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## CONSERVATIVE IDEOLOGY IN THE U.S. SUPREME COURT IN THE 21ST CENTURY

At the beginning of the new millennium, the United States entered a new Republican Party cycle. The competition between the two leading parties in the 2000 elections was more acute than ever. It even resulted in a protracted constitutional and political crisis, when the U.S. Supreme Court had to stop the prolonged recounts in Florida (five votes in favor, four against), which was beneficial to the Republican parties. However, the Republicans managed to strengthen their future positions, and Democrat Barack Obama replaced Republican George W. Bush in the White House only after his two presidential terms.

Should understand American constitutional judicial lawmaking primarily as the Supreme Court's lawmaking as the activity of processing, interpreting, applying, and repealing regulations. Lawmaking activities aim to fill the gaps in legislation and reflect the objective needs of public life. Hence the importance of constitutional judicial lawmaking in human rights and other areas of legal regulation.

As a legal tool, the U.S. Supreme Court uses procedural requirements and arguments in relatively (and specifically) undeveloped and unmodified legislation. The basis of constitutional lawmaking is the U.S. Supreme Court's role in overseeing the implementation of judicial procedures. The requirement to comply with the procedural guarantees included in the U.S. Constitution's text, which coincide with common law's procedural requirements, is given the meaning of constitutional principles by the U.S. Supreme Court.

Thus, there was no reason for conservatism's full triumph in the early 21st century, as in the last decade of the 20th century. This celebration is not visible in the activities of the Supreme Court. Due to the death of W. Rehnquist in 2005, John Roberts, whose biography was very similar to Rehnquist's in terms of close ties to the Washington bureaucracy, filled the Chairman's vacancy.

The Supreme Court of the United States in national minorities' rights until the 2000s, despite the turn to constitutional judicial conservatism, did not move to a complete activism revision. The Court's main goal was not to attack affirmative measures but to interpret state regulation's doctrinal grounds, such as equal protection by law and due process. Still, conservative courts failed to change the role and reformat the meaning of doctrines.

**Key words:** conservative ideology, conservatism, U.S. Supreme Court, constitutional judicial doctrines, U.S. Constitution, dissenting opinions of U.S. Supreme Court justices, conservative decisions of the U.S. Supreme Court.

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### 21 ғасырдағы АҚШ жоғарғы сотындағы консервативті идеология

Жаңа мыңжылдықтың басында Америка Құрама Штаттары Республикалық партияның жаңа цикліне кірді. 2000 жылғы сайлауда екі жетекші партия арасындағы бәсекелестік бұрынғыдан да өткір болды. Бұл тіпті ұзаққа созылған конституциялық және саяси дағдарысқа әкелді, онда АҚШ Жоғарғы Соты Флоридадағы дауыстарды қайта санауды тоқтатуға мәжбүр болды (бес дауыс, төрт қарсы), бұл республикалық партияларға пайдалы болды. Алайда, болашақта республикашылар өз позицияларын нығайта алды, ал демократ Барак Обама республикашыл Джордж У. Буштың орнына Ақ үйге екі президенттік мерзімнен кейін ғана келді.

Американдық Конституциялық заң шығаруды, ең алдымен, Жоғарғы соттың заң шығаруын ережелерді өңдеу, түсіндіру, қолдану және жою қызметі ретінде түсіну керек. Заң шығару қызметі заңнамадағы олқылықтардың орнын толтыруға және қоғамдық өмірдің объективті қажеттіліктерін көрсетуге бағытталған. Бұл адам құқықтары саласындағы және құқықтық реттеудің басқа салаларындағы Конституциялық сот заңының маңыздылығын білдіреді.

Заңды құрал ретінде АҚШ Жоғарғы Соты процедуралық талаптар мен дәлелдерді дамымаған және өзгермеген заңдарға қатысты (және нақты) қолданады. Конституциялық заң шығарудың негізі – АҚШ Жоғарғы Сотының Сот процедураларының орындалуын бақылаудағы рөлі.

Жалпы Заңның процедуралық талаптарына сәйкес келетін АҚШ Конституциясының мәтініндегі процедуралық кепілдіктерді сақтау талабын АҚШ Жоғарғы Соты Конституциялық принциптердің мағынасына береді.

Осылайша, 20 ғасырдың соңғы онжылдығындағыдай 21 ғасырдың басында консерватизмнің толық жеңісіне негіз болған жоқ. Бұл мереке Жоғарғы соттың қызметінде көрінбейді. 2005 жылы У. Ренквисттің қайтыс болуына байланысты, Джон Робертс, оның өмірбаяны Вашингтон бюрократиясымен тығыз байланысы жағынан Ренквистпен өте ұқсас болды, төрағаның бос орнына келді.

АҚШ-тың Жоғарғы Соты ұлттық азшылықтардың құқықтары мәселесі бойынша 2000 жылдарға дейін конституциялық сот консерватизміне бет бұрғанымен, белсенділікті қайта қарауға көшкен жоқ. Соттың негізгі мақсаты оң әрекеттерді сынға алу емес, мемлекеттік реттеудің заңдармен және процедуралармен тең қорғалуы сияқты доктриналық негіздерін түсіндіру болды. Алайда, консервативті соттар доктриналардың рөлін өзгертіп, мағынасын қайта құра алмады.

**Түйін сөздер:** консервативті идеология, консерватизм, АҚШ Жоғарғы Соты, Конституциялық сот доктриналары, АҚШ Конституциясы, АҚШ Жоғарғы Соты судьяларының ерекше пікірлері, АҚШ Жоғарғы Сотының консервативті шешімдері.

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### Консервативная идеология в верховном суде США в 21 веке

В начале нового тысячелетия Соединённые Штаты вступили в новый цикл Республиканской партии. Конкуренция между двумя ведущими партиями на выборах 2000 года была более острой, чем когда-либо. Это даже привело к затяжному конституционному и политическому кризису, когда Верховный суд США был вынужден прекратить затянувшиеся пересчёты голосов во Флориде (пять голосов за, четыре против), что было выгодно республиканским партиям. Однако в дальнейшем республиканцам удалось укрепить свои позиции, и демократ Барак Обама сменил республиканца Джорджа У. Буш в Белом доме только после двух президентских сроков.

Следует понимать американское конституционное правотворчество прежде всего, как правотворчество Верховного суда как деятельность по обработке, толкованию, применению и отмене нормативных актов. Законотворческая деятельность направлена на восполнение пробелов в законодательстве и отражение объективных потребностей общественной жизни. Отсюда вытекает важность Конституционного судебного правотворчества в области прав человека и других сферах правового регулирования.

В качестве юридического инструмента Верховный суд США использует процедурные требования и аргументы в относительно (и конкретно) неразвитом и неизменённом законодательстве. Основой Конституционного законотворчества является роль Верховного суда США в надзоре за осуществлением судебных процедур. Требование соблюдения процессуальных гарантий, содержащихся в тексте Конституции США, которые совпадают с процессуальными требованиями общего права, придаётся Верховным судом США смыслу конституционных принципов.

Таким образом, не было никаких оснований для полного триумфа консерватизма в начале 21-го века, как в последнее десятилетие 20-го века. Этот праздник не виден в деятельности Верховного суда. В связи со смертью У. Ренквиста в 2005 году Джон Робертс, чья биография была очень похожа на биографию Ренквиста с точки зрения тесных связей с washingtonской бюрократией, заполнил вакансию председателя.

Верховный суд США в вопросе о правах национальных меньшинств вплоть до 2000-х годов, несмотря на поворот к конституционному судебному консерватизму, не перешёл к полному пересмотру активизма. Главная цель суда состояла не в том, чтобы критиковать позитивные меры, а в том, чтобы толковать доктринальные основания государственного регулирования, такие как равная защита законом и надлежащая судебная процедура. Однако консервативным судам не удалось изменить роль и переформатировать смысл доктрин.

**Ключевые слова:** консервативная идеология, консерватизм, Верховный суд США, конституционные судебные доктрины, Конституция США, особые мнения судей Верховного суда США, консервативные решения Верховного суда США.

## Introduction

Since the early 1980s, the Supreme Court of the United States has sought to narrow (reduce, weaken) the guarantees of citizens' constitutional rights, primarily the rights formulated and recognized by judges during the strategy of judicial activism. To this end, the Court consistently revised constitutional judicial doctrines by applying textualism techniques (and other «ingredients» of judicial conservatism).

The concept of «judicial conservatism» when applied to the analysis of the activities of justices of the U.S. Supreme Court looks overly politicized but reflects real political and legal positions. The concept is multi-faceted and represents a system of views, methods, and practical actions with these elements' interdependence. Can attribute the following factors to the main ones:

- Commitment to textualism as a mechanical (literal) interpretation of the U.S. Constitution, judicial self-restraint, and originalism as complementary textualism conceptual approaches;

- Borrowings from the concept of legal formalism with its varieties of «analytical jurisprudence» and «legal process», rejection of sociological jurisprudence, «legal realism» and «judicial activism»;

- Emphasis on the «classical» values of free enterprise with an apology for the inviolability of property and freedom of contract, and, as a result, a negative attitude to state interference in the space of market relations, especially the Federal government;

- Rejection of judicial lawmaking as the power of judges in the process of interpretation to create legal structures to eliminate gaps in legal regulation;

- A conservative political and legal ideology based on the declared independence from public pressure on the Court; non-recognition of a wide range of constitutional rights and their restriction by the «fundamental rights» (property and freedom) of citizens;

- Refusal in words in contradiction with the implementation of lawmaking in the form of legal fiction (Lindquist 2012: 10-12), emphasizing limiting the jurisdiction of Federal courts.

## Materials and methods

The object of scientific research is conservative judicial law-making in the United States as one of the US Supreme Court's functions. Scientific work's methodological basis is a set of general scientific and special methods of studying phenomena and processes: the historical and legal method, the functional and sociological method, the compara-

tive-legal method, the logical method, analysis and synthesis, induction, and deduction.

The scientific article is based on the study of English-language sources, including materials of judicial practice, some of which were not previously used by domestic specialists.

## Results and discussion

The complex historical and theoretical nature of scientific research predetermined the use of various normative sources. Still, the U.S. Constitution with amendments, the U.S. Supreme Court's decisions on the main areas of law-making activity were of particular importance. It is necessary to highlight the specific significance of judges' special opinions, which are auxiliary sources that allow us to analyze the motivation for making judicial decisions.

Judicial conservatism has developed throughout constitutional history since the formation of the U.S. state. There is a coincidence of traditional conservative values of previous periods and modern values of judicial conservatism. For example, the revival as the only genuine negative concept of human rights, based on an individualistic worldview and non-interference of the state in the so-called «space of freedom». This proves the stability of the ideological and legal basis and the stability of the practice of judicial conservatism.

By the beginning of the 21st century, judicial conservatism elements were more clearly embodied in constitutional practice, primarily weakening constitutional rights – guarantees due to their narrow interpretation. This was the case in criminal proceedings and administrative proceedings, for example, the restriction of the right to judicial review concerning recipients of social benefits (Rossum 2006: 8).

Judicial conservatives oppose the interpretation of equal protection of laws as allowing for legal differentiation, even though traditional differentiation is one of the realities of rights.

At the center of the judicial conservatives, ' efforts were adopting decisions to destroy, equal to other fundamental rights in importance and constitutional guarantees.

The above signs of judicial conservatism are not exhaustive. The above symptoms of judicial conservatism are not thorough. Besides, the last obstacle is politicization when discussing the most important constitutional issues. Moreover, in its conservative composition, with a numerical predominance of judges with conservative views, the U.S. Supreme

Court agreed on some problems with recognizing individual rights and social programs in the «era of activism».

The concept of «new rights» is subject to evolutionary development. In the U.S., the idea of four generations of rights (personal, political, socio-economic, collective) is not in demand, as are other European concepts of human rights. In the 1940s and 1970s, human rights types, particularly social and economic requests, were intensively discussed. Still, at the present stage, the problem of classification of rights has lost its relevance due to the weakening of interest in the previous models of the so-called «social state» (Safonov 2007).

Since the early 1970s, the focus has been on the right to privacy and its derivatives. A group of these rights, which have received a very vague formulation of «new rights», gradually acquires the meaning of the legal «Institute of privacy». There is an opinion that their discussion is a departure of the Court from pressing problems. We must, however, immediately recognize that the dispute about privacy and new rights is essential not only in connection with the massive violations in the sphere of «personal space» and «private life» that take place but also for reasons related to the foundations of constitutionalism, the interpretation of the U.S. Constitution and the desire to give constitutional development a new impetus. Another issue is always «hovering» over the U.S. Supreme Court's discussion on sexual minorities' rights, euthanasia, the right to appeal against police actions, etc. What should consider society's interests and the state the highest state interests, and which rights of citizens are inviolable for state intervention (restrictions)? These issues are mutually determined by each other. The interpretation and creativity of judges select the solution to the problems of judicial practice.

Noting the heterogeneity of aspirations and pluralism of views of the U.S. Supreme Court justices, it is impossible, firstly, to ignore the division into judicial liberals-activists and judicial conservatives, and, secondly, not to recognize the prevailing trend of the strategy of judicial conservatism. It is clear to all American law researchers that without considering the political and legal approach of judges as factors influencing the judicial function's implementation, it is impossible to carry out a legal analysis of the Supreme Court's activities (Pozner 2008: 371-372).

The influence of individual preferences and views of judges, judicial neutrality in the political sense, as a component of the U.S. Supreme Court judges' professionalism also occurs. However, in

our opinion, political and legal ideology is an essential factor in the interpretation and lawmaking activities of the U.S. Supreme Court. Although it is in demand, it is impossible to limit itself to the U.S. Supreme Court's normative analysis, allegedly acting outside of ideology and politics. «Mechanical» or «challenging constructivist» interpretation and application of textualism are indeed an essential part of the U.S. Supreme Court's modern judicial conservatism, but only a part. Equally fundamental goals and values, such as reducing the list of rights protected by the Constitution; the desire to weaken the constitutional guarantees of the so-called «new rights» legalized by The Court in the era of judicial activism.

To characterize judicial conservatives and judicial liberal activists, the «party trail» is also essential. The division between judicial conservatives and judicial liberals largely coincides with the political division between Republican Party appointees (judges with predominantly conservative beliefs) and Democratic Party nominees (judges with predominantly liberal-activist and non-interpretative views) (Burns 2009: 99).

The personal factor plays a vital role in the U.S. Supreme Court's judicial strategy in applying and revising doctrinal interpretation. For example, Sandra Day O'Connor, a nominee from the Republican conservative circles, took a balanced and moderate position on several essential Court decisions, relying on public interest in private constitutional law. To a lesser extent, this applies to the influential retired member of the Court, Anthony Kennedy. In comparison with his colleagues from the conservative majority, he voted following the liberal position; for example, he supported the decision to legalize same-sex marriage in 2015. As if refuting the division into judicial conservative and judicial liberal activists, such instances abound in the Court's past composition. Several judges are characterized by a strong commitment to conservative interpretation methods and views by traditional legal philosophy. The late Supreme Court Justice Antonin Scalia, an «informal leader» of conservative-leaning justices and former and current chief judges of the United States Supreme Court. Rehnquist and J. Roberts judge Clarence Thomas, and Samuel Alito.

American authors believe that judges nominated by U.S. Presidents and representatives of the Republican Party emphasize innovations in American law structure and recognize (directly or indirectly) the lawmaking of judges.

Turning to the Supreme Court's activities in the last decade, it is advisable to highlight the main ar-

eas of judicial practice of a conservative orientation to review the doctrinal approaches developed before the early 1980s.

The strategic approach of the U.S. Supreme Court justices is based on the concept of fundamental constitutional rights (to life, liberty, and property), the restriction of which is contrary to the U.S. Constitution, primarily its provision on due process and equal protection by law. They are also referred to as fundamental personal rights. Did not directly reflect citizens' private rights for several reasons, the original version of the U.S. Constitution. They were consolidated after amendments and additions to the Constitution, called the «Bill of Rights» in 1791. However, the Constitution's text and the bill of rights do not provide a clear understanding of the list of individual rights.

An oft-repeated argument is that by the time adopted the U.S. Constitution, and recorded them in the States' declarations of human rights. The reason is the reluctance to talk about slavery, tacitly recognized by the Constituent Convention.

However, the prevailing view is that the right to life, liberty, and property are fundamental personal rights that the state cannot restrict without due process of law. Thus, fundamental rights are guaranteed by procedural guarantees of judicial protection in the event of violations by the government. After adopting the XIV Amendment, due process requirements were eventually interpreted as directed against the States' violations. The critical problem of judicial interpretation was not the claim's object – the States or/and the Federal government. The list of due process rights is more important, taking into account the natural evolution of fundamental constitutional rights.

The state can legally restrict such rights, but only if its actions are dictated by the highest state interest, which is the public interest (the concept of «state interest» is not applicable and has little meaning in the American tradition). The U.S. Supreme Court reviews laws that may lead to restrictions on citizens' rights for violations of fundamental rights and the existence of an undisputed public interest.

How do we understand the undisputed public, compelling state interest (undisputed and immutable)? It should not be in doubt and, under its indisputability, does not require judicial interpretation. It is difficult to determine the interest of judicial review with methods of interpretation as indisputable and immutable. Theoretically, this is the interest of the state-organizational society, each in the protection of absolute values, such as protecting the coastline,

clean air, depleted natural resources, public health, and assistance to the disabled, and the elimination of slum areas with housing. Can abuse these values to the detriment of public interests. The public interest (infrastructure, offshore mining, emergency housing, fight against unsanitary conditions, etc.) if it leads to abolishing fundamental rights is not absolute; it creates a legal conflict. The U.S. Supreme Court seeks a balance between the public interest and individual law of fundamental importance but focuses on protecting the private part. Thus, there are doubts about forced eviction from low-rise or dilapidated houses, the right to provide all citizens with medical insurance through compulsory deductions, and the right to receive unemployment benefits (for people who do not have work experience). In other words, the main goal of the Court is to protect fundamental rights, fix violations that mean unconstitutional actions, contradict the Constitution as the highest source. The Court suspects the restriction of fundamental rights in a particular act of the authorities and requires them to prohibit the relevant action. Under this approach, the right to private property and business freedom is also a real public interest of the state, a public interest (although it is not, without restrictions). According to the author of this article, the undisputed and compelling interest is not limited to «fundamental rights», as they are narrowly defined in conservative judicial jurisdiction.

In the wording of court rulings and doctrinal approaches to the public interest and to the state's inspection powers, American judges from the first half of the 19th century attributed life, health, and public safety as the main goals the country. Simultaneously, as in the period when put the doctrine of inspection powers forward as the basis for state regulation of economic relations, the list of such indisputable constitutional goals, i.e., public order requirements, is not fully defined by the U.S. Supreme Court. From time to time, there are debates in the Court and in the legal community about whether public morals or the common good (in judicial terms, «general welfare» – the General welfare or – the common good) are related to the primary constitutional goals.

Under the strict judicial procedure, the Court presumes any restriction of fundamental rights unconstitutional. The regulation of «fundamental rights» can only be justified by the highest state interest. For example, a threat to public order from a criminal offense requires restrictions on the offender's fundamental rights. Nevertheless, the American legal system's public order concept includes the goals that are usually appropriate for public-legal

regulation and guarantees of property and personal integrity. The judicial interpretation analysis is also complicated because private property and its protection are considered the highest constitutional value and indisputable «public interest».

The highest requirement of public order in the American tradition is protecting fundamental rights as private rights of natural origin. Hence (in addition to the fact that the list is not defined textually) the message of constitutional legitimization, or a kind of «fundamentalization» of new constitutional rights. Among these new rights is the right to privacy, the right to «privacy». This «constitutionalization» (turning into a subjective constitutional right) of privacy with rights derived from it (the right to euthanasia, the right to abortion, etc.), and met with opposition from judicial conservatives and part of the legal community, and society as a whole.

The core of the conservative strategy is an approach to interpretation. Only those rights specified in the text or arise from the authors of the Constitution's intention or original intentions (textualism and originalism) are constitutionally protected. According to judicial conservatives, they should abandon new rights legitimized by applying «due process» as a substantive requirement. The state has to provide them with protection under the «flag» of justice. Argument – the text of the XIV Amendment of the Constitution does not have the purpose and intent of the constitutional requirement to protect a limited list of rights. Moreover, it cannot safeguard non-named rights under amendment XI without recourse to other Constitution provisions.

The arguments of liberal activists, supporters of abortion, euthanasia, sexual minority rights, and other new rights were indeed impeccable, as was the interpretation of the XIV amendment's provisions. Their main argument is that the combination of fundamental personal rights and due process requirements in one phrase proves that the Constitution guarantees all the rights derived from the individual's fundamental rights. There is a point of view about the division of all individual rights into procedural rights (according to due process and according to the provisions of amendments IV to VIII; and these are also personal rights) and so-called «rights to self-expression» (religious freedoms, freedom of speech, press and information). For example, freedom of movement, spouses' divorce, the right to an old-age pension, etc.

Nevertheless, conservative judges have also found it difficult to formulate their legal position. Their usual argument that the constitutional text does not contain a particular individual right is re-

jected because many other rights recognized by the U.S. Supreme Court, constitutionally legitimized by applying established doctrinal approaches, are not mentioned in the text. American author K. Sunstein noted that with a textual system, it would be necessary to repeal state laws on the use of contraceptives since there is no indication of this in the text of the U.S. Constitution. The problem of contraception is also multi-layered in meaning. Some contraception methods prevent pregnancy from developing after conception, which is theoretically a threat to the right to life. There are grounds for prohibiting contraception (Chemerinsky 2010 a: 326). Of course, it would be extraordinary if recorded some of the modern rights in 1787.

The right to privacy has been at the center of discussion over the past decades. The evaluation of «privacy» by the Russian researcher V. Vlasikhin deserves attention (V. Vlasikhin, 2000 a:55-58). «Privacy», in his opinion, refers to all those aspects of human life that are subject to absolute legal protection from any encroachments from outside (whether by the state or other individuals). This is the intimate world of a person, the sphere of their relationships, including family life, beliefs, personal rights, personal contact, housing, correspondence, reputation, personal, informal relationships with other people, religious and political views. American lawyers also include such concepts as the right of a person to control «their own living space», «their personality», and «information about themselves».

The formation and development of «privacy» are of interest from studying the U.S. Supreme Court's broad interpretative capabilities. Judicial lawmaking of the Court at all stages, especially during «judicial activism», was characterized by flexibility and elasticity. The Court, relying on the IV, XIV, and, to a lesser extent, IX amendments, formulated a new constitutional right of citizens, which is not explicitly stated in the U.S. Constitution's text. Of all the citizens' rights in the United States, «privacy» is the most convincing example of implementing the U.S. Supreme Court's lawmaking function.

The Institute of the right to non-interference in private life (the Institute of privacy) has been formed since the second half of the 1960s. However, the concept of confidentiality appeared earlier. It is estimated that such rights are enshrined in Amendments IV to VIII. «Must not violate the right of the people to guarantee the inviolability of their persons, homes, papers, and property from unjustified searches and arrests» (IV Amendment of the U.S. Constitution). The Amendment's meaning is not only to proclaim guarantees against criminal pros-

ecution but also to fix everyone's right to inviolability from state interference in the difficult-to-define sphere of personal space and private life. If it is a right, then it must protect it in a substantive sense.

The first critical decision on non-interference in private life was *Griswold v. Connecticut* (*Griswold v. Connecticut*, 381 U.S. 479 (1965)), where the U.S. Supreme Court, for the first time, came close to recognizing the right not to contradict the Constitution. In the circumstances of the case, the law of the state of Connecticut not only prohibited the use of contraceptives but also extended to spouses. Accordingly, any consultation related to the use of contraceptives was also considered illegal. Because of two center employees for conscious motherhood providing information to a married couple about contraceptives, they were fined by a court decision. The U.S. Supreme Court, which heard the case on appeal, declared the Connecticut law unconstitutional. In the conclusion of the Supreme Court of the United States on this from the mouth of W. Douglas sounded the following words: «We are dealing here with «privacy», which is older than the bill of rights – it is older than our political parties, older than our education system. Marriage is a union that should support a specific order of life, not someone's interests, a Union that should promote well-coordinated experience together, not political programs. This Union should promote mutual loyalty, not economic or social initiatives...» (The judicial majority representative, judge Douglas).

The Supreme Court of the United States in this decision confirmed the ability of the family to independently, without state intervention, determine the order of childbirth. Simultaneously, the Court found the justification for its decision in many fragments of the U.S. Constitution's text, even though the concept of «privacy» is not used in any provision. The Court argued that various constitutional guarantees, such as those in the «semitones» of the U.S. Constitution. The Amendments create the right to form associations, with the freedom of such associations as the family to make decisions. In this sense, privacy is one of these guarantees. In its ban on soldiers 'camping «in any house» in peacetime without the owner's consent, the third Amendment represents another aspect of this «privacy», the inviolability of the home... V amendment in its clause on the inadmissibility of forcing self-incriminating testimony and allows a citizen to form a «privacy» zone, which the state cannot force him to give up... All such cases show that the «privacy» that this case calls for its recognition is legitimate (Vlasikhin 2000 b: 56).

The Court also based its decision on the IX Amendment provisions, where there are grounds for the doctrine of unnamed rights (Zhidkov 1993: 768). Thus, the Court applied a «structural interpretation», invoked several provisions, and recognized the right to privacy as valid.

In 1973, the Supreme Court of the United States made one of the most critical decisions (*Roe v. Wade*, 410 U. S. 113 (1973)) on the right to abortion. The U.S. Supreme Court, first, to determine whether fundamental constitutional rights are restricted here, and second, to determine whether banning abortion is an undefined state interest has tested state laws prohibiting the right to abortion. In other words, what is consistent with the Constitution – a woman's right to terminate a pregnancy or the obligation to obey the law of the state (state) prohibiting termination of pregnancy in the name of moral goals and women's health?

In privacy, defined the subject of a legal dispute between activists and conservatives to interpret constitutional principles.

In the 1973 *Roe v. Wade* decision, the U.S. Supreme Court rejected the Texas law banning abortion, but not based on a «light-weight» approach in the context of the relationship between the Federal center and the States regarding the balance of their powers in this area, as was the case with the U.S. Supreme Court several times before. The «activist» majority of the U.S. Supreme Court in 1973 argued that it recognized the right of privacy as a new constitutional right under the prohibition of deprivation of liberty under the due process clause. The Court also turned to the clarifying wording of another decision: «...the right of privacy includes the rights of an individual, whether married or not, to be free from unlawful interference by the state in matters as important as the conception of a child» (*Eisenstadt v. Baird* 435 U. S. 438 (1972)).

In the *Roe* decision, when considering the right to abortion, the Court expressed no overriding (indisputable) state interest in preserving the human embryo at an early stage of development. «The prohibition of abortion becomes an undisputed state interest only if the fetus has formed to such an extent that it can survive without the mother's womb», the Court's activist majority argued. According to the main speaker, Judge Blackman, this is due to the embryo's transition to another development stage – the ability to live later. In this case, the deprivation of life is unacceptable, and the state interest in banning abortion becomes immutable. Judge Blackman continued: «But we can't precisely define this point, as it could not be determined, in addition to law,

other scientific areas—medicine, theology, philosophy. We can't rely on their position either. Judges do not have the right to decide this issue independently (about the critical point)» (Cases and Materials: 478).

According to the prominent constitutionalist L. Tribe (Chemmerinsky 2010 b: 173), it is not the legislator or the Court that should choose whether to preserve the fetus or have an abortion. A woman, possibly with the help of a doctor, should select this. L. Tribe argued that conservatives' position (human life begins with the appearance of signs of conception and the beginning of the embryo) is formulated not based on a secular morality, medicine, and scientific knowledge. Still, the basis of religious faith. Moreover, the recognition of life from the moment of conception leads to the glory of the prohibition of abortion as an immutable constitutional interest that cannot be challenged.

However, it is indisputable that the Court's language is not absolute, which has led to a new discussion of the issue from the 1970s to the present when the U.S. Supreme Court has chosen privacy as the object of increasing criticism and modification of doctrinal approaches. Attempts to evaluate the normative value of «privacy» are not complete (Johnson J. 1989:157-168). The complexity of the problem is also that the general name combines very heterogeneous rights, interests, and regulation methods in various private life manifestations.

Due to the difficulties of reviewing the Roe precedent, judicial conservatives have developed a strategy other than textualism – cutting and diluting new rights. It is difficult to abolish the right to abortion since the U.S. Supreme Court has repeatedly defended many types of the right to freedom as a fundamental constitutional right (the right to freedom of movement, to attend Church schools, to sterilization, etc.). However, they are not mentioned explicitly in the U.S. Constitution's text and were not discussed by its founders. Some arguments go beyond legal logic but left them out of the brackets since the judges mostly used standard logic in constitutional debates. From the mid-1970s to the present, the U.S. Supreme Court's position has evolved towards restricting the right to terminate the pregnancy as the primary type of privacy law.

Discussed the issue of turning a fetus into a viable being in the context of the abortion ban. In 1992, in the case (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U. S. 833 (1992)) of *Planned Parenthood v. Casey*, the Court ruled that a woman who doubts the choice of a solution must agree to state authorities' decision following the law

in the interests of preserving the child even before the final formation of the fetus. In other words, it can prohibit abortion at any time, but as an exception. For example, if a woman is charged with excessive responsibility, or, in the Court's terminology, «improper encumbrance of a responsible decision». Besides, the Supreme Court of the United States agreed that the establishment in the law of the state of Pennsylvania of a «waiting period» of 24 hours for a decision is not contrary to the U.S. Constitution.

Therefore, there was a deviation from the legitimacy of the right to abortion, but the U.S. Supreme Court repeatedly returned to the issues under discussion even after this decision. The Court continued to derogate from the right to terminate a pregnancy. If in the Casey decision, the judges allowed that, per the undoubtedly proven results of medical checks and the problematic situation of women, can revoke the right to abortion, then in 2007, in the decision in the case of *Gonzales v. Carhart* (*Gonzales v. Carhart*, 550 U. S. 124 (2007)), a new interpretation followed. In this case, after legislative initiatives of the George W. Bush administration to tighten procedures for termination of pregnancy, the Court ruled that if for typical medical reasons, the need to ban abortion covers a significant number of women in labor; the state can pass a law restricting the right to abortion even in the initial stages of pregnancy. The concept of «partial-birth» included in the legislation, according to many authors, is not wholly legitimate and linked to medical expertise. It is used to achieve a ban on abortion under the pretext of improving the psychological state. Nevertheless, it ignores the fact that it is necessary to have an abortion in some cases to preserve women's health.

The trend of restriction has not led to the abolition of abortion rights. Factors such as the change in the Supreme Court's composition in the early 2000s, when the U.S. Congress approved the appointment of two opponents of the abolition of privacy, and the uncertainty of public opinion and the main political forces on this issue played a role. In the U.S. and even more in other countries where the level of medicine is lower. Women's health issues related to the state of health care in the country, the availability of medical services and contraception in a broad sense, and the level of sexual literacy are increasingly coming to the fore. Nevertheless, we repeat that the peculiarity of the standard technologies of the U.S. Supreme Court and the impossibility of «simple» cancellation of precedents, the duration and doctrinal validity of the previous strategy of the U.S. Supreme Court to legitimize the right of privacy, are significant reasons for preserving the



right to abortion. Judicial conservatives, in our opinion, prohibit the right to abortion; it would be necessary to decide not using the methods of text and tradition but using judicial lawmaking. The abortion ban is deduced from the recognition of «non-legal», external, as R. Posner defined factors as the main ones. The ban can be constructed by an allegorical interpretation and judicial interpretation of the provisions, such as social aspects and religious values being highlighted. Nevertheless, this could backfire on the conservatives in Court. After all, they are categorically against «speculation» and non-interpretive as ways of judicial lawmaking.

There is not much else in the U.S. Constitution that would logically confirm the conservative position of justices like Antonin Scalia and Clarence Thomas. The political factor also plays a role. Thus, according to E. Chemerinsky, judicial conservatives' arguments are based on not only textualism and the need for self-restraint and not only on the protection of property and business. Judicial conservatives are forced to consider the positions of the U.S. Congress and the U.S. President, insurance companies, social protection authorities, and various groups of the population, including minorities, who are subjected to discrimination.

The institution of privacy includes norms governing the issue of recognizing the rights of individuals belonging to sexual minorities and, in the context of privacy, to same-sex marriage. There has been a modified application of the doctrinal interpretation of privacy. For a very long time, the U.S. Supreme Court opposed recognizing such rights as the rights of a social group; therefore, the Court's decision was controversial. On the one hand, the U.S. Supreme Court, and in its predominantly conservative composition, recognized the new law as consistent with the U.S. Constitution. On the other hand, the Court recognized the constitutional right to same-sex marriage with significant restrictions.

In 1986, at the height of Reaganism, the U.S. Supreme Court refused to recognize the right to non-traditional sexual relations as a fundamental right. Note that U.S. President Ronald Reagan, like most members of the Republican Party, as opposed to sexual minorities' empowerment (*Bowers v. Hardwick* 478 U. S. 186 (1986)). In the Court's opinion, the law does not have a unified interpretation with the right to privacy. Albeit with reservations, the majority of the judiciary upheld Georgia's homosexuality and lesbian law. By defining couples' relationships as «sodomy», the Court specifically emphasized that such sexual encounters were generally illegal and

prohibited by 13 states in 1971 when introduced the Bill of Rights.

However, the 2003 decision in *Lawrence v. Texas* recognized the rights of individuals with non-traditional sexual orientation to engage in intimate relationships (without marriage). Revision of the 1986 precedent begins. Majority rapporteur, Judge Anthony Kennedy emphasized that the rights of persons of nontraditional sexual orientation are based on the recognition of the freedom and dignity of all as free citizens (*Lawrence v. Texas*, 539 U. S. 558 (2003)).

However, the U.S. Supreme Court did not recognize this right as a fundamental right; many restrictions accompanied the decision. Thus, it did not identify the state's corresponding goal (interest) to protect homosexuality and lesbianism as a dominant interest. Consequently, state laws that impose bans on this group of individuals do not apply, the U.S. Supreme Court said, verification by the strict procedure. The Court noted that instead of a rigorous verification procedure, the laws regulating members of this social group's rights are checked based on «reasonableness», as it would be with non-fundamental rights that do not contradict the Constitution. Only if there is the expression «legalized» discrimination against sexual minorities (in public institutions, at work, etc.), the procedure for strict verification of the relevant regulatory Act is applied. The Court still (2017) does not assert that the right to engage in same-sex sexual contact is fundamental. Consequently, the U.S. Supreme Court (SCOTUS) upholds the relevant state laws to the extent that they do not exceed the reasonableness test. As a result, many state laws maintained several restrictions against people of nontraditional social orientation.

Since recognition as a «fundamental right» did not occur, the *Lawrence* precedent was a so-called «defective precedent», from the point of view of liberal activism. However, in our opinion, liberal activists in judicial robes do not take modern American society's realities, the negative social consequences, including for the child's psyche, into account. By 2014, most U.S. states had passed laws prohibiting discrimination against sexual minorities and approving same-sex marriage. The U.S. Supreme Court on June 26, 2015, in its decision in *Obergefell v. Hodges* (and other choices), recognized the right of same-sex couples to marry. Argument – section 1 of the XIV amendment on due process guarantees ([https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf)). In terms of judicial strategy and the doctrinal rationale for due process, the conservative majority has become a

minority due to Justice Anthony Kennedy's defection to non-interpretivism and sexual minority rights advocates.

The lawmaking activity of the U.S. Supreme Court includes another area of regulation – the right to euthanasia. This is a difficult question, referred to in popular literature as «the right to die». In U.S. legal practice, the right to euthanasia is often accompanied by a strict definition of «right to assisted suicide».

The law itself as a derivative of privacy has been debated in the United States for several decades and has been extraordinarily active since 1973. The subject of disputes is recognizing or rejecting the right to leave life due to the unbearable suffering of incurable patients who are conscious and confirm the choice by relatives and doctors.

The first Court of Appeals district XI 1997 (D.C.) in *Vacco v. Quill* held that privacy includes the right to medical assistance of death with a terminal illness and a conscious request of the patient (*Vacco v. Quill* 117 S. Ct. 2293 (1997)). Reason: the provision of equal protection of laws is not relevant to this right, so it is possible to apply a soft verification procedure and, consequently, allow euthanasia as an exception. Nevertheless, in 2002, the second circuit court of appeals (New York State) explicitly prohibited the right to medical assistance in the event of death. The revised the decision's basis: the right to euthanasia contradicts the judicial constitutional doctrine of equal protection by law. The following arguments justified this decision. The first argument is that the artificial life support system for a patient in a coma makes it possible to pass away with dignity. However, most Americans are not provided with such a scenario, so it is impossible to ensure equality before the law. Recognition of such a right would violate the U.S. Constitution, something that would violate equality. The second argument of the New York Court of Appeals is that allowing such actions can be a way to facilitate suicide. Moreover, as a justification, one of the judges said that lifting the ban in such conditions would be equivalent to a so-called «invitation to suicide».

The difference in the legal positions of the circuit courts of appeals in most cases is the basis for consideration of the issue in the U.S. Supreme Court. The Supreme Court of the United States, having considered the possibility of *Glucksberg*, refused to recognize the right to euthanasia as fundamental and stressed that «...in all civilized countries, it is a crime to assist in suicide» (*Washington v. Glucksberg* 117 v. S. Ct. 2258 (1997)). The Court applied a method of interpretation typical of the «school of

the political process»: «This is such an important decision that the U.S. Congress should make it as an expression of the will of the people... this decision should not reflect the judges' preferences» (Ibid. P. 577). Judge Brewer (speaking with the same opinion) he clarified that the decision does not mean legitimation of the right to a dignified end of life, but leaves questions about physical and moral torment. Cannot assess the right to end one's life on the principle that a fundamental right is not an absolute right. «Our Court does not take into account the unbearable suffering to which some incurable patients are subjected» (Cases and Materials... P. 561). And other judges concluded that the issue of euthanasia needs further consideration.

Indeed, the number of supporters of euthanasia is growing. The Court ruling referred to an «ingrained tradition» as an argument for banning euthanasia for terminally ill people who are suffering. It is complicated for judges to reject life and death as a fundamental human right if they do not apply to religious philosophy. The right to choose is denied, but the right to life is transferred from the individual to the state and the nation to politicians and legislators. According to E. Chemerinsky, when the Court moves the right to life to politicians, the state's interest disappears as an insurmountable interest. Such a claim must be constitutional and exist against the will of politicians. According to the logic of constitutionalism, the right to life and death under natural origin is inviolable. When an incurable patient experiences unbearable suffering, it is necessary not only to turn to an abstract tradition that does not coincide with the modern needs of morality and law, state, and religion. The Court did not conduct such an analysis.

In 2014-2017, we should note the continuation of state legislatures' attempts to pass euthanasia laws. In four states (Oregon, Washington, Vermont, Montana), they remain in effect pending a U.S. Supreme Court review of their constitutionality. Various circumstances, including the Court's incomplete composition after the sudden death of Antonin Scalia, made it impossible to make a responsible and legitimate decision. In March 2017, at the suggestion of Donald Trump, the U.S. Senate approved a new conservative Supreme Court judge, who took Antonin Scalia – Neil Gorsuch. Besides, after some «shift» towards the moderate non-originalist position of Judge Anthony Kennedy, with eight judges, the reality for some time was a «stalemate» situation with the voting.

The entire Court (since April 2017) has again turned into a «super-legislature» and performs law-

making functions. However, this depends on many factors and the formation of the corps of judges and their views. Leaving aside forecasts in the direction of realities, it should be admitted that if before 1973, the Court was inclined to recognize types of rights derived from privacy. After 1973, the erosion of privacy rights begins. As for the U.S. Congress, it has intensified the departure from the previous strategy of protecting citizens' rights and new rights due to the balance of political forces in this organ of state power.

The transition of the U.S. Supreme Court to restrictions on procedural rights has become one of the foundations of judicial conservatism. This trend's realization meant the consistent erosion of due process's guarantees, which was one of the U.S. Supreme Court's achievements in the 1950s and 1960s.

The main intention of conservative judges is to abandon the due process clause's broad interpretation, thereby undermining the concept of judicial activism and U.S. citizens' constitutional right to judicial protection. First, by disabling both a provision (principle, doctrine) to protect a wide range of rights under most of the Bill of Rights amendments. Second, as a substantive and not a «purely» procedural requirement. Thirdly, as a requirement for political power and the state to adopt laws appropriate for citizens and social groups' rights. Fourth, the aim is to disclaim the application of due process (legal justice) as a basis for the expansion of the list of ownership by the U.S. Supreme Court as referred to as fundamental rights or as derived from fundamental rights.

Since it is impossible to directly cancel the results of previous activities due to the rule of common law and the recognition of precedent as a source of direction, the conservative leadership has chosen a strategy of erosion of citizens' procedural rights in the main areas of constitutional regulation.

The conservative approach has changed almost every area of constitutional law. The conditions for implementing judicial guarantees of citizens who have suffered damage from large corporations' activities have worsened. The Court imposed restrictions on protecting consumer rights by reducing the coefficient of the so-called «punitive compensation» within the institution of «punitive damages». The Court took the position of abolishing constitutional guarantees to participants in contractual relations as a «weak side», for example, in labor relations. The strategy of restricting rights affected the rights of «vulnerable» categories of citizens. The Supreme Court recognized the compulsory transfer of citi-

zens who suffered from the deprivation of benefits to private arbitration bodies, not to the courts, as mandatory to the Constitution. Not only is the rather abstract principle of responsibility of the authorities to society undermined; under the threat of the use of a civil lawsuit in relations between citizens and government officials.

Two basic requirements follow from the concept of a civil claim: the right to compensation for damage and the obligation to restore the violated right. The application of civil action against government officials and employees remains at the center of discussion in the U.S. Supreme Court during the period of judicial conservatism. The principle of equality of subjects in a civil dispute is questioned, as is the possibility of a claim against the authorities and administration.

Conservatives in the U.S. Supreme Court cannot overturn the application of civil action to the relationship between government and individuals. Therefore, they employ a strategy of slowly destroying this vital right, using sophisticated tactics here too. The tactics are selective to applicants from various social groups (*Mobil Oil Exploration v. the United States* 530 U. S. 604 (2000)). In this case, with the participation of a large corporation, the Court, in its decision, recognized the legality of the waiver of sovereign immunity and the legitimacy of the corporation's financial claims against the government.

The concept of a civil suit is rarely applied to the categories of the least protected citizens, pensioners, students, women, disabled people, all recipients of benefits who are harmed due to errors of officials and discrimination. E. Chemerinsky cites an example of lower courts' attempt to protect a disabled person's rights who tried to get a job with a decent salary corresponding to his skills and abilities but was refused based on age criteria. The U.S. Supreme Court has affirmed (in an appeal against a lower court ruling) that you cannot sue the state if you are fired due to age (*Kimel v. Florida Board of Regents* 528 U. S. (2001)).

In a 2009 decision, in the case of *14 Penn Plaza v. Pyett*, the U.S. Supreme Court dismissed an old-age Union member's claim (*14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009)). He has been rejected even though under the Fair Working Conditions Act of 1938, the service workers' Union has the right to keep a worker at retirement age. The Court continued to apply a controversial rationale of «goodwill» by the state to an employee's acceptance of a claim in another case (*Alden v. Maine*, 527 U. S. 706 (1999)). Employees demanded overtime pay for

overtime per federal law. The decision of the U.S. Supreme Court: without the consent of the state, the claim cannot be considered, including based on the requirements of federal law following the doctrine of sovereign immunity. Often, the Court rejected claims under the pretext of the impossibility of relying on the law and precedent and formulating a position on the law. The Court again called the best way to resolve a labor dispute is the assistance of private mediators, which indicates an infringement of the right to judicial protection.

Therefore, there was a restriction on the right to judicial protection in claims against the possibility of applying to the Court with a lawsuit against public authorities. The activity of the U.S. Supreme Court has led to a narrowing of the chances of challenging decisions in the interests of big business and the state elite (establishment). At the same time, doctrinal approaches have changed.

Let us turn to one of these approaches, the doctrine of «sovereign immunity». It is based on the principle extracted from English Law, which in the popular presentation sounds: «The king can't be wrong». The regulation forbade the filing of lawsuits against the monarch, the state, or officials, even if they act in contradiction with the law. But this principle is archaic, and the U.S. judicial practice is dominated by another one, about the responsibility of authorities and public administration before the law in violation of citizens' rights and damage to them. From this perspective, applying the doctrine of sovereign immunity undermines the fundamental constitutional principle enunciated in the U.S. Supreme Court's decision in *Marbury v. Madison*. «The essence of civil rights and liberties includes the right to be protected by law, regardless of by whom or when it is harmed», the Marshall Court ruled in 1819 (*Marbury v. Madison*, 5 U. S. 137 (1803)). First of all, private law principles' constitutional significance is the focus of equality of subjects – participants of legal relations contradict the code (in this sense archaic) of sovereign immunity.

M. Dorf convincingly refutes the judges' arguments with conservative views in the U.S. Supreme Court, referring to their methodology. From the standpoint of originalism, as for the adherence to tradition and the original interpretation, the actual arrangement did not include the doctrine of sovereign immunity, he recalls. There was no discussion of sovereign immunity in the Constitutional Convention if that makes it pointless to rely on originalism and the founding fathers' original intentions.

Concerning arguments based on textualism, the U.S. Constitution is silent about granting states the

privilege of sovereign immunity. We must agree with M. Dorf that «not a single provision of the U.S. Constitution, including the text of the 11th Amendment, referred to by judicial conservatives, does not mean prohibiting citizens from applying to the court of their state with a damage claim». But to interpret this way, one will have to use the sophisticated method of non-interpretivism inherent in liberal activists, that is, ignore the text and the original intention. That is, to refute the textually exact meaning of Amendment 11 to prohibit lawsuits against states in federal courts only for citizens of other countries and foreigners, but not for citizens of their government. This is even though this Amendment's purpose is to prohibit citizens' filing of claims in federal courts from citizens of other states, but not from their citizens.

This is how the U.S. Supreme Court, with a very dubious, similar to the most daring examples of activists, interpretation, did in 1890 in the judgment in the case of *Hans v. Louisiana*. The Court then refused to follow the text. Moreover, he replaced the narrow interpretation of sovereign immunity as acting exclusively against citizens of other states and foreigners with a broad understanding of the text of the 11th Amendment. This meant that citizens of other countries and citizens of their nation were prohibited from suing state authorities in federal courts. Judge A. Kennedy, one of the attentive interpreters of the U.S. Constitution, not distinguished by liberal approaches and joining the conservatives in most decisions, was forced to declare that the principle of sovereign immunity was derived not from the 11th Amendment, «but from the structure of the Constitution as it is were accepted». The notion of «constitutional structure» in justifying a specific provision on sovereign immunity is unconvincing. For example, the principle of the supremacy of federal Law from Article 4 of the U.S. Constitution is a structural element that does not provide grounds for a broad interpretation of sovereign immunity. Therefore, the impossibility of following textualism and originalism on the issues of sovereign immunity in the U.S. Supreme Court testifies to the flaws of the conservative methodology. Nevertheless, the conservatives' use of «activist» methods also became a manifestation of opportunism and dependence on political factors.

The Opinion of E. Chemerinsky: «If judicial conservatives are honest in their commitment to textualism and originalism as the basis of interpretative methodology, then they should recognize the absence of a provision on sovereign immunity in the Constitution». «Otherwise, with the continuation of

the broad interpretation of sovereign immunity, according to the author, the responsibility of the authorities to the people is undermined».

At the beginning of the new century, the U.S. Supreme Court sought to change the previous doctrinal approaches to procedural guarantees, in particular, to limit the rights of participants in criminal proceedings.

First of all, this is the restriction of the right to go to Court with claims against officials who have violated the rights of those under investigation and accused, and the erosion of the doctrine of «exclusion of evidence» (illegally obtained by police and investigators).

It must be admitted that in many cases, the basis for authoritarian approaches and restrictions on rights in the actions of the U.S. Supreme Court was the position of the «political authorities» – the U.S. President and the U.S. Congress, their criminal law policy pursued to combat crime. The problem of crime in the United States has been one of the most acute and caused great public outcry. Concern about high crime rates leads to attempts to identify causes and gives rise to different views on how to solve the problem. Objectionable is the tendency to humanize criminal law that emerged in the 1960s. Right-wing conservative political forces demanded tightening criminal legislation at many historical development stages and extending all new legal regulation areas. The position of the Conservatives on the doctrine of «exclusion of evidence» was formulated by President Ronald Reagan and his entourage: «... the fact that the culprit can be exempted from criminal liability is much worse, the «excesses» associated with obtaining evidence of guilt». R. Reagan gained wide popularity by attacking judicial activism, «excessive guarantees and indulgences to criminals». The criticism was carried out with an eye to the adoption of stringent criminal laws. About 20 bills of R. Reagan passed the stages of consideration in Congress, and the President signed almost all. Thus, the Organizational Crime Control Act of 1984 weakened and undermined the right to bail. Simultaneously, the U.S. Supreme Court put forward strange arguments that even if the suspect does not pose a public danger, he cannot be dangerous in the future.

The fight against terrorism has given a new impetus to legal conservatism due to the tightening of criminal law policy. In 1996, it adopted the law on combating terrorism and the effective use of the death penalty. In amendments to this law, the U.S. Congress abolished the right of accused of terrorist activities to go to federal courts. According to the 2001 Patriotism Act, adopted by the U.S. Congress

to fight terrorism, among other areas, there was a tightening of procedural aspects of investigating new types of crimes; the concept of «federal crime related to terrorism» appeared. The population's particular discontent was caused by the massive introduction of wiretapping and electronic surveillance. In 2005, the federal law on combating terrorism was extended until June 1, 2015. Discussions are continuing on new measures, including anti-immigration measurements, in the spirit of this Act.

Criminal law is the responsibility of the states. Since the 19th century, there have been attempts to codify at the federal level, but they are far from being implemented. Simultaneously, in the field of criminal procedure relations, the role of the federation and the U.S. Supreme Court is more significant (Kozochkin 2007: 478). By interpreting legislation, filling its gaps, correcting shortcomings, federal courts in this area are engaged in lawmaking. The Court initiates and stimulates new approaches that directly affect the constitutional rights of the individual. The U.S. Constitution and the U.S. Supreme Court's interpretations of criminal procedural requirements and precedents are essential sources of constitutional and criminal law.

Defined the U.S. Supreme Court's strategy under the chairmanship of E. Warren in the criminal procedural sphere as a «model of due process». Besides, the U.S. Supreme Court's design was carried out to ensure the unity of criminal law, the judicial system, and the coordination of legal policy to protect citizens' rights.

It is necessary to highlight two goals of the strategy of judicial conservatives in the criminal law sphere. First, to rethink the legacy of the «era of activism», that is, the Warren Court's strategy that went beyond focusing on protecting due process. In several 5th and 15th Amendments due to process decisions, the Supreme Court in the 1960s achieved the extension of procedural guarantees to the states, considered by judicial conservatives, to violate the states' rights.

Secondly, the conservative forces sought, together with the political branches, to achieve a reduction in crime by tightening legislation and cutting procedural guarantees. During the reign of the Republican administrations (R. Nixon, R. Reagan, both Bushes), the opinion was spread that the reason for the high crime rate was the judicial activism of the U.S. Supreme Court chaired by E. Warren and W. Berger in the 60s and 70s of the 20th century.

During the subsequent twentieth century, the U.S. Supreme Court considered that illegal police actions could negatively affect the court decision.

The goal was to prevent police brutality and prevent the practice of violating suspects' rights and accused persons. The ruling of the U.S. Supreme Court in *Miranda v. Arizona* was crucial (*Miranda v. Arizona* 384 U.S. 436 (1966)). Evidence obtained by police officers who failed to comply with such rights as the right to refuse to testify, the right to a lawyer and the right to an interpreter during the investigation stage, and other investigative actions were declared illegal under the V amendment's prohibition of self-incrimination during testimony. Besides, the Court here, taking into account the use of unlawful methods by the police against H. Miranda (although He was guilty of rape, besides with repeated criminal acts), applied the provisions of the XIV amendment as related in the sense of protecting constitutional guarantees with the requirements of the V amendment, continuing the line of the *Mapp* case. The Court ensured that the bill of rights was incorporated with the provisions of the fourteenth Amendment. During those decades of the 1960s and 1980s, American police used less illegal methods.

Judicial conservatives have continuously criticized these decisions, especially the *Miranda* precedent. In recent decades, they have achieved a partial repeal of the *Miranda* rules in several decisions (For example, in the judgment in *Arizona v. Evans* 514 U.S. 1 (1995)).

According to judicial conservatives, the Warren Court went too far in protecting the rights of criminal defendants, which was one reason for the increase in crime in the country.

I completely disagree with the opinion of judicial conservatives that the Warren Court went too far in protecting the rights of criminal defendants. This suggests that judicial conservatives are trying to undermine the accused's rights in criminal proceedings to put them behind bars without any evidence.

During the democratic administration of Barack Obama (2009-2016), the United States President and Congress remained passive concerning the numerous manifestations of police brutality and patronage of ill-treatment of accused' ill-treatment persons on the ground. The limitation of opportunities to obtain judicial protection for victims from the actions of the authorities became obvious. According to E. Chemerinsky, restricting the rights of the accused is erroneous because, at the same time, constitutional rights are violated. The essence of the issue is that police arbitrariness and restriction of suspects' rights and persons under investigation cannot reduce crime and eliminate its causes. Still, they do lead to a limitation of constitutional rights.

The violation of the accused and suspects' rights at the beginning of the new century is becoming an important public issue. The reason is the search for a model of fighting crime and the increased cases of police arbitrariness against the background of a shift towards a repressive model of criminal justice. Describe this picture of police brutality can be an example of an African American George Floyd. On May 25, 2020, George Floyd died after a white Minneapolis police officer, Derek Chauvin, pinned his neck with his knee to the asphalt and held him in this position for almost 8 minutes while Floyd lay face down on the road. Police officers Thomas lane (African American) and J. Alexander Kueng (white) also helped hold Floyd, while Tu Tao stood by and watched. Floyd's arrest occurred in Powderhorn (Minneapolis, Minnesota) on suspicion of paying for a pack of cigarettes purchased at a store with a fake \$ 20 bill and was recorded by several observers on their phones. Videos of Floyd repeatedly saying, «I can't breathe», were quickly shared on social media and broadcast by the media. It is known that George Floyd began to utter the phrase «I can't breathe» even before he was knocked to the ground. The four police officers involved were dismissed the next day and were later arrested.

The FBI launched an investigation into the death at the Minneapolis police department's request. At the same time, the Minnesota Bureau of Criminal prosecutions investigates whether there were violations of Minnesota laws, including the use of force.

It is essential that police repressive and excessive actions were mainly characterized by a stricter approach to youth from national minorities. They have used illegal methods against this social group, such as planting drugs.

One of the U.S. Supreme Court's deviations from the constitutional guarantees of participants in criminal proceedings is modifying the Fourth Amendment's application. This Amendment guarantees the interference of public authorities, including the police, in private life. The fourth Amendment requires sufficient grounds for detentions and searches. The interpretation of part IV of the Amendment (a combination of words) since the beginning of the XX century has been that police intervention, in the form of searches and temporary detention, requires justification by real facts, credible reasons, and otherwise, the methods are illegal. For some time, the only exceptions to the guarantees against unlawful intrusion were the Prosecutor's sanction and the criminal's pursuit.

However, the modern U.S. Supreme Court is gradually moving away from this interpretation,

which creates the ground for police abuse. In *Mueller v. Mena* in 2005, the Court expanded the police's ability to conduct unjustified, unauthorized searches, and arrests (*Mueller v. Mena*, 544 U. S. 293 (2005)). In another decision, the Court found that unsecured checks of suspicious persons on the street were legal and consistent with the U.S. Constitution (to stop and frisk). The judges concluded that if a police officer sees a person who has changed travel direction, it is enough to check documents and identify them. Refusal to identify a person, according to the U.S. Supreme Court, is grounds for detention. If the suspicions are unjustified, and the police actions were rude and degrading, then the victim's appeal to the Court almost does not lead to a positive result – the judges' side with the police.

Among the cases considered by the Court in the 2007-2008 session, the public drew attention to several of them. For the first time in almost 70 years, the Court took up interpreting the second constitutional Amendment on the right to bear arms. In an inherently conservative decision, *District of Columbia v. Heller*, the justices, by a majority of just one vote, considered unconstitutional the Federal district of Columbia's status, which required residents to obtain licenses for any small arms. Moreover, the owners had to keep it unloaded and locked in a safe place. The late U.S. Supreme Court Justice Antonin Scalia, who made the decision, did not consider that the Amendment only applies to the militia as an organized formation, but rather authorizes an individual citizen's right to bear arms self-defense.

However, it was recognized that legislatures could restrict the rights of certain groups at risk (criminals and the mentally ill), as well as the use of those types of weapons (for example, bullets) that did not exist at the time of the adoption of the constitutional Amendment, i.e., at the end of the XVIII century.

Cases attract increased public attention related to the application of criminal procedure rules. In the decision in *Georgia v. Randolph* (2006) prepared by D. Souter and adopted by five votes in favor and three against, a police search of private premises without the authorization of a judge and if there was an objection from at least one of the residents was found to have no legal consequences. The evidence found could not be used against the tenant who objected, which was argued by the IV constitutional amendment on the home's inviolability. It is shown that the accepted interpretation differed from the circumstances of the case *Illinois v. Rodriguez* (1990) when one of the tenants gave consent to the search

in the absence of another tenant – then such an investigation was recognized as lawful. Chief justice of the United States Supreme Court John Roberts expressed a different opinion, noting that his colleagues' decision to limit the police's ability to counter domestic violence. He also pointed out that the Fourth Amendment is not relevant since the person who shares a room with someone refuses to protect their privacy, since their cohabitant can consent to its invasion. Justices Scalia and Thomas also supported the minority opinion.

The American authors draw attention to a change in another doctrinal approach that follows from Amendment IV. Back in the first half of the 20th century, the U.S. Supreme Court decided that the police were not allowed to invade a home at their will at any time. The Supreme Court in 2006, in a decision in *Hudson v. Michigan*, took the position of restricting the rights of citizens according to the well-known doctrinal method of police actions «to knock and announced». The Supreme Court of the United States agreed that the police do not violate the right to inviolability of the home and other rights if immediately after the words «Open, the police» begins to break down the door, even if there was no reason to do so (*Hudson v. Michigan*, 547 U. S. 586 (2006)). Supreme Court argument: suspects can be dangerous (even if they are not now) potentially in future actions. In this precedent, the concept of a «potential criminal» appeared, which is unacceptable because, without being a criminal, an individual can be deprived of rights.

In this original article, considering the U.S. Supreme Court's conservative ideologist should be emphasized that with the coming to power of Donald Trump, the U.S. Supreme Court has become an even more conservative ideological balance the highest state power. The current President of the United States immediately appointed three justices of the Supreme Court of the United States with conservative views.

This is due to the death of U.S. Supreme Court Justice Ruth Bader Ginsburg, who died on September 18. She was 87 years old.

President Bill Clinton appointed Ginsburg to the position in 1993. She belonged to the liberal wing of the Supreme Court and was the second female justice of the U.S. Supreme Court. In this position, she fought against gender discrimination and defended women's rights. In particular, she promoted equality for men and women in pay and access to education and advocated for women's rights to abortion.

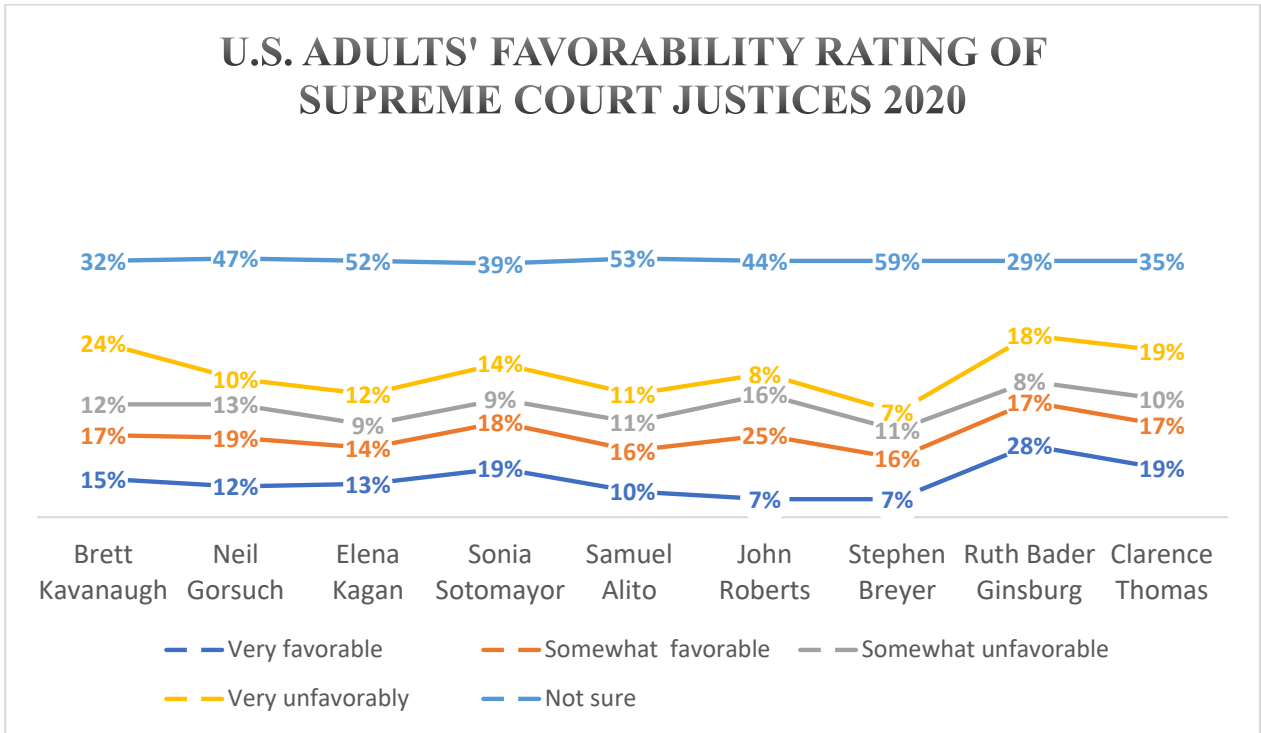


Chart №1

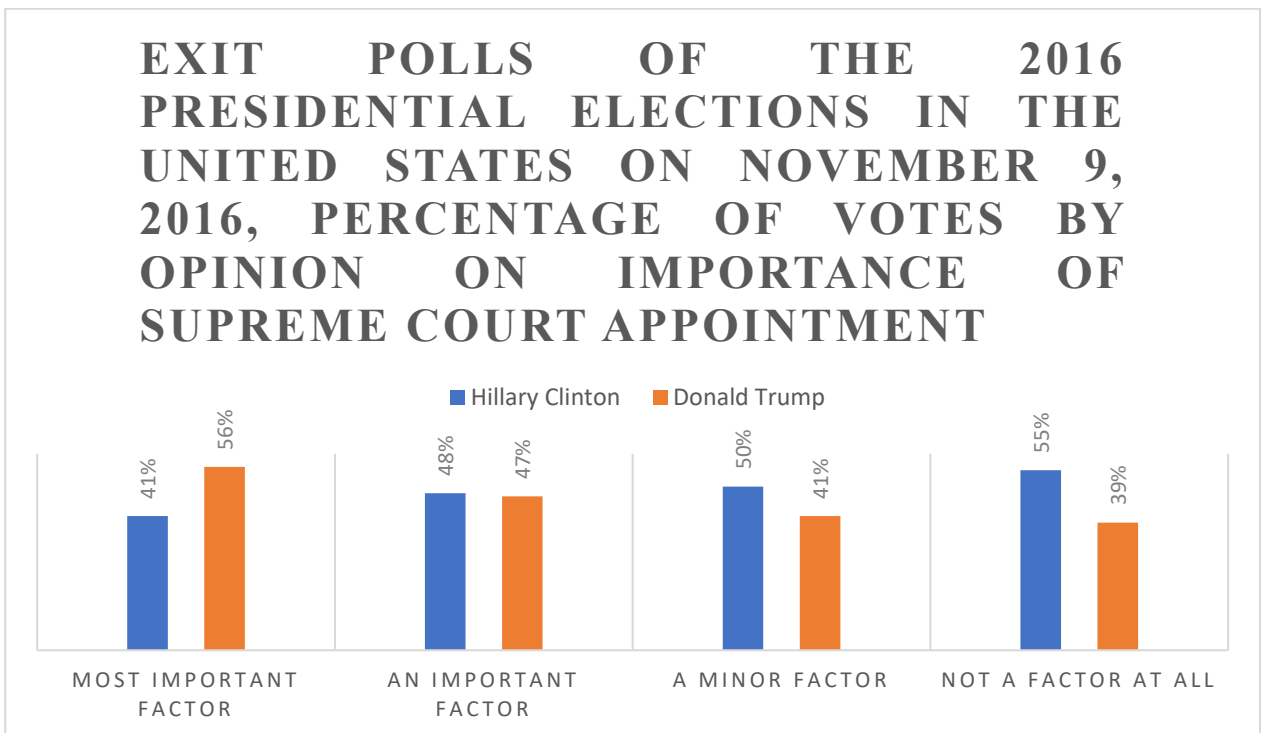


Chart №2



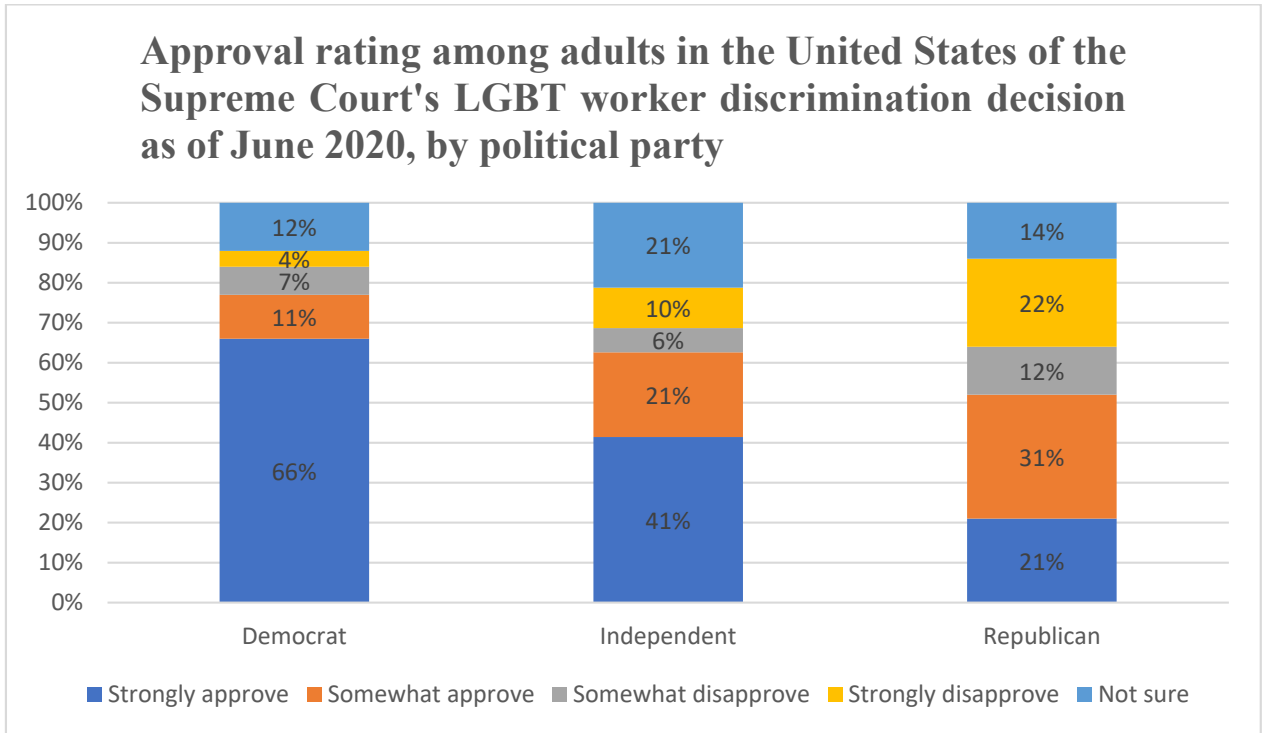


Chart №3

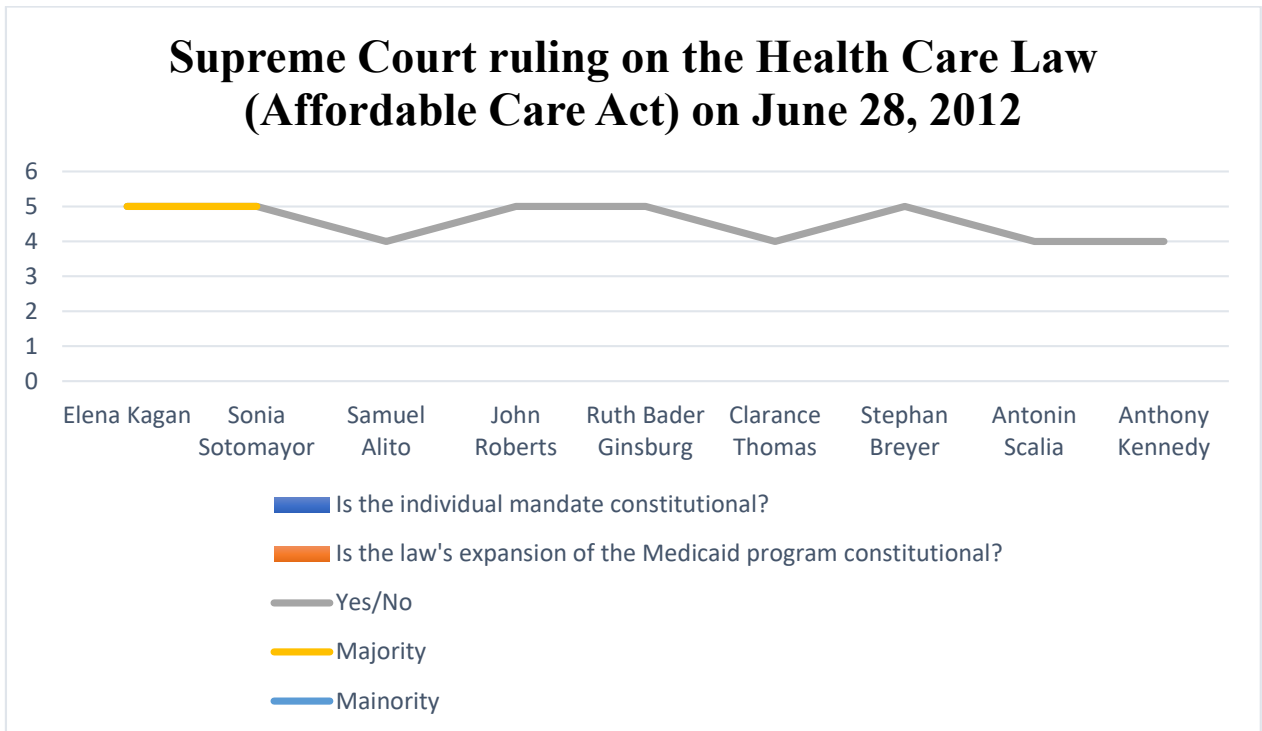


Chart №4

**Increasing Support for the Chamber  
Since Chief Justice John Roberts and Justice  
Samuel Alito joined the Supreme Court, the  
Court has ruled for the U.S. Chamber of  
Commerce's position 70% of the time**

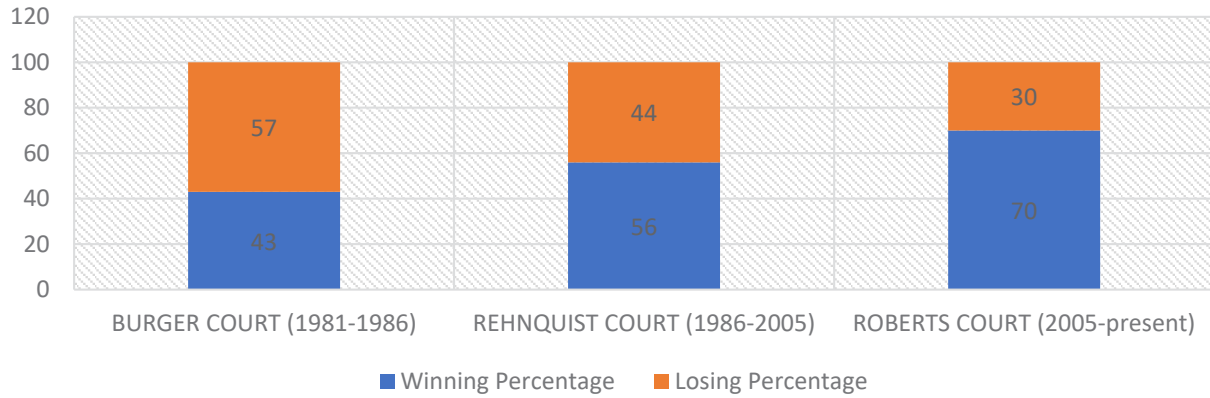


Chart №5

**Conservative federal court-packing in action  
Number of appellate judges confirmed by the  
U.S. Senate, 2007-2010 and 2015-2020**

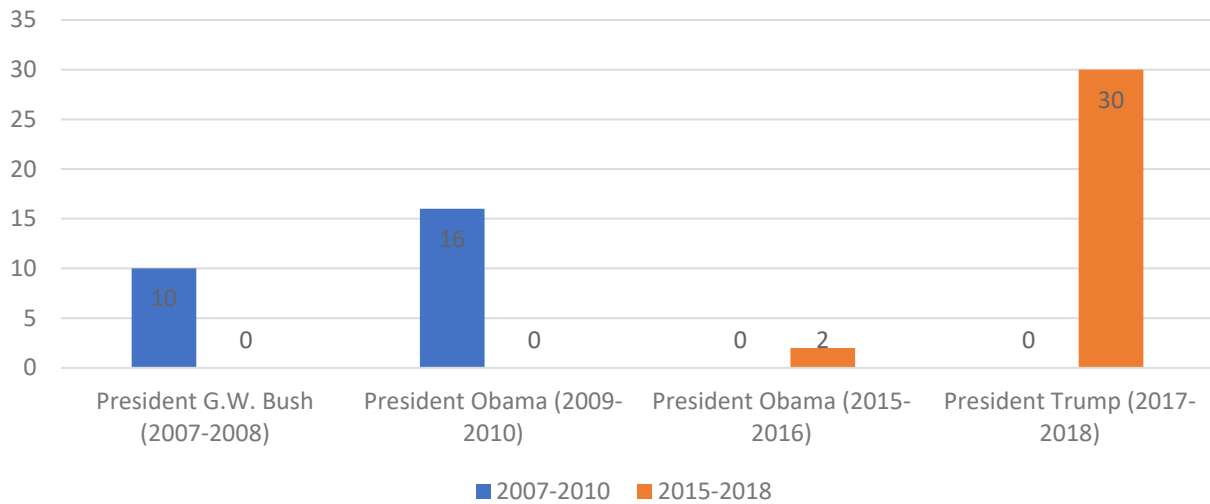


Chart №6

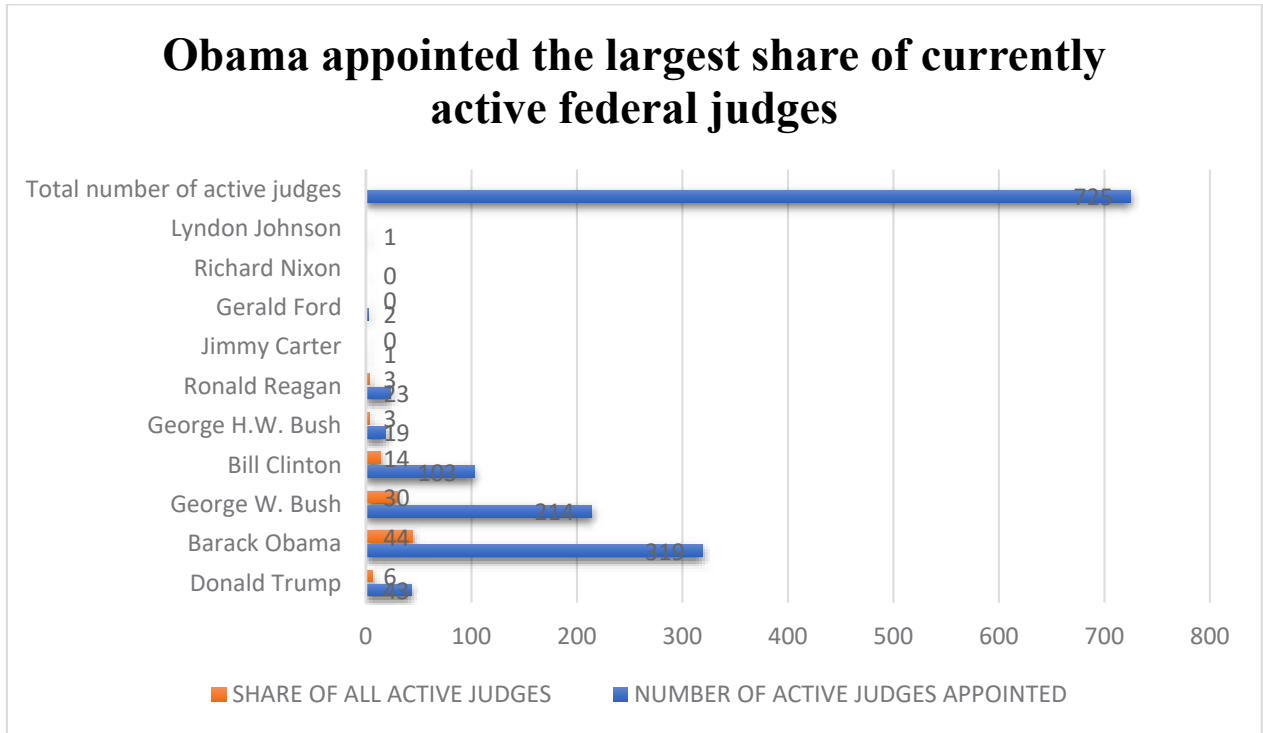


Chart №7

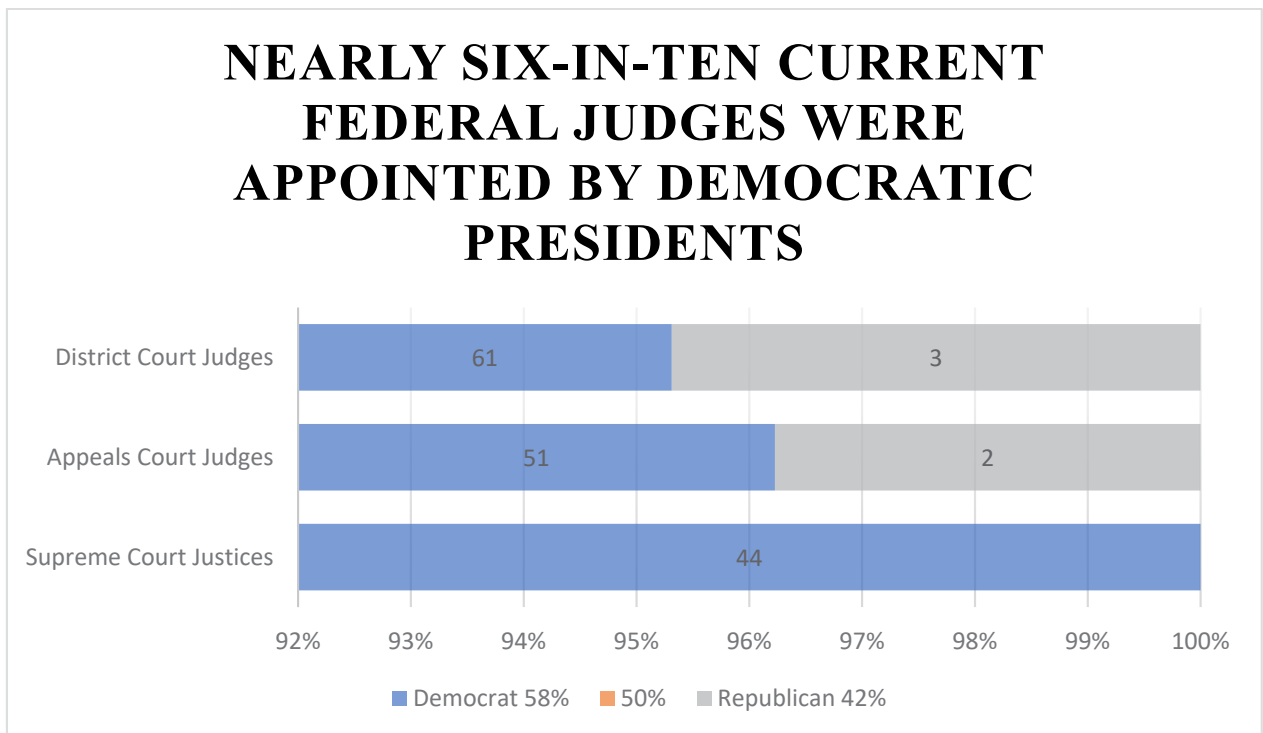


Chart №8

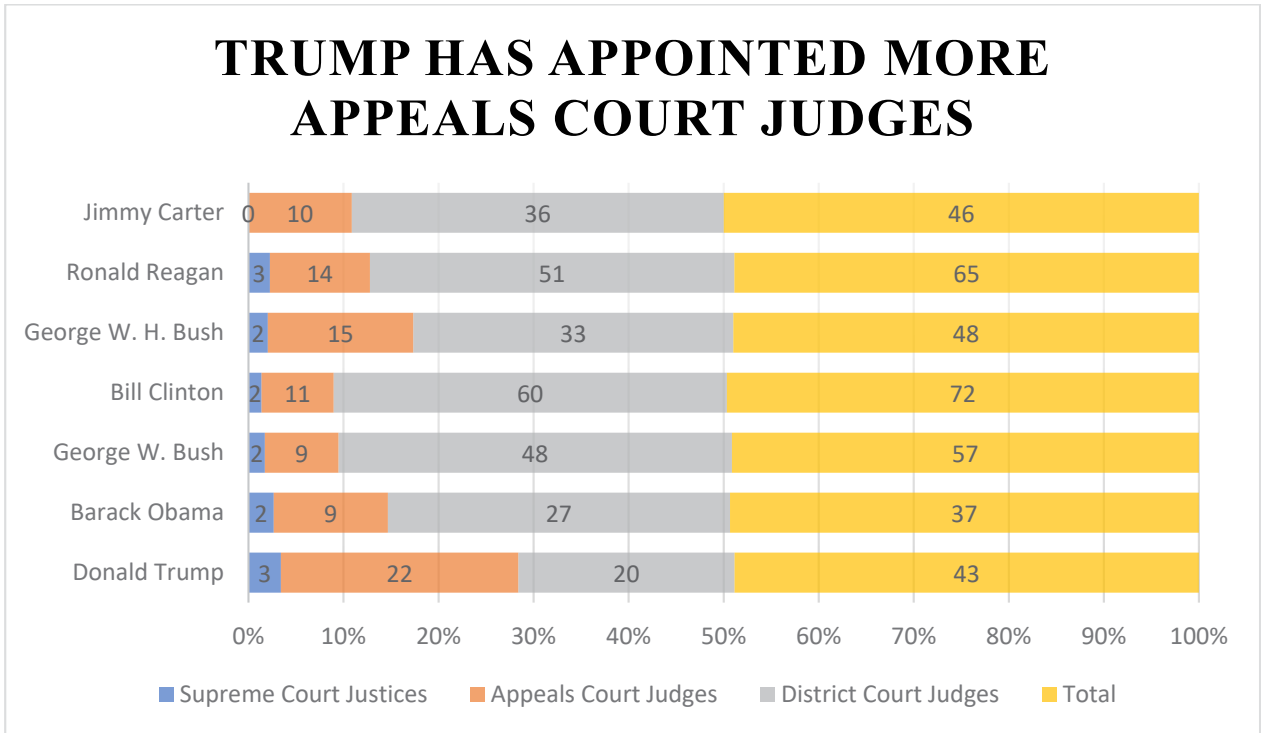


Chart №9



U.S. Supreme Court Justice Ruth Bader Ginsburg (1993-2020)

Before her death, Ginsburg told her granddaughter that she wanted her replacement to be appointed as the next President.

«My most fervent wish is that will not replace me until a new President is appointed», said Ruth Bader Ginsburg.

Ruth Bader Ginsburg knew that the Trump administration was a potential threat. She knew that the Trump administration would do everything possible to promote its nominee to the Supreme court and change the balance of power in favor of Republicans. By the way, the first contender for Ruth’s seat of trump’s choice is Neil Gorsuch, whom liberals despise for supporting Evangelical Christians. The evangelists were those pastry chefs from Colorado who refused to bake cakes for same-sex weddings. Another candidate, Brett Kavanaugh, was accused of sexual harassment, and one of his victims was psychology Professor Christine Blasey Ford. The latter had to speak at a public hearing and tell how Kavanaugh tried to rape her.

Despite Ruth Bader Ginsburg’s fears, the Trump team pushed through their candidate just 42 days before the election. Justice Amy Coney Barrett of the United States Supreme Court took Ginsburg’s seat with conservative views. Barack Obama was not allowed to choose a candidate as many as 11 months before the 2016 election. This is important because an elected Supreme court justice can remain in this position for life-like Bader Ginsburg. And he will devote his service either to protecting minorities or destroying the civil rights that were so hard-won.

## Conclusion

Conclusion the study of the U.S. Supreme Court's legal activities in the second half of the 20<sup>th</sup> and early 21<sup>st</sup> century can identify two main areas: judicial activism, judicial law admission, and judicial conservatism in the form of judicial conservatism self-restraint. We have to note the legal uncertainty, and to a certain extent, not quite the legal nature of these concepts, established in American lawyers' lexicon.

Judicial activism criticized continuously for the ideological and political component and deviation from the U.S. Constitution's letter. The U.S. Supreme Court, especially the Warren Court, in the opinion of judges with conservative views, pushed back the objective doctrine-based «stare decisis», the justification of decisions based on non-legal (political and other) goals, guided, among other things, the protection of the interests of various social groups, elitist groups or protest movements, seeking the constitutional legitimization of all new rights contrary to the duty of judges to follow judicial self-restraint, the text of the Constitution U.S., not non-legal factors.

In the past three decades, judicial conservatives' work has also gained judicial activism signs, with their advantage in the U.S. Supreme Court, but only with the opposite vector. The conservative majority's goal is to dismantle the achievements in the 1937-1970s, results of judicial lawmaking, a return to the apology of legal formalism, modification of doctrines in the direction of a return to a narrow interpretation of the provisions of the Constitution.

The doctrine of judicial self-restraint can only be explained on a superficial basis as a means against the politicization of judges. Its purpose is not to renounce judicial lawmaking; the real intention is to revise constitutional principles' interpretation. There is no doubt that some of the justices seek to achieve conservative political goals in the style of politicians like R. Reagan and J. Bush Jr. (they also offered to the Senate majority of the current composition of judges of the U.S. Supreme Court).

The policy-law ingemination of judicial self-restraint and judicial minimalism is as follows. Social justice is unattainable, and actions in this direction are not entirely consistent with constitutional principles, from the point of view of judicial self-restraint, procedural justice, and legal equality, which creates equal opportunities (a different idea of equality of opportunity in J. Rawls

and R. Dvorkin, allowing the so-called unequal treatment of equality).

In the author's opinion, recognizing the importance of procedural equality and procedural justice, he comes to a different assessment of the vector of American law development.

Not only the U.S. Supreme Court but also the U.S. Congress will not be fair because of the unequal representation of social groups in Congress and the rigid attachment of judicial methodology to natural justice. Conservative judges who refuse to protect citizens as representatives of «vulnerable groups» discriminating against members of these groups who do not adequately enforce procedural rights (examples of this are given in this paper) create such unequal opportunities. These unequal possibilities are challenging to eliminate.

The American author S. Lindquist and other authors, for example, R. Posner, speak about the more significant influence of non-political factors on judicial decision-making. Applying the concept of «institutional» is non-political activism. Institutional activism refers to the judicial justification (measured and by the vote of judges) to preserve the existing institutions of society and the state and maintain the status of the federation and the states' powers. Institutional activism is characterized by the abandonment of the function of judicial lawmaking, the preservation of the priority of governments in the field of common law, and unconditional guarantees are fundamental rights of private property, etc.

However, a new problem arises: it is almost impossible to separate «institutional activism» from judges' ideological and political activism with sufficient certainty, as the American authors acknowledge. Theoretically, when U.S. Supreme Court justices waive constitutional restrictions in the form of a duty under Article III of the Constitution to be considered solely under common law and the law of fairness, they open the way for judicial legalization that, frankly speaking, is not the best and not the best option for legal stability. This increases the amount of «political» belonging to the political branches and the courts' powers. The erosion of the «threshold» (requirement) of procedural guarantees through expansive interpretations is indeed a feature of judicial activism and the appropriation of the function of judicial lawmaking. Hence the narrow conservative interpretation.

Nevertheless, there is no other consequence of the current commitment to narrowly interpreting due process as a purely procedural requirement

and other Constitution provisions. This reluctance protects new forms of public interest and social groups' rights by analyzing the due process as a substantive requirement. According to S. Lindquist, this position «is a way to disguise ideological [Conservative at the new stage] activism, that is, to hide their political goals».

The evaluation of judicial activity, therefore, depends on the purpose of self-restraint. If judges, following a restriction, should not make decisions with political consequences such as constitutional protection of the rights of the poor, women, and national minorities, the conclusion is that institutional views (in the spirit of American legal formalism, textualism, and «inviolability» of precedent) to protect conservative political objectives. This position, covered by traditional dogma and references to the U.S. Constitution's text, is political.

The opposition of judicial activism and judicial conservatism characterizes the current stage of the Supreme Court of the United States. This is not a repetition of the previous steps: the former activists, supporters of the «living» Constitution, have abandoned many activist intentions, wanting to «Minimum» preserve the liberal-activist stages' achievements. Besides, judicial conservatives faced a difficult obstacle in the form of doctrines and doctrinal methods adopted in the 20<sup>th</sup> century. It is complicated to revise precedents, ideologies, and interpreted principles; hence the «flash» of conservative activism at the turn of the century.

The balance between conservatives (turned conservative activists) and activists who have become minimalists is not stable due to the crisis in politics, the economy, and the mass consciousness.

American law's most important feature is legal dualism, corresponding to judicial methodology's dualism, the unity of legal formalism, and traditional liberalism with judicial lawmaking elements. Thus, in the era of activism of the 1950s-1970s, the U.S. Supreme Court, from the perspective of formalism and conservative dogmatic, repeatedly adopted not only liberal activists but also conservative decisions, for example, rejected the recognition of equality between men and women, preserved the death penalty abolished the glory of the right to education as a fundamental constitutional right. However, this period should be characterized as institutional (representations of the place and role of the judiciary) and referring to the direction of judicial methodology (sociological jurisprudence and legal realism).

The U.S. Supreme Court remains close to this position on the widespread use of procedural

safeguards as a doctrinal method. However, this technology does not allow the right to be used as a tool for social change. Such a strategy is not enough to implement the law, as is not enough and the law's omnipotence in a positivist sense in other legal systems.

It is wrong to talk about changing the American law model and the judiciary – from a progressive activist to a minimalist-conservative model, and therefore a rejection of judicial law. Even judicial conservatives are forced to use the methods of opponents. This scientific paper gave examples of protection by conservative judges, such as A. Scalia, of the «counter-reform» actions of political authorities by addressing arguments with a deviation from textualism.

Redefining the model and institutional framework of judicial lawmaking is possible in two ways. Firstly, by understanding the U.S. Constitution as a document of exclusively private law with a negative concept of human rights («fundamental rights»), with a return to the model of «federalism from below» and to the inviolability of state sovereignty, through a narrow and narrow dogmatic (conservative) interpretation of constitutional principles. This first path does not seem feasible because of the «heritage» of activists in hundreds of doctrines and a robust law layer. Notably, the Conservative strategy of judges, which are discussed in American jurisprudence, has not received a large part of the legal community.

Secondly, changing the dualistic model of American law is theoretically possible theoretically because to abandon the established methodology of judicial lawmaking with three dedicated elements of judicial law (applying procedural guarantees in the material and legal, it is impossible to be absolutized by standard law methodology, the traditional function of lawmaking).

Besides, the condition for changing the judicial methodology with the rejection of constitutional lawmaking will be the constitutional recognition of a broad list of constitutional rights of the individual, the adoption by the U.S. Congress of decisions on the codification of the federal legislation, a new model of federalism with a focus on the powers of national power. However, this way at the present stage, with the most substantial influence of conservatism, including the judicial one, is impossible.

Thus, legal dualism, not constitutionalism in its understanding of following the Constitution's letter – the basis of American statehood, legal consciousness, interpretation of the text. Consideration in the U.S. Supreme Court's scientific

work allowed the author to conclude that there are conflicting ideological meanings and sometimes-opposite targets, making it challenging to fulfill the task of maintaining sustainability and stabil-

ity. In other words, the objectives of the Supreme Court cannot be achieved conservatively. This demonstrates the need to find new interpretations and the need for judicial lawmaking.

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