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KATARZYNA MAĆKOWSKA[1]

Tertium non datur? American Originalism and Polarization in Democracy[2]

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Abstract

Originalism – as one of the main approaches to the interpretation of the U.S. federal Constitution – has been increasingly viewed as an instrument of political struggle in the hands of the judiciary. This article offers a discussion of the effects of originalist interpretation, which enable legal orders with different axiology to exist in a federal state. The above situation raises the question of the legitimacy of accepting legal relativism and consent to the creation of parallel juridical realities when the degree of polarisation makes it impossible to seek compromise. The purpose of the article is to highlight that, paradoxically, originalism can strengthen the stabilising and organising role of law in line with the concept of *E pluribus unum*.

Keywords: originalism, polarisation, "living originalism", originalism and "laboratories of democracy".

[1] KUL Professor, Katarzyna Maćkowska, PhD, DSc – Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin (Poland); e-mail: katarzyna.mackowska@kul.pl; ORCID: 0000-0002-1744-931X.

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Introduction

Critics consider originalism to be subservient to conservative world-views, functioning as an instrument for blocking the statutory demands of progressives. Its supporters, in turn, see it as a method of interpretation that guarantees that the legal order remains consistent with the wording of the U.S. Constitution and tradition, and that any legislative changes are made in accordance with the procedure set forth in the Constitution. Contrasting originalism with the *living constitution* method and the multifaceted dispute over the validity and effectiveness of both undoubtedly leads to a deepening of the discussion of theories of legal interpretation.[3] As Randy E. Barnett has recently noted in his review of Casa Sunstein's *How to Interpret the Constitution*,[4] both the defence and the criticism of originalism point to the question of "how to decide how to interpret the Constitution".[5] The purpose of this article is to provide a context that may indicate the pragmatic effectiveness of originalism in relation to the problem of world-view polarisation and the non-unitary legal system of the United States.

The very notion of originalism has the traits of a neologism, and its originator is Paul Brest, a critic of the method, a constitutionalist, and former dean of Stanford Law School, who used it in his publications from the early 1980s.[6] Earlier discussions on juridical matters made use of terms like *original intention*, *original meaning*, and *original understanding*. Over time, U.S. Supreme Court Justice Antonin Scalia[7] gave a sort of priority to the first of the coined terms in his speech given at a Department of Justice conference in 1986, which paved the way for the development of the

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3 However, there is also an aspect of "culture war" to it. See: A. Bryk, *Orzecznictwo Sądu Najwyższego Stanów Zjednoczonych jako autonomiczne źródło tworzenia norm konstytucyjnych*, "Studia Iuridica Lublinensia" 2016, 25(3), pp. 119–138.

4 Known for his critical approach to originalism, the author covers the problem of interpreting the Constitution comprehensively, but the claim that the choice of the method of interpretation is to be determined by the recognition that it will ensure that the constitutional order will "work better, not worse" does not make it possible to resolve the dispute between originalists and progressives. See: C.R. Sunstein, *How to Interpret the Constitution*, Princeton, NJ 2023. On the method of interpretation and what the "constitutional results" should be, see also: O. Raban, *The Silent Prologue: How Judicial Philosophies Shape Our Constitutional Rights*, Fairfax, VA 2020.

5 R.E. Barnett, *Originalism and Its Discontents. Originalism is the Theory to Beat*, "Claremont Review of Books. A Journal of Political Thought and Statesmanship" 2023, 23(4), pp. 69–73.

6 The origins of the concept of originalism are described by L.B. Solum, [in:] idem, *What is Originalism? The Evolution of Contemporary Originalist Theory* (April 28, 2011).

7 Ibidem, p. 15.

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so-called *New Originalism*, referring to *original public meaning* and involving the discovery of:

> the most plausible meaning of the words of the Constitution to the society that adopted it – regardless of what the Framers might secretly have intended.[8]

The concept of *original public meaning* was precisely defined by Lawrence B. Solum and takes into account:

- the element of fixation, i.e. *the Fixation Thesis*, which means that the original meaning of the constitutional text was fixed at the time each provision was framed and ratified,
- the element of public meaning, i.e. *the Public Meaning Thesis*, which implies that the best understanding of original meaning of a given provision is the communicative content accessible to the public at the time of the establishment and adoption of the provision in question,
- *the Constraint Principle*, according to which the constitutional practice must be consistent with, fully expressive of, and fairly traceable to the original public meaning of the constitutional text.[9]

Originalism as a method of interpretation is somewhat of a sophistry, and the discussion on its legitimacy or functionality may not ignore the fact that the source of the U.S. Supreme Court's very power to examine the constitutionality of legislative acts is the ruling issued in case *Marbury v. Madison* of 1803, and not explicitly Article III of the U.S. Constitution. In theoretical terms, Chief Justice John Marshall's precedential decision stands somewhat in contradiction to the concept of Robert H. Bork, regarded as the "father" of originalism, according to whom judges do not have the space to create laws that are not expressed in the Constitution.[10] The only constant – in the context of the *necessary and proper clause*, *implied powers*,

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8 As cited in: M. Cairns, *Originalism: Can Theory and Supreme Court Practice be Reconciled?*, "The Georgetown Journal of Law & Public Policy" 2021, 19, p. 264. In terms of recent publications, see also: J.B. Staab, *The Political Thought of Justice Antonin Scalia: A Hamiltonian Conservative*, "Perspectives on Political Science", 2019, 48(1), pp. 14–23.

9 R.E. Barnett, L.B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The role of history and tradition*, "Northwestern University Law Review" 2023, 118(1), pp. 436–437.

10 Bork's concept has been the subject of many scholarly studies. It has also been making recurring appearances in various articles in recent years, and this is due to the prevailing direction of constitutional interpretation by the federal Supreme Court, which was rejected with the Senate's refusal to give a positive opinion on Bork's nomination to the Supreme Court.

or *judicial review* – is that determining what the U.S. federal Constitution expresses will make the process of interpreting the Constitution variable.

The essence of the debate over originalism from the beginning boiled down to the question of whether the linguistic interpretation of the Constitution should refer to the time of the enactment of it, and to what extent it should be supplemented by teleological interpretation. At present, the overtone of the discussion is shaped by the need to interpret the U.S. federal Constitution in the context of world-view disputes, and the modern polarisation of the societies of Western civilisation has led to the marginalisation of the issue of the limits to public authorities' "provision" and "promotion" of the public good, because despite the established abstract-objective understanding of what this good is, we are faced today with a process of redefinition of constitutional freedoms and rights. At the system layer, deep polarisation affects the perception of the role of compromise in law. This is because it is seen on the one hand as a relativistic, anti-absolutist measure, blurring the truth that always has the attribute of objectivity, and on the other hand as a half-measure, the first step in the process of further change.

It can be posited that bipolarity requires democratic law to seek non-antagonistic solutions in the absence of any form of mutualism. In the relativist approach, the U.S. federal system allows the parallel functioning of legal orders that cannot be axiologically reconciled, which, paradoxically, the originalist interpretation will make possible.

Originalism and the claim of apriorism of interpretation

As C. Błaszczyk rightly pointed out: "The decision to uphold a long-established interpretation of the law petrifies the system and the constitutional list of rights and freedoms, and the idea of »fidelity to the Constitution« sets the course of action for the political activity of other bodies and shapes the political imagination of the public. And so, an originalist interpretation of the Constitution leads to e.g. defending the right to own guns, the free market, freedom of speech, the vertical separation of powers, as well as opposition to positive discrimination programmes, universal compulsory health insurance or the right to abortion. Honouring the traditional understanding of regulations supports by default the norms and values that, in the face of social change, are nowadays considered conservative."[11]

[11] C. Błaszczyk, *Interpretacja w służbie doktryny. Oryginalizm konstytucyjny w Stanach Zjednoczonych*, "Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia" 2020, 64(2), p. 14.

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This problem is perfectly illustrated by the highly emotionally-charged discussion that ensued after the 24 June 2022 ruling in case *Dobbs v. Jackson*, in which the U.S. Supreme Court ruled that the Constitution does not grant a right to abortion and overturned the ruling issued in case *Roe v. Wade* (which is American legal scholars, academics, and commentators consider a "superprecedent"), arguing that under divided sovereignty, it is up to the people of the individual states to regulate the right to abortion.[12] Without going into the details of the case, which is still the subject of much analysis, when considering originalism itself, it should be noted that the judges voting in favour of the ruling raised a valid argument that the right to abortion is not an entitlement that can be derived from the federal Constitution. Thus, in this case, originalism as a *strictly* juridical construct actually makes it possible to defend the conservative world-view as it implies that only the individual states have the power to regulate abortion. However, there is no doubt whatsoever that the fundamental effect of the *Dobbs* case ruling, eliminating the intervention of federal legislation, is manifested in the enablement of sovereigns of state jurisdictions to protect the world-view deemed dominant in the democratic decision-making process.

It also seems reasonable to add that the recent literature dealing with the subject features claims that the *Dobbs* case, as well as the *Bruen* case, are embedded in the realm of gender discrimination. As Reva B. Siegel argues, this conclusion stems from interpreting the Constitution from the perspective of an age when women did not participate in the lawmaking process and were seen as individuals who do not govern, but are "to be governed."[13] It seems that the above conclusion, although detached from the essence of the dispute over American federalism, perfectly shows that originalism is seen as a tool used in the struggle between supporters of conservative and – using European terminology – leftist views on social issues, which undoubtedly translates into a pathology manifested in the departure from treating exegesis theory as an intellectual contextualisation of the juridical layer, and calls for a return to a debate within the limits of the *common sense* politics, so typical of the Anglo-American system (assuming that polarisation is a "removable" phenomenon). However, it is important to take into account that the phenomenon of world-view divergence has been gaining momentum for several decades, and the very concept of originalism had a reactionary nature. For this reason, it is argued that it is used instrumentally by conservatives. In 2006, the aforementioned Reva B. Siegel and Robert Post pointed out that originalism had been developed since the 1980s as a political practice aiming more or less "blatantly" to amend the Constitution in such

12 *Dobbs v. Jackson*, 597 U.S. 2015 (2022).

13 R.B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, "Houston Law Review" 2023, 60(4), p. 908.

a way that it "infuse" it with conservative political principles to a greater extent.[14] This quote illustrates the threat of irreversible polarisation since defending the traditional perception of the social order is understood as "amending" the Constitution. The attempts to reconcile originalism and *living constitution* have not found broader support in terms of political practice. Since 2007, a somewhat intermediate concept of *living originalism* has been featured by Jack M. Balkin in various publications. The *text-and-principle* method he developed combines fidelity to the original understanding of a text at the interpretation stage and its adaptation at the constructive implementation stage.[15] This model, developed and rooted in originalism – but containing an element of openness, could be a praxeological element of interpretation in the dogmatic layer. And in the context of social judgements, considered very often as 'binary' or 'black and white', it seems that interpretive intermediate formulas will be rejected by both sides of the dispute, but the U.S. Supreme Court judges are, in fact, not 'above' this dispute.

Randy E. Barnett and Lawrence B. Solum inquired e.g. whether the *Dobbs*, *Kennedy*, and *Bruen* rulings constituted a new trend of interpretation or were in line with the originalist approach. The authors of the publication stressed that, to paraphrase, they are not evaluating the effects of the rulings in question, but are describing the role which history and tradition play in them and which they should play to be consistent with the ideas of originalism. They also argue that judges should consider history and tradition in an originalist framework, but also reject the non-originalist view that history and tradition allow a departure from the *original public meaning* of the constitutional text.[16] Importantly, in their view, *Bruen*, *Dobbs,* and *Kennedy* rulings are examples of a conservative constitutional pluralism that "eschews reliance on changing societal values and relies instead on the backward-looking modalities of constitutional argument. These modalities include the original meaning of the constitutional text, historical practice, tradition, and precedent."[17] According to Barnett and Solum, this constitutional pluralism is not indicative of the originalist approach.

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14 R. Post, R. Siegel, *Originalism as a Political Practice? The Right's Living Constitution*, "Fordham Law Review" 2006, 75(2), p. 561.

15 The view has been analysed thoroughly by D. Minich, *Między originalism a living constitution – Jacka M. Balkina koncepcja wykładni konstytucji*, "Ius Novum" 2022, 3, pp. 130–145.

In the above context, an important aspect to consider is that outside the originalist trend there exists the so-called "historical traditionalism", which allows "systemic interpretation" of the Constitution, provided that it is legitimised by long and continuous historical practice or custom. This approach laid the foundation for the transformation of the dualist model of federalism into a cooperative form, gaining support in the wake of the 1930 economic collapse and confirmed by the U.S. Supreme Court's 1935 ruling issued in *National Labor Relations Board v. Jones and Laughlin Steel*.

16 R.E. Barnett, L.B. Solum, Originalism…, p. 3.

17 Ibidem, pp. 41–42.

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In light of the above remarks, it should be noted that the phenomenon of social polarisation, which, after all, affects the autonomous sphere of interpretation and application of law, has found its practical as well as dogmatic manifestation in defining originalism itself. This gives ground to certain reflection on the limits of the flexibility of American juridical pragmatism. It seems that with the ruling issued in case *Marbury v. Madison*, these limits are being pushed further and further, and the hitherto clear division between advocates of the *living constitution* concept and static purposive interpretation is no longer that clear. In addition, the modality referred to by Barnett and Solum, becomes, in fact, a deontic modality in which the source (sender) of an utterance will be the subjective source of law in each case. This threat is also real when the process of interpretation of the U.S. federal Constitution is based on both the originalist approach and the *living constitution* method.

Originalism and the vertical division of power

In the U.S. federal system, based on the functional paradox of divided sovereignty, Dillon's concept,[18] and non-centralisation, the structure of the vertical arrangement of public power clashes with the U.S. Supreme Court's interpretation of the *Bill of Rights*. In terms of the potential impact of originalism on the structure of the vertical division of power in the U.S., it is necessary to first address the provisions of the federal Constitution itself, which determines two fundamental questions, i.e. whether an issue can be regulated at all by any level of public authority, and further, if so, by which one – federal, state, or both.[19]

According to the Supremacy Clause defined in Article VI, Clause 2: "(…) Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

[18] John Dillon claimed that all forms of local government are completely subordinate to state power and can exercise only those powers that are expressly reserved to them and those that are necessary and essential for their implementation. A different view was presented by Justice Thomas Cooley, who saw local self-government as primarily sovereign over higher levels of government, and considered the right to local self-government as a natural right that inherently belonged to the people. The influence of the 20th-century judicial decisions cannot be underestimated here either, especially that of Supreme Court Justice Brennan, who emphasised the legal responsibility of municipalities, which was intended to be one of the elements of preventing public authorities from infringing on the rights and freedoms of individuals.

[19] It is noteworthy that the literature examining the legal connotations of social change emphasises that local units (and especially cities) are extremely vulnerable to dynamic changes occurring in the model of American federalism. J.C. Williams, *The Constitutional Vulnerability of American Local Government: the Politics of City Status in American Law*, "Wisconsin Law Review" 1986, 83, pp. 83–152.

be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[20]

The constitutional framework was thus delineated through the perspective of horizontal separation of powers, defining the prerogatives of Congress, the President, and the Supreme Court in the first three articles of the Constitution, with Article I containing the so-called *necessary and proper clause*, allowing Congress to enact laws that prove necessary and proper for the exercise of powers expressed directly. Subsequently, Amendment X made the powers that the Constitution did not entrust to the United States or exclude from the jurisdiction of the individual states continued remain vested in the individual states or the people.

As a result, the vertical division of powers under the federal Constitution includes powers that are reserved to the federal power, meaning those that state authorities cannot interfere with, which also includes therefore shared powers, i.e. those that the federal and state powers can exercise jointly. These very tasks of fulfilling social needs are often the subject of cooperation between all vertical levels of government. However, if they involve potential violations of federal rights of individuals, they will be subject to the U.S. Supreme Court's binding review. According to Chief Justice Marshall, "a constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[21] It is important to add here that there is a rare view among American legal scholars, academics, and commentators, based on historical textual interpretation, that the phrase contained in the Tenth Amendment, i.e. "to the people", takes into account precisely the powers exercised through local units, which means that the federal Constitution refers implicitly to the right to local self-government,[22] but the constitutional practice of *second-order devolution* has been dominated by the Dillon principle.

From a pragmatic point of view, it is the nature of the issues that determines which authority should deal with a given issue, as there are those that can be constructively resolved only by the federal level, those that will most effectively be dealt with by the state, those that should be decided at the local level, and those where cooperation is advisable.[23] As a result, the fact that the federal Constitution does not contain enumeratively closed competence clauses is a functional advantage, but also translates into the need to seek instruments to modernise it at the same time. It seems reasonable to pose a question of whether the contemporary originalist interpretation of the Tenth Amendment is going to strengthen state subjectivity

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20 U.S. Constitution, Article VI, Clause 2, http://libr.sejm.gov.pl/tek01/txt/konst/usa.html (access: ……).

21 *McCulloch v. Maryland*, 17 U.S. 316 (1819).

22 J. Sullivan, *The Tenth Amendment and Local Government*, "The Yale Law Journal" 2003, 112(7), p. 1939.

23 L. Cowen, *What is Left of the Tenth Amendment*, "North Carolina Law Review" 1961, 39(2), p. 182.

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and local self-governance, which would constitute a mechanism for "departing from federal regulation", which could mean a deliberate, intentional lawmaking strategy that can be used in light of the existing polarisation and unwillingness to work out a compromise or simply of the impossibility to resolve disputes consensually. Recognising a sort of paradox underlying this phenomenon and accepting the element of heuristics in the analysis, it should be emphasised that the strong differences in the systemic and political visions in such an important area for the functioning of the United States have resulted from the very beginning in a certain generalisation of constitutional provisions, so that only later interpretation makes it possible to give them substance. The flexible model of the legal nature of the United States and the variable functional pattern of so-called *second-order devolution* implied by these dynamics facilitate the realisation of the unwritten but dominant rule of pragmatism in the American mentality. By its very nature, the unresolved dispute between Federalists and Anti-Federalists locks the contemporary Tenth Amendment in the interpretive category of *living Constitution*. Moreover, the source of the interpretive dynamism in this regard, which in theory overturns the sense of the originalist approach to the Amendment in question, can be found in the claims contained in the deliberations of "Publius" (Hamilton, Madison, Jay) or "Brutus", "Cato", and other opponents of strengthening the central government.

In verifying this hypothesis, it is reasonable to consider Madison's arguments featured in Federalist No. 45. Madison accused opponents of focusing solely on the possible impact of subjecting certain matters to federal jurisdiction on the individual states, instead of determining what scope of activity is absolutely necessary for federal authority. He stressed that the federal construct was designed to prevent external threats, tensions, and wars between states, internal rifts that would harm the principle of freedom so idolised since colonial times. "If, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States?"[24]

For the Anti-Federalists, the very idea of the states giving up part of their sovereignty was unacceptable. They warned that the powers granted by the Constitution to the federal authorities would lead to the abolition of the states and the creation of a unitary state. They argued that a central government would certainly exercise the right to make do of certain powers once it is endowed with them and that the powers left to the states would, in turn, inhibit the activity of the federation, which

[24] The Federalists, No. 45, https://avalon.law.yale.edu/18th_century/fed45.asp (access: 19.02.2024).

would result in the federation aiming to eliminate them because each community equipped with certain rights aims to strengthen them.[25]

Robert Yates compared New York's constitution in effect at the time to the draft federal constitution, indicating where the state would lose its existing prerogatives, which led him to the following conclusion: "In a word, the new constitution will prove finally to dissolve all the power of the several state legislatures, and destroy the rights and liberties of the people; for the power of the first will be all in all, and of the latter a mere shadow and form without substance, and if adopted we may (in imitation of the Carthagenians) say, Delenda vit America."[26]

The contemporary dispute over the scope of individual rights in the United States inherently takes place in the context of the federal structure of the country, with the core issue to resolve being which level of government representing the sovereign should be given priority in supplementing said rights. In terms of decentralised legislation and socially responsive regulation of natural rights, it appears that it is the interpretation of the Tenth Amendment and the flexibility of the American federal model that can determine the process of interpreting the *Bill of Rights*, which, formally speaking, is the prerogative of the Supreme Court.

Whether we can, in this light, speak of a threat to the idea of democracy as a result of U.S. Supreme Court rulings overturning federal laws imposing solutions on the states in spheres beyond James Madison's indispensable necessity of complete authority remains a rhetorical question.

Juxtaposing the above digression with the rulings currently causing heated debates within the framework of world-view polarisation, it should be objectively stated that originalism can restore to the states the competence to independently shape laws not explicitly reserved to the jurisdiction of the central authority, which, after all, is in line with the idea of the Union itself in the context of both federalist and anti-federalist arguments.

The U.S. political-constitutional dissonance is that even if the Supreme Court were to declare unconstitutional federal laws implementing the demands of American progressives, it would still do so within the framework of textual-historical interpretation, arguing that it is within the competence of state legislatures to normalise the issue in question. It should be acknowledged that such a mechanism could eliminate world-view-related tensions in spheres not directly regulated by the federal Constitution and amendments, and encapsulate them within the legal orders of individual states, especially since the judicial decisions of the U.S. courts

[25] The Antifederalist, No. 17, Antifederalist No. 17 – 18th Century History – The Age of Reason and Change (history1700s.com) (access: 19.02.2024).

[26] The Antifederalist No. 45, Antifederalist No. 45 – 18th Century History – The Age of Reason and Change (history1700s.com) (access: 19.02.2024).

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make use of the term defining states as "laboratories of democracy". It is reasonable to conclude that a *strictly* juridical approach to the process of seeking to alleviate social tensions is possible in the United States in this regard. Acknowledging that states have the right to "social experimentation" within the existing jurisdiction, an expression used by Justice Louis Brandeis (considered a "radical") in the *New State Ice Co. v. Liebman* case, remains consistent with the originalist interpretation promoted by conservatives.[27] In expressing a dissenting opinion, Justice Brandeis argued: "The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. (…) There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the states which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts. (…) Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[28]

Paradoxically, the originalist interpretation of the U.S. Constitution will remain consistent with the *living Constitution* thesis in this regard, since the very idea of *E pluribus unum* implies legislative diversity among the individual states. The federal legal model can serve as a backdrop for a specific form of isolationist-separationist compromise under which opponents operate under different juridical systems created in accordance with the principle of sovereignty of the entities that make up the federal state, and perhaps even at even lower levels of government.

Conclusions

The process of "clashing" of the two major methods of interpreting the U.S. Constitution – i.e. the concepts of *originalism* and the *living constitution* – has surely gone beyond the juridical framework, becoming an instrument of pursuit of certain

[27] In the aforementioned 1932 ruling, the legislation enacted by the Oklahoma legislature that rationed the business of selling ice cream, treating this sphere of activity as public and declaring – due to Oklahoma's climate – ice cream to be a necessity commodity was found unconstitutional and in violation of the *Due Process of Law* Clause by the Supreme Court.

[28] *New State Ice Co. V. Liebman*, 285 U.S. 262 (1932).

policies. The phenomenon has now become particularly evident as it is occurring in parallel with an increasing social polarisation, which leaves less and less room for conciliation. It might seem that the U.S. federal system and the openness to adapt to new social challenges through state legislation would enable the *common sense* tradition to survive in the American legal order. Yet, the time has come to move away from commensalistic-pragmatic solutions to *Carthago delenda est*. Law is increasingly becoming a political tool; in the absence of compromise or consensus as to its basic purposes, it loses its axiological attributes. Reducing American originalism to a conservative approach, as is often the case in what can be heard and read in the mainstream, eliminates several important paradoxes that always appear in the space when certain instruments are manipulated by both sides of the conflict. For when faced with casuistry, it turns out that the various originalist resolutions uphold not so much conservative values, but the essence of American democracy derived from individualism, liberalism,[29] *due process of law*, and the diversity of law inherent in the federal character of the United States – in line with the motto *E pluribus unum*. Thus, it can be assumed (although it may be difficult to verify it scientifically) that it is the non-unitary model of the state that makes it possible to postpone or even marginalise the effects of deep polarisation in which compromise is no longer possible and that has taken the form of active legal conflict, and to perpetuate the dichotomy in the form of different legal orders existing side by side, thus making Brandeis' concept of "laboratories of democracy" gain new meaning.

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[29] O. Raban, a critic of the formalist approach in interpreting the Constitution, who considers originalism and textualism manifestations of said approach, stresses that the principle of separation of powers embedded in the federal Constitution is meant to protect liberalism from democracy. See: O. Raban, *Is Textualism Required by Constitutional Separation of Powers?*, "Loyola of Los Angeles Law Review" 2023, 49(2), pp. 421–452.

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