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Progressive and Populist Strands in American Constitutionalism

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Why Bernie Is Confused:
Populist and Progressive Strands in Liberal Constitutionalism
Louis Michael Seidman

Introduction

Here is what Bernie Sanders thinks about the federal government:

[I]t doesn’t matter what party is in power, because the real power, economically and politically, rests with a billionaire class. . . . It’s not the Republican Party, per se. It is not the Democratic Party, per se. It is the billionaire party, led by people like the Koch brothers and Sheldon Adelson. And they are the dominant political force in this country, because they can spend unbelievable sums of money on elections.1

And here is what Bernie Sanders thinks we should do about American health care:

The solution to this crisis is not hard to understand. A half-century ago, the United States established Medicare. Guaranteeing comprehensive health benefits to Americans over 65 has proved to be enormously successful, cost-effective and popular. Now is the time to expand and improve Medicare to cover all Americans.2

Not all modern liberals agree with these specific views, but all modern liberals share the sensibilities that lie behind the views. Modern liberalism is defined by the twin goals of reducing the influence of money on politics and expanding government programs designed to dismantle various unjust power hierarchies and to benefit the poor and middle class.3 Both commitments reflect the broader view that unbridled private economic power produces unjust outcomes for too many Americans.

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But the commitments are difficult to reconcile. If, as Sanders asserts, the federal government has been captured by a “billionaire party” determined to wield public power for private gain, then why would anyone want to turn over roughly 18 percent of the American economy to Washington?\(^4\) Conversely, if, as Sanders also asserts, federal health insurance has been “enormously successful, cost effective and popular,” then how can it be that the program is under the thumb of a selfish plutocracy?\(^5\)

There is a history to this contradiction. Modern American liberalism is an amalgam of older populist and progressive impulses with deep roots in the country’s past. 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,\(^6\) a revealing pattern emerges.

Both populists and progressives worry about the interaction between markets and public power, but their focus differs. Speaking very broadly, the populist impulse locates 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.\(^7\)

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\(^5\) Sanders’ positions might be reconciled if one read him to favor Medicare for all only after our politics was cleansed of the corrupting influence of wealth. Many things not now possible might become possible after a millennial transformation. But nothing in Sanders’ rhetoric or actions suggests that he favors this sequential approach. He appears to believe that Medicare has been a success in an era when the government was under the control of the “billionaire class” and to favor Medicare for all in the here-and-now.


\(^7\) See pp xx-xx, infra.
In contrast, the progressive impulse tends 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.8

Because these two positions are hard to reconcile, and because both positions are embedded in the DNA of modern liberalism, liberals are often inconsistent. Sanders speaks as a populist when he complains about the billionaire party; he speaks as a progressive when he advocates Medicare for all; and he speaks as a liberal when he fails to notice the tension between these two views.

This contradiction at the core of modern liberalism deserves more sustained attention than it has received from historians and political theorists. It suggests why Bernie Sanders and Donald Trump or, in an earlier age, Robert Kennedy and George Wallace enjoyed overlapping support. It hints at what might be “the matter with Kansas”9 and helps explain why strands of leftist thinking overlap with libertarian ideology, supposedly the antagonist of left. More broadly, it helps elucidate the failures and frustrations of the moderate left.

I will have more to say about the contradiction in general, but this article’s principal focus is on a particular branch of the contradiction that relates to civil liberties and constitutional interpretation. My thesis is that the populist/progressive split explains much that is otherwise mysterious in modern constitutional argument. Within this domain, however, the dispute between populists and progressives plays out in some unexpected and counterintuitive ways.

One might expect populist distrust of government to translate into a constitutional stance supportive of 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

8 See pp xx-xx, infra.
government encroachment. Conversely, one might expect progressive faith in government to translate into 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\(^\text{10}\) or attacked the use of military force against the Pullman strike.\(^\text{11}\) At least at some points in its history, populism also made efforts to establish common ground with racial minorities.\(^\text{12}\)

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.\(^\text{13}\) 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.\(^\text{14}\)

\(^{10}\) See John D. Hicks, The Populist Revolt: A History of the Farmers’ Alliance and the People’s Party (1961) (detailing populist support for Coxey’s Army).

\(^{11}\) See id. (detailing populist criticism of President Cleveland for using military in Pullman Strike).

\(^{12}\) See generally Joseph Gerteis, Class and the Color Line: Interracial Class Coalition in the Knights of Labor and the Populist Movement (2017). 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 shows that it was based on a “black-white collation 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 and Ineq. 355, 375-77 (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. Sheryl 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”).


\(^{14}\) See id. at 319 & n.* (populists sympathetic to Jefferson, but unlike Jefferson, were not dedicated to small government); Thomas Goebel, The Political Economy of American Populism from Jackson to the New Deal, 11 Studies in Amer. Pol. Dev. 109, 122 (1997) (noting that populists favored regulation of railroads due to 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. They were especially hostile to judicial review that limited government power. Some progressives — Felix Frankfurter, for example — insisted on deference toward the political branches in civil liberties cases well into the mid-twentieth century.

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. Even as they 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 facts, 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. As already noted, they favored a strong government run by experts who would rationalize and equalize private markets. The corruption that they feared was the contamination of that expertise by ignorant and prejudiced mass opinion. What they labeled as protection for minorities was often in fact

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17 See, e.g. Dennis v. United States, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring in affirmance of the judgment) (rejecting First Amendment challenge to conviction of leaders of the Communist Party for advocating forceful overthrow of the government); Wolf v. Colorado, 338 U.S. 25 (1949) (Frankfurter, J.) (rejecting application of the Fourth Amendment exclusionary rule to the states).
18 See, e.g., Herbert Hovenkamp, Appraising the Progressive State, 102 Iowa L. Rev. 1063, 1064-65 (2016) (noting that progressives favor “deferential judicial review” of economic legislation but “harsher review of provisions that adversely affect underrepresented minorities or impair the practice of fundamental rights”).
19 See, e.g., Herbert Hovenkamp, note x, supra, at 1064-65 (identifying progressivism with use of scientific evidence, commitment to nonmarket institutions, and policy making by government agencies).
institutionalized protection for government against the threat posed by an unschooled populace. In that sense, progressive support for what they called “civil liberties” was consistent with their pro-government stance.

In contrast, populism was often rooted in nostalgia for the past rather than hope for the future. Populist politicians typically represented constituents whose culture and livelihood were endangered by rapid economic and social change. 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.” In that sense, populist distrust of the progressive view of “civil liberties” was consistent with their distrust of government.

All of this would be of no more than historical interest but for its impact on modern, liberal constitutionalism. For the most part, liberals are heirs to the progressive tradition. When Bernie Sanders argues for “Medicare for all,” he imagines a system run by apolitical civil servants who will rationalize our dysfunctional and unfair medical system. That image, in turn, supports a constitutional stance that is supportive of the administrative state and of broad congressional power and dismissive of localism and constitutional protection for a private sphere. But if progressives trust government, why do they support civil liberties? Despite rhetoric to the contrary, the role of civil liberties in this world is often to protect the government from corruption by supposedly ignorant and prejudiced popular.

20 See Richard Hofstadter, note x. supra, at 23-59. Cf. William A. Galston, Antipluralism: 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 (1888). But, as Bellamy’s title suggests, hopes for the future were often grounded in a sense of loss in the present.

21 See note xx, supra.

22 Cf. J.M. Balkin, Populism and Progressivism as Constitutional Categories, 104 Yale L. J. 1935, 1946 (1995) (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 the opportunity to have a say in what affects them, but they also wish 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”).
majorities. Hence, liberals tend to favor a version of civil liberties that promotes elite positions like opposition to religious fundamentalism and to government suppression of academic and literary speech.

But Sanders and other modern liberals can’t quite shake their populist roots. Their support for a powerful government rests uneasily with the residual fear of special interest capture. Even as they worry about mass prejudice and intolerance, they maintain a residual affection for the cleansing power of popular democracy. When liberals think like populists, their support for civil liberties translates into opposition to elite dictation. The result is a version of civil liberties that is hostile to judicial power, worries about agency capture, and supports a right to vote, a right to a basic income, and a right to be free from government surveillance and harassment.

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.” 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

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reconcile libertarian views with regard to certain individual rights with a faith in government regulation with regard to everything else. It fails to explain why Bernie Sanders is confused. 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 two dramatic historical events that illustrate the tension between populist and progressive constitutionalism: The Scopes Monkey trial of 1925, where a court found a school teacher guilty of the “crime” of teaching evolution, 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.

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-canonical, 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.

I argue that this conventional account misses a larger point. An alternative historical construction makes Justice Holmes’ majority opinion in Buck and Clarence Darrow’s defense of Scopes

\[24\] 274 U.S. 200 (1927).
into symbols of the progressive view of civil liberties, which sees the primary threat as government capitulation in the face of uninformed and unintelligent mass opinion. On this telling, William Jennings Bryan’s defense of the Tennessee anti-evolution statute and Carrie Buck’s tragic fate symbolize the competing, populist view of civil liberties, which sees the very existence of “ordinary people” as threatened by elite oppression.

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, modern constitutionalism grows out of the court-packing controversy and the Supreme Court’s iconic footnote 4 in United States v. Carolene Products. Instead, I emphasize two cases that reinterpret Scopes and Buck. In Skinner v. Oklahoma, 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.

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 law, 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 take-over that recast populist insights into a deregulatory program. The problem for progressives is

25 See note x, supra.
28 319 U.S. 624 (1943).
explaining how elite control of government could be reconciled with the interests of ordinary people. This problem left progressives isolated and vulnerable when attacked by rightwing populists.

Part VI concludes by asking what steps we might take to resolve the contradictions that have produced Bernie’s confusion.

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 contribute, much less resolve these disagreements. In truth, like all political movements, populism and progressivism were amorphous and contradictory.\textsuperscript{29} 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.

\textsuperscript{29} See, e.g., Cas Mudde and Cristobal 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 (1987) (characterizing populism as “a remarkably varied movement” and arguing that “[t]he conventional wisdom about its nature can be contradicted at every turn”).
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, though, even if the actual history is much messier and more complicated than this account suggests. 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 that we currently face.

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

A. Populists

The populist movement of the nineteenth and early twentieth centuries was a rural, agrarian revolt that grew out of a set of historical circumstances – in particular, the deflationary policies pursued by the federal government after the Civil War, 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.


See Goebels, note 12, supra; Lawrence Goodwyn, The Populist Moment: A Short History of the Agrarian Revolt in America 3-93 (1978); Richard Hofstadter, The Age of Reform 7 (1955) (associating populism with the rapid decline of rural America). Cf. Cas Mudde & Cristobal Rovira Kaltwasser, “Populism and (Liberal) Democracy: A Framework for Analysis” in Populism in Europe and the Americas: Threat or Corrective for Democracy? 3 (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.”)

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\textsuperscript{32} and an anger at the people who are destroying this golden age.\textsuperscript{33} The anger, in turn, expresses 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.\textsuperscript{34}

What was the remedy for these problems? Because the interests have corrupted the government, some solutions involve self-help and localism.\textsuperscript{35} The Grange Movement and the growth of farmer cooperatives reflect this impulse. In part, though, and in tension with their views about government corruption, many populists favored strong government action like the 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.\textsuperscript{36} Because the government had been corrupted by the interests, and because the people are “good,” the people must

\textsuperscript{32} See note 19, supra.
\textsuperscript{33} Id. at 13-14.
\textsuperscript{34} 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); Cas Mudde & Cristobal Rovira Kalwasser, note x., supra, 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. Michael Kazin, The Populist Persuasion: An American History 31 (rev.ed. 2017) (“With privilege now resting securely in the saddle, [populist] literature of reform bristled with narratives of degeneration, conspiracy, and betrayal.”)
\textsuperscript{35} See, e.g., Norman Pollack, note x, supra, at 108 (1987) (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.”)
\textsuperscript{36} See J.M. Balkin, Populism and Progressivism as Constitutional Categories, note xx, supra 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 Michael Kazin, note x, supra, at 41-42.
seize control of governmental power. They can do so by direct action that will displace the compromised politicians administering a plutocracy.\textsuperscript{37}

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.\textsuperscript{38}

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. 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.\textsuperscript{39} Whereas

\textsuperscript{37} See id., 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 alternation of values and social relations, the formation of a public standard, and the redistribution of power” that would nonetheless leave private property in place).

\textsuperscript{38} See Richard Hofstadter, note x, supra, at 61; William A. Galston, Anti-Pluralism: The Populist Threat to Liberal Democracy 65 (2018).

\textsuperscript{39} Richard Hofstadter, The Age of Reform 163 (1955) (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
populists were nostalgic for a lost past, progressives thought that they could lead the country toward a sensible and humane future.\footnote{See, e.g., id., at 148-64.}

Progressives were much less drawn to conspiracy theories than populists, and they were therefore less concerned with an imagined world-wide 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.\footnote{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.”)} Direct popular control often obstructed the ability of these technocrats to do their work.\footnote{Cf. William A. Galston, Anti-Pluralism, note xx, supra, 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”).} Public opinion was often fickle, uninformed, and prejudiced.\footnote{See J.M. Balkin, Populism and Progressivism as Constitutional Categories, note xx, supra, at 1947 (asserting that progressives believed that “[p]opular anger and uneducated public sentiment are more likely to lead to hasty and irrational judgments”); Michael Kazin, The Populist Persuasion: An American History, note xx, supra 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”).} 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.\footnote{For a famous, book length exposition of progressive distrust of public opinion, see Walter Lippmann, Public Opinion (1922).}

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. Like the populists, however, their concern about the changing demographics of the 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’”); Michael Kazin, The Populist Persuasion, note x, supra, at 51 (asserting that progressives “sought to harmonize . . . legitimate but partial interests for the sake of the larger ‘public interest’”).}
country sometimes led to xenophobia and racism.\textsuperscript{45} 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.\textsuperscript{46} 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.

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.

\section*{II. Of Monkeys and Imbeciles: Evolution, Eugenics, and the Meaning of Civil Liberties}

\subsection*{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.

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.\textsuperscript{47} At the beginning, everyone

\textsuperscript{47} See id. ("[Elitists] are sure that they are promoting the public interest, but they understand it through the prism of their own class interests and biases").
understood that there would be no hard feelings.\textsuperscript{48} John Scopes, himself, may never have taught evolution\textsuperscript{49} and openly cooperated with the prosecution so as to put on a good show.\textsuperscript{50}

Things changed when, over the opposition and doubts of some of the original participants,\textsuperscript{51} 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.\textsuperscript{52} 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.\textsuperscript{53} 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.\textsuperscript{54}

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. In the suffocating heat, Darrow mercilessly badgered Bryan about biblical literalism. A huge throng watched on an outdoor platform, where the trial had been moved for fear that the courtroom floor would collapse. Millions more followed the trial through a primitive radio hook up and the print media. The jury’s guilty verdict, reached after only minutes of deliberation, was anticlimactic, but high drama returned when Bryan died

\textsuperscript{48} See id at 91-92.
\textsuperscript{49} Id. at 173-74.
\textsuperscript{50} See note x, supra.
\textsuperscript{51} 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. See Summer of the Gods, note xx, supra, 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. See id. at 104.
\textsuperscript{53} Id. at 271-277
\textsuperscript{54} On Darrow’s defense of labor, see Andrew Edmund Kersten, Clarence Darrow: American Iconoclast 107-51 (2011). On his religious skepticism, see id. at 221-22. On his material determinism, see id. at 197.
suddenly a few days after the trial. By the time the episode concluded, it had become the stuff of American legend.55

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.56 Bryan, who had always opposed attaching penalties to antievolution statutes, graciously offered to pay Scopes’ modest fine.57 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.58 The court urged the prosecution not to retry the case,59 and the prosecutors promptly acquiesced.60

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 from Dayton61 and how Frederick Lewis Allen presented the case in his best-

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55 For an account, see Summer for the Gods, note xx, supra, at 177-83.
56 Id. at 200-01.
57 Id. at 244.
58 The Tennessee Supreme Court reversed on 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, 289 S.W. 363, 367 (1927).
59 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.”)
60 See Summer for the Gods, note xx, supra, at 221.
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.\(^{63}\)

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.\(^{64}\) Evolutionists themselves were divided between Darwinian and Lamarckian versions,\(^{65}\) and the Lamarckian theory, still endorsed by important scientists in 1925, was more compatible with biblical literalism.\(^{66}\) There remained important holes in the Darwinian account for which there were not yet adequate explanations.\(^{67}\)

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.\(^{68}\) According to the highly regarded biologist Boyd Dawkins, “The evidence was

\(^{64}\) See The Many Faces of Evolution in Europe, C. 1860-1914 (Patric Dassen & Mary Keperink, eds. xi (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”).
\(^{65}\) Lamarck is commonly taken to have held that species inherited acquired characteristics. See C. Leon Harris, *Evolution: Genesis and Revelations* 110 (1981). 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.
\(^{66}\) 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.” The Many Faces of Evolution in Europe, C. 1860-1914, note x, supra, at xi.
\(^{67}\) 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 C. Leon Harris, *Evolution: Genesis and Revelations*, note x, supra, at 202-03.
clear that this discovery revealed a missing link between man and the higher apes.” 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 from a species almost entirely ape.”

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.

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. 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. 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, but at a crucial stage of Darrow’s examination, he conceded that at least some biblical passages should be read figuratively and even managed to joke about

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72 See The Clarence Darrow Digital Collection: The Scopes Trial, note xx, supra, at 237 (statement of Dr. Fay-Cooper Cole); id. at 278 (statement of Prof. Horatio Hackett Newman).
74 See, e.g., The Clarence Darrow Digital Collection: The Scopes Trial, note xx, supra, 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”).
75 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
At many other points in the examination, he commendably refused to express an opinion without studying the matter in greater detail.

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 usual sense of the word. 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. 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. 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

76 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.
77 See, e.g., id. at 292-93.
78 For a sympathetic account of Bryan that strongly emphasizes these points, see Michael Kazin, A Godly Hero: The Life of William Jennings Bryan 262-65 (2006).
79 In Dayton, Bryan proclaimed that “The real issue is not what can be taught in public schools, but who shall control the education system.” Summer for the Gods, note xx, supra, at 104. See also William Jennings Bryan, Speech to Legislature, in 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 paycheck 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).
majority pressure in the name of individual autonomy.80 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.

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. 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.

Hays’ 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 communism is the best form of government.

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

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80 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.” Laura Weinrib, The Taming of Free Speech: America’s Civil Liberties Compromise 157-58 (2016). On the ACLU’s more general embrace of academic freedom as a means of protecting radical speech, see id. 151-57 (2016).
argued. When the Supreme Court finally entered the fray, the justices instead bought the argument advanced by the ACLU that public schools could not ban the teaching of Darwinian theory and must ban the teaching of creationism even if coupled with the teaching of Darwinian theory. 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.

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 have not had much chance-they 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.  

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81 See The Summer for the Gods, note xx, supra, 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.
82 In its brief for the appellees in Edwards v. Aguillard, the ACLU argued that it was unconstitutional for a state to enact a statute with the purpose of creating “the pedagogic juxtaposition of a scientific theory with a divine explanation of the universe.” Brief for Appellees in Edwards v Aguillard, 1986 WL 727765 at 2.
85 The Clarence Darrow Digital Collection: The Scopes Trial, note xx, supra, at 288-89.
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. For progressives, “civil liberties” was about protecting government from the influence of a biased and ignorant populace and their “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, 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.\textsuperscript{86} 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.\textsuperscript{87} 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

\textsuperscript{86} For accounts, see Adam Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck 93-97 (2016); Paul A. Lombardo, Three Generations, No Imbeciles x-xi (2010).

\textsuperscript{87} See Imbeciles, note xx, supra, at 98-99; Three Generations, No Imbeciles, note xx, supra, at 74.
Holmes, Jr. for the United States Supreme Court, 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. At the height of 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.” By 1931, 28 states had enacted similar statutes authorizing eugenic sterilization and, as we shall see, laws along these lines had been endorsed by the leading jurists in the United States.

Carrie Buck was an early victim of the craze. She was the descendant of destitute farmers who had been forced off the land, the sort of people who might have supported William Jennings Bryan’s presidential campaigns. 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. When she became pregnant as a result of being raped by Alice’s nephew, the Dobbs filed a petition to commit her to the Colony for Epileptics and Feeble-Minded. Buck had been a good student, and there is little or no evidence that she suffered from mental deficiencies. Despite this fact, the judge granted the Dobbs’ petition.

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91 Adam Cohen, Imbeciles, note xx, supra, at 300.
92 See pp xx, infra.
93 See Adam Cohen, Imbeciles, note xx, supra, at 19-20.
94 Id. at 21.
95 Id. at 23-24.
96 Id. at 21, 24.
97 Id. at 27.
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.98 After she lost at trial and in the United States Supreme Court, she was involuntarily sterilized99 and, eventually, released from custody.100 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.” The visitor reported that Buck was “not a sophisticated woman, and lacked social graces,” but that “she was neither mentally ill nor retarded.”101

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. The connection was not inevitable. Evolution operates without human intervention. Conservatives 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.102

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 was 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

98 Apparently, Buck was chosen because of the previous finding of feeblemindedness, 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. See id. at 91-92.
99 For a description of the surgery, see Paul A. Lombardo, Three Generations, No Imbeciles, note x, supra, at 185.
100 See id. at 284.
101 Adam Cohen, Imbeciles, note xx, supra, at 298.
progressives favored. Indeed, eugenics might supply meaning that random, undisturbed evolution lacked.

Whether logical or not, there is no doubt that many early twentieth century advocates of eugenics and evolution saw a connection. Charles Darwin, himself, understood the attraction of eugenics. For example, he suggested that small-pox vaccinations were 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.”

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.”

Darwin’s son, Leonard, was the president of the Eugenics Education Society. Ronald A. Fisher, perhaps the leading evolutionary biologist in Europe, was motivated by the desire to prove the worth of eugenics.

Many evolutionary biologists in the United States held similar views. Although Darrow himself was a strong opponent of eugenics, six of the experts that he summoned to support him in Dayton had endorsed eugenics. The textbook from which John Scopes taught linked evolutionary theory to eugenics and endorsed both. Scopes made a public appearance with Charles B. Davenport, one of the

103 Charles Darwin, The Descent of Man 134 (1871).
105 See The Eugenics Education Society, Presidential Address by Major Leonard Darwin (1911).
108 Summer for the Gods, note x, supra, at 135
109 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
country’s leading eugenicist, who was also a fierce defender of evolutionary biology.\textsuperscript{110} Harry Laughlin, a tireless campaigner for eugenic sterilization, held a doctorate in biology from Princeton.\textsuperscript{111} Every article on eugenics published in medical journals between 1899 and 1912 favored sterilization.\textsuperscript{112}

Conversely, much of the opposition to eugenics came from Christian opponents of Darwinism. Bryan himself opposed evolutionary theory in part because it led to eugenic conclusions.\textsuperscript{113} When Nebraska’s governor vetoed a sterilization bill, he stated that the bill was “more in keeping with the pagan age than with the teachings of Christianity,” and that “man is more than an animal.”\textsuperscript{114} 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,” he said. “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.”\textsuperscript{115}

The second important fact about the eugenics movement was that it was largely a progressive project.\textsuperscript{116} Theodore Roosevelt, the progressive hero of the Bull Moose campaign, was also the country’s most famous advocate for eugenics. “Feeble minded persons,” he insisted, should be

\textsuperscript{110} See Edward J. Larson, Summer for the Gods, note x, supra, at 115.
\textsuperscript{111} See Adam Cohen, note x, supra, at 122.
\textsuperscript{112} Id. at 66.
\textsuperscript{113} See Michael Kazin, A Godly Hero, note x, supra, at 263.
\textsuperscript{114} Edward J. Larson, Summer for the Gods, note x, supra, at 101.
\textsuperscript{115} Edward J. Larson, Summer for the Gods, note x, supra, at 28.
\textsuperscript{116} See Adam Cohen, Imbeciles, note x, supra, at 55 (linking eugenics to progressive reformers); Thomas C. Leonard, Illiberal Reformers 117-119 (same); Donald K. Pickens, Eugenics and the Progressives (1968) (same).
“forbidden to leave offspring behind them.”\textsuperscript{117} 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.”\textsuperscript{118} Oliver Wendell Holmes, Jr., the author of \textit{Buck v. Bell} and long-time proponent of eugenics,\textsuperscript{119} was also a progressive hero, although his relationship to the movement was complex and ambivalent.\textsuperscript{120} The same could not be said of Louis Brandeis an unabashed progressive\textsuperscript{121} or of Harlan Fiske Stone, who was rapidly moving toward progressive positions.\textsuperscript{122} Both joined Holmes’ opinion.

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.\textsuperscript{123} 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.\textsuperscript{124} But given this fact, it is all the more striking that eugenics never gained a foothold in the Deep South. The


\textsuperscript{118} Paul A. Lombardo, Three Generations, No Imbeciles, note x, at 26.

\textsuperscript{119} See Oliver Wendell Holmes, Jr., 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, co-ordinated 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); Yosul 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”); Adam Cohen, Imbeciles, note x, \textit{supra} at 240-42 (detailing Holmes’ long association with the eugenics movement).

\textsuperscript{120} See G. Edward White, Oliver Wendell Holmes, Jr. 94-96 (2006) (explaining how a “group of progressive intellectuals” claimed Holmes as a hero).


\textsuperscript{122} 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”).

\textsuperscript{123} See David W. Southern, The Progressive Era and Race: Reaction and Reform, 1900-1917, \textit{supra} note xx, 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, \textit{Excluding Unfit Workers: Social Control versus Social Justice in the Age of Economic Reform}, 72 Law & Contemp. Probs. 177, 179 (2009) (associating progressive elitism with belief in social control through judgments of hereditary fitness); Donald K. Pickens, Eugenics and the Progressives, note xx, \textit{supra}, at 4 (associating eugenics with progressive faith in science and worries about democracy).

\textsuperscript{124} See Thomas C. Leonard, Illiberal Reformers, note x, at 141-67.
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.\textsuperscript{125}

Given this association, it is easy to see why Carrie Buck’s case, like John Scopes’, 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’ 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,\textsuperscript{126} where he warned that we should be “eternally vigilant against attempts to check the expression of opinion that we loath.”\textsuperscript{127} It is also the way that Arthur Garfield Hays characterized what was at stake in the Scopes trial.\textsuperscript{128}

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.\textsuperscript{129} In Dayton, Darrow argued against the unthinking acceptance of

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\textsuperscript{126} 250 U.S. 616 (1919).
\textsuperscript{127} Id. at 630 (Holmes, J., dissenting).
\textsuperscript{128} See pp xx, supra.
\textsuperscript{129} See Herbert Hovenkamp, note x, supra, at 971 (noting that by the time \textit{Buck} was decided, “compulsory sterilization legislation was already the target of considerable scientific doubt.”); Adam Cohen, Imbeciles, \textit{supra} note x, at 252-54 (detailing growing opposition to eugenics at time when \textit{Buck} was decided).
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received wisdom. The Holmes of Abrams warned that “time has upset many fighting faiths.” 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. This was also the Holmes of Lochner v. New York, when he confronted what might be characterized as the economic version of eugenics. 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.”

Of course, Holmes wrote none of these opinions. After a brief and perfunctory obeisance toward the principle of judicial deference, 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.

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130 See pp xx, supra.
131 250 U.S., at 630 (Holmes, J., dissenting).
132 See pp xx, supra.
133 198 U.S. 45 (1905).
134 Id. at 75 (Holmes, J., dissenting).
135 Buck v. Bell, 274 U.S., at 207 (“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”).
136 Id.
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 the eugenics program.\footnote{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”).} 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’ 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.\footnote{Cf. Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601 (1990).} 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’ endorsement of eugenics. On the contrary, eugenics threatened the very existence of communities that made progressives uncomfortable.\footnote{See, pp xx, infra.} 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.
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 truth. 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 opinion.

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
Carnage Institution suggested euthanasia as a method of dealing with disabled individuals. Harry
Laughlin, the head of the Eugenics Record Office and a leading spokesman for the movement, wrote
that the “lowest ten percent of the human stock are so meagerly endowed by Nature that their
perpetuation would constitute a social menace.” 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 feebleminded. Tests administered to 1.75 million Army enlistees in 1917
found feeblemindedness in 47.3 percent. One leading eugenicist thought that it might be necessary
to sterilize some fifteen million people.

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

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140 See Donald K. Pickens, Eugenics and the Progressives, note xx, supra, at 20 (“eugenists 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 objectives laws of civilization and nature”).
142 Adam Cohen, Imbeciles, note xx, supra, at 118.
143 Id. at 33-34
144 Id. at 34.
145 Id. at 110.
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.

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. That dilemma, in turn, is supposedly resolved by justificatory theories premised on originalism, representation reinforcement, moral philosophy, or common law constitutionalism.

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 favor individual rights. When “ordinary people” were in control, as they were when Tennessee enacted its anti-evolution statute, populists favored majoritarianism and progressives favored individual rights.

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147 See, e.g., id.
Because modern liberalism is an amalgam of populism and progressivism, liberal
constitutionalism reflects both positions. Seeing how this conflict played out is the work of the next two
Parts.

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.151 America’s love affair with eugenics continued as well. Polls in the late 1930s
found that 84 percent of Americans favored sterilization of “habitual criminals and the hopelessly
insane.”152 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.”153 As late as 2010, California was sterilizing large numbers of female prisoners without
their full consent.154

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

151 See Board of Trustees 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 University of California v. Bakke,
438 U.S. 265, 336 (1973) (Opinion of Brennan, White, Marshall, and Blackmun, concurring in the judgment in part
and dissenting in part) (noting Justice Holmes’ remark that the Equal Protection Clause was the “last resort of
constitutional arguments”); Roe v. Wade 410 U.S. 113, 154 (1973) (noting that the Court has “refused to recognize
an unlimited” scope for the right of privacy).
152 Paul A. Lombardo, Three Generations No Imbeciles, note x, supra, at 227. In contrast, only 70 percent
favored distribution of birth control information, 65 percent favored the death penalty for murder. More than half
the respondents favored “mercy deaths” for “hopeless invalids.” Id.
154 See Laura I. Appleman, Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and
Mass Incarceration, 68 Duke L. J. 417, 461 (2018). For efforts to trace modern hyperincarceration to roots in the
eugenics movement, see id.; James C Oelson, The New Eugenics: Black Hyper-Incarceration and Human
program. A simultaneous legal change occurred in 1942 when the Supreme Court decided Skinner v. Oklahoma. At issue was a state statute providing for involuntary sterilization of persons who had committed three or more “felonies involving moral turpitude.” Justice Douglas’s opinion for the majority cited Buck several times and purported to leave its holding intact. 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.”

The first paragraph of Justice Douglas’ opinion, apparently added late in the drafting process, invoked neither the populist nor the progressive tradition. Instead it used the rhetoric of individual rights. “This case touches a sensitive and important area of human rights,” Douglas wrote. “Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race – the right to have offspring.”

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. Both the Virginia and Oklahoma statutes would have fallen because they violated a substantive

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155 There is evidence that the Nazis used the American genetics program as a model, and Nazis on trial in Nuremberg cited Buck v. Bell in defense of their actions. See Adam Cohen, Imbeciles, note xx, supra, at 10-11. 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. See Victoria A. Nourse, In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics, note, xx, supra, at 15.

156 316 U.S. 535 (1942).

157 See id. at 538-44.

158 Id. at 537.


160 316 U.S., at 536.
constitutional norm. The question, then, is why the Court thought that the *Skinner* statute, but not necessarily the *Buck* statute, was arbitrary.

To find the answer, 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. Although eugenics remained popular among the populace as a whole, experts increasingly doubted eugenic claims. 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.

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, and Justice Jackson asked whether environment, rather than genetics produced crime. 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

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161 As Victoria Nourse points out in her perceptive study of *Skinner*, Douglas’ invocation of human rights must be read against the backdrop of the way that rights claims were understood in the 1940s. Unlike today, rights were not thought of as “trump” that entailed the unconstitutionality of government actions that infringed them. A violation of even “important” rights was unconstitutional only if it was “arbitrary.” See Victoria F. Nourse, In Reckless Hands: *Skinner* v. Oklahoma and the Near Triumph of American Eugenics, note, xx, supra, at 151-52.

162 See id. at 15, 129-32.

163 See Adam Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck, note x, supra, at 309.

164 See, e.g., Herbert Hovenkamp, note x, supra, at 972 (noting change in expert opinion about eugenics by 1942).


166 Id.
scientific authorities respecting inheritability of criminal traits,” but he nonetheless took the trouble to cite seven studies suggesting that the eugenics argument was deeply flawed. 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. 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.” 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.”

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 mass and elite opinion about eugenics switched places 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. 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

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167 316 U.S. at 538.
168 Id. at 545 n.1.
169 Id. at 539.
170 Id. at 546 (Jackson, J., concurring).
171 Id. at 544 (Stone, C. J., concurring).
172 Cf, Herbert Hovenkamp, The Progressives: Racism and Public Law, 59 Ariz. L. Rev. 947, 956 (2017) (“On characteristic of progressive policy ever since its inception was its tendency to follow prevailing science, changing its political views when dominant scientific views changed.”)
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. “Strict scrutiny” he wrote, was necessary “lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutionality of just and equal laws.”

For populists, this language could easily be read as endorsing the proposition that the life styles, 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 Board of Education v Barnette 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. In Minersville School Dist. v. Gobitis, 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*.

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 “One’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 election”\(^{176}\) 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.”\(^{177}\)

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 a 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 controls and only the mildest supervision over men’s affairs.”\(^{178}\) 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.”\(^{179}\)

\(^{176}\) 319 U.S., at 638.  
\(^{177}\) Id. at 642.  
\(^{178}\) Id. at 639.  
\(^{179}\) Id. at 640.
These musings amount to a remarkably (and in Jackson’s case characteristically) candid acknowledgment of what in this context might be labeled “Bernie’s confusion.” 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. 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.” 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 dissipated the effect of parental indoctrination.

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. Children who write essays defending white supremacy in their civics classes or insist on the Ptolemaic

\[180\] 310 U.S., at 599.
\[181\] Cf. Wisconsin v. Yoder, 406 U.S. 205, 242 (1972) (Douglas, J., dissenting) (“No 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”).
\[182\] This point was made prominently in the Court’s famous opinion in Brown v. Board of Education, 347 U.S. 483 (1954), where it argued that education was “the very foundation of good citizenship. . . . [I]t is the 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.” Id. at 493.

One might respond by arguing that part of “good citizenship” and of our “cultural values” is the appreciation of free speech rights. See Justin Driver, The School-House 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.
system in their science classes do not tend to get good grades. Jackson writes that “[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.” 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. In one incident, Witnesses were “forced. . . to drink large quantities of castor oil, roped . . . together, then paraded . . . through town.” In two Wyoming incidents, Witnesses were beaten and tarred and feathered. 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.” Altogether, in 1940, there were attacks against almost

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183 Cf. id.
184 319 U.S. at 637.
1500 Witnesses in 335 incidents in 44 states.\textsuperscript{187} Over two thousand Witness children in 48 states were expelled from school for refusal to salute the flag.\textsuperscript{188}

\textit{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-\textit{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.” At Stone’s strong urging, Jackson removed the direct references.\textsuperscript{189} 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.”\textsuperscript{190}

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.” The fear was about private, rather than public power. It was that Jehovah’s Witnesses, a small and powerless group, was 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.”

\begin{itemize}
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id. at 422.
\item \textsuperscript{190} 319 U.S. at 639-40.
\end{itemize}
He nonetheless wrote that the ceremonies were “a primitive but effective way of communicating ideas . . . a short cut from mind to mind.”\textsuperscript{191} 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,”\textsuperscript{192} 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.”\textsuperscript{193}

This rhetoric fits uncomfortably with the Witness’ 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 would undoubtedly 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 \textit{Barnette}, but his opinion was hardly a defense of populism. Instead, the argument between the dissent and the majority amounted to an intermural 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,”\textsuperscript{194} he hardly could. As a personal matter he “whole-heartedly associate[d] [himself] with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime.”\textsuperscript{195} 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,

\textsuperscript{191} Id. at 641-42.
\textsuperscript{192} Id. at 640.
\textsuperscript{193} Id. at 641-42.
\textsuperscript{194} Id. at 646 (Frankfurter, J., dissenting).
\textsuperscript{195} Id. at 646-47 (Frankfurter, J., dissenting).
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 conscience 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 . . . . 196

Of course, self-restraint of this sort depends on a 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 “Bernie’s confusion” 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 without just compensation” 197 – 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, he invoked standard
progressive programs for public betterment like “compulsory vaccination” and “food inspection
regulation.” 198 And in a chilling, if perhaps unintentional, reminder of Buck, he added “compulsory
medical treatment” to his list. 199

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 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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196 Id. at 659 (Frankfurter, J., dissenting).
197 Id. at 648 (Frankfurter, J., dissenting).
198 Id. at 655 (Frankfurter, J., dissenting).
199 Id.
Channeling James Madison, Jackson, warned that “small and local authorit[ies]” might be more susceptible to mass pressure. Frankfurter might have responded by celebrating local, direct democracy, as populists often did. Instead, he emphasized 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.” No one 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.” 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. Relying on Skinner’s invocation of reproductive rights, the Warren Court began an inquiry that culminated in Roe v. Wade. Barnette’s emphasis on secularism and rationality in public education led to the banning of prayers in public schools, limits on the funding for parochial schools, invalidating a prohibition on

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200 See The Federalist No. 10 (James Madison) in The Federalist at 46 (The Gideon Edition, 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”).

201 319 U.S., at 637.

202 Id. at 638.


205 410 U.S. 113 (1973).


207 See Board of Ed. of Central Sch. Dist. No. 1 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 . . .
the teaching of evolution in public schools\textsuperscript{208} and the outlawing of school segregation.\textsuperscript{209} Its emphasis on freedom of inquiry led to the Warren Court’s free speech activism,\textsuperscript{210} including its defense of academic freedom\textsuperscript{211} and of erotic literature.\textsuperscript{212}

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 \textit{Barnette} and \textit{Skinner} to the reformist judicial activism of the 1950s and 60s. 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.\textsuperscript{213} On his view, most of the Court’s work did not rest on contestable substantive value judgments. Instead, the Court was in the business of insuring 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.\textsuperscript{214} The Court’s free speech, voting rights, and reapportionment decisions were prime examples of the first effort.\textsuperscript{215} Its campaign against racial discrimination exemplified the second effort.\textsuperscript{216} On Ely’s account,

\textsuperscript{208} See Epperson v. Arkansas, 393 U.S. 97 (1968).
\textsuperscript{212} See, e.g., Roth v. United States, 354 U.S. 476 (1957); Redrup v New York, 386 U.S. 767 (1967).
\textsuperscript{214} See id. at 75-87.
\textsuperscript{215} See id.
\textsuperscript{216} See id. at 144-69.
the pivot point in the Court’s history comes with footnote 4 of *Carolene Products*\(^{217}\) and the Court’s reconciliation of liberal judicial activism with anti-Lochnerism.\(^{218}\)

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,\(^{219}\) 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,\(^{220}\) and an unbridled faith in the power of government-led reform.\(^{221}\) Although Powe himself does not put it this way, both pillars illustrate the victory of progressive over populist constitutionalism. 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,\(^{222}\) democratic theory is open textured and contested. The Court’s rejection of a state-wide referendum mandating a malapportioned upper house\(^{223}\) – 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

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\(^{217}\) United States v. Carolene Products Co. 304 U.S. 144, 152 n. 4 (1938).


\(^{219}\) Lucas A. Powe, Jr., The Warren Court and American Politics (2000).

\(^{220}\) Id. at 489-94

\(^{221}\) Id. at 215.


and suburban areas. As a cultural matter, reapportionment was a triumph for the educated and cosmopolitan middle and upper classes. Its victims were the already isolated and downwardly mobile rural voters.

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.

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. As Derrick Bell and Gary Peller have powerfully demonstrated, the black community was divided between integrationist and black nationalist critiques of white racism. 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.


225 In his separate opinion in Keyes v. School Dist., No. 1, 413 U.S. 189 (1973), 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. Id. at 219. 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 Board 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 v. School Dist. No. 1, 413 U.S. 189 (1973) (upholding 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 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 Board 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 Community Schools v., Seattle School Dist. No. 1, 551 U.S. 701 (2001).

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. Instead, the Court effectively mandated the destruction of those institutions. It embraced a progressive view that emphasized the irrationality of racial differences and the need to assimilate African Americans into a sensible, meritocratic, and rationalistic white culture.\textsuperscript{227}

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.\textsuperscript{228} 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.\textsuperscript{229} A populist approach might, instead, have focused on democratizing policing and providing for direct community involvement and control.

The desegregation and criminal justice cases also illustrate the second of Powe’s two hallmarks of Warren Court activism: unconstrained optimism about the possibilities of social transformation through the forceful use of government power. The Warren Court appears to have actually believed that racism could be eradicated by the integration of public education; that Miranda warnings\textsuperscript{230} and suppression of illegally seized evidence\textsuperscript{231} could eliminate police violence and professionalize law enforcement; that a speech marketplace that was “robust” and “wide open”\textsuperscript{232} would yield sensible public policy; and that disputes about matters like abortion, pornography, and prayer could be settled by calm study of the empirical evidence.

\textsuperscript{227} See Gary Peller, note xx, supra, at 5-18.
\textsuperscript{229} See id. at 199.
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, 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 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, that prohibited jailing of defendants too poor to pay fines, that abolished the poll tax, and that protected the rights of welfare recipients 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 waiver that made the

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233 See Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment guaranteed indigent criminal defendants the right to appointed counsel).
234 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).
reforms more theoretical than real. The possibility of a jury trial was of little value in a world where the vast majority of cases ended in plea bargain.

When the conservative counterrevolution began, the left-populist strands of Warren Court activism were among the first to be disowned. The revolution began slowly and tentatively, but eventually it picked up steam and, at this writing, is poised to achieve something like complete victory.

How did this happen? There are many explanations, ranging from Warren Court overreaching, macro-level political and economic changes, and 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

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 economic injustice. On occasion, populists favored strong government action – for example, vigorous antitrust enforcement or nationalization of some major industries – to fight their wealthy oppressors. But many populists also believed that they were being victimized by a gigantic conspiracy that involved both the private and public sectors. Legislators and judges had sold out to the rich and powerful, and government collusion with the railroads and producers

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238 See id. at 1 (roughly 90% of state and federal criminal defendants plead guilty rather than go to trial).

239 See generally The Burger Court: The Counter-Revolution that Wasn’t (Vincent Blasi, ed. 1983).
had driven down the incomes of ordinary people. 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 effected, then a newly invigorated and corruption-free state could marshal government power to protect the people from predation.

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 they decried made implausible the solution they proposed.

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. Of course, in the real world, the people are not united and not always virtuous or wise.

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. And even this characterization may be simplistic. “Distortions” implies that before mediating institutions take hold, there is some

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240 See pp xx, supra.
241 See id.
242 See notes xx-xx, supra.
243 See, e.g., William A. Galston, note xx, supra, at 38 (noting that “[p]lurality, not homogeneity, characterizes most peoples most of the time”).
undistorted “general will.” But modern social science also supports the view that opinions and preferences are always situated within a matrix of power, culture and politics and never exist in some pure and unpolluted state.245

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, populism turned into 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.

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” – to elites, immigrants, and racial minorities. 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, access to justice, free speech law, and statutory construction, 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.

246 See, e.g., William A. Galston, note xx, supra, at 4-5, 19-21.
248 See e.g, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (restricting commonality and particularity requirements for class action lawsuits); Philip Morris USA v. Williams, 549 US. 346 (2007) (limiting punitive damage awards).
249 See, e.g., Janus v. Am. Fed’n of State, Cty. & Mun, Empls., Council 31, 138 S. Ct. 448, 471 (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).
251 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 U.C.L.A. L. Rev.
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. However, more moderate versions of the same claims are poised to become part of mainstream constitutional thinking. Advocates of the unitary executive, of overruling Chevron, of revival of the nondelegation doctrine, and of “the constitution in exile,” claim that the federal bureaucracy is unaccountable, undemocratic, and populated by elites who fail to understand American values.

1482 (2018); Bojan Bugark, The Two Faces of Populism: Between Authoritarian and Democratic Populism, 20 German L.J. 390 (2018). My argument is that the Justices have succeeded in muddying the waters by appropriating populist rhetoric to reverse its ideological valence.

252 See, e.g., George Papadopoulos, Deep State Target: How I Got Caught in the Crosshairs of the Plot To Bring Down President Trump (2019).

253 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.


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. What they have lost is their faith in the possibility of radical transformation of government that would make it a force for good rather 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. 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.

The most interesting overlap between conservative constitutionalism and modern populism pertains to civil liberties. Consider, for example, the fact that Justice Thomas recently devoted nineteen

258 See, e.g., Richard A. Epstein, Exit Rights under Federalism, 55 LCPR 147, 149 (1992) (exit rights provided by federalism protect individuals from government regulation).

259 See, e.g., New York v. United States, 505 U.S. 144, 169 (1992) (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.”)
pages of the U.S. Reports to an extended essay linking abortion to eugenics\textsuperscript{260} and both to Darwinian thought\textsuperscript{261} and to “progressives, professionals, and intellectual elites.”\textsuperscript{262}

Of course, the analogy between state mandated sterilization and individual choices about childrearing is far from perfect,\textsuperscript{263} 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, Thomas reinterprets progressive support for individual rights as an effort to control subordinate groups that in his view make progressives uncomfortable.

Similarly, the Court’s emerging concern for the rights of conservative Christians\textsuperscript{264} echoes in obvious ways the worries that brought Bryan out of retirement almost a century ago.\textsuperscript{265} The Court has moved strongly to protect prayer in public places,\textsuperscript{266} religious monuments and displays on public land,\textsuperscript{267}

\begin{itemize}
  \item \textsuperscript{260} See Box v. Planned Parenthood of Indiana and Kentucky, 587 US. \textemdash, \textemdash - \textemdash (2019 (Thomas, J. concurring).
  \item \textsuperscript{261} See id. at \textemdash (noting that “eugenics is rooted in social Darwinism”).
  \item \textsuperscript{262} Id.
  \item \textsuperscript{263} 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,” The Atlantic, May 29, 2019, available at https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/?fbclid=IwAR3fOv3gn3FzzMn7dFAVQWLZ-EFVi-S3zYNA8WK5fYmtFmneDUxTsbsv1SvU.
  \item \textsuperscript{264} See Obergefell v. Hodges, 135 S. Ct. 2584, 2638 (2015) (Thomas, J., dissenting) (arguing that constitutional right to same sex marriage threatens religious liberty); id. at 2642 (Alito, J., dissenting) (arguing that decision upholding right to same sex marriage “will be used to vilify Americans who are unwilling to assent to the new orthodoxy”); Burwell v. Hobby Lobby, 573 U.S. 682 (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. Colorado Civil Rights Com’n., 138 S. Ct. 1719 (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).
  \item \textsuperscript{265} 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 pp xx, supra.
  \item \textsuperscript{266} See Town of Greece v. Galloway, 572 U.S. 565 (2014) (upholding practice of beginning town board meetings with prayers almost always delivered by Christian clergy against establishment clause attack).
  \item \textsuperscript{267} See Van Orden v. Perry, 545 U.S. 677 (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, Utah v, Summum, 555 U.S. 460 (2009) (holding that a privately donated Ten Commandments memorial in a public
and, somewhat less strongly, Christian businesspeople who do not want to provide service to gay customers or contraception coverage to their employees.268

The Court has also moved to restrict affirmative action programs thought to harm the white middle and lower classes.269 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.270

Finally, the Court has greatly expanded free speech protection especially as it relates to the regulation of business.271 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, park was “government speech,” and, therefore, did not create a public forum where there was a right to engage in competing speech).

268 See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n., 138 S. Ct. 1719 (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 v. Hobby Lobby, 573 U.S. 682 (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).


270 See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-41 (1995) (“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 equality that underlies and infuses our Constitution”); Grutter v. Bollinger, 539 U.S. 306, 367 (2003) (Thomas, J., concurring in part and dissenting in part) (attacking “legacy preferences” in “elite institutions” as part of argument against affirmative action); id. at 368 (asserting that “there is nothing ancient, honorable, or constitutionally protected about ‘selective’ admissions”).

but a government captured by the rich and powerful – the very elements of society who are their allies.

An alliance like this seems bound to disintegrate, and there are indeed tensions within it that might be exploited. 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. . . . To 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.

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 century, 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

272 See pp xx, infra.
273 Obergefell v. Hodges, 135 S. Ct., at 2629 (Scalia, J., dissenting).
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.\textsuperscript{274}

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 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 them and must be guided by elites who better understand their interests. That view, in turn, ignores the role that progressives themselves 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.

\textsuperscript{274} Grutter v. Bollinger, 529 U.S., at 362 (Thomas, J., concurring in part and dissenting in part).
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.” 275 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. 276

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, 277 and northern Democrats were willing to accept a southern walk out from the 1948 convention in order to enact a civil rights plank in their platform. 278 But it was not until the Warren Court period and the election of Lyndon Johnson that progressives broke decisively with the racist south. 279

When they did so, and as Johnson, himself, had predicted, 280 progressives provoked a huge populist backlash. 281 As already noted, populism had a long, if not entirely unbroken, history of racism. 282 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.

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275 See pp xx, supra.
280 See “The Long Goodbye,” The Economist, (Nov. 11, 2010) (“After President Lyndon Johnson signed the Civil Rights Act of 1964, he reportedly turned to his press secretary and lamented that Democrats ‘have lost the South for a generation.’”)
281 See note 279, supra.
282 See pp xx, supra.
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.\textsuperscript{283} Still, programs like Medicare, Social Security, and the GI Bill of Rights provided material evidence of 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,”\textsuperscript{284} embarked on a massive deregulatory program,\textsuperscript{285} and promoted a “free trade” system that some perceived as decimating American labor.\textsuperscript{286} 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,\textsuperscript{287} the Dodd-Frank banking reforms,\textsuperscript{288} and the McCain-Feingold campaign finance reforms,\textsuperscript{289} have marginally improved the functioning of economic and political markets, but exponentially increased their complexity and opacity.

Now out of power, some progressives have promised sweeping changes if only they are again granted governing responsibility. Proposals for universal health care, free college tuition, and broad

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based changes in the tax code abound. But other progressives are doubtful at best about these measures, and it remains to be seen whether a Democratic president and Congress would 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

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“demagogic” proposals that in their view are likely to make things worse rather than better and are, in any event, politically unattainable. 292

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 counterweight to populist distrust of government. Instead, they reinforce the view that there is no real hope for meaningful social change. 293

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. Even progressives who promise profound change if they gain political power rarely speak of constitutionally driven reform. Any serious hope that a new version of the Warren Court might transform the country is long gone. Instead, progressive constitutionalists have become the new reactionaries. They have devoted all their energy to worshiping the relics of past glory days without any real hope that the relics might be removed from museums and actually put to good use. 294

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

292 See note xx, supra.
293 See Mark V. Tushnet, Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration, 113 Harv. L. Rev. 26, 33 (1999) (“the 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.”)
294 See id. 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.”)
realization of the long-held dream of a constitutional right to same sex marriage. 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 LBGTQ 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 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 gay rights, it is hard to think of any cause 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. 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. This kind of formal equality “affected the hearts and minds” of black students “in a way unlikely ever to be undone.” It followed from this view that the formal dismantling of race-based legal structures was insufficient to meet the

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government’s constitutional responsibilities. Instead, school boards were constitutionally obligated to develop affirmative plans for integration that actually “worked” and “worked now.” Necessarily, those programs had to be race-conscious.

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. They have fought an entirely defensive battle to preserve a few voluntary programs that create some of the optics of a racially just society while doing little to help the least advantaged or 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’ critique of meritocracy to support the opposite of the outcomes that Justice Thomas favors. Liberal justices might have insisted that the elite standards of “merit” that govern college and graduate school admissions reflect no more than the

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299 See, e.g., Regents of University of California v. Bakke, 438 U.S. 265, 358-59 (1978) (Brennan, J., concurring the judgment in part and dissenting in part) (asserting that affirmative action measures should not be “analyzed by applying the very loose rational-basis stand 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”).
300 See P xx, supra.
eminently contestable views of the rich and powerful as to who is deserving of privilege. Maintaining these standards hardly constitute 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. Thirty years ago, progressive constitutionalism produced some important victories for gender equality by removing overt gender distinctions from the law.\footnote{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).} 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. Two opinions by Justice Ginsburg, the champion of progressive feminism, illustrate the point.

Consider first, Sessions v. Morales-Santana.\footnote{137 S. Ct. 1678 (2017).} At issue was the United States citizenship of a child born to unmarried parents when only one parent was a United States citizen. 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. In contrast, if the unmarried mother was a United States citizen, she could transmit citizenship to her child if she has lived in the United
States for only one year.\textsuperscript{303} The Court held that this gender based distinction violated the equal protection component of the due process Clause.\textsuperscript{304}

As Justice Ginsburg implicitly acknowledged in her opinion for the Court,\textsuperscript{305} the decision amounted to a mopping up operation. It dealt with a statute enacted more than three-quarters of a century ago\textsuperscript{306} – 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 retards rather than advances gender justice.

Having found that the unequal treatment was unconstitutional, the Court nonetheless denied the plaintiff relief. 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.\textsuperscript{307} The upshot is that even though the plaintiff “won” his case, he did not benefit from the victory. More generally, and tragically, citizenship is now available to a smaller number of people than enjoyed the benefit before the

\begin{itemize}
  \item[bbox]\textsuperscript{303} 8 U.S.C. § 1401(a)(7) (1958 ed.), 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 14. 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.
  \item[bbox]\textsuperscript{304} Id. at 1698.
  \item[bbox]\textsuperscript{305} 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”).
  \item[bbox]\textsuperscript{306} The statute was part of the Nationality Act of 1940. See 54 Stat. 1139–1140.
  \item[bbox]\textsuperscript{307} 137 S. Ct., at 1698.
\end{itemize}
Court acted. In order to protect men from supposed discrimination, many more people, who, like the plaintiff, have lived in this country for years, are now subject to deportation. Can this be what progressive, constitutional feminism has turned into?

A second decision is more consequential and, therefore, even more disturbing. In United States v. Virginia,\(^\text{308}\) Justice Ginsburg, again speaking for the Court, wrote that the exclusion of women from the Virginia Military Academy (VMI) denied the women equal protection of the laws.

VMI was famous for its unusual “adversative training” techniques, which were characterized by features like physical rigor, mental stress, absence of privacy, and minute regulation of behavior:

VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. Entering students are incessantly exposed to the rat line, “an extreme form of the adversative model,” comparable in intensity to Marine Corps boot camp. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7–month experience, to their former tormentors.\(^\text{309}\)

Applying a heightened standard of review, the Court found that there was not an “exceedingly persuasive justification” for excluding women from this sort of training.\(^\text{310}\) The Court assumed that “most women would not choose VMI’s adversative method,”\(^\text{311}\) but relied upon expert testimony to the effect that some women were capable of meeting VMI’s physical standards. It followed that the “categorical exclusion [of women] in total disregard of their individual merit” was unconstitutional.\(^\text{312}\)

The condemnation of supposedly irrational or stereotypical generalizations based on gender is at the core of the progressive feminist project. In Virginia, however, the project was complicated by the state’s offer to establish a separate Virginia Women’s Institute for Leadership (VWIL), open only to women, which would also train citizen soldiers, but do so through “a cooperative method that

\(^{308}\) 518 U.S. 515 (1996).
\(^{309}\) Id. at 522.
\(^{310}\) Id. at 529.
\(^{311}\) Id. at 542.
\(^{312}\) Id. at 545-46.
encourages self-esteem” rather than through the adversative method. There were real questions about whether this separate institution would have the same resources and offer the same opportunities as VMI, but the Court’s rejection of this alternative was apparently not based on these questions. Instead, the problem was that the VWIL program did not offer the same adversative training as VMI. As the Court explained “generalizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”

It is now more than twenty years since Justice Ginsburg wrote these words, and there is a sense in which she has been proved right. VMI now trains a substantial number of women. Although it has modified some of its standards to meet their needs, its program has not collapsed. There are individual women who now have an opportunity that they did not have before the Court intervened.

It is nonetheless striking how discordant the opinion is with the views of many feminists who do not happen to be Supreme Court justices. Most significant is the Court’s readiness to accept the VMI standards for success at face value. The Court’s analysis takes these standards as its starting point and then argues that there are at least a few women who can meet them. It never addresses the possibility that the reason only a few women can meet them is because they are, themselves, gendered. When viewed from this perspective, preferring a system under which women must meet male standards at

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313 Id. at 548.
314 Id. at 517, 543.
315 Id. at 573 n.1.
VMI to a system under which they could excel according to female standards at VWIL, harms, rather than helps, women. That preference, in turn, is associated with the broader progressive resistance to foundational challenges directed at existing institutions.

In some respects, *Virginia* is aberrational. The case is important because it illustrates what progressive constitutionalists did with their power when they had it and, perhaps, why they no longer have it. But the case was decided two decades ago. Today, progressives rarely control a majority of the Court. 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 will be back in control any time soon. For the foreseeable future, a conservative-populist majority will be in the driver’s seat.

That fact, in turn, provides space for thinking about what might come next. 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? Put simply, can Bernie’s confusion be resolved? That is the subject of the next Part.

VI. 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 is internal to the progressive and populist components of American liberal 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 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 position. On the one hand, populists surely 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 where government regulation at least for a time has authentically advanced the general welfare. As the historian Michael Kazin has argued:
[T]he path to success of 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 bodes, 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.³¹⁹

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. An authentic embrace of individual rights would in fact 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

³¹⁹ Michael Kazin, The Populist Persuasion, note x, supra, at 24-25.
civil liberties is easy to misunderstand. A true defense of untrammeled public power would be inconsistent with populist fears of government corruption. The populist 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 foreseeable 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.\(^{320}\)

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.

\(^{320}\) As J.M. Balkin wrote almost 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 progressive mode that continually pits them against the sensibilities of many ordinary citizens.

J.M. Balkin, Populism and Progressivism as Constitutional Categories, note xx, supra at 1949-50.
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. More recent work by scholars like, Larry Kramer, Sanford Levinson, Joseph Fishkin, and William Forbath, Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How the People Can Correct It) (2006). 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

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323 See Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How the
325 See Ganesh Sitaraman, The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens
Our Republic (2017).
326 See David Fontana, Unbundling Populism, note x, supra.
327 See Liberal Constitutionalism and Economic Inequality, 85 U. Chi L. Rev. 369, 370, 396 (2018).
328 See Mark V. Tushnet, Taking the Constitution Away from the Courts (1999).
constitutionalism that is legalistic, proscriptive, and elitist. The Society’s allies in the 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. 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 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 it always has 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 crisis of social and constitutional disintegration.

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329 The American Constitution Society website features a mission statement that describes itself as promoting “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.” The statement is available at https://www.facebook.com/pg/acslaw/about/?ref=page_internal. 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.

330 Cf. J.M. Balkin, note xx, supra 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”).