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Searching for Progress: Progressivism and the U.S. Supreme Court Jurisprudence (Some Remarks)

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Abstract

In American legal historiography, the debate concerning the exact contours and reforms of the Progressive Era is still ongoing. In the late 19th and early 20th centuries, the American reform movements tried to match American ideals with the challenges of the times. Although progressive attitudes toward the economy, taxation, foreign policy, labor law, social standards, human rights, women's suffrage, rapid urbanization and unrestricted immigration highlighted the necessity of reforms, such progress was seen from a variety of perspectives. We may ask the question if American legal thought that time was really progressive. The jurisprudence of the U.S. Supreme Court profoundly influenced the shape of the legal order in economic and labor law. Unfortunately, some decisions were not compatible with the visions of progressive reformers and reflected the ideological attitudes of the justices rather than an aspiration for reform.

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Streszczenie**Podążając w kierunku rozwoju: progresywnizm a orzecznictwo Sądu Najwyższego Stanów Zjednoczonych (wybrane uwagi)**

Mającą miejsce w amerykańskiej historiografii debata dotycząca właściwych ram czasowych oraz reform, jakie zostały przedsięwzięte w Erze progresywnej, trwa po dzień dzisiejszy. Organizacje i ruchy reformatorskie, które zintensyfikowały swą działalność w ostatnich dziesięcioleciach XIX w. oraz na początku XX w., dążyły do tego, aby dostosować amerykańskie rozwiązania do ówczesnych wyzwań. Jakkolwiek progresywne podejście do gospodarki, podatków, polityki zagranicznej, prawa pracy, standardów społecznych, praw człowieka, praw wyborczych kobiet, szybkiej urbanizacji czy imigracji bez ograniczeń podkreślały konieczność reform, to jednak progres był rozważany z różnorodnej perspektywy. Czy ówczesna amerykańska myśl prawna oraz orzecznictwo Sądu Najwyższego Stanów Zjednoczonych rozwijały się zgodnie z ideałami tegoż nurtu? Orzecznictwo Sądu Najwyższego Stanów Zjednoczonych w sposób znaczący wpłynęło na porządek prawny w zakresie ekonomii i prawa pracy. Niestety, część decyzji sądu nie była kompatybilna z wizją progresywnych reformatorów, gdyż bardziej odzwierciedlała przekonania ideologiczne sędziów niż ich inklinacje w kierunku reform.

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I. Introductory remarks

George W. Ruiz advanced the thesis that “Americans have always had a strong psychological attachment to the idea of *progress*, although they have differed at times as to the precise meaning of the word”². In fact, progress has been used to legitimize the decisions of federal and state authorities, to justify increased democratization, the abolition of slavery, and industrialization. For some, the common thread of various interpretations of progress was the attempt to provide a wider spectrum of the American populace with greater economic, political and social opportunity.

² G.W. Ruiz, *The Ideological Convergence of Theodore Roosevelt and Woodrow Wilson*, “Presidential Studies Quarterly” 1989, vol. 19, No. 1, Part 1: American Foreign Policy for the 1990s and part 2: Wilson and the Progressive Era, p. 159.

During a few decades between the end of the Reconstruction (1865–1877) and the First World War, the United States underwent a huge transformation. Some scholars see this change simply as “a matter of settling the remaining territories, closing the frontier, and admitting new states”³. For some, this period is notable for the emergence of large-scale reform movements which oscillated between populism and progressivism. The other representatives of the academic milieu emphasize “the shift of both numerical preponderance and political power from the farm to city”⁴, while others highlight the basic change in the decline of independent small business in the face of huge monopolies. The authors dealing with foreign policy also highlight the drift of the United States from isolation to interest in worldwide politics to becoming a true world power⁵.

In the late 19th and early 20th centuries, American reform movements tried to match American ideals with the challenges of the times. Progressivism was a reaction to the social and political consequences of unrestrained rapid urbanization, *laissez-faire* capitalism and industrialization. It is significant that the progressive movement had never existed as a recognizable organization with common goals. In fact, following the 1890s, “there were many progressive movements on many levels seeking sometimes contradictory objectives”⁶.

American Progressivism has been the subject of research of many academic disciplines. Reflections concerning the Progressive Era are very impressive, and the American subject-related literature is extensive. However, it should be emphasized that the authors of older publications (e.g., Richard Hofstadter, William E. Leuchtenburg, Robert H. Wiebe) present a different assessment of the events than contemporary scholarship (e.g., Shelton Stromquist, Maureen A. Flanagan, Rebecca Edwards). Unfortunately, since the modest scope of this article does not allow for an exhaustive treatment of the subject, the present work is contributory in nature. This article focuses on the perception of the activities of the U.S. Supreme Court in the context of the progressive

³ D.H. Donald, *Foreword*, [in:] R.H. Wiebe, *The Search for Order, 1877–1929*, New York 1967, p. vii.

⁴ *Ibidem*.

⁵ *Ibidem*.

⁶ A.S. Link, *What Happened to the Progressive Movement in the 1920s?*, “The American Historical Review” 1959, vol. 64, No. 4, p. 836.

reforms and ideas advanced during the Progressive Era. The judgments and opinions of the Supreme Court are not exhaustively reviewed and only certain controversial cases are selected for closer consideration. The main questions the present study strives to answer are: Was American legal thought really progressive? Were the U.S. Supreme Court judgments in conformity with the ideas of Progressivism? How can we assess the involvement of the U.S. Supreme Court in eugenic practices? In this particular study, the historic-descriptive method of theoretical analysis, and the formal-dogmatic method, precisely - the analysis of legal texts (according to the Polish typology), were applied to address the research questions and to reach some conclusions. The development of the Progressive Era and directions of progressive reforms are presented in the first part of the article. The second part of the publication is devoted to evaluating the activities of the U.S. Supreme Court under Melville Fuller and Edward Douglas White and analyzing the legitimization of eugenic practices.

II. The development of the Progressive Era and directions of progressive reforms

The Gilded Age began after the demise of Reconstruction and lasted until the end of the 19th century. It was a period of rapid economic growth, particularly in the north and west. Many problems faced by American society during the Gilded Age gave rise to the expected reforms of the subsequent Progressive Era. It should be emphasized that in American historiography, the debate concerning the exact contours of the Progressive Era is still ongoing⁷. Generally, it is claimed that it lasted either until World War I or to the Great Depression. Historians date the beginning of the Progressive Era as the period of mobilizing for reforms around 1900⁸, although some scholars recently

⁷ See: R. Edwards, *Politics, Social Movements, and the Periodization of U.S. History*, "The Journal of Gilded Age and Progressive Era" 2009, vol. 8, No. 4, p. 463; D.W. Grantham, *The Contours of Southern Progressivism*, "The American Historical Review" 1981, vol. 86, No. 5, pp. 1035–1059; R.B. Nye, *Midwestern Progressive Politics: A Historical Study of its Origins and Development, 1870–1958*, East Lansing 1959, pp. 183–188.

⁸ Cf.: R.H. Wiebe, *op.cit.*, p. 166.

moved back the starting date to when Jane Addams founded Hull House in Chicago in 1889. Rebecca Edwards argued that progressive movements were active even during the last decade of the 19th century because the Progressives, those who worked to regulate and restrict the extraordinary power of big business, purify politics, reduce poverty and other economic injustices, were active in the late 19th century⁹. A review of recent literature suggests that reconsideration of the dates of the period may be justified. Edwards even delineated a Long Progressive Era dating from 1880 to 1894, and a Late Progressive Era running from 1894 to 1920¹⁰. Progressives reached their height in the early 20th century as a response to vast industrialization, the growth of large corporations and the fears of corruption in American politics¹¹. Large-scale corporate enterprises influenced the fact that manufacturing replaced agriculture as the primary source of national wealth. By 1900, the United States had become the foremost industrial country in the world. Railroads had created a national market for goods, linking small towns to urban centers and farming communities. Private investment capital was essential to finance the spectacular economic boom. In such a situation, farmers were drawn into the market economy.

Although the American economy grew at an extraordinary rate, generating unprecedented levels of wealth, the nation had to face the growing division between the haves and the have-nots¹². The emergence of an industrial and financial aristocracy caused discontent in some parts of American society. The situation led to political protests and calls for radical legal changes to restrict private economic power and to help the poor. Americans tried to come to terms with the rapid changes of the late 19th century, yet as much as Americans wanted political and social reforms, they disa-

⁹ R. Edwards, *New Spirits: Americans in the "Gilded Age" 1865–1905*, 2nd edn., Oxford-New York 2011, p. 5. About rethinking conventional periodization of the Gilded Age and the Progressive Era see also: E.I. Perry, *Men Are from the Gilded Age, Women Are from the Progressive Era*, "The Journal of Gilded Age and Progressive Era" 2002, vol. 1, No. 1, pp. 25–48.

¹⁰ R. Edwards, *Politics...*, p. 472.

¹¹ See more about the roots of progressive change in: L.L. Gould, *America in the Progressive Era, 1890–1914*, London-New York 2013, pp. 1–18; J.M. Beeby, B.M. Ingrassia, *Precursors to Gilded Age and Progressive era Reforms*, [in:] *A Companion to the Gilded Age and Progressive Era*, eds. C. McKnight Nichols, N.C. Unger, Malden-Oxford 2017, pp. 21–30.

¹² For more see: R. Hofstadter, *The Age of Reform*, New York 1955, pp. 109–120.

greed on the kinds of reforms desired. The revolutionary economic growth had changed the ways of living and dislocated the population. Progressive causes, to various degrees, coincided with demands for a new redistribution of wealth across the republic. Federal legislation would have played a key role in this matter¹³. Because of the citizens' discontent and protest movements, the states adopted a variety of measures to protect the interests of their citizens and they began to erect barriers to the free flow of capital and interstate trade.

It is significant that by the third decade of the 20th century, many social problems had been solved, however, there were also some untouched. Although the central theme of the Progressivism reform was to protect the public interest and common good, the terms were understood in diverse ways. Progressivism developed in many different versions in every region of the country, and it should be emphasized that it crossed class, party, and gender lines. In the more industrialized and urbanized northwest and midwest, corruption in city and state government was fiercely attacked by the Progressives. They fought for public education, responsive governments, safe cities and against the repression of workers in factories and mines. In the agrarian South, the main goals for Progressives were efforts to curb the exploitation of child labor, end railroad monopolies, treat chronic diseases and access scarce credit. Many supporters of the movement also promoted women's suffrage. Shelton Stromquist even emphasizes the multiplicity of reform campaigns as a single movement¹⁴. Most scholars agree that during the Progressive Era, the directions of the changes were "progressive", but there is no consensus on how "progressive" they were¹⁵.

¹³ A.R. Amar, *America's Constitution. A Biography*, New York, 2005, p. 405.

¹⁴ S. Stromquist, *Reinventing "The People": The Progressive Movement, the Class Problem, and the Origins of Modern Liberalism*, Urbana-Chicago 2006, pp. 1–204.

¹⁵ It should be taken into account that there is no consensus in American historical interpretation of Progressivism. In the perception of Glen Gendzel, the American "progressives" a century ago must have shared "something in common". "The historical emphasis in studies of progressivism has shifted from political disputes to demographic diversity, drawing attention to the race, class, ethnic, and gender identities of various reformers and organizations", G. Gendzel, *What the Progressives Had in Common*, "The Journal of the Gilded Age and Progressive Era" 2011, vol. 10, No. 3, pp. 331–339.

In the late 1880s, the development of government regulatory services began. In 1887, the Congress issued the Interstate Commerce Act¹⁶, and the Interstate Commerce Commission was created as an independent regulatory agency¹⁷. To break up monopolies, the Granger Movement and other organizations lobbied Congress to regulate monopolistic practices. The Act was passed in response to rising public concern over the growing power and wealth of the great corporations. At the beginning of the 20th century, the federal authorities passed amendments to the Interstate Commerce Act to strengthen and extend the power of agency over further areas¹⁸. Issued in 1890, the Sherman Anti-Trust Act was a landmark federal legal act of antitrust law, which regulated interstate commerce¹⁹.

The New Nationalism of Theodore Roosevelt, *The New Freedom* of Woodrow Wilson, and particularly the presidential election of 1912 represented a contest between two candidates who supported competing strands of progressivism expressed in their party platforms²⁰. Roosevelt's policy included a broad range of political and social reforms. During his presidency, Wilson focused on three areas of reforms: tariff reform, business reform and banking reform²¹. In 1913, the *Underwood Tariff Act*²² lowered basic tariff rates from 40% to 25% against the protests of the protectionist lobby. In 1914, the *Federal Trade Commission Act* was enacted which established the Federal Trade

¹⁶ Pub. Law 24 Stat 379 (1887).

¹⁷ For more about the activities of the Commission see: E. Sokalska, *Legal and Political Dimensions of American Federalism: Development and Interpretations*, Olsztyn 2018, p. 260.

¹⁸ Elkins Act, Pub. Law. 32 Stat. 847 (1903); Mann-Elkins Act, Pub. Law. 36 Stat. 539 (1910), and subsequent acts.

¹⁹ Pub. Law 26 Stat. 209 (1890). For more about the origins of the act see: G. Stigler, *The Origin of the Sherman Act*, "Journal of Legal Studies" 1985, vol. 14, pp. 1–12; P. Newman, *Revenge: John Sherman, Russell Alger and the Origins of the Sherman Act*, "Public Choice" 2018, vol. 173, pp. 257–275.

²⁰ For further reading see: E. Sokalska, *Legal and Political Dimensions...*, pp. 279–285; W.B. Murphy, *The National Progressive Republican League and the Elusive Quest for Progressive Unity*, "The Journal of the Gilded Age and Progressive Era" 2009, vol. 8, No. 4, pp. 515–543.

²¹ For more see: D.S. Wright, *A Century of the Intergovernmental Administrative State: Wilson's Federalism, New Deal Intergovernmental Relations, and Contemporary Intergovernmental Management*, [in:] *A Centennial History of the American Administrative State*, ed. R.C. Chandler, New York 1987, pp. 219–260.

²² 38 Stat. 114 (1913).

Commission to investigate illegal business practices. In 1914, the Clayton Anti-Trust Act was a subsequent regulation in the sphere of anti-competitive practices²³. Banking reform came with the *Federal Reserve System* in 1913 and the *Federal Farm Law Act*, which set up Farm Loan Banks to support farmers. The passage of the Federal-Aid Highway Act in 1916 was an example of reform efforts at the national level²⁴. The newly-created Federal Highway Research Board was an example of the national government's interest in supporting research for practical application to public problems. It is significant that basic innovations at the local level of administration also catalyzed public service programs in future decades. Enacted in 1913, the Sixteenth Amendment allowed Congress to levy income taxes without apportioning it among the states based on population²⁵. In this way, the federal government income increased and the grant-in-aid system was developed. In 1920, the Nineteenth Amendment was the success of the women's suffrage movement. It prohibited the states and federal government from denying U.S. citizens the right to vote based on gender.

III. The U.S. Supreme Court under Melville Fuller and Edward Douglas White

The Supreme Court during Morrison R. Waite's tenure (1874–1888) had to confront the problem of respect for constitutional rights and the dynamic reality of a changing economy. The Court played a key role in interpreting post-war constitutional amendments and the law of the Congress, particularly concerning the protection of civil rights. In the last decades of the 19th century, economic and social changes influenced the development of new patterns of constitutional thought. 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

²³ Pub. Law 63–212, 38 Stat. 730, 15 U.S.C. § 15–27, 29 U.S.C. § 52–53 (1914).

²⁴ Pub. Law. 39 Stat. 355. It was a categorical grant program which enhanced an active administrative role of the national government.

²⁵ For more see: P. Laidler, *Sąd Najwyższy Stanów Zjednoczonych Ameryki: od prawa do polityki*, Kraków 2011, p. 90.

any person of life, liberty, or property without due process of law” formed the basis for this new view. Businesses perceived the Fourteenth Amendment as a federal guarantee of economic rights and any interference with these rights was deemed illegal.

The turn of the 19th and 20th centuries became the period when the Supreme Court restored its position in American public life. However the legacy of the Court is often criticized, particularly the activities of Melville Fuller, the 8th Chief Justice²⁶. Fuller cooperated with justices who represented different political visions of American society. American legal scholarship emphasizes the significance of such justices as John Marshal Harlan and Oliver Wendell Holmes, Jr., who often opposed Chief Justice Fuller. In the 20th century, their distinctive opinions inspired several rulings of the Supreme Court. The Court tried to stabilize tensions and to guide the actions of the American judiciary branch. It is significant that the distinctive direction of its rulings has remained controversial to the present day. Edward Douglas White was the 9th Chief Justice in the period from 1911 to 1930. During his tenure, the expected ‘refreshment’ of adjudication did not take place.

The Supreme Court in its rulings affirmed the federal judicial supervision of state economic legislation²⁷. In the sphere of economic regulations, the Supreme Court examined cases which appeared as the effect of the Sherman Anti-Trust Act rules. The Act in reaction to harmful practices of monopolies triggered, for example, *United States v. E.C. Knight Corporation*, known also as *Sugar Trust Case* in 1895²⁸. The case concerned the sugar monopoly. The stock market activities of *A.C. Knight Co.* were the subject of the case. The firm had bought shares in a sugar enterprise. Federal courts ruled that the Sherman Anti-Trust Act did not apply to the case. It was a very narrow interpretation of the rules of federal law²⁹. Business had to be ready to meet the

²⁶ C. Warren, *The Supreme Court in the United States History*, vol. 1, Boston 1922, pp. 413–450. About Fuller’s nomination see: H.J. Abraham, *Justices, Presidents and Senators: A History of the United States Supreme Court Appointments from Washington to Clinton*, new and revised edn., Lanham 1999, pp. 113–115.

²⁷ Cf.: J.W. Ely, *The Fuller Court: Justices, Rulings and Legacy*, Santa Barbara-Denver-Oxford, 2003, p. 6.

²⁸ 156 U.S. 1 (1895).

²⁹ In the context of the battle against monopoly see also the other cases, e.g.: *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Tobacco Co.*, 221 U.S. 106 (1911).

challenge in a new commercial environment. Interestingly enough, the state courts in cases involving inter-state commerce discriminated against businesses from other states. Therefore, corporations and other businesses started to turn to the federal courts to resolve cases³⁰.

It should be noted that from 1880 to 1910, legal regulations concerning workplace safety and health in the United States were modified. Workplace safety laws, developing at the state level, initially were remarkably uniform across the country. The laws then evolved unevenly from state to state, eventually becoming uniform national laws³¹. Founded in 1906, the American Association for Labor Legislation attracted influential academics interested in social insurance. The purpose of a broad community of reformers was to build an alliance of experts and reformers to strengthen social insurance and labor-management reconciliation.

As far as the activities of the U.S. Supreme Court justices are concerned, it appears that some of them concentrated only on the problems of operating a selected branch of the economy, or the area of social life in the examined cases, whereas some of them looked further at the context of the general role of the union or states in the creation of a new economic and social order. The ruling in *Lochner v. New York*³², holding that limits of working time violated the Fourteenth Amendment, is sometimes perceived as one of the most significant in the history of American law³³. The case concerned the problems of protecting the working class because it affected the legality of labor legislation that limited working hours. The arguments presented by the justices during the discussion over the ruling were often ideological. The proponents of restricted interference of the state in the economy and social area succeeded in

³⁰ B. Friedman, *The Will of the People. How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, New York 2009, p. 151.

³¹ D.W. Rogers, *From Common Law to Factory Laws: The Transformation of Workplace Safety Law in Wisconsin before Progressivism*, "The American Journal of Legal History" 1995, vol. 39, No. 2, p. 177.

³² 198 U.S. 45 (1905).

³³ See, e.g.: D.E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform*, Chicago 2012, pp. 23–39; Idem, *Lochner v. New York: A Centennial Retrospective*, "Washington University Law Review" 2005, vol. 83, pp. 1469–1474; H. Schweber, *Lochner v. New York and the Challenge of Legal Historiography*, "Law & Social Inquiry" 2014, vol. 39, p. 242–272; B. Schwartz, *A History of the Supreme Court*, New York, 1995, pp. 190–202.

the mentioned case. They believed that such interference disturbs economic relations and it could have negative effects on society. It is significant that the ruling in *Lochner v. New York* has been condemned on many occasions. In the 1980s, the spectacular success of the Chicago school of economics contributed to changing public opinion on the ruling. Bernard H. Siegan and Richard Posner influenced the debate on the revision of the Supreme Court's view³⁴.

Decided in 1918, *Hammer v. Dagenhart*, known also as the *Child Labor* case, was consistent with the field of labor law³⁵. The Supreme Court considered the consequences of the Congressional regulation of the Keating-Owen Child Labor Act of 1916 banning the interstate sale of goods made by children under fourteen or children under sixteen (working more than sixty hours per week). Responding to growing public concern, some states sought to impose local restrictions on child labor. The purpose of the Act was to curb child labor. In the Supreme Court's opinion, the Act was not in conformity with the *Commerce clause* because the problem of child labor should have been resolved at the state level. The decision was overruled in 1941, in the case of *United States v. Darby Lumber Co.*³⁶

Growing industrialization and urbanization of the country caused massive immigration, especially in the late 19th century. Since a part of American society was not in favor of such open immigration, pressure groups lobbied Congress to tighten the laws governing immigration. The situation of Chinese workers who migrated on a large scale to the United States was very difficult. Often coming illegally, they were often exploited by American employers. In response to Chinese immigration, in 1882 Congress began introducing the Chinese exclusion acts and many cases brought before the Supreme Court were a direct result of these regulations (*Chinese Exclusion Cases* in 1884–1905). In its rulings, the Supreme Court often repealed restrictive regulations and the Chinese issue was often present in the public dialogue³⁷. The United States changed the open-door policy in the third decade of the 20th century.

³⁴ Cf.: G. Górski, *Sąd Najwyższy Stanów Zjednoczonych do 1930 roku*, Lublin 2006, p. 238.

³⁵ 247 U.S. (1918).

³⁶ 312 U.S. (1941).

³⁷ Cf.: G. Górski, *op.cit.*, p. 225. See, e.g.: *Chew Heong v. United States* 112 U.S. 536 (1884), or *Chae Chan Ping v. United States* 130 U.S. 581 (1889). For further reading see: Ch.J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America*,

Racism was so deeply ingrained in the American tradition that it was very difficult to eradicate. The Supreme Court in *Plessy v. Ferguson*³⁸ established the *doctrine of separate but equal*. It upheld the law of Louisiana that mandated racially segregated accommodation on trains, by ruling that so long as the segregated facilities were equal, they did not violate the Fourteenth Amendment's equal protection clause³⁹. In 1898, the Supreme Court reviewed provisions of the state constitution that set requirements for voter registration in *William v. Mississippi*⁴⁰. The Court validated the use of state literacy tests. It allowed the state to determine standards under which citizens would gain the right to vote. It should be emphasized that the provisions had a discriminatory impact on African Americans. *The doctrine of separate but equal* was overturned later in the 20th century by a series of Supreme Court decisions, starting with *Brown v. Board of Education of Topeka*⁴¹ in 1954. The process of departure from the separate-but-equal doctrine involved federal legislation and many court proceedings even in the 1960s and 1970s.

IV. The U.S. Supreme Court and the legitimization of eugenics practices

In the perception of many Europeans, the term “eugenics” in contemporary scientific discourse is largely associated with the criminal experimental eugenics of Nazi Germany. It might be surprising for a modern reader to find a link between progressive American reforms and the biology of human inheritance. During the Progressive Era, eugenic approaches to economic and social reforms were popular and widespread⁴². Economists aimed at reforms

Berkeley, 1994, pp. 1–385; E. Higginbotham, *Review: In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America* by Charles J. McClain, “Law and History Review” 1996, vol. 14, No. 1, pp. 203–206.

³⁸ 163 U.S. 537 (1896).

³⁹ See more about the case in: E. Sokalska, *The U.S. Supreme Court...*, pp. 97–100.

⁴⁰ 170 U.S. 213 (1898).

⁴¹ 347 U.S. 483 (1954).

⁴² Thomas C. Leonard from Princeton University discussed the influence of progressive eugenic ideas upon American economic reform. He drew attention to the areas of immigration and labor reform. See more in: T.C. Leonard, *Retrospectives: Eugenics and Economics in the Progressive Era*, “The Journal of Economic Perspectives” 2005, vol. 19, No. 4, pp. 207–224.

which “defended exclusionary labor and immigration legislation on the grounds that the labor force should be rid of unfit workers, whom they labeled *parasites, the unemployable, low-wage races* and the *industrial residuum*”⁴³. Based on the assumption that differences in human intelligence, character and temperament are due to differences in heredity, the eugenicists strived to improve human heredity by the social control of human breeding. They advanced the idea that socially undesirable traits were the product of bad heredity. Progressive eugenicists’ sought to improve the “race” by furthering the productivity of citizens. Clearly, the eugenics of the Progressive Era appeared to be racist. However, in the Progressive Era, “race” was an imprecise expression and it had different connotations than today. The use of ‘race’ meant nationality or ethnicity. American eugenicists, besides the people regarded as deficient in intellect, criminals, and morally deficient, often included women and the lower classes in the category of unfit persons.

“Race suicide” was a term for the process by which natives (racially superior) were outbred by immigrants (racially inferior). However, leading professional economists did not emphasize the quantity, but rather the quality of immigrants. The proponent of the race-suicide theory was Edward A. Rose. He claimed that although the native workers’ productivity was higher, they would be displaced by immigrants from China who were racially disposed to work for lower wages. In his opinion, the legitimization of “social control” was necessary⁴⁴.

Progressive Era eugenic ideas were influential, in fact, eugenics found proponents whose ideologies spanned the entire political spectrum. The second half of the Progressive era brought many statutory victories by the progressive economists and their proponents. Their reforms included state laws that regulated working conditions, fixed minimum wages, determined working hours and banned child labor. Eugenic views justified exclusionary immigration legislation and economists affiliated with the American Association for Labor Legislation advocating labor reforms were under the influence of race-suicide theories⁴⁵.

⁴³ Ibidem, p. 208.

⁴⁴ Ibidem, pp. 214, 217.

⁴⁵ A.S. Orloff, T. Skocpol, *Why not Equal Protection? Explaining the Politics of Public Social Spending in Britain, 1900–1911, and the United States, 1880–1920*, “American Sociological

Some of the eugenic solutions were deeply ingrained in the state society and survived for many years. For example, in 1924 in Virginia, the state General Assembly enacted eugenic sterilization and marriage restriction laws. In 1927, in the ruling *Buck v. Bell*⁴⁶, the U.S. Supreme Court affirmed the constitutionality of Virginia's law allowing state-enforced sterilization, and it upheld Virginia's sterilization law. In an infamous opinion concerning Carrie Buck, her mother, and her daughter who were all suspected of being feeble-minded, Oliver Wendell Holmes, Jr. declared that "three generations of imbeciles are enough". Consequently, sterilization in Virginia was higher than in other states. Only in the 1967 case *Loving v. Virginia*⁴⁷, did the Supreme Court strike down Virginia's anti-miscegenation statutes under the equal protection and due process clauses of the Fourteenth Amendment⁴⁸.

V. The evaluation of the U.S. Supreme Court activities

The activities of the Supreme Court during the Progressive Era have been the subject of various interpretations in the American literature in the 20th and 21st centuries⁴⁹. Undeniably, the work of the U.S. Supreme Court was influenced by economic, social, and intellectual currents of the late 19th century⁵⁰. Although the critics of the Supreme Court activities have focused on its conservative nature, particularly in restricting federal and state authorities from interference with the economy and labor relations, it is argued that it was not the intention of the Supreme Court to be too restrictive concerning the role of federal authorities in the economy. The Court rather preferred to view the area of the economic activities as being free from the pressure of the federal state⁵¹.

Review"1984, vol. 49, No. 6, p. 726; T.C. Leonard, op.cit., p. 212.

⁴⁶ 274 U.S. 200.

⁴⁷ 388 U.S. 1.

⁴⁸ More about eugenics and its traces in Virginia's state law during the Progressive Era see: G.M. Dorr, *Segregation's Science: Eugenics and Society in Virginia*, Charlottesville-London, 2008, pp. 48–69.

⁴⁹ W.H. Rehnquist, *The Supreme Court. Revisited and Updated*, New York, 2001, pp. 100–110.

⁵⁰ J. Ely, op.cit., p. 4.

⁵¹ Cf.: G. Górski, op.cit., p. 243.

Professor Barry Friedman noted that American judiciary repeatedly struck progressive measures, and, in some sense, the conflict of power between the courts and lawmakers was noticeable⁵². The activities of the U.S. Supreme Court were also criticized by Rebecca Edwards, who observed that “if being thwarted by the Supreme Court keeps one from being called “progressive”, then the legions of twentieth-century reformers will have to forego their titles, as well; an important continuity was that, with notable exceptions, the Supreme Court remained hostile to progressive measures from Reconstruction well into the New Deal”⁵³. A progressive federal income tax enacted in 1894 was struck down by the Supreme Court, and the Sixteenth Amendment concerning income tax was enacted two decades later⁵⁴.

Barry Friedman also noted the widespread public discontent concerning the activities of the Supreme Court. The famous speech (1895) of William Howard Taft addressed to the American Bar Association, in which he responded to popular criticism, was entitled *Criticisms of the Federal Judiciary*. In 1906, Roscoe Pound (the Dean of Nebraska Law School) presented the speech *Causes of Popular Dissatisfaction with the Administration of Justice*. The public was losing faith in the judiciary, which was emphasized by Roosevelt in his message to Congress in 1908⁵⁵. It was notable that the same year, all parties had expressed concerns about the judiciary (particularly with regard to labor injunctions) in their party platforms.

It is significant that the period from the late 19th century until 1937, in which the Supreme Court used substantive due process to invalidate state economic regulations, is sometimes labelled as the “Lochner era”. In the opinion of Professor Erwin Chemerinsky, it was the time when the Supreme Court protected state sovereignty by invalidating federal statutes as exceeding the scope of Congressional commerce and spending powers in an aggressive way⁵⁶. During the “Lochner Era”, the Supreme Court also actively safe-

⁵² B. Friedman, *op.cit.*, p. 174.

⁵³ R. Edwards, R., *Politics...*, p. 466.

⁵⁴ *Ibidem.*

⁵⁵ B. Friedman, *op.cit.*, pp. 178–179.

⁵⁶ E. Chemerinsky, *The Supreme Court, 1988 Term, Foreword: The Vanishing Constitution*, “Harvard Law Review” 1989, vol. 103, No. 1, 1989, p. 50.

guarded some economic liberties by ruling unconstitutional numerous laws enacted in the states as interfering with freedom of contracts⁵⁷.

VI. Concluding remarks

The Progressive Era is perceived by American scholars as one of the most important periods in American history. The United States experienced a great change in the role of the government, particularly in terms of its involvement in the regulation of business and industry during that time. The era is often characterized as the first period in which the power of government was increased for egalitarian reasons. However, the thesis is sometimes advanced that federal legislation was designed by industry to serve its own purposes.

In his article, *What Happened to the Progressive Movement?*⁵⁸ Artur S. Link claimed the disintegration and decline of the Progressive Movement in the 1920s was due to “a substantial paralysis of the progressive mind”⁵⁹, which was the result of the repudiation of purposes and ideals by many intellectuals and urban middle classes. The problem was also “the lack of any effective leadership”⁶⁰, the lack of a suitable political apparatus, infighting among Progressives, a lack of agreement upon a common program, the instability of the movement, and the absence of national leadership to unite the progressive movement. Although there were components of a potential movement, it was not organized as a progressive coalition capable of merging into a united front. According to Link, an important external factor of the decline of Progressivism was also a widespread defection from its ranks of the urban middle-class, which was driven by technological, economic and demographic changes⁶¹. In the perception of Shelton Stromquist, progressivism departed

⁵⁷ E.g.: *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), *Williams v. Standard Oil*, 278 U.S. 235 (1929). It is significant that in 1937 in *West Coast Hotel Co. v. Parrish* (300 U.S. 379) the Supreme Court upheld the constitutionality of minimum wage legislation enacted by the State of Washington, and overturned an earlier decision in *Adkins v. Children’s Hospital*.

⁵⁸ A.S. Link, op.cit., pp. 833–851.

⁵⁹ Ibidem, p. 841.

⁶⁰ Ibidem, p. 842. However, such a statement is criticized by the proponents of Theodore Roosevelt and Woodrow Wilson.

⁶¹ Ibidem, pp. 840–843.

in significant ways from its classical antecedents, and “a new theory and practice of liberalism, in the guise of what contemporaries called *progressivism*, gradually took shape out of the shock and disorientation brought on by raging industrialization and the class warfare it precipitated”⁶².

The differing views and approaches in American scholarship toward progressivism in the U.S. deserve attention. Progressive attitudes toward the economy, taxation, foreign policy, labor law, social standards, human rights, eugenic ideas, women’s suffrage, rapid urbanization and unrestricted immigration highlighted the necessity of reforms, however, the amelioration was seen from a variety of perspectives. Some progressive reformers concentrated on the federal and state governments, looking for better ways to provide changes in society and the economy. They also repeatedly warned that the corrupt political system should be modernized, and they hoped that by regulating large corporations and monopolies they could develop a modern economy. The reformers were interested in social and political reform as well as the limitation of political corruption caused by political machines. They emphasized the need for civil service reform, increased political rights for women and workers, food safety laws and professionalism and bureaucratization of the old system. Some called for a strong government guided by experts rather than public opinion⁶³.

The jurisprudence of the Supreme Court under Fuller profoundly influenced the shape of legal order in the area of economic and labor law, which developed rapidly at the turn of the 19th and 20th centuries. *Judicial review* developed into an important part of the American constitutional order. Undoubtedly, the U.S. Supreme Court should have played an important part in the progressive developments. Unfortunately, many of the Court’s activities do not confirm this thesis. The establishment of the *separate but equal doctrine* in *Plessy v. Ferguson* may be seen as a symbol of resurgent white supremacy. The decision reflected the departure of Southern conservative whites from post-Revolutionary War progressive developments. Eugenic practices were also approved and legitimized, e.g., in *Buck v. Bell*. It appears that some decisions of the U.S. Supreme Court were not compatible with the visions of pro-

⁶² S. Stromquist, *op.cit.*, p. 191.

⁶³ *Rhetoric and Reform in the Progressive Era*, ed. J.M. Hogan, East Lansing 2003, p. xv.

gressive reformers and reflected the ideological attitudes of the justices rather than an aspiration for reform.

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