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## Populist and Progressive Strands in American Constitutionalism

Louis Michael Seidman

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## Article

### Populist and Progressive Strands in American Constitutionalism

LOUIS MICHAEL SEIDMAN

*Modern constitutional law can best be understood as the product of conflicting populist and progressive sensibilities with deep roots in the nation's past. Populist and progressive versions of constitutional law stem from different versions of the corruption that the Constitution should address. For progressives, corruption consists of contamination of government expertise by ignorant and prejudiced mass opinion. In contrast, populists distrust rationalistic, elite opinion. The corruption they fear is elite government control that leads to the oppression of ordinary people by "their betters." Progressive "civil liberties" focus on protection of government from mass hysteria and prejudice, while populist "civil liberties" focus on protection from government dominated by elites.*

*This Article examines how this conflict has played out throughout the twentieth century, with special emphasis on some iconic cases and events: the Scopes Monkey Trial, Buck v. Bell, Skinner v. Oklahoma, West Virginia State Board of Education v. Barnette, and the Warren Court experience. It then discusses the reasons why, in modern times, populist constitutional discourse has migrated from the left to the right side of the political spectrum. A conclusion explores strategies for patching together a renewed alliance between populists and progressives.*

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# Progressive and Populist Strands in American Constitutionalism

LOUIS MICHAEL SEIDMAN\*

## INTRODUCTION

In the summer of 1925, two titans of the American left<sup>1</sup>—William Jennings Bryan and Clarence Darrow—showed up in the small town of Dayton, Tennessee. Under a blazing sun, they battled over the conflicting populist and progressive strands of the mainstream, American liberalism.<sup>2</sup>

The struggle concerned a newly enacted Tennessee statute that had the effect of prohibiting teaching evolutionary theory in public schools. Bryan, the populist, argued that the statute should be enforced. He did so in the name of the dignity of ordinary people and evangelical Christianity. Darrow, the progressive, argued against the statute. He did so in the name of science and enlightenment values. The struggle ended inconclusively. John Scopes, a young high school teacher, was convicted of violating the statute, but his conviction was reversed on a technicality.<sup>3</sup>

Two years later, the same forces, although not the same players, clashed again in the basement of the United States Capitol, where the United States Supreme Court heard oral arguments. The dispute before the Court was about a state eugenics statute that would lead to the sterilization of a young woman, Carrie Buck.<sup>4</sup> Bryan was now dead, but he had spent his last years

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<sup>1</sup> Darrow spent his professional life representing radicals and labor organizers. ANDREW E. KERSTEN, CLARENCE DARROW: AMERICAN ICONOCLAST 121 (2011). Bryan ran for President three times as an opponent of plutocracy and class privilege. MICHAEL KAZIN, A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN xiii (2006) [hereinafter KAZIN, A GODLY HERO].

<sup>2</sup> “Populism,” “progressivism,” and “American liberalism” are all vague terms with contested meanings. By “American liberalism,” I mean a political orientation that emphasizes the inequalities and power imbalances produced by private markets and favors redistribution to correct these imbalances. As we shall see, although populists and progressives shared this orientation, they disagreed about the source of the problem, the appropriate solutions, and the intersection between the problem and protection for civil liberties. See *infra* Part I (explaining how I use the terms “populism” and “progressivism”).

<sup>3</sup> For a detailed account of the trial, see EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA’S CONTINUING DEBATE OVER SCIENCE AND RELIGION 87–146 (1997).

<sup>4</sup> For histories of the controversy, see ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 253–54, 270 (2016); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (2008).

strongly attacking eugenics, and his populist allies shared his views.<sup>5</sup> Although Darrow himself opposed eugenics,<sup>6</sup> most of his progressive allies strongly favored the practice as a manifestation of scientific rationality.<sup>7</sup> This time, the outcome was hardly inconclusive. In an 8–1 decision with the majority opinion written by Oliver Wendell Holmes and joined by progressive champion Louis Brandeis, the Court held that “[t]hree generations of imbeciles are enough” and upheld the sterilization order.<sup>8</sup>

All of this happened many years ago. One might have thought that passions would have cooled. And yet, almost a century later, the struggle between populists and progressives continues. As political scientists Gary Miller and Norman Schofield point out, the angry emotions that Bryan and Darrow ignited over the intersection of social and religious issues on the one hand and political and cultural power on the other remain central to our politics.<sup>9</sup> Even more surprisingly, the disputes remain at the center of modern constitutional law. Only recently, Justice Clarence Thomas devoted nineteen pages of the United States Reports to an impassioned attack on eugenics and Darwinian thought, which he associated with “progressives, professionals, and intellectual elites.”<sup>10</sup> Thomas’s opinion is hardly aberrational. Both he and some of his colleagues regularly enrage constitutional progressives when they rehearse populist complaints against elite control of government institutions and elite denigration of the religious and other convictions of “ordinary Americans.”<sup>11</sup>

On the other side, progressive Supreme Court Justices defend the value of science, condemn the penetration of religion into the public sphere, and support the independence and expertise of executive branch agencies. They regularly enrage conservative populists with the claim that traditional beliefs about marriage, gender, sex, and abortion are manifestations of unconstitutional discrimination.<sup>12</sup> Darrow and Bryan would have had no trouble recognizing this rhetoric.

It is not as if nothing has changed, however. The arguments in *Scopes* and *Buck* were intermural fights on the left. Today, liberals have retained their allegiance to progressive values, but the political valence of populism has shifted. Miller and Schofield point out that “[William Jennings] Bryan’s position on social policy issues is now ascendant in the Republican Party”<sup>13</sup>

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<sup>5</sup> See *infra* pp. 432–33.

<sup>6</sup> See *infra* note 128 and accompanying text.

<sup>7</sup> See *infra* p. 432–33.

<sup>8</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>9</sup> See Gary Miller & Norman Schofield, *The Transformation of the Republican and Democratic Party Coalitions in the U.S.*, 6 PERSPS. ON POL. 433, 435 fig.2, 436 (2008) (discussing modern salience of Bryan’s vision and continuing relevance of the dispute between elites and agrarian populists).

<sup>10</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring). For a discussion of this case, see *infra* notes 286–88 and accompanying text.

<sup>11</sup> See *infra* note 346 and accompanying text.

<sup>12</sup> See *infra* pp. 463–67.

<sup>13</sup> Miller & Schofield, *supra* note 9, at 446.

and that transformation is also beginning to extend to economic issues.<sup>14</sup> Once again, the transmutation has important parallels in constitutional rhetoric. It is now usually the Supreme Court's most conservative Justices who are the most fervent defenders of populist constitutionalism.<sup>15</sup>

How did this happen? This Article traces the strange history of populist and progressive constitutionalism over the last century. It argues that our modern constitutional history is best understood as an argument over conflicting populist and progressive worldviews and that much of our current difficulties can be traced to the migration of populist thought from the left to the right.

The story is confused and complicated because the populist and progressive movements overlapped and because politicians and political movements cannot be reduced to simple, coherent ideologies. Still, if we treat "populism" and "progressivism" as ideal types,<sup>16</sup> a revealing pattern emerges.

The beginning point is the contrasting stances taken by populists and progressives regarding ordinary, nonconstitutional disputes. Both populists and progressives worried about the interaction between markets and public power, but their focuses differed. Speaking very broadly, the populist impulse located the source of economic oppression in government corruption. According to this story, corrupt politicians have handed out special privileges to private interests who have used their authority to create monopoly power and to suppress small-scale enterprise. The solution to this problem is direct, popular democracy, which will prevent plutocratic government capture.<sup>17</sup>

In contrast, the progressive impulse tended to locate the source of economic oppression in the malfunction of private markets. According to this story, private individuals use markets to help themselves and inflict injury on others. The solution to this problem is government regulation by elite experts shielded from direct popular control.<sup>18</sup>

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<sup>14</sup> Miller and Schofield observe that:

In the long-run, the same dynamic could actually make the Republican Party more blue-collar than the Democrats. Social conservatives in the Republican Party already insist that the Democratic Party is the party of privilege and elitism. The populist rhetoric adopted by the Republican Party has pictured the Democratic Party as the home of overpaid professors, bureaucrats, and social technicians. Democrats are seen as "limousine liberals" who want to indulge themselves in expensive pro-environmental policy, and who have nothing to lose when wages collapse to the levels of Third World countries.

*Id.* at 446–47.

<sup>15</sup> See *infra* note 286 and accompanying text.

<sup>16</sup> Cf. J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1944 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993) (treating populist and progressive constitutional sensibilities as ideal types).

<sup>17</sup> See *infra* pp. 422–23.

<sup>18</sup> See *infra* notes 60–62 and accompanying text.

How do these general tendencies translate into constitutional law? One might expect populist distrust of government to produce populist support for civil liberties, minority rights, and limited government. If the rich inevitably control the levers of power, the sensible response is to utilize the Constitution to protect individuals from government encroachment. Conversely, one might expect progressive faith in government to produce support for civil liberties skepticism. In a world where the government is a force for social justice, it makes no sense to empower courts to obstruct its work.

There are strands of both populism and progressivism that cohere with this narrative. Populists occasionally invoked civil liberties, as when, for example, they defended the right of Coxey's Army to assemble,<sup>19</sup> or attacked the use of military force against the Pullman Strike.<sup>20</sup> At least at some points in its history, populism also made efforts to establish common ground with racial minorities.<sup>21</sup>

However, populists are better known for disparaging or disregarding civil liberties. There is more than a hint of antisemitism and racism in some populist rhetoric.<sup>22</sup> Populists were also more sympathetic to government intervention than one might expect. Although many populists tried to tie the movement to Jeffersonian democracy, they nonetheless favored an expansive view of congressional powers that would, for example, lead to public ownership of railroads and means of communication.<sup>23</sup>

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<sup>19</sup> See JOHN D. HICKS, *THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY* 322–23 (1961) (detailing populist support for Coxey's Army).

<sup>20</sup> See *id.* at 322 (detailing populist criticism of President Cleveland for using federal troops in the Pullman Strike).

<sup>21</sup> See JOSEPH GERTEIS, *CLASS AND THE COLOR LINE: INTERRACIAL CLASS COALITION IN THE KNIGHTS OF LABOR AND THE POPULIST MOVEMENT* 49–50 (2007) (discussing populist efforts to achieve interracial coalition). See also Lawrence C. Goodwyn, *Populist Dreams and Negro Rights: East Texas as a Case Study*, 76 AM. HIST. REV. 1435, 1436 (1971) (case study of populism in Grimes County, Texas, showing that populism was based on “a black-white coalition that had its genesis in Reconstruction and endured for more than a generation”); John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 375 (2007) (“In the early expression of the Populist movement, it was the southern White populist leadership that realized the need for multiracial coalitions in order to succeed.”). But cf. Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL'Y 71, 82 (2006) (“In the end, any possibilities for a sustained, interracial political alliance were defeated by exploiting whites' fear of being dominated by Negroes.”).

<sup>22</sup> See, e.g., MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 10 (2017 prtg.) [hereinafter KAZIN, *THE POPULIST PERSUASION*] (quoting populist Tom Watson complaining that “red-eyed Jewish millionaires” had become the “chiefs” of the Democratic Party); LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* 325 (1978) (explaining that some Populist leaders became white supremacists).

<sup>23</sup> See GOODWYN, *supra* note 22, at 319 n.\* (noting that populists were sympathetic to Jefferson, but unlike Jefferson, they were not dedicated to small government); Thomas Goebel, *The Political Economy of American Populism from Jackson to the New Deal*, 11 STUD. AM. POL. DEV. 109, 122 (1997) (noting that populists favored regulation of railroads due to the perception that they were “government-sponsored monopolies”).

Conversely, as one might expect, early progressives tended toward civil liberties skepticism and were sometimes unsympathetic to minority rights.<sup>24</sup> They were especially hostile to judicial review that limited government power.<sup>25</sup> Some progressives, like Justice Felix Frankfurter, for example, insisted on deference toward the political branches in civil liberties cases well into the mid-twentieth century.<sup>26</sup>

But at least since the New Deal revolution, many progressives have embraced causes like free speech, abortion rights, Fourth Amendment rights, and judicially enforced gender and racial equality.<sup>27</sup> Even as progressives have trusted government when it intervenes in economic affairs, they have adopted a posture of distrust regarding matters like the regulation of speech, search and seizure law, and statutes limiting sexual and reproductive freedom.

What explains this disjunction? No one explanation fits all the fact, but in this Article, I emphasize a particular source for the paradox: populists and progressives had different views about public corruption, and these different views produced counterintuitive positions with regard to civil liberties and minority rights. Progressives were believers in progress, science, and rationalism. They favored a strong government run by experts who would rationalize and equalize private markets.<sup>28</sup> The corruption that they feared was the contamination of that expertise by ignorant and prejudiced mass opinion. Their embrace of civil liberties is easy to misunderstand. Superficially, their support for the claims of minorities against government overreach looks like support for limited government that is in tension with their support for government regulation in the economic sphere. What often actually motivated them, however, was a desire to protect the government against the threat posed by an unschooled populace. What they labeled as protection for minorities was instead opposition to popular interference with governing elites. In that sense, progressive support for what they called “civil liberties” was consistent with their pro-government stance.

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<sup>24</sup> See David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 53 (1992) (describing progressive ambivalence toward free speech prior to World War I); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 958–62 (1996) (expanding upon the progressive ambivalence toward free speech prior to World War I); DAVID W. SOUTHERN, *THE PROGRESSIVE ERA AND RACE: REACTION AND REFORM, 1900–1917*, at 47–54 (2005) (describing progressive racism).

<sup>25</sup> See generally WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* (1994) (discussing progressive hostility toward judicial review).

<sup>26</sup> See, e.g., *Dennis v. United States*, 341 U.S. 494, 517, 520–21 (1951) (Frankfurter, J., concurring) (rejecting a First Amendment challenge to the conviction of leaders of the Communist Party for advocating a forceful overthrow of the United States government); *Wolf v. Colorado*, 338 U.S. 25, 26 (1949) (rejecting application of the Fourth Amendment exclusionary rule to the states).

<sup>27</sup> See, e.g., Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. REV. 1063, 1064–65 (2017) (noting that progressives favored “deferential judicial review of economic legislation . . . but harsher review of provisions that adversely affect underrepresented minorities or impair the practice of fundamental rights”).

<sup>28</sup> See, e.g., *id.* at 1064 (identifying progressivism with the use of scientific evidence, a commitment to nonmarket institutions, and policy making by government agencies).

In contrast, populism was often rooted in nostalgia for the past rather than hope for the future.<sup>29</sup> Populist politicians typically represented constituents whose culture and livelihood were endangered by rapid economic and social change.<sup>30</sup> Distrust of the rationalistic, elite opinion that drove that change produced a different and less familiar, if no less vibrant, version of civil liberties. The corruption that they feared was elite government control that led to the oppression of ordinary people by “their betters.”<sup>31</sup> In that sense, populist distrust of the progressive view of “civil liberties” was consistent with their distrust of government.

If this story is correct, then most people who have studied and participated in the last century’s constitutional debate have misunderstood what is going on. Conventional accounts pit popular sovereignty against individual rights. In this framing, courts are caught in a dilemma between the argument for democratic self-rule and the argument for minority rights.<sup>32</sup> That dilemma, in turn, is supposedly resolved by justificatory theories premised on originalism,<sup>33</sup> representation reinforcement,<sup>34</sup> moral philosophy,<sup>35</sup> or common law constitutionalism.<sup>36</sup>

But this is not the best way to account for the actual behavior of progressives and populists. Their actual behavior suggests that claims about democracy and individual rights were only instrumentally useful and that methods of constitutional interpretation were epiphenomenal. The real argument was between the empowerment of educated experts and of “ordinary people.” When “experts” were in control of government, as they were when Virginia enacted its eugenics statute, progressives favored majoritarianism and populists favored individual rights. When “ordinary people” were in control, as they were when Tennessee enacted its

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<sup>29</sup> See RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 24 (1955) (discussing populist nostalgia). Cf. WILLIAM A. GALSTON, *ANTI-PLURALISM: THE POPULIST THREAT TO LIBERAL DEMOCRACY* 4 (2018) (associating modern populism with longing “for an imagined past that insurgent politicians promised to restore”). Populism also had a utopian strain that pointed in vague and sweeping terms to a humane and just future, best exemplified by EDWARD BELLAMY, *LOOKING BACKWARD: 2000–1887*, at iv–vi (1888). But as Bellamy’s title suggests, hopes for the future were often grounded in a sense of loss in the present.

<sup>30</sup> See *infra* note 48 and accompanying text.

<sup>31</sup> Cf. Balkin, *supra* note 16, at 1946 (noting that populists believed that people wanted “to participate in government, but they [did] not wish to be manipulated and shaped by some master plan for effective governance. They want[ed] the opportunity to have a say in what affect[ed] them, but they also wish[ed] to be allowed to live their lives, raise their children, and pursue their own vision of happiness . . . free from the hand of bureaucratic planning, or corporate overreaching”).

<sup>32</sup> For a classic statement of the dilemma, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 2–3 (1971).

<sup>33</sup> See, e.g., *id.* at 3 (arguing that the Supreme Court should be bound by intent of the Framers).

<sup>34</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing for representation reinforcement as a means of reconciling judicial power with democracy).

<sup>35</sup> See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 96–98 (1986) (arguing that interpreters should make the morally best use of legal material).

<sup>36</sup> See David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 879 (1996) (describing and defending common law mode of constitutional interpretation).

anti-evolution statute, populists favored majoritarianism and progressives favored individual rights.

This formulation represents a substantial departure from the standard—some would say tired—story about our constitutional disagreements. The standard story treats the New Deal as a pivot point, marking a transition from a suddenly discredited jurisprudence resting on classical legal thought to a new world that had to contend with and domesticate the insights drawn from legal realism. On this telling, in the wake of *Lochner*'s demise, some Justices on the Roosevelt Court opted for judicial restraint, while others embraced a version of judicial review that ignored economic rights but protected civil liberties, political rights, and “discrete and insular minorities.”<sup>37</sup> In complex ways and for complicated reasons, that division eventually morphed into a dispute between originalism and living constitutionalism.

Of course, this story tells us things that are useful to know. It is not the whole story, though, and it leaves some important things unexplained. For example, it fails to explain how conservatives have successfully coopted populist constitutionalism and turned it into a mass movement centered on deregulation. It does not explain why progressive constitutionalists found it necessary somehow to reconcile libertarian views with regard to certain individual rights with a faith in government regulation with regard to everything else. My hope for this Article is that a different way of organizing our constitutional experience will yield different insights and explanations that provide an alternative account of our current dilemmas and controversies.

Part I sets the stage for this account by explaining the way in which I use the labels “populist” and “progressive.” These labels are tied to historical events occurring in the late nineteenth and early twentieth centuries. As used here, though, the labels are meant to identify sensibilities and tendencies that transcend the events that gave rise to the labels.

With this definitional work completed, I begin the story in Part II. Because the story itself is nonstandard, it has a nonstandard starting point. On this account, in the beginning there was not John Marshall's confrontation with Thomas Jefferson, enactment of the Reconstruction Amendments, the court-packing episode, or the NAACP's campaign against racial subordination. Instead, the story begins with the two dramatic historical events described above: the *Scopes Monkey Trial* of 1925 where a court found a school teacher guilty of the “crime” of teaching evolution,<sup>38</sup> and the Supreme Court's decision two years later in *Buck v. Bell*, where the Justices allowed the sterilization of a young woman under a eugenics-inspired statute.<sup>39</sup>

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<sup>37</sup> See, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT 108–20* (3d ed. 2000) (describing this history); see generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) (same).

<sup>38</sup> Cf. *Scopes v. State*, 154 Tenn. 105, 108 (1927) (reversing the conviction secured at the trial).

<sup>39</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

In the popular imagination, the *Scopes* trial is a morality play pitting know-nothing religious prejudice against modern science and oppressive state orthodoxy against individual freedom. *Buck*, part of our anti-canon, is often characterized in a similar fashion. On this version, Carrie Buck's individual rights were sacrificed on the altar of government prejudice and ignorance.

But this treatment of the two cases produces a disturbing puzzle: Why were progressives on the side of individual rights in *Scopes* but on the side of government power in *Buck*? Why did populists defend Carrie Buck's right to procreate but not John Scopes's right to teach? The contradiction can be resolved by understanding what really divided populists and progressives. Justice Holmes's majority opinion in *Buck* and Clarence Darrow's defense of Scopes were both manifestations of the progressive view of civil liberties, which saw the primary threat to freedom as government capitulation in the face of uninformed and unintelligent mass opinion. Bryan's defense of the Tennessee anti-evolution statute and his attacks on eugenics were expressions of the competing, populist view of civil liberties, which saw the primary threat as elite attacks on popular belief systems and on the very existence of "ordinary people."<sup>40</sup>

Part III explores the way in which the argument between populists and progressives, illustrated by the *Scopes* and *Buck* controversies, continued in their immediate aftermath. On standard accounts,<sup>41</sup> modern constitutionalism grows out of the court-packing controversy and the Supreme Court's iconic footnote four in *United States v. Carolene Products*.<sup>42</sup> Instead, I emphasize two cases that reinterpret *Scopes* and *Buck*. In *Skinner v. Oklahoma*,<sup>43</sup> populists and progressives were able to unite around the outcome when the Court invalidated a eugenics program on Equal Protection grounds. But the argument resumed when the Court turned to compulsory flag salutes in *West Virginia State Board of Education v. Barnette*.<sup>44</sup>

Part IV extends the argument into the modern period and discusses how it has influenced disputes about prayer in schools, racial justice, reproductive rights, free speech, reapportionment, and criminal procedure.

Part V discusses internal contradictions in both the populist and progressive traditions. Briefly stated, the problem for populists is explaining how economic oppression could possibly be remedied without systematic government intervention. This problem left populists vulnerable to a conservative takeover that recast populist insights into a deregulatory program. The problem for progressives is explaining how elite control of government

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<sup>40</sup> For a discussion of the ambition of many eugenicists to eliminate large segments of the population, see *infra* text accompanying notes 162–66.

<sup>41</sup> See *infra* notes 243–44 and accompanying text.

<sup>42</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>43</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

<sup>44</sup> *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

could be reconciled with the interests of ordinary people. This problem left progressives isolated and vulnerable when attacked by rightwing populists.

The final part concludes by asking what steps we might take to resolve the contradictions that have produced many of our current constitutional difficulties.

### I. POPULISTS AND PROGRESSIVES

This is not the place for an extended historical examination of the populist and progressive movements as they played out in the United States. Historians continue to argue about the aims, composition, and character of these movements, and I am hardly in a position to resolve the disagreement or even to contribute much to the debate. In truth, like all political movements, populism and progressivism were amorphous and contradictory.<sup>45</sup> Even the participants in the movements were uncertain about their meaning and scope. For the most part, these participants were not political philosophers. Their responses were determined more by the pressure of immediate events than by a worked out political theory. While there is undoubtedly a “there there,” its boundaries are uncertain and contested.

For these reasons, it is important to guard against essentialism and oversimplification. That said, there is also a risk that runs in the opposite direction. Yes, individual advocates of populism and progressivism were complex bundles of sometimes contradictory ideas. Still, one cannot even begin to talk about the ideas, much less the contradictions within them, without organizing them in some formal, necessarily overly simple fashion. Of course, other organizations are possible, but *some* organization is necessary and all organizations are vulnerable to the charge of essentialism.

For my argument to go through, then, it is necessary that the competing sensibilities that I identify are at least loosely tied to historical events and movements, but the argument does not depend on whether any particular person who identified herself as a populist or progressive actually held all the views that I ascribe to the movements. In what follows, I use some particular actors and particular historical events—what these actors said and did—to illustrate and dramatize my point. The point stands even though it is possible to tell the story in a different way. What ultimately matters is that the competing sensibilities I describe once existed, that they exist today, and that they help to explain some of the problems we currently face.

In the two sections that follow, I describe these competing sensibilities to which, perhaps by stipulation, I assign the labels “populist” and “progressive.”

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<sup>45</sup> See, e.g., CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* 2 (2017) (noting that populism “truly is an essentially contested concept”); NORMAN POLLACK, *THE JUST POLITY: POPULISM, LAW, AND HUMAN WELFARE* 3 (1987) (characterizing populism as “a remarkably varied movement” and arguing that “[t]he conventional wisdom about its nature can be contradicted at every turn”).

### A. Populists

The populist movement of the nineteenth and early twentieth centuries was a left-wing political revolt. The populist program included progressive taxation, redistribution of income, and control of corporate power.<sup>46</sup> Predominantly rural and agrarian, the revolt grew out of a set of historical circumstances—in particular, the deflationary policies pursued by the federal government after the Civil War,<sup>47</sup> rapid industrialization, the rise of “big business” and the corporate structure, widespread corruption in government, and the decline of the cultural hegemony of rural America.<sup>48</sup>

Although these events occurred in a particular time and place, they produced a sensibility that transcends these particularities. It is marked by a nostalgia for a partially imagined and rapidly receding past<sup>49</sup> and an anger at the people who are destroying a perceived golden age.<sup>50</sup> The anger, in turn, expressed itself in a Manichean view of politics. On one side are “the people”—an undifferentiated mass that is good and noble and that has common interests and views. On the other side are “the interests”—a small minority in control of the government and the culture that is determined to oppress the people in order to achieve its own selfish objectives.<sup>51</sup>

What was the remedy for these problems? Because the interests have corrupted the government, some solutions involve self-help and localism.<sup>52</sup> The Grange Movement and the growth of farmer cooperatives reflect this impulse.<sup>53</sup> In part, though, and in tension with their views about government corruption, many populists favored strong government action like the

<sup>46</sup> For a short summary of populist aims, see GERARD N. MAGLIOCCA, *THE TRAGEDY OF WILLIAM JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH* 37–38 (2011).

<sup>47</sup> See GOODWYN, *supra* note 22, at 8–19 (describing deflationary policies).

<sup>48</sup> See Goebel, *supra* note 23, at 120–24 (describing conditions that gave rise to populism); GOODWYN *supra* note 22, at 3–93 (same); HOFSTADTER, *supra* note 29, at 7 (associating populism with the rapid decline of rural America). Cf. Cas Mudde & Cristóbal Rovira Kaltwasser, *Populism and (Liberal) Democracy: A Framework for Analysis*, in *POPULISM IN EUROPE AND THE AMERICAS: THREAT OR CORRECTIVE FOR DEMOCRACY?* 1, 3 (Cas Mudde & Cristóbal Rovira Kaltwasser eds., 2012) (asserting that a “commonality” of populist movements was “an agrarian programme in which the peasantry was seen as the main pillar of both society and economy”).

For a discussion of American populism’s roots in the antebellum period, see KAZIN, *THE POPULIST PERSUASION*, *supra* note 22, at 9–25. For discussions of populism as an international phenomenon, see generally Mudde & Kaltwasser, *supra*.

<sup>49</sup> See GALSTON, *supra* note 29, at 4 (describing populist nostalgia).

<sup>50</sup> *Id.* at 13–14.

<sup>51</sup> See, e.g., *id.* at 36 (asserting that populists distinguish between the “people” and the “elites,” with each group treated as homogeneous and the two interests fundamentally opposed); Mudde & Kaltwasser, *supra* note 48, at 8 (asserting “that every manifestation of populism criticizes the existence of powerful minorities, which in one way or another are obstructing the will of the common people”). Cf. KAZIN, *THE POPULIST PERSUASION*, *supra* note 22, at 31 (“With privilege now resting securely in the saddle, [populist] literature of reform bristled with narratives of degeneration, conspiracy, and betrayal.”).

<sup>52</sup> See, e.g., POLLACK, *supra* note 45, at 108 (noting that populists favored abolition of “[s]pecial advantages conferred by the state,” but “that the purpose of removing obstructions was to throw individuals on their own mettle”).

<sup>53</sup> See MAGLIOCCA, *supra* note 46, at 36 (discussing the grange movement).

nationalization of the railroads and means of communication. The tension was partially resolved by their commitment to direct popular democracy—measures like the referendum, initiative, and recall.<sup>54</sup> Because the government had been corrupted by the interests, and because the people are “good,” the people must seize control of governmental power. They can do so by direct action that will displace the compromised politicians administering a plutocracy.<sup>55</sup>

Although populists regularly lost national elections, they are widely credited with achieving important reforms. The movement also had a downside, however. The Manichean mindset left populists vulnerable to conspiracy theories, some of which were quite bizarre. Moreover, despite what populists said, “the people” are not, in fact, an undifferentiated mass. In order to make their ideology work, the theory had to identify “the people” with *some* people. That tendency, when combined with a conspiratorial mindset, sometimes led to antisemitism, xenophobia, and racism that tarnished the movement.<sup>56</sup>

#### B. Progressives

There is considerable overlap between the populist and progressive movements. Both were founded in part on status anxiety, and the movements often shared similar aims, including the taming of unbridled corporate power and a redistribution of wealth in favor of the less fortunate. For our purposes, though, it is important to emphasize the differences.

Whereas populists were worried about the decline of rural America, progressives tended to be middle or even upper class and urban. They felt themselves squeezed between the influx of immigrants “corrupting” urban government on the one hand and the growth of newly wealthy “captains of industry” on the other. Against these forces, progressives imagined themselves as sensible centrists who could be neutral arbiters between working class radicalism and heartless plutocracy.<sup>57</sup> Whereas populists were

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<sup>54</sup> See Balkin, *supra* note 16, at 1945 (noting that populists favored “regular rotations of positions of authority and power” and “popular participation in economic and political structures that affect the lives of ordinary citizens.”). On populist ambivalence about strong government, see KAZIN, *THE POPULIST PERSUASION*, *supra* note 22, at 41–42.

<sup>55</sup> See POLLACK, *supra* note 45, at 5, 8 (arguing that populists “viewed the political economy as a system of emergent monopolism that had . . . denied the autonomous existence of the state as the custodian of individual security and the nation’s welfare” and that populists thought that the solution to this problem was “an alteration of values and social relations, the formation of a public standard, and the redistribution of power” that would nonetheless leave private property in place).

<sup>56</sup> See HOFSTADTER, *supra* note 29, at 61 (describing populist tendencies toward racism and xenophobia); GALSTON, *supra* note 29, at 65 (same).

<sup>57</sup> See HOFSTADTER, *supra* note 29, at 163 (characterizing eastern progressivism as “a mild and judicious movement, whose goal was not a sharp change in the social structure, but rather the formation of a responsible elite, which was to take charge of the popular impulse toward change and direct it into moderate and, as they would have said, ‘constructive’ channels”); KAZIN, *THE POPULIST PERSUASION*,

nostalgic for a lost past, progressives thought that they could lead the country toward a sensible and humane future.<sup>58</sup>

Progressives were much less drawn to conspiracy theories than populists, and they were therefore less concerned with an imagined worldwide force that had taken control of government. For many progressives, government was the solution rather than the problem. Government could be the agent of the moderate reform that they favored, but in order to accomplish this reform, it had to be populated by fair-minded experts.<sup>59</sup> Direct popular control often obstructed the ability of these technocrats to do their work.<sup>60</sup> Public opinion was often fickle, uninformed, and prejudiced.<sup>61</sup> Regulators needed to be at least partially shielded from popular control lest they lose their neutrality and their ability to pursue solutions that were complex rather than simple.<sup>62</sup>

Like populism, progressivism both produced important reforms and was tarnished by important weaknesses. Progressives succeeded in actually utilizing the levers of government power to produce a more just polity by, for example, providing a social safety net and protecting the right of workers to organize. Like the populists, however, their concern about the changing demographics of the country sometimes led to xenophobia and racism.<sup>63</sup> Moreover, the progressive impulse to depoliticize public policy tended to produce a blindness about good faith moral disagreement. Some progressives smugly assumed that their positions were value-free and “scientific” and that opposing views were ignorant and prejudiced.<sup>64</sup> Whereas populists were, perhaps, unduly pessimistic about the extent of government corruption by the interests, progressives were unduly ingenuous about problems of agency capture and interest group control.

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*supra* note 22, at 51 (asserting that “[p]rogressives sought to harmonize . . . legitimate but partial interests for the sake of the larger ‘public interest’”).

<sup>58</sup> See, e.g., HOFSTADTER, *supra* note 29, at 148–63 (emphasizing future orientation of progressives).

<sup>59</sup> See *id.* at 155 (“The development of regulative and humane legislation required the skills of lawyers and economists, sociologists and political scientists, in the writing of laws and in the staffing of administrative and regulative bodies.”).

<sup>60</sup> Cf. GALSTON, *supra* note 29, at 4 (noting that elitist “efforts to insulate themselves from the people—in the quasi-invisible civil service, in remote bureaucracies, in courts and international institutions—inevitably breed resentment”).

<sup>61</sup> See Balkin, *supra* note 16, at 1947 (asserting that progressives believed “[p]opular anger and uneducated public sentiments are more likely to lead to hasty and irrational judgments”); KAZIN, *THE POPULIST PERSUASION*, *supra* note 22, at 52 (noting progressive “skepticism about the masses” and belief that reform was possible only when the people were “guided by a skilled, perceptive counter-elite”).

<sup>62</sup> For a famous, book-length exposition of progressive distrust of public opinion, see generally WALTER LIPPMANN, *PUBLIC OPINION* (1922).

<sup>63</sup> See generally SOUTHERN, *supra* note 24 (describing progressive racism). Cf. C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877–1913*, at 369–95 (1951) (describing progressive racism in the south). But see Herbert Hovenkamp, *The Progressives: Racism and Public Law*, 59 ARIZ. L. REV. 947 (2017) (arguing that progressives “inherited” racist attitudes but ultimately destroyed scientific racism).

<sup>64</sup> See GALSTON, *supra* note 29, at 4 (“[Elitists] are sure that they are promoting the public interest, but they understand it through the prism of their own class interests and biases.”).

How did these competing sensibilities influence the development of modern constitutional law? That is the subject of the next Parts. The story might be recounted abstractly and generally. Instead, I relate it in the context of a few specific and dramatic historical events and court decisions.

## II. OF MONKEYS AND IMBECILES: EVOLUTION, EUGENICS, AND THE MEANING OF CIVIL LIBERTIES

### A. *The Showdown in Dayton*

Part publicity stunt, part morality play, part farce, and part deadly serious cultural battle, the Scopes Monkey Trial commands our attention almost a century after its inconclusive end. Much of that attention, though, focuses on the riveting personalities involved or on issues that were not really at the center of the controversy. Once one refocuses on what was actually at stake, one begins to perceive a direct line between the trial and disputes that animate modern constitutional law.

The trial was originally the brainchild of community leaders in the small town of Dayton, Tennessee. They had little ideological interest in either evolution or biblical literalism. Instead, their objectives were secular. They thought that a “test case” involving the state’s new statute prohibiting publicly funded schools from teaching “any theory that denies the story of the divine creation of man as taught in the Bible,” would spark much-needed economic activity.<sup>65</sup> At the beginning, everyone understood that there would be no hard feelings.<sup>66</sup> John Scopes, himself, may never have taught evolution<sup>67</sup> and openly cooperated with the prosecution so as to put on a good show.<sup>68</sup>

Things changed when, over the opposition and doubts of some of the original participants,<sup>69</sup> William Jennings Bryan and Clarence Darrow arrived on the scene. Bryan was a hero to many populists. He had run for president three times and served as Woodrow Wilson’s Secretary of State but was now retired from politics.<sup>70</sup> He nonetheless retained a huge following and had spent years of his life campaigning against evolutionary theory and arguing for laws that prohibited the teaching of the theory in public schools.<sup>71</sup>

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<sup>65</sup> See LARSON, *supra* note 3, at 89, 171 (describing origins of the trial).

<sup>66</sup> See *id.* at 91–92. (describing friendly relationships between trial’s antagonists).

<sup>67</sup> *Id.* at 173–74.

<sup>68</sup> See *id.* at 89–92 (discussing the prosecutor’s recruitment of Scopes as a willing defendant).

<sup>69</sup> Darrow was not the ACLU’s first choice for counsel, and “his strong personality and provocative tactics upstaged the ACLU’s intended message.” LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* 148 (2016). Indeed, the ACLU made repeated attempts to displace Darrow. LARSON, *supra* note 3, at 102. In contrast, although the prosecution welcomed Bryan’s arrival, *id.* at 99, they must have entertained doubts about his courtroom abilities. Bryan had not practiced law in over thirty years, *id.* at 98, and had little interest in debating the truth of evolution in a courtroom setting. *Id.* at 104.

<sup>70</sup> See KAZIN, *A GODLY HERO*, *supra* note 1, at 76–77, 107–08, 164, 216, 237–42 (describing Bryan’s career).

<sup>71</sup> *Id.* at 271–77.

Darrow, the most famous trial lawyer of his time, had prevailed in many seemingly hopeless cases. He was a tireless defender of labor and of radicalism and a notorious religious skeptic and advocate of material determinism.<sup>72</sup>

When these two giants showed up, the case turned into a media circus climaxed by Darrow's dramatic decision to call Bryan himself to the stand as an expert on the Bible.<sup>73</sup> In the suffocating heat, Darrow mercilessly badgered Bryan about biblical literalism.<sup>74</sup> A huge throng watched on an outdoor platform, where the trial had been moved for fear that the courtroom floor would collapse.<sup>75</sup> Millions more followed the trial through a primitive radio hook up and the print media.<sup>76</sup> The jury's guilty verdict, reached after only minutes of deliberation, was anticlimactic, but high drama returned when Bryan died suddenly a few days after the trial.<sup>77</sup> By the time the episode concluded, it had become the stuff of American legend.<sup>78</sup>

The legend has tended to obscure what was actually at stake in the case. On one level, the answer is not much. Even after Darrow and Bryan became involved, there were many indications that the participants were not playing for keeps. There was never a risk that Scopes would be incarcerated or even lose his job.<sup>79</sup> Bryan, who had always opposed attaching penalties to antievolution statutes, graciously offered to pay Scopes's modest fine.<sup>80</sup> Even had he lived, Bryan would not have had to make good on the offer because the Tennessee Supreme Court found a technicality that allowed it to reverse the jury's verdict.<sup>81</sup> The court urged the prosecution not to retry the case,<sup>82</sup> and the prosecutors promptly acquiesced.<sup>83</sup>

The absence of the high personal stakes that often accompany criminal trials only serves to emphasize the symbolic stakes. But what, exactly, were those stakes? Two related conventional accounts do not quite fit the facts.

On the first view, Bryan and Darrow symbolize religious ignorance and obscurantism pitted against free inquiry and scientific rationalism. This is the way that H.L. Menken characterized the trial in his famous dispatches

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<sup>72</sup> On Darrow's defense of labor, see KERSTEN, *supra* note 1, at 107–51. On his religious skepticism, see *id.* at 221–22. On his material determinism, see *id.* at 197.

<sup>73</sup> LARSON, *supra* note 3, at 187–90.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 167, 186–87.

<sup>76</sup> *Id.* at 142, 203.

<sup>77</sup> *Id.* at 191, 199–204.

<sup>78</sup> For an account, see *id.* at 204–06, 225–28.

<sup>79</sup> *Id.* at 200–01.

<sup>80</sup> *Id.* at 244.

<sup>81</sup> The Tennessee Supreme Court reversed the judgment on the ground that “a jury alone can impose the penalty this Act requires” that “the trial judge exceeded his jurisdiction in levying this fine,” and that the court was “without power to correct his error.” *Scopes v. State*, 154 Tenn. 105, 121 (1927).

<sup>82</sup> See *id.* (“We see nothing to be gained by prolonging the life of this bizarre case. On the contrary we think the peace and dignity of the State, which all criminal prosecutions are brought to redress, will be the better conserved by the entry of a *nolle prosequi* herein. Such a course is suggested to the Attorney-General.”).

<sup>83</sup> LARSON, *supra* note 3, at 221.

from Dayton<sup>84</sup> and how Frederick Lewis Allen presented the case in his bestselling book published six years after the trial.<sup>85</sup> It was the dramatic focal point for *Inherit the Wind*, the Broadway play and movie based on the trial. It was how Darrow himself meant to frame the controversy when his examination of Bryan revealed Bryan's scientific illiteracy and the absurdities produced by biblical literalism.<sup>86</sup>

Unfortunately, though, this framing oversimplifies the controversy. Consider first the “scientific” basis for Darrow's position. If not still in its infancy, evolutionary biology was undergoing a turbulent adolescence in 1925. Its scientific status was contested and shaky.<sup>87</sup> Evolutionists themselves were divided between Darwinian and Lamarckian versions,<sup>88</sup> and the Lamarckian theory, still endorsed by important scientists in 1925, was more compatible with biblical literalism.<sup>89</sup> There remained important holes in the Darwinian account for which there were not yet adequate explanations.<sup>90</sup>

It gets worse. Perhaps the most important archeological evidence in support of Darwinian theory was the Piltdown Man, discovered some thirty miles from Darwin's home in 1909 on the fiftieth anniversary of the publication of *Origin of Species*. The discovery was hailed by the leading experts on human development.<sup>91</sup> According to the highly regarded biologist Boyd Dawkins, “The evidence was clear that this discovery revealed a

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<sup>84</sup> For a compilation of the dispatches, see H.L. Mencken, “*The Monkey Trial*”: *A Reporter's Account*, FAMOUS TRIALS, <https://famous-trials.com/scopesmonkey/2132-menckenaccount> (last visited Mar. 3, 2021).

<sup>85</sup> FREDERICK LEWIS ALLEN, *ONLY YESTERDAY: AN INFORMAL HISTORY OF THE NINETEENTWENTIES 199–206* (1931).

<sup>86</sup> For a transcript, see NAT'L BOOK CO., *THE WORLD'S MOST FAMOUS COURT TRIAL: TENNESSEE EVOLUTION CASE 284–304* (1925) [hereinafter *TENNESSEE EVOLUTION CASE*].

<sup>87</sup> See Patrick Dassen & Mary G. Kemperink, *Introduction*, in *XIV THE MANY FACES OF EVOLUTION IN EUROPE, C. 1860–1914*, at xi (Patrick Dassen & Mary Kemperink eds., 2005) (noting that “[a]round 1900 the theory of natural selection was so unpopular that Darwin's opponents believed that it would never recover” and that “[i]t was only in the late 1930s . . . that natural selection was accepted as the main mechanism of evolution”).

<sup>88</sup> Lamarck is commonly taken to have held that species inherited acquired characteristics. See C. LEON HARRIS, *EVOLUTION: GENESIS AND REVELATIONS* 110 (1981) (“Most people who know of Lamarck at all associate his name with the ‘inheritance of acquired character’—the so-called Lamarckian Principle.”). His views were actually somewhat more complex. He thought that “changes in conditions create new needs for an organism, and the degree of use of an organ to meet those needs leads to heritable changes in the organ.” *Id.* at 111.

<sup>89</sup> For example, the neo-Lamarckian Robert Chambers thought that “living beings, including man and society, [were] the products of a gradual and progressive development. Higher forms came into being because of a small change in a species which was ‘lower’ in the evolutionary chain. This process, guided by God, was directed at a fixed goal, namely man.” Dassen & Kemperink, *supra* note 87, at xi.

<sup>90</sup> In the early 1920s, many scientists thought that Darwinian natural selection was incompatible with the emerging science of genetics. At the time of the Scopes trial, a synthesis was just beginning to emerge. See HARRIS, *supra* note 88, at 202 (explaining emergence of synthesis).

<sup>91</sup> See J. S. WEINER, *THE PILTDOWN FORGERY: THE CLASSIC ACCOUNT OF THE MOST FAMOUS AND SUCCESSFUL HOAX IN SCIENCE* 1–16 (reprt. 2009) (describing reception of Piltdown discovery).

missing link between man and the higher apes. . . .”<sup>92</sup> Paleontologist Arthur Smith Woodward of the British Museum stated that the Piltdown “skull, representing a hitherto unknown human species, is the missing link[.] I, for one, have not the slightest doubt . . . [W]e came direct from a species almost entirely ape.”<sup>93</sup> In a debate with Bryan three years before the *Scopes Trial*, Henry Fairfield Osborne, the President of the American Museum of Natural History, relied on the discovery to refute Bryan’s claim that evolutionary theory was unproved.<sup>94</sup>

It should come as no surprise, then, that when Darrow submitted affidavits of leading scientists to the *Scopes* court in support of evolutionary theory, some of them relied heavily on the Piltdown discovery.<sup>95</sup> There was only one problem: years later, investigators revealed that the Piltdown Man was a crude fake, produced by burying together a human skull, the jaw of an orangutan, and chimpanzee teeth.<sup>96</sup> When it came to Piltdown, it turned out to be conservative Christians who asked the skeptical questions and much of the scientific establishment that was guilty of ingenuous faith.

If Darrow’s claim to speak for science was exaggerated, so too was the assertion that Bryan was the voice of mindless biblical literalism. No doubt, Bryan believed biblical accounts of miracles that cannot be explained by modern science,<sup>97</sup> but at a crucial stage of Darrow’s examination, he conceded that at least some biblical passages should be read figuratively<sup>98</sup> and even managed to joke about biblical literalism.<sup>99</sup> At many other points in the examination, he commendably refused to express an opinion without studying the matter in greater detail.<sup>100</sup>

On a broader level, much of Bryan’s opposition to evolution was political rather than theological. Of course, his Christian faith was important to him, but he was never a “fundamentalist” in the modern sense of the word.

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<sup>92</sup> See Charles Dawson & A. S. Woodward, *On the Discovery of a Palaeolithic Human Skull and Mandible in a Flint-Bearing Gravel Overlying the Wealden (Hastings Beds) at Piltdown, Fletching, Sussex*, 69 Q.J. GEOLOGICAL SOC’Y LONDON 117, 149 (1913) (quoting Dawkins).

<sup>93</sup> See *Man Had Reason Before He Spoke*, N.Y. TIMES, Dec. 20, 1912 (quoting Woodward).

<sup>94</sup> LARSON, *supra* note 3, at 26, 31.

<sup>95</sup> See TENNESSEE EVOLUTION CASE, *supra* note 86, at 237 (showing statement of Dr. Fay Cooper Cole); *id.* at 278 (showing statement of Prof. Horatio H. Newman).

<sup>96</sup> For an account of the unravelling of the hoax, see WEINER, *supra* note 91, at 37–49.

<sup>97</sup> See, e.g., TENNESSEE EVOLUTION CASE, *supra* note 86, at 285 (“It is hard to believe for you, but easy for me. A miracle is a thing performed beyond what a man can perform. When you get beyond what man can do, you get within the realm of miracles; and it is just as easy to believe the miracle of Jonah as any other miracle in the Bible.”).

<sup>98</sup> Asked by Darrow about a suggestion in the Bible that the sun revolved around the earth, Bryan replied, “I believe [the Bible] was inspired by the Almighty, and He may have used language that could be understood at that time.” *Id.* at 286. Later in the examination, when queried about whether God had created the earth in six days, Bryan acknowledged that “days” did not mean literal, twenty-four-hour days. *Id.* at 302.

<sup>99</sup> When Darrow asked whether he believed that “all the living things that were not contained in [Noah’s Ark] were destroyed,” Bryan replied, “I think that the fish may have lived.” *Id.* at 289.

<sup>100</sup> See, e.g., *id.* at 292–93 (refusing to offer opinions about matters as to which he was not expert).

His religion was instrumental. Christianity was important because he saw it as supporting the political commitments that had shaped his adult life: the insistence on individual dignity and on the necessity of taking seriously the needs and beliefs of ordinary people.<sup>101</sup> For Bryan, mechanistic and deterministic evolutionary theory put these commitments at risk, especially in an environment where opponents of these commitments were using “survival of the fittest” to justify laissez faire economics.

A second characterization of the Dayton trial pits Bryan’s majoritarianism against Darrow’s defense of individual rights. This was the way that Bryan himself sometimes described the stakes. He repeatedly and eloquently defended the rights of communities to decide for themselves what was taught in their own public schools.<sup>102</sup> On the other side, it was also the way that the American Civil Liberties Union, and its representative in Dayton, Arthur Garfield Hays, saw the case. According to this characterization, John Scopes represented free thought, inquiry, and expression—the freedom to resist majority pressure in the name of individual autonomy.<sup>103</sup> On this view, it was Darrow, rather than Bryan, who was the supporter of dignity and freedom.

For both sides, this characterization had the advantage of bracketing explosive issues about the truth of evolutionary theory on the one hand and of biblical accounts on the other. Bryan could claim that, whatever one made of the Bible’s creation story, communities had the right to decide for themselves what their children should be taught. Similarly, Hays could argue that the right of self-expression should not be held hostage to majority beliefs whether or not those beliefs were accurate.

But this characterization also fit awkwardly with the positions taken by each side. There is no doubt that Bryan’s majoritarianism was sincere, but there is good reason to doubt that it provided his primary motivation. If the shoe were on the other foot, it is hard to imagine that he would have traveled hundreds of miles and spent weeks in unbearable summer heat to defend the right of a popularly elected school board to mandate the teaching of evolutionary theory.

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<sup>101</sup> For a sympathetic account of Bryan that strongly emphasizes these points, see KAZIN, *A GODLY HERO*, *supra* note 1, at 262–65.

<sup>102</sup> In Dayton, Bryan proclaimed that “[t]he real issue is not *what* can be taught in public schools, but *who* shall control the education system.” LARSON, *supra* note 3, at 104. See also WILLIAM JENNINGS BRYAN, *ORTHODOX CHRISTIANITY VERSUS MODERNISM* 45–46 (1923) (“[Teachers in public schools] have no right to demand pay for teaching that which the parents and the taxpayers do not want taught. The hand that writes the pay check rules the school.”). For discussion, see Edward J. Larson, *The Scopes Trial and the Evolving Concept of Freedom*, 85 VA. L. REV. 503, 510–11 (1999).

<sup>103</sup> In a contemporaneous explanation of the stakes of the Scopes trial, the ACLU envisioned it as presenting “a clear legal test of the right of a majority acting through the legislature to determine what shall or shall not be taught in public school” and of “the tyranny over minority and unpopular views.” WEINRIB, *supra* note 69, at 157–58 (internal quotation marks omitted). On the ACLU’s more general embrace of academic freedom as a means of protecting radical speech, see *id.* at 151–57.

Hays's individual rights stance provides an even more procrustean fit with the ACLU's actual position. It is deeply implausible that opponents of the Tennessee statute really believed that individual school teachers had the right to teach whatever they wanted to school children. No one claimed that a school board had to permit teachers to tell their students that mathematics was the work of the devil or that totalitarianism is the best form of government.<sup>104</sup>

If the standard accounts of the Dayton confrontation are wrong, then what was it that generated the undeniable emotion that accompanied the trial? The real stakes are dramatically illustrated by the emotional climax of Darrow's cross examination of Bryan:

The Witness [Bryan]: These gentlemen . . . did not come here to try this case. They came here to try revealed religion. I am here to defend it, and they can ask me any question they please.

The Court: All right.

(Applause from the court yard.)

Mr. Darrow: Great applause from the bleachers.

The Witness: From those whom you call "yokels."

Mr. Darrow: I have never called them yokels.

The Witness: That is the ignorance of Tennessee, the bigotry.

Mr. Darrow: You mean who are applauding you?

(Applause.)

The Witness: Those are the people whom you insult.

Mr. Darrow: You insult every man of science and learning in the world because he does not believe in your fool religion.<sup>105</sup>

As this exchange illustrates, the real dispute was not about majority rule or scientific rationalism. It was about the conflict between progressive and populist versions of civil liberties. Both scientific rationalism and majority rule had something to do with the argument, but only in an indirect fashion.

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<sup>104</sup> When antievolutionists began to lose the culture war, they started to cloak their argument in the very individual rights claims that Hays and the ACLU had made earlier. Why not present both sides and give teachers and students the intellectual freedom to decide the controversy for themselves, they argued. LARSON, *supra* note 3, at 258. In response to this argument, Tennessee, Arkansas, and Louisiana adopted statutes that mandated some form of "balanced treatment" between Darwinian theory and creationism. *Id.* at 258–59. When the Supreme Court finally entered the fray, the Justices instead bought the argument advanced by the ACLU, see Brief of Appellees at 4, *Edwards v. Aguillard*, 482 U.S. 578 (1986) (No. 85-1513), that public schools could not ban the teaching of Darwinian theory, see *Epperson v. Arkansas*, 393 U.S. 97 (1968), and must ban the teaching of creationism even if coupled with the teaching of Darwinian theory. *Edwards v. Aguillard*, 482 U.S. 578 (1987). It turned out that the ACLU's "civil liberties" position was not about freedom of speech at all but about the primacy of evolutionary theory.

<sup>105</sup> TENNESSEE EVOLUTION CASE, *supra* note 86, at 288.

For progressives, “civil liberties” were about protecting government from the influence of a biased and ignorant populace and its “fool religion.” Scientific rationalism related to this claim, but only because it was part of the belief system of elites. For populists, collective self-determination was not ultimately about government power, but about shielding powerless “ordinary” people from elite denigration—from being labeled as “yokels.” Majoritarianism related to this claim, but only because it was sometimes instrumentally useful in providing this shield.

In order to see the way in which the dispute played out and its connection to modern constitutional debate, we need to compare the Dayton trial with a second, less famous dispute that reached the Supreme Court two years later.

### B. *Preventing the Unfit from Continuing Their Kind*

A few months before the Dayton trial, another trial court convened to adjudicate another test case in another southern, rural community—in this case, Amherst County, Virginia.<sup>106</sup> Although there was none of the hoopla or press coverage that marked the Bryan-Darrow confrontation, the trial in Amherst County was also mostly for show. Counsel for the respondent was a long-time friend and supporter of the petitioner and put up only token opposition to the petitioner’s case.<sup>107</sup> The result was again a foregone conclusion, and, as in Dayton, the purpose of the trial was to establish a broader point only tangentially related to the personal interests of the participants. But whereas the personal stakes for John Scopes were negligible, the stakes for Carrie Buck—the eighteen-year-old Amherst County respondent—were huge. Her loss, ultimately ratified in a notorious opinion written by Oliver Wendell Holmes, Jr. for the United States Supreme Court,<sup>108</sup> resulted in compelled surgery that permanently deprived her of the ability to give birth.

The Amherst County trial grew out of a eugenics craze that engulfed the country in the early twentieth century.<sup>109</sup> At the height of the craze, Virginia enacted a statute that permitted the forced sterilization of individuals found to be “afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy.”<sup>110</sup> By 1931, twenty-eight states had enacted similar statutes authorizing eugenic sterilization,<sup>111</sup> and, as we shall see, laws along these lines had been endorsed by the leading jurists in the United States.<sup>112</sup>

<sup>106</sup> For accounts, see COHEN, *supra* note 4, at 93–97; LOMBARDO, *supra* note 4, at x–xi.

<sup>107</sup> COHEN, *supra* note 4, at 98–99; LOMBARDO, *supra* note 4, at 74.

<sup>108</sup> *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>109</sup> See THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA 109–28* (2016) (describing eugenics craze); COHEN, *supra* note 4, at 55–71 (same).

<sup>110</sup> V.A. CODE §§ 1095(h) (1924).

<sup>111</sup> COHEN, *supra* note 4, at 300.

<sup>112</sup> See *infra* p. 433–34.

Carrie Buck was an early victim of the craze. She was the descendant of destitute farmers who had been forced off their land, the sort of people who might have supported William Jennings Bryan's presidential campaigns.<sup>113</sup> Her mother's economic difficulties made it hard to care for the child, and she was taken in by John and Alice Dobbs, who treated her as a servant.<sup>114</sup> When she became pregnant as a result of being raped by Alice's nephew, the Dobbsses filed a petition to commit her to the Virginia Colony for Epileptics and Feeble-Minded.<sup>115</sup> Buck had been a good student, and there is little or no evidence that she suffered from mental deficiencies.<sup>116</sup> Despite this fact, the judge granted the Dobbsses' petition.<sup>117</sup>

When the head of the Colony was looking for a test case to establish the constitutional validity of Virginia's new eugenics statute, he selected Buck.<sup>118</sup> After she lost at trial and in the United States Supreme Court, she was involuntarily sterilized<sup>119</sup> and, eventually, released from custody.<sup>120</sup> People who knew her late in life had no doubt about her intelligence. One visitor found her "reading the newspaper daily and 'joining a more literate friend to assist at regular bouts with the crossword puzzles.'"<sup>121</sup> The visitor reported that Buck was "not a sophisticated woman, and lacked social graces," but that "she was neither mentally ill nor retarded."<sup>122</sup>

The eugenics fad resulted in personal tragedy for Carrie Buck and for many others, but for purposes of this Article, two more general facts about the movement merit attention. First, there was a direct connection between eugenics and Darwinism.<sup>123</sup> Charles Darwin himself understood the attraction of eugenics. For example, he suggested that sss vaccinations were

<sup>113</sup> See COHEN, *supra* note 4, at 19–20 (describing Buck's family).

<sup>114</sup> *Id.* at 20–21.

<sup>115</sup> *Id.* at 16, 24.

<sup>116</sup> *Id.* at 17, 21, 24.

<sup>117</sup> *Id.* at 27.

<sup>118</sup> Apparently, Buck was chosen because of the previous finding of feeble-mindedness, the fact that her mother had been declared a "moron," the fact that she was an unwed mother, and the fact that she was young. *Id.* at 91–92.

<sup>119</sup> For a description of the surgery, see LOMBARDO, *supra* note 4, at 185.

<sup>120</sup> *Id.* at 284.

<sup>121</sup> COHEN, *supra* note 4, at 298.

<sup>122</sup> *Id.*

<sup>123</sup> The connection was not inevitable. Evolution operates without human intervention. Progressives therefore might have treated it as allied with a laissez-faire economic and social approach. Eugenics, in contrast, involved extensive and, by modern lights, extreme government intervention. *Cf.* Hovenkamp, *supra* note 63, at 968 (arguing that conservative "support for eugenics legislation seems inconsistent with their general embrace of laissez-faire policy").

There is another sense, though, in which eugenicists and evolutionists were natural allies. Because evolution is a random process that affected humans, other animals, and plants alike, it suggested to some that there was nothing special about humans and no intrinsic meaning to their existence. If that were true, then it might be thought to follow that there was nothing wrong with human intervention in the evolutionary process. Because intrinsic human dignity was not a concern, there was no reason to oppose manipulation of the gene pool in order to accomplish the social ends that progressives favored. Indeed, eugenics might supply meaning that random, undisturbed evolution lacked.

problematic because they preserved people of “weak constitution.” The result, he wrote, “must be highly injurious to the race of man.” For Darwin, though, “the noblest part of our nature” meant that “we must bear without complaining the undoubtedly bad effects of the weak surviving and propagating their kind.”<sup>124</sup>

Many of Darwin’s supporters were uninhibited by these moral reservations. His half cousin, Francis Galton, coined the word “eugenics” and produced “scientific” work linking Darwinian insights to a program of promoting “the more suitable races or strains of blood . . . over the less suitable.”<sup>125</sup> Darwin’s son, Leonard, was the president of the Eugenics Education Society.<sup>126</sup> Ronald A. Fisher, perhaps the leading evolutionary biologist in Europe, was motivated by the desire to prove the worth of eugenics.<sup>127</sup>

Many evolutionary biologists in the United States held similar views. Although Darrow himself was a strong opponent of eugenics,<sup>128</sup> six of the experts that he summoned to support him in Dayton had endorsed eugenics.<sup>129</sup> The textbook from which John Scopes taught linked evolutionary theory to eugenics and endorsed both.<sup>130</sup> Scopes made a public appearance with Charles B. Davenport, one of the country’s leading eugenicists, who was also a fierce defender of evolutionary biology.<sup>131</sup> Harry Laughlin, a tireless campaigner for eugenic sterilization, held a doctorate in biology from Princeton.<sup>132</sup> Every article on eugenics published in medical journals between 1899 and 1912 favored sterilization.<sup>133</sup>

Conversely, much of the opposition to eugenics came from Christian opponents of Darwinism. Bryan himself opposed evolutionary theory in part

<sup>124</sup> 1 CHARLES DARWIN, *THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX* 162 (1871).

<sup>125</sup> FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 25 n.1 (1883).

<sup>126</sup> See EUGENICS EDUC. SOC., *PRESIDENTIAL ADDRESS BY MAJOR LEONARD DARWIN* (1911).

<sup>127</sup> See RONALD AYLMEYER FISHER, *THE GENETICAL THEORY OF NATURAL SELECTION* (1930) (defending eugenics).

<sup>128</sup> Darrow characterized eugenics as a “gaudy little plan” designed to impose a “caste system.” VICTORIA F. NOURSE, IN *RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 15 (2008); see also LEONARD, *supra* note 109, at 111 n.17 (“Clarence Darrow, Scopes’s defense lawyer, became an outspoken opponent of eugenics.”).

<sup>129</sup> LARSON, *supra* note 3, at 135.

<sup>130</sup> See GEORGE WILLIAM HUNTER, *A CIVIC BIOLOGY: PRESENTED IN PROBLEMS* 194–96 (1914) (endorsing evolution and noting that evolution had culminated in “the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America”); *id.* at 261–65 (noting that “[h]undreds of families [with mental and moral defects] exist to-day, spreading disease, immorality, and crime to all parts of this country” and that “we . . . have the remedy of separating the sexes in asylums or other places and in various ways preventing intermarriage and the possibilities of perpetuating such a low and degenerate race”). After the *Scopes* trial, the textbook’s author removed the offending material about evolution but retained and expanded the material about eugenics. LEONARD, *supra* note 109, at 111.

<sup>131</sup> See LARSON, *supra* note 3, at 115 (describing appearance).

<sup>132</sup> COHEN, *supra* note 4, at 122.

<sup>133</sup> *Id.* at 66.

because it led to eugenic conclusions.<sup>134</sup> Billy Sunday, the leading evangelist of his day, insisted on a similar linkage:

Let your scientific consolation enter a room where the mother has lost her child. Try your doctrine of the survival of the fittest . . . And when you have gotten through with your scientific, philosophical, psychological, eugenic, social service, evolution, protoplasm and fortuitous concurrence of atoms, if she is not crazed by it, I will go to her and after one-half hour of prayer and the reading of the Scripture promises, the tears will be wiped away.<sup>135</sup>

The second important fact about the eugenics movement was that it was largely a progressive project.<sup>136</sup> Theodore Roosevelt, the progressive hero of the Bull Moose campaign, was also the country's most famous advocate for eugenics. "[F]eeble-minded persons," he insisted, should be "forbidden to leave offspring behind them."<sup>137</sup> While serving as reform governor of New Jersey, Woodrow Wilson, a strong supporter of eugenics, signed into law a statute permitting surgery on the "feebleminded (including idiots, imbeciles and morons), epileptics, rapists, certain criminals and other defectives."<sup>138</sup> Oliver Wendell Holmes, Jr., the author of *Buck v. Bell* and long-time proponent of eugenics,<sup>139</sup> was also a progressive hero, although his relationship to the movement was complex and ambivalent.<sup>140</sup> The same could not be said of Louis Brandeis, an unabashed progressive,<sup>141</sup> or of Harlan Fiske Stone, who was rapidly moving toward progressive positions.<sup>142</sup> Both joined Holmes's opinion.

<sup>134</sup> See KAZIN, *A GODLY HERO*, *supra* note 1, at 263 (explaining Bryan's views on connection between eugenics and evolution).

<sup>135</sup> LARSON, *supra* note 3, at 28.

<sup>136</sup> See COHEN, *supra* note 4, at 55 (linking eugenics to progressive reformers); LEONARD, *supra* note 109, at 117–19 (same). See generally DONALD K. PICKENS, *EUGENICS AND THE PROGRESSIVES* (1968) (same).

<sup>137</sup> Victoria Brignell, *When America Believed in Eugenics*, *NEW STATESMAN* (Dec. 10, 2010), <https://www.newstatesman.com/society/2010/12/disabled-america-immigration>.

<sup>138</sup> LOMBARDO, *supra* note 4, at 26.

<sup>139</sup> See Oliver Wendell Holmes, *Ideals and Doubts*, 10 *ILL. L. REV.* 1, 3 (1915) ("I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, coordinated human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race. That would be my starting point for an ideal for the law."); Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 *STAN. L. REV.* 254, 282 (1963) ("It is difficult to overestimate the importance of eugenicism in Holmes's social thought."); COHEN, *supra* note 4, at 240–42 (detailing Holmes's long association with the eugenics movement).

<sup>140</sup> See G. EDWARD WHITE, *OLIVER WENDELL HOLMES, JR.* 94–96 (2006) (explaining how "[a] group of progressive intellectuals" claimed Holmes as a hero).

<sup>141</sup> See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 201, 214, 216–17, 220 (2009) (describing Brandeis's association with the progressive movement).

<sup>142</sup> See ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 252–54 (1956) (describing Stone's contemporaneous movement toward Brandeis and Holmes in their "battle against formalistic jurisprudence").

More broadly, eugenics fit seamlessly into a progressive program that emphasized rationality, social hygiene, science, and the seemingly limitless potential for reform that could be produced by intelligent use of government power to correct social ills.<sup>143</sup> Of course, a strong current of racism and xenophobia also ran through the eugenics movement. It was no coincidence that its triumphs came at a time when there was growing panic about immigration and a change in the country's ethnic mix.<sup>144</sup> But given this fact, it is all the more striking that eugenics never gained a foothold in the Deep South. The reason seems to be that progressive elitism was almost entirely a northern phenomenon. The eugenics movement was populated by white, middle class, northern, and urban reformers who were also attracted to progressivism. Where populism reigned, eugenics mostly failed.<sup>145</sup>

Given this association, it is easy to see why Carrie Buck's case, like John Scopes's, pitted progressive and populist versions of constitutionalism against each other. Figuring out what was at stake in Buck's case helps us see more clearly what was at stake in Dayton and what, precisely, the difference between populists and progressives amounts to.

The starting point for this inquiry is a comparison between Holmes's remarkable opinion and the opinions that he might have written. Holmes might have written an opinion supporting Carrie Buck's claim on the ground that the Constitution protects minority rights. This is the Holmes of his famous dissent in *Abrams v. United States*,<sup>146</sup> where he warned "that we should be eternally vigilant against attempts to check the expression of opinions that we loathe."<sup>147</sup> It is also the way that Arthur Garfield Hays characterized what was at stake in the *Scopes* trial.<sup>148</sup>

Alternatively, Holmes might have ruled in Buck's favor on the ground that eugenics was "junk science." Although many contemporary scientists supported eugenics, there was enough contemporary dissent to form the basis for doubt.<sup>149</sup> In Dayton, Darrow argued against the unthinking

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<sup>143</sup> See SOUTHERN, *supra* note 24, at 50 ("Eugenics appealed to tough-minded progressives because it was reformist, involved the use of government, and was, seemingly, based on cutting-edge science."); David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177, 179–80 (2009) (associating progressive elitism with belief in social control through judgments of hereditary fitness); PICKENS, *supra* note 136, at 4 (associating eugenics with progressive faith in science and worries about democracy).

<sup>144</sup> See LEONARD, *supra* note 109, at 148 (discussing the Progressive Era anti-immigration campaign and its ties to eugenics).

<sup>145</sup> See generally EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH (1995) (noting the contrast between the populist and progressive movement as it relates to eugenics). *But cf.* LEONARD, *supra* note 144, at 115 ("The appeal of eugenics crossed ideological boundaries . . .").

<sup>146</sup> 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

<sup>147</sup> *Id.* at 630.

<sup>148</sup> See *supra* p. 429 (discussing Hays's argument that "the right of self-expression should not be held hostage to majority beliefs").

<sup>149</sup> See Hovenkamp, *supra* note 63, at 971 (noting that by the time *Buck* was decided "compulsory sterilization legislation was already the target of considerable scientific doubt"); COHEN, *supra* note 4, at 252–54 (detailing growing opposition to eugenics at the time when *Buck* was decided).

acceptance of received wisdom.<sup>150</sup> The Holmes of *Abrams* warned that “time has upset many fighting faiths.”<sup>151</sup> The Holmes of *Buck* might have directed some of his famous skepticism against the state’s case.

Finally, if Holmes was determined to rule against Buck, he might have done so on majoritarian grounds. This stance would have aligned him with Bryan’s assertion in Dayton that, whether or not biblical creation accounts were accurate, the people had the right to decide for themselves that they wished to embrace it.<sup>152</sup> This was also the Holmes of *Lochner v. New York*,<sup>153</sup> when he confronted the economic version of Darwinian theory. In that context, he wrote that:

If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.<sup>154</sup>

Of course, Holmes wrote none of these opinions. After a brief and perfunctory obeisance toward the principle of judicial deference,<sup>155</sup> he wrote the following:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.<sup>156</sup>

This is not the language of skepticism, of deference to majority judgments, or of civil liberties. It is a full-throated defense, on the merits, of

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<sup>150</sup> See *supra* pp. 426–28 (discussing Darrow’s position in favor of evolutionary biology and science).

<sup>151</sup> *Abrams*, 250 U.S. at 630.

<sup>152</sup> See *supra* p. 429 (discussing Bryan’s claim that communities have a right to decide for themselves what should be taught in schools).

<sup>153</sup> 198 U.S. 45 (1905).

<sup>154</sup> *Id.* at 75 (Holmes, J., dissenting).

<sup>155</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result.”).

<sup>156</sup> *Id.* (citation omitted).

the eugenics program.<sup>157</sup> That defense is consistent with broad strands in the progressive tradition that celebrated public policy produced by unsentimental, rational, and clear-eyed balancing of costs and benefits. This posture leads naturally to a readiness to override supposed individual rights in order to achieve the public good. It also lends itself to an ingenuous acceptance of scientific expertise.

At first, though, Holmes's rhetoric seems irreconcilable with the civil liberties position that Arthur Garfield Hays advanced in *Dayton*, just as the progressive defense of civil liberties more generally seems inconsistent with progressive faith in government power. In fact, the two positions can be reconciled, but only in a way that is deeply unsettling.

The reconciliation cannot be achieved by reference to constitutionally imposed neutrality between competing community norms—that is, in the way that many modern liberals claim.<sup>158</sup> As I have already argued, it is very doubtful that the ACLU really favored a freedom of conscience that permitted school teachers to teach children whatever the teachers happened to believe. The ACLU was in favor of science, not freedom of conscience. Similarly, there was nothing “neutral” or respectful toward competing communities in Holmes's endorsement of eugenics. On the contrary, eugenics threatened the very existence of communities that made progressives uncomfortable.<sup>159</sup> Like evolutionary theory, eugenics was attractive to progressives because it was “scientific” and rationalistic, and, therefore, in accord with the values of the particular community to which progressives belonged.<sup>160</sup>

A reconciliation between progressive support for civil liberties and progressive belief in government power is possible only because of the persistent progressive tendency to confuse progressive value judgments with neutral and universal truths.<sup>161</sup> On this reconciliation, what civil liberties actually amounted to was not immunity for individual conscience, but immunity for government when it is threatened by unreasoned and biased mass opinions.

To understand how far progressives were willing to go in order to enforce that immunity, we need to grasp the scope of the eugenics project that *Buck v. Bell* endorsed. A report funded by the Carnegie Institution suggested euthanasia as a method of dealing with disabled individuals.<sup>162</sup> Harry

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<sup>157</sup> Cf. *Tennessee v. Lane*, 541 U.S. 509, 534 (2004) (Souter, J., concurring) (noting that *Buck v. Bell* “was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities”).

<sup>158</sup> Cf. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 603 (1990) (advocating government neutrality between competing norms).

<sup>159</sup> See *infra* p. 456–57.

<sup>160</sup> PICKENS, *supra* note 136, at 4.

<sup>161</sup> *Id.* (“[E]ugenists [sic] appeared as progressives in their use of ‘science’ in reform matters, and yet, worried about the growth of democracy in an urban and industrial America, they merely projected their class prejudices as objective laws of civilization and nature.”).

<sup>162</sup> See BLEEKER VAN WAGENEN, EUGENICS EDUC. SOC'Y, PROBLEMS IN EUGENICS. PAPERS COMMUNICATED TO THE FIRST INTERNATIONAL EUGENICS CONGRESS HELD AT THE UNIVERSITY OF

Laughlin, the head of the Eugenics Record Office and a leading spokesman for the movement, wrote that “[t]he lowest ten percent of the human stock are so meagerly endowed by Nature that their perpetuation would constitute a social menace.”<sup>163</sup> Intelligence tests administered to newly arrived immigrants in 1913 “found that 79 percent of Italians, 80 percent of Hungarians, 83 percent of Jews, and 87 percent of Russians were feeble-minded.”<sup>164</sup> Tests administered to 1.75 million Army enlistees in 1917 found feeble-mindedness in 47.3% of white test takers.<sup>165</sup> One leading eugenicist thought that it might be necessary to sterilize some fifteen million people.<sup>166</sup>

In light of all this, it is easy to see why William Jennings Bryan thought that eugenics and the evolutionary theory that buttressed it were an existential threat. The eugenics project was nothing less than an attempt to extirpate the portion of the population most likely to be his supporters. The reasonableness of that fear, in turn, dissolves the tension between Bryan’s support for majoritarianism during the *Scopes* trial and, had he lived, what undoubtedly would have been his support for individual rights in the *Buck* case. The thread that connects the two positions is not a concern for either majoritarianism or individual rights as we understand these concepts today, but rather a concern that “ordinary people” in general will be belittled, subjugated, and, ultimately, eliminated by an arrogant and heartless elite.

To summarize, both the progressive and populist stances in *Scopes* and *Buck* are internally consistent if one focuses on the right question. True, progressives favored individual liberties in *Scopes*, but not *Buck* and populists opposed majoritarianism in *Buck*, but not *Scopes*. But this seeming inconsistency dissolves once one understands that neither individual liberties nor majoritarianism was what the participants thought was at stake in the two cases. Instead, the real issue was protection of “ordinary people” from elite denigration on the one hand and protection of government from mass ignorance on the other. For populists, defense of Tennessee’s anti-evolution law and of Carrie Buck’s right to have children were both efforts to shield average citizens from elite denigration. For progressives, defense of Virginia’s eugenics law and of John Scopes’s right to teach Darwinian theory were both efforts to avoid pollution of government by mass ignorance.

Seeing how this conflict played out is the work of the next two Parts.

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LONDON, JULY 24<sup>TH</sup> TO 30<sup>TH</sup>, 1912, at 464 app. (1912) (discussing possibility of utilizing euthanasia to deal with disability).

<sup>163</sup> COHEN, *supra* note 4, at 118 (quoting Laughlin).

<sup>164</sup> *Id.* at 33.

<sup>165</sup> *Id.* at 34.

<sup>166</sup> *Id.* at 110.

### III. WHAT CAME NEXT

#### A. Eugenics

*Buck v. Bell* has never been overruled, and the Supreme Court continued to cite it into the twenty-first century.<sup>167</sup> America's love affair with eugenics continued as well. Polls in the late 1930s found that 84% of Americans favored sterilization of "habitual criminals and the hopelessly insane."<sup>168</sup> In 1974, a federal judge found "uncontroverted evidence" that in the recent past "minors and other incompetents have been sterilized with federal funds and that an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization."<sup>169</sup> In 2010, California was found to have sterilized large numbers of female prisoners without their full consent.<sup>170</sup> As late as 2019, a nurse at the Irwin County Ice Detention Center in Georgia filed a whistle-blower complaint claiming that detainees had told her they had had their uteruses removed without their full understanding or consent.<sup>171</sup>

But although support did not die out, cultural and legal developments reversed the momentum favoring eugenics. The cultural change resulted from popular revulsion with the Nazi eugenics program.<sup>172</sup> A simultaneous legal change occurred in 1942 when the Supreme Court decided *Skinner v. Oklahoma ex rel. Williamson*.<sup>173</sup> At issue was a state statute providing for involuntary sterilization of persons who had committed three or more "felonies

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<sup>167</sup> See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 n.6 (2001) (noting that eugenics-based "laws were upheld against constitutional attack 70 years ago in *Buck v. Bell*"); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1973) (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in the judgment in part and dissenting in part) (quoting Justice Holmes's remark that the Equal Protection Clause "was the last resort of constitutional arguments"); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (citing *Buck* for the proposition that "[t]he Court has refused to recognize an unlimited" scope for the right of privacy).

<sup>168</sup> LOMBARDO, *supra* note 4, at 227. In contrast, only 70% favored distribution of birth control information, and 65% favored the death penalty for murder. More than half the respondents favored "mercy deaths" for "hopeless invalids." *Id.*

<sup>169</sup> *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974).

<sup>170</sup> See Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 461 (2018) (noting the legacy of *Buck v. Bell* in California's forced sterilization of female prisoners). For efforts to trace modern hyper-incarceration to roots in the eugenics movement, see *id.* and James C. Oleson, *The New Eugenics: Black Hyper-Incarceration and Human Abatement*, 5 SOC. SCIS. 1, 1–2, 5 (2016).

<sup>171</sup> See Caitlin Dickerson, Seth Freed Wessler & Miriam Jordon, *Immigrants Say They Were Pressured into Unneeded Surgeries*, N.Y. TIMES (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html>.

<sup>172</sup> There is evidence that the Nazis used the American genetics program as a model, and Nazis on trial in Nuremberg cited *Buck* in defense of their actions. COHEN, *supra* note 4, at 11. By the late 1930s, however, the German regime had begun to characterize America as populated by "weaker white 'races,'" thereby helping to discredit "scientific" racism and, with it, the eugenic project. NOURSE, *supra* note 128, at 15.

<sup>173</sup> 316 U.S. 535 (1942).

involving moral turpitude.”<sup>174</sup> Justice Douglas’s opinion for the majority cited *Buck* several times and purported to leave its holding intact.<sup>175</sup> It nonetheless found that the Oklahoma statute violated the Equal Protection Clause because it excepted from its coverage “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses.”<sup>176</sup>

The first paragraph of Justice Douglas’s opinion, apparently added late in the drafting process,<sup>177</sup> invoked neither the populist nor the progressive tradition. Instead it used the rhetoric of individual rights. Douglas wrote, “[t]his case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.”<sup>178</sup>

But here, as in *Scopes* and *Buck*, we should not be misled by individual rights rhetoric. If the “important” “right to have offspring” really had constitutional stature, then *Buck* would have been overruled or, at least, sharply limited, and there would have been no need to resort to equal protection analysis.

To understand what actually drove the outcome, we need to view the case through the prism of populist and progressive constitutionalism. It turns out that whereas populists and progressives disagreed in *Scopes* and *Buck*, they could join in an overlapping consensus in *Skinner*.

From the progressive point of view, an important change occurred between 1927 and 1942. In large part because of the Nazis’ brutal experiment with eugenics, elite opinion had changed sides.<sup>179</sup> Although eugenics remained popular among the populace as a whole, experts increasingly doubted eugenic claims.<sup>180</sup> Academics now saw the program as thinly disguised racism based on myth and pseudo-science in much the way that experts had denigrated biblical creation stories fifteen years earlier in Dayton.<sup>181</sup>

There are hints throughout the *Skinner* litigation that the Justices were influenced by this shift. At oral argument, Chief Justice Stone asked skeptical questions about whether criminal traits were subject to genetic transmission,<sup>182</sup> and Justice Jackson asked whether environment, rather than genetics, produced crime.<sup>183</sup> When Douglas came to write his opinion, he bracketed the argument that the Oklahoma statute “cannot be sustained as an exercise of the police power, in view of the state of scientific authorities

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<sup>174</sup> *Id.* at 536.

<sup>175</sup> *Id.* at 539–42.

<sup>176</sup> *Id.* at 537 (quoting Oklahoma’s Habitual Criminal Sterilization Act, 57 OKLA. STAT. § 195 (1935)).

<sup>177</sup> The paragraph appeared “[i]n a large, cloud-shaped bubble at the top of [Douglas’s] penciled draft.” NOURSE, *supra* note 128, at 151.

<sup>178</sup> *Skinner*, 316 U.S. at 536.

<sup>179</sup> See NOURSE, *supra* note 128, at 15, 129–32.

<sup>180</sup> See COHEN, *supra* note 4, at 309 (describing shift in opinion).

<sup>181</sup> See, e.g., Hovenkamp, *supra* note 63, at 972 (noting change in expert opinion about eugenics by 1942).

<sup>182</sup> See NOURSE, *supra* note 128, at 146 (describing Stone’s questions).

<sup>183</sup> *Id.*

respecting inheritability of criminal traits,”<sup>184</sup> but he nonetheless took the trouble to cite five studies suggesting that the eugenics argument was deeply flawed.<sup>185</sup> And when he turned to the Equal Protection analysis, he mocked Oklahoma’s claim that there was scientific evidence supporting the notion that chicken thieves, but not embezzlers, had a genetic propensity to crime.<sup>186</sup> Justice Jackson’s concurring opinion expressed doubt about the effort “to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility.”<sup>187</sup> Chief Justice Stone based his concurrence on the failure of the state to provide a hearing to discover whether “[the defendant’s] criminal tendencies are of an inheritable type.”<sup>188</sup>

In light of this shift in expert opinion, the progressive stance in *Scopes*, *Buck*, and *Skinner* is entirely consistent. In each case, progressives treated the Constitution as shielding government from corruption produced by ignorant and prejudiced mass opinion. The fact that elite opinion about eugenics changed between *Buck* and *Skinner* might have given more perceptive progressives pause about their ingenuous faith in expertise. But because that faith remained unshaken, progressives were willing to change their views to conform to a shift in the scientific consensus.<sup>189</sup> Because that consensus now condemned eugenics, preservation of government as the domain of experts now required courts to condemn it as well.

That condemnation, standing alone, might have led to the outright overruling of *Buck*. But by preserving *Buck* and shifting to an equal protection theory, Justice Douglas was able to make a second point, also in tension with an individual rights approach, but this time appealing to populists. For populists, the shift from the substantive due process emphasis in *Buck* to an equal protection rationale served to emphasize the class bias inherent in the eugenics project. No doubt because of the Nazi experience, Douglas mentioned race and nationality rather than class. Still, the statutory distinctions that he emphasized—between chicken thieves on the one hand and embezzlers and corrupt politicians on the other—made the point about class distinctions clearly enough. “[S]trict scrutiny,” he wrote, was necessary “lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”<sup>190</sup> For populists, this language could easily

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<sup>184</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 537–38 (footnote omitted).

<sup>185</sup> *Id.* at 545 n.1.

<sup>186</sup> *Id.* at 539.

<sup>187</sup> *Id.* at 546 (Jackson, J., concurring).

<sup>188</sup> *Id.* at 544 (Stone, J., concurring).

<sup>189</sup> *Cf.* Hovenkamp, *supra* note 63, at 956 (“One characteristic of progressive policy ever since its inception was its tendency to follow prevailing science, changing its political views when dominant scientific views changed.”).

<sup>190</sup> *Skinner*, 316 U.S. at 541 (majority opinion).

be read as endorsing the proposition that the lifestyles, customs, and beliefs of “ordinary Americans” were not sources of shame and should not be the target of derision and condescension. They were certainly not a cancer to be removed from the American body politic. Instead, they were sources of pride to be valued and respected. Of course, and above all, that was the point that Bryan wanted to make in Dayton and, indeed, throughout his public life.

### B. *Orthodoxy in Education*

Just as *Skinner* required a reinterpretation of *Buck*, the Court’s decision a year later in *West Virginia State Board of Education v. Barnette*<sup>191</sup> required a reinterpretation of *Scopes*. But whereas *Skinner* produced a populist/progressive détente, *Barnette* demonstrated that the conflict could not be resolved permanently.

At issue was a school district’s expulsion of children who adhered to the Jehovah’s Witness faith for refusal to participate in a flag salute ceremony.<sup>192</sup> In *Minersville School District v. Gobitis*,<sup>193</sup> the Court had rejected a free exercise challenge to expulsions with only one dissent. A scant three years later, it reversed itself and endorsed a free speech challenge to a similar measure in *Barnette*.<sup>194</sup>

Justice Jackson’s opinion is famous for his powerful endorsement of individual rights, and Justice Frankfurter’s lengthy and sprawling dissent rings all the changes of majoritarianism and judicial restraint. Once again, though, one needs to look beneath the surface to find the issues that actually divide the justices.

Consider, first, the Jackson opinion. In its most famous passages, Jackson proclaims that “[o]ne’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections”<sup>195</sup> and that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>196</sup>

This is strong rhetoric, but it presents two difficulties. First, the rhetoric conflicts with the more general progressive position on government power. Jackson himself said as much. He conceded that the principles he relied on “grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few

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<sup>191</sup> 319 U.S. 624 (1943).

<sup>192</sup> *Id.* at 629–30.

<sup>193</sup> 310 U.S. 586 (1940).

<sup>194</sup> *Barnette*, 319 U.S. at 642.

<sup>195</sup> *Id.* at 638.

<sup>196</sup> *Id.* at 642.

controls and only the mildest supervision over men's affairs."<sup>197</sup> On Jackson's account, this "*laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls."<sup>198</sup>

These musings amount to a remarkably (and, in Jackson's case, characteristically) candid acknowledgement of progressive confusion over civil liberties. Why should progressives, who trust government power everywhere else, worry about it in this context?

The confusion is especially pronounced because *Barnette* dealt with school children, where doubts about whether "liberty [is] attainable through mere absence of governmental restraints" are most intense.<sup>199</sup> Jackson must have understood that withdrawing government compulsion did not leave the children free to decide for themselves whether to salute the flag. As Justice Frankfurter wrote in *Gobitis*, the pledge might serve "to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent."<sup>200</sup> Viewed from this angle, it is easy to see the progressive point that state compulsion sometimes promotes freedom of thought, as when, for example, it dissipates the effect of parental indoctrination.<sup>201</sup>

This point, in turn, leads to a second problem. Whatever the merits of Jackson's eloquent attack on compelled orthodoxy in other contexts, it is hard to reconcile with the way that public education actually functions. Public education is shot through with compelled orthodoxy. Indeed, the transmission of a unifying body of common knowledge and belief is the central aim of the enterprise.<sup>202</sup> Children who write essays defending white supremacy in their civics classes or insist on the Ptolemaic system in their science classes do not tend to get good grades.<sup>203</sup> Jackson writes that "[f]ree public education, if

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<sup>197</sup> *Id.* at 639–40.

<sup>198</sup> *Id.* at 640.

<sup>199</sup> *Id.* at 639.

<sup>200</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599 (1940).

<sup>201</sup> *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 242 (1972) (Douglas, J., dissenting) ("[N]o analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children.").

<sup>202</sup> This point was made prominently in the Court's famous opinion in *Brown v. Board of Education*, where it argued that education was "the very foundation of good citizenship. . . . [I]t 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." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1953).

One might respond by arguing that part of "good citizenship" and of our "cultural values" is the appreciation of free speech rights. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 12–13 (2018). But that observation begs the question what free speech rights students should have, and the answer to that question might be influenced by the felt need to expose students to widely shared knowledge, values, and norms. As even Driver concedes, "students assigned to write a paper about the American Revolution—who would prefer to tackle the Cuban Revolution—have [no] legitimate claim to their preferred topic under the First Amendment's right to free expression." *Id.* at 19.

<sup>203</sup> *Cf. DRIVER, supra* note 202, at 19.

faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.”<sup>204</sup> But Jackson could only make this assertion by wrongly associating secularism with “political neutrality” and his own contestable beliefs with nonpartisanship. That conflation is incompatible with the very intellectual freedom that the opinion celebrates, but it is fully consistent with progressive elitism.

For these reasons, *Barnette* fits awkwardly within the individual rights canon. To understand what the opinion is really about, one must know something about the events that transpired between the Court’s original decision upholding compelled flag salutes and its ultimate decision invalidating the practice.

As Vincent Blasi and Seana Shiffrin detail in their riveting account, in the immediate wake of *Gobitis*, there were hundreds of violent attacks on Jehovah’s Witnesses.<sup>205</sup> In one incident, Witnesses were “forced . . . to drink large quantities of castor oil, roped . . . together, then paraded . . . through the town.”<sup>206</sup> In a Wyoming incident, a Witness was tarred and feathered.<sup>207</sup> In still another incident, “vigilantes pulled [a] Witness . . . from his car, draped a flag over the hood, and when he refused their demand that he salute the flag, slammed his head against the hood for nearly thirty minutes as the chief of police looked on.”<sup>208</sup> Altogether, in 1940, there were attacks against almost 1,500 Witnesses in 335 incidents in forty-four states.<sup>209</sup> Over 2,000 Witness children in forty-eight states were expelled from school for refusal to salute the flag.<sup>210</sup>

*Barnette* does not explicitly mention any of these events, but there is no doubt that the Justices were aware of them. According to Shawn Francis Peters, Jackson’s original draft referred to the post-*Gobitis* violence, but Chief Justice Stone warned Jackson that the allusions might promote “the impression that our judgment of the legal question was affected by the disorders.”<sup>211</sup> At Stone’s strong urging, Jackson removed the direct references.<sup>212</sup> Instead he made his point inferentially by detailing “the Roman drive to stamp out Christianity . . . the Inquisition . . . the Siberian exiles . . . down to the fast failing efforts of our present totalitarian enemies.”<sup>213</sup>

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<sup>204</sup> *Barnette*, 319 U.S. at 637.

<sup>205</sup> Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES 409, 420–21 (Michael C. Dorf ed., 2d ed. 2009). For a comprehensive account of the state and private persecution of Witnesses during this period, see SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* 96–152 (2000).

<sup>206</sup> Blasi & Shiffrin, *supra* note 205, at 420.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 421.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 422.

<sup>211</sup> PETERS, *supra* note 205, at 251 (quoting Chief Justice Stone).

<sup>212</sup> *Id.*

<sup>213</sup> *Barnette*, 319 U.S. 624, 641 (1943).

Jackson's concern was rooted in progressive fears about populism unchained. The fear was not solely about government impingement on individual rights. After all, Jackson was an opponent of the view that "liberty was attainable through mere absence of governmental restraints" or "that government should be entrusted with few controls and only the mildest supervision over men's affairs."<sup>214</sup> The fear was about private, rather than public, power. It was that Jehovah's Witnesses, a small and powerless group, were being victimized by popular hatred and prejudice. A paroxysm of mass violence required active government intervention, not the acquiescence in private arrangements that traditional civil liberties entails. For Jackson, the government intervention took the form of invalidating legislation that fueled the violence.

The concern was reinforced by elite disdain for empty, symbolic ritual. Jackson was willing to tolerate flag salute ceremonies designed to promote nationalism when they were purely "voluntary." He nonetheless wrote that the ceremonies were "a primitive but effective way of communicating ideas. . . . a short cut from mind to mind."<sup>215</sup> This "short cut" was no substitute for the hard intellectual work necessary to reach the kinds of conclusions that merited respect. True national unity was the product of "persuasion and example,"<sup>216</sup> not compelled ritual. Jackson was confident "of the appeal of our institutions to free minds" and protective of "intellectual individualism and the rich cultural diversities that we owe to exceptional minds."<sup>217</sup>

This rhetoric fits uncomfortably with the Witness's actual objections to the flag salute, based as they were on religious faith rather than in secular, intellectual analysis. But it is hardly a surprise that progressive justices would use arguments like this to support their position. The arguments are rooted in a commitment to voluntarism, rationality, and Enlightenment values. They implicitly discount the roles of history, culture, habit, ritual, and indoctrination as sources of value and methods by which values are transmitted. Put differently, as populists undoubtedly would have pointed out, the arguments are deeply hostile to the ways in which many Americans come to their views.

Justice Frankfurter, joined by Justices Roberts and Reed, dissented in *Barnette*, but his opinion was hardly a defense of populism. Instead, the argument between the dissent and the majority amounted to an intramural quarrel between progressives. Frankfurter did not defend mass opinion, much less mass violence. As "[o]ne who belongs to the most vilified and persecuted minority in history,"<sup>218</sup> he hardly could. As a personal matter he "whole-heartedly associate[d] [himself] with the general libertarian views in

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<sup>214</sup> *Id.* at 639–40.

<sup>215</sup> *Id.* at 632.

<sup>216</sup> *Id.* at 640.

<sup>217</sup> *Id.* at 641–42.

<sup>218</sup> *Id.* at 646 (Frankfurter, J., dissenting).

the Court's opinion, representing as they do the thought and action of a lifetime."<sup>219</sup> But for Frankfurter, the lesson to be drawn from the progressive triumph that he helped bring about was that judges should generally abstain from interferences with the political branches which could, on the whole, be trusted to produce wise and humane public policy. In a passage that directly tied the flag salute controversy to the earlier dispute in *Dayton*, he asked:

[I]s this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare *Scopes v. State* . . . .<sup>220</sup>

Of course, self-restraint of this sort depends on faith that government institutions will be mostly a force for good even if they occasionally adopt retrograde policies. But as a lifelong progressive, Frankfurter understood that a failure of this faith doomed the progressive platform as a whole. He was prepared to resolve progressive confusion over civil liberties by an unambiguous embrace of government power. Accordingly, he warned that the majority's support for freedom of speech and religion might also support "[t]he right not to have property taken without just compensation"<sup>221</sup>—a right that had notoriously stood in the way of progressive reforms. For him, the proper analogies were not to the Roman suppression of Christianity or the Inquisition. Instead, like Holmes in *Buck*, Frankfurter invoked standard progressive programs for public betterment like "[c]ompulsory vaccination" and "food inspection regulations."<sup>222</sup> And in a chilling, if perhaps unintentional, reminder of *Buck*, he added "compulsory medical treatment" to his list.<sup>223</sup>

On this reading, then, both Jackson's and Frankfurter's opinions defended progressivism against populist rivals. For Jackson, that defense meant standing up to mass pressure and unregulated private violence that threatened sensible, unbiased government institutions like the public schools. For Frankfurter, it meant defending government against claims of individual rights.

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<sup>219</sup> *Id.* at 646–47.

<sup>220</sup> *Id.* at 659. The citation is to the Tennessee Supreme Court decision reversing the outcome of the *Dayton* trial.

<sup>221</sup> *Id.* at 648.

<sup>222</sup> *Id.* at 655.

<sup>223</sup> *Id.*

Channeling James Madison,<sup>224</sup> Jackson warned that “small and local authorit[ies]” might be more susceptible to mass pressure.<sup>225</sup> Frankfurter might have responded by celebrating local, direct democracy, as populists and anti-Federalists before them often did. Instead, he made the opposite point, emphasizing that “[t]he flag salute requirement . . . comes before us with the full authority of the State of West Virginia. . . . To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue . . . .”<sup>226</sup>

No one on the Court suggested that “some village” might be the best venue for determining school policy, that citizens of such a village might feel legitimately threatened by challenges to the sacred ceremonies that defined their culture, or that their school curricula might be rooted in something other than the “ideal of secular instruction and political neutrality.”<sup>227</sup> The silence proved to be ominous, but its consequences were delayed by a mid-century flowering of progressive constitutionalism.

#### IV. THE WARREN COURT AND ITS AFTERMATH

One can draw a direct line from *Skinner* and *Barnette* to much of the Warren Court’s work. Relying on *Skinner*’s invocation of “strict scrutiny,” the Warren Court subjected racial classifications and classifications impinging on a “fundamental interest” to heightened review.<sup>228</sup> Relying on *Skinner*’s invocation of reproductive rights, the Warren Court began an inquiry<sup>229</sup> that culminated in *Roe v. Wade*.<sup>230</sup> *Barnette*’s emphasis on secularism and rationality in public education led to the banning of prayers in public schools,<sup>231</sup> limits on the funding for parochial schools,<sup>232</sup> invalidating a prohibition on the teaching of evolution in public schools<sup>233</sup> and the outlawing of school segregation.<sup>234</sup> Justice Jackson’s concern that populist hysteria might destroy establishment institutions led the Warren

<sup>224</sup> See THE FEDERALIST NO. 10, at 46 (James Madison) (George W. Carey & James McClellan eds., 2001) (arguing that “a society consisting of a small number of citizens” is more susceptible to domination by “[a] common passion or interest”).

<sup>225</sup> *Barnette*, 319 U.S. at 637 (majority opinion).

<sup>226</sup> *Id.* at 650–51 (Frankfurter, J., dissenting).

<sup>227</sup> *Id.* at 637 (majority opinion).

<sup>228</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (racial classifications); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (voting as fundamental right); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (travel as fundamental right).

<sup>229</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital use of contraception).

<sup>230</sup> 410 U.S. 113 (1973).

<sup>231</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>232</sup> *Bd. of Educ. v. Allen*, 392 U.S. 236, 242 (1968) (permitting the use of public funds for the purchase of secular textbooks but endorsing the view “that the Establishment Clause bars . . . any ‘tax in any amount, large or small . . . levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.’”) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947)).

<sup>233</sup> *Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>234</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Court to oppose McCarthyism.<sup>235</sup> *Barnette*'s embrace of free inquiry led to the Warren Court's free speech activism,<sup>236</sup> including its defense of academic freedom<sup>237</sup> and of erotic literature.<sup>238</sup>

Of course, it is a mistake to abstract from the various social and political forces that produced Warren Court progressivism. There was nothing automatic or mechanical about the movement from *Barnette* and *Skinner* to the reformist judicial activism of the 1950s and 1960s. The connection is nonetheless worth emphasizing because it sheds a different and revealing light on the Warren Court experience.

In his famous synthesis, John Hart Ely argued that the Warren Court could best be understood as "reinforcing" democratic processes.<sup>239</sup> In his view, most of the Court's work did not rest on contestable substantive value judgments. Instead, the Court was in the business of ensuring fair representation by preventing political insiders from locking out their opponents and by protecting "discrete and insular minorities" from the prejudice that blocked their full political participation.<sup>240</sup>

The Court's free speech, voting rights, and reapportionment decisions were prime examples of the first effort.<sup>241</sup> Its campaign against racial discrimination exemplified the second effort.<sup>242</sup> On Ely's account, the pivot point in the Court's history comes with footnote four of *Carolene Products*<sup>243</sup> and the Court's reconciliation of liberal judicial activism with anti-Lochnerism.<sup>244</sup>

No doubt, there is something to this account, but the account also misses something important that studying the progressive-populist split reveals. In a less well-known but equally brilliant synthesis,<sup>245</sup> Lucas A. Powe points out the extent to which Warren Court activism rested on two very different pillars: an effort to bring rural and southern America into the mainstream northern, suburban, and urban political culture,<sup>246</sup> and an unbridled faith in the power of government-led reform.<sup>247</sup> Although Powe himself does not put it this way, both pillars illustrate the victory of progressive over populist constitutionalism.

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<sup>235</sup> See generally ROBERT M. LICHTMAN, THE SUPREME COURT AND MCCARTHY-ERA REPRESSION: ONE HUNDRED DECISIONS (2012) (detailing Warren Court decisions attacking McCarthyism).

<sup>236</sup> See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that the First Amendment limited actions for libel).

<sup>237</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

<sup>238</sup> See, e.g., *Roth v. United States*, 354 U.S. 476 (1957); *Redrup v. New York*, 386 U.S. 767 (1967).

<sup>239</sup> ELY, *supra* note 34, at 73–87.

<sup>240</sup> *Id.* at 75–87.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 144–69.

<sup>243</sup> 304 U.S. 144, 152 n.4 (1938).

<sup>244</sup> ELY, *supra* note 34, at 75–77.

<sup>245</sup> LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

<sup>246</sup> *Id.* at 489–94.

<sup>247</sup> *Id.* at 215.

They provide a way to understand constitutional conflicts if one focuses on *Scopes* and *Buck* instead of on *Lochner* and *Carolene Products*.

The first effort is illustrated by the reapportionment decisions. It is easy to see why Ely treated the cases as grounded in support for democratic processes, but as Justice Frankfurter, among others, pointed out,<sup>248</sup> democratic theory is open-textured and contested. The Court's rejection of a statewide referendum mandating a malapportioned upper house<sup>249</sup>—the kind of direct, popular democracy that populists favored—was certainly not required by uncontroversial tenets of democratic theory. Nor would it be hard to construct a version of the theory that treated rural voters as a “discrete and insular minority” entitled to institutional protection. What is beyond dispute, though, is the fact that the reapportionment cases massively shifted electoral power from the countryside to the emerging urban and suburban areas.<sup>250</sup> As a cultural matter, reapportionment was a triumph for the educated and cosmopolitan middle and upper classes—the natural constituency of progressives. Its victims were the already isolated and downwardly mobile rural voters—the natural constituency of populists.

In still more obvious ways, the Court's desegregation decisions attacked what was then thought of as southern exceptionalism. It did not escape the attention of southern populists that the Court quickly lost its zeal for the integration process when the battle moved from the rural south to the urban north.<sup>251</sup>

Despite this fact, no one should deny Ely's point that prejudice against racial minorities, as well as more overt denials of the franchise, sharply limited Black political power. Nor should anyone doubt the Warren Court's good faith when it grappled with the problem of racial justice. Still, there was nothing inevitable about the Court's proposed solution to this problem.

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<sup>248</sup> *Baker v. Carr*, 369 U.S. 186, 267–73 (1962) (Frankfurter, J., dissenting).

<sup>249</sup> *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736–37 (1964).

<sup>250</sup> See, e.g., Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 91 n.624 (1984) (citing sources demonstrating reapportionment's impact).

<sup>251</sup> In his separate opinion in *Keyes v. School District No. 1*, Justice Powell, then the only southern Justice on the Court, attacked the “merely regional application” of *Brown* and argued that southern de jure and northern de facto segregation should be held to the same legal standard. 413 U.S. 189, 218–19 (1973) (Powell, J., concurring in part and dissenting in part). Although the Court never endorsed Justice Powell's position, for a short period it did appear poised to attack at least some forms of de facto segregation. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding use of bussing to overcome segregation resulting from residential segregation in system that had been segregated on de jure basis); *Keyes*, 413 U.S. at 213–14 (majority opinion) (upholding a judicially mandated desegregation plan in northern context). However, when northern opposition to desegregation intensified, the Court quickly retreated. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (limiting the availability of interdistrict relief in northern context); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (limiting judicial remedies for school segregation in Kansas City, Missouri); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (disapproving judicial remedies to prevent resegregation in northern context). Ultimately, the Court invalidated even voluntary, race-conscious remedies for de facto segregation. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding that race conscious assignment of students to promote integration was unconstitutional).

As Derrick Bell and Gary Peller have powerfully demonstrated, the Black community was divided between integrationist and Black nationalist critiques of white racism.<sup>252</sup> In a counterfactual world where African Americans were fairly represented in our political institutions, it is anyone's guess who would have won this struggle.

It follows that a Court devoted to representation reinforcement might have endorsed Black nationalist remedies that would have required massive public investments in Black communities and institutions. This approach would have embraced the kind of localism and community power compatible with a populist world view. Instead, the Court nationalized the struggle. It effectively mandated the destruction of African American primary and secondary schools and embraced the progressive view that emphasized the irrationality of racial differences and the need to assimilate African Americans into a sensible, meritocratic, and rationalistic white culture.<sup>253</sup>

The Warren Court's criminal justice decisions stemmed from similar impulses. As many have pointed out, the Justices thought of criminal justice reform as a branch of its racial justice project.<sup>254</sup> The target was mostly southern, racist police forces that used state violence to enforce racial subjugation. The objective was to "modernize" and "professionalize" policing by making it more scientific and rational.<sup>255</sup> A populist approach might, instead, have focused on democratizing policing and providing for direct community involvement and control.

Many Warren Court decisions also illustrate the second of Powe's two hallmarks of Warren Court activism: unconstrained optimism about the possibilities of social transformation through the vigorous and "rational" application of constitutional law. Justices on the Warren Court appear to have actually believed that racism could be eradicated by the integration of public education; that *Miranda* warnings<sup>256</sup> and suppression of illegally seized evidence<sup>257</sup> could eliminate police violence and professionalize law enforcement; that a speech marketplace that was "robust[] and wide-open"<sup>258</sup> would yield sensible public policy; and that disputes about matters

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<sup>252</sup> DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 17 (1987); GARY PELLER, *CRITICAL RACE CONSCIOUSNESS: RECONSIDERING AMERICAN IDEOLOGIES OF RACIAL JUSTICE* 51–55 (2011).

<sup>253</sup> See PELLER, *supra* note 252, at 5–18 (defending the Black nationalist perspective against integrationist ideology).

<sup>254</sup> See, e.g., POWE, JR., *supra* note 245, at 198, 492 (noting that the Warren Court's "criminal procedure cases were thinly disguised race cases"); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 84–87 (exploring connection between race and Warren Court criminal procedure decisions).

<sup>255</sup> POWE, JR., *supra* note 245, at 199.

<sup>256</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>257</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the Fourth Amendment exclusionary rule to the states).

<sup>258</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

like birth control, pornography, and prayer in schools could be settled by calm study of the empirical evidence.

With the advantage of hindsight, it is now clear that these predictions were wildly optimistic. For present purposes, though, it is important to emphasize that they were connected to the general progressive faith in progress and rationality and rejection of populist fears about elitism and condescension. The point is obscured by the fact that Warren Court reforms often involved the invalidation of legislation. If one thinks of progressivism as emphasizing the power of the political branches, that fact seems anomalous. If instead, one thinks of progressivism as entailing an effort to cleanse the political processes of popular prejudice and irrationality that blocked needed reform, the paradox dissolves.

The Warren Court was liberal, and liberalism is an amalgam of contradictory progressive and populist impulses. It is therefore unsurprising that there were also some populist strands in Warren Court jurisprudence. For example, its efforts to deal with the problem of poverty reflected a populist sensibility. Decisions that guaranteed the right of poor people to representation in criminal trials,<sup>259</sup> that prohibited jailing of defendants too poor to pay fines,<sup>260</sup> that abolished the poll tax,<sup>261</sup> and that protected the rights of welfare recipients<sup>262</sup> all suggested a concern about class-based exclusion from full citizenship.

It is nonetheless striking that the Warren Court was at its most tentative when it embraced the class problem. The Court never quite got around to saying that wealth discrimination was a suspect classification or that there was a fundamental interest in the means of subsistence. Reforms to protect the poor and powerless in the criminal justice system were linked to the rise of waivers that made the reforms more theoretical than real.<sup>263</sup> The possibility of a jury trial was of little value in a world where the vast majority of cases ended in a plea bargain.<sup>264</sup>

When the conservative counterrevolution began, the left-populist strands of Warren Court activism were among the first to be disowned. The

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<sup>259</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment guaranteed indigent criminal defendants the right to appointed counsel).

<sup>260</sup> See *Williams v. Illinois*, 399 U.S. 235 (1970) (holding that the Equal Protection Clause prohibited the imprisonment of an indigent defendant for failure to pay a fine).

<sup>261</sup> See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding that the poll tax unconstitutionally infringed on the right to vote).

<sup>262</sup> See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that the Due Process Clause prohibited the termination of welfare benefits prior to a hearing); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that states could not impose durational residency requirements on welfare recipients).

<sup>263</sup> See, e.g., Michael E. Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 7–8 (1970) (attacking Warren Court's readiness to recognize waiver of constitutional rights); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 39 (1979) (describing pervasiveness of plea bargaining).

<sup>264</sup> See Alschuler, *supra* note 263, at 1 (stating that roughly ninety percent of state and federal criminal defendants plead guilty rather than go to trial).

counterrevolution began slowly and tentatively,<sup>265</sup> but eventually it picked up steam and, at this writing, is poised to achieve something like complete victory.

There are many explanations for this shift, ranging from Warren Court overreaching, to macro-level political and economic changes, to luck in the timing of Supreme Court vacancies. For purposes of this Article, though, it is useful to emphasize the connection between the conservative victory and the internal weaknesses and contradictions in both populist and progressive approaches to constitutional law. That is the subject of the next Part.

## V. WHAT HAPPENED IN KANSAS<sup>266</sup>

### A. *Populism's Conservative Transformation*

From the beginning, populism was beset by a fatal contradiction. The movement was grounded in anger and resentment directed at twin evils: economic injustice and cultural denigration. It turned out, though, that remedies for the two evils looked in opposite directions. On occasion, populists favored strong government action to remedy the first evil—for example, vigorous antitrust enforcement or nationalization of some major industries—to fight their wealthy oppressors. But many populists also believed that the government was in the hands of forces that had no sympathy for their deepest beliefs and aspirations. This cultural disconnect contributed to a sense that government could not be trusted. Legislators and judges had sold out to the rich and powerful, and government collusion with the railroads and producers had driven down the incomes of ordinary people.<sup>267</sup> But if government was the enemy, then how could it also be the solution?

The contradiction might have been resolved by popular democracy. The first step was for an aroused citizenry to take direct control of government. Once the takeover had been effectuated, a newly invigorated and corruption-free state could marshal government power to protect the people from predation.<sup>268</sup>

Unfortunately, this resolution posed a variety of problems of its own. First, it was always unclear how popular democracy could be put in place. Certainly, state plutocrats were not about to agree to procedural reforms that would guarantee their own defeat. Revolutionary Marxists had a solution to this problem, but populists did not. The very pervasiveness of the corruption that populists decried made implausible the popular democracy solution that they proposed.

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<sup>265</sup> See generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983) (arguing that the Burger Court did little to reverse Warren Court initiatives).

<sup>266</sup> Cf. THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA (2004) (describing how conservative emphasis on social issues caused many Americans to vote against their economic self-interest).

<sup>267</sup> See *supra* pp. 422–23.

<sup>268</sup> *Id.*

Second, the resolution fell victim to the populist conceit that there was a united, virtuous, and wise “people,” which could somehow be given voice without distortion produced by intermediate institutions.<sup>269</sup> Of course, in the real world, the people are not united and are not always virtuous or wise.<sup>270</sup>

Because the people are not united, mechanisms must be put in place to measure how many people favor one policy over another. As a later generation of political theorists demonstrated, any means of aggregating conflicting preferences produces distortions.<sup>271</sup> The populist conceit that elections would reveal an unpolluted general will was therefore naïve. Worse yet, even before these mediating institutions take hold, public opinion never exists in antiseptic form. Opinions and preferences are always situated within a matrix of power, culture, and politics.<sup>272</sup>

Because people are not always virtuous or wise, filtering mechanisms are sometimes necessary to make reform effectual. Populist romantics assumed that there were simple solutions to problems of social justice. If only the people were allowed to rule, social disintegration could be halted, and economic misery could be eradicated. But, of course, solutions are rarely simple. Real government programs that really ameliorate economic dislocation must deal with complex problems and avoid unintended consequences. That requires experts who do not have to respond to the immediate demands of a sometimes ill-informed electorate.

These weaknesses left populism vulnerable to a right-wing takeover. When populist efforts to establish direct democracy predictably failed, either because it could not be effectuated or because, once effectuated, it produced disappointing outcomes, populists were left with no solution to the problem of plutocratic government. In the absence of a solution, populist focus concentrated on the second evil—cultural denigration. The movement turned to the politics of despair and grievance. With the hope of democratic transformation shattered, all that remained of the populist impulse was distrust of government as currently constituted—a distrust reinforced by exogenous shocks like Vietnam, Watergate, the failure to find weapons of mass destruction in Iraq, and the Great Recession. The upshot was a populism that was more aligned with conservative opposition to government regulation than with traditional left-wing arguments for government intervention.

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<sup>269</sup> *Id.*

<sup>270</sup> See, e.g., GALSTON, *supra* note 29, at 38 (noting that “[p]lurality, not homogeneity, characterizes most peoples most of the time”).

<sup>271</sup> For a short statement of “Arrow’s Theorem” demonstrating that under certain conditions voting cannot achieve stable outcomes, see KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 60 (3d ed. 2012). For a summary of the problems with democratic aggregation uncovered by public choice theory, see generally JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

<sup>272</sup> See, e.g., Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 2–8 (2011) (explaining how motivated cognition distorts perceptions); Anca M. Miron, Nyla R. Branscombe & Monica Biernat, *Motivated Shifting of Justice Standards*, 36 PERSONALITY & SOC. PSYCH. BULL. 768, 768 (2010) (same).

Matters were made worse by populism's historic association with Manichean and conspiratorial thinking that intersected in toxic ways with deeply engrained American racism. Like their forbearers, modern populists attribute their misfortunes to the evil scheming of people who are not part of "the people"—elites, immigrants, and racial minorities.<sup>273</sup> Once detached from a more optimistic and inclusive politics directed at popular control and government reform, the attribution produces free-floating cultural resentment and nihilistic rage.

This transformation has had its most profound effect on our general political culture, but it has also influenced modern constitutional culture. Counterintuitive as it might seem, we stand at the threshold of a populist constitutional moment.

The claim seems counterintuitive because the modern Supreme Court is the most business-friendly in memory. Over a wide range of issues, including administrative law,<sup>274</sup> access to justice,<sup>275</sup> free speech law,<sup>276</sup> and statutory construction,<sup>277</sup> the Court has systematically favored business interests. But the violated intuition is rooted in outdated assumptions about populism's leftward tilt. Most of the emerging conservative constitutional agenda is compatible with or has roots in a modern populism that has given up on government.<sup>278</sup>

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<sup>273</sup> See, e.g., GALSTON, *supra* note 29, at 4–5, 19–21 (describing populist conspiracy theories).

<sup>274</sup> See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding that the Department of Labor failed to engage in a reasonable process when it interpreted the Fair Labor Standards Act to require certain employers to pay certain employees overtime); *Sackett v. EPA*, 566 U.S. 120, 131 (2012) (holding that an EPA compliance order was a final agency action subject to APA review); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 226 (2009) (holding that EPA permissibly considered costs and benefits before promulgating rules).

<sup>275</sup> See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–60 (2011) (restricting commonality and particularity requirements for class action lawsuits); *Philip Morris USA v. Williams*, 549 U.S. 346, 352–54 (2007) (limiting punitive damage awards).

<sup>276</sup> See, e.g., *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018) (holding that compelled contributions to unions by government employees violates freedom of speech); *Citizens United v. FEC*, 558 U.S. 310, 342–43 (2010) (holding that corporations have a First Amendment right to expend money in conjunction with political campaign); *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (holding that a statute establishing a "buffer zone" around abortion clinics violates the First Amendment).

<sup>277</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014) (holding that "person," within meaning of Religious Freedom Restoration Act's protection of a person's exercise of religion, includes for-profit corporations); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1612 (2018) (holding that the Federal Arbitration Act's savings clause does not permit courts to reject "arbitration agreements waiving collective action procedures for claims under the [Fair Labor Standards Act] and class action procedures for claims under state law").

<sup>278</sup> I do not mean to deny that there are populist movements—Black Lives Matter or Occupy Wall Street, for example—that oppose the Court's agenda. See generally David Fontana, *Unbundling Populism*, 65 UCLA L. REV. 1482 (2018) (distinguishing between left and right populism); Bojan Bugarić, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 GERMAN L.J. 390 (2018) (distinguishing between different types of populism). My argument is that the Justices have succeeded in muddying the waters by appropriating populist rhetoric to reverse its ideological valence.

The emerging alliance between populists and conservatives is most obvious with regard to the regulatory state. In its most extreme form, and when combined with populist conspiracy theories, the attack morphs into worries about the “deep state” that secretly controls the government. For now at least, these worries bother only people associated with the Trump Administration or otherwise vulnerable to paranoid fantasies.<sup>279</sup> However, more moderate versions of the same claims are poised to become part of mainstream constitutional thinking.<sup>280</sup> Advocates of the unitary executive,<sup>281</sup> of overruling *Chevron*,<sup>282</sup> of revival of the nondelegation doctrine,<sup>283</sup> and of “the constitution in exile,”<sup>284</sup> claim that the federal bureaucracy is unaccountable, undemocratic, and populated by elites who fail to understand American values.

Of course, conservatives and populists often have different motives for these attacks. For some conservatives, the regulatory state is dangerous because of its potential to upset the economic status quo, which they view as just and desirable. Right-wing populists, in contrast, often remain angry at economic injustice. They have lost their faith in the possibility of radical transformation of government that would make it a force for good rather

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<sup>279</sup> See, e.g., GEORGE PAPADOPOULOS, *DEEP STATE TARGET: HOW I GOT CAUGHT IN THE CROSSHAIRS OF THE PLOT TO BRING DOWN PRESIDENT TRUMP 6–11* (2019) (describing the “deep state”).

<sup>280</sup> Consider, for example, the following comments by Chief Justice Roberts:

The Framers could hardly have envisioned today’s “vast and varied federal bureaucracy” and the authority administrative agencies now hold over our economic, social, and political activities. . . .

Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence. As scholars have noted, “no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.” . . . President Truman colorfully described his power over the administrative state by complaining, “I thought I was the president, but when it comes to these bureaucrats, I can’t do a damn thing.” . . . President Kennedy once told a constituent, “I agree with you, but I don’t know if the government will.” . . . The collection of agencies housed outside the traditional executive departments, including the Federal Communications Commission, is routinely described as the “headless fourth branch of government,” reflecting not only the scope of their authority but their practical independence.

*City of Arlington v. FCC*, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting) (citations omitted).

<sup>281</sup> See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1153 (1992) (arguing in favor of the unitary executive theory); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 548–50 (1994) (same).

<sup>282</sup> See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron*, *U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) should be overruled).

<sup>283</sup> See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (arguing for revival of the nondelegation doctrine); *Dep’t of Transp. v. Ass’n Am. R.Rs.*, 575 U.S. 43, 66–91 (2015) (Thomas, J., concurring) (same).

<sup>284</sup> See Douglas H. Ginsburg, *Delegation Running Riot*, 18 REG., no. 1, at 83, 83–84 (1995) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)).

than evil. Faced with the choice between “free” markets and rule by corrupt government elites who have no understanding of their culture and values, many modern populists are prepared to choose the former.

A second, closely related prong of the conservative constitutional agenda—the revival of federalism and of judicially enforced limits on congressional power—has similar populist roots. No doubt, many conservatives favor these changes because the federal government poses the greatest threat of enacting and enforcing redistributive programs.<sup>285</sup> However, the judicial rhetoric of federalism rarely mentions this fear. Instead, the Justices regularly resort to rhetoric about the need for government close to the people and accountable to popular opinion—rhetoric that is long associated with the populist critique.<sup>286</sup>

The most interesting overlap between conservative constitutionalism and modern populism pertains to civil liberties. Consider Justice Thomas’s startling rediscovery of the debate over evolution and eugenics, along with his use of these disputes to challenge progressive orthodoxy. In his separate opinion in *Box v. Planned Parenthood*—defending abortion restrictions—he devotes nineteen pages of the U.S. Reports to an extended essay about abortion, eugenics,<sup>287</sup> and Darwinian thought.<sup>288</sup> All three are identified with “progressives, professionals, and intellectual elites.”<sup>289</sup> The analogy between state mandated sterilization and individual choices about childrearing is far from perfect,<sup>290</sup> but that fact should not distract us from the way in which Justice Thomas takes advantage of early twentieth century populist tropes. Like William Jennings Bryan before him, Justice Thomas reinterprets progressive support for individual rights as an effort to control subordinate groups that, in his view, make progressives uncomfortable. He thinks that

<sup>285</sup> See, e.g., Richard A. Epstein, *Exit Rights under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 149 (1992) (noting that exit rights provided by federalism protect individuals from government regulation).

<sup>286</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 169 (1992) (stating accountability is “diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . . .”); *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. . . . The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.”).

<sup>287</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. \_\_\_, \_\_\_-\_\_\_, 138 S. Ct. 1780 (2019) (Thomas, J., concurring).

<sup>288</sup> 138 S. Ct. at 1784 (noting that “eugenics is rooted in social Darwinism”).

<sup>289</sup> *Id.*

<sup>290</sup> See Adam Cohen, *Clarence Thomas Knows Nothing of My Work: The Justice Used My Book to Tie Abortion to Eugenics. But His Rendition of the History is Incorrect.*, ATLANTIC (May 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455> (“Between eugenic sterilization and abortion lie two crucial differences: who is making the decision, and why they are making it. In eugenic sterilization, the state decides who may not reproduce, and acts with the goal of ‘improving’ the population. In abortion, a woman decides not to reproduce, for personal reasons related to a specific pregnancy.”).

progressive support for abortion rights is connected to their historical support for eugenics and to the belief that some groups are genetically inferior to others.<sup>291</sup>

Similarly, the Court's emerging concern for the rights of conservative Christians<sup>292</sup> echoes in obvious ways the worries that brought Bryan out of retirement almost a century ago.<sup>293</sup> The Court has moved strongly to protect prayer in public places,<sup>294</sup> religious monuments and displays on public land,<sup>295</sup> and, somewhat less strongly, Christian businesspeople who do not want to provide service to gay customers or contraception coverage to their employees.<sup>296</sup>

The Court has also moved to restrict affirmative action programs thought to harm the white middle and lower classes.<sup>297</sup> Instead of conceptualizing these programs as remedying centuries of racism, it has focused on powerless whites, whose victimhood amounts to the unnoticed byproduct of elite, racial condescension.<sup>298</sup>

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<sup>291</sup> *Box*, 138 S. Ct. at 1783.

<sup>292</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 733 (2015) (Thomas, J., dissenting) (arguing that constitutional right to same sex marriage threatens religious liberty); *id.* at 741 (Alito, J., dissenting) (arguing that decision upholding the right to same sex marriage “will be used to vilify Americans who are unwilling to assent to the new orthodoxy”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (holding that Religious Freedom Restoration Act gave corporations with religious objections to birth control the right to an exemption from a mandate that these services be provided to employees); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1732 (2018) (invalidating on free exercise grounds state civil rights commission decision to issue a cease and desist order against merchant who refused to sell wedding cake to a same sex couple).

<sup>293</sup> In keeping with the conservative cooptation of populism, the decisions echo Bryan's concern about the denigration of religious values, but not Bryan's association between Christianity and social justice. See *supra* pp. 428–29.

<sup>294</sup> See *Town of Greece v. Galloway*, 572 U.S. 565, 591–92 (2014) (upholding practice of beginning town board meetings with prayers almost always delivered by Christian clergy against Establishment Clause attack).

<sup>295</sup> See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2090 (2019) (upholding placement on public land of Roman cross as part of World War I memorial); *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (holding that placement of a six-foot-high monolith inscribed with the Ten Commandments on state capitol grounds did not violate Establishment Clause); *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (holding that a privately donated Ten Commandments memorial in a public park was “government speech,” and, therefore, did not create a public forum where there was a right to engage in competing speech).

<sup>296</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (2018) (invalidating on narrow grounds state civil rights commission decision to issue a cease and desist order against merchant who refused to sell wedding cake to a same sex couple); *Burwell*, 573 U.S. at 736 (2014) (holding that Religious Freedom Restoration Act gave corporations with religious objections to birth control the right to an exemption from a mandate that these services be provided to employees).

<sup>297</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003) (invalidating University of Michigan's affirmative action program). *Cf.* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (invalidating race conscious voluntary desegregation plan). *But cf.* *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (utilizing strict scrutiny but upholding affirmative action program); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214–15 (2016) (same).

<sup>298</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring in part and concurring in the judgment) (“There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent

Finally, the Court has greatly expanded free speech protection, especially as it relates to the regulation of business.<sup>299</sup> These cases illustrate better than any other both the oddity and the effectiveness of the conservative-populist alliance. In obvious ways, the new freedom of speech advances the conservative agenda. It shields economic actors from the threat of government-mandated redistribution. One might think that populists would favor this redistribution, but their worry is the mirror image of conservative fears. For them, the threat is not a government devoted to redistribution, but a government captured by the rich and powerful—the very conservative elements with which they are allied. An alliance like this seems bound to disintegrate, and there are indeed tensions within it that might be exploited.<sup>300</sup> Still, these complementary but contradictory concerns have provided powerful motivation for both sides, especially when combined with progressive nostalgia and sentimentality about freedom of speech.

When the Court announces these decisions, it typically utilizes the dry language of constitutional exegesis and statutory construction, but occasionally, the raw rhetoric of populism seeps through. Consider, for example, Justice Scalia's attack on his colleagues for their support for gay rights:

[T]he Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination. . . . [T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.<sup>301</sup>

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equality that underlies and infuses our Constitution.”); *Grutter*, 539 U.S. at 367–68 (2003) (Thomas, J., concurring in part and dissenting in part) (attacking “‘legacy’ preference[s]” in “elite institutions” as part of his argument against affirmative action); *id.* at 368 (asserting that “there is nothing ancient, honorable, or constitutionally protected about ‘selective’ admissions”).

<sup>299</sup> See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011) (holding that statute prohibiting the sale and disclosure of pharmacy records that reveal the prescribing practices of individual doctors violates the First Amendment); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151–52 (2017) (holding that a statute that prohibits merchants from offering a discount in exchange for paying with cash regulates speech). Cf. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2248, 2486 (2018) (holding that compelled payment of “agency fees” to unions representing employees of a public entity violates free speech).

<sup>300</sup> See *infra* p. 469.

<sup>301</sup> *Obergefell v. Hodges*, 576 U.S. 644, 717–18 (2015) (Scalia, J., dissenting) (footnotes omitted).

With appropriate modifications, William Jennings Bryan might have said the same thing almost a century earlier. Like Bryan before him, Scalia voiced the suspicion that what progressives think of as protection for minority rights is actually a cover for elite denigration of the beliefs of ordinary Americans.

Similarly, consider how Justice Thomas defends his position that the University of Michigan has failed to demonstrate a “compelling state interest” justifying its affirmative action program. Like populists of the late nineteenth and early twentieth centuries, Thomas worries that wealthy and powerful interests are systematically devaluing the welfare of the middle and lower classes. On his view:

[t]he [University of Michigan] Law School’s decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan . . . . With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, . . . the Law School could achieve its vision . . . .<sup>302</sup>

A cynic might respond to this rhetoric by doubting the good faith of the people who use it. On this view, conservatives are manipulating, rather than embracing, populists. They are using populist tropes to advance causes that are detrimental to the real interests of the dispossessed. Perhaps this view is correct. As I have already argued, the conservative-populist alliance is fragile and vulnerable. That said, the view elides the undeniable fact that both the rhetoric and the positions that the rhetoric supports have deep roots

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For similar rhetoric, see *Romer v. Evans*, 517 U.S. 620, 636, 652–53 (1996) (Scalia, J., dissenting):

This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected . . . .

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation’s law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant’s homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires . . . . This law-school view of what “prejudices” must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws . . . and which took the pains to exclude them specifically from the Americans with Disabilities Act of 1990.

<sup>302</sup> *Grutter*, 539 U.S. at 360, 362 (Thomas, J., concurring in part and dissenting in part).

in the American populist tradition. Moreover, the view itself has similarly deep roots in the progressive tradition. It reflects the longstanding progressive inclination to believe that ordinary people do not know what is best for themselves and must be guided by elites who better understand their interests. That view, in turn, ignores the role that progressives have played in populist disillusionment. That is the subject of the next section.

### B. *Progressive Loss of Faith*

Historically, populist distrust in government was countered or at least leavened by successful progressive social reform. From the Square Deal through the Great Society, progressives met populist claims that the government was irretrievably corrupt with actual programs that improved the lives of vulnerable people. That success, in turn, reinforced the strains in populist thinking that had always been sympathetic to at least some forms of government activism.

Two trends beginning in the 1960s and reaching a climax in our own period have sharply limited this ability of progressives to temper populist distrust of government.

The first trend related to the progressives' turn toward racial justice. Throughout the New Deal period and its immediate aftermath, race was far from the center of the progressive agenda. As the eugenics controversy illustrates, some early progressives believed in "scientific racism."<sup>303</sup> Even when elite opinion changed, New Dealers were willing to embrace a bargain that exchanged white Southern support for New Deal programs for New Deal acceptance of segregation and racial subordination.<sup>304</sup>

In the wake of the New Deal, there were sporadic attempts to break the stranglehold that the South held over the Democratic Party. President Roosevelt made a spectacularly unsuccessful attempt to purge southern conservatives from his coalition in 1938,<sup>305</sup> and northern Democrats were willing to accept a southern walkout from the 1948 convention in order to enact a civil rights plank in their platform.<sup>306</sup> But it was not until the Warren Court period and the election of Lyndon Johnson that progressives broke decisively with the racist south.<sup>307</sup>

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<sup>303</sup> *Supra* p. 424 and note 63.

<sup>304</sup> See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 151, 159–60 (2013) (describing New Deal's accommodation of southern racists).

<sup>305</sup> See, e.g., WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940*, at 268 (1963) (explaining that Roosevelt experienced "a humiliating drubbing"). For a more nuanced account that nonetheless reaches the same conclusion, see Charles M. Price & Joseph Boskin, *The Roosevelt "Purge": A Reappraisal*, 28 *J. POLITICS* 660, 661–62 (1966).

<sup>306</sup> W.H. Lawrence, *Truman, Barkley Named by Democrats; South Loses on Civil Rights*, 35 *Walk Out; President Will Recall Congress July 26*, *N.Y. TIMES*, July 15, 1948, at 1.

<sup>307</sup> See Sidney M. Milkis, *Lyndon Johnson, the Great Society, and the "Twilight" of the Modern Presidency*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* 1, 19–21 (Sidney M. Milkis &

When they did so, as Johnson himself had predicted,<sup>308</sup> progressives provoked a huge populist backlash.<sup>309</sup> As already noted, populism had a long, if not entirely unbroken, history of racism.<sup>310</sup> With the emergence of progressive support for racial justice, many populists now saw the redistributive programs that they had previously supported through the lens of racial division. The upshot was a reinforcement of populist distrust of government and increased suspicion of progressive elites.

The second trend involved a retrenchment of progressive ambition. Progressivism was never as radical as populism. Historically, progressives tended to be insiders rather than outsiders and reformers rather than revolutionaries.<sup>311</sup> Still, programs like Medicare, Social Security, and the GI Bill of Rights provided material evidence of the government's capacity to improve the lives of ordinary citizens.

In recent years, however, progressive enthusiasm for large-scale reform has declined. When progressives were actually in power, they ended "welfare as we know it,"<sup>312</sup> embarked on a massive deregulatory program,<sup>313</sup> and promoted a "free trade" system that some perceived as decimating American labor.<sup>314</sup> Many progressives made their peace with Wall Street and with a regulatory regime that is more facilitative than disruptive. Piecemeal reform, exemplified by the Affordable Care Act,<sup>315</sup> the Dodd-Frank banking reforms,<sup>316</sup> and the McCain-Feingold campaign finance reforms,<sup>317</sup> have marginally improved the functioning of economic and political markets, but exponentially increased their complexity and opacity.

Having now regained power, some progressives are again promising sweeping changes. Proposals for universal health care, free college tuition,

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Jerome M. Mileur eds., 2005) (describing how Johnson "triumphed where FDR failed: without embroiling himself in an enervating purge campaign, he had discredited southern resistance to liberal reform").

<sup>308</sup> See TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65, at 404 (1998) (quoting Johnson as saying that his civil rights policies had lost the South to the Democratic Party "for your lifetime and mine").

<sup>309</sup> *Supra* note 298.

<sup>310</sup> *Supra* pp. 416, 423, and 454.

<sup>311</sup> *Supra* pp. 423–24.

<sup>312</sup> See Martin Carcasson, *Ending Welfare as We Know It: President Clinton and the Rhetorical Transformation of the Anti-Welfare Culture*, 9 RHETORIC & PUB. AFFS. 655, 655 (2006) (arguing that Clinton's repeal of welfare mandate motivated by desire to help the "working poor").

<sup>313</sup> See Timothy A. Canova, *The Legacy of the Clinton Bubble*, DISSENT (2008), <https://www.dissentmagazine.org/article/the-legacy-of-the-clinton-bubble> (detailing deregulatory efforts by the Clinton Administration).

<sup>314</sup> See Andrew Chatzky, James McBride & Mohammed Aly Sergie, *NAFTA and the USMCA: Weighing the Impact of North American Trade*, COUNCIL FOREIGN RELS. (July 1, 2020), <https://www.cfr.org/background/naftas-economic-impact> (assessing economic effects, including effects on labor markets, of North American Free Trade Agreement).

<sup>315</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

<sup>316</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

<sup>317</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (2002).

and broad-based changes in the tax code abound.<sup>318</sup> But other progressives are doubtful at best about these measures,<sup>319</sup> and it remains to be seen whether a Democratic president and Congress will actually attempt, much less succeed, in implementing them.

This decline of progressive ambition resulted, at least in part, from the converse of the contradiction that destroyed left-leaning populism. Whereas populists had to reconcile their support for revolutionary change with their distrust of the government that might bring the change about, progressives needed to reconcile their support for elite institutions with sympathy for the kind of people routinely excluded from those institutions.

For populists, the contradiction was resolved by sullen distrust of government. For progressives, it has been resolved by a combination of deep pessimism and patrician paternalism. Faith in government has remained, but it is faith in a government staffed by policy experts who are resistant to “simplistic” redistributive schemes and paralyzed by their understanding of the complexities of market regulation and the possibilities of unintended consequences. This stance, reinforced by the dependence of the Democratic party on large and wealthy donors, makes many modern progressives suspicious of “demagogic” proposals that, in their view, are likely to make things worse rather than better and are, in any event, politically unattainable.<sup>320</sup>

In the absence of a broad-based social vision, progressives have often retreated to incrementalism, a reflexive defense of social programs already in place, and a devotion to identity politics in support of various minority groups, more and more narrowly defined, thought to be subject to discrimination. These stances, in turn, erode the sense that progressives stand for the general public good and suggest that they are instead catering to entrenched interests. The result is that, at least until recently, modern progressives offered no

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<sup>318</sup> Jonathan Martin & Abby Goodnough, *Medicare for All Emerges as Early Policy Test for 2020 Democrats*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/us/politics/medicare-for-all-2020.html>; Adam Harris, *The College-Affordability Crisis is Uniting the 2020 Democratic Candidates: Well, Sort of*, ATLANTIC (Feb. 26, 2019), <https://theatlantic.com/education/archive/2019/02/2020-democrats-free-college/583585/>; Matt Viser, *Democrats' Tax Plans Reflect Profound Shift in Public Mood*, WASH. POST (Feb. 2, 2019, 7:17 PM), [https://www.washingtonpost.com/politics/democrats-tax-plans-reflect-profound-shift-in-public-mood/2019/02/02/a1bb8ad0-2573-11e9-81fd-b7b05d5bed90\\_story.html](https://www.washingtonpost.com/politics/democrats-tax-plans-reflect-profound-shift-in-public-mood/2019/02/02/a1bb8ad0-2573-11e9-81fd-b7b05d5bed90_story.html).

<sup>319</sup> See, e.g., James Pindell, *In N.H., Bloomberg Compares Warren's 'Ultra Millionaire Tax' with Chaos in Venezuela*, BOS. GLOBE (Jan. 29, 2019, 3:15 PM), <https://www.bostonglobe.com/metro/2019/01/29/bloomberg-compares-warren-ultra-millionaire-tax-venezuela/HjIQ22sfeO14OZyDTNetBN/story.html> (quoting Michael Bloomberg as saying, “If you want to solve income inequality, one of the things you have to do is you have to adjust just how progressive the tax rates are.”); Jared Bernstein, *The Influence of Centrist Democrats is Fading Fast. What Does That Mean for Liberal Technocrats?*, WASH. POST (Mar. 5, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/03/05/influence-centrist-democrats-is-fading-fast-what-does-that-mean-liberal-technocrats/> (describing the gulf between modern progressives: “the ‘leftier’ left” and center-left Democrats).

<sup>320</sup> *Supra* note 319.

counterweight to populist distrust of government. Instead, they reinforce the view that there is no real hope for meaningful social change.<sup>321</sup>

Like the evolution of populism, the changed focus for progressives is most evident in the general political culture. Unsurprisingly, though, it too manifests itself in constitutional doctrine. Progressives on the Supreme Court continue to defend “expert agenc[ies]” who engage in “sensible regulation.”<sup>322</sup> They worry about the ability of juries to evaluate pseudoscientific evidence not derived from “the scientific method” and not exposed to peer review by other, recognized scientists.<sup>323</sup> They still rail against public policy that vindicates what they identify as religious, rather than secular, purposes.<sup>324</sup> What has gone missing, though, is the progressive faith in constitutional law as an engine for serious reform.

Even progressives who promise profound change if they gain political power rarely speak of constitutionally driven transformation. Instead, progressive constitutionalists have become the new reactionaries. They have devoted all their energy to worshipping the relics of past glory days without any real hope that the relics might be removed from museums and actually put to good use.<sup>325</sup>

The one exception to this generalization proves the rule. Progressives on the Court have pushed through an important reform agenda regarding the civil rights of LGBTQ Americans, culminating in the realization of the long-held dream of a constitutional right to same-sex marriage.<sup>326</sup> There is no denying that this is a victory for justice that has made the lives of millions of Americans better. But the victory also reflects some of the most problematic aspects of the progressive tradition. Like the progressive embrace of abortion rights, the constitutionalization of LGBTQ rights is premised on the belief that authentic disputes about morality can be resolved by reason if only people will accept uncontroversial first premises. That assumption is linked to a disdain for conventional religious attitudes and a belief that the value judgments of the educated classes are not value

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<sup>321</sup> See Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 33 (1999) (“[T]he new constitutional order is one in which the aspiration of achieving justice directly through law has been substantially chastened. Instead, justice is to be achieved not by national legislation identifying and seeking to promote it, but by individual responsibility and market processes.”).

<sup>322</sup> *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 343 (2014) (Breyer, J., concurring in part and dissenting in part).

<sup>323</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590–96 (1993).

<sup>324</sup> See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 566 (1989) (Stevens, J., concurring in part and dissenting in part) (“I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution.”).

<sup>325</sup> See Tushnet, *supra* note 321, at 64 (noting that “the Warren Court is dead in the sense that the current Court will undertake no dramatic initiatives, but its aspirations—chastened as they are—mean that there will be few dramatic retrenchments on established doctrine either”).

<sup>326</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

judgments at all, but instead the necessary outcome of disinterested rationality. Put differently, here, as in the past, individual rights rhetoric masks resistance to mass control of government power.

Apart from LGBTQ rights, it is hard to think of any important goal that modern progressive Justices believe could be achieved through constitutional, judicial intervention. There is little remaining interest in constitutionalizing the rights of the poor, judicially led fundamental reform of the criminal justice system, or transforming race relations. Instead, progressive constitutionalists now occupy themselves with an entirely defensive and only occasionally successful effort to preserve the remains of a fast-receding past.

Progressive support for affirmative action provides a particularly striking example. The original logic of *Brown* pushed toward a rejection of formal equality and a requirement of affirmative, constitutionally compelled government action to dismantle racial hierarchies.<sup>327</sup> Formal equality between the races—a separate but equal regime, with black and white students alike prohibited from attending integrated schools—was unconstitutional because of its actual impact.<sup>328</sup> This kind of formal equality “affect[ed] the[] hearts and minds” of Black students “in a way unlikely ever to be undone.”<sup>329</sup> It followed from this view that the formal dismantling of race-based legal structures was insufficient to meet the government’s constitutional responsibilities. Instead, school boards were constitutionally obligated to develop affirmative plans for integration that actually “work[ed]” and “work[ed] now.”<sup>330</sup> Necessarily, those programs had to be race-conscious.<sup>331</sup>

A modern translation of this approach would make affirmative action not just constitutionally permissible but constitutionally mandatory. It would require actual desegregation of private and public schools throughout the country. Indeed, taken to the limits of its logic, it would mandate a wide variety of sweeping affirmative measures designed to dismantle all manifestations of racial hierarchy. But no modern Justice takes this argument seriously. Instead, liberals on the Court have acquiesced to a standard that makes affirmative action constitutionally problematic.<sup>332</sup> They have fought an entirely defensive battle to preserve a few voluntary

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<sup>327</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–95 (1954).

<sup>328</sup> *Id.* at 492.

<sup>329</sup> *Id.* at 494.

<sup>330</sup> *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968).

<sup>331</sup> *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25–28 (1971) (upholding race-conscious remedial efforts to achieve actual desegregation).

<sup>332</sup> *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 358–59 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (asserting that affirmative action measures should not “be analyzed by applying the very loose rational-basis standard of review” but should instead be upheld only when shown to “serve important governmental objectives” and to “be substantially related to the achievement of those objectives”).

programs that create some of the optics of a racially just society while doing little to help the least advantaged or to promote a racial transformation.

Worse yet, the apologetic stance of liberals serves to reinforce rather than attack racial stereotypes. By acquiescing in the assumption that affirmative action is a necessary but limited departure from otherwise unproblematic standards of merit, they communicate a belief that African Americans can succeed only if they are given special privileges.

A left-populist stance on affirmative action might have countered this condescending narrative. It might have built upon, rather than rejected, Justice Thomas's critique of meritocracy to support the opposite of the outcomes that Justice Thomas favors.<sup>333</sup> Liberal justices might have insisted that the elite standards of "merit" that govern college and graduate school admissions reflect no more than the eminently contestable views of the rich and powerful as to who is deserving of privilege. Maintaining these standards hardly constitutes sufficient grounds for denying equal opportunity to all. But while this argument might be advanced by populists, it is not in the progressive playbook. Progressives are too committed to norms of objectivity and rationality to challenge the implicit bias that infects the effort to measure these qualities.

Affirmative action law is emblematic of the sad state of progressive constitutionalism, but it is not unique. The progressive position on gender discrimination suffers from similar problems. More than forty years ago, progressive constitutionalism produced some important victories for gender equality by removing overt gender distinctions from the law.<sup>334</sup> The effort played to progressivism's strength. Progressive Justices insisted on the necessity of neutral and objective standards that should replace old-fashioned, irrational stereotypes about sex and gender.

But that program ran out of steam long ago. Today, formal equality has become an end in itself, divorced from the ambition of actually promoting justice. *Sessions v. Morales-Santana*,<sup>335</sup> a decision authored by Justice Ginsburg, the champion of progressive feminism, illustrates the point.

At issue was the United States citizenship of a child born to unmarried parents when only one parent was a United States citizen.<sup>336</sup> The law provided that if the child's father was a United States citizen, the child was entitled to citizenship if the father had lived in the United States for five years prior to the child's birth.<sup>337</sup> In contrast, if the unmarried mother was a United States citizen, she could transmit citizenship to her child if she had

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<sup>333</sup> See *supra* p. 459.

<sup>334</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating facial gender discrimination); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (same); *Reed v. Reed*, 404 U.S. 71 (1971) (same).

<sup>335</sup> 137 S. Ct. 1678 (2017).

<sup>336</sup> *Id.* at 1686.

<sup>337</sup> *Id.*

lived in the United States for only one year.<sup>338</sup> The Court held that this gender-based distinction violated the equal protection component of the Due Process Clause.<sup>339</sup>

As Justice Ginsburg implicitly acknowledged in her opinion for the Court,<sup>340</sup> the decision amounted to a mopping-up operation. It dealt with a statute enacted more than three-quarters of a century ago<sup>341</sup>—one of the few remaining laws in the United States Code providing for facially differential treatment based on gender. The Court used by now familiar rules about heightened scrutiny for laws that are based on overbroad gender stereotypes to invalidate it.

As it happens, though, the stereotype—that unmarried mothers are more likely to influence the upbringing of their children than unmarried fathers—is almost certainly statistically accurate. Moreover, the statute actually provided better treatment for women than for men. If the stereotype is indeed accurate, eliminating the differential treatment arguably hinders rather than advances gender justice.

Having found that the unequal treatment was unconstitutional, the Court nonetheless denied the plaintiff relief.<sup>342</sup> Because inequality can be remedied by either ratcheting up or ratcheting down, and because, according to the Court, Congress would have preferred to ratchet down, the decision solved the inequality problem by denying the more generous citizenship rule to everyone.<sup>343</sup> The upshot is that even though the plaintiff “won” his case, people like him did not benefit from the victory. Tragically, citizenship is now available to a smaller number of people than enjoyed the benefit before the Court acted. In order to protect men from supposed discrimination, many more people are now subject to deportation. Can this be what progressive, constitutional feminism has turned into?

In some respects, *Morales-Santana* is aberrational. The case is important because it illustrates what progressive constitutionalists tend to do with their power when they have it and, perhaps, why they now so seldom have it. But today, progressive Justices rarely write majority opinions. Even if they wanted to, they are no longer positioned to offer a positive alternative to the pessimism of modern populists. It is hard to see a scenario under which they

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<sup>338</sup> 8 U.S.C. § 1401(a)(7) (1958). The statute required the U.S.-citizen parent to have ten years’ physical presence in the United States prior to the child’s birth, “at least five of which were after attaining” age fourteen. The rule is made applicable to unwed U.S.-citizen fathers by § 1409(a), but § 1409(c) creates an exception for an unwed U.S.-citizen mother, whose citizenship can be transmitted to a child born abroad if she has lived continuously in the United States for just one year prior to the child’s birth.

<sup>339</sup> *Morales-Santana*, 137 S. Ct. at 1698.

<sup>340</sup> *Id.* at 1689 (noting that the statutes at issue “date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are”).

<sup>341</sup> The statute was part of the Nationality Act of 1940. Pub. L. No. 853, 54 Stat. 1138–39 (repealed 1952).

<sup>342</sup> *Morales-Santana*, 137 S. Ct. at 1698–99.

<sup>343</sup> *Id.*

will be back in control in the immediate future. Instead, a conservative-populist majority will be in the driver's seat.

That fact, in turn, provides space for thinking about what might hasten a progressive return to power. Might progressives yet pry populists away from conservative pessimism? Is there a way to reconcile populist skepticism about government with progressive faith in the possibilities of reform? That is the subject of the Conclusion.

#### CONCLUSION: IS THERE A WAY FORWARD?

This Article has focused on two sets of contradictions that plague the moderate American left. The first set relates to American liberalism as a whole. Many liberals believe that the government is thoroughly corrupted by the role that money plays in our politics, yet they also believe that expanded government will be a force for social justice. They have failed to explain how a corrupted government can serve as such a force.

The second set relates to the progressive and populist components of American constitutionalism. Progressives believe in government intervention, but they have struggled to explain how that belief can be reconciled with their libertarian stance toward putative constitutional rights like free speech and reproductive freedom. Populists distrust government, but it is hard to reconcile that stance with their civil liberties skepticism in cases involving matters like the rights of religious minorities in public schools.

Together, these contradictions have hobbled American liberalism. They help explain why, from the perspective of American liberals, things have spun out of control. If this analysis is right, then resolving the contradictions is a matter of some urgency. Can they be resolved?

There can be no complete resolution of the first contradiction, at least if we are prepared to give full force to both sides of it. If government is truly and irredeemably corrupt, then we cannot look to government to ameliorate the country's social and moral deficiencies. To claim on the one hand that the plutocrats control all levers of power in Washington, but on the other that we should, for example, turn over our healthcare system to the federal government, is simply nonsensical.

Absent an external shock that produces truly revolutionary change, this problem is unlikely to go away. It follows that liberal victories are fated to be fragile and partial. It does not follow, though, that nothing at all can be accomplished. It remains possible to make things marginally better if we decline to give full force to either side of the argument. Perhaps the government is sometimes, but not always, corrupt. Perhaps government can sometimes, but not always, push toward social justice.

At its best moments, American liberalism has pragmatically adjusted policy to navigate between the progressive and populist positions. On the one hand, populists have a point when they emphasize the risk of government capture. When the risk is serious, liberals should insist on

popular control and be skeptical of government intervention when that control is not in place. On the other, populists must recognize that the only realistic hope of countering private power is through government regulation. They need to pay attention when progressives point to historical examples of when government regulation, at least for a time, authentically advanced the general welfare.<sup>344</sup>

Of course, actually assembling political majorities for reform presents difficult problems. I am hardly in a position to provide a roadmap or checklist. One thing seems relatively clear, though: putting together such a coalition is ultimately a political and practical problem, rather than a conceptual and theoretical one. Instead of focusing on theoretical, global contradictions that can drive people apart, successful politicians focus on local, practical compromise that can bring them together.

It does not follow, though, that politicians should altogether ignore the forces that have driven progressives and populists apart. Liberals will need to regain the trust of populists suspicious of progressivism. That will require more sensitivity to populist concerns about denigration of their mores and beliefs, more flexibility and openness in administering reforms, and, most significantly, more of the courage, creativity, and determination necessary to advance serious reform. All this is easier said than done, but the problems are resolvable at least in principle, and recent events suggest that things are moving in the right direction.

What about the narrower problems of liberal constitutionalism? The first step forward is a diagnosis of the problem's causes. At bottom, progressive support for civil liberties is not what it seems to be. As Justice Jackson's pained concession in *Barnette* illustrates,<sup>345</sup> an authentic embrace of individual rights would be inconsistent with progressive faith in collective decision-making. The progressive contradiction disappears when one realizes that progressive concern has often been more about elite power than individual rights. Similarly, populist rejection of civil liberties is easy to misunderstand. A true defense of untrammelled public power would be inconsistent with populist fears of government corruption. The populist

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<sup>344</sup> As the historian Michael Kazin has argued:

[T]he path to success for movements that do not favor revolution has always run through reform-minded members of the existing establishment, aspiring members of the counter-elite, or both. New kinds of laws, administrative bodies, and elected officials are the harvest of all that the pamphlets, strikes, and demonstrations—the repertoire of discontent—have sown. . . .

Legitimacy of this sort carries a price, of course. Movements usually have to shear off their radical edges and demonstrate that, if necessary, they can march to the rhetorical beat of an influential set of allies. The boundaries, as well as the benefits, of this relationship—in all their historical specificity—are central to what the friends of “the people” have been able to say and what they have been able to achieve.

KAZIN, *THE POPULIST PERSUASION*, *supra* note 22, at 24–25.

<sup>345</sup> See *supra* pp. 442–45.

contradiction disappears when one realizes that the populist concern is more about preventing government denigration of ordinary citizens than about protecting government prerogatives.

This diagnosis, in turn, leads to possibilities for solutions. As a practical matter, conservatives are likely to be in control of the Supreme Court for the immediate future. Still, the situation would be improved if it were possible to rupture the alliance between constitutional conservatives and populists. Conservatives should be forced to defend their deregulatory agenda on its merits without hiding behind populist rhetoric.<sup>346</sup>

Rupturing the alliance is work that populists will have to do for themselves; progressives who think that lecturing others will achieve their goal are once again indulging their propensity for elite condescension. There are nonetheless things that progressives can do to ease the transition. Resolving the first contradiction is an important step in the right direction. If progressives succeed in formulating and defending government programs that achieve and are perceived to achieve real benefits, populist constitutionalist distrust of government may wane. That change in attitude, in turn, might produce more skepticism about conservative populist rhetoric.

Change in the general political environment is part of the solution, but there also needs to be change within liberal constitutionalism itself. Progressives must stop insisting that disputes about value can be definitively resolved by disinterested, lawyerly exegesis of the Constitution. They need to stop pretending that their constitutional positions are ones that all rational and sensible people must accept. That insistence mistakes partial, elite viewpoints for universal principle. The mistake will be corrected only when progressives stop demanding adherence to civil liberties orthodoxy and give up the authoritarian insistence that the Constitution simply requires the results that they favor.

A few academics have shown that there is a way forward. A generation ago, Richard Parker's path-breaking defense of populist constitutionalism effectively attacked liberal orthodoxy.<sup>347</sup> More recent work by scholars like,

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<sup>346</sup> As J.M. Balkin wrote a quarter century ago:

The enduring connections between liberalism and progressivism have made liberalism continually susceptible to populist attacks from the right . . . [They] have also led to constant and persuasive claims that liberals are out of touch with and even hostile to the concerns of ordinary Americans. The contemporary Republican party has understood this lesson well. By discarding or disguising conservative elitism and offering a rightward spin on populist rhetoric, conservative Republicans have repeatedly trapped liberal Democrats into a progressivist mode that continually pits them against the sensibilities of many ordinary citizens.

Balkin, *supra* note 16, at 1949–50.

<sup>347</sup> RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 113 (1994).

Larry Kramer,<sup>348</sup> Sanford Levinson,<sup>349</sup> Joseph Fishkin and William Forbath,<sup>350</sup> Ganesh Sitaraman,<sup>351</sup> David Fontana,<sup>352</sup> Rosalind Dixon and Julie Suk,<sup>353</sup> and Mark Tushnet<sup>354</sup> have demonstrated how a certain kind of constitutionalism might be reconciled with populist impulses. One might embrace the overarching goals of the Constitution—the ambition to provide for the common defense and for the general welfare, and to ensure that all American inhabitants enjoy equal protection and due process—without insisting that these shared commitments are more than an invitation to a conversation about what is to be done.

But most of these scholars are working on the fringes of American liberalism. The American Constitution Society, the semi-official voice of liberal constitutionalism, too often speaks in favor of a constitutionalism that is legalistic, proscriptive, and elitist.<sup>355</sup> The Society's allies in law schools and on the courts have similar commitments.

It does not follow that liberals should silently acquiesce to the worst impulses embedded in the populist tradition. They can and must stand strong against racism, misogyny, xenophobia, and homophobia.<sup>356</sup> Progressives have much to learn from populists, but populists, too, must do some learning. Importantly, though, the learning will come only when progressives are willing to defend their position on the merits and not simply rely on constitutional compulsion.

Once these goals are accomplished, progressives and populists can begin to have a real discussion about the prerequisites for a decent society. It would be expecting too much to suppose that these conversations will produce a

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<sup>348</sup> LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004).

<sup>349</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 29 (2006).

<sup>350</sup> Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 670 (2014).

<sup>351</sup> GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* 17–18 (2017).

<sup>352</sup> Fontana, *supra* note 278, at 1485–86, 1493.

<sup>353</sup> Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 370, 396 (2018).

<sup>354</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

<sup>355</sup> The American Constitution Society website features a mission statement that describes itself as “promot[ing] the vitality of the U.S. Constitution and the fundamental values it expresses,” lauds “the vision of the Constitution’s framers” and asserts that “the Constitution has retained its authority and relevance for each new generation.” *American Constitution Society (ACS) for Law and Policy*, PENNSTATE L., <https://pennstatelaw.psu.edu/about-us/student-life/student-organizations/american-constitution-society-acs-law-and-policy> (last visited Oct. 9, 2020). In fairness, the Society is an umbrella organization that promotes the views of a variety liberal legal thinkers. Still, no one would mistake its ethos for that of an organization devoted to populist constitutionalism.

<sup>356</sup> *Cf.* Balkin, *supra* note 16, at 1950–51 (noting that “it is especially important to recognize and counteract” populist pathologies including “fascism, nativism, anti-intellectualism, persecution of unpopular minorities, exaltation of the mediocre, and romantic exaggeration of the wisdom and virtue of the masses”).

permanent *détente*. The gap between progressive and populist sensibilities is too wide and the history of conflict too fraught to produce a lasting coalition. At some future point, frustration, resentment, and anger will again drive the two sides of liberalism apart, as they always have in the past.

But if periods of rupture are part of the history of modern liberalism, so too are periods when contradictions have been papered over and old divisions patched up. An overlapping consensus has emerged in the past, and it can emerge in the future. Temporary though it may be, such a consensus is more important now than ever before as we face the looming possibility of social and constitutional disintegration.

