

# THE PROGRESSIVES: RACISM AND PUBLIC LAW

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*American Progressivism initiated the beginning of the end of American scientific racism. Its critics have been vocal, however. Progressives have been charged with promotion of eugenics, and thus with mainstreaming practices such as compulsory housing segregation, sterilization of those deemed unfit, and exclusion of immigrants on racial grounds. But if the Progressives were such racists, why is it that since the 1930s Afro-Americans and other people of color have consistently supported self-proclaimed progressive political candidates, and typically by very wide margins?*

*When examining the Progressives on race, it is critical to distinguish the views that they inherited from those that they developed. The rise of Progressivism coincided with the death of scientific racism, which had been taught in American universities since the early nineteenth century and featured prominently in the scientific debate over Darwin's theory of evolution. Eugenics, which attempted to use genetics and mathematics to validate many racist claims, was its last gasp. The most notable thing about the Progressives is that they were responsible for bringing scientific racism to an end.*

*One of the most powerful characteristics of the progressive state was its attentiveness to science—a characteristic that it retains to this day. When the Progressive Era was forming, however, genetic racism was the scientific model of the day, cutting across a wide range of disciplines and reaching people of all political persuasions, even into the most elite of American research institutions. By and large, non-Progressives were just as racist as Progressives and some significantly more so. Further, the Progressive period lay entirely within the southern era of Jim Crow legislated segregation, often making it impossible to identify particular racial attitudes in the New South as Progressive or simply as inherited features of long held southern racial ideas. The all-important question for the historian is, which racial ideas did the Progressives inherit from their predecessors, and which did they develop on their own?*

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*Progressives did believe in a more active state, however, and racism supported by an activist legislative agenda can be much uglier than racism that is passively tolerated. One cannot characterize most of the segregationist, exclusionary, and other racist legislation passed during this era as Progressive, however. Southern states actively regulated racial exclusion by statute, and all of the racial zoning laws sometimes attributed to Progressives were passed in formerly slave holding states. Whatever the ideological or scientific sources of these laws, they were supported by staunch anti-Progressives. The same thing is true of compulsory sterilization laws. For example, the Supreme Court Justices who voted consistently against Progressive labor protective and other regulatory legislation voted to uphold compulsory sterilization of mental defectives. While many Progressives advocated for more restrictive immigration laws, nothing that was passed during the Progressive Era matched the explicit restrictions on Chinese immigration that came earlier, or the racist immigration restrictions enacted during the terms of anti-Progressive Presidents Harding and Coolidge after the Progressive Era had ended. Finally, the attempts to link Progressive support for minimum wage laws to racial exclusion fail because they misunderstand the objectives of the Progressive minimum wage commitment and, further, pick and choose a small number of idiosyncratic examples from an enormous economic literature.*

*The one place where a sharp difference emerged between Progressives and their various opponents was in the subsequent rejection of genetic racism in favor of more environmentalist, nurture-based models of human nature and development. More environmentalist views began to take hold in the social sciences in the 1910s and 1920s and began to change legal thinking in the 1940s. They found expression in a Supreme Court that was almost unanimously Democrat and self-acknowledged Progressive. The result was gradual emergence of a division that has endured to this day, with Progressives largely appearing as promoters of racial inclusion and diversity.*

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### INTRODUCTION

American Progressivism, a political and intellectual movement that lasted roughly from the mid-1890s until 1920, began bringing the century-old era of American scientific racism to an end. However, critics of American Progressivism have been vocal: Progressives have been charged with promoting eugenics, and thus with mainstreaming practices such as school and housing segregation, compulsory sterilization of those deemed unfit, and excluding immigrants on racial grounds.<sup>1</sup> The criticism has fueled movements to remove Woodrow Wilson's name from Princeton's School of Public and International Affairs,<sup>2</sup> and opposition to naming a building at Iowa State University after suffragette Carrie Chapman Catt<sup>3</sup>—in both cases because of their racism or xenophobia.<sup>4</sup> One question this raises is, if the Progressives were such racists, why is it that since the 1930s people of color have consistently supported self-proclaimed progressive political candidates, mostly Democrats, and typically by wide margins? The answer, as for most important movements, is that we must distinguish the set of ideas the Progressives inherited from those they developed internally and contributed to future generations.

The claim that many Progressives were racists is true. Some Progressives also held strongly exclusionary views about immigration and supported the sterilization of perceived mental defectives. However, Progressives inherited these views, and they were not appreciably different from those held by most of their non-Progressive predecessors and contemporaries. Progressives themselves were highly

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1. E.g., DAVID HOROWITZ, *PROGRESSIVE RACISM* (2016); THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* (2015); ERIC S. YELLIN, *RACISM IN THE NATION'S SERVICE: GOVERNMENT WORKERS AND THE COLOR LINE IN WOODROW WILSON'S AMERICA* (reprint 2016) (2013); Richard A. Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the "Progressive Era,"* 51 VAND. L. REV. 787 (1998); Harry G. Hutchison, *Waging War on the "Unfit"? From Plessy v. Ferguson to New Deal Labor Law,* 7 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2011); Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration,* 41 HASTINGS CONST. L.Q. 845 (2014); Malcolm Harris, *The Dark History of Liberal Reform,* NEW REPUBLIC (Jan. 21, 2016), <https://newrepublic.com/article/128144/dark-history-liberal-reform>; see also DAVID W. SOUTHERN, *THE PROGRESSIVE ERA AND RACE: REACTION AND REFORM, 1900–1917* (2005).

2. See Andy Newman, *At Princeton, Woodrow Wilson, a Heralded Alum, is Recast as an Intolerant One,* N.Y. TIMES (Nov. 22, 2015), [http://www.nytimes.com/2015/11/23/nyregion/at-princeton-addressing-a-racist-legacy-and-seeking-to-remove-woodrow-wilsons-name.html?\\_r=0](http://www.nytimes.com/2015/11/23/nyregion/at-princeton-addressing-a-racist-legacy-and-seeking-to-remove-woodrow-wilsons-name.html?_r=0).

3. See Heather Wiese, *Controversy Surrounds Building's Name,* IOWA ST. DAILY (May 6, 1996), [http://www.iowastatedaily.com/gsb/article\\_51b19593-b663-50f6-a7a3-bc4ecfd83d07.html](http://www.iowastatedaily.com/gsb/article_51b19593-b663-50f6-a7a3-bc4ecfd83d07.html).

4. The efforts are not limited to Progressives. For example, early in 2017, John C. Calhoun's name was removed from a Yale University building. Noah Remnick, *Yale Will Drop John Calhoun's Name from Building,* N.Y. TIMES (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/us/yale-protests-john-calhoun-grace-murray-hopper.html>. Calhoun, a racist political leader from South Carolina and seventh Vice President of the United States, died in 1850.

diverse on the question of race, ranging from the explicit racism of people like John R. Commons<sup>5</sup> or Edward A. Ross,<sup>6</sup> to the more egalitarian views held by the mainly white founders of the NAACP in 1909,<sup>7</sup> including Jane Addams, John Dewey, Oswald Garrison Villard, and also Afro-Americans W.E.B. DuBois, Booker T. Washington, and Ida B. Wells. The NAACP embarked on a strategy of using the courts to combat race discrimination and segregation.<sup>8</sup> Its first major victory in the Supreme Court was *Buchanan v. Warley*, which struck down racially exclusive zoning.<sup>9</sup>

While many scientists during the Progressive Era were scientific racists, not all were. Further, the approaches to science that Progressives inherited from the past were sharply different from those that they developed and that we associate today with progressive science. For example, Progressive reformer Franz Boas, the most prominent anthropologist of his era and developer of cultural relativism, was a sharp critic of scientific racism as well as eugenics.<sup>10</sup> John B. Watson, the founder of behavioral psychology who wrote mainly in the 1910s and 1920s, believed that genes had virtually nothing to do with a person's character or intelligence; everything was a response to environmental stimuli.<sup>11</sup> Progressive sociologist Charles Horton Cooley, son of the famous Gilded Age constitutional scholar Thomas M. Cooley, complained bitterly that Afro-Americans were consistently subjugated to Jim Crow-style treatment, even though they were equal to whites in character and intelligence.<sup>12</sup> *These* approaches to science—not the hereditary determinism of the era in which Progressives were educated—are the Progressives' important contributions.

The development of these new approaches substantially brought about the death of institutional scientific racism, which had been taught in American universities since the early nineteenth century and featured prominently in the debate

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5. See generally JOHN R. COMMONS, RACES AND IMMIGRANTS IN AMERICA (1907).

6. See generally Edward A. Ross, *The Causes of Race Superiority*, 18 ANNALS AM. ACAD. POL. & SOC. SCI. 67 (1901).

7. See, e.g., William Steuk, *Progressivism and the Negro: White Liberals and the Early NAACP*, 38 HISTORIAN 58 (1975) (account of the role of white liberals in founding the NAACP); see also Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880–1890*, 77 FORDHAM L. REV. 1479, 1530–32 (2009).

8. See NANCY J. WEISS, THE NATIONAL URBAN LEAGUE: 1910–1940, at 47–48 (1974).

9. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917); see *infra* text accompanying notes 244–50.

10. See *infra* text accompanying notes 296–300; see also Thomas J. Horton, *The Anthropologist as Progressive Reformer: Franz Boas and the Scientific Battle Against American Racism* (Georgetown Univ., M.A.L.S. Thesis no. 9232, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1626339](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626339).

11. See *infra* text accompanying notes 313–20.

12. See CHARLES HORTON COOLEY, SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND 218–20 (1909).

over Darwin's theory of evolution.<sup>13</sup> Eugenics, which attempted to use genetics and mathematics to validate many racist claims, was its last gasp. The most notable thing about the Progressives is that they were responsible for bringing these views to an end, although that did not happen immediately.

At the time Progressivism came onto the scene, the dominant views held by educated Americans were historicism; traditional political economy, with its anti-institutionalist and historical theories of value; Darwinism; and scientific racism, which was taught even in ivy-league institutions. Progressives decisively rejected historicism in favor of more forward-looking views, including marginalism in economics, cultural relativism in anthropology, and behaviorism in psychology. These scientific views were notable for the extent to which they either ignored or rejected genetics and other commitments to inheritance from the past in favor of more environmentalist alternatives. While the Progressives did not come close to ending racism in government policy, they did force rejection of the most racist elements of nineteenth-century scientific thought.

First, determining how genetic racism and eugenics fit into Progressivism requires that we identify who the Progressives were. Numerous legislative reforms subsequently characterized as *Progressive* originated in the 1890s and 1900s, including the Sherman Act (1890), the Pure Food and Drug Act (1906), and many state statutes regulating hours of labor, working conditions, and professional licensing.<sup>14</sup> However, the word *progressive* was not commonly used to describe this movement until 1910 or so. Prior to that, in 1894, the eminent Progressive tax scholar Edwin R. A. Seligman wrote a book entitled *Progressive Taxation in Theory and Practice*.<sup>15</sup> Seligman used the term *progressive* not to describe a wide-ranging political movement, but rather a theory of taxation based on marginalist economics, which was only one important principle of progressivism.<sup>16</sup> In 1908 Herbert Croly, founder of *The New Republic*, published his highly influential *The Promise of American Life*,<sup>17</sup> which used the word *progressive* to advocate government

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13. See, e.g., SAMUEL GEORGE MORTON, CRANIA AMERICANA; OR, A COMPARATIVE VIEW OF THE SKULLS OF VARIOUS ABORIGINAL NATIONS OF NORTH AND SOUTH AMERICA, TO WHICH IS PREFIXED AN ESSAY ON THE VARIETIES OF THE HUMAN SPECIES (Philadelphia, J. Dobson 1839); see GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914, at 74 (1971) (crediting Morton with developing scientific racism); see also JOSIAH CLARK NOTT & GEORGE R. GLIDDON, TYPES OF MANKIND (Philadelphia, Lippincott, Grambo & Co. 1854) (developing scientific arguments for polygenesis, or view that different races had distinct origins and were of different species); Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 651–57 (tracing history of nineteenth-century scientific racism).

14. See Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. REV. 1063 *passim* (2017).

15. EDWIN R.A. SELIGMAN, PROGRESSIVE TAXATION IN THEORY AND PRACTICE (2d ed. completely rev. and enlarged 1908). The debate over “progressivism” in tax policy actually antedated Seligman. See HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970, at 92–100 (2015).

16. See SELIGMAN, *supra* note 15, at 17–35.

17. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (1908).

economic planning as part of a transition to a more corporate rather than individualistic conception of capitalism. The political label *progressive* became popular during the 1912 presidential election campaign, where it was claimed to some extent by all three presidential candidates: Theodore Roosevelt, William H. Taft, and Woodrow Wilson.<sup>18</sup>

Identifying the origins of a comprehensive progressive rhetoric is difficult.<sup>19</sup> The reification of the term had to await such mid-century historians as Richard Hofstadter, whose 1955 book *The Age of Reform* attempted to characterize Progressivism and classify its members. However, Hofstadter missed some of Progressivism's most important characteristics. For example, he completely ignored the development of marginalism in economics, which was central to Progressive economic policy; although he did write a great deal about the classical, or *laissez-faire*, economics against which Progressives were reacting.<sup>20</sup>

Failure to engage Progressivism's economics has been a shortcoming in the intellectual history of the Progressive Era ever since. For example, Thomas Leonard's excellent book *Illiberal Reformers* is expressly about American economists during the Progressive Era. However, his entire discussion of marginalism is limited to two pages about the marginal productivity theory of wages.<sup>21</sup> Marginalism did substitute a new theory of wages, but it did much more than that. It developed new theories about institutions, wealth distribution, government regulation, competition policy, tax policy, and risk management, as well as methodologies that gradually came to set economics apart from the other social sciences.<sup>22</sup> The best way to understand Progressivism's reaction to Gilded Age individualism is to understand its economics.<sup>23</sup>

Those who self-identified with Progressivism were diverse. At the risk of oversimplification, the movement's most important intellectual characteristics were the following: (1) marginalism in economics, with its increased emphasis on forward-looking expected value and risk management, wealth distribution, and market failure; (2) a strong tendency to follow prevailing science, including a fascination for emergent social science; (3) a concern with broader political participation in all levels of government as well as business; and (4) a commitment to institutionalism, or the view that resources should and do move through society by diverse mechanisms, of which the traditional market is only one. These views were shared by many Americans, but certainly not by all.

Just as any other movement, the Progressives inherited some theories and developed others. Among the former were well-established scientific theories about

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18. See Daniel T. Rodgers, *In Search of Progressivism*, 10 REV. AMER. HIST. 113, 127 n.1 (1982).

19. See J.M. BEACH, *THE ORIGINS OF PROGRESSIVISM: A HISTORY*, ch. 1 (2012).

20. See RICHARD HOFSTADTER, *THE AGE OF REFORM* 142 (1955); see also HAROLD U. FAULKNER, *THE DECLINE OF LAISSEZ FAIRE, 1897–1917* (1951) (similar perspective on the same period).

21. LEONARD, *supra* note 1, at 85–87.

22. See generally HOVENKAMP, *supra* note 15.

23. *Id.* at 76–91; SELIGMAN, *supra* note 15, at 17–35.

the human race, many of which antedated the Civil War. However, as Progressive social science matured, it developed its own models that were much more environmentalist and dismissive, not only of hereditary determinism, but even of the very concept of race. The result was the views that we most strongly identify today with the Progressive social science revolution—namely, cultural relativism, behaviorism, instrumentalism, and other environmentally based theories of human behavior.<sup>24</sup>

For hereditary determinists, inheritance played a nearly exclusive role in determining an organism's most important characteristics. Further, one's inheritance from the past could not be changed. The role of the environment was thought to be small or even non-existent. People of all political stripes shared these views, and much of the legislation characterized as representing Progressive beliefs about inheritance and race was not passed by Progressives at all. Indeed, much of the current criticism of Progressives for their racism begins by identifying anyone who lived during that era as *Progressive*.<sup>25</sup>

Was Progressive racism different from the racism of non-progressive contemporaries? And more importantly, who led the emergence from the heavily hereditary race theories of the nineteenth century to the relatively more egalitarian theories of the 1910s and after? Related to this last question is another: How can we explain the political “flip” that occurred on questions of race, origins, and immigration? Increasingly since the 1940s, racial minorities have aligned themselves with liberal or progressive political leaders.

This Article explores American engagement with these issues in public law, economics, and social science. To the extent possible, it uses *Progressive* with a capital “P” to refer specifically to the short-lived movement that was a strong force in American politics before the election of Warren Harding in 1920. By contrast, *progressivism* with a small “p” refers to a collection of ideologies and policy positions that have reappeared time and again in American politics, including the 2016 political campaigns of Bernie Sanders and Hillary Clinton.<sup>26</sup> Many of these later self-proclaimed progressives were Democrats, but not all. For example, Dwight D. Eisenhower ran on a platform emphasizing “progressive moderation.”<sup>27</sup> Nelson Rockefeller's wing of the Republican Party was referred to as “progressive Republicans,” and included such people as Chief Justice Earl Warren.<sup>28</sup> The original

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24. For a chronicle of the decline of pre-Progressive theories written by a contemporary, see J. B. Eggen, *The Fallacy of Eugenics*, 5 SOC. FORCES 104 (1926).

25. See *infra* text accompanying notes 42–44.

26. On the recurrence of self-acknowledged progressivism in American politics, see Hovenkamp, *supra* note 14. See also PRESIDENTIAL CAMPAIGNS, SLOGANS, ISSUES, AND PLATFORMS: THE COMPLETE ENCYCLOPEDIA (Robert N. Roberts, et al. eds., 2012) (discussing earlier campaigns).

27. See Norman A. Graebner, *Eisenhower's Popular Leadership*, 39 CURRENT HIST. 230, 232 (1960) (Eisenhower's use of terms *moderate progressivism* and *progressive moderation*).

28. To this day progressive Republicans continue to maintain a website. See *Progressive Republicans: A New Vision for GOP*, PROGRESSIVE REPUBLICANS, <http://progressiverepublicans.org> (last visited Nov. 3, 2017).

Progressive movement also cut across party lines, initially claiming Republican Theodore Roosevelt as the first Progressive President. Republicans William Howard Taft and Herbert Hoover both took the Progressive label at some point in their careers, although today neither is regarded as a particularly good representative of progressive ideology. Woodrow Wilson, a Democrat, was the last president to be a self-acknowledged part of the original Progressive movement.

Prior to the Progressive Era, hereditary racism was the scientific model of the day, cutting across a wide range of disciplines and reaching people of all political persuasions, even into the most elite of American research institutions.<sup>29</sup> The people we identify as the original Progressives were all educated during this period. By and large, non-Progressives were just as racist as Progressives and some significantly more so. Further, the Progressive period lays entirely within the southern era of Jim Crow legislated segregation, often making it impossible to identify particular racial attitudes in the New South as Progressive, rather than simply as inherited features of southern racial views held from long before the Civil War. This is particularly true for Southerners such as Woodrow Wilson. It thus becomes critical to distinguish the views that the first generation of Progressives inherited from those that they developed themselves.

Second, one-way Progressive public policy differed from prevailing alternatives was that Progressives believed in a more active State. They were more supportive of legislative intervention than their more laissez-faire predecessors and opponents. Racism supported by a legislative agenda can be much uglier and more aggressive than racism that is passively tolerated. However, one cannot characterize most of the segregationist, exclusionary, and other racist legislation passed during this era as Progressive. Southern states actively promoted racial exclusion by an assortment of practices and, later, statutes collectively known today as “Jim Crow.” Statutory segregation began in the schools as early as the 1860s and then quickly spread elsewhere.<sup>30</sup> All of the racial zoning laws sometimes attributed to

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29. See *infra* text accompanying notes 81–82.

30. See *Ohio v. McCann*, 21 Ohio St. 198, 210–12 (1871) (upholding 1864 provision requiring separate but equal public schools); see also Stanley J. Folmsbee, *The Origin of the First “Jim Crow” Law*, 15 J. SOUTHERN HIS. 235 (1949) (identifying first non-school Jim Crow statute as a Tennessee separate-but-equal provision for railroads, passed in 1881). Dating Jim Crow depends on whether one counts racial practice or explicit legislation, which came a few years later. At the state level, the era is probably best dated as from the end of Reconstruction in 1875 or a little later, until *Brown v. Board of Education* in 1954. See generally STEPHEN A. BERREY, *THE JIM CROW ROUTINE: EVERYDAY PERFORMANCES OF RACE, CIVIL RIGHTS, AND SEGREGATION IN MISSISSIPPI* (2015); LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* (1998); I. A. NEWBY, *JIM CROW’S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA, 1900–1930* (1965); HOWARD N. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH, 1865–1890* (1978) (looking at practice as well as statutes); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955). Federal enablement came in the 1880s. See generally THOMAS A. UPCHURCH, *LEGISLATING RACISM: THE BILLION DOLLAR CONGRESS AND THE BIRTH OF JIM CROW* (2004); RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896* (2017).



Progressives were passed in formerly slaveholding states.<sup>31</sup> Whatever the ideological or scientific sources of these laws, they were supported by staunch anti-Progressives. The same thing is true of compulsory sterilization laws. For example, the Supreme Court Justices who voted consistently against Progressive labor protection and other regulatory legislation also largely voted to uphold compulsory sterilization of mental “defectives.”<sup>32</sup> While many Progressives advocated for more restrictive immigration laws, nothing passed during the Progressive Era matched the explicit restrictions on Chinese immigration that came earlier, or the racist immigration restrictions promoted and enacted in the 1920s by anti-Progressive Presidents Harding and Coolidge.<sup>33</sup>

Progressive racism cannot be defended. However, the Progressives did not invent racism; scientific, historical, cultural, and religious racism already existed. During the period before 1920, many Progressives did not do much to combat racism either, although some did. But that gets to the next point.

Third, one notable characteristic of Progressivism was its leadership in rejecting hereditary racism in favor of more environmentalist, nurture-based models of human nature and development. These views began to take hold in the social sciences in the 1910s and 1920s and began to change legal thinking in the 1940s.<sup>34</sup> They found expression in a Supreme Court that was almost unanimously self-acknowledged Progressive. The result was gradual emergence of a division that has endured to this day, with Progressives largely appearing as the champions of racial inclusion, diversity, and procedural due process.

### I. THE PROGRESSIVE ERA AND THE SCIENCE OF RACE

Racism was deeply engrained in nineteenth-century American social and scientific thought.<sup>35</sup> The genetic Darwinism ideas that dominated racial theory after the Civil War initially served to reify and extend these views into the newly fashioned social sciences. These ideas were held by people of all political ideologies, although not unanimously. One set of dissenters from evolutionary racism were Christian evangelicals who rejected the theory of evolution, but were racist for other reasons.<sup>36</sup> Another set was a dwindling number of scientists who also denied evolution and favored alternatives such as polygenesis, which was even more racist than the theories embraced by the scientific mainstream.<sup>37</sup>

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31. *See infra* text accompanying notes 244–48.

32. *See infra* text accompanying notes 129–33.

33. *See infra* text accompanying notes 270–72.

34. *See infra* text accompanying notes 328–38.

35. Good scientific and cultural surveys include RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN 19TH-CENTURY AMERICA* (rev. ed. 2000) and THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* (1963). For a more global history, see generally PAT SHIPMAN, *THE EVOLUTION OF RACISM: HUMAN DIFFERENCES AND THE USE AND ABUSE OF SCIENCE* (First Harvard Univ. paperback ed. 2002).

36. *See infra* text accompanying notes 52–53.

37. *See infra* text accompanying notes 55–57.

Many of these attitudes did not differ noticeably from the views of elite Western thinkers who wrote long before the Progressive Era. Charles Darwin himself believed that Caucasians had come out the winners in the human struggle for existence that he had described in *The Descent of Man*.<sup>38</sup> In fact, many interpreted the theory of evolution to give credence to a secular, “scientific” view of racial superiority that lasted well into the twentieth century.<sup>39</sup>

The beginning of the Progressive Era coincided with a broad-based revolution in the social science of race. One characteristic of progressive policy ever since its inception was its tendency to follow prevailing science, changing its political views when dominant scientific views changed. This fact has served to make the progressive state somewhat less stable than more ideologically driven alternatives, but it has also enabled the progressive state to step away from unappealing past commitments.<sup>40</sup> The hereditary determinism that prevailed before and during the early Progressive Era tended to find strong hereditary explanations for criminal and other antisocial behavior, including sexual promiscuity and even differences in basic intelligence.<sup>41</sup> Some writers describe these racial theories as *progressive* simply because someone asserted them during the Progressive Era. Some take this to uninformed extremes—even characterizing strong anti-Progressives such as Oliver Wendell Holmes, Jr.<sup>42</sup> or Justice James McReynolds,<sup>43</sup> one of the Four Horsemen who voted to strike down so much Progressive legislation, as *progressive* simply because they lived during that Era.

As is true of so many legal movements that incorporate science, however, the legal policy often lagged behind the scientific understanding. One prominent example of this was the absorption of classical economic ideas into American statecraft. Americans first began to embrace laissez-faire economic ideas with the election of President Andrew Jackson in 1828, roughly a half-century after Adam

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38. See 2 CHARLES DARWIN, *THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* (London, John Murray 1871).

39. For a good account, see generally JOHN S. HALLER, JR., *OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859–1900* (1971).

40. See Hovenkamp, *supra* note 14.

41. See *infra* text accompanying notes 61–64; HOVENKAMP, *supra* note 15, at 36–52.

42. See *Eugenics and the Progressive Movement*, DISCOVERTHENETWORKS.ORG, <http://www.discoverthenetworks.org/viewSubCategory.asp?id=1220> (last visited Nov. 3, 2017) (describing Holmes as a “progressive icon”); see also PAUL D. MORENO, *THE AMERICAN STATE FROM THE CIVIL WAR TO THE NEW DEAL: THE TWILIGHT OF CONSTITUTIONALISM AND THE TRIUMPH OF PROGRESSIVISM* 31 (2013) (speaking of the “progressive icon Oliver Wendell Holmes”).

43. See Jeffrey Lord, *Two Presidents and the Court: When Bigotry Takes the Bench*, AM. SPECTATOR (July 14, 2009), [http://spectator.org/41259\\_two-presidents-and-court-when-bigotry-takes-bench/](http://spectator.org/41259_two-presidents-and-court-when-bigotry-takes-bench/) (characterizing Justice McReynolds as a “political progressive” and attempting to associate his views with those of Justice Sotomayor simply because she occupies the same seat on the Court and acknowledged that her experiences play a role in her judicial philosophy).

Smith articulated them in *The Wealth of Nations*.<sup>44</sup> Laissez-faire economics became constitutional first through legislation and then through the state courts in the 1880s;<sup>45</sup> but not until the turn of the century in the federal courts.<sup>46</sup> By that time, the marginalist revolution in mainstream Anglo-American economics was well underway, with its rejection of the wage-fund doctrine, as well as increased concern about market failure and the need for regulatory intervention.<sup>47</sup> Holmes was already well aware of this in his 1905 *Lochner* dissent, complaining that the majority was deciding the case based “upon an economic theory which a large part of the country does not entertain.”<sup>48</sup> In sum, American constitutional statecraft embraced laissez-faire economic theory just as it was becoming obsolete within mainstream economics. Very largely the same thing happened in the case of genetic determinism and eugenics.<sup>49</sup>

#### A. Racial Science Before Genetics

Long before Darwin, racism was a central feature of European and American theories about humanity.<sup>50</sup> It was hardly invented during the Progressive Era and came from a variety of sources, including both science and religion. Around 1733, Voltaire opined in an essay that black Africans were so inferior to white people that they were “not capable of any great application or association of ideas . . . They are a race peculiar to that part of Africa, the same as elephants and monkeys.”<sup>51</sup> Twenty years later, David Hume argued that “there never was a civilized nation of any other complexion than white . . . No ingenious manufactures among them, no arts, no sciences.”<sup>52</sup> In his 1781 book *Notes on the State of Virginia*, Thomas Jefferson compared Afro-Americans to primates, most notably the orangutan.<sup>53</sup>

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44. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (C.J. Bullock ed., 1909) (1776); see Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1, 4–5 (2015) (“More classical views grew largely out of the Jacksonian movement, which began to take hold in the early 1830s.”).

45. *E.g.*, *In re Jacobs*, 98 N.Y. 98 (1885) (striking down a statute forbidding cigar-rolling in tenement houses, on due process grounds).

46. *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (striking down maximum-hours law for bakers); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (striking down statute excluding out-of-state insurers).

47. HOVENKAMP, *supra* note 15, at 27–35, 278–98.

48. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

49. See *infra* text accompanying notes 75–77.

50. On pre-Darwinian racial theory in the United States, see WILLIAM STANTON, *THE LEOPARD’S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815–1859*, at 50 (1960).

51. Voltaire, *The Negro*, in *PHILOSOPHICAL LETTERS*, reprinted in 39 *THE WORKS OF VOLTAIRE* 240–41 (Oliver H.G. Leigh & John Morley eds., 1904).

52. 1 DAVID HUME, *ESSAYS AND TREATISE ON SEVERAL SUBJECTS* 291 (London, Printed for A. Millar, 4th ed. corrected, with additions 1753).

53. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 149–50 (Richmond, J.W. Randolph, revised ed. 1853) (1781); see RON CHERNOW, *ALEXANDER HAMILTON* 513 (2005) (noting that Hamilton accused Jefferson of racism because of this passage).

The post-Civil War era gave birth to a revolution in evolutionary social science theory that became institutionalized in American universities.<sup>54</sup> Following Darwin himself, many of the early social scientists were scientific racists as well. Some were racist in more old-fashioned ways based on historical practice, their reading of Christian scripture, or the use of racial science and pseudoscience in the South to first justify slavery and later statutorily enforced segregation.<sup>55</sup>

Darwin's theory of evolution invited theorizing about human "stages" of evolution and served to rationalize white supremacy. Darwin himself predicted a future "at no very distant date, when an endless number of the lower races will have been eliminated by the higher civilized races throughout the world."<sup>56</sup> Thomas Huxley, Darwin's indefatigable defender and popularizer, wrote in the 1860s:

No rational man, cognizant of the facts, believes that the average negro is the equal, still less the superior, of the white man. And if this be true, it is simply incredible that, when all his disabilities are removed, and our prognathous relative has a fair field and no favour, as well as no oppressor, he will be able to compete successfully with his bigger-brained and smaller-jawed rival, in a contest which is to be carried out by thoughts and not by bites.<sup>57</sup>

For many, Darwinian evolution supported a linear, "scientific" view of racial superiority that lasted well into the twentieth century, including the period encompassed by the Progressive Era.<sup>58</sup> However, during this period elite anti-evolutionists were equally racist. For example, the prominent Harvard University anti-evolutionary paleontologist Louis Agassiz was a believer in polygenesis, or the theory that the different races had distinct origins and were not even of the same species. Around 1850, Agassiz gave a lecture tour with a set of photographs of American slaves designed to illustrate their structural inferiority.<sup>59</sup> Belief in polygenesis was not uncommon among scientifically trained Americans before the Civil War and died out only slowly thereafter. In fact, polygenesis offered one of the strongest rationales for maintaining slavery and opposing interracial marriage:

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54. Good histories of the development of modern social science, particularly in American universities are DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991) and MARY O. FURNER, *ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865–1905* (Routledge 2017) (1975).

55. E.g., JOSIAH PRIEST, *BIBLE DEFENCE OF SLAVERY; AND ORIGIN FORTUNES, AND HISTORY OF THE NEGRO RACE* (5th ed. 1852) (popular racist Christian writer); see also FREDERICKSON, *supra* note 13, at 58–70. On the development of the law, see Hovenkamp, *supra* note 13.

56. Letter from Charles Darwin to W. Graham, July 3, 1881, in *THE LIFE AND LETTERS OF CHARLES DARWIN* 285–86 (Francis Darwin ed., 1901); see also GERTRUDE HIMMELFARB, *DARWIN AND THE DARWINIAN REVOLUTION* 343 (1959). On Anglo-American racism in the mid-nineteenth century, see generally SHIPMAN, *supra* note 35.

57. THOMAS H. HUXLEY, *LAY SERMONS, ADDRESSES AND REVIEWS* 20 (1871).

58. For a good account, see generally HALLER, *supra* note 39.

59. See Brian Wallis, *Black Bodies, White Science: Louis Agassiz's Slave Daguerrotypes*, 9 AM. ART 38 (1995) (including many of Agassiz's photographs).

the idea that the Afro-American was a distinct and inferior class of beings.<sup>60</sup> Agassiz himself became one of the principal scientific opponents of Darwin in the United States, but his views were at least as racist as those of the Darwinians.<sup>61</sup> One historian identifies his influence at Harvard in the 1850s and 1860s with the origins of American scientific racism.<sup>62</sup>

The leading evolutionary anthropologists before the Progressive Era were Oxford University Professor Edward Tylor<sup>63</sup> and Lewis Henry Morgan in the United States.<sup>64</sup> Both patterned their work after Darwin, who had published *On the Origin of Species* in 1859 and *The Descent of Man* in 1871.<sup>65</sup> Both Tylor and Morgan presented the human race as evolving through a series of stages, culminating in white caucasians. For Morgan, the theory of evolution showed that the black man was inferior to the white, and second only to Australian aborigines on a scale of racial inferiority.<sup>66</sup> Morgan granted to “Aryan and Semitic nations” the status of superior, “because they have carried [human progress] to the highest point yet attained.”<sup>67</sup> Both of their books were published in the 1870s, more than a generation before the rise of Progressivism.

### ***B. Genetics, Mathematics, and Eugenics***

Darwin, Tylor, and Morgan all wrote before genetics emerged as a distinct scientific field. Nevertheless, Darwin’s work inspired a great deal of scientific study about the link between race and inheritance. In 1877, Richard L. Dugdale, a member of the New York Prison Association, found inheritance and criminality to be linked in his book *The Jukes: A Study in Crime, Pauperism, Disease, and Heredity*.<sup>68</sup>

60. See generally Christopher A. Luse, *Slavery’s Champions Stood at Odds: Polygenesis and the Defense of Slavery*, 53 CIVIL WAR HIST. 379 (2007). On polygenesis and interracial marriage, see generally polygenecist J. C. Nott, *The Mulatto a Hybrid—Probable Extermination of the Two Races if the Whites and Blacks are Allowed to Intermarry*, 29 BOS. MED. & SURGICAL J. 29 (1843).

61. STANTON, *supra* note 50, at 50; see also Hovenkamp, *supra* note 13. On Agassiz in particular, see EDWARD LURIE, *LOUIS AGASSIZ: A LIFE IN SCIENCE* (John Hopkins Univ. Press 1988) (1960).

62. Louis Menand, *Morton, Agassiz, and the Origins of Scientific Racism in the United States*, 34 J. BLACKS HIGHER EDUC. 110 (2001).

63. EDWARD B. TYLOR, *PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, ART, AND CUSTOM* (London, John Murray 1871).

64. LEWIS H. MORGAN, *ANCIENT SOCIETY* (New York, Henry Holt & Co. 1877).

65. CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* (Cambridge, Harvard Univ. Press 1859); 2 DARWIN, *supra* note 38.

66. MORGAN, *supra* note 64, at 51.

67. *Id.* at 507.

68. RICHARD L. DUGDALE, *THE JUKES: A STUDY IN CRIME, PAUPERISM, DISEASE, AND HEREDITY* (3d ed. revised 1877). Such studies continued through the 1910s. See, e.g., ARTHUR H. ESTABROOK, *THE JUKES IN 1915* (1916) (updating the original Dugdale study); CHARLES B. DAVENPORT & FLORENCE H. DANIELSON, *THE HILL FOLK: REPORT ON A RURAL COMMUNITY OF HEREDITARY DEFECTIVES* (1912); HENRY H. GODDARD, *THE KALLIKAK FAMILY: A STUDY IN THE HEREDITY OF FEEBLE-MINDEDNESS* (1912). Other studies are

Dugdale identified more than 700 people in the extended Jukes family that had been criminals, suffered from mental disease, or required public assistance for their support.<sup>69</sup> While Dugdale himself believed in the importance of environmental as well as hereditary sources and even acknowledged that the Jukes “family” was a composite, his book became a hereditary manifesto.<sup>70</sup>

Economists and mathematicians were drawn to eugenics and genetic theories of race superiority much more than social scientists were.<sup>71</sup> That fact may seem counterintuitive because disciplines such as anthropology and sociology engaged questions about race much more directly. However, the fact remains that eugenics was most heavily promoted in the United States by people who worked in mathematics, statistics, and economics, while leaders in anthropology and other social sciences led the reaction against eugenics that paved the way for the more environmentalist, nurture-based social science of the 1910s and after.<sup>72</sup> Indeed, the fact that eugenics was dominated by mathematicians explained both its extreme positions and its eventual downfall. Eugenicists were very interested in the mathematics of inheritance, but they devoted little attention to the more empirical problem of determining which of an individual’s characteristics are inherited and which are a product of environmental influences.

The rise of mathematical genetic science appeared not only to confirm the importance of heredity, but also to emphasize that environment and culture had little to do with intelligence, character, or ability. In his experiments with successive generations of peas, the Moravian cleric Gregor Mendel had already discovered what were widely perceived to be mathematical laws of inheritance. Mendel performed most of his experiments between 1856 and 1863, before Darwin’s work was well known. However, Mendel’s studies laid dormant for four decades, until they were uncovered at the turn of the century.<sup>73</sup>

Around 1889, English statistician Francis Galton, first cousin to Charles Darwin, tried to determine precise mathematical expressions that would predict a child’s characteristics based on information about the characteristics of his or her

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summarized in MARK H. HALLER, *EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT* (1963).

69. DUGDALE, *supra* note 68, at 68 (out of 700 identified Jukes, 180 had either been sent to the poor house or received other public relief); *see also id.* at 47 (finding that among those who engaged in crime, most of the crime was committed by illegitimate children and that eldest sons were the most likely to be criminal).

70. *See e.g.*, NICOLE HAHN RAFTER, *WHITE TRASH: THE EUGENIC FAMILY STUDIES, 1877–1919* (1988); Elof Axel Carlson, *The Hoosier Connection: Compulsory Sterilization as Moral Hygiene*, in *A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT TO THE HUMAN GENOME ERA* 23 n.4 (Paul A. Lombardo ed., 2010) (on how hereditary determinists overread and misused Dugdale’s book); Paul A. Lombardo, *Return of the Jukes: Eugenic Mythologies and Internet Evangelism*, 33 *J. LEGAL MED.* 207 (2012) (on later misuses of Dugdale’s book).

71. *See infra* text accompanying notes 75–80.

72. *See infra* text accompanying notes 281–310.

73. *See* A.H. STURTEVANT, *A HISTORY OF GENETICS* 1–32 (2001).

parents.<sup>74</sup> Galton concluded that inherited characteristics were extremely stable and predicted mental ability, physical features, and behavioral features.<sup>75</sup> For example, Galton's mathematical "law of natural inheritance" prescribed that the "offspring of any parentage, when considered in its entirety, inherits one half of its characteristics from its parents, one-fourth from its grandparents, one-eighth from its great-grandparents and so on."<sup>76</sup> Galton's law of "regression from mediocrity" was that offspring's inherited characteristics tended to moderate the more extreme characteristics of their ancestors. For example, Mendel's studies of peas showed that the optimal size of seed for reproduction was 3.94 millimeters, which produced the highest survival rate. As peas went through successive generations, the range of diameters grew smaller and moved toward this optimal size.<sup>77</sup> In 1897, Galton presented a mathematical paper to the British Royal Society on the inheritance of coat color among Basset Hounds.<sup>78</sup> He derived a formula for making precise predictions about a Basset pup's various color combinations based on data about the coats of its ancestors. Galton's work in this area together with that of his mentor, the statistician Karl Pearson, was instrumental in developing modern regression analysis.<sup>79</sup> Pearson would later write that:

[i]t was Galton who first freed me from the prejudice that sound mathematics could only be applied to natural phenomena under the category of causation. Here for the first time was a possibility, I will not say a certainty, or reaching knowledge—as valid as physical knowledge was then thought to be—in the field of living forms and above all in the field of human conduct.<sup>80</sup>

The Eugenics and Progressive movements were contemporary, and many of those who supported eugenics believed that legislation could be used to prevent or limit biological deterioration. The perceived threats were the fertility of mental defectives and interracial sexual relations. Nevertheless, many other Progressives rejected eugenics, and many followers of eugenics were not Progressives.<sup>81</sup> Even

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74. See FRANCIS GALTON, *NATURAL INHERITANCE* (New York, MacMillan & Co., 2d ed. 1894). On Galton, see generally NICHOLAS WRIGHT GILLHAM, *A LIFE OF SIR FRANCIS GALTON: FROM AFRICAN EXPLORATION TO THE BIRTH OF EUGENICS* (2001).

75. See GALTON, *supra* note 74, at 197–98. For an explanation of his models, see generally Michael Bulmer, *Galton's Law of Ancestral Heredity*, 81 *HEREDITY* 579 (1998).

76. See George Harrison Shull, *Galtonian Regression in the "Pure Line,"* 5 *TORREYA* 21, 21–22 (1905). Shull was a prominent plant geneticist who spent most of his career at the Carnegie Institute, and founder of the journal *Genetics*. On Galton's numerous statistical experiments with such things as intelligence tests, see GILLHAM, *supra* note 75, at 156–66.

77. GALTON, *supra* note 74, at 225–26.

78. Francis Galton, *The Average Contribution of Each of Several Ancestors to the Total Heritage of the Offspring*, 61 *PROC. ROYAL SOC'Y* 401 (1897).

79. See Jeffrey M. Stanton, *Galton, Pearson, and the Peas: A Brief History of Linear Regression for Statistics Instructors*, 9 *J. STAT. EDUC.* 125, 125–126 (2001); see also STEPHEN M. STIGLER, *THE HISTORY OF STATISTICS: THE MEASUREMENT OF UNCERTAINTY BEFORE 1900*, at 266–75 (1990).

80. GILLHAM, *supra* note 74, at 277 (quoting Karl Pearson).

81. See *supra* text accompanying notes 73–79.

anti-Progressives who opposed many other forms of control legislation, including protective labor legislation, nevertheless approved highly invasive legislation that mandated sterilization of people thought to be mentally unfit.

Building on the mathematical models of inheritance developed by Mendel and Galton, eugenics reflected extreme emphasis on the genetic content of human character, to the point of disregarding environmental influences altogether. However, at the time, eugenics was not pseudoscience. A pseudoscience, such as astrology, must be rejected by the contemporary scientific mainstream. But that was hardly the case with eugenics, which took hold in elite American institutions and was taught in nearly 400 colleges and universities.<sup>82</sup> Among its supporters were University of Chicago and later Harvard zoologist Charles Davenport, Stanford University president David Starr Jordan, University of Chicago Professor John Merle Coulter, Yale economist Irving Fisher, University of Michigan president Clarence Cook Little, businessmen John D. Rockefeller<sup>83</sup> and Andrew Carnegie, inventors Alexander Graham Bell and Nikola Tesla, aviator and public figure Charles Lindberg, as well as others too numerous to mention.

Eugenics derived its scientific status from its impressive use of mathematics.<sup>84</sup> The same was true of Progressive Era economics, where marginalism invited mathematics into the discipline and greatly increased its attractiveness to younger scholars.<sup>85</sup> Other fields—such as anthropology, which was not mathematical and much more involved with empirical questions about inheritance—were more reticent. Economists lost their infatuation with eugenics in the late 1910s and after, as marginalism became more technical and focused strictly on preferences, rejected the idea that the biological quality of preferences is a legitimate subject of economics. In the process, economics largely cut its ties with the theory of evolution, including eugenics.<sup>86</sup>

During the Progressive Era, many students of inheritance believed that Mendel and Galton provided the basis for a quantifiable theory. Mainstream scientific journals from England and America were filled with such studies.<sup>87</sup> Most

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82. See ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* 4 (2016) (stating that eugenics was taught in 376 American colleges and universities); see generally EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE* (2003); HALLER, *supra* note 69; DONALD K. PICKENS, *EUGENICS AND THE PROGRESSIVES* (1968).

83. On Rockefeller, see DAVID J. PETERSON, *REVOKING THE MORAL ORDER* 53 (1999).

84. See, e.g., Harry H. Laughlin, *Illustrating the Structure and Mathematics of the Human Germ-Plasm*, 11 J. HEREDITY 185 (1920); Frederick Adams Woods, *Some Desiderata in the Science of Eugenics*, 5 J. HEREDITY 244 (1909).

85. See HOVENKAMP, *supra* note 15, at 32–33.

86. See *id.* at 13–35, 91–106.

87. See, e.g., William Ernest Castle, *The Laws of Heredity of Galton and Mendel, and Some Laws Governing Race Improvement by Selection*, 39 PROC. AM. ACAD. ARTS & SCI. 223 (1903); R.A. Fisher, *The Correlation Between Relatives on the Supposition of Mendelian Inheritance*, 52 PHIL. TRANSACTIONS ROYAL SOC'Y EDINBURGH 399 (1919); Francis Galton, *Kinship and Correlation*, 150 N. AM. REV. 419 (1890); Laughlin, *supra* note 84; Raymond



of it was purely theoretical or investigative, and did not draw explicit implications for public policy. There were some exceptions. For example, University of Chicago economist James Alfred Field wrote in 1911 that “[u]nless many signs fail, the study of eugenics has established its claim to recognition among the hopeful applications of science in social reform.”<sup>88</sup> In 1912, *Popular Science Monthly* included a report in its regular feature on “The Progress of Science” on the First International Eugenics Congress, which took place in London in July of that year.<sup>89</sup> The article concluded that such congresses were “another witness of the growth of that best type of internationalism that leads scientific men to step unhesitatingly across political imaginary lines whenever they feel that they can work more effectively together than apart.”

Darwin’s own son, Leonard Darwin, became an enthusiastic advocate of eugenic human engineering. In 1912, he lectured to the Cambridge University Eugenics Society that the “primary object of Eugenics is, no doubt, to substitute for the slow and cruel methods of nature some more rational, humane, and rapid system of selection by which to ensure the continued progress of the race.”<sup>90</sup> Although he did not cite his father’s book, *Variation of Animals and Plants under Domestication*,<sup>91</sup> he likely had it in mind. Charles Darwin himself had concluded that evolution proceeds much more quickly under domestication and selective breeding, and that evolution can be directed through artificial, as opposed to natural, selection.

Most of the historical writing about the eugenics movement, and particularly the legal history, has focused on the implications for human inheritance and the unappealing policy consequences. That picture mischaracterizes the movement as a whole, although it was the focus of some very popular texts, such as Popenoe and Johnson’s *Applied Eugenics*.<sup>92</sup> Eugenics actually cut much more broadly, dominating theories about plant and livestock breeding as well. For example, William Castle, a geneticist who did much of his research on fruit flies, wrote an important textbook on the use of eugenics in animal and plant breeding.<sup>93</sup>

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Pearl, *The Service and Importance of Statistics to Biology*, 14 Q. PUB. AM. STAT. ASS’N 40 (1914); Karl Pearson, *Mathematical Contributions to the Theory of Evolution: On a Generalised Theory of Alternative Inheritance, with Special Reference to Mendel’s Laws*, 203 PHIL. TRANSACTIONS ROYAL SOC’Y LONDON 53 (1904); Karl Pearson & Alice Lee, *On the Laws of Inheritance in Man: I. Inheritance of Physical Characters*, 2 BIOMETRIKA 357 (1903).

88. James A. Field, *The Progress of Eugenics*, 26 Q.J. ECON. 1, 1–2 (1911).

89. *The First International Eugenics Congress*, 81 POPULAR SCI. MONTHLY 310 (1912), <https://archive.org/stream/popularsciencemo81newy#page/310/mode/2up> (full text of the proceedings available at <https://archive.org/details/problemsineugeni00inte>).

90. Leonard Darwin, *First Steps Towards Eugenic Reform, reprinted in 1 EUGENICS REV.* 26, 26 (1912), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2986811/>.

91. CHARLES DARWIN, *THE VARIATION OF ANIMALS AND PLANTS UNDER DOMESTICATION* (New York, Orange Judd & Co. 1868).

92. PAUL POPENOE & ROSWELL HILL JOHNSON, *APPLIED EUGENICS* (1920).

93. WILLIAM ERNEST CASTLE, *GENETICS AND EUGENICS: A TEXTBOOK FOR STUDENTS OF BIOLOGY AND A REFERENCE BOOK FOR ANIMAL AND PLANT BREEDERS* (1922) (heavily mathematical); see also H.B. Derr, *The Breeding of Winter Barleys*, 3 J. HEREDITY 108 (1912) (discussing the use of eugenics to develop superior barley strains); Jan Sapp, *The*

Harvard Professor Edward Murray East's influential 1919 book, *Inbreeding and Outbreeding*, was concerned with the science of eugenics as applied to all plant and animal species.<sup>94</sup> His co-author, Donald F. Jones, was a geneticist at the Connecticut Agricultural Experiment Station and a pioneer inventor of hybrid corn seed.<sup>95</sup> However, East and Jones were scientists, not policymakers. One disturbing feature of their book is the ease—or even indifference—with which the authors moved from discussions of selective breeding in plants or horses to engineering of human beings.

This point about the breadth of eugenics is also important when particular Progressive Era individuals are considered. Some Progressives did believe in theories about human racial selection and sterilization, but others followed eugenics for no other reasons than that they either had an interest in breeding plants or livestock, or else in its underlying mathematics. Approximately one-third of the articles in the early issues of *Biometrika*, Galton's mathematical eugenics journal, were concerned with human beings and inheritance. Most of the others were about mice, fruit flies, plants, or other organisms.<sup>96</sup> Further, most articles that were about human beings were not about racial superiority, but about such technical matters as the relationship between inheritance and skull shape, or the correlation between human hair color and eye color.<sup>97</sup>

Two elements of eugenics' mathematical approach to the laws of inheritance are critical for understanding early twentieth-century scientific racism, as well as the commonly accepted views about mental deficiency. These two elements also help explain why eugenics failed. First, Galton's mathematical models functioned only if an individual's character was *solely* a product of their genes. That is, admitting any environmental influences at all undermined mathematical predictability. This fact explains why the first generation of Galton's followers were so steadfastly genetic in their ideas about race and capacity, completely ruling out or ignoring environmental influences. It also made alternative models that mixed environmental and genetic influences, such as those of Franz Boas and his followers, much more complex and unwieldy.<sup>98</sup> However, the other important result was that when social science began to appreciate environmental factors more, the

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*Struggle for Authority in the Field of Heredity, 1900–1932: New Perspectives on the Rise of Genetics*, 16 J. HIST. BIOLOGY 311 (1983). On the use of eugenics in agriculture, see Barbara A. Kimmelman, *The American Breeders' Association: Genetics and Eugenics in an Agricultural Context, 1903–13*, 13 SOC. STUD. SCI. 163 (1983).

94. EDWARD M. EAST & DONALD F. JONES, *INBREEDING AND OUTBREEDING: THEIR GENETIC AND SOCIOLOGICAL SIGNIFICANCE* (1919).

95. See J. A. Weir, *Harvard, Agriculture, and the Bussey Institution*, 136 GENETICS 1227 (1994); Stanley L. Becker, *Donald F. Jones and Hybrid Corn*, CONN. AGRIC. EXPERIMENT STATION, BULL. 763, at 1 (1976), <http://www.ct.gov/caes/lib/caes/documents/publications/bulletins/b763.pdf>.

96. A complete table of contents of *Biometrika* back to 1901 can be found at <http://biomet.oxfordjournals.org/content/by/year>.

97. See, e.g., K.P., *On the Correlation Between Hair Colour and Eye Colour in Man*, 3 BIOMETRIKA 459 (1904).

98. See *infra* text accompanying notes 280–95.

eugenicists' confidence in their ability to reengineer the human race began to look very naïve.

Second, the mathematical models that Galton and his followers developed explains why genetic determinism was so popular in the scientific community. Any science able to embrace mathematics was thought to be superior to less quantifiable alternatives. That same fact accounted for economists' claims of methodological superiority. However, beginning in the 1920s, economics retained its mathematics but largely began to assume that every individual's utility preferences must be taken at face value. Searching for the sources of these preferences—biological or otherwise—lay outside the boundaries of scientific economics.<sup>99</sup> In the process, economists largely lost their infatuation with eugenics.

In 1901, Galton and his associates founded *Biometrika*, a journal historically dedicated to the mathematical determination of inheritance in all forms of biological organisms.<sup>100</sup> American geneticists such as Edward M. East,<sup>101</sup> zoologist Charles Davenport,<sup>102</sup> and William Ernest Castle,<sup>103</sup> all members of Harvard's scientific faculty, adopted these views wholesale. Among the recommendations eugenicists made were prohibitions of interracial sex and marriage. Reasoning that many relationships are formed when people are students, they also counseled against integrated education. The general thrust of this literature was not only that genetics accounts for all of the important features of human development, but also that environment counts for almost nothing.<sup>104</sup>

The ideas were quickly popularized and found their way into legal argument. For example, in 1905, William Benjamin Smith, a German immigrant professor of mathematics at Tulane University, published a best-seller entitled *The Color Line* which applied eugenics to the problem of race.<sup>105</sup> Smith argued that eugenics completely undermined any notion of equality between the white and black races, and that "it was idle to talk of education and civilization . . . as corrective or compensative agencies."<sup>106</sup> The science of genetics had shown that these institutions are "weak and beggarly as over against the almightiness of heredity; the omnipotence of the transmitted germ plasma."<sup>107</sup>

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99. See HOVENKAMP, *supra* note 14, at 16, 110–13.

100. See D. R. Cox, *Biometrika: The First 100 Years*, 88 BIOMETRIKA 3, 3 (2001).

101. EAST & JONES, *supra* note 94.

102. *E.g.*, C. B. DAVENPORT, EUGENICS: THE SCIENCE OF HUMAN IMPROVEMENT BY BETTER BREEDING (1910); C. B. Davenport, *Fit and Unfit Matings*, 11 BULL. AM. ACAD. MED. 657 (1909); Charles B. Davenport, *State Laws Limiting Marriage Selection Examined in the Light of Eugenics*, EUGENICS REC. OFF. BULL. No. 9 (1913).

103. *E.g.*, W. E. CASTLE, THE LAWS OF HEREDITY OF GALTON AND MENDEL AND SOME LAWS GOVERNING RACE IMPROVEMENT BY SELECTION (1903).

104. See, *e.g.*, GALTON, *supra* note 74.

105. WILLIAM BENJAMIN SMITH, THE COLOR LINE: A BRIEF IN BEHALF OF THE UNBORN (1905).

106. *Id.* at 13.

107. *Id.*

Smith's book is a classic in eugenics and race theory and has been kept in print.<sup>108</sup> More significantly for legal history, the passage above from *The Color Line* was quoted verbatim in Kentucky's brief successfully defending the segregation statute challenged in the *Berea College* case.<sup>109</sup> The brief is interesting because Kentucky Attorney General James Breathitt submitted it only five months after Louis Brandeis had submitted his famous brief in *Muller v. Oregon*.<sup>110</sup> Breathitt also cited Sanford B. Hunt, a Civil War surgeon who had conducted numerous autopsies on deceased soldiers and concluded that the brains of black soldiers were, on average, five ounces lighter than those of white soldiers. Hunt accepted the view—already under sharp attack by 1908—that brain weight was proportional to intelligence.<sup>111</sup> As the Attorney General's brief emphasized:

If we are right in our contention that intimate association in the school room will ultimately lead to social equality and amalgamation, who, then will estimate the import of this "mental gap" between the white and the black.<sup>112</sup>

It is easy to discount these views as pseudoscience, and some have.<sup>113</sup> But the fact is they were widely held before the 1920s by people of every political stripe, and even by academics at elite universities.

By the time of *Berea College*, the lawfulness of racial segregation in public elementary schools was well established. A provision in the proposed 1875 Civil Rights Act had forbidden the exclusion of black students from schools, but it was removed prior to passage.<sup>114</sup> Even that proposal would merely have prohibited exclusion, or complete denial of educational facilities to black students. It would not have mandated integration. The 1875 Civil Rights Act, but without the provision for schools, remained in force until the Supreme Court struck it down in 1883 for exceeding congressional power to legislate under § 5 of the Fourteenth Amendment.<sup>115</sup> Judicial decisions in 1871<sup>116</sup> and 1882<sup>117</sup> upheld segregated schools

108. WILLIAM BENJAMIN SMITH, *THE COLOR LINE: A BRIEF IN BEHALF OF THE UNBORN* (CreateSpace Indep. Publ'g Platform, reprint ed. 2015) (1905).

109. Brief for Defendant in Error at 41, *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908).

110. Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605. On *Muller* and the early use of social science briefs, see HOVENKAMP, *supra* note 15, at 249–51.

111. The principal advocate for correlating brain weight and intelligence was Samuel George Morton. See Samuel George Morton, *Observations on the Size of the Brain in Various Races and Families of Man*, 5 PROC. ACAD. NAT. SCI. PHILA. 1, 30–33 (1850).

112. Brief for Defendant in Error, *Berea Coll.*, *supra* note 109, at 40.

113. E.g., ALEXANDER BICKEL & BENNO C. SCHMIDT, *The Judiciary and Responsible Government, 1910–21*, at 731, 731 n.10, in 9 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT (1984).

114. GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866*, at 88–90 (2012).

115. *The Civil Rights Cases*, 109 U.S. 3, 32 (1883).

116. *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 201–02 (1871).

117. See *United States v. Buntin*, 10 F. 730, 735 (C.C. Ohio 1882).

in Ohio and Kentucky, provided the schools were equal.<sup>118</sup> A number of courts also agreed that nothing in state or federal constitutions prohibited segregated schools or, in some cases, the provision of no schools at all for black children.<sup>119</sup> All of this long antedated the Progressive Era.

### C. Who Supported Eugenics?

During the Progressive Era, racism appeared often in the writings of liberals such as President Woodrow Wilson, economists Richard T. Ely and Irving Fisher, and sociologist Edward A. Ross. However, these views were just as staunchly held by anti-Progressives including Justices Oliver Wendell Holmes, Jr. and James McReynolds, one of the Four Horsemen who voted frequently to strike down protective labor legislation and other forms of regulation. Wilson's successor, President Warren Harding, is believed to have been inducted into the Ku Klux Klan in a private Green Room ceremony in the White House while he was President.<sup>120</sup> He and his successor, Calvin Coolidge, also campaigned for race-based immigration restrictions,<sup>121</sup> which were eventually enacted in 1924 after Harding's death.<sup>122</sup> The statute, popularly known as the Johnson–Reed Act, placed particularly severe restrictions on immigration from Africa and completely banned immigration of Arabs and Asians. Its stated purpose was “to preserve the ideal of American homogeneity.”<sup>123</sup> Coolidge himself wrote diatribes in popular journals favoring racial exclusion.<sup>124</sup>

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118. See HOVENKAMP, *supra* note 15, at 60–62.

119. See, e.g., *Ward v. Flood*, 48 Cal. 36, 56–57 (1874) (upholding statute that provided for separate schools for Afro-American and Native American children, but warning that if a district did not provide such schools these children would be entitled to attend the white school); *Lehew v. Brummell*, 15 S.W. 765, 766–67 (Mo. 1891) (upholding mandatory segregation of schools, even if it entailed that the Afro-American plaintiffs could not go to any school at all); *People ex rel. King v. Gallagher*, 93 N.Y. 438, 457 (Ct. App. 1883) (upholding 1864 New York statute segregating public schools by race); *State ex rel. McCann*, 21 Ohio St. at 201–02 (rejecting similar claims based on both Fourteenth Amendment and Ohio Constitution); *Cory v. Carter*, 48 Ind. 327, 366 (1874) (similar).

120. WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 165 (1987) (noting both the induction ceremony in the Green Room and the fact that Harding took the oath on the White House Bible because the Klansmen had forgotten their own). The Klan blamed Catholics for Harding's early death three years into his first term as President. See MICHAEL NEWTON, *WHITE ROBES AND BURNING CROSSES: A HISTORY OF THE KU KLUX KLAN FROM 1866*, at 61 (2014).

121. See GOSSETT, *supra* note 35, at 404 (quoting a 1920 Harding speech for the fact that no one could “tranquilly contemplate the future of this Republic without anxiety for abundant provision for admission to our shores of only the immigrant who can be assimilated and thoroughly imbued with the American spirit.”).

122. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153; see *infra* text accompanying notes 275–77.

123. See Muneer I. Ahmad, *The Citizenship of Others*, 82 *FORDHAM L. REV.* 2041, 2062 n.109 (2014).

124. See *infra* text accompanying notes 262–63.

During its heyday, eugenics had as much traction among conservatives as progressive liberals.<sup>125</sup> In the main, conservatives believed that some people were simply destined to be a social burden and that forced sterilization or sexual isolation was a way of reducing this cost. Their support for eugenics legislation seems inconsistent with their general embrace of laissez-faire policy. Conservatives were far more suspicious of legislation than Progressives were, particularly of legislation that limited due process rights. In light of that, the breadth of conservative support for statutes that sterilized people who had never been convicted of a crime<sup>126</sup> or that segregated entire classes of people is remarkable.

The historical writing on eugenics sees the movement as evolving from mainline to reform. *Mainline* eugenicists believed that heredity accounted for all elements of character, while later *reform* eugenicists acknowledged the importance of environmental sources.<sup>127</sup> This development tracks changes in other social sciences, particularly anthropology and psychology, which rejected hereditary determinism early on.<sup>128</sup> Mainline eugenicists were fairly orthodox followers of Galton, who advocated social policies concerning procreation based exclusively on genetic determinism. These policies included sterilization of those believed to be mentally unfit, opposition to interracial marriage, and opposition to birth control for fear that it would be most practiced by racially superior families, tilting population growth in favor of inferior races.<sup>129</sup> Many eugenicists were also opposed to higher

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125. See LEONARD, *supra* note 1, at 115.

126. Earlier state court decisions had been divided on the question of compulsory sterilization, both civilly and as a criminal punishment. See, e.g., *State v. Feilen*, 126 P. 75, 78 (Wash. 1912) (approving); *Davis v. Berry*, 216 F. 413, 419 (S.D. Iowa 1914) (disapproving), *vacated as moot*, 242 U.S. 468 (1917); *Mickle v. Henrichs*, 262 F. 687, 691 (D. Nev. 1918) (holding that vasectomy is a form of mutilation, which is cruel and unusual punishment); *Williams v. Smith*, 131 N.E. 2, 2 (Ind. 1921) (striking down statute that denied inmate right of cross examination of experts prior to forced sterilization); *Smith v. Bd. of Exam'rs of Feeble-Minded*, 88 A. 963, 967 (N.J. 1913) (statute authorizing sterilization for prevention of procreation of feeble-minded violated Equal Protection Clause); *Haynes v. Lapeer Circuit Judge*, 166 N.W. 938, 941 (Mich. 1918) (same; concerning a statute authorizing sterilization of mentally defective); *Osborn v. Thomson*, 169 N.Y.S. 638, 645 (N.Y. Sup. Ct. 1918) (same).

127. The classification comes from DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 88–100 (1985).

128. See *infra* text accompanying notes 277–300.

129. KEVLES, *supra* note 127. See also POPENOE & JOHNSON, *supra* note 92, at 240–42 (white women were having too few children). The birth control issue divided those who supported eugenics. For example, Progressive birth control advocate Margaret Sanger accepted the validity of eugenics, but countered its opponents by arguing that the solution was not abolition of birth control among the higher classes, but rather its expansion among poorer classes. Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, *BIRTH CONTROL REV.*, Oct. 1921, at 5, 5.

education for women, largely for fear that it would induce upper-class women to have fewer children.<sup>130</sup>

The multi-ideological nature of Americans' support for eugenics made it fundamentally different from Progressive legislative reform in areas of employment and industry regulation. A case in point is the 1927 Supreme Court decision in *Buck v. Bell*.<sup>131</sup> The Court ruled 8–1 to uphold a Virginia statute requiring Carrie Buck to be sterilized once it was determined that she was “feeble minded,” and that both her mother and her illegitimate child were feeble minded. The attack was substantive and not procedural<sup>132</sup> and was based on the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>133</sup>

Justice Holmes's opinion produced one of the most reviled statements in the Supreme Court lexicon: “three generations of imbeciles are enough.”<sup>134</sup> Nevertheless, of the nine votes cast in the decision, Justice Holmes's is probably the least surprising. He was not sympathetic with most legislative reform, but he was also a strict textualist who frequently objected when the Supreme Court overturned legislation without an explicit warrant in the Constitution.<sup>135</sup> Applying the same reasoning, he found no infirmity in the sterilization law. Nevertheless, his opinion went further, making clear that he supported the statutorily mandated sterilization of people whose offspring were thought to be a burden on society. He compared Carrie Buck's sacrifice with that of soldiers who had fallen in combat:

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,

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130. KEVLES, *supra* note 127; *see, e.g.*, POPENOE & JOHNSON, *supra* note 92, at 240–42, 262–65 (concluding that college education for women is harmful because such women bear fewer children).

131. *Buck v. Bell*, 274 U.S. 200 (1927). For a comprehensive catalog of state eugenical sterilization statutes, see generally HARRY HAMILTON LAUGHLIN, *EUGENICAL STERILIZATION IN THE UNITED STATES* (1922, and subsequent editions).

132. *Buck*, 274 U.S. at 207.

133. *Id.* at 205.

134. *Id.* at 207.

135. *E.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525, 568 (1923) (four years before *Buck*). Holmes dissented from the decision striking down a Washington D.C. minimum wage law for women, saying:

I agree, of course, that a law answering the foregoing requirements might be invalidated by specific provisions of the Constitution. For instance it might take private property without just compensation. But in the present instance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law.

*Id.*; *see also* Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 162–63 (1927) (emphasizing this quality of Holmes's Constitutional interpretation).

or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.<sup>136</sup>

Among the votes cast in *Buck*, the more interesting were those of the anti-Progressive Four Horsemen—Justices Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter. These four Justices were so named because they so often voted to strike down Progressive regulatory legislation, including minimum wage laws and many business regulations.<sup>137</sup> Only four years earlier, Justice McReynolds had authored the Supreme Court's decision in *Meyer v. Nebraska*, which struck down a World War I era state statute aimed largely at Germans that severely restricted the teaching of foreign languages in elementary schools. He wrote eloquently about the need to extend substantive due process liberties beyond the economic and regulatory sphere, and provided this litany of the types of freedoms that should be protected:

[N]ot merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>138</sup>

In *Buck*, however, three of the four Horsemen, including Justice McReynolds, voted to approve the sterilization order. The fourth, Justice Pierce Butler, dissented, but that was very likely because he was a Catholic. Catholics on principle objected to surgical sterilization for largely the same reasons that they subsequently opposed abortion; namely, that it was intended to interfere with natural procreation.<sup>139</sup> Progressive Louis Brandeis also voted in favor, as did Chief Justice Taft, who by this time had become quite conservative. In sum, no case can be made that *Buck v. Bell* reflects a Progressive/anti-Progressive divide among the Supreme Court Justices.

Eugenics dominated mainstream scientific discourse during the period 1900–1920 or so. By the early 1920s, however, it was being pushed aside by scientific views emphasizing nurture and environmental rather than hereditary determinants of human nature, in particular cultural relativism and behaviorism.<sup>140</sup> Increasingly, scholarly papers began to emphasize environmental factors in

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136. *Buck*, 274 U.S. at 207.

137. HOVENKAMP, *supra* note 15, at 265–68; *see also* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559–60 (1997).

138. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Justices Holmes and Sutherland dissented without opinion.

139. *See generally* GERALD A. KELLY, S.J., MEDICO-MORAL PROBLEMS 154–57 (1958); A.R. VONDERAHE, *The Sterilization of the Feeble-minded*, 9 NAT'L CATH. WELFARE COUNCIL BULL. 29 (1927). Nevertheless, there were also contemporary Catholic defenders of the practice. *See, e.g.*, E.J. MAHONEY, DD, *The Morality of Sterilization*, 3 THOUGHT 276 (1928).

140. *See infra* text accompanying notes 275–76.



development. The work began with study of plants and agricultural products such as corn, but soon expanded to animal and then human inheritance.<sup>141</sup> Further, because humans create culture, environmental factors appeared to have much greater impact on human character than for plants and animals.<sup>142</sup>

By 1927, the year of *Buck v. Bell*, compulsory sterilization legislation was already the target of considerable scientific doubt. Even prior to *Buck*, University of Michigan law professor Burke Shartel complained that the “proof that some form of social inferiority will be passed on to offspring by these persons is far from conclusive.”<sup>143</sup> Assuming Carrie Buck’s feeble-mindedness existed at all,<sup>144</sup> how much was a product of genetics and how much emanated from the environment in which she, her mother, and her child were raised? The emerging view among contemporary scientists was that answering this question was much more difficult than the *Buck* decision suggested.

Ironically, part of *Buck*’s downfall was the unintended consequences of state eugenics legislation that attempted to comply with due process by requiring evidence of the very thing that the eugenics movement assumed without proof—that the defects in question were actually hereditary. For example, two years after *Buck*, the Utah Supreme Court concluded that the due process standards in Utah’s compulsory sterilization law had not been met. The statute permitted compulsory sterilization upon proof that “the inmate, by the law of heredity, is the probable potential parent of socially inadequate offspring.” After examining the record, the court concluded:

As a general rule, members of judicial tribunals are not well informed as to the law of heredity. Even though they may be so informed, they may not take judicial notice that, if Esau Walton should have offspring, the same will be socially inadequate offspring likewise afflicted. Those who have made a thorough scientific study of the law of heredity are not in entire accord as to the operation of the so-called law, but doubtless persons so trained may lend valuable aid to judicial tribunals in determining the probable nature of the offspring of a given person. We doubt, however, that even the most ardent advocate of the immutability of the law of heredity would wish to determine

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141. For a good discussion, see MARK A. LARGENT, *BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES* 125–35 (2011); see also HAMILTON CRAVENS, *THE TRIUMPH OF EVOLUTION* 166–86 (rev. ed. 1988). Speaking of scientific developments that occurred in the late 1910s, Cravens wrote that the implications “were momentous for genetics, evolution, the nature-nurture issue, and eugenics. The complexities . . . made inheritance far more contingent and complex than implied by the genetics ‘principles’ the eugenicists fondly recited.” CRAVENS, *supra*, at 171.

142. CRAVENS, *supra* note 141, at 172.

143. Burke Shartel, *Sterilization of Mental Defectives*, 16 J. CRIM. L. & CRIMINOLOGY 537, 541 (1926).

144. For doubts on this question, see PAUL A. LOMBARD, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 103–04 (2008). On the use of science in *Buck v. Bell*, see Robert J. Cynkar, *Buck v. Bell: “Felt necessities” and Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981).

the probable nature of the offspring of Esau Walton without more facts than appear in the record before us. Be that as it may, the record before us does not support the finding that “by the law of heredity Esau Walton is the probable potential parent of socially inadequate offspring likewise afflicted.”<sup>145</sup>

In 1933, Professor Jacob Henry Landman agreed with the North Carolina Supreme Court in his analysis of *Brewer v. Valk*. The court had struck down the state’s compulsory sterilization statute on procedural grounds because it provided for neither notice nor a hearing. Further, the court observed, the causes of “low mentality” can be numerous including “the sins of the fathers, heredity, disease, poverty, undernourishment—the struggle for daily bread, dissipation, and many other things . . . .”<sup>146</sup> Mary Brewer was one of 12 children, 1 of whom had died of meningitis. She worked in a textile plant from the age of ten, and later in a cigarette factory. She married an unsupportive man who drank, gambled, and was generally unstable. The family was forced to rely on state assistance. Landman concluded there was “absolutely no evidence in the record to indicate that Mary Brewer has a bad inheritance. It might well be concluded from the testimony that society is at fault.”<sup>147</sup> By the late 1920s, Progressives had largely moved that view into the mainstream.<sup>148</sup> In 1942, the U.S. Supreme Court struck down a state statute that mandated sterilization of criminals thrice convicted of crimes involving moral turpitude.<sup>149</sup> Justice Douglas’s opinion for the Court cited numerous scientific sources and repeatedly observed the lack of any evidence of the “inheribility of criminal traits,” such as those that the defendant exhibited.<sup>150</sup>

## II. RACISM AND PROGRESSIVE ECONOMICS

### A. Racism in the Classical Economic Tradition

At least as far back as Adam Smith’s *Wealth of Nations*, racism was a part of Anglo-American economics. A long line of economists argued that more advanced people are more industrious, while more primitive people are unlikely to accumulate significant capital or develop exchange economies. In making these

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145. Davis v. Walton, 276 P. 921, 924–25 (Utah 1929).

146. Brewer v. Valk, 167 S.E. 638, 640 (N.C. 1933). On this decision and the North Carolina legislature’s statutory response, see Alfred L. Brophy & Elizabeth Troutman, *The Eugenics Movement in North Carolina*, 94 N.C. L. REV. 1871, 1919–21 (2016). On successful challenges prior to *Brewer*, see Stephen Siegel, *Justice Holmes*, Buck v. Bell, and the History of Equal Protection, 90 MINN. L. REV. 106, 115–20 (2005).

147. Jacob Henry Landman, *The Human Sterilization Movement*, 24 J. CRIM. L. & CRIMINOLOGY 400, 407 (1933). On Landman, see MARK A. LARGENT, *supra* note 141, at 131–37.

148. See *infra* text accompanying notes 279–81.

149. Skinner v. Oklahoma, 316 U.S. 535, 545 (1942).

150. *Id.* at 537–38, 538 n.1, 541–42 (citing numerous scientific sources). On *Skinner* and its aftermath, see generally VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS (2008).

arguments, Smith developed a distinction between “savage” and civilized nations. Smith stated that savage nations

are so miserably poor, that, from mere want, they are frequently reduced . . . to the necessity sometimes of directly destroying, and sometimes of abandoning their infants, their old people, and those afflicted with lingering diseases, to perish with hunger, or to be devoured by wild beasts. Among civilised and thriving nations, on the contrary . . . the produce of the whole labour of the society is so great, that all are often abundantly supplied, and a workman, even of the lowest and poorest order, if he is frugal and industrious, may enjoy a greater share of the necessaries and conveniences of life than it is possible for any savage to acquire.<sup>151</sup>

Thomas Malthus spoke even more forcefully on the issue than Smith. His fullest discussion appears in his well-known 1798 *Essay on the Principle of Population*.<sup>152</sup> In it, Malthus argued that population growth naturally exceeds growth in the food supply, thus continuously pushing people to subsistence levels. For Malthus, however, an inadequate food supply did not affect all peoples equally. At the bottom were “savages,” among whom Malthus counted North American Indians. For example, he observed that slavery was much more common among them, they were continuously at war, and often left their elderly to die.<sup>153</sup> Next above the savages were shepherds, and above them farmers.<sup>154</sup>

Even the libertarian John Stuart Mill defended British colonization of India in an essay otherwise advocating nonintervention in the affairs of other countries. For Mill, the conquest of India was a justified example of a civilized nation improving a barbarous one. The main limitation he required was that the occupation be for the purposes of improving the barbarous civilization, not for ransacking it.<sup>155</sup> He argued that negotiating with such nations or establishing norms by treaty would be useless because “barbarians will not reciprocate. They cannot be depended on for observing any rules. Their minds are not capable of so great an effort, nor their will sufficiently under the influence of distant motives.”<sup>156</sup>

American political economists spoke similarly. For example, Brown University’s Francis Wayland, one of the better known nineteenth-century American political economists and an abolitionist, continuously contrasted “savage” and “civilized” societies, principally in observing that only the latter were able to accumulate significant capital.<sup>157</sup> In particular, Wayland praised Great Britain for

151. SMITH, *supra* note 44, at 5–6.

152. THOMAS MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION (Donald Winch ed., Cambridge Univ. Press 1992) (1798).

153. *Id.* at 12–13.

154. *Id.* at 13–14.

155. 3 JOHN STUART MILL, *A Few Words on Non-Intervention*, in DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL AND HISTORICAL 153, 158–76 (Boston, William v. Spencer 1867).

156. *Id.* at 167.

157. FRANCIS WAYLAND, D.D., THE ELEMENTS OF POLITICAL ECONOMY 29, 76 (London, W. Kent & Co., rev. ed. 1857).

attaining superiority over nearly all other nations, notwithstanding lack of “physical advantage.” He placed great weight on England’s free Constitution, but added that a constitution “is of no value, unless the moral and intellectual character of a people be sufficiently elevated to avail itself of the advantages which it offers.”<sup>158</sup> Henry Carey, an economic advisor to Abraham Lincoln, made similar observations in his book *Principles of Political Economy*.<sup>159</sup>

### ***B. The Impact of Marginalism***

Between 1870 and 1930, marginalism completely upended classical political economy. Briefly, classical political economy had drawn its theory of value from the past. For example, the value of a good was thought to be a function of the amount of labor that had been used to make it. By contrast, for marginalists, value was based entirely on willingness to pay, a forward-looking concept. Further, ideas such as anticipated consumer demand or marginal value and marginal cost were capable of being quantified, making marginalism a playground for mathematics. Nevertheless, estimated future values are inherently less certain than those computed from the past. The management of risk and uncertainty became an important feature of the new economics.<sup>160</sup> This had profound implications for legal policy, transforming the theory of business finance<sup>161</sup> and eventually making the management of foreseeable risk a central component in private law areas such as torts and contracts.<sup>162</sup>

As a technical matter, marginalist economics never incorporated any particular theory about race or mental inferiority. By the 1930s, when its methodological approach had matured and found nearly universal acceptance, the economic mainstream generally rejected attempts to incorporate assumptions about mental prowess, intelligence, or any other attribute that we might associate with race. Rather, each person was conceived to be a rational actor who attempted to maximize his or her own preferences, whatever those might be. Getting behind these preferences to evaluate them was not the economist’s job. The only requirement was that preferences be *rational*, which meant no more than that they must be transitive. For example, if an individual prefers *A* over *B* and *B* over *C*, then she must prefer *A* over *C*. One of the things that was thought to make neoclassical economics scientific was this formalism of assumptions, which avoided the highly eclectic observations of the classical political economists that often included political theory, history, and even religion and ethics.<sup>163</sup>

During its early development, however, both the usefulness and the domain of marginalism were controversial. Some American economists, such as John Bates Clark, completely embraced it. Others, such as Thorstein Veblen on the left and

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158. *Id.* at 67.

159. HENRY CHARLES CAREY, *PRINCIPLES OF POLITICAL ECONOMY* 109–10 (Philadelphia, Carey, Lea & Blanchard 1837).

160. *See* HOVENKAMP, *supra* note 15, at 27–35.

161. *Id.* at 159–71.

162. *Id.* at 123–55.

163. *Id.*

Simon Newcomb on the right, largely rejected it.<sup>164</sup> Many found compromises that permitted them to merge marginalism with some of the broader concerns about human nature that were characteristic of classical political economy. For example, the short-lived movement called Institutionalism included economists who either rejected or qualified marginalism in significant ways, preferring assumptions about human choice that drew from a wider variety of sources, including history and biology.<sup>165</sup> Most of the American economists who were publishing supporters of eugenics were also Institutionalists. As Institutionalism lost its favor in the 1920s, race talk largely disappeared from mainstream neoclassical economics.

Nevertheless, during its early days, the founders of what became modern marginalism included observations about race that were quite similar to those made by the earlier classical political economists. For example, in the 1860s William Stanley Jevons, one of the early British founders of marginalism, relied on Darwin for the view that non-Nordic people were ignorant and lacked initiative and foresight, making them unable to accumulate significant capital.<sup>166</sup> In his *Theory of Political Economy*, he wrote that incentives to be productive

depend greatly upon the character of the race. . . . A man of lower race, a negro for instance, enjoys possession less, and loathes labour more; his exertions, therefore soon stop. A poor savage would be content to gather the almost gratuitous fruits of nature, if they were sufficient to give sustenance; it is only physical want which drives him to exertion.<sup>167</sup>

Even Alfred Marshall, the highly technical pioneer of marginalist industrial economics at Cambridge University, could not resist an occasional aside about race. In his *Principles of Economics* (1890) he described “savages” as being ruled by “impulse” and thus lacking the foresight for long-range planning, as opposed to “steadfast” Anglo-Saxons.<sup>168</sup> The people of England, in particular, made up the strongest race and it was they who achieved the modern capital-labor division of the economy.<sup>169</sup>

As noted above, many of America’s economic Institutionalists rejected neoclassical models in favor of more complex assumptions that took human biology

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164. *Id.* at 86; see also Thorstein Veblen, *The Limitations of Marginal Utility*, 17 J. POL. ECON. 620, 620–21 (1909).

165. On the Institutionalists, see HOVENKAMP, *supra* note 15, at 106–22.

166. William Stanley Jevons, *A Deduction from Darwin’s Theory*, 1 NATURE 231 (1869).

167. WILLIAM STANLEY JEVONS, *THEORY OF POLITICAL ECONOMY* 182–83 (London & New York, MacMillan & Co. 1871). He reflected similar attitudes in William Stanley Jevons, President of Section F (Economic Science and Statistics), British Ass’n for the Advancement of Sci., opening address at the Fortieth Meeting of the British Ass’n for the Advancement of Sci. (Sept. 1870), in 33 J. ROYAL STAT. SOC’Y LONDON 309, 309–10 (1870).

168. ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 10, 662 (London, MacMillan & Co. 1890).

169. *Id.* at 740–45.

and the theory of evolution into account.<sup>170</sup> For example, Thorstein Veblen preferred to speak of “instincts” rather than economic preferences, and he expressly incorporated Darwinian survival instincts into his theory of human choice.<sup>171</sup> His writing frequently linked racial diversity to differences in preferences.<sup>172</sup> Later institutionalists such as Edward A. Ross,<sup>173</sup> Richard T. Ely,<sup>174</sup> and John R. Commons<sup>175</sup> did the same thing.

Ross’s racial theories have been singled out as a particularly strong example of Progressive racism.<sup>176</sup> However, his theories were actually a complex mixture of hereditary and environmental influences. In his 1901 address to the American Academy of Political and Social Science on “The Causes of Race Superiority,” he argued that adaptability to different climates accounted for a great deal of cultural progress and that the more favorable climates of the northern hemisphere were at least part of the explanation. This premise of adaptability led him to believe that immigration and movement are fundamentally a good thing. “Those branches of a race achieve the most brilliant success which have wandered the farthest from their ancestral home.”<sup>177</sup> He also praised democratic forms of government for facilitating progress, as well as the fact that social status “depends little on birth and much on personal success.” In sum, while a large amount of what Ross said was racist, he hardly believed that genetic inheritance was the exclusive cause. Nevertheless, Ross believed in eugenics and supported Wisconsin’s 1913 compulsory sterilization law.<sup>178</sup> In fact, in one of the great academic-freedom

170. E.g., Thorstein Veblen, *Why is Economics not an Evolutionary Science?*, 12 Q.J. ECON. 373, 390–91 (1898).

171. THORSTEIN VEBLEN, *THE INSTINCT OF WORKMANSHIP AND THE STATE OF THE INDUSTRIAL ARTS* 116–20 (1914) [hereinafter VEBLEN, *INSTINCT OF WORKMANSHIP*] (considering racial differences in innovation and craftsmanship); THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS* 320–22 (London & New York, The MacMillan Co. 1899) [hereinafter VEBLEN, *LEISURE CLASS*] (racial differences in religiosity).

172. E.g., VEBLEN, *INSTINCT OF WORKMANSHIP*, *supra* note 171; VEBLEN, *LEISURE CLASS*, *supra* note 171; see also Sophus A. Reinert, *Iconoclastic Eugenics: Thorstein Veblen on Racial Diversity and Cultural Nomadism*, 14 INT’L REV. SOC. 513, 521–23 (2004).

173. E.g., Edward A. Ross, Professor of Sociology, Univ. of Neb. Annual Address at the Meeting of the American Academy of Political & Social Science: The Causes of Race Superiority (July 1, 1901), in 18 ANNALS AM. ACAD. POL. & SOC. SCI. 67 (1901) [hereinafter Ross, *Causes of Race Superiority*]; Edward A. Ross, *The Menace of Migrating Peoples*, 102 CENTURY MAG. 131 (1921).

174. See, e.g., Richard T. Ely, *Pauperism in the United States*, 152 N. AM. REV. 395 (1891); Richard T. Ely, *Thoughts on Immigration*, No. I, CONGREGATIONALIST, June 28, 1894, at 88; Richard T. Ely, *Thoughts on Immigration*, No. II, CONGREGATIONALIST, July 5, 1894, at 13; Richard T. Ely, *Fraternalism vs. Paternalism in Government*, 55 CENTURY MAG. 780, 781 (1898); RICHARD T. ELY, *STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY* 139 (1903).

175. E.g., COMMONS, *supra* note 5.

176. E.g., LEONARD, *ILLIBERAL REFORMERS*, *supra* note 1, *passim*.

177. Ross, *Causes of Race Superiority*, *supra* note 173.

178. Rudolph Vecoli, *Sterilization: A Progressive Measure?*, 43 WISC. MAG. HIST. 190, 196 (1960).

controversies of the early twentieth century, it was his views on eugenics that resulted in the termination of his professorship at Stanford University.<sup>179</sup>

### III. RACISM AND PROGRESSIVE LABOR LEGISLATION

In reading the Progressive literature on race, it is important to remember that the period did not have our sense of political correctness about the term. For virtually everyone in the nineteenth and early twentieth century, race was a much more objective classification than it is today. That would remain true until scientific racism gave way to cultural relativism and behaviorism, two of Progressivism's most important contributions to social science. What these Progressive methodologies developed was the idea that race is not an objective classification at all, but rather an artificial construct used for either convenience or invidious comparison.<sup>180</sup>

Further, during the early twentieth century, the term *race* was often used in a non-comparative fashion, more similar to *human race* than as a reference to any particular race.<sup>181</sup> A good illustration is Louis Brandeis's defense of minimum wage legislation in an article he wrote for *The Survey* in 1915.<sup>182</sup> Brandeis had represented workers in *Stettler v. O'Hara*, where the Oregon Supreme Court upheld an Oregon minimum wage law that applied to women and children.<sup>183</sup> An equally divided U.S. Supreme Court affirmed the case three years later.<sup>184</sup> By that time, Brandeis was on the Court but recused himself because of his prior representation. Had he participated, the vote would certainly have been 5–4 to uphold the minimum wage.

In his article, Brandeis defended minimum wage laws for largely the same reasons that he defended maximum hour provisions in *Muller v. Oregon*.<sup>185</sup> Mainly, as the bearers of children, women were particularly vulnerable if they did not receive a livable wage. Significantly, no part of Brandeis's defense of minimum wage legislation made any reference to racial exclusion. He did speak of the necessity of a livable wage to prevent the "degeneration of the race,"<sup>186</sup> but nothing in the context suggests that he was talking about any particular race or comparing the white race against others. He was talking about the damaging effects of substandard wages on the human race.

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179. See James C. Mohr, *Academic Turmoil and Public Opinion: The Ross Case at Stanford*, 39 PAC. HIST. REV. 39, 40 (1970); Michael S. Pak, *Academic Freedom and the Liberation of the Nation's Faculty*, THOUGHT & ACTION, Fall 2007, at 83, 88–89.

180. See, e.g., Herbert S. Lewis, *Introduction* ix, to FRANZ BOAS, ANTHROPOLOGY AND MODERN LIFE (Routledge 2017) (1932).

181. Leonard acknowledges this in Thomas C. Leonard, *Retrospectives: Eugenics and Economics in the Progressive Era*, J. ECON. PERSP., Fall 2005, at 207, 208, <https://www.princeton.edu/~tleonard/papers/retrospectives.pdf>.

182. Louis D. Brandeis, *The Constitution and the Minimum Wage: Defense of the Oregon Minimum Wage Law Before the United States Supreme Court*, 33 SURVEY 490 (1915).

183. *Stettler v. O'Hara*, 139 P. 743, 750–51 (Or. 1914).

184. *Stettler v. O'Hara*, 243 U.S. 629, 629 (1917) (per curiam).

185. 208 U.S. 412, 421–22 (1908).

186. Brandeis, *supra* note 182, at 493–95.

The same thing is true of Josephine Goldmark's important 1912 Progressive book *Fatigue and Efficiency*, a study of laborers who were overworked to produce greater productive efficiency.<sup>187</sup> Goldmark was Brandeis's sister-in-law and had co-authored the famous Brandeis Brief in *Muller v. Oregon*. Goldmark devoted a subchapter of her book to the topic of Race Degeneration.<sup>188</sup> However, once again, she clearly was not drawing any comparisons among Aryans, Europeans, Africans, Asians, or any other ethnic group. Her point was simply that overwork led to high death rates, low birth rates, promiscuity, and other bad outcomes. To the extent she talked about any particular race at all, it was the "factory population" themselves or people living in areas where factory employment was highest. Indeed, the vast majority of factory workers were white. Harsh working conditions had produced "[a] race of pale, stunted, and emaciated creatures irregular in their lives and dissolute in their habits."<sup>189</sup> She observed data that in various countries that had a military draft, "the proportion of young men rejected for physical unfitness is far higher in industrial communities than in others."<sup>190</sup> She cited similar observations about Italian working women, who exhibited a greatly impaired ability to bear children if they were employed in industrial occupations.<sup>191</sup> It is thus important not to overread mentions of race in Progressives' discussions of worker-protective legislation. Some of them implied notions of Aryan superiority or the comparative inferiority of Africans or Asians, but many did not.

Some historians have argued that support for minimum wage laws and other protective legislation was driven by essentially racist concerns. The thrust of this argument is that minimum wage laws would reduce the demand for labor, and that employers would selectively reduce hiring by favoring Aryan groups. When the legislation at issue concerned maximum hours or working conditions, the argument was that white workers needed protection from workers of other races who were willing to work for lower wages or under more adverse conditions.

Most American economists who identified with the Progressive movement argued in favor of workers' protective legislation, particularly maximum hour and minimum wage laws, and regulation of employee safety. Some of these statutes were addressed by the Supreme Court and struck down on grounds of liberty of contract, held to be protected by one of the Constitution's due process clauses.<sup>192</sup> The legal history of the conflict between Progressive economics and the Supreme Court before the court-packing controversy in 1937 is in large part a story of these decisions.

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187. JOSEPHINE GOLDMARK, *FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY* (1912).

188. *Id.* at 97–100.

189. *Id.* at 97; *see also id.* at 325 (speaking of the "influence of vigorous health upon the future well-being of the race").

190. *Id.* at 97–98.

191. *Id.* at 96.

192. *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (Fourteenth Amendment Due Process Clause); *Adkins v. Children's Hosp.*, 261 U.S. 525, 558–62 (1923) (Washington, D.C. minimum wage statute violated Fifth Amendment Due Process Clause).



However, as noted below, only a tiny fraction of this literature, including the judicial decisions, ever suggested racial or ethnic exclusion was a rationale.

State minimum wage statutes developed in the United States in two stages. The first group was passed between 1912 and 1923 by 17 states and the District of Columbia.<sup>193</sup> A few of these were upheld, but several were struck down by both state and federal courts, mainly on liberty of contract grounds. Some were upheld as applied to minors, but not to adults, and some were upheld as applied only to women. Some were never enforced. In any event, the 1923 Supreme Court decision striking down the Washington, D.C. minimum wage statute for women was thought to kill the minimum wage movement in the states.<sup>194</sup> However, new state initiatives emerged in the 1930s. A closely divided Supreme Court initially struck down a state statute just before the 1937 court-packing controversy,<sup>195</sup> but upheld another soon after.<sup>196</sup> The judicial resolution to the court packing controversy actually occurred in a set of disputes about state minimum wage laws, not, in the first instance, about federal New Deal legislation.<sup>197</sup>

Whether or not the claims linking racism to workers' protective legislation such as minimum wage laws are plausible, they must be placed in perspective. They were certainly not Progressive economists' central argument supporting such legislation; at most, they were a sidebar raised by a very small percentage of the defenders of the minimum wage provisions.

The rationales that Progressive Era economists gave in support of protective legislation, including minimum wage laws, are fairly well understood. Most were enthusiastic participants in the marginalist revolution in economics, which saw value in forward-looking conceptions of willingness to pay or anticipated contribution. The result was the death of the wage-fund doctrine, one of the more extreme examples of historicism in classical political economy. The backward-looking wages fund, which was a staple of classical political economy through Mill, argued that the rate of wages was limited by a fund made up of capital accumulation from a previous time period. This *iron law of wages*, as it came to be called, entailed that the fund, divided by the number of workers, placed an absolute limit on individual wages. Attempts to pay more would require the firm to borrow against the future, producing bankruptcy and even greater distress for workers.<sup>198</sup>

For marginalists, the proper rate of wages was seen not as a function of what was previously paid in, but rather of the worker's anticipated contribution to the value of his employer. In the words of John Bates Clark, the most prominent

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193. For a useful table of enactments and enforcement history, see Clifford F. Thies, *The First Minimum Wage Laws*, 10 CATO J. 715, 718–19 (1991).

194. *Adkins*, 261 U.S. at 558.

195. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 631 (1936) (striking down 1933 New York minimum-wage statute).

196. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400 (1937) (upholding 1932 Washington State minimum wage statute).

197. HOVENKAMP, *supra* note 15, at 263–65.

198. On the wage-fund doctrine in classical political economy, see HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, at 193–98 (1991).

technical American economist of his generation, this principle led to a “scientific law of wages.”<sup>199</sup> After completely dismantling the wage-fund doctrine, Clark explained that, in a competitive economy, the returns for every factor, or element of production, are driven to their marginal values. Lenders of capital, owners, suppliers, and laborers would all receive the value of their contribution, *provided* that the markets in question were competitive.<sup>200</sup> A vast amount of Progressive Era economic literature defended and developed this proposition.<sup>201</sup>

The competition issue posed the principal difficulty. Labor markets, particularly for unskilled labor, were thought to be much more competitive than markets for production and capital. As a result, when it came to labor, employers had much greater buying power than workers had selling power. The economic term *monopsony*, or buyer-side monopoly, would not enter the economic literature until the early 1930s, when Cambridge economist Joan Robinson introduced it in her book *The Economics of Imperfect Competition*. Speaking of wages, Robinson showed explicitly what many Progressives had intuited: a monopoly employer, or monopsonist, suppresses the buying price—in this case wages—by suppressing employment. As a result, correcting monopsony would result in *both* higher wages and higher employment. As Robinson observed, “[T]he rise in wages which reduces exploitation and transfers a part or the whole of the monopsony profit to labour will actually result in an increase of employment.”<sup>202</sup> To the extent this problem was corrected, higher wages would produce both greater income for workers and more jobs. To the extent that Progressives understood this, the argument that higher wages

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199. *E.g.*, John Bates Clark, *The Possibility of a Scientific Law of Wages*, 4 PUB. AM. ECON. ASS’N 39, 39 (Mar. 1889).

200. *See* Frank T. Carlton, *The Relation of Marginal Rents to Price*, 20 Q.J. ECON. 596, 605 (1906); Jacob H. Hollander, *The Residual Claimant Theory of Distribution*, 17 Q.J. ECON. 261, 275 (1903); G.R. Wicker et al., *Outlines of a Theory of Wages: Discussion*, 11 (3d series) AM. ECON. ASS’N Q. 157, 159 (1910).

201. *See, e.g.*, HERBERT J. DAVENPORT, *VALUE AND DISTRIBUTION: A CRITICAL AND CONSTRUCTIVE STUDY* (1908); EDWIN R. A. SELIGMAN, *PRINCIPLES OF ECONOMICS* (1909); Thomas Nixon Carver, *The Theory of Wages Adjusted to Recent Theories of Value*, 8 Q.J. ECON. 377, 383 (1894); Thomas Nixon Carver, *The Marginal Theory of Distribution*, 13 J. POL. ECON. 257, 263–64 (1905); J. B. Clark, *The Ultimate Standard of Value*, 8 PUB. AM. ECON. ASSN. 82, 86 (1893); John Bates Clark, *Wages and Interest as Determined by Marginal Productivity*, 10 J. POL. ECON. 105, 107 (1901); W.G. Langworthy Taylor, *Some Important Phases in the Evolution of the Idea of Value*, 3 J. POL. ECON. 414 (1895). Critics who preferred the traditional model included S. M. MacVane, *Marginal Utility and Value*, 7 Q.J. ECON. 255, 280 (1893) and David I. Green, *Pain-Cost and Opportunity-Cost*, 8 Q.J. ECON. 218, 228 (1894). Yale political economist and Social Darwinist commentator William Graham Sumner also adhered to the wage-fund doctrine his entire life. *See* William G. Sumner, *Wages*, in *COLLECTED ESSAYS IN POLITICAL AND SOCIAL SCIENCE* 36, 56 (New York, Henry Holt & Co. 1885).

202. JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 215, 292–96 (1933) (quotation at 295); Joan Robinson, *What is Perfect Competition?*, 49 Q.J. ECON. 104, 109 (1934). For a discussion of why the monopsonist suppresses the input, see HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 1.4 (4th ed. 2011).

would suppress demand and exclude Afro-Americans or foreigners was fallacious. Eliminating monopsony would actually produce higher wages and *more* jobs.

Many Progressive Era economists believed that the market in which capitalists purchased labor was far less competitive than the market in which laborers sold it, particularly if the market in question was for unskilled labor.<sup>203</sup> They saw correctly that American industry was producing ever-increasing returns, most of which were not going to labor. For them, the question was who should be getting the benefits of the increase. Progressives posed the question as the following: Who should be the “residual claimant” of increased industrial productivity?<sup>204</sup> Traditionalists and some Progressives argued that the increased returns properly belonged to capital because machinery, a product of capital, was responsible for nearly all of an enterprise’s increased productivity.<sup>205</sup> But the emergent Progressive argument was that laborers were getting an ever-smaller share of industrial growth because capital markets were much less competitive than labor markets. Well-organized capitalists had complete control over unorganized labor markets. As a result, “the residual claimant is monopoly,” Wharton business college Dean Simon Patten concluded in 1908.<sup>206</sup>

Overall, the writing of Progressive economists on the wage question developed these positions:

1. The maximum wage is determined, not by the wage-fund doctrine, but rather by the worker’s marginal contribution to employer value.<sup>207</sup>
2. If all markets were fully competitive, then laborers would earn precisely their contribution, but in fact wage-earner markets are more competitive than capital markets; as a result, workers are not getting

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203. E.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474 (1923). Some critics argued that labor unions created unjustified monopoly power in labor markets. See, e.g., J. Laurence Laughlin, *Capitalism and Social Discontent*, 203 N. AM. REV. 403, 408–10 (1916).

204. As far as I can determine, William Graham Sumner was the first to use the term *residual claimant*; he then took issue with the proposition that labor should be the residual claimant. WILLIAM GRAHAM SUMNER, *PROBLEMS OF POLITICAL ECONOMY* 34–35 (New York, Henry Holt & Co. 1889).

205. E.g., Francis A. Walker, *The Doctrine of Rent, and the Residual Claimant Theory of Wages*, 5 Q.J. ECON. 417, 421–23 (1891) (arguing that after all other factors of production receive a reasonable return, labor should be the residual claimant of the balance); Charles F. Dunbar, *The Career of Francis Amasa Walker*, 11 Q.J. ECON. 436, 446 (1897) (agreeing with Walker); John A. Hobson, *The Law of the Three Rents*, 5 Q.J. ECON. 263, 263 (1891) (disagreeing with Walker); Hollander, *supra* note 200, at 269 (disputing Walker); Simon N. Patten, *The Political Significance of Recent Economic Theories*, 32 ANNALS AM. ACAD. POL. & SOC. SCI. 82, 94 (1908) (worker mobility should help labor obtain its fair share).

206. Patten, *supra* note 205, at 86.

207. See, e.g., *supra* notes 200, 205.

their fair share.<sup>208</sup> Further, correcting this imbalance would not produce fewer jobs.

3. Laborers are entitled to a living wage,<sup>209</sup> which can be determined by assessing cost of living for the typical wage-earning family.<sup>210</sup>

4. Low wages and harsh conditions were being exacerbated by excessive use of child labor and excessively lenient immigration policies

Historians Bernstein and Leonard looked at roughly two dozen publications written by Progressives that linked the mandated minimum wage to effects on employment of immigrants, Afro-Americans, or those deemed unfit.<sup>211</sup> This is a tiny portion of the Progressive literature devoted to wage economics or minimum wage legislation.<sup>212</sup> Further, none of the articles they rely on are fundamental, technical, neoclassical analyses of the kind that reflected the impact of the marginalist revolution in economics. Rather, they are book reviews, roundtable discussions, or articles that attempted to tie economics to broad political policy.

Further, in the literature that Bernstein and Leonard cite, many of the statements appear to be taken out of context or are interpreted differently than their

208. See Walker, *supra* note 205, at 421–23; see also John R. Commons, *Protection and Natural Monopolies*, 6 Q.J. ECON. 479, 484 (1892); Richard T. Ely, *Economic Theory and Labor Legislation*, 9 AM. ECON. ASS'N Q. 124 (1908) (discussions of Malthus and population, or maximum-hour laws as employing more people, but nothing on race); Hale, *supra* note 203 at 479.

209. Dorothy W. Douglas, *American Minimum Wage Laws at Work*, 9 AM. ECON. REV. 701, 701 (1919); Florence Kelley, *Minimum-Wage Laws*, 20 J. POL. ECON. 999, 1010 (1912); Scott Nearing, *The Adequacy of American Wages*, 59 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 111 (1915); see also Frank T. Carlton, *Scientific Management and the Wage-Earner*, 20 J. POL. ECON. 834, 845 (1912).

210. LOUISE BOLARD MORE, *WAGE-EARNERS' BUDGETS: A STUDY OF STANDARDS AND COST OF LIVING IN NEW YORK CITY* 125 (1907); Charles E. Persons, *Estimates of a Living Wage for Female Workers*, 14 PUBLICATION AM. STAT. ASS'N 567, 567–70 (1915); see also JOHN A. RYAN, *A LIVING WAGE* 123 (1906). Ryan, a Catholic social activist, was not an economist but his book marshalled the sociological and economic arguments for a minimum wage; he did list exclusion by race as a rationale.

211. David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177 (2009); see also LEONARD, *supra* note 1, at 158–78; Thomas C. Leonard, *Retrospectives: Eugenics and Economics in the Progressive Era*, 19 J. ECON. PERSP. 207, 212–15 (2005).

212. Google Scholar lists 1240 articles during the period 1890–1920 with the word *wage* or *wages* in the title, and 172 with either the term “minimum wage” or “living wage” in the title. It lists 4560 publications during the same period that speak of a “minimum wage” or “living wage” somewhere in the text. Many of the most important discussions of minimum wage laws did not include the term in the title. *E.g.*, Clark, *supra* note 199; Hollander, *The Residual Claimant Theory of Distribution*, *supra* note 200; Walker, *The Doctrine of Rent, and the Residual Claimant Theory of Wages*, *supra* note 205. Google Scholar also lists 63 articles or books during the same period discussing the residual-claimant theory of wages.

authors intended.<sup>213</sup> The strongest case for their position is Columbia University economist Henry Seager, who argued the eugenics line that sterilization of the unfit could reduce the supply of marginal workers.<sup>214</sup> However, he also admitted that this concern “may seem somewhat remote from the minimum wage but such a policy judiciously extended should make easier the task of each on-coming generation . . . .”<sup>215</sup> He then added that child-labor provisions should be used as well as “facilities for industrial and trade training” in the public schools.<sup>216</sup> Bernstein and Leonard also quote a passage in which Seager stated that serious laborers needed protection from the “casual worker and the drifter,”<sup>217</sup> but Seager himself made no attempt to identify this phrase with immigrants, eugenically unfit racial minorities, or any other particular group. In fact, his essay never mentions immigrants or race at all. Further, the thrust of his article was that society needed to provide education and training with a view toward creating a prosperous working class of participatory citizens. In his economics textbook, published the same year, Seager argued that many immigrants may have been deceived into coming to America:

In the cities of the United States competition for employment in the sweating trades is made especially severe by the steady influx of immigrants, many of whom find this species of work the easiest to take up, and do not learn, until after they have been in the country some time, how much worse they are than American workmen in other trades.<sup>218</sup>

Bernstein and Leonard also cite a statement from A.B. Wolfe, another Progressive economist, speaking in a roundtable discussion, that “[i]f the inefficient entrepreneurs would be eliminated [by minimum wages], so would the ineffective workers.”<sup>219</sup> But the statement makes clear that Wolfe was acknowledging the existence of inefficient *employers* as well as inefficient laborers, and his belief that a minimum wage law would weed out both, “wherever they are.” Significantly, Wolfe never mentioned breeding, eugenics, or race; but simply observed that some employers and laborers were less effective than others. His central argument was that capital markets are noncompetitive, that stock prices were greatly inflated, that stockholders demanded a return in proportion to this inflated value, and that interest rates were too high.<sup>220</sup> All of these problems suggested to Wolfe that wages could

213. Bernstein and Leonard also discussed the work of Sidney and Beatrice Webb and Sidney Ball, who were British and in any event were Fabian socialists outside of the mainstream. Bernstein & Leonard, *supra* note 211, at 180, 187.

214. Henry R. Seager, *The Minimum Wage as Part of a Program for Social Reform*, 48 ANNALS AM. ACAD. POL. & SOC. SCI. 3, 10 (1913).

215. *Id.*

216. *Id.*

217. *Id.* at 12.

218. HENRY ROGERS SEAGER, PRINCIPLES OF ECONOMICS 572 (1913).

219. Bernstein & Leonard, *supra* note 211, at 186–87 (quoting A.B. Wolfe et al., *Some Phases of the Minimum Wage: Discussion*, 7 AM. ECON. REV. 275, 278 (1917) (roundtable discussion with Robert L. Hale and John A. Ryan)).

220. A.B. Wolfe et al., *Some Phases of the Minimum Wage: Discussion*, 7 AM. ECON. REV. 275, 276–78 (1917).

in fact be raised without damaging productivity, simply by squeezing some monopoly out of the supply side. In redistributing from producers to labor, there was much more surplus available on the supply side than the demand side. Wolfe then added, “Turning now to labor supply, the idea that standard minimum wages would stimulate further overgrowth of population is not well founded. One way to reduce the birth rate is to raise the standard of living, and the only way to do that is to raise wages.”<sup>221</sup> For that, he advocated giving women greater economic independence so that they would “not be tempted to marry simply to escape long hours of hard work at low pay . . . .”<sup>222</sup>

Notably, neither Wolfe nor his fellow roundtable discussants said anything about eugenics or race. Wolfe mainly observed that just as not all firms are equally efficient neither are all laborers, and a mandatory minimum wage would put pressure on both. Wolfe’s only mention of immigration was in a paragraph arguing that a minimum wage law is not “the only line of economic advance.” In addition, there should be “vocational education, restriction of immigration, birth control, segregation of the unemployable.”<sup>223</sup> Even this passage cannot be construed as talking about anything more than numerical quotas. He never suggested excluding particular people based on race or nationality. To be sure, ethnic or race-based restrictions on immigration did come, but these were at the behest of the anti-Progressive administrations of Harding and Coolidge.<sup>224</sup>

Bernstein and Leonard also discuss a book review by Royal Meeker, a Princeton economist who later worked in the Wilson administration. They quote him as saying the following:

It is better to enact a minimum-wage law, even if it deprives these unfortunates of work. Better that the state should support the inefficient wholly and prevent the multiplication of the breed than subsidize incompetence and unthrift, enabling them to bring forth after their kind.<sup>225</sup>

However, it is clear from the context that Meeker is reacting to the reviewed author’s proposal that the state pay a supplement sufficient to raise the wages of

221. *Id.* at 277.

222. *Id.* at 278.

223. *Id.* at 278; *see also* Henry P. Fairchild, *The Restriction of Immigration*, 2 AM. ECON. REV. 53, 56–61 (1912) (advocating immigration restrictions based on numbers and worker qualifications, but not race); Walter Lippman, *The Campaign Against Sweating*, NEW REPUBLIC, Mar. 27, 1915, at 1, 25 (advocating immigration restrictions in order to reduce the labor supply, but not suggesting that they be based on race but rather applied to all, including Europeans: “If the European is compelled to work at not less than an American standard he will be less useful to the employers of cheap labor, and less effort will be made to bring him over”; then applying the “same reasoning . . . to the employment of children”).

224. *See infra* text accompanying notes 275–77.

225. Bernstein & Leonard, *supra* note 211, at 187 (quoting Royal Meeker, Book Review, 25 POL. SCI. Q. 543, 544 (1910) (reviewing CLEMENT COLSON, *COURS D’ECONOMIE POLITIQUE* (2d ed. rev. & enlarged 1907)). Clement Colson, the author of the article Meeker reviewed, was a relatively minor French liberal economist.

substandard workers to an acceptable subsistence level.<sup>226</sup> By contrast, Meeker himself advocated for worker training, speaking of the “duty of the state to provide manual and technical training to those born under its sovereignty, to the end that the inefficient may be diminished or eliminated.”<sup>227</sup> In other words, Meeker was not speaking about a problem of heredity or race, but rather of lack of training that could be remedied if the State would provide it. Indeed, he rejected the author’s view that “the poor are poor through their own laziness, inability or thriftlessness.”<sup>228</sup> This was not an essay about heredity at all, but rather about lack of job skills.

Bernstein and Leonard also briefly mentioned a 1913 article by Paul Underwood Kellogg, a civil libertarian who worked as a journalist and social reformer and was a founding member of the ACLU. Kellogg discussed the relationship between immigration policy and the minimum wage law.<sup>229</sup> He saw the fundamental problem as an excessive labor supply and believed that limitations on child labor and the labor of women was a partial corrective. But he also believed that there should be immigration restrictions, focused on immigrants destined for industrial occupations.<sup>230</sup> Under his proposal, a minimum wage would apply to corporate employers and would limit the minimum wage of immigrants for a period of five years until they could become naturalized citizens. The wage would be determined as “a subsistence basis for American family livelihood.”<sup>231</sup> The proposal would not apply to non-corporate employers, including agriculture employers. He argued that with this restriction in place the wages of existing unskilled labor would “creep up toward the federal minimum.” Significantly, Kellogg made no mention of any racial or ethnic restrictions, but appeared to be speaking about immigration quotas generally. Further, the proposal was not aimed at exclusion of immigrants but rather at raising the general level of industrial wages.

Clearly, Progressive legislation could be exclusionary, sometimes on racist grounds or based on assumptions about mental unfitness. But, there is little support for the proposition that racial exclusion was a central part of Progressives’ motivation in enacting minimum wage or maximum hour laws.

Workers’ protective legislation, like all legislation, benefits some people and harms others. Sometimes one can generalize by dividing affected groups into categories, such as competitors or those who are suppliers or customers. Sometimes differential effects are caused by different cost structures, technologies, or education. Nevertheless, it is naive to point to a policy as deficient simply because it has particular effects on one certain group. For example, one does not rehabilitate *Lochner* simply by showing that unionized bakers approved of the ten-hour law because it raised the costs of more marginal bakers.<sup>232</sup> The ten-hour law was also

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226. Royal Meeker, Book Review, 25 POL. SCI. Q. 543, 544 (1910) (reviewing CLEMENT COLSON, *COURS D’ECONOMIE POLITIQUE* (2d ed. rev. & enlarged 1907)).

227. *Id.*

228. *Id.*

229. Paul U. Kellogg, *Immigration and the Minimum Wage*, 48 ANNALS AM. ACAD. POL. & SOC. SCI. 66 (1913).

230. *Id.* at 75.

231. *Id.*

232. *See generally* DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 23–25 (2011).

heavily supported by groups concerned about working conditions. Virtually every government action benefits some groups while harming others. Assessing welfare requires a mechanism for netting out these gains and losses.

#### IV. RACISM AND THE ACTIVE STATE

The Progressives believed in a more active state than their more laissez-faire predecessors and contemporaries. Most Progressive Era regulation was economic, resulting from changes in population demographics and economic theory that led them to place less faith in private markets. Nevertheless, one possibility that cannot be ignored is that even if Progressives were not more racist than laissez-faire alternatives, Progressive policy might have been more exclusionary or discriminatory simply because Progressives produced more legislation. The common law largely tolerated most forms of private racism but rarely compelled it. By contrast, *de jure* segregation, compulsory sterilization, and racist immigration restrictions were all legislative products supported by the power of the State.

However, one is hard-pressed to show that the Era's legislation that discriminated based on race or that compelled sterilization or exclusion of immigrants was particularly attributable to Progressives. During Reconstruction and the Gilded Age, the most prominent *privately* initiated racial social practice in the South was not segregation at all, but absolute exclusion. That is, Afro-Americans were not accorded separate-but-equal facilities, but rather no facilities at all.<sup>233</sup> At the end of Reconstruction, southern states and municipalities began passing a wide variety of Jim Crow laws providing for segregated public facilities.<sup>234</sup> This process accelerated after the Supreme Court struck down the 1875 Civil Rights Act in 1883.<sup>235</sup> All of this happened well before the rise of Progressivism. The record in the *Civil Rights Cases* and other litigation makes clear that both exclusionary and segregationist practices were already widespread at that time, even among common carriers and inns, two entities that traditionally had universal service obligations.<sup>236</sup> In 1888, the state of Mississippi passed a statute mandating racially segregated trains, and Louisiana passed a virtually identical statute in 1890.<sup>237</sup> Both statutes produced challenges that went to the Supreme Court, which upheld the first statute against a Commerce Clause challenge in 1890,<sup>238</sup> and the second statute against an Equal Protection challenge in *Plessy v. Ferguson* in 1896.<sup>239</sup>

Segregated public schools appeared in all parts of the country soon after the Civil War. In the South, statutory segregation replaced a system in which enslaved children were generally forbidden from going to school at all.<sup>240</sup> This also occurred long before the rise of the Progressive movement, and its legacy in the

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233. See RABINOWITZ, *supra* note 30, at 182–254.

234. See, e.g., WOODWARD, *supra* note 30, at 3–12.

235. The Civil Rights Cases, 109 U.S. 3, 25–26 (1883).

236. See HOVENKAMP, *supra* note 15, at ch. 3.

237. *Id.* at 61–62.

238. Louisville, New Orleans & Tex. Ry. v. Mississippi, 133 U.S. 587, 594–95 (1890).

239. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

240. HOVENKAMP, *supra* note 15, at 56–60.



South persisted well beyond the Progressive Era and into the mid-twentieth century. Indeed, the earliest school segregation legislation dates to the 1860s, and the cases upholding it to the 1870s and 1880s.<sup>241</sup>

Progressive Era decisions approving segregated colleges and residential zoning need to be read in this light. For example, no case can be made that 1904 Kentucky legislation compelling segregated colleges was either a novelty or a Progressive initiative. Although a slave state, Kentucky chose to remain with the Union in the Civil War, largely because it would have been first in line for invasion.<sup>242</sup> In 1874, it passed a statute providing for segregated elementary and secondary schools, replacing a policy of completely denying education to black students.<sup>243</sup> The later statute, extending segregation to colleges, had been proposed by state representative Carl Day, a vehement segregationist, who was outraged when Progressive President Theodore Roosevelt invited Booker T. Washington to dine with him in the White House.<sup>244</sup> At that time, Berea was Kentucky's only integrated college. The Supreme Court upheld the Kentucky statute in 1908.<sup>245</sup> Justices Harlan and William R. Day were the only dissenters. In *Lochner* three years earlier, both had also dissented from the decision striking down the maximum hours statute. By contrast, all of the Justices left over from the majority that struck down the statute in *Lochner* voted to uphold the segregation statute.<sup>246</sup>

The same thing is true of the segregationist zoning statutes leading up to the Supreme Court's *Buchanan v. Warley* decision in 1917, which struck them down for interfering with liberty of contract. Some supporters of segregation by zoning were acknowledged Progressives, while others were not. All of the statutes were passed in what had been slave states prior to the Civil War, although three of them (Kentucky,<sup>247</sup> Maryland,<sup>248</sup> and Missouri) were border states that chose to remain in

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241. *People ex rel. King v. Gallagher*, 93 N.Y. 438, 457 (Ct. App. 1883) (upholding 1864 New York statute segregating public schools by race); *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 210–11 (1871) (similar, considering both federal and state constitutions); *Cory v. Carter*, 48 Ind. 327, 366 (1874) (similar); *Ward v. Flood*, 48 Cal. 36, 56 (1874) (segregated schools are permissible as long as provision was made to educate Afro-American and Native American children).

242. The others were Maryland, Delaware, and Missouri. West Virginia was also formed as a separate state when 50 Virginia counties chose not to follow Virginia into the confederacy.

243. MARION B. LUCAS, *A HISTORY OF BLACKS IN KENTUCKY: FROM SLAVERY TO SEGREGATION, 1760–1890*, at 255–56 (2d ed. 2003).

244. See Richard A. Heckman & Betty J. Hall, *Berea College and the Day Law*, 66 REG. KY. HIST. SOC'Y 35, 38 (1968). On Booker T. Washington's visit to the White House, see CLARENCE LUSANE, *THE BLACK HISTORY OF THE WHITE HOUSE* 219–31 (2011). A good, fact-based history of both the legislation and the subsequent litigation is T.R.C. HUTTON, *BLOODY BREATHITT: POLITICS AND VIOLENCE IN THE APPALACHIAN SOUTH 187–904* (2013).

245. *Berea Coll. v. Kentucky*, 211 U.S. 45, 58 (1908), *aff'g* 94 S.W. 623 (1906).

246. There was only one personnel change. In 1906 Roosevelt appointed William Henry Moody to replace Justice Henry Billings Brown. Brown had authored *Plessy*.

247. *Buchanan v. Warley*, 245 U.S. 60, 70–73 (1917).

248. *State v. Gurry*, 88 A. 546, 552–53 (Md. 1913) (ordinance unconstitutionally deprived homeowners of vested property rights).

the Union. More than anything else, the legislation reflected Jim Crow racial policies that long antedated the Progressive Movement. Other states passing the statutes included Georgia,<sup>249</sup> North Carolina,<sup>250</sup> South Carolina, Oklahoma, Louisiana, and Virginia.<sup>251</sup> These were not the nation's first segregationist zoning restrictions. Twenty years earlier, the federal courts had considered and struck down legislation that excluded Chinese from certain residential areas.<sup>252</sup>

The one significant Progressive presence in the *Buchanan* litigation was the NAACP.<sup>253</sup> From then through the 1950s, the NAACP aggressively pursued an agenda to abolish racial segregation. Its activities were paralleled by the National Urban League, another Progressive organization whose main purpose was to broaden economic opportunity for Afro-Americans, particularly those who had migrated north. Like the NAACP, the Urban League also developed a litigation agenda. For example, it was a major force behind the move to litigate against racially restrictive private covenants.<sup>254</sup>

Exactly how much of the political force supporting the racial zoning laws was a species of Progressive reform, and how much was a simple application of Jim Crow? Long before the rise of Progressivism, every state that had passed a segregationist zoning law had also practiced *de jure* segregation of public facilities and operated segregated schools.<sup>255</sup> Northern cities also experienced huge influxes of Afro-Americans, much of it just as the zoning statutes were being passed. Indeed, the great migration of Afro-Americans, which began early in the twentieth century, saw tens of thousands of Afro-Americans leaving southern cities for homes in the

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249. See *Harden v. City of Atlanta*, 93 S.E. 401, 402–03 (Ga. 1917) (approving statute to the extent it did not affect vested property rights), *overruled by* *Glover v. City of Atlanta*, 96 S.E. 562 (Ga. 1918) (overruling *Harden* in light of *Buchanan v. Warley*).

250. *State v. Darnell*, 81 S.E. 338, 340 (N.C. 1914) (ordinance unconstitutionally restricted transferability of property).

251. See Roger L. Rice, *Residential Segregation by Law, 1910–1917*, 34 J. SO. HIST. 179, 181 (1968). Some northern cities may have considered similar ordinances, although the evidence is scant. In any event, none passed. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 41 (1993).

252. *In re Lee Sing*, 43 F. 359, 359–60 (C.C.N.D. Cal. 1890) (the statute provided, “It is hereby declared to be unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in that district . . . hereinafter prescribed for their location.”); see also Rice, *supra* note 251.

253. On the NAACP and the *Buchanan* litigation, see generally George C. Wright, *The NAACP and Residential Segregation in Louisville, Kentucky, 1914–1917*, 78 REG. KY. HIST. SOC'Y 39, 47–51 (1980). On the organization's Progressivism, see generally August Meier & John H. Bracey, *The NAACP as a Reform Movement, 1909–1965: “To Reach the Conscience of America,”* 59 J. SOUTHERN HIST. 3 (1993); William Steuck, *Progressivism and the Negro: White Liberals and the early NAACP*, 38 HISTORIAN 58 (1975).

254. See generally JESSE T. MOORE, *A SEARCH FOR EQUALITY: THE NATIONAL URBAN LEAGUE, 1910–1961*, at 175–77 (1981); GUICHARD PARRIS & LESTER BROOKS, *BLACKS IN THE CITY: A HISTORY OF THE NATIONAL URBAN LEAGUE*, 325–29 (1971).

255. See WOODWARD, *supra* note 30, at 97–99.

North.<sup>256</sup> Nevertheless, none of these states or their municipalities ever passed a racial-segregation zoning provision.

In defending their segregationist zoning ordinance to the Supreme Court, the City of Louisville, Kentucky, relied heavily on racial science. The Louisville Brief on Reargument, which was modelled after the Brandeis Brief in *Muller v. Oregon*, contained about a half-dozen pages of legal argument and 100 pages summarizing scientific evidence supporting the case against racial integration.<sup>257</sup> Mainstream science had already rejected much of the evidence that the brief cited.<sup>258</sup> It included a discussion of Benjamin A. Gould's study of autopsy reports of Civil War soldiers indicating that "mulatto," or mixed race soldiers, were chronically unhealthy.<sup>259</sup> A principal concern of the brief was interracial marriage, which was the subject of many of the cited studies.<sup>260</sup>

Opposition to interracial marriage was neither novel nor Progressive. Many of the colonies had forbidden interracial marriage, beginning with a Maryland statute passed in 1661 that prohibited white women from marrying slaves.<sup>261</sup> Many states, both slave and free, passed anti-miscegenation statutes as early as the 1820s.<sup>262</sup> During the regional strife preceding the Civil War, some northern states repealed their statutes.<sup>263</sup> In sum, state anti-miscegenation statutes were hardly a

256. See generally JAMES N. GREGORY, *THE SOUTHERN DIASPORA: HOW THE GREAT MIGRATIONS OF BLACK AND WHITE SOUTHERNERS TRANSFORMED AMERICA* (2005).

257. Supplemental and Reply Brief for Defendant in Error on Rehearing, *Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 61423133).

258. For a fuller analysis of the contents of the scientific brief in *Buchanan v. Warley*, see Hovenkamp, *supra* note 13, at 659–64.

259. See BENJAMIN A. GOULD, *INVESTIGATIONS IN THE MILITARY AND ANTHROPOLOGICAL STATISTICS OF AMERICAN SOLDIERS* 471 (1869).

260. See, e.g., ALEXANDER H. SHANNON, *RACIAL INTEGRITY AND OTHER FEATURES OF THE NEGRO* 21–22 (1907); James Bryce, *Thoughts on the Negro Problem*, 153 *NORTH AM. REV.* 641, 643–44, 651 (1891). Bryce later became British Ambassador to the United States. On Bryce's scientific racism, see MARILYN LAKE & HENRY REYNOLDS, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY* 49–74 (2008).

261. William D. Zabel, *Interracial Marriage and the Law*, in *INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE AND LAW* 54, 56 (Werner Sollors ed., 2000); Carter G. Woodson, *The Beginnings of the Miscegenation of the Whites and Blacks*, 3 *J. NEGRO HIST.* 335, 339–41 (1918); see also NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 40–43 (2000) (noting that most colonies prohibited either marriage or sexual relations between a white person and an Afro-American); RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 19 (2001).

262. See James R. Browning, *Anti-Miscegenation Laws in the United States*, 1 *DUKE BAR J.* 26, 31 (1951).

263. Tom Head, *Interracial Marriage Laws History & Timeline*, THOUGHTCO (Aug. 12, 2017), <https://www.thoughtco.com/interracial-marriage-laws-721611>. For a good history focusing on the south, see generally Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia 1860s–1960*, 70 *CHI. KENT L. REV.* 371 (1994); Kevin Brown, *The Enduring Integration School Desegregation Helped to Produce*, 67 *CASE WESTERN RES. L. REV.* 1055 (2017).

Progressive initiative, although contemporary racial science certainly served to strengthen long-held prejudices.

One set of practices that did develop during the Progressive Era was widespread, mandatory sterilization of certain criminals and, more significantly, people who were deemed “defective” but had never been convicted of a crime. As noted previously, these statutes and procedures were a product of Gilded Age racial science and eugenics. However, it is equally clear that support for them was widespread and hardly limited to Progressives. For example, Supreme Court Justices who opposed most Progressive labor-protective legislation supported compulsory sterilization.<sup>264</sup>

The remaining set of racially exclusionary statutes were the immigration acts, particularly the Act of 1924.<sup>265</sup> The history of racial exclusion under immigration acts actually goes back to the early National Period. The Naturalization Act of 1790 permitted entry and naturalization to any “free white person.”<sup>266</sup> The Naturalization Act of 1870, enacted in the wake of the Civil War Amendments, provided that “the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent.”<sup>267</sup> Other non-whites were not mentioned.<sup>268</sup> The Page Act of 1875 first introduced explicit exclusion of Asians.<sup>269</sup> Ostensibly, the statute was directed at people from “China, Japan, or any Oriental country” who were coming into the United States under peonage contracts or who were being imported for “lewd or immoral purposes.”<sup>270</sup> That is, the explicit purpose of the statute was not so much to exclude Asians per se, but rather to combat the practice of luring Asian immigrants into the country with passage to be paid for by service in the United States. The provisions paralleled those of the Anti-Peonage Act of 1867,<sup>271</sup> and were intended in part to enforce the involuntary servitude provisions of the Thirteenth Amendment. The statute also made it unlawful for persons to immigrate if they had a criminal record in their own country. The Chinese Exclusion Act of 1882 explicitly barred Chinese immigration, at least if those immigrating were laborers.<sup>272</sup> Under it, “the coming of Chinese laborers to the United States . . . [was] suspended.”<sup>273</sup>

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264. See *supra* text accompanying notes 134–36.

265. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

266. Naturalization Act of 1790, ch. 3, 1 Stat 103 § 1.

267. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

268. *Id.*

269. Page Act, ch. 141, 18 Stat. 477, 477 (1875).

270. *Id.* § 1.

271. Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 42 U.S.C. § 1994 (2012)); see also *Bailey v. Alabama*, 219 U.S. 219, 240–42 (1911) (linking the anti-peonage act to the Thirteenth Amendment).

272. Chinese Exclusion Act, ch. 126, 22 Stat. 58, 58–59 (May 6, 1882); see also LON KURASHIGE, *TWO FACES OF EXCLUSION: THE UNTOLD HISTORY OF ANTI-ASIAN RACISM IN THE UNITED STATES* 62–85 (2016).

273. § 1, 22 Stat. 58–59. More specifically, the Act decreed:

That from and after the expiration of ninety days after the passage of this act . . . the coming of Chinese laborers to the United States be, and . . . is

One exclusionary statute passed during the Progressive Era was the Immigration Act of 1917, which required a literacy test for immigrants and barred most Asian laborers. Significantly, Progressive President Wilson vetoed the bill twice, but was eventually overridden by Congress.<sup>274</sup> His veto message on the first bill described the Act—particularly its literacy test and quotas—as a distinct departure from a long American tradition of generally open immigration:

[The bill] seeks to all but close entirely the gates of asylum which have always been open to those who could find nowhere else the right and opportunity of constitutional agitation for what they conceived to be the natural and inalienable rights of men; and it excludes those to whom the opportunities of elementary education have been denied, without regard to their character, their purposes, or their natural capacity.<sup>275</sup>

In sharp contrast, anti-Progressive Presidents Harding and later Coolidge both favored stronger and explicitly race-based restrictions. The Immigration Act of 1921, also known as the Emergency Quota Act, was passed early in Harding's term. The Act employed a quota system that strongly favored Western European immigrants over those from Eastern and Southern Europe or non-European countries.<sup>276</sup> While he was Harding's Vice President, Coolidge had written a popular article in *Good Housekeeping* magazine entitled *Whose Country is This?* Coolidge argued that America must be kept "American." Biological laws, he argued, showed that Nordics "deteriorate" when mixed with other races.<sup>277</sup>

President Harding did not live to see the statute he really wanted enacted. The Immigration Act of 1924, known as the Johnson–Reed Act, was signed by his successor, Calvin Coolidge, six months after Harding's death.<sup>278</sup> That statute made the quotas in the 1921 Act permanent, and also limited the annual number of immigrants from any country to 2% of the number who were already living in the United States in 1890, 35 years prior to the statute's passage. The choice of 1890 as a base year might seem peculiar, but its purpose was undoubtedly that the quotas not reflect the large numbers of Southern European immigrants that came in after 1890.

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hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States.

*Id.*

274. Immigration Act of 1917, ch. 29, 39 Stat. 874, 876–77.

275. John Wooley & Gerhard Peters, *Woodrow Wilson: Veto Message January 28, 1915*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=65386> (last visited Sept. 23, 2017).

276. For a detailed discussion of the debates leading up to this statute and the 1924 Act, see generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM: 1860–1925*, at 300–25 (1955). Probably the most popular contemporary defense of race restricted immigration was MADISON GRANT, *THE PASSING OF THE GREAT RACE: OR, THE RACIAL BASIS OF EUROPEAN HISTORY* (1916).

277. Calvin Coolidge, *Whose Country is This?*, *GOOD HOUSEKEEPING*, Feb. 1921, at 13, 14 ("Biological laws tell us certain divergent people will not mix or blend. The Nordics propagate themselves successfully. With other races, the outcome shows deterioration on both sides."); see also DANIEL J. KEVLES, *supra* note 127, at 97.

278. Immigration Act of 1924, ch. 190, 43 Stat. 153.

The quota system strongly favored immigration from Northern Europe and the UK, because that was where most people had immigrated from before that time. The statute also forbade immigration by any person who was otherwise barred from pursuing citizenship by virtue of race or nationality. At the time, existing law prohibited most Asians, including Chinese and Japanese, from obtaining citizenship. As a result, under the 1924 Act they were not permitted to immigrate either.

To summarize, while Progressivism's idea of a more active state might have become an aggressive tool for expressing racist ideology, the actual legislative record does not indicate that legislation promoting racial exclusion or sterilization of the unfit was uniquely or even substantially Progressive in its origins. Most of the sources lay elsewhere.

### V. PROGRESSIVES AND THE NATURE/NURTURE CONTROVERSY

When thinking about the Progressives, or any other movement for that matter, it is important to distinguish the ideas they inherited from those they developed for themselves. The first generation of Progressives inherited scientific racism and did little to lift themselves out of it, although there were some important exceptions.<sup>279</sup> Before long, however, Progressives began to develop less historicist and more environmentalist conceptions of human nature.<sup>280</sup> To be sure, neither they nor anyone else ever came close to eradicating racism from American society. Nevertheless, through a gradual process, the social science of the 1910s and after undermined the scientific basis for genetically exclusive, natural-science driven views about human intelligence and capacity. These views were distinctly Progressive in that they were not simply borrowed from the scientific theories of the Gilded Age and earlier. They began to have an important impact on the public law of race relations in the 1940s.

Just as marginalism in economics, environmentalist theories in the social sciences carried few preconceptions about the quality or origins of behavior other than that it be valuable to the person making the choice.<sup>281</sup> Both economic marginalism and environmentalist social science reflected a strong opposition to historicism, or the idea that who we are is completely controlled by our pasts.<sup>282</sup> By contrast, Gilded Age racial determinism was strongly historicist, built on the proposition that the past controls our character and destiny, and that pasts are unchangeable. To a significant extent, that was also true of classical political economy, which saw value as a function of past decisions.

The high point of historicism in American public law was the Supreme Court's decision in *Plessy v. Ferguson*. In upholding the separate-but-equal segregation statute for passenger railroads, the Court observed that the constitutional argument against the statute "assumes that social prejudices may be overcome by

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279. See *supra* text accompanying notes 5–8.

280. See *infra* text accompanying notes 282–345.

281. See HOVENKAMP, *supra* note 15, at 16.

282. See *id.* at 26–27, 82–84. On the powerful influence of historicism in Gilded Age legal thought, see generally DAVID M. RABBAN, *LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (2013).

legislation, and that equal rights cannot be secured . . . except by an enforced commingling of the two races.”<sup>283</sup> This argument, which would be played out repeatedly in the segregationist writings of the South, was that racial social relations were the product of long-developed custom and could never be changed in the twinkling of an eye by legislation.<sup>284</sup>

Likeminded historicist voices of the era, such as James Coolidge Carter, William Graham Sumner, and Thomas M. Cooley, were devoted to this proposition. Carter steadfastly opposed codification, or displacement of the common law by statutes. His most important book, posthumously published as *Law, its Origin, Growth and Function*, argued that historical practice as reflected in the common law was an inexorable result of human custom and instinct, which legislation was powerless to change.<sup>285</sup> Yale political economist William Graham Sumner reflected that view in his more popular book, *Folkways*.<sup>286</sup> Sumner’s theme, that “Folkways are not Stateways,” argued that legislation that attempts to change long-held values and beliefs will simply fail. Legal scholar and Michigan Supreme Court Justice Thomas M. Cooley, one of the Gilded Age architects of substantive due process, protested the use of legislation to induce economic change because it would be “casting overboard the wisdom of experience,” substituting “the winds of mere speculative abstractions.”<sup>287</sup> By contrast, the common law develops out of “the nature of the people themselves” as an “outgrowth of their habits of thought and action.”<sup>288</sup>

The historicist position reflected the principal noneconomic objection to the Progressive agenda favoring increased regulation and worker protection statutes: that nearly all of it was accomplished by legislation. Because of its instantaneous and broadly revisionist nature, legislation was capable of dismissing years of social and judicial experience with one pen stroke. To be sure, the *Plessy* separate-but-equal statute was legislation, but Justice Brown’s opinion for the Court saw it as something far different than the legislation contemplated by Progressives. For Justice Brown, Jim Crow statutes were nothing more than a reflection of long-held southern values. They were designed to preserve the status quo, not to change it.

As far as the nature/nurture controversy was concerned, that Progressives would choose nurture was methodologically inevitable. Their forward-looking theory of value precluded any other choice. In his book *History of Economic Analysis*, Joseph Schumpeter conceded as much, but he nevertheless castigated

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283. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

284. See HOVENKAMP, *supra* note 15, at 26–27.

285. JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN, GROWTH, AND FUNCTION* 24–25 (1907).

286. WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMERS, MORES, AND MORALS* 55–57 (1906).

287. Thomas M. Cooley, *Sources of Inspiration in Legal Pursuits*, 9 *WESTERN JURIST* 515, 517 (1875).

288. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 21 (Boston, Little, Brown, & Co. 1868).

marginalism for finding arguments from nature and heredity to be unimportant.<sup>289</sup> As he put it, marginalist “economists, who are or should be vitally interested in the range of variation of individual ‘abilities’ and in the question of their inheritance, are but mildly interested in the specifically racist aspect of the latter.”<sup>290</sup> Schumpeter himself had relatively little to say about the subject of genetics or eugenics, although he was sympathetic with some parts of the eugenics agenda. For example, in 1941 he suggested that the urge to procreate produced a bias against people of higher intelligence. “The men and women who want to do something in this life don’t want children in the next room. They will be the ones to restrict families first.”<sup>291</sup>

In addition to marginalist economics, two of Progressivism’s most important intellectual contributions were cultural relativism and behaviorism. The former developed mainly within anthropology and the latter in psychology. Both spread to other disciplines and, at least in the case of cultural relativism, more broadly to ethics and religion. Using cultural relativism as a foil, conservatives branded progressivism in the 1930s and after as an ideology without values.<sup>292</sup> For example, for Protestant liberalism—the strongest expression of cultural relativism in religion at the time—all beliefs and values were culturally derived and equally legitimate, provided that they did not harm others.<sup>293</sup> That is, progressive Christianity came to embrace inclusion to the extreme.<sup>294</sup>

#### A. Cultural Relativism

The person most identified with cultural relativism in anthropology was German born Franz Boas, whose book *The Mind of Primitive Man* was published in 1911, a dozen years after he became a professor of anthropology at Columbia University.<sup>295</sup> By that time, Boas had been studying human culture for more than 20 years, after an early career in geography and physics and 10 years as a museum curator at the Smithsonian. He was in his early 50s when *Primitive Man* was published.<sup>296</sup>

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289. JOSEPH SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 757–59 (Elizabeth Booddy Schumpeter ed., 1986) (1954).

290. *Id.* at 759.

291. Joseph Schumpeter, *An Economic Interpretation of Our Time: The Lowell Lectures*, in THE ECONOMICS AND SOCIOLOGY OF CAPITALISM 377 (Richard Swedberg ed., 1991).

292. See e.g., ANDRE FEFFER, THE CHICAGO PRAGMATISTS AND AMERICAN PROGRESSIVISM 10–11 (1993).

293. GARY DORRIEN, THE MAKING OF AMERICAN LIBERAL THEOLOGY: CRISIS, IRONY, AND POSTMODERNITY, 1950–2005, at 139–40 (2006).

294. See MILAN ZAFROVSKI, LIBERAL MODERNITY AND ITS ADVERSARIES: FREEDOM, LIBERALISM AND ANTI-LIBERALISM IN THE 21ST CENTURY 507–08 (2007).

295. FRANZ BOAS, THE MIND OF PRIMITIVE MAN (1911).

296. For biographical information on Boas and more on his influence, see VERNON J. WILLIAMS JR., RETHINKING RACE: FRANZ BOAS AND HIS CONTEMPORARIES (1996); DOUGLAS COLE, FRANZ BOAS: THE EARLY YEARS, 1858–1906 (1999); George Stocking, Jr.,



Each chapter of Boas's book dismantled a particular aspect of scientific racism. His opening chapter, entitled *Racial Prejudices*, completely undermined the notion of earlier evolutionary anthropologists that evolution had been a more-or-less linear progression with Aryan northern Europeans at the culmination. Even a minimal knowledge of history revealed that the world had experienced many periods in which non-Aryan groups such as the Chinese had developed advanced civilizations and culture. In fact, "[s]everal races have developed a civilization of a type similar to the one from which our own had its origins."<sup>297</sup> He also attacked the view that a correlation exists between intelligence and brain weight,<sup>298</sup> and argued that there was no observable correlation between race and intelligence.<sup>299</sup>

In a second chapter, entitled *Influence of Environment Upon Human Types*, Boas argued that environmental factors dominated inheritance in determining human typology. He believed that one of the biggest factors in determining which tribes or cultures were "primitive" and which were more advanced was the degree of interaction with other tribes or cultures.<sup>300</sup> Further, "retarding" influences in the environment inevitably affected the extent of total human development. For example, children who are afflicted with disease or other adverse circumstances at an early age might develop out of these conditions, but their total development would generally be less than the development of a child raised in healthier circumstances.<sup>301</sup> "Illness in early childhood, malnutrition, lack of fresh air and physical exercise, are so many retarding causes, which bring it about that the growing individual of a certain age is in its physiological development younger than the healthy, well-nourished individual . . ."<sup>302</sup>

Boas could not find "any example in which the influence of [natural] selection has been proved beyond cavil." However, he was "able to demonstrate the existence of a direct influence of environment upon the bodily form of man . . ."<sup>303</sup> Apropos of this, he was able to show significant differences in body type between first- and second-generation immigrants to the United States and the peoples from which they had come.<sup>304</sup> The longer the time period since immigration, the more noticeable these differences:<sup>305</sup>

We are thus led to the conclusion that environment has an important effect upon the anatomical structure and physiological functions of man; and that for this reason differences of type and action between primitive and civilized groups of the same race must be expected.<sup>306</sup>

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*Franz Boas and the Founding of the American Anthropological Association*, 62 AM. ANTHROPOLOGIST 1 (1960). Boas unfortunately lacks a biography of his complete life.

297. BOAS, *supra* note 295, at 16.

298. *Id.* at 18–29.

299. *Id.* at 120–25.

300. *Id.* at 43.

301. *Id.* at 48–49.

302. *Id.*

303. *Id.* at 52–53.

304. *Id.* at 54–55 (giving examples).

305. *Id.* at 55–57.

306. For example, he later observed:

It seems plausible that one of the most potent causes of these modifications must be looked for in the progressive domestication of man incident to the advance of civilization.<sup>307</sup>

Boas did not deny the influence of heredity. Indeed, he devoted an entire chapter to discussing its importance for human typology.<sup>308</sup> But he drew two important conclusions. First, that individual variations within a race were much more substantial than the differences between races.<sup>309</sup> Many characteristics identified as “racial” are nothing more than an expression of the varieties of individuals.<sup>310</sup> Second, the important differences resulted from a mixture of environmental and hereditary forces interacting with one another.

Boas blamed the then-prevalent idea of Aryan superiority on “the growth of modern nationalism, with its exaggerated self-admiration of the Teutonic race.” However, “these views are not supported by the results of unbiased research.”<sup>311</sup> He then devoted an entire chapter to dismantling the argument of earlier post-Darwinian anthropologists that the various races were going through “stages” of evolution, with Aryans at the most advanced stage.

In 1916, Boas published a withering attack on eugenics in the popular magazine *Scientific Monthly*. He noted that eugenics simply assumed that characteristics were inherited without making any serious attempt to distinguish genetic from environmental influences.<sup>312</sup> “If an individual possesses a desirable quality the development of which is wholly due to environmental causes, and that will not be repeated in the descendants, its selection will have no influence upon the following generations.”<sup>313</sup> As a result, it is “of fundamental importance to know what is hereditary and what not.”<sup>314</sup> Looking at the various studies of “defective

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It has also been claimed that lack of control is exhibited by primitive man in his outbursts of passion occasioned by slight provocations. I think that in this case also the difference in attitude of civilized man and of primitive man disappears if we give due weight to the social conditions in which the individual lives.

*Id.* at 108.

307. *Id.* at 75.

308. *Id.* at 76–94.

309. *Id.* at 94.

310. For example, on Afro-Americans, Boas concluded:

When we turn our attention to the negro problem as it presents itself in the United States, we must remember our previous considerations, in which we found that no proof of an inferiority of the negro type could be given, except that it seemed possible that perhaps the race would not produce quite so many men of highest genius as other races, while there was nothing at all that could be interpreted as suggesting any material difference in the mental capacity of the bulk of the negro population as compared to the bulk of the white population.

*Id.* at 268.

311. *Id.* at 174.

312. Franz Boas, *Eugenics*, 3 *SCI. MONTHLY* 471, 471–72 (1916).

313. *Id.* at 471.

314. *Id.*

families” such as the Jukes, he concluded that in every case more “favorable home surroundings” and “possession of adequate means of support against the abuse of alcohol” would certainly have changed the result.<sup>315</sup> In fact, “we know that in the great mass of a healthy population the social stimulus is infinitely more potent than the biological mechanism.”<sup>316</sup>

Boas was willing to live with the much less mathematically manageable world that environmentalist anthropology envisioned. As noted before, the eugenicists’ commitment to mathematics was driven mainly by a quest for scientific certainty. But the mathematics of genetic prediction applied only if there were no environmentalist “noise” affecting the results. As a result, eugenicists were forced to exclude environmental influences as inconsistent with the model. Allow them in, and everything becomes indeterminate. Boas additionally objected that even if heredity explained everything, the problem of indeterminacy would not go away. In particular, he contrasted humans and lower organisms:

If it is a question of breeding Indian corn or chickens, we know what we want. We desire a large yield of good corn, or many eggs of heavy weight. But what do we want in man? Is it physical excellence, mental ability, creative power, or artistic genius? We must select certain ideals that we want to raise. Considering then the fundamental differences in ideals of distinct types of civilization, have we a right to give our modern ideals the stamp of finality, and suppress what does not fit into our life?<sup>317</sup>

Boas’s numerous followers from the 1910s through the 1930s and after developed culture rather than natural science as the key to understanding human personality, temperament, and intelligence. For progressive social scientists, it would quickly become the dominant framework for understanding the human race.<sup>318</sup> Culturalists believed that habits, customs, beliefs, innovation, and even some physical characteristics migrated through a society through environmental influences, although inheritance remained relevant.<sup>319</sup> Further, there was no hierarchy. Each culture or cultural practice should be evaluated only by how well it served its own members. Already in 1909, Progressive pragmatist John Dewey could

315. *Id.* at 471, 473. On the Jukes, see *supra* text accompanying notes 68–70.

316. Boas, *supra* note 312, at 475–76.

317. *Id.* at 476.

318. Examples among Boas’s students include RUTH BENEDICT, *PATTERNS OF CULTURE* (1934); GILBERTO FREYRE, *THE MASTERS AND THE SLAVES: A STUDY IN THE DEVELOPMENT OF BRAZILIAN CIVILIZATION* (1933) (PORT.); MELVILLE HERSKOVITS, *THE AMERICAN NEGRO* (1928); MELVILLE HERSKOVITS, *THE MYTH OF THE NEGRO PAST* (1941); ALFRED L. KOEBER, *HANDBOOK OF THE INDIANS OF CALIFORNIA* (1925); ASHLEY MONTAGU, *MAN’S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (1942); EDWARD SAPIR, *LANGUAGE: AN INTRODUCTION TO THE STUDY OF SPEECH* (1921); *see also* GEORGE W. STOCKING, JR., *RACE, CULTURE, AND EVOLUTION: ESSAYS IN THE HISTORY OF ANTHROPOLOGY* (1968); VERNON J. WILLIAMS, JR., *RETHINKING RACE: FRANZ BOAS AND HIS CONTEMPORARIES* (1996).

319. On the numerous Progressive contemporaries to Boas who also argued for more environmentalist theories, see Kathy J. Cooke, *The Limits of Heredity: Nature and Nurture in American Eugenics Before 1915*, 31 J. HIST. BIOLOGY 263 (1998).

declare that “there is no inferior race, and the members of a race so-called should each have the same opportunities of social environment and personality as those of the more favored race.”<sup>320</sup> The comment is interesting. By speaking of a race “so-called,” Dewey indicated that he had already come around to what would be a central tenant of progressive anthropology and cultural relativism—namely, that race is nothing more than a mental construct.

### ***B. Behaviorism***

Coming from a very different place but reaching similar results was behaviorism in psychology, and later in sociology and other social sciences. John B. Watson, the founder of behaviorist psychology, spent most of his career at Johns Hopkins University. He began writing his radically anti-hereditarian views in the 1910s.<sup>321</sup> His magnum opus, *Behaviorism*, was published in 1925.<sup>322</sup> Justice Holmes read the book and recognized its importance, summarizing in a letter to Harold Laski that Watson was “preoccupied with resolving all our conduct into reflex reactions to stimuli.”<sup>323</sup>

Watson categorically dismissed eugenics and even heredity as a basis for understanding human nature, concluding that “one need not give very much weight to any of their present conclusions.”<sup>324</sup> He acknowledged that “black parents will bear black children,” but “these differences are relatively slight. They are due among other things to differences in the amount and kind of pigments in the skin.”<sup>325</sup> In an article written the same year, he concluded, “there is no such thing as an inheritance of capacity, talent, temperament, mental constitution and characteristics.”<sup>326</sup>

If eugenics went to the extreme of ignoring environmental influences in favor of inheritance, behaviorism tended toward the opposite extreme. Luther L. Bernard, one of the founders of modern sociology, concluded in 1924 that “[t]he naive partisanship of the biologists for . . . the eugenic program in sociology has sometimes been pathetic. It reveals equally an appalling ignorance of the facts of sociology and social psychology.”<sup>327</sup> In 1930, the first edition of the influential and heavily behaviorist *Encyclopaedia of the Social Sciences* proclaimed, “At birth human infants, regardless of their heredity, are as equal as Fords. . . . Each ready to

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320. John Dewey, *Address to National Negro Conference*, in 4 THE COLLECTED WORKS OF JOHN DEWEY 156, 157 (J.A. Boydston ed., 1976).

321. J.B. Watson, *Psychology as the Behaviorist Views It*, 20 PSYCHOL. REV. 158 (1913).

322. J.B. WATSON, BEHAVIORISM (Gregory A. Kimble ed., 2009) (1925).

323. Letter from Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, to Harold J. Laski (Nov. 23, 1928), in HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 1113 (Mark DeWolfe Howe ed., 1953).

324. J.B. WATSON, *supra* note 322.

325. *Id.* at 76.

326. J.B. Watson, *What the Nursery Has to Say About Instincts*, 32 PEDAGOGICAL SEMINARY & J. GENETIC PSYCHOL. 293, 294 (1925).

327. L.L. BERNARD, INSTINCT: A STUDY IN SOCIAL PSYCHOLOGY 12 (1924).

respond to its appropriate stimulus.”<sup>328</sup> The metaphor of new cars rolling off an assembly line was powerful. For all practical purposes, there were no differences among them.

Around 1920, sociology—also a very young discipline—began to embrace cultural relativism and environmentalism, rejecting the more racist views held by elders such as Edward A. Ross.<sup>329</sup> For example, William F. Ogburn, one of the most prominent sociologists of his era, wrote his book on *Social Change* in 1922.<sup>330</sup> He had nothing good to say about eugenics, repeatedly castigating it for overemphasizing biology at the expense of the environment in forming human social identities.<sup>331</sup> In a 1922 article, he attacked those who would use race as an explanation paradigm, arguing mainly that cultural change occurred much more rapidly than biological change.<sup>332</sup>

Finally, major changes in genetics itself served to undermine eugenics.<sup>333</sup> Most importantly, the Galton models were shown to be far too simple, and the complexities served to make selective breeding of humans completely impractical. Thomas Hunt Morgan, who later received the Nobel Prize for his work on chromosomes and heredity, argued in 1924 that social and economic inheritance were at least as important as biological inheritance in explaining mankind.<sup>334</sup> Writing in a popular journal on the relative influences of inheritance and environment he concluded:

The geneticist alone cannot hope to solve such a complex problem. The psychologist and the physiologist and the pathologist are needed, especially in the diagnosis of those characters that belong properly in their special fields. The failure of critical diagnosis accounts in large part for the disrepute into which some of the work on human mental traits has fallen.<sup>335</sup>

The nature/nurture controversy began in the 1910s and ran its course through the 1920s and 1930s. By the mid-1920s, eugenics had begun to lose its hold on the mainstream American academy. The disputes that dominated the nature/nurture debate included genetics and eugenics, mental testing, and the role of

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328. Horace M. Kallen, *Behaviorism*, in *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 498, 498 (Edwin R.A. Seligman & Alvin Johnson eds., 1930).

329. For an account, see CRAVENS, *supra* note 141, at 148–51.

330. WILLIAM F. OGBURN, *SOCIAL CHANGE WITH RESPECT TO CULTURE AND ORIGINAL NATURE* (1922).

331. *Id.* at 39, 338–39.

332. William F. Ogburn, *The Historical Method in the Analysis of Social Phenomena*, 16 *PUB. AM. SOC. SOC'Y* 70, 72 (1922).

333. See CRAVENS, *supra* note 141, 157–77.

334. Thomas Hunt Morgan, *Human Inheritance*, 58 *AM. NATURALIST* 385, 406–09 (1924).

335. *Id.* at 409.

instinct in human development.<sup>336</sup> In every area, the environmentalists achieved the upper hand in the mainstream scientific community.

Further, as the science of race and mental defect progressed away from Gilded Age genetic determinism, it was entirely progressives who led the legal way out. In fact, they did so very quickly after more environmentalist, nurture-based theories came to dominate the social sciences. The culmination was a dramatic turnaround in Supreme Court decision making on race, particularly in the 1944 “white primary” case and *Shelley v. Kraemer* in 1948. In the first of these, *Smith v. Allwright*, the Supreme Court overruled a ten-year-old decision,<sup>337</sup> voting 8–1 that an election primary for the Democratic Party in Texas that excluded Afro-Americans involved sufficient state action to warrant Equal Protection condemnation.<sup>338</sup> Justice Owen Roberts, the only dissenter, was the last surviving Hoover appointee. All the other eight Justices were appointed by Roosevelt.

Justice Roberts retired from the Court in 1945, and President Truman replaced him with Justice Harold Burton, a progressive Republican who had built his reputation as the reformist mayor of Cleveland. Four years later, the Supreme Court again reversed itself and unanimously held in *Shelley v. Kraemer* that the enforcement of private racially restrictive covenants invoked state action and violated the Equal Protection clause.<sup>339</sup> The *Shelley* Court was composed of eight Roosevelt appointees and one Truman appointee. From that point on, Democratic appointees led the way to *Brown v. Board of Education*. The most noteworthy Republican was Earl Warren—state Attorney General, Governor, and self-proclaimed progressive before he was appointed to the Court.<sup>340</sup> He was appointed by Republican President Eisenhower and led the most liberal Supreme Court in American history.

The social science expressed in Brandeis Briefs of race cases tracks similar changes. The first two social science briefs filed in race discrimination cases defended scientific racism and were presented in the *Berea College* case in 1908, and *Buchanan v. Warley* in 1917.<sup>341</sup> In the 1920s the NAACP turned that shield into a sword, however, using Brandeis Briefs to attack race discrimination in areas outside of housing.<sup>342</sup> In the 1940s, Thurgood Marshall adopted this strategy for

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336. All of these have been treated numerous times. See, e.g., STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (rev. and expanded ed. 1996); CRAVENS, *supra* note 141.

337. See *Grovey v. Townsend*, 295 U.S. 45, 55 (1935) (Texas’s Democratic Party’s restriction of primary voting to whites was merely a rule about private political party membership and did not involve state action).

338. *Smith v. Allwright*, 321 U.S. 659, 664–66 (1944).

339. *Shelley v. Kraemer*, 334 U.S. 1, 22–23 (1948) (overruling *Corrigan v. Buckley*, 271 U.S. 323, 331–32 (1926), which had found no state action, and thus no constitutional infirmity, in enforcement of private racially restrictive covenants).

340. See ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* (1997); Morton J. Horowitz, *In What Sense was the Warren Court Progressive?*, 4 WIDENER L. SYMP. J. 95, 95 (1999).

341. See *supra* text accompanying notes 244–50.

342. See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944); *Smith v. Texas*, 311 U.S. 128 (1940); *Powell v. Alabama*, 287 U.S. 45 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927);

desegregation cases, either through the NAACP directly or else through amicus briefs written by sympathetic third parties.<sup>343</sup> The brief he filed in *McGhee v. Sipes*,<sup>344</sup> a companion case to *Shelley v. Kraemer*, provided evidence about the dangers of urban segregation, racial exclusion, and the deteriorating quality of Afro-American housing. The NAACP's success in *Shelley* prompted it to rely on social science data much more strongly in *Brown v. Board of Education*.<sup>345</sup> *Shelley* was also the first time that the U.S. government filed an amicus brief in a civil rights case. Tom Clark, Attorney General under President Truman, filed the brief urging the court to prohibit the enforcement of private racially restrictive covenants.<sup>346</sup>

The social science briefs filed in the 1940s and 1950s race cases fall into two broad groups. The larger group simply looked at the impact of certain practices. For example, the amicus brief of the United States in *Shelley* contained data about the deteriorating condition of urban housing for racial minorities, relating it to the heavy presence of racially restrictive covenants that excluded Afro-Americans and sometimes Asians from better neighborhoods.<sup>347</sup> A smaller group of briefs addressed the problem of race and segregation more theoretically, relying heavily on scientific work done after the 1920s. One example of the latter was the amicus brief filed by the Congress of Industrial Organizations (“CIO”) in the *Shelley* case. It showed just how far cultural relativism had come in social science.<sup>348</sup> One subtitle in the CIO brief described Race as a “vague and abstract concept,” asserting that

[t]he range of physical variability in mankind has given rise to repeated attempts to classify peoples into groups with similar inherited characteristics. Yet these characteristics are not fundamentally distinct and are overshadowed by the essential

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see also MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 70–77 (1987). On the Brandeis Briefs in these cases, see Walter F. Murphy, Book Review, 73 *HARV. L. REV.* 1236 (1960) (reviewing ALAN F. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1958)).

343. The National Consumers' League did the same thing. See Clement E. Vose, *The National Consumers' League and the Brandeis Brief*, 1 *MIDWEST J. POL. SCI.* 267 (1957).

344. 334 U.S. 1 (1948); see also Brief for Petitioners at 41–71, *McGhee v. Sipes*, 334 U.S. 1 (1948) (No. 87), 1947 WL 30427.

345. Brief for Appellants, *Brown v. Bd. of Educ.* at 10–13, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1952 WL 47265; Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument, *Brown* at 21–31, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1953 WL 48699; see also PAUL L. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* (1972).

346. Brief for the United States as amicus curiae at 2, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87, 290, 291), 1947 WL 44159; Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960, an Oral History*, 100 *HARV. L. REV.* 817 (1987); see also JEFFREY D. GONDA, *UNJUST DEEDS: THE RESTRICTIVE COVENANT CASES AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* 145–48 (2015); RICHARD KLUGER, *SIMPLE JUSTICE* 252–53 (1st Vintage Books ed. 2004) (1971).

347. Brief for the United States as amicus curiae, *supra* note 346, at 28–39.

348. Brief Amicus Curiae on Behalf of the Congress of Industrial Organizations and Certain Affiliated Organizations at 20–22, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87, 290, 291), 1947 WL 44164.

uniformities of man morphologically. An individual's "race" cannot be determined with absolute certainty by his appearance. The variations in the physical appearance among "races" are not sharp and distinct but are a series of gradations.<sup>349</sup>

It continued:

This difficulty in definition is evident in the different racial classifications that have been made. Classifications have varied in accordance with the series of traits selected as race criteria, with the significance assigned to small differences by the observer, and with other fluctuations in observation. One anthropologist has pointed out that races are "creations of the investigator, and creations with regard to which all the creators are by no means in agreement."<sup>350</sup>

The brief then quoted a resolution of the American Anthropological Association from the late 1930s that "[a]nthropology provides no scientific basis for discrimination against any people on the ground of racial inferiority, religious affiliation, or linguistic heritage."<sup>351</sup>

The CIO is a labor organization that was intervening on behalf of plaintiffs in a housing discrimination case. Its position in *Shelley* deserves mention. Historically, many American labor unions had excluded Afro-Americans as well as some other racial minorities. Many of these unions formed into the American Federation of Labor ("AFL"), dominated by skilled trades and crafts. By contrast, the CIO was composed largely of unions representing unskilled or semi-skilled labor. For much of the 1930s and 1940s the two groups took different positions on racial exclusion and immigration.<sup>352</sup> While the AFL was exclusionary, the CIO became more acceptant of Afro-Americans and also refused to support aggressive campaigns to restrict immigration.<sup>353</sup> The two groups split over these issues in 1935, finally reuniting in 1955 after the AFL formally abandoned its policies of racial exclusion.<sup>354</sup>

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349. *Id.* (citing Wilton Marion Krogman, *The Concept of Race*, in *THE SCIENCE OF MAN AND THE WORLD CRISIS* 53 (Ralph Linton ed., 1945)).

350. *Id.* (quoting RALPH LINTON, *THE STUDY OF MAN* 39 (1936)).

351. *Id.* at 21 (quoting *The New York Meeting of the American Anthropological Association*, 89 *SCIENCE* 19, 29–30 (1930)).

352. See VERNON M. BRIGGS, JR., *IMMIGRATION AND AMERICAN UNIONISM* 116–20 (2001); Ron Jacobson & Kim Geron, *Unions and the Politics of Immigration*, *SOCIALISM & DEMOCRACY*, Nov. 2008, at 105, 111, 111 n.17.

353. See Michael Goldfield, *Race and the CIO: The Possibilities for Racial Egalitarianism During the 1930s and 1940s*, *INT'L LABOR WORKING-CLASS HIST.*, Fall 1993, at 1, 5–7.

354. Significantly, even as it was taking this position on racial and immigrant exclusion, the CIO was involved in campaigns for higher minimum wage laws. Julie Meyer, *Trade Union Plans for Post-War Reconstruction in the United States*, 11 *SOC. RESEARCH* 491, 498–99 (1944). As noted above, some have attempted to tie support for a legislative minimum wage and racial exclusion together, but that was not the case with the CIO in the 1940s.



### CONCLUSION

The American Progressives produced an outpouring of writing in economics and the social sciences, including law. This makes it easy for someone to pick and choose through the Progressive record and make a case for practically any proposition.

This fact places a premium on perspective and balance. Yes, many Progressives were racists, but how much did they inherit from their predecessors and what exactly did they contribute themselves? And what about contemporary non-Progressives, of which there were many? Progressives were no more racist than their non-Progressive contemporaries, and the dissenters from genetic natural science models were mainly Progressives. Speaking more generally, the historicist methodologies and perspectives that the early Progressives inherited were highly racist. By contrast, the later methodologies and perspectives that Progressives developed internally—namely, marginalism in economics and cultural relativism and behaviorism in the social sciences—were environmentalist almost to the point of rejecting genetic influences except for trivial things such as physical appearance.

To be sure, the Progressive conception of an active, legislative state imposed dangers because it could make mandatory or regulatory what had previously been a purely private choice. Nevertheless, no good *empirical* case can be made that racist legislation or legislation promoting sterilization of perceived mental defectives were distinctive products of Progressivism. Most of it came from a complex mixture of historical sources antedating the Civil War, found support among non-Progressives who opposed the active state in other areas, and in some cases, was promoted by anti-Progressives over the objections of Progressives.

The one place that Progressives made a unique and durable contribution to American policy about race and mental defect was in its pursuit of a way out—a process that remains unfinished to this day.