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ŁUKASZ MACHAJ
Uniwersytet Wrocławski

# THE UNITED STATES SUPREME COURT REVERSES ITSELF: SENSE OF INJUSTICE OR PUBLIC PRESSURE?

Since the famous *Marbury v. Madison* case the United States Supreme Court assumed the power of judicial review of legislation, based on its accordance with the federal Constitution. John Marshall, the Chief Justice at that time, contended that "the constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish"[1]. One of the most crucial aspects of this power is to establish what the law is. In Marshall's view, "The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it"[2]. He claimed that the whole American political-and-legal system had been founded on a very simple premise: "The people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness"[3]. The United States' Constitution serves as a source and an embodiment of those principles, including the limitations imposed on a legislative power. The possibility of an actual enforcement of those limitations is indeed one of the chief reasons of having the Constitution which cannot be made toothless if it is to serve its purpose. As Marshall put it: "To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation"[4].

[1] Marbury v. Madison, 5 U. S. 137, 173 (1803).
[2] Ibid., 176.
[3] Ibid.
[4] Ibid., 176–177.

Therefore, it is necessary to assume that the Constitution must be seen as "a superior, paramount law", the one which "controls any legislative act repugnant to it", and that any such conflict between ordinary law and constitutional principles makes the former invalid. To take the opposite view would render the Constitution pointless and would make establishing it an absurd endeavor. If we accept this perspective on the role and the position of the Constitution, the consequence is obvious. As Justice Marshall succinctly explained: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty"[5].

Obviously, the Supreme Court — as the highest judicial authority in the land — must be the ultimate arbiter in such cases.

Marshall's viewpoint expressed in that decision has become a constitutional reality in the United States. This almost universal acceptance (of fact, if not of doctrine justifying it) made the Supreme Court the Constitution's "most authoritative interpreter", endowed with almost an absolute power of making "final determinations on the meaning of the fundamental law". The Court's "self-assumed power to rule on the validity of the actions of other governmental officers" made it epitomize "the idea of government under law". Taking into account a sacred role played by the Constitution in the American society, such an approach gave the Supreme Court a position in the secular community equivalent to that of Deity or "personified king"[6]. It would be, at least in my opinion, wrong to say that such a construction is not theoretically or even politically seductive. The notion of an objective, impartial body, designed to protect the axiological, ethical, moral and systemic foundations of a given polity against both majority's and minorities' excesses, consisting of infallible experts, focused only on securing the public good as defined by a particular legal system, may certainly appear desirable. Unfortunately, in real life, this is nothing but a chimera. The natural limits of legal knowledge and unavoidable fallibility of human beings make the above description a pleasant-sounding fantasy. Moreover, such a model creates a lot of problems from a political standpoint; one does not have to be a passionate and blind follower of the tenets of radically majoritarian democracy to realize that placing such an enormous power in the hands of judicial elite will cause serious tension in any system purported to be governed by "the will of the people". However, it is not

[5] Ibid., 177–178.

[6] A. Selwyn Miller, *The Supreme Court: Myth and Reality*, Westport 1978, pp. 7–8.

the purpose of this article to examine accusations and complaints levelled against the Supreme Court which for over two hundred years has operated according to Marshall's principles. I am interested in one particular aspect of its jurisprudence, i.e. the issue of reversals. The fact that the Supreme Court reverses itself and declares, sometimes in express terms and sometimes implicitly, that its previous rulings, often comprising a very long line of important precedents, were wrong, is in my opinion one of the strongest arguments against Marshall's theory. I agree with Morris L. Ernst who contends that "nothing reveals the Supreme Court quite so clearly as the way it changes its mind. This most powerful tribunal in the world has done it more than a hundred times since its first about-face in 1810, and it is always a traumatic experience for someone, usually the litigants and lawyers who relied on the old rule"[7]. A reversal and an abandonment of a stare decisis principle is not therefore a rare occurrence; it happens both in relatively minor and major cases[8]. A question concerning the reasons for which the Supreme Court changes its mind is particularly interesting. I will attempt to show in this article, providing a reader with two illustrative examples, that reversals may result both from inside and outside factors; either they are an authentic consequence of Justices coming on their own to the conclusion that the previous decisions were wrong and keeping them alive would be unjust or they happen due to social-and-political pressure (to which the Supreme Court is supposed to be immune). Both of those reasons are problematic from the standpoint of Marshall's theory. In the first situation, the allegedly infallible pronouncer of Law admits to being wrong in the past; in the second one, the Court takes extralegal and extrajudicial factors into account, undermining its moral and jurisprudential authority and shedding doubts on the legitimacy of its God-like position.

After the Civil War the South underwent a process of a so-called Reconstruction. One of the most important legislative tools designed to improve the situation of the black population was the 14th Amendment to the Constitution of the United States which — apart from including a prohibition against depriving any person of life, liberty or property without due process of law — declared that no State can "deny to any person within its jurisdiction the equal protection of the laws". The clause clearly prohibited outright racial discrimination by public authorities. Nevertheless, the precise scope and meaning of this prohibition was far from clear. During the ninth decade of the 19th century the Southern states started adopting the so-called Jim Crow laws which instituted racial segregation

[7] M.L. Ernst, *The Great Reversals: Tales of the Supreme Court*, New York 1973, p. 1.

[8] In the area of the free speech jurisprudence, for the example of the former, see Minersville School District v. Gobitis, 310 U. S. 586 (1940) and West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) (a constitutionality of compelling public school students to recite the Pledge of Allegiance); for the example of the latter, see Whitney v. People of State of California, 274 U. S. 357 (1927) and Brandenburg v. Ohio, 395 U. S. 444 (1969) (the constitutional principles regarding a possibility of a conviction for a criminal advocacy).

of public utilities. As Kimberley Johnson points out, "the Jim Crow order was a complex and interconnected system of beliefs, laws, and state action. It was not a static entity existing outside of time or space". Johnson observes correctly: "The Jim Crow South was a world in which white supremacy was not only intellectually and morally acceptable, but had been legitimated by intellectuals and the mass media. White supremacy was not only a social hierarchy; it reflected a political and economic hierarchy as well"[9]. The segregation system was very pervasive. According to Ronald H. Bayor, "the policy of strict racial segregation […] took hold and consolidated during the 1890s as a concession to poor white people, a bid to rebuild a 'solid South' unified across class lines by white racism. The Jim Crow laws reached into every nook and cranny of southern life. Their relentless logic created not only separate railroad cars, building entrances, and drinking fountains, but also separate Bibles for swearing witnesses in the courtroom, separate streets for prostitutes, even separate gallows for hanging condemned men. The chief aim of white supremacy was not so much racial separation, although that was its form, but racial subordination. Jim Crow was a system of countless daily humiliations intended to remind black people of their inferior position"[10].

While the question of the constitutionality of private discrimination and segregation was not a subject of significant debate at that time, the segregationist practices undertaken by local and state government were seen by many as violating the 14th Amendment (specifically, its "equal protection" provision). It soon became clear that the Supreme Court would have to opine on the issue. It got the opportunity to do so in a landmark case *Plessy v. Ferguson*[11]. The circumstances of the case were relatively simple. A law introduced by the state of Louisiana ordered all railway companies to "provide equal but separate accommodations for the white, and colored races"; train attendants were empowered (and ordered) to "assign each passenger to the coach or compartment used for the race to which such passenger belongs"; if a person in question refused to comply with a train officer's command, he or she could have been fined or even incarcerated[12]. The petitioner based his appeal to the Supreme Court on two parallel arguments. The first one was centered around a contention that the Louisiana statute violated the 13th Amendment to the U.S. Constitution which had eliminated the institution of slavery. This line of reasoning was given a very short shrift by the Court. The majority opinion said in unequivocal terms that since the law in question did not have anything to do with "involuntary servitude", "a state of bondage", "the ownership of mankind as a chattel", "the control of the labor and services of one man for the benefit of another" or depriving someone of a legal right to "dispose of

[9] K. Johnson, *Reforming Jim Crow: Southern Politics and State in the Age before Brown*, New York 2010, pp. 3, 11.

[10] R.H. Bayor, *Race and Ethnicity in America: A Concise History*, New York 2003, p. 101.

[11] 163 U. S. 537 (1896).

[12] Ibid., 540–541.

his own person, property or services"[13], the argument was spurious. The second claim against the statute involved a 14th Amendment challenge and implied that it infringed upon the Equal Protection Clause. The Court unhesitatingly rejected this legal position. At the very center of the opinion, a specific interpretive theory of equality (as a constitutional word) can, unsurprisingly, be found. Marcela Marlowe writes that *Plessy* was founded on the notion of formal equality, reflecting the general consensus regarding allegedly proper construction of the 14th Amendment which contemporaneously existed among "the public, political and legal community"[14]. While I do not believe that such an understanding of formal equality is correct (I think that only color-blind laws conform with this principle), certainly the Court perceived its ruling in this way. The opinion declared that the essential purpose of the 14th Amendment was to establish "the absolute equality of the two races before the law" and contrasted the said objective with far wider aims of abolishing any "distinctions based upon color", of enforcing social equality or of "commingling of the two races upon terms unsatisfactory to either"[15]. The Court also contended that regulations establishing racial segregation "do not necessarily imply the inferiority of either race to the other"[16]. Such a separation is interpreted as stamping "the colored race with a badge of inferiority" simply and just because blacks choose to see it that way. If the situation was reversed and it was blacks who enjoyed political prominence, whites would not accept the assumption that segregation affirms the former's superiority. As Jules Lobel points out, this part of the opinion offered a horribly "vapid sociological insight" about consequences of segregation being only a result of psychological attitudes of blacks, wrongly identifying separation with inequality[17]. The Court even went as far as to suggest that rules prohibiting racial intermarriage do not violate the principle of equality before law. *Plessy* also stated that segregation of public transport is a reasonable step incomparable to demanding that "separate cars […] be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities" or to enacting regulations "requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors"[18]. While such laws would be unconstitutional (due to their unreasonable character), oppressive and adopted in order to annoy certain classes of persons, segregation of public utilities is enacted *bona fide* and for *bonum*

[13] Ibid., 542.

[14] M. Marlowe, *Jurisprudential Regimes: The Supreme Court, Civil Rights, and the Life Cycle of Judicial Doctrine*, El Paso 2011, p. 51.

[15] Plessy, 544.

[16] Ibid.

[17] J. Lobel, *Success without Victory: Lost Legal Battles and the Long Road to Justice in America*, New York 2009, p. 113.

[18] Plessy, 549.

*commune*. The Court also did not hesitate to invoke a principle of judicial restraint and claimed that state legislatures should enjoy a lot of leeway in their lawmaking endeavors, provided they "act with reference to the established usages, customs, and traditions […] and with a view to the promotion of their comfort, and the preservation of the public peace and good order"[19]. In the decision's penultimate paragraph, the Justices accused the petitioner of assuming "that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in People v. Gallagher […] 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed'. Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane"[20].

According to James M. Donovan and H. Edwin Anderson, this passage reflects the Supreme Court's belief that the legalized racial segregation only confirms the existing social reality of racial hierarchy and that it is not a duty of the Constitution to try to rectify this state of affairs (nor is it achievable by any legal means)[21]. A far more charitable interpretation of the above-mentioned statements would be that the opinion simply eschewed any notion of social engineering and of attempting to modify American societal consciousness through law. While personally I do appreciate the latter sentiment, I think that in the context of the whole decision, the first construction seems closer to the truth. All in all, I agree with A. Leon Higginbotham Jr. who contends (perhaps in a bit overdramatic style) that *Plessy* is "one of the most retrogressive 'civil rights' decisions ever rendered by the United States Supreme Court" which judicially sanctioned racism and caused numerous human tragedies[22].

[19] Ibid., 550.

[20] Ibid., 551–552.

[21] J.M. Donovan, H. Edwin Anderson, *Anthropology and Law*, New York 2003, pp. 90–91.

[22] A.L. Higginbotham Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process*, New York 1996, p. 188.

As Desmond King observes, *Plessy v. Ferguson* became "a seminal majority judgment" on the legality of segregation practices for over fifty years (though its impact was somewhat diminished by a small number of later Supreme Court's decisions concerning, for example, the unconstitutionality of all-white primaries and the states' obligation to secure equal university education opportunities for whites and blacks)[23]. Throughout that period, an opposition toward segregation began to strengthen (particularly in the North); *Plessy*'s moral legitimacy became questionable at best. The Supreme Court could not remain impervious to social, political and axiological pressures forever. Michael J. Klarman observes that, particularly after World War II, the social and political context in which segregation laws were functioning, underwent a very drastic change due to a significant black empowerment. After 1945 "demographic shifts, industrialization, and the dislocation impact of World War II had produced an urban black middle class with the education, disposable income, and lofty expectations conducive to involvement in social protest. Economic gains enabled blacks to challenge the social status quo by freeing them from white control […]. Ideological forces had also helped to transform social attitudes and practices. The war against fascism impelled many Americans to reconsider their racial preconceptions in order to clarify the differences between Nazi Germany and the Jim Crow South"[24].

Moreover, the majority of the new crop of Justices came to the conclusion that in the long run racial segregation was untenable if the phrase "equal protection of laws" was to actually mean something. The increasing conviction in the Court concerning the basic injustice of *Plessy* came to the fore in 1954 when the landmark decision in *Brown v. Board of Education* was issued[25]. It is crucially important to note that the unanimous opinion in *Brown* — while positively assessed by almost every authoritative scholar as far as its end-result, meaning the outright abolition of segregation in public education and implicit abolition of segregation by public authorities everywhere, is concerned — raised very serious constitutional doubts even among those morally opposed to segregation[26]. While I believe that racial segregation violates the Equal Protection Clause, it appears to me that the Supreme Court's decision in *Brown* was quite cursory, its reasoning remained shoddy, its findings and conclusions insufficiently and unsatisfactorily explained. First, let me point out that the Court summarily rejected the judicial principle of legal restraint and the interpretive principle of originalism — the rules to which a few of its members — like Justice Stanley Reed or Justice Felix Frankfurter

[23] D. King, *Separate and Unequal: Black Americans and the U.S. Federal Government*, Oxford 1997, p. 18. The decisions referenced by King are Smith v. Allwright, 321 U. S. 649 (1944) and Gaines v. Canada, 305 U. S. 337 (1938).

[24] M.J. Klarman, *Brown v. Board of Education and the Civil Rights Movement*, New York 2007, p. 56.

[25] 347 U. S. 483.

[26] J. Brand-Bellard, *Limits of Legality: The Ethics of Lawless Judging*, New York 2010, p. 81.

— openly subscribed. The opinion briefly stated that "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws"[27].

Next, the Court engaged in sociological and psychological discourse concerning the growing role of public education in America and the impact of the segregation practices on black students[28]. The opinion declared that "today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms"[29].

Then the Court concluded that to separate black children in educational facilities "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"[30], unequivocally rejecting one of the basic premises of *Plessy*. Finally it added that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"[31]. The opinion raises a number of significant doubts. First, while I certainly am not a proponent of originalism and while I believe that the postulate of legal judicial restraint usually serves as a red herring or a codeword for criticizing decisions some commentators do not approve of, I consider these issues sufficiently important so as to deserve a far more thorough discussion, particularly in light of the fact that quite a few of the Justices were in favor of those positions in other judicial contexts. Second, one does not have to be an opponent of judicial activism to question whether courts really are best-equipped to base their decisions upon psychological or sociological insights. Third, the opinion is lacking a comprehensive and exhaustive theory of

[27] Brown, 492–493.

[28] J.T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*, New York 2001, pp. 66–67.

[29] Brown, 493.

[30] Ibid., 494.

[31] Ibid., 495.

legal equality, gliding — at best — on the surface of the issue. I agree with Jack M. Balkin that these deficiencies, omissions and interpretive choices were a result of quite conscious and deliberate strategy aimed at avoiding accusatory tone of moral condemnation[32]. Putting it in different terms, the Justices thought — most of them due to their deeply held personal beliefs, some of them because of inexorably changing public morality — that racial segregation (at the very least in the field of the education system) was no longer morally tenable; the soundness and coherence of constitutional reasoning took the backseat to this conviction. Susan Dudley Gold writes, while discussing *Brown*, that with this decision "in less than two thousand words […] the Court had changed the course of United States history"[33]. The Justices rejected the earlier precedent (even though they equivocated a little bit) and admitted that the Court had made a mistake in *Plessy* precisely because they no longer thought the previous position fair or just. *Brown* is a reversal based on the sense of moral injustice of previous rulings.

Another field of constitutional jurisprudence in which the Supreme Court made a drastic U-turn concerns economic legislation, in particular its understanding of the provisos of the 5th and 14th Amendment, stipulating prohibitions — aimed at federal, state and local authorities — against depriving persons of liberty without due process of law. However, it must be pointed out that the legal reasoning applied by the Supreme Court in relevant cases was emblematic of a general attitude of Justices towards an idea of economic regulation, the approach which was evident in cases revolving around other Constitutional clauses. For almost fifty years, from the turn of the 19th century until the late thirties of the 20th century, the Court adopted a liberal (in its classical variant) or free-market principles in its interpretive practice, focusing on the need to protect economic freedom and private property[34]. The most famous (or notorious) case, which until today serves as a representative example of such an attitude, is *Lochner v. New York*[35] in which the Court developed a concept of substantive due process. The facts of the case were relatively straightforward. New York's labor code included a provision on a maximum number of working hours in bakeries which stated that "no employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average

[32] J.M. Balkin [in:], *What Brown v. Board of Education Should Have Said: Top Legal Experts Rewrite America's Landmark Civil Rights Decision*, ed. J.M. Balkin, New York 2001, pp. 50–51.

[33] S.D. Gold, *Brown v. Board of Education: Separate but Equal?*, New York 2005, p. 81.

[34] W. Cohen, D.J. Danelski, *Constitutional Law. Civil Liberty and Individual Rights*, Westbury 1994, p. 867.

[35] 198 U. S. Reports 45 (1905).

of ten hours per day for the number of days during such week in which such employee shall work"[36].

The law was found unconstitutional as violating the 14th Amendment. The majority opinion (which reads a bit like an excerpt from a treatise on libertarian political philosophy) was written by Justice Rufus Peckham. He claimed that the regulation amounted to an absolute prohibition on working for more hours than the law prescribed, regardless of the wishes and motivations that the parties of a particular labor contract may have had. Therefore, according to Peckham, "the statute necessarily interferes with the right of contract between the employer and employees […] the general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution"[37]. The Justice contended that the right to buy or sell labor (a significant element of this contractual freedom) was not absolute and was subject to regulation by authorities on a state level aimed at protecting "the safety, health, morals, and general welfare of the public". The use by an individual of his or her property and liberty rights may be restricted by laws which constitute an exercise of those police powers, provided that the conditions imposed by said regulations remain within certain constitutional parameters. Peckham proposed a form of a balancing test in order to determine whether such statutes do not infringe on the guarantees accorded by the 14th Amendment: "When the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail — the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state"[38].

Peckham approbatively quoted earlier Supreme Court's precedents dealing with laws limiting economic liberty or private property rights (including a right to self-ownership)[39], stating that the Court had been generally receptive to states' claims concerning the legitimacy of the laws purporting to preserve "the safety, health, morals, and general welfare of the public". At the same time he emphasized: "It must […] be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety

[36] Ibid., 47.

[37] Ibid., 53.

[38] Ibid., 54.

[39] See e.g. Holden v. Hardy, 169 U.S. 366 (1898); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Petit v. Minnesota, 177 U.S. 164 (1900), Atkin v. Kansas, 191 U.S. 207 (1903).

of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext — become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for"[40].

In order to avoid these perils, the Court, when facing such legislation, must carefully investigate whether it is "fair, reasonable, and appropriate" or rather "unreasonable, unnecessary, and arbitrary". In other words, not only the alleged end of a law matters but also the means that it applies in order to achieve this objective. Michael J. Phillips is correct in saying that the Lochner ruling "combined a fairly easy 'ends' test with a relatively strict 'means' test"[41]. While the purposes are defined in extremely general terms, the means used to advance those ends must be instrumentally rational, substantively justifiable and have a "direct" relationship with those aims.

According to Peckham, the New York law fails the constitutional test. First, it is arbitrary because it targets only one professional group whereas "there is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state"[42]. Second, the law has nothing whatsoever to do with public interest (in a sense that it does not protect public health, safety, welfare or morals). Third, there is no evidence that imposing such limitations on individuals' working hours will contribute in any way to the improvement of their health. The Justice was convinced that — at least generally — laws "limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual" and constitute a very vivid manifestation of a purely paternalistic governmental attitude. Last but not least, Peckham did not hesitate to employ a "slippery slope" mode of reasoning in order to reduce the assumption underlying the New York law to absurdity. This passage is worth quoting *in extenso*: "There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning

[40] Lochner, 56.

[41] M.J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from 1890s to the 1930s*, Westport 2001, p. 5.

[42] Lochner, 57. Peckham also refused to accept that there were exceptional hardships and health hazards connected with a profession of a baker which warranted special legislative treatment.

one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts. It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law"[43].

The *Lochner* decision has been forcefully criticized by the huge majority of commentators. Only some libertarians and paleo-conservatives were willing to praise Peckham for respecting traditional and jurisprudentially sound principles and for appreciating constitutionally justified values like economic freedom or

[43] Ibid., 59–61.

private property[44]. The prevailing criticisms revolved around two closely connected, or even inextricably intertwined, accusations. The first one was that the Supreme Court drastically overstepped its bounds and encroached upon rights reserved by the Constitution for legislatures (both on federal and state level). For instance, according to Paul L. Rosen, the decision meant that the Court was "free to promulgate its own vision of social reality", instead of relying on common convictions[45] (presumably expressed by lawmakers). Bernard Schwartz argues that the Court in *Lochner* "had abandoned this restrained approach to its function of judicial review and had come instead to conceive of itself as the Supreme Censor of all legislation". Respect for contractual liberty was used — unconstitutionally — as a litmus paper for evaluating states' economic legislation. Schwartz does not mince words: "It is not for a judicial tribunal to set itself up as judge of the wisdom or desirability of measures taken by the states to deal with supposed economic evils. The Fourteenth Amendment was not intended to prevent the state legislatures from choosing whether to regulate their economies or leave them to the blind operation of uncontrolled economic forces, futile or even noxious though the particular choice might seem to the individual judge. Economic views of confined validity are not to be treated as though the Framers had enshrined them in the Constitution"[46].

Stephen P. Powers and Stanley Rothman accuse the *Lochner* Court of instrumental treatment of judicial review in order to achieve purely political objectives[47]. Charles S. Hyneman sums up when assessing *Lochner*: "Probably no other decision of the Supreme Court is so frequently cited as proof that judges, by making the due-process requirement a limitation on the goals or purposes of legislation, have transgressed the boundaries of the judicial function and invaded a realm assigned exclusively to the elected branches of government"[48]. The second criticism revolved around the rejection of political-and-economic theories which constituted a doctrinal foundation of the ruling. In Jamin B. Raskin's view "the *Lochner* Court […] constitutionalized the rule that the democratic state could use law to defend capital investments that owners have in their businesses but not labor investments that workers have in their bodies. To put it more graphically, the

[44] See e.g. H. Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Jurisprudence*, Durham 1999, pp. 10–11; D.E. Bernstein, "Lochner, Parity and the Chinese Laundry", *William and Mary Law Review*, vol. 41; R.E. Barnett, "Liberty and the Police Power. Justice Kennedy's Libertarian Revolution: Lawrence v. Texas", *Cato Supreme Court Review* 2002–2003; M.J. Phillips, op. cit., pp. 93, 126, 156, 177–196.

[45] P.L. Rosen, *The Supreme Court and Social Science*, Urbana 1972, p. 73.

[46] B. Schwartz, *The Supreme Court. Constitutional Revolution in Retrospect*, New York 1957, pp. 13, 194.

[47] S.P. Powers, S. Rothman, *The Least Dangerous Branch? Consequences of Judicial Activism*, Westport 2001, pp. 20, 22.

[48] Ch.S. Hyneman, *The Supreme Court on Trial*, New York 1963, p. 177.

state could use the police power to protect the absolute control of corporate owners over their workplaces but not to protect the health and dignity of employees"[49].

*Lochner* is rooted in libertarian political philosophy, apotheosizes unlimited rights of privileged classes and, using "idiosyncratic political rhetoric", refuses public authorities the right to help people "whose principal property lies in the labor of their bodies". It is therefore an ideological decision, based on a value preference for free market over common good and democratically expressed will of the people[50]. According to Arthur S. Miller, the Court, adopting the laissez-faire economic position rejected by most Americans, used the fiction of the liberty of contract simply to "thwart state or federal attempts to establish minimum wages, maximum hours, and acceptable working conditions in the reciprocal business relations of management and labor"[51]. Alpheus T. Mason and William M. Beaney pithily call the decision a manifestation of judicial obscurantism, designed to constitutionalize economic Darwinism[52]. In light of the above-quoted opinions, we can come to a justifiable conclusion that *Lochner* is commonly seen today as an illegitimate decision (from political, constitutional, legal and philosophical standpoint).

Why has *Lochner* been so universally condemned or even reviled? For the Left it is a result-oriented and ideologically motivated decision aimed at constitutionalizing and perpetuating libertarian and Darwinist economic principles. For the Right it is an example of naked judicial power-grab, the purpose of which is simply to thwart democratic will of majority, expressed by legislative bodies. But apart from substantive discussion concerning the construction of the "due process" clause, the meaning of liberty and property protected by the 14th Amendment or the proper role of judiciary, *Lochner* is — correctly, in my opinion — perceived as a symbol of the whole era in the Supreme Court's jurisprudence. This special place of the decision has two aspects. First, the reasoning in *Lochner* was expressly repeated by the Court in many different cases which led to the invalidation of laws regarding, for instance, the right of government to determine a minimum wage, to establish maximum prices, to regulate economic activities by setting qualitative standards which fail the thresholds of "necessity" and "reasonableness" or to prohibit employers from requiring that employees do not join a trade-union under a threat of a termination of their labor contract[53]. Second, the "immaterial"

[49] J.B. Raskin, *Overruling Democracy: The Supreme Court vs. the American People*, New York 2003, pp. 179–181, 183.

[50] Ibid., pp. 179–181.

[51] A.S. Miller, *The Supreme Court: Myth and Reality*, Westport 1978, pp. 66, 295–296.

[52] A.T. Mason, W.M. Beaney, *The Supreme Court in a Free Society*, Englewood Cliffs 1959, p. 237.

[53] See e.g. Adkins vs. Children's Hospital 261 U. S. Reports 525 (1923); Morehead v. New York ex rel. Tipaldo 298 U. S. Reports 587 (1935); Ribnik v. McBride 277 U. S. Reports 350 (1928); Jay Burns Baking Co. v. Bryan 264 U. S. Reports 504 (1924); Coppage v. Kansas 236 U. S. Reports 1 (1915).

spirit of *Lochner* was also seen as permeating other areas of constitutional jurisprudence, regarding the interpretation of the Takings Clause, the construction of the Commerce Clause, limits of the powers of federal government (under the 10th Amendment) or the scope of regulatory rights that the Congress can constitutionally delegate to the executive[54]. Many of those decisions led to the abolition of crucial New Deal programs initiated by Franklin Delano Roosevelt who — from a purely political standpoint quite understandably — was not too thrilled with this development. His response was to introduce a piece of legislation obliquely titled the *Judicial Procedures Reform Bill*.

While, generally speaking, it can be said that in a contemporary American public discourse President Roosevelt is very much respected or even lionized (even by political opponents of his program of extending economic powers of government), the court-packing plan is rather seen as a stain on his legacy. He publicly announced his proposal on the 5th of February 1937. It is, however, pertinent to point out that he had not hesitated to criticize the Supreme Court before that day, for example by accusing it of trying to maintain the constitutional order from "horse and buggy days"[55]. Time and time again FDR "had expressed the opinion that the biggest question before the country in years was whether or not the national government should have the right to enact and administer laws having to do with national economic and social problems, a power possessed by every other national government in the world"[56]. Due to this reason, he did not hesitate to strike and shatter "a hornet's nest"[57]. The selected method was quite cleverly couched (even though almost everybody saw through the pretense). In the mentioned speech President contended that "life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world"[58].

Ostensibly the proposal referred to the whole federal judiciary; regardless of that, the part of the suggested bill dealing with the Supreme Court was crucial. Ac-

[54] See e.g. Railroad Retirement Board v. Alton Railroad Co., 295 U. S. 330 (1935); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carte Coal Co., 298 U. S. 238 (1936); Ashton v. Cameron County Water Improvement District No. 1, 298 U. S. 513 (1936); United States v. Butler, 297 U. S. 1 (1936); Panama Refining Co. v. Ryan, 293 U. S. 388 (1935)

[55] E.R. Nichols, *Congress or the Supreme Court: Which Shall Rule America?*, New York 1995, p. 12.

[56] J.E. Johnsen, *Limitation of Power of Supreme Court to Declare Acts of Congress Unconstitutional*, New York 1935, p. 4.

[57] M.J. Pusey, *The Supreme Court Crisis*, New York 1937, p. 1.

[58] Speech is reprinted in: *Franklin D. Roosevelt and the Supreme Court*, ed. by A.H. Cope, F. Krinsky, Boston 1952, pp. 19–20.

cording to Section 1 of the proposed legislation, "when any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of 70 years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired, the President for each such judge who has not so resigned or retired, shall nominate, and by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned. Provided, that no additional judge shall be appointed hereunder if the judge who is of retirement age dies, resigns or retires prior to the nomination of such additional judge".

The maximum number of the Supreme Court's Justices was capped at fifteen[59]. Roosevelt's intention was quite clear (especially taking into account a retroactive scope of the law): he wanted to pack the Court with supporters of New Deal legislation. As Marian C. McKenna concludes, "in proposing to increase the size of the Supreme Court in 1937, Roosevelt abruptly ended an era during which the Court, though often lambasted for its activism, for propounding arguments that were termed inconsistent, or for manipulating doctrines of constitutional law, had remained immune from frontal attack"[60].

We do not have to discuss the fate of the bill (it failed ignominiously in Congress). What is relevant for our purpose, is the Supreme Court's judicial response. First decisions relevant to the Presidential attempt to influence the Court's take on economic issues were announced on the 29th of March 1937. The most famous one[61], utterly refuting *Lochnerian* principles, upheld a constitutionality of the state of Washington minimum wage law. Many commentators argue that the decision was not a reaction towards Roosevelt's speech, as the preliminary vote in this case took place in December 1936[62]. As a matter of fact, they are obviously correct. We have to remember, however, previous critical remarks expressed by Roosevelt; we also cannot entirely exclude a possibility that, taking into account the realities of political Washington, some leaks concerning future legislative proposal curbing the Court's powers (one way or another) might have reached Justices' ears even at that time. But there is a more important reason. It is not so much that the Court's position changed at all; it is rather how dramatically it changed and how radical a departure from earlier precedents and the *stare decisis* principle *Parrish* was. The Court did not carve out a minor exception in its former jurisprudential stance concerning one particular question but utterly refuted the whole line of reasoning that had led to *Lochner* and its progeny. Writing for the majority, Chief Justice

[59] Ibid., pp. 24–25.

[60] M.C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937*, New York 2002, p. 556.

[61] West Coast Hotel Co. v. Parrish, 300 U. S. 379.

[62] Ch.C. Faille, *The Decline and Fall of the Supreme Court: Living out the Nightmares of the Federalists*, Westport 1995, p. 17.

Charles Evans Hughes could not have been more clear: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular"[63].

The Court with a few strokes of pen went from the presumption in favor of economic freedom and protection of private property to the assumption that governmental regulations of socioeconomic matters which fulfill a very abstract and quite easy criterion of reasonableness and are allegedly enacted for common good are constitutional. The opinion presaged that from this moment the Court — in the context of economic regulation — was going to give legislatures a substantial leeway when interpreting general clauses like "due process of law" or rather imprecise phrases like "health, safety, morals, and welfare of the people". That is why the *Parrish* decision signified a revolutionary change in judicial paradigm, a transformation that quickly became visible in other cases regarding economic legislation. In its subsequent decisions (two of them issued on the same day as *Parrish*) the Court radically expanded the meaning of the Commerce Clause, permitting the wholesale regulation of economy by federal government, drastically reduced the scope of protection of property rights afforded by the Takings Clause and practically ignored the 10th Amendment's proviso concerning state rights[64]. The jurisprudence of the *Lochner* era was almost instantaneously over. Let me be clear. I am not saying that the Supreme Court was always or even mostly correct during that period (although I think that the expansive exegesis of the Commerce Clause adopted after 1937 is mistaken); I am not even trying to contend that the change in jurisprudential approach towards economic regulation was not inevitable, taking the social reality into account. I am just saying that the Court caved under political pressure.

At the end of this article I would like to offer one final observation. The instances of the Supreme Court reversing itself are hugely problematic from a theoretical, judicial, political or practical standpoint. But the history of those two switches demonstrates that even though the Supreme Court occasionally admits — sometimes expressly, sometimes implicitly — that it is a fallible institution, that

[63] Parrish, 391–392.

[64] See e.g. Wright v. Vinton Branch, 300 U. S. 440 (1937); Virginia Railway v. Federation, 300 u. s. 515 (1937); National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1 (1937); Helvering v. Davis, 301 U. S. 619 (1937); Wickard v. Filburn, 317 U. S. 111 (1942).

sometimes it succumbs to outside influences, that sometimes it issues decisions which offend fundamental moral principles and that sometimes its opinions cause social outrage and remain extremely controversial, in the long run all those factors have failed to weaken the Court's authority in American society. Personally, I hope that the Constitutional Tribunal in Poland will someday enjoy such an elevated position.

## SĄD NAJWYŻSZY USA ZMIENIA ZDANIE: POCZUCIE NIESPRAWIEDLIWOŚCI CZY PRESJA SPOŁECZNA

Streszczenie

Od czasu wyroku w słynnej sprawie Marbury vs. Madison Sąd Najwyższy Stanów Zjednoczonych dysponuje prawem sprawowania nadzoru nad konstytucyjnością prawa, które jest niemal powszechnie respektowane w amerykańskim dyskursie prawno-politycznym. Aksjologiczną i doktrynalną przesłanką przyznania judykatywie wskazanego uprawnienia jest przekonanie o potrzebie istnienia kompetentnego, obiektywnego i niezależnego organu, odpowiedzialnego za autorytatywną interpretację przepisów, a w szczególności ustawy zasadniczej. Interesującego kontekstu dla takiego pojmowania roli SN dostarczają sytuacje, w których Sąd podejmuje decyzję o uchyleniu swoich własnych precedensów i, *implicite* lub *expressis verbis*, przyznaje się do popełnienia błędu w przeszłości. Artykuł wskazuje, że takie uchylenie może wynikać z dwóch powodów. Po pierwsze, z autentycznego przekonania Sądu o błędnym charakterze wcześniejszych orzeczeń. Po drugie, z ulegnięcia zewnętrznej presji politycznej czy społecznej. Obydwie sytuacje są nader problematyczne z perspektywy teorii prawa.