

The U.S. Supreme Court and the establishment of the *separate but equal doctrine*

ABSTRACT

Purpose of the study: The subject of the study is to present the social, political, economic setting, and the establishment of the *separate but equal doctrine* in the United States. *Plessy v. Ferguson* became a symbol of resurgent white supremacy. The decision reflected Southern conservative whites' depart from the order of federally imposed Reconstruction and civil rights enforcement. The decision set in law a rule known as the *separate but equal doctrine*.

Research methods: In this particular study the historico-descriptive and formal-dogmatic methods (Polish typology of methods used in legal studies) were applied. Subject related legal texts and case law were analyzed.

Results: The borders of racial politics were often delineated by the Supreme Court adjudications. The decision of *Plessey v. Ferguson*, even being criticized, legitimized racial segregation in the South and 'infected' the American constitutional law. The Supreme Court judgments in the last decade of the 19th century in the sphere of civil rights and the establishment of the *separate but equal doctrine* emphasized the significance of federal and state authorities in creating a new economical and social order. *Judicial review* developed into an undeniable rule of the American constitutional order. At the turn of the 19th and 20th centuries the Supreme Court restored its position in the American public life, despite the fact that some of its rulings were highly discussed and criticized, especially those referring to racial segregation.

Discussion: The history of the U.S. Supreme Court and *judicial review* should not be interpreted only as a series of decisions, but also as the activities drawing

to the new reception of reality and determining a new shape of the public life. It should be also taken into account that the Supreme Court decisions reflected in some way economic, cultural, political and ideological values of the contemporary society. Unfortunately, it took over half century to eradicate the *separate but equal doctrine* from the American legal system. The time of the 1950s is associated with the reconsideration of civil and states' rights.

KEYWORDS: *Progressivism, the Gilded Age, segregation, the U.S. Supreme Court, judicial review, constitutional doctrine*

Introduction

The American Civil War caused terrible disturbance in the life of American society and its moral standards. On the one hand, the conflict strengthened the forces of national identity, on the other hand, it was noticeable that it sharpened sectionalism in the United States. Slavery, which had been before the part of the fabric of American life, influenced greatly the image of American society, its economy and politics. The period of 1870-1900 called Gilded Age or Gilded Era was the time of rapid economic growth especially in the North and West. A lot of problems faced by the American society during the Gilded Age gave rise to expected reforms of the subsequent Progressive Era. Industrialization changed the American society in fundamental ways (Beeby and Ingrassia, pp. 21–30). The migration of Americans from farms to cities, where they joined recent immigrants in the search for the better life and economic opportunities, caused explosive urban growth (Kahan, 2017, pp. 31–43).

The history of the U.S. Supreme Court and *judicial review* should not be interpreted only as a series of decisions, but also as the activities drawing to the new reception of reality, and determining a new shape of the public life. Courts do not function in a vacuum, therefore the U.S. Supreme Court under the justiceships of Melville Fuller was undoubtedly influenced by social, economic, and intellectual currents of the late 19th century. The aim of the study is to present the social, political, economic setting, and the establishment of the *separate but equal doctrine* in the United States. The research hypothesis is that the Gilded Age and Progressive currents, although perceived as modern

and progressive trends, influenced the American constitutional thought and the activities of the U.S. Supreme Court in a negative way in the context of the development of the *separate but equal doctrine*.

In this particular study the historico-descriptive and formal-dogmatic methods (Polish typology of methods used in legal studies) will be applied. Subject related legal texts and case law will be analyzed. Unfortunately, the modest scope of the below article does not allow to the exhaustive treatment of the subject, therefore only some subject related issues were taken into consideration.

The Gilded Age and Progressivism

During the Gilded Era rapid economic growth generated vast wealth. Means of transport, which developed that time, created new opportunities for entrepreneurs and cheaper goods for consumers. Although the nation had to face the growing division between the haves and the have-nots, the American economy grew at an extraordinary rate, generating unprecedented levels of wealth. The emergence of industrial and financial aristocracy caused discontent of some parts of the American society. New technologies and products improved the quality of life of the middle class. A growing urban middle class prospered, but the speed of economic transformation inevitably caused some social disproportions. The prosperity was not shared by farmers and industrial workers. The conditions of their work were dangerous, their working hours were long and low paid. In the society dominated by large corporations lot of factory workers and farmers felt helpless and dissatisfied. The situation led to political protests and calls for the radical change of law in order to restrict private economic power, and to help discontented. Americans tried to come to terms with the rapid changing of the late 19th century, and in effect, the most of Americans wanted political and social reforms, but there were no agreement concerning the kinds of desirable changes (Hofstadter, 1955, pp. 109–120; Flanagan, 2006, pp 1–304).

The period of the early 1890s was very difficult for agriculture because of declining crop prices, drought, and unstable agricultural market. Many

farmers did not pay off their debts, and criticized new economic realities (Nugent, 2010, pp.16–24). They encouraged the federal and state authorities to take steps to inflate the currency. They also attacked railroads companies regarded as the most suspicious symbol of industrialization. As it is sometimes raised in American literature, farmers complained about excessive transportation charges that allegedly consumed their profit (Sanders, 1999, p. 101–147), “although the allegations of railroad abuse were overblown, the anger of Southern and Western farmers toward the carriers contributed to a mood of political radicalism” (Ely, 2003, p. 8).

The discontent of farmers found its expression in the formation of the People’s Party, known as Populist Party, or as Populists, which for a few years (1892–1896) played a major role as a left-wing force in the American politics. Being highly critical to capitalism, it drew support from disenchanted farmers in the West and South, and operated on the left wing of American politics. The Populist Movement, attributing agricultural distress to concentrated wealth and large corporations, intended to reshape governmental policy in order to benefit agriculture. The activists of the Party rejected the existing political system and the dominance of laissez-fair philosophy in the American country. The platform of the new third political party argued that the powers of government should be expanded to assist the poorer and handicapped. They were in favor of a graduated income tax and currency policies to benefit debtors, or imposing limits on immigration. Under the influence of the Populist Movement, the Democratic Party platform denounced some decisions of the Supreme Court as the income tax ruling.

The rise of large business changed profoundly the employment relationships. Some scholars notice that it was hard to improve working conditions, and employees had to work in an impersonal environment (Ely, 2003, p. 5). Labor movement as the consequence of social mobility banded workers together to try to force their collective will upon the domination of industrial giants, which dominated individuals. Labor unions, which fought for the better work conditions were popular, but not every employees, were their members. A ten-hour workday created favorable conditions for the frequency of accidents, which happened in factories and railroad works. The

victims of accidents frequently brought lawsuits for negligence, which was a challenge for the American legal system. The victims of accidents often did not receive any compensation because common law doctrines restricted employer liability.

Industrial workers were anxious about new economic order. In the late 19th century, because of periodic economic downturns, some of the workers were unemployed, and the wages cut. Although at the end of the 19th century the trade unions were not a vital force in America, it triggered some forms of protest as strikes, which occurred in factories and railroad industry. As voices of discontent grew in the American society, labor law developed faster at the state rather than federal level. States enacted some laws, which regulated working conditions and the methods of payment. A number of states restricted the use of child labor.

It is significant that new patterns of constitutional thought developing then were influenced profoundly by economic and social changes. The broad concept of property rights inclined constitutional theorists to criticize governmental intervention in the economy. The provisions of the Fourteenth Amendment that no state "should deprive any person of life, liberty, or property without due process of law" were the basis for this new view. In the time before the American Civil War, due process was usually correlated with the procedural guaranties, and it was the notion that due process encompassed restrictions on government or legislative power, because substantive due process was grounded on the premise that some of the fundamental liberties cannot be changed. In this context, entrepreneurship perceived the Fourteenth Amendment as a federal guarantee of the economic rights, and the interference with these rights was illegal. The Supreme Court under Melville Fuller in its rulings affirmed the federal judicial supervision of state economic legislation (Ely, 2005, p. 6).

It is significant that the problems with impoverished regions escalated during the Gilded Age. The drive to restore the whites' rules was noticeable after the Northerners turned away from Reconstruction (the process of the return of rebel states to the Union, 1865–1877). White supremacist sentiments gained advantage in the politics of the South. A great number of the Southern

whites turned to violence in response to the revolutionary changes of Reconstruction after 1867. The Ku Klux Klan and other organizations of the white people attacked local African-Americans and white Republican leaders who challenged the authority of the whites. President Ulysses S. Grant enforced the protection of the blacks in the South thanks to the Enforcement Acts passed by the Congress. Unfortunately, racism in the South and North was still noticeable, and republicans became more conservative and less egalitarian as the decade continued.

Despite the fact that racist social views were widely shared in the United States in the late 19th century, the voices for the legalization of segregation were rather unique in the South. Although the local worthies of the South were in favor of the encouragement of the industrial growth and lured investors from the North with subsidies and tax exemptions, unfortunately, many inhabitants of the South were still engaged in agriculture. Southern political leaders were often skeptical about Northern control of the Southern regional economy, and poor farmers felt trapped by crop-lien laws. Such attitudes in the South caused populist attacks on federal courts and railroad companies in the 1890s. Although, there were attempts to foster the economy and industry in the South, the states stayed behind the rest of the nation (Wood, 2017, pp. 44–57). Maybe the Southerners were not much interested in the national economic development (Ely, 2005, p. 5).

The Civil Rights Act of 1875 (18 Stat. 335–337) guaranteed Afro-Americans equal access to certain public accommodations, such as public entertainment or transportation. The law expressed victory of the republican supporters of the legal protection of racial equity. The opponents objected to the new civil rights bill because of its intrusion into many areas of traditional state responsibility. They also complained about the direct regulation by the Congress of private activities. In fact, the whites in the South succeeded in re-establishing legal and political dominance over the blacks through violence and discrimination. However, which is emphasized in the American literature, there were promoted some ambitious economic development programs (Cooper and Terril and Childers, 2017, pp. 455–483) and laws

against racial discrimination in public transport and accommodations. The *Civil Rights Cases* of 1883 were a group of five cases, in which the Supreme Court assumed that the Congress is not empowered by Thirteenth and Fourteenth Amendments to outlaw racial discrimination by private individuals.

Rebecca Edwards advances the thesis that oversimplifications of the presented above era should be rejected. She assumes that the period should be characterized by taking into account many contradictions. In her opinion historians mainly tend to depict America in the late 19th century as dominated by “corruption and malaise” (Edwards, 2011, p. 5), while she approaches late 19th century American federal state from a different angle, exploring the ways, in which it was a starting point for modern America. In this context, similar view on the characteristics of the Gilded Age presents Julie Greene (Greene, 2017, pp. 137–148). Edwards presents the last decades of the Gilded Age as the beginning of the Early Progressive Era. Historians generally date the beginning of the Progressive Era as the period of mobilizing for reforms around 1900, although recently some scholars have just set the date to 1889, the time when Jane Addams funded Hull House in Chicago. The Progressives were very active in the late 19th century. They were the people who worked to regulate and restrict extraordinary power of big business, purify politics, reduce poverty and other economic injustice. Edwards presents some evidence that progressive movement was vivid even during the last decade of the 19th century (Edwards, 2011, p. 5).

The Progressive Movement reached its height in the early 20th century. It was a response to the vast industrialization, the growth of large corporation, and the fears of corruption in American politics. The Progressives, being interested in social and political reforms, and the limitation of political corruption, hoped to develop modern economy and modern society. They questioned the power of monopolies and large business, and they were in favor of the moral improvement of the American society. They emphasized the need of a civil service reform, professionalism and bureaucratization of the old system, and increased political rights for minorities. In fact, the Progressive Movement did the groundwork for the New Deal.

The Fuller Court

As it was noticed in the previous section, after the American Civil War the U.S. Supreme Court had to stand up to the new dynamic reality of changing economic and social life, and also to some growing problems in the context of the respect for civil and political rights. In 1874, Morrison Waite was appointed the Chief Justice of the United States by Ulysses S. Grant. The Supreme Court under Waite played an important part in the interpretation of postwar constitutional amendments and civil rights (mentioned above *Civil Rights Cases* of 1883; *Reynolds v. United States* of 1879), economic processes concentrating on the development of railroads (*Granger Cases* of 1877), and the protection of the legal position of corporations, which was fundamental for the development of the American economic life (*Santa Clara County v. Southern Pacific Railroad Company* of 1886) (Górski, 2006, pp. 220–224).

Melville Fuller was Chief Justice appointed by Grover Cleveland (Ely, 1995, pp. 3–24; King, 1950, pp. 1–100). Being the 8th Chief Justice, he led the Court in the period of 1888–1910 (Abraham, 1999, pp. 113–115). He had not entertained any federal function before, and his political activities were modest. As it was emphasized previously, during the time of dynamic economic growth and social changes there appeared new legal questions, therefore American judicial branch was obliged to increased vigilance, and the Supreme Court had to react in order to resolve new problems. It was crucial to introduce the stability in the social order. The direction of the Supreme Court rulings of that time has been controversial up to these days, however, it gave the sense of stability of the legal order (Górski, 2006, p. 228).

It is significant that the Supreme Court restored its position in the American public life at the turn of the 19th and 20th centuries. Although today his legacy is not always appreciated, the part of Chief Justice Fuller was fundamental in this process (Warren, 1922, pp. 413–450). Melville Fuller cooperated with the justices who represented different political visions and ideas. American subject related literature emphasizes the significance of such justices as John Marshall Harlan, who actively opposed to the racial segregation, or Oliver Wendell Holmes, Jr. (White, 1993, pp. 298–353,

378–411; Maciejewski, 2006, p. 203; Machaj, 2010, pp. 143–155), who presented liberal attitude, and strived to combine the protection of constitutional rights with the limitation of excessive legal formalism. In fact, they both often opposed to the Chief Justice Fuller, and their distinctive opinions in the 20th century inspired some rulings of the Supreme Court. Among the justices of the Supreme Court under Fuller were also, e.g.: Woods L. Lamar, David Brewer, Henry B. Brown, George Shiras, Jr, Howel Jackson, Edward D. White, Rufus Peckham, Joseph McKenna, William Day, William H. Moody, Horace H. Lurton, Henry Billings, Charles E. Hughes (Górski, 2006, pp. 229–234).

Some the rulings of the Fuller Court contributed to the development of labor law (*Lochner v. New York*, 1905; *Muller v. Oregon*, 1908; *Adair v. United States*, 1908). For example, the case of *Lochner v. New York* concerned on the problems of protection of the labor class because it touched the legality of the labor legislation, which limited working hours (Bryk, 2016, pp. 120–121). The Court also decided a series of cases determining the strength of the Sherman Antitrust Act, which was passed by the Congress to break up the unpopular trusts and monopolies (*United States v. E.C. Knight Co.*, 189); *Swift & Co. v. United States*, 1905). It is significant that in a lot cases ideological rather than legal dispute took place.

Plessy v. Ferguson

Although the rulings of the Supreme Court focused on American economy, some social tensions and problems also required firm reactions of the Court. It is obvious that racial segregation had a lot of common with racism, and the borders of racial politics were often delineated by the Supreme Court adjudications (Longchamps de Bériér, 2010, pp. 12–23). It is significant that one of the most controversial and highly debated cases up today is *Plessy v. Ferguson*. In 1881 Tennessee's legislature mandated segregated railroad cars. 33 states followed that decision over the next 26 years: Florida (1887), Mississippi (1888), Texas (1889), Louisiana (1890), Alabama (1891), Kentucky (1891), Georgia (1891), South Carolina (1898),

North Carolina (1899), Virginia (1900), Maryland (1904), and Oklahoma (1907) (Davis, 2012, p. xvii).

In *Plessy v. Ferguson* the problem concerned civil rights in the context of segregated railroad cars. In 1890, it was enacted the Separate Car Act, which required racial segregation on railways. There were different railway cars for whites and non-whites. Homer Plessy, the man of mixed race who wanted to commute in the department for whites, was arrested because he refused to change the compartment. It was assumed that he violated the state law. He sued the State of Louisiana before the state court, arguing that the Thirteenth and Fourteenth Amendments to the U.S. Constitution, which provided for equal treatment under the law, had been violated. John Howard Ferguson was the judge presiding over the case. In the ruling he assured that the state had the right to regulate railroad companies operating within the state. The Citizen's Committee to Test Constitutionality of Louisiana's Separate Car Act was organized in New Orleans in order to support the activities of Plessy (Davis, 2012, p. xix). The Committee took the appeal of Plessy to the Supreme Court of Louisiana, which upheld the ruling of Ferguson. In 1896, the Committee appealed to the U.S. Supreme Court, where the lawyers of Plessy presented their opinion concerning the violation of the constitutional amendments, arguing that segregation laws stigmatized black people with a second-class status, and therefore violated the Equal and Protection Clause (Groves, 1951, pp. 66–72).

On the 18th of May 1896, the Supreme Court found no constitutional violation in Louisiana's enforced separation of the races in the Separate Car Act of 1890. Seven justices formed the majority of the Court and supported the opinion written by Justice Henry Billings Brown. The Court reasoned that the Equal Protection Clause of the Fourteenth Amendment was not violated because the guarantee of legal equality of all the races did not intend to prevent social or other types of discrimination. It was within the police power of Louisiana to enact the law requiring racial separation. In the reception of the Court, any racial prejudice cannot be overcome by legislation, therefore the position of Plessy's lawyers that the blacks were stigmatized by the law was rejected. Justice Brown saw no harm in racial segregation. Brown and

the rest of majority perceived separate but equal segregation as treating whites and nonwhites the same. In the opinion of Brown, the segregation reflected some customs and traditions rooted deeply in the American society (Davis, 2012, p. xii).

Justice John Marshall Harlan was the only dissenter in the decision of *Plessy v. Ferguson*. He put forward the opinion that despite the fact that white Americans considered themselves superior to American of other races, the U.S. Constitution did not permit to divide citizens in the matters of civil rights (in the matter of fact, the American Constitution did not resolve the problem of slavery, and it can be treated as a compromise in this case) (Zajadło, 2014, p. 481–494). Harlan disagreed with the opinion of majority that the state law of Louisiana influenced the inferiority of the blacks.

It should be taken into account that despite the fact that *Plessy v. Ferguson* is perceived as symbolic establishment of the *separate but equal doctrine*, there were the other rulings of the Supreme Court, which also touched the matter of racial segregation. For example, *Louisville, New Orleans & Texas Railway Co. v. Mississippi*, submitted on the 10th of January 1890 and decided on the 3rd of March 1890, concerned not only the railway business but also the constitutionality of the state regulation regarding railways cars separate for whites and nonwhites. The effect of the decision of *Plessy v. Ferguson* was immediate: segregated educational facilities, under funded black schools, separate public institutions. It generated disagreement of coloured people and new cases adjudicated by the Supreme Court (e.g., *Cumming v. Richmond County Board of Education*) concerning some problems of the separation at school, and many subsequent cases).

Unfortunately, it took over a half century to eradicate the *separate but equal doctrine* from the American legal system. The time of the 1950s is associated with the reconsideration of civil and states' rights. In *Brown v. Board of Education of Topeka* (1954) black children were denied admission to schools, where white children were taught. Therefore a group of parents wished their children to be admitted to public schools in their communities on a nonsegregated basis, and sued the Board of Education of the City of Topeka (Kansas) in the District Court (1951). The District

Court ruled in favor of the Board of Education of Topeka, taking into account the previous precedent of *Plessy v. Ferguson*, despite the fact that some of the judges were of the opinion that segregation in public education had a harmful effect on black children. In the opinion of the Court, the crucial argument was that the separation of black children from the others of similar age generates a feeling of inferiority, and consequently it may deprive the children (Tushnet, 2008, pp. 133–150). The Supreme Court declared state law that established separate public schools for black and white students to be unconstitutional. Therefore, the decision overturned the previous ruling in the case of *Plessy v. Ferguson*. It is significant that before that case, the U.S. Supreme Court had also considered *Bolling v. Sharpe* (1954), in which it had dealt with constitutionality of segregation in the District of Columbia. The school segregation was not addressed in the context of the Fourteenth Amendment's Equal Protection Clause, but it was held that school segregation was unconstitutional under Due Process Clause of the 5th Amendment. The decision of *Brown v. Board of Education of Topeka* was victory of the civil rights movement and it opened the way for integration. It also served as a model for many other cases (e.g., *Cooper v. Aaron* of 1958, in which one of the schools in Arkansas opposed the ruling of the Supreme Court and intended to continue desegregation) (Sokalska, 2018, pp. 228–229).

Conclusion

Plessy v. Ferguson became a symbol of resurgent white supremacy. The decision reflected Southern conservative whites' depart from the order of federally imposed Reconstruction and civil rights enforcement (Davis, 2012, p. xii). The Supreme Court decision legitimized the state laws establishing racial segregation and provided an impetus for further segregation law. The decision set in law a rule known as *the separate but equal doctrine*. In fact, the Court ruling reached further than railway cars because it concerned also other public services and facilities as hotels, schools, parks, transportation to schools, etc. The *separate but equal doctrine* became a legal doctrine in

the American constitutional law. *Plessy v. Ferguson* upheld the principle of racial segregation and provided legal justification for segregation over the next half century

It should be considered that there is also a different aspect of the decision of *Plessy v. Ferguson* besides the problem of segregation. As Thomas J. Davis indicates, “for Homer Plessy and the Creole people of color he represented, the case was about who they were” (Davis, 2012, p. xii). That time their identity was neither black nor white. This multicultural reality will be the core of the contemporary American society in the future.

It is significant the Supreme Court decisions reflected in some way economic, cultural, political and ideological values of the contemporary society. The borders of racial politics were often delineated by the Supreme Court adjudications. The Supreme Court judgments in the last decade of the 19th century in the sphere of civil rights, states’ rights and the establishment of the *separate but equal doctrine* emphasized the significance of federal and state authorities in creating a new economical and social order. Although the decision of *Plessey v. Ferguson* legitimized racial segregation in the South and infected the American constitutional law, *judicial review* developed into an undeniable rule of the American constitutional order, and the turn of the 19th and 20th centuries became the period when the Supreme Court restored its position in the American public life.

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