitutional provisions. Thus *Mc Ginnisi Rappaport* emphasizes that in this case the source of the interpretation should be sought again in the constitutional text itself because if the constitutional norm is ambiguous it could mean

- 1) that there are two meanings of the provision, which are equal, i.e. both interpretations can be applied, and
- 2) there are two rational interpretations of the provision, but the entity that interprets it believes that only one interpretation applies to the regulation of the particular case.

Therefore, when the definition of ambiguity refers to the first case, the originalists believe that the situations in which a constitutional norm can have two meanings that lead to a completely different outcome are extremely rare, and in the second case the interpretation about the meaning of the specific constitutional norm that is most acceptable to the judge is logical according to his/her persuasion, The application of the originalism method in terms of an *unclear constitutional norm* is explained in the same way. Thus, in conditions when the constitutional provision is unclear and indeterminate, it is logical to initially determine whether it can or cannot

²⁷*Original methods originalism: A New Theory of Interpretation and the Case against Construction.* John O McGinnis & Michael B. Rappaport. Northwestern University Law Review. Vol. 103 no. 2.2009. p. 758

²⁸. *Originalism Too Conservative?* Keith E Whittington. <http://www.harvard-jlpp.com/wp-content/uploads/2011/08/WhittingtonFinal.pdf>. Harvard Journal of Law and Public Policy. vol. 34. 2012. p. 37

be applied in a specific legal situation. In such a case, the judge would always take into account the facts of the particular case and be guided by them to assess whether the unclear constitutional norm is applicable or not. In the conditions of application of its unclear and ambiguous legal norm, the entity that interprets it should always take into account the constitutional structure, the text, the history and the intention of the constitutor. Therefore, the non-acceptance of these guidelines in the interpretation of the constitutional norms would allow unlimited discretion of the judges in the decision-making process, which would ultimately result in the introduction of new constitutional rules²⁹.

The main disadvantage of the originalist interpretive theories is the question of how they would be applied in conditions of constitutional emptiness and in conditions where the constitution is silent on issues related to modern state policies.

IV. CONCLUSION

Talking about modern constitutionalism in the USA means focusing on the discussion to position the series of legal and political ideas that have developed since the early 20th century to the present day. This, in some way, includes discussions on the principle of separation of powers, restriction of government, recognition and protection of human rights and freedoms in relation to the constitutional set-up of the Supreme Court of the United States, established and nurtured practice of interpreting constitutional norms and its extension to model the constitutional principles and to create new ones in practice. The attitude of the judiciary towards other branches of government is extremely plainly regulated by the constitutional provisions. In the above statement, it is necessary to mention the lack of a constitutional solution for who should exercise the authority to interpret the ambiguous, unspoken and misguided provisions of the constitution, as well as the established and nurtured practice of the Supreme Court of the United States to apply the techniques of the so-called judicial activism. Finally, it can be concluded:

- Judicial supremacy as a new form of judicial review opens the questions: Do judges have the legitimacy to decide on the constitutionality of the law; Do the representatives of the citizens have the authority to adopt a certain act with specific content inconsistent with the Constitution if we take into account that "we the people" is a source of political power. All open questions are finally reduced to this: Is judicial supremacy compatible with the traditional conception of the principle of separation of powers and the doctrine of constitutionalism in a broader sense.
- The basic premises which are the starting point in the attempt to defend the need for judicial supremacy are: the court is the guardian of the Constitution, and the judges are its promoters and protectors; the independence and autonomy of the judiciary per se represent a democratic value and as such make the judiciary an option to protect the rights and freedoms of citizens and the only entity that should review the constitutionality of laws. The conventional theses stated in the attempt to justify the purposefulness of the judicial supremacy do not refer to the phenomenon itself in their essence, but the institute of judicial review of constitutionality. Replacing the terms judicial review of constitutionality with judicial supremacy, however, accepted the term and phenomenon is, is not theoretically justified. Although the view that "judicial supremacy is a natural

²⁹ *Original methods originalism: A New Theory of Interpretation and the Case against Construction*. John O McGinnis & Michael B. Rappaport. *Northwestern University Law Review*. Vol. 103 no. 2.2009. p. 773-774

partner of the USA constitutionalism" is accepted, this does not make this phenomenon more democratic.

- In an attempt to overcome the problem of the court's activist approach and its direct involvement in issues of a political nature, the US constitutional legal literature offers several different solutions developed in the Judicial Self-Restraint Doctrine and Positivist Interpretive Theories.
- Finally, *activism* defined as "conscious or unconscious tendency to change an existing law or to create a new law that did not exist until then to achieve a real balance between conflicting social values (individual rights in relation to the needs of the collective, the authority of one in relation to another branch of the government)"³⁰, and *self-restraint* as a "conscious or unconscious judicial tendency to reach a balance between conflicting social values while preserving the existing law"³¹ are two extremes of a continuum. Constitutional literature in the United States defines the so-called pathology of the system, but it seems that it is not yet ready to offer an acceptable solution for it. Theoretical views regarding this matter have exceeded the phase when the problem of the system should be detected, but the impression remains that the phase that will result in the supply of appropriate mechanisms and solutions is not yet complete. So the impression remains that although the so-called romantic conceptions of the Constitution have been abandoned, the constitutional law science in the USA does not dare to offer any radical changes that would provide for a more radical constitutional action than that of "we the people" and elevate the passive virtue of the Supreme Court of the United States as one of the values of the system.

References:

- 1) Ackerman Bruce *Oliver Wendell Holmes Lectures-The Living Constitution*. - Harvard Law Review. Vol 120 no.7, May 2007
- 2) Antony Townsend Kronman. *Alexander Bickel's Philosophy of Prudence*. The Yale Law Journal. Vol.94.no 7.1985.
- 3) Barak Aharon *The Judge in a democracy*. Princeton University Press.2006.
- 4) Barry Friedman, Errin B. Delaney. *Becoming Supreme: The Federal Foundation of Judicial Supremacy*. Columbia law review. Vol.100:2. 2011. Public law and legal theory research paper series,no11-61.
- 5) David Luban. *Justice Holmes and the Metaphysics of Judicial Restraint*. Duke Law Journal. 1998. Vol.44:449.p 489 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3270>.
- 6) Graglia Lino.A. *It's Not Constitutionalism, Its Judicial activism*. Harvard Journal of Law and Public policy.1996.vo.19.issue 2
- 7) Jamal Green. *Giving the Constitution to the Courts*. The Yale Law Journal. Princeton University Press. New Jersey.2007.
- 8) James B. Thayer. *The Origin and Scope of the American Doctrine of Constitutional Law*, 7HARV. L. REV. 129, 144 (1893)
- 9) James E Fleming. *Living Originalism and Living Constitutionalism as moral readings of American Constitution*. Boston University Law Review.vol. 92:1171

³⁰*The Judge in a Democracy*. Barak Aharon. Princeton University Press. 2006, p. 271, taken from *Suvremeni konstitucionalizam I „nova’’ doba vlasti*. PetarBacic. Zbornik radova Pravnog fakulteta u Splitu. 4/2009. p .776

³¹ *ibid*

- 10) John Agresto. *The Supreme Court and Constitutional Democracy*. Cornell University Press. 1984.
- 11) John O McGinnis & Michael B. Rappaport. *Original methods originalism: A new theory of Interpretation and the Case against Construction*. Northwestern University Law Review. Vol.103 no2.2009.
- 12) Jonathan Crowe. *What`s so bad about judicial review?* Policy.vol24.no4
- 13) Keith E Whittington. *Is Originalism Too Conservative?* <http://www.harvard-jlpp.com/wp-content/uploads/2011/08/WhittingtonFinal.pdf>. Harvard Journal of Law and Public Policy. vol.34. 2012.
- 14) Keith E Whittington. *Originalism Within the living Constitution*. American Constitution society for law and policy paper. 2007.
- 15) Petar Bacic. *Suvremeni konstitucionalizam i „ nova” dioba vlasti*. Zbornik radova Pravnog fakulteta u Splitu.4/2009.
- 16) Richard.A Posner. *The Rise and Fall of judicial self-restraint*. California Law Review. vol.100. 2012. No3.
- 17) Roosevelt Kermit. , *The Invisible Constitution*" University of Pennsylvania, Faculty Scholarship Paper 286, 4-1-2009