ACHIEVING OUR FUTURE IN THE AGE OF OBAMA?: LOCHNER, PROGRESSIVE CONSTITUTIONALISM, AND AFRICAN-AMERICAN PROGRESS

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Achieving Our Future in the Age of Obama?:
Lochner, Progressive Constitutionalism, and
African-American Progress*

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I. INTRODUCTION

On one account, the Supreme Court’s decision in the 1938 case, United States v. Carolene Products, created new constitutional space for “discrete and insular minorities” as an exemplary, even revolutionary, achievement of the New Deal Court.¹ This case represented “a new judicial acquiescence in the will of Congress. By extension, Carolene Products’ presumption of constitutionality would be afforded [to] state as well as federal laws.”² In response to that claim, this Article examines New Deal constitutionalism from a perspective that is shaped by the economic and social progress of African Americans and other outsiders. The outcome of this evaluation is crucially important to the resolution of the following dispute: whether progressive ideas and policies advance social and economic justice, or, alternatively, expand the subordinating power of special interest groups. As Part I suggests, New Deal constitutionalism, as exemplified by both its antecedents and progeny, rather than creating a defendable barrier against subjugation, appears to expand the power of government at the expense of African-American progress.

A. Truth and Progress

Contemporary citizens of the United States live in a dispiriting epoch

* This Article represents the Author’s remarks at the University of Pennsylvania Journal of Constitutional Law symposium titled FDR and Obama: Are There Constitutional Law Lessons from the New Deal for the Obama Administration?, held on January 20, 2012. The Article retains the informal tone of the presentation.

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² Weinberg, Unlikely Beginnings, supra note 1, at 291–92.
that is teeming with particularities. This era has seen the groundbreaking election of the first African-American President of the United States accompanied by: (1) a sharp rise in African-American unemployment, particularly among younger age groups, (2) the bracing claim that President Barack Obama’s reelection campaign lacks diversity, and (3) the charge that the Democratic National Committee awards few contracts to firms that are controlled by members of racial minority groups. Philosopher Chantal Delsol asserts that “[o]ne of the particularities of our time consists of the fear of truth. We hold dearly to the good, but we are suspicious of truth.” Nevertheless, ethics and ethical judgment persist in modern societies despite the putative “fading of religions, world system and ideologies, which are structures of truths.” Against this backdrop, Delsol contends that modern “man is no longer sure if the world is infinite, if there is life after death, or if human society can hope for perfection in this world.” Accompanying this angst, there is an ongoing dispute about whether the achievement of virtue reflects internal goods that scholars can examine independently of consequences, or whether the consequences of human endeavors embody society’s moral pivot point, particularly when debates about the possibility of attaining human and social progress in the defiantly modern age focus on the lives of people of color and women.

It is possible that the persistence of social and human difficulties signifies that progress, in some final collective sense, is a debilitating illusion. “Rather than witnessing the birth of a new world order premised on...
on the hopeful claim that ‘all human beings are born free and equal in dignity and rights,’ moderns have observed a world order that features ‘a morass of moral ambiguity and expediency.’” The New Deal and its antecedent, the Progressive Era, embody a sprawling search for human perfection provoked by the belief that scientific experimentation leads inescapably to national improvement. It seems clear that the effects of these currents on African Americans and other minorities bear analysis from both an ethical and a consequentialist perspective. This has implications for any description of past and future policy initiatives that are secured by a nation’s surrender to the demands of progress.

Such an inspection must consider the commitment of progressive theoreticians to law reform initiatives that were sustained by a dedication to presumptions, such as the innate inferiority of women, scientific forms of racism, and the need “to cleanse society through programs that mandate[d] the compulsory evisceration of the reproductive capacity of individuals that were seen as ‘impure’ or ‘defective.’” From a perspective that is refracted through the prism of the economic and social progress of African Americans, the implications of such an examination are pertinent to an intelligible examination of New Deal constitutionalism and its progeny. It is likely that a principled refraction—one informed by the experience of African Americans and an assessment of the consequences of progressive ideology—should lead to a highly skeptical appraisal of elitist movements that are sheltered by the language of progress and the national interest. Equally clear, such an assessment should also question the claims of Supreme Court Justices who maintain that the Court’s protection of liberty of contract in *Lochner v. New York* “rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.”

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12. Id. (citations omitted).


15. See infra Parts II, III, IV.

16. See infra Parts II, III, IV.

B. Progressive Architecture and the Search for a Radiant Future

Today’s exploration examines an effort in the United States to fashion a radiant future instantiated by New Deal constitutionalism. This Article responds to Professor Weinberg’s rather elegant contention that a revolution in thinking occurred during the New Deal when the Court in Carolene Products presumably carved out new constitutional space for “discrete and insular minorities” in a footnote as part of its embrace of government control of interstate shipments of filled milk. It is also possible that this examination will have implications for the Obama administration’s regulatory agenda and the President’s future confrontation with the current Supreme Court. On a provisional level, confrontation is doubtful, because the Court seems predisposed to take a deferential view toward progressive legislation that President Obama favors. Moreover, the Court has previously interpreted the Constitution according to judicially-determined evolving standards of decency consistent with the notion that the Framers of the Constitution created a living document that responds to the insistent demands of progress. As demonstrated in case law, the Court’s prior surrender to postmodern heuristics and hermeneutics give substance to the claim that neither the text nor the actual desires of the members of the populous have much meaning or importance when it comes to constitutional


18. Professor Weinberg was a lead presenter at a conference on January 20, 2012, sponsored by The University of Pennsylvania Law School, entitled FDR and Obama: Are There Constitutional Lessons to Be Learned from the New Deal for the Obama Administration?.


20. Carolene Prods., 304 U.S. at 144 (representing a full surrender to anti-Lochnerism and the demise of substantive due process that assumed prominence thirty years after the Supreme Court’s decision in Lochner v. New York, 198 U.S. 45 (1905)).


23. Jack M. Balkin, Living Originalism 154–55 (2011) (discussing commerce as intercourse, which, in his view, enables the Supreme Court to work around older cases without overruling them explicitly as part of the federal courts’ evolutionary form of common law decision-making that enables human progress). Evidently, the Supreme Court has for quite some time generally deferred to legislative innovation. See, e.g., David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform 1 (2011) [hereinafter Bernstein, Rehabilitating Lochner]. Lochner was an outlier opinion, and the Supreme Court quickly limited this opinion to its facts. Id.

24. See, e.g., Roper, 543 U.S. at 563 (suggesting that the Constitution ought to be interpreted according to judicially determined evolving standards of decency).
Whether or not the current Court reconfigures the original public meaning of the text of the Constitution, the Court’s dedication to the needs of an ever-expanding state may prevent a truthful and complete examination of the legislation, so long as the legislation supports formal equality. This seems particularly true when such legislation claims to advance social justice through regulations pertaining to public health and labor.

Equating “active government with good government,” some observers concede that while the New Deal is inconsistent with the Framers’ interpretation of the Constitution, its legitimacy is tied to “a quasi-revolutionary ‘constitutional moment,’ which actually amended the Constitution outside of the Article V amendment process.” Other New Deal apologists abstain from deciding whether compliance with the formal amendment process is required; they contend that legislative innovation was part of a necessary program that functions dependably with the underlying principles and original meaning of the Constitution. Consequently, the New Deal consists of a series of new constitutional constructions by the political branches that the federal judiciary ultimately ratified. These claims and sentiments form a sturdy plinth that precludes the Supreme Court from impinging on progressive policies.

Progressive architecture, whether or not derived from the New Deal, must confront a growing critique from a number of scholars. As demonstrated in Part II, progressives’ policies, whether triggered by

25. Id. at 608–10 (Scalia, J., dissenting).
26. See Balkin, supra note 23, at 12 (citing Scalia’s reliance on nonoriginalist precedents despite his asserted commitment to an originalist conception of the Constitution).
27. See id. at 138–39 (asserting that the rise of the modern state poses problems for originalist judges and scholars and that accepting the New Deal as settled law solves these problems).
29. Balkin, supra note 23, at 139.
30. See id.
31. Id.
32. See infra Part IV.
intentional or inadvertent animus, have repeatedly enlarged human subordination, despite the surface commitment of some progressives to the anti-subordination principle ostensibly contained within employee-protective law.\textsuperscript{34} Offering a stalwart defense of New Deal policy, contemporary progressives have refrained from a principled analysis of the consequences of statutes from the Great Depression Era.\textsuperscript{35} For instance, progressives have failed to consider the Davis–Bacon Act of 1931, legislation that supporters contended was necessary to prevent defective workers (African Americans) from taking jobs from white union men\textsuperscript{36} who were seen as more deserving.\textsuperscript{37} From a constitutional perspective, progressives legitimate their support for a regulatory state by an expansive conception of the Commerce Clause,\textsuperscript{38} a capacious conception of the Necessary and Proper Clause,\textsuperscript{39} or a broad conception of a state’s police power.\textsuperscript{40}

Whether or not constrained by a quest for accurate analysis, constitutional observers agree that the Roosevelt administration forged fundamental change in government policy during the 1930s despite some opposition from the Supreme Court.\textsuperscript{41} The evolving progressive iconography


\textsuperscript{35} See, e.g., BERNSTEIN, ONLY ONE PLACE OF REDRESS, supra note 33, at 105–09 (disputing the claims of contemporary progressives, including those of Bruce K. Ackerman).


\textsuperscript{37} Id. at 400.

\textsuperscript{38} See, e.g., NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37–38 (1937) (holding for the first time that Congress could regulate the labor relations of manufacturers and their workers because labor strife affected interstate commerce by obstructing the flow of manufactured goods bound for interstate market).


\textsuperscript{40} See, e.g., W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (sustaining a state minimum wage law for women against a substantive due process claim under the Fourteenth Amendment on the grounds that it was a legitimate exercise of the state police power); Nebbia v. New York, 291 U.S. 502 (1934) (sustaining state legislation setting minimum prices for the retail sale of milk on grounds that this was a legitimate exercise of the state’s police power); Buck v. Bell, 274 U.S. 200 (1927) (upholding state power to engage in eugenics on grounds of health).

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of President Franklin D. Roosevelt (FDR) shaped the pursuit of fundamental change in government policy. This progressive shift developed during his service as Assistant Secretary of the Navy. FDR’s “immediate boss, patron and mentor, was the famed progressive newspaperman Josephus Daniels. As both secretary of the navy and a journalist, Daniels represented all of the bizarre contradictions . . . of the progressive movement.” Daniels was a deeply committed progressive reformer and a wide-ranging racist whose North Carolina newspapers regularly published profoundly offensive cartoons and editorials about blacks. As discussed in this Article, the life of Daniels represents an unfortunate, but essentially intact, metaphor for progressive values.

Although the New Deal Era was the most important and wide-ranging period of constitutional change since the Civil War, the events that catalyzed the New Deal were echoed more recently by the economic and financial collapse of 2008 that sparked President Obama’s current efforts to save capitalism in the United States. In this regard, three things are worth noting. First, President Obama’s recovery plans, taken together, will “leave the government permanently bigger, more costly, and more intrusive[.]” Second, his approach to the current crisis recalls the efforts of his predecessor and model, FDR. Third, and finally, such efforts are marred by contradiction. Despite President Obama’s efforts and in spite of sporadic evidence that the United States is beginning to emerge from one of the most devastating economic downturns in its history, workers in the United States, African Americans included, must tackle anxiety. That


43. Id. at 126.

44. Id.

45. Id.

46. Somin, supra note 41, at 602.


48. Id.


50. Id.

51. See infra Part IV.

anxiety is elevated by allegations of falling or stagnant wages, increasing employment uncertainty, and growing disparities in African-American versus Caucasian unemployment rates.\(^{53}\) Amidst recent evidence that the latter trend has accelerated,\(^{54}\) the pertinent question today is whether the fundamental change offered by the Obama administration will lead to consequences similar to those that plagued the New Deal. It is, therefore, a propitious time to consider whether the constitutional law and policy implications drawn from the New Deal offer a secure foundation for questioning various Obama administration initiatives that are tied to progressive teleology.\(^{55}\)

Before elaborating, this Article offers four hypotheses. First, defining New Deal constitutionalism within the domain of civil liberties and civil rights in terms that all can agree on is problematic.\(^{56}\) But, building on Professor Risa Goluboff’s comprehensive analysis, New Deal constitutionalism involves a whole constellation of issues that include civil

<table>
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<th>White</th>
<th>Nonwhite</th>
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<td>1890–1930 (average)</td>
<td>5.82%</td>
<td>5.90%</td>
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<tr>
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<td>2011</td>
<td>7.5%</td>
<td>15.8%</td>
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\(^{53}\) RICHARD VEDDER & LOWELL GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA 272–79 (1993) (showing that racial differences in terms of unemployment rates were essentially nonexistent between the period from 1890 and 1930; however, during the 1930s, the federal government’s legislative and regulatory initiatives were aimed at raising wages for workers, but actually widened the unemployment gap between African-American and white workers and contributed to increased income inequality). The following table illustrates the widening gap. See id. at 272. In a more recent report, Steven Pitts of the UC Berkeley Labor Center shows that while African-American unemployment rose from 14.9% to 15.8% during the period after June 2009, white unemployment fell from 8.7% to 7.5%. See CTR. FOR LABOR RESEARCH & EDUC. ET AL., BLACK WORKER UNEMPLOYMENT MUCH HIGHER THAN NATIONAL AVERAGE IN 2011 (2012), available at http://laborcenter.berkeley.edu/press/release_jan12.shtml.


\(^{55}\) See infra Parts II, III, IV.

\(^{56}\) See MACINTYRE, supra note 9, at 226 (explaining how a large part of contemporary moral and philosophical debates in the United States have an “interminable and unsettable character” that impedes the ability for consensus). See id.
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rights, civil liberties, and labor rights,\textsuperscript{57} as well as executive and legislative responses to claims of oppression within the boundaries provided by the bureaucratic state.\textsuperscript{58} Sanctioning “a far more robust role for the federal government as protector and provider,” the end of Lochnerian jurisprudence and its non-deferential approach to judicial review destabilized established understandings of civil rights.\textsuperscript{59} \textit{Lochner} came to exemplify Progressive Era reformers’ hostility to liberty of contract jurisprudence.\textsuperscript{60} The Supreme Court’s occasional invalidation of reformist legislation led to hostility.\textsuperscript{61} But, as a raft of recent scholarship shows, the end of Lochnerian jurisprudence is not without risk to marginalized citizens in the United States.\textsuperscript{62} Second, progressive constitutionalism, however undefinable, can be distinguished from conservative theories of constitutional interpretation, such as originalism or judicial restraint.\textsuperscript{63} Third, this Article’s approach is largely consequentialist and contextual in nature, concentrating on the effects of progressive constitutionalism for members of disadvantaged groups. Lastly, this Article accepts the claim that many theories regarding the growth of

\textsuperscript{57} Risa Goluboff, \textit{The Lost Promise of Civil Rights} 111 (2007) (describing the civil rights work of the Department of Justice as including an emphasis on such “fundamental rights” as New Deal rights, the rights of organized labor, and the related First Amendment rights of free speech and assembly).

\textsuperscript{58} \textit{Id.} at 1–15 (describing the indifference of the FDR administration toward the subordination of African Americans).

\textsuperscript{59} \textit{Id.} at 22. In \textit{Lochner}, the Supreme Court established that a state legislature was perfectly free to regulate the hours of bakers in order to protect their health. \textit{Lochner} v. New York, 198 U.S. 45 (1905); Nelson Lund & John O. McGinnis, \textit{Lawrence v. Texas and Judicial Hubris}, 102 Mich. L. Rev. 1555, 1564 (2004) (discussing \textit{Lochner}). However, the majority assumed it would be unconstitutional to regulate bakers’ hours in order to protect their unions, or otherwise to enhance their bargaining power vis-à-vis their employers. \textit{See id.}

\textsuperscript{60} Bernstein, \textit{Rehabilitating Lochner}, supra note 23, at 2.

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{See, e.g.}, \textit{id.} at 3 (showing that Lochnerianism as exemplified by liberty of contract jurisprudence often had an ambiguous or even clearly “pro-poor” distributive consequences).

government point to the ability of governments to exploit periods of crisis, especially those massive enough to engender constitutional change, in order to “expand their powers beyond what is necessary to resolve the crisis at hand.”

Constitutional changes, during periods of crisis, often provide an opportunity to redistribute power and wealth to powerful interest groups—Big Business, Big Labor, and Big Lobbyists—which consequently disfavor truly disadvantaged citizens.

With these caveats in mind, this Article argues that the chief weakness of New Deal constitutionalism is that it set the stage for an expansionist state, including New Deal regulatory legislation that is provoked by the deeply paradoxical demands of progress. It is likely that legislative innovation, often sheltered by a commitment to formal equality and progress, has had a disproportionately adverse effect on the well-being of African Americans. Historically, progressive teleology originated, in policymakers’ extensive commitment to an unconstrained conception of majoritarian paternalism that was amply fortified by blithe self-confidence in their capacity to design effective policies in combination with a dangerous faith in the benevolence of the State and its agents. Congruent with this intuition, President Roosevelt’s brash insistence on raising the price of labor during the Great Depression (1) increased unemployment and human suffering, and (2) widened the unemployment gap between blacks and

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64. Somin, supra note 41, at 599.


66. See id. at 51–52.

67. BERNSTEIN, ONLY ONE PLACE OF REDRESS, supra note 33, at 103 (showing, for example, that the Agricultural Adjustment Acts reimbursed white planters for taking land out of production, causing many owners to evict African-American tenant farmers from their land).

68. Bernstein & Leonard, supra note 33, at 179 (progressives were “simultaneously conservative and liberal . . . . Their liberal (progressive) instincts led them to call for social justice, to uplift the poor and disenfranchised. Their conservative instincts led them to call for social control. . . . [Which led them to depict] many groups of poor workers as undeserving of uplift . . . .”) (first alteration in original).

69. See infra Part III.

70. As used in this Article, majoritarian paternalism refers to the attempt to clothe the economic, political, and social preferences of elites (policymakers, special interest groups, and others) in the cloak of democratic decision-making as part of a process that is ostensibly animated by the public interest. See, e.g., Hutchison, Waging War on the “Unfit”?, supra note 14, at 2–6 (drawing on the notion that law reform often reified by courts leans on heavily majoritarian paternalism to subjigate the disadvantaged among us on grounds of the public interest).

71. Id. at 4.

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whites. If the Obama administration replicates the missteps of the Roosevelt administration, including its overconfident faith in experts, and if the Obama administration strives to expand government power and influence premised on an expansive conception of the Commerce Clause, or a broad conception of the federal police power, the future of African Americans and others classified as outsiders is likely in further doubt. That is unless the courts are prepared to intervene.

Part II examines the rise of progressive constitutionalism and its consequent rejection of Lochnerism. Contradictory impulses led progressives to view minorities, such as African Americans, women, and other so-called “defectives,” as undeserving and unworthy of uplift. This intuition provoked the embrace of a “living Constitution,” which by one account simply means an evolutionary change in how judges and lawyers understood the text of the Constitution. Part III examines the New Deal and its origins, consequences, and ramifications for contemporary outsiders. Such ramifications strongly imply that New Deal constitutionalism cannot be seen as virtuous, and confirm that society has little hope for perfection. Hence, the acclaimed creation of new constitutional space for “discrete and insular minorities,” ironically enough, preserves ample space for exclusion and subordination. In Part IV, this Article considers the ramifications for African Americans caused by President Obama’s decision to build new programs and policies on the superstructure forged by FDR. The Article concludes that the current administration’s emphasis on centralization led by elite policymakers may unintentionally or inadvertently foster adverse consequences for disadvantaged Americans. Yet, such consequences are unlikely to prompt the Supreme Court to move from indifference toward redress in the current age.

73. See VEDDER & GALLAWAY, supra note 53, at 272–79 (showing that a previously non-existent gap grew over time such that the unemployment rate of African Americans is now double the unemployment rate of whites).

74. Sawyer, supra note 17, at 29–30 (describing the development of the federal police power as a way to solve collective action problems in the economy).

75. See infra Part IV.


77. BALKIN, supra note 23, at 6.

78. See infra Part III.

79. See infra Part IV.

80. See infra Part V.
II. THE RISE OF PROGRESSIVE CONSTITUTIONALISM AND THE RISE OF CONTRADICTION

Progressive constitutionalism reflects a commitment to certain presuppositions and fables. Presuppositions include a largely unrestrained reliance on experts and the consequent conclusion that the judgment of experts tied to prevailing pseudo-science, necessarily advance health, wealth, and morality in the United States. The development of progressive constitutionalism was grounded in pseudo-science, which was putatively tied to evolutionary thought and placed certain individuals and groups in specific and often highly racialized categories. Constitutional jurisprudence during the Progressive Era was epitomized in two Supreme Court decisions, Plessy v. Ferguson and Buck v. Bell. As discussed further, Justice Holmes’s opinion in Buck provided a sturdy platform for the advancement of progressive constitutionalism during the New Deal Era.85

A. Discovering Progressive Era Mythology

In order to understand how progressive policies adversely affect the lives of disadvantaged citizens in the United States, it is useful to reconsider the repellent mythology that supports both the Progressive and New Deal Eras. Scholars David E. Bernstein and Thomas C. Leonard explain progressive fables and the correlative consequences by showing that reformers committed to progressive ideology were:

[N]ot a one-dimensional band of “heroic liberals snatching helpless social science from the clutches of vile Social Darwinists.” The progressives were, in fact, simultaneously conservative and liberal. Moreover, many were enthusiastic biologizers, and most were elitist. Their liberal (progressive) instincts led them to call for social justice, to uplift the poor and disenfranchised. Their conservative instincts led them to call for social control, to impose order upon the causes of economic and social disorder. As elitists, the progressives believed that intellectuals should guide social and economic progress, a belief erected upon two subsidiary faiths: a faith in the disinterestedness and incorruptibility of the experts who would run the welfare state they envisioned, and a faith that

82. Id. at 1–19.
83. Plessy v. Ferguson, 163 U.S. 537 (1896).
84. Buck v. Bell, 274 U.S. 200 (1927); see infra Part II.B.
expertise could not only serve the social good, but also identify it.
. . . The reformers depicted the poor as victims in need of uplift but also as threats requiring social control. This fundamental tension was ultimately resolved by the appeal to hereditary fitness as a scientific basis for distinguishing workers worthy of uplift from workers who should be regarded as threats to the health and wellbeing of the economy and of society. 86

Consistent with these views, “progressives did, of course, advocate for labor . . .” and women’s rights. 87 At the same time, they “depicted many groups of poor workers as undeserving of uplift, indeed as the cause rather than the consequence of low wages[.],” and encouraged a version of economic and family life removing women from the work force such that women would be better able to meet the obligation of being the mothers of the race, and thus deferring to the male breadwinners. 88 “[P]rogressive economists and their reform allies offered uplift only to those groups they deemed deserving of work, arguing that in the name of social control the labor force should be rid of unfit workers: the immigrants, African Americans, women, and other ‘defectives.’” 89

With the exception of male Anglo-Saxon heads of household labor reform, progressive theorists “judged an impressive array of human groups, to be unworthy of work, or ‘unemployable.’” 90 Simply put, progressives classified all non-white males as well as all females as “unemployable,” or “unfit,” simply because “those workers . . . , owing to putative hereditary debility, earned less than what American reformers called a ‘living wage.’” 91 Consequently, employers who paid workers less than a living wage, as well as workers who received less than a living wage, were considered “parasites.” 92 “Parasites” consisted of Chinese immigrants who were inclined to work for lower wages and consequently displaced “native” (Anglo-Saxon) workers who were members of a race that was genetically predisposed to earn “American” wages; 93 Jews, who worked in Jewish sweatshops, which were nothing more than “the tragic penalty paid by that

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87. Id. at 180.
88. Id. (citation omitted).
89. Id.
90. Id.
91. Id.
93. Id.
ambitious race,’” and African Americans, who were seen as “‘indolent and fickle,’ which explained why slavery was defensible, even necessary . . .” Such wide-ranging myths led to the conclusion that these so-called “parasites” ought to be culled, as they were deemed threats to the well-being of the nation.

The instantiation of law reform initiatives provided a solution to health threats in the United States. This solution would eliminate “parasites” from the workforce and the nation. Specific solutions included legislation pertaining to minimum wage and other initiatives protecting employees. Such legislation, if enacted, would have engendered job losses for “undeserving” workers and would have been legitimated by the calculation that “ridding the labor force of the ‘unemployable[]’” was “not a mark of social disease, but actually of social health.”

Echoing labor history of the Apartheid Era in South Africa, this exclusionary move was richly extended to women. Borrowing from the currents in Australia, for example, influential United States labor reformer, Florence Kelley, endorsed minimum wage law as a way of “‘redeeming the sweated trades.’” It did so by preventing the ‘unbridled competition’ of the unemployable, the “women, children, and Chinese [who] were reducing all the employees to starvation.” Policymakers vetted various other law reform initiatives to “protect men and to protect the Anglo-Saxon race from the labor-force participation of women.”

Accompanying these various proposals, and often propelled by racialized science, policymakers waged a remarkably successful war on the “unfit.” Their efforts included state endeavors to sterilize the poor and other “defectives,” or alternatively, programs and policies designed to

94. Id. at 181.
95. Id.
96. Id. at 187.
97. Id. (describing support by elites for the enactment of a minimum wage).
99. Id. at 186.
100. Hutchison, Employee Free Choice, supra note 36, at 376.
101. Bernstein & Leonard, supra note 33, at 188–90 (showing that the original progressives were at times hostile to the participation of women in the workforce because they were a threat to the sanctity of home and a threat to the eugenic health of the race).
102. Id. at 188.
103. Id. (citations omitted) (quoting Florence Kelley).
104. Id. at 189.
105. Id. at 180–90.
eliminate competition from African Americans or immigrants.106 The basis of this budding war on the “weak,” made real by statutory innovation percolating through the Progressive and New Deal Eras, can be described as follows:

Building on the racialized platform established by *Plessy v. Ferguson*, and advanced by the pursuit of human perfectibility and a narrow conception of human liberty, this war extended beyond the boundaries established by state-based efforts focusing on the “feeble-minded” and other “defectives” to federal efforts that intentionally or inadvertently diminished the economic and social opportunities of “undesirables.”107

Early progressives represented a constellation of views that idealized eugenics and expressed a thirst for sociological jurisprudence under the banner of the “living constitution,” aided this transformative epiphenomenon.108 Obsessed by the progressive health movement, some progressive experts intentionally infected African Americans with syphilis without their knowledge as part of the United States’ infamous Tuskegee experiment.109 In harmony with such sentiments, “E. A. Ross, [a leading reform Darwinist] who shared Woodrow Wilson’s conviction that social progress, ‘inevitable’ as it was, had to take into account the ‘innate’ differences in race.”110 They also shared the belief that various races were at different stages of evolution.111 Africans and South Americans, on this quasi-scientific account, remained close to savages.112 For a nation committed to science,113 it was only natural to treat “savages” in a disparaging way.

**B. Moving from Theory to Practice**

These moves, dripping with fanciful notions of biological superiority and racial hierarchy, should surprise no one, since racism and group hatred
have existed for millennia.\textsuperscript{114} Although power tends naturally toward manipulation and control,\textsuperscript{115} it is unfair to claim that progressives invented contempt as a weapon against the “unfit.”\textsuperscript{116} Nonetheless, the human “longing to transmute contempt into subordinating action reinforced by pseudo-science” fortified progressives’ thirst for power, which “‘in its most coarse expressions would exploit, subjugate, and even enslave.’”\textsuperscript{117} Imbued with an aristocracy of knowledge and reflecting the weight of opinion from leading social groups, public intellectuals, and institutions, early progressives launched their campaign “against ‘undesirables’ with great subtlety and sophistication.”\textsuperscript{118} Claiming ownership of the “noble notions of public interest and fairness[,]” they asserted that “their programs and policies actually helped the underprivileged citizens they targeted.”\textsuperscript{119} Bubbling below the surface were noxious views that “proposed the ‘eradication of the vicious and inefficient.’”\textsuperscript{120} Attesting to the transformative power of hierarchy borne of racial supremacy and recalling the ruthlessness of the French Revolution, American progressives, anticipating a future fashioned by centralized power,\textsuperscript{121} were captivated by Jacobin proposals.\textsuperscript{122} Blinkered by morally suspect presumptions and “standing on a morally wobbly superstructure erected by experts, ‘many progressives saw the contemporary social and economic position of [undesirables] as the irremediable, inevitable effect of Darwinism.’”\textsuperscript{123} Posited as an ontology of necessity and a compelling faith, these currents penetrated the New Deal, reflecting the presumption that “social progress” is a higher law than equality.\textsuperscript{124}

To be fair, “not all progressives favored the diminution of economic

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114. & Hutchison, \textit{Waging War on “Unemployables”?}, supra note 11, at 34. \\
115. & JAMES DAVISON HUNTER, \textit{TO CHANGE THE WORLD: THE IRONY, TRAGEDY, & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD} 188 (2010). \\
116. & Hutchison, \textit{Waging War on “Unemployables”?}, supra note 11, at 35. \\
117. & \textit{Id.} (quoting HUNTER, supra note 115, at 188). \\
118. & Hutchison, \textit{Waging War on the “Unfit”?}, supra note 14, at 22. \\
119. & Hutchison, \textit{Waging War on “Unemployables”?}, supra note 11, at 35. \\
120. & Bernstein & Leonard, supra note 33, at 184. \\
121. & Hutchison, \textit{Employee Free Choice}, supra note 36, at 382. \\
122. & Leading French revolutionary, George-Jacques Danton, offered the following proposal: “Let us be terrible so that the people will not have to be.” DAVID ANDRESS, \textit{THE TERROR: CIVIL WAR IN THE FRENCH REVOLUTION} 376 (2005). \\
123. & Hutchison, \textit{Waging War on “Unemployables”?}, supra note 11, at 40 (citation omitted). \\
124. & \textit{Id.} at 42. \\
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opportunities and political rights for marginalized Americans[.]”

Nevertheless, in sharp contrast with President Calvin Coolidge’s call for religious and racial tolerance during his 1924 election campaign, President Wilson, the United States’ leading progressive icon, “implement[ed] an agenda that created socially constructed racial categories, enforced racial disparity, and advanced racial stigma.” This agenda reached the crest of its exclusionary potential when Wilson “resegregat[ed] . . . the U.S. Civil Service.” Despite these repulsive maneuvers, modern-day “commentators ‘continue to insist that the New Deal [a direct outgrowth of the Progressive Era philosophy] was a positive step toward social justice and a [highly promising] new world order.”

Prescinding from Lochnerian liberty-of-contract jurisprudence, which was occasionally invoked to justify expanding constitutional protection of African Americans and women, the social progress movement reached its predictable zenith in Justice Holmes’s decision in Buck v. Bell, an opinion that fearlessly defended the benefits of majoritarianism and racialized science. Predicated, in part, on the growing fear of “race suicide,” the forces of social exclusion concluded that the state has virtually unlimited power to regulate activities (such as the work hours of healthy bakers and able-bodied women) and to control the “‘socially inadequate’ through discretionary salpingectomies.” Despite the significant advancement of this agenda during the period encompassing the early to mid-part of the twentieth century, the Constitution materialized as a barrier, preventing the full flowering of this move at both the state and federal level. Lochner and its jurisprudential offspring occasionally stymied the achievement of

125. Id. at 36.
127. Hutchison, Waging War on the “Unfit”? supra note 14, at 11 (describing President Wilson as having a historical reputation as a far-sighted progressive).
129. EPISTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, supra note 28, at 102.
132. Hutchison, Waging War on “Unemployables”? supra note 11, at 43.
133. Id.
progressive goals and ambitions. Responding to this development, law reformers sought to cultivate progressive constitutionalism in order to achieve a root and branch removal of impediments to the nation’s evolutionarily predetermined progress.

III. ACHIEVING OUR FUTURE: FROM BUCK TO NEW DEAL CONSTITUTIONALISM

The exclusion of people of color and other so-called defectives from the workforce, and hence from economic life in the United States, required a stalwart commitment by progressives to pseudo-evolutionary thought, the creation of an idealized state, and the active involvement of elites who conspired to create a subordinating framework. But, in order to deprive the “unfit” of economic life, progressives pursued an accommodative constitutional theory. The process was advanced by none other than Justice Holmes, who helped facilitate the necessary conditions for New Deal constitutionalism. Once outsiders were deprived of constitutional protection tied to *Lochner*’s continued viability, they were inevitably exposed to adverse consequences.

A. From Buck v. Bell to the New Deal

Reflecting the weight of elite reformers’ dedication to majoritarianism, no one should be surprised that Holmes’s intuition paved the way for constitutional jurisprudence that legitimized the exclusion of those who were labeled “unfit.” This maneuver reflects the presuppositions of leading progressives, like President Woodrow Wilson, who sought “to convert the Democratic Party into a progressive party and make it the engine for the

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135. See Bernstein, Rehabilitating *Lochner*, supra note 23, at 1 (noting that *Lochner* was an outlier that occasionally thwarted legislative innovation within the realm of the social and economic progress movement).

136. See infra Part III.


138. Hutchison, *Waging War on the “Unfit”?*, supra note 14, at 26–27 (describing the constitutional development of a broad conception of the police power and an equally broad conception of the commerce power as necessary predicates to the subordination of outsiders by elite policy makers).

139. See id. at 27–28.

140. See id. at 27–34 (describing the adverse consequences associated with the demise of *Lochner* within the framework of the New Deal).

141. See infra Part III.A.
transformation of [the United States].” 142 In 1913, for instance, President Wilson vowed to pick only progressives for his administration. 143 Examined from a Critical Race Reformist 144 perspective, it is doubtful that such moves were a positive development for African Americans. 145 Throughout history, from the Jim Crow Era to the New Deal Era and its ramifications, “unfit” individuals have consistently struggled to gain “social and economic legitimacy.” 146 Given the expansion in government since the New Deal, 147 the ability of the disadvantaged to escape subordinating and exploitive policies has declined ever since Justice Holmes offered his dissent in  

Lochner. 148 Forecasting his future, all-embracing capitulation to majoritarian paternalism in  

Buck, Holmes stated in his  

Lochner dissent:  

I think that the word “liberty,” in the 14th Amendment, is perverted when it is held to prevent the natural outcome of dominant opinion, unless it can be said that a rational and fair man necessarily would admit that a statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. 149  

What sparked this incipient surrender to majoritarian paternalism? Several answers surface, but one assumes prominence: the thirst for progress. 150 On one account, for the past two centuries, humans have strived to escape from the labyrinth of mediocrity and disorder. 151 “Since Condorcet, the ‘Philosophy of Progress’ 152 has promised to eliminate war,
disease, and need and various [new] ideologies have announced a radiant future."\textsuperscript{153} Spanning the Progressive Era and continuing through the New Deal, “[p]rogressives . . . [were] . . . convinced that society was a living organism required to obey the law of life and not the law of mechanics . . . .”\textsuperscript{154} Exchanging the pursuit of the “True” for the pursuit of the “Good,”\textsuperscript{155} progressives believed, and many modern progressives still believe, “that the Constitution must be interpreted pursuant to evolving Darwinian principles”\textsuperscript{156} in order to ensure that the state remains an adequate instrument for controlling the nation’s health.\textsuperscript{157} Influenced by pseudo-evolutionary values, progressives accepted “the conclusion that government (either state or federal) was entitled to impose a form of sociological jurisprudence”\textsuperscript{158} that bears a striking resemblance to Social Darwinism.

From a constitutional perspective that ultimately led to the Supreme Court’s putative embrace of “discrete and insular minorities,”\textsuperscript{159} this deferential view of legislation was precisely what FDR sought when he proposed all sorts of economic regulations during the 1930s.\textsuperscript{160} Accurately appreciated, the President sought a compliant Court and an equally acquiescent, if ignorant, public when it came to legislative and regulatory innovation.\textsuperscript{161} Placed in context, the New Deal’s surrender to the necessity of an activist national government\textsuperscript{162} that is constrained by few enduring constitutional principles contradicts the goal of human flourishing by favoring entrenched interest. As such, and as developed more fully below,\textsuperscript{163} the New Deal fashioned a constitutional, legal, and bureaucratic superstructure that systematically expands opportunities for subordination.\textsuperscript{164}

As a technical matter, how did the process of constitutional change commence? On one account, during “the late 1930s and early 1940s . . .
established constitutional thought underwent dramatic change”\(^{165}\) perhaps in partial response to “a crisis atmosphere occasioned by an overwhelming imminent threat.”\(^{166}\) Professor Goluboff explains that “in response to the Great Depression, Congress passed economic legislation that trenched on” Lochnerian jurisprudence, its emphasis on substantive due process, and the rights to contract and property—ideals that many progressives have so often railed against.\(^{167}\) This maneuver launched a war for the Supreme Court’s future, a war that was evidently advanced by deliberate deception and interest-group politics.\(^{168}\) For example, the National Labor Relations Act (NLRA),\(^{169}\) consistent with the tenets of special interest group’s capacity to capture the “public interest,”\(^{170}\) aimed at placating narrow, well-organized interests.\(^{171}\) Hence, this law “was . . . justified despite the fact that its main purpose—the strengthening of labor unions and the guarantee of the right to strike—was opposed by the majority of the public at the time.”\(^{172}\)

Contrary to the progressive canon, which routinely portrays \textit{Lochner} as an obstacle to progressive reforms, Nelson Lund and John McGinnis show that the often repeated critique of the \textit{Lochner} decision is not fully justified.\(^{173}\) And this claim does not depend on the correctness of the decision. Rather, it depends on the observation that substantive due process only led to occasional decisions to invalidate statutes, and as such, it was less like a hegemonic tool of constitutional interpretation and “more like a random strike of lighting.”\(^{174}\) Lund and McGinnis show that all of the \textit{Lochner} justices “appeared to agree that the legislature was perfectly free to regulate the hours of bakers in order to protect their health, but the majority assumed it would be unconstitutional to regulate their hours in order to protect their unions, or otherwise

\(^{165}\) Goluboff, \textit{supra} note 57, at 22.

\(^{166}\) Somin, \textit{supra} note 41, at 664.

\(^{167}\) Goluboff, \textit{supra} note 57, at 22.

\(^{168}\) See Somin, \textit{supra} note 41, at 665–66 (discussing how the political process is often hijacked by well-organized interest groups, particularly during periods of constitutional change).


\(^{170}\) See id.

\(^{171}\) Somin, \textit{supra} note 41, at 666.

\(^{172}\) Id.

\(^{173}\) Lund & McGinnis, \textit{supra} note 59, at 1564 (“All the Justices [who participated in the \textit{Lochner} decision] appeared to agree that the legislature was perfectly free to regulate the hours of bakers in order to protect their health . . . .”).

\(^{174}\) Id. at 1565.
to enhance their bargaining power vis-à-vis their employers.”

Thus appreciated, the “[p]rotection of the bakers’ health is every bit as paternalistic” as many other public health and safety laws that have been approved before or since *Lochner*, but the law’s fatal flaw was its direct advancement of the entrenched interests of large unions and large bakers against the liberty of contract interest of small bakeries run by immigrants.

This analysis, coupled with David Mayer’s observations, supports the observation that established modes of adjudication rarely inhibited the extension of judicial approval of an expansionist state, because the courts were already predisposed to an expansionist state. Consequently, well before the creation of the New Deal, courts were inclined to enforce labor law as a potent weapon to displace biologically suspect workers in order to prevent the destruction of the standard of living for Caucasians. Hence, “[t]he real difficulty, which the *Lochner*-era Court never faced up to, was the need to articulate some principled basis, having some real connection to the Constitution, for distinguishing constitutionally tolerable legislative adjustments from those which are beyond the pale.” Coherent with Lund and McGinnis’s intuition, “[t]hree years after *Lochner*, the Court sustained state legislation that regulated the number of hours women could work.”

In *Muller v. Oregon*, the Supreme Court rejected the claim that “[w]omen within the meaning of both the state and Federal constitutions, are persons and citizens, and as such are entitled to all the privileges and immunities therein provided, and [hence they] are as competent to contract with reference to their labor as are men.” In an astonishing opinion that bristles with pure masculine self-appreciation, the Court upheld the statute based on the innate inferiority of women. Prophetically, this proposition was

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175. *Id.* at 1564.

176. *Id.*


179. See *Moreno*, *supra* note 33, at 116 (quoting Samuel Gompers who served as President of the American Federation of Labor).


183. *Id.*
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premised on progressive argumentation tied to detailed sociological studies manufactured by Louis Brandeis, who argued that women ought to be protected from the rigors of work. 184

The Supreme Court’s acceptance of such quasi-science is coherent with the intuition that the most important aspect of Lochner is Justice Holmes’s dissent. 185 Holmes provided a sturdy and expandable foundation for the future triumph of progressive constitutionalism, implying that no constitutional barriers could survive to prevent the economic and social goals of biologically superior interests from prevailing in society’s war against the weak, unfit, and unemployable. 186 Conceiving police power as virtually infinite, Justice Holmes took the view that the Court, congruent with the tenets of sociological jurisprudence, ought to defer to state legislatures on issues of health, 187 even when such legislation favored entrenched interest. 188 Unconvinced by an alternative approach to the Fourteenth Amendment that would require courts to invalidate all class legislation, including labor legislation favoring trade unions and laws precluding interracial marriage, Holmes’s outlook was a forerunner of a legislative and judicial commitment to a capacious paternalism that venerates the tyranny of the majority or special interest claiming to represent the majority. 189

Although powerful interest groups have assumed the moral high ground in debates regarding the benefits and evils of a centralized government, Professor Bernard Siegan explained that this high ground is a mirage. 190 Offering a similar analysis of Lochner, Professor Bernstein demonstrated that the larger New York bakeries were staffed by unionized workers who were angry about the upstart competition from smaller, non-union bakeries

184. Id.


186. See id.


188. Holmes’s dissent favored the majority’s right to pass laws that favored the interests of larger and richer bakeries and better paid workers at the expense of the interests of smaller bakeries run by immigrants. See STEARNS & ZYWICKI, supra note 177, at 80–82.


190. The State of New York endeavored to regulate the hours of bakers premised on the claim that regulation was necessary to reduce potential health risks. See STEARNS & ZYWICKI, supra note 177, at 80 (discussing Siegan’s view). This claim was not the result of a benign motivation to protect bakers from harm. See id. Rather, such regulation was designed to protect those bakers who worked at the larger industrial bakeries that already complied with the various safety and hours regulations reflected in the New York law, at the expense of small, often immigrant-owned bakeries that did not. See id.
staffed by lower-wage immigrants. Evidently, immigrants were prepared to work long hours in basements of tenement buildings in order to survive. Believing that competition from members of unfit, racially-inferior groups drove down wages of union members, labor union leaders and their ideological allies, as well as larger bakeries dreading competition, sought the consolidating power of government, sheltered by the language of social justice, in order to safeguard their collusive pursuit of economic and ideological rents achievable through the subordination of their competitors.

While Lochner represents the paradigmatic case invalidating state labor regulation, Lund and McGinnis demonstrate that the Supreme Court eventually extended its reach to other cases involving employment regulation when the Justices determined that the regulation constituted an unreasonable interference with an individual’s liberty of contract. During the 1930s, the Supreme Court backed away from even a tangential commitment to Lochner, as the Court took some steps that had far-reaching consequences. Initially, the Court began to expand the list of alleged fundamental rights to include a number of privileges traditionally thought essential to a life of bourgeois happiness, including the right to raise a family, to worship God, and to better oneself through work and education.

Then, following some important personnel changes, the Court lost “its enthusiasm for protecting the core economic rights summed up by liberty of contract and the protection of property rights.” This ongoing “process of

191. See id. at 81–82 (discussing Bernstein’s analysis).
192. See id. at 82.
193. See id. at 80–82.
195. See, e.g., NOWAK & ROTUNDA, supra note 181, at 174 (citing Adkins v. Children’s Hosp., 261 U.S. 525 (1923) (invalidating a District of Columbia statute regulating the wages of women on grounds that the law violated substantive due process under the Fourteenth Amendment); Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922) (invalidating the levying of an excise tax on anyone who employed child labor under the terms proscribed in earlier regulation); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating a federal statute that prohibited the interstate shipment of goods coming from a mining or manufacturing establishment that employed children under certain ages)).
197. Id. at 1565–66; see also United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding Congress’s power to regulate and prohibit the interstate shipment of filled milk against a Fifth Amendment Due Process challenge); W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) (dismissing liberty of contract claims and sustaining the constitutionality of a state minimum wage law for women against a substantive due process challenge under the Fourteenth Amendment and, accordingly, the Supreme Court departed from the precedent in Adkins, 261 U.S. at 525); Nebbia v. New York, 291 U.S. 502 (1934) (sustaining a state regulatory scheme for milk, because it was reasonable in light of the desired end).
expanding the periphery and abandoning the core of substantive due process culminated in” Footnote 4 of Carolene Products.\footnote{198} This innovative turn in constitutional adjudication was premised on the deduction that “where the legislative judgment is drawn into question, [the inquiry] must be restricted to the issue whether any state of facts . . . affords support for the legislation.”\footnote{199} This development was part of a clever process that tamed the doctrine of substantive due process and thus vitiated the judiciary’s ability to limit federal and state regulatory power.\footnote{200} This approach signifies that the substantive due process doctrine could no longer protect the disadvantaged among us from special interest group politics, meaning that “well-organized interest groups [were now free] to hijack the political process for their own benefit, at the expense of the less organized general public.”\footnote{201} This reformulation proceeded in two steps.\footnote{202} “First, the Court began by imposing a virtually conclusive presumption of constitutionality under due process with on 'regulatory legislation affecting ordinary commercial transactions,'”\footnote{203} meaning that "substantive due process [had] effectively been abolished in this area."\footnote{204} Second, in Carolene Products, the Court created Footnote 4 as a vehicle to outline the circumstances under which the presumption of constitutionality might be relaxed or even reversed—particularly with respect to laws that fail to honor the Bill of Rights’ guarantees, as well as statutes that distort the political process or laws disadvantaging “discrete and insular minorities.”\footnote{205} Consequently, contemporary legal academics instigated avid worship of Footnote 4, saluting its expansion of the scope of the regulatory state so long as regulatory innovation remains facially neutral and refrains from formal discrimination.\footnote{206} In step with FDR’s devotion to progress fashioned by elite-led programs that surrender to majoritarian paternalism, the Supreme Court
unfailingly upheld federal regulations in a series of decisions, including NLRB v. Jones & Laughlin Steel,207 Carolene Products,208 United States v. Darby,209 and Wickard v. Filburn.210 These regulations contained provisions promoting the growth of labor cartels; restricting the interstate shipment of filled milk; controlling wages, hours, and the terms and conditions of employment, even when employees worked solely in intrastate production; and precluding the production of home-grown wheat on the grounds that it competed with and therefore affected the sales of interstate wheat.211 Such policies and holdings, when considered together with numerous other decisions, further entrenched special interests by excluding individuals and groups with limited political and social capital.212

Historically, exclusionary practices in the United States were most prevalent where “unions controlled access to work.”213 The Supreme Court confirmed its acquiescence to virtually unlimited majoritarian governance when accompanied by putative facial neutrality, limiting the force of labor union exclusion in Steele v. Louisville & Nashville Railroad, and imposing a duty of fair representation on labor organizations.214 The Court verified its

207. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942) (upholding Congress’s power to limit the quantity of wheat that an individual farmer could grow, even though the farmer did not wish to sell this product at all, because growing crops for individual consumption exerts a substantial effect on interstate commerce; therefore, the statute is sustainable as a necessary and proper implementation of the power of Congress); NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937) (holding for the first time that Congress could regulate the labor relations of manufacturers and their workers because labor strife affected interstate commerce by obstructing the flow of manufactured goods bound for interstate market).

208. Carolene Prods., 304 U.S. 144 (upholding Congress’s power to prohibit the interstate shipment of filled milk against a Fifth Amendment due process claim on grounds that the Court must restrict its examination of a legislative decision to rational basis analysis, which effectively granted Congress police power).

209. United States v. Darby, 312 U.S. 100, 114 (1941) (holding that Congress had the power to (a) prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours are greater than a prescribed maximum even though the manufacturing itself does not amount to interstate commerce, and (b) prohibit the employment of workmen in the production of goods for interstate commerce at other than prescribed wages and hours because its commerce power extends to intrastate activities that so affect interstate commerce as to make its legislative efforts an appropriate means to attain legitimate ends).


211. See NOWAK & ROTUNDA, supra note 181, at 187.

212. See generally MAYER, supra note 178, at 97–110 (describing the demise of liberty of contract jurisprudence culminating in the Carolene Products decision, which validated unprincipled special interest legislation).


214. See Steele, 323 U.S. 192.
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support for the doctrine of “separate but equal” by declining to require the labor union to admit African Americans as members despite the labor union’s status as a statutorily recognized exclusive bargaining agent.215 As such, the Court’s 1944 decision is entirely consistent with the tenets of racial hierarchy and the prejudices percolating throughout the Progressive Era.216 This decision indicated that the Court’s corruption by progressive values was virtually complete.217 The Hughes Court fortified its capitulation to majoritarianism by vindicating state police power in a series of decisions that most notably included West Coast Hotel v. Parrish,218 which sustained the constitutionality of the State of Washington’s minimum wage law for women.219 Although many progressives lionized this decision,220 the Court’s holding echoes its earlier decision in Muller v. Oregon,221 upholding the permissibility of a statute limiting the hours that women could work.222 The Court justified additional protection for women based on female inferiority, failing to notice that laws to protect women served as a central means of oppressing them.223

While cause and effect are difficult to establish, a wave of state and federal legislation explicitly succumbed to the logic of Justice Holmes’s commitment to majoritarian paternalism.224 Early progressives were “champions of economic nationalism” grounded in the claim that “the extensive interconnection of all aspects of the American economy cried out for federal regulation.”225 In the absence of regulation, progressives looked to state police power to fill the gap.226 Protected by an asserted consensus favoring social justice and fairness, this calculus was rarely “checked against actual opinions, least of all those of the most disadvantaged.”227 Taken

215. See id.
216. See id.
217. See id.
223. Id. at 90.
224. MAYER, supra note 178, at 97–110 (discussing the wave of legislation before the Court embraced Justice Holmes’s formalism, which was on display in Lochner).
225. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, supra note 28, at 8.
226. Id. at 8–9.
227. Bernard Yack, Liberalism Without Illusions: An Introduction to Judith Shklar’s Political
together, the implementation of these views exposed marginalized citizens in the United States to risks from the unconstrained exercise of government power.\textsuperscript{228} These risks materialized as “both big business and labor union leaders saw the early Depression period as an opportunity to implement cartelization schemes for product prices and labor markets.”\textsuperscript{229} The next Part explores the consequences of this move.

\section*{B. The Consequences of the New Deal for African Americans}

Historians have richly documented the consequences of the New Deal. For present purposes, this subsection discusses a few examples. In 1933, Congress enacted the National Industrial Recovery Act (NIRA),\textsuperscript{230} which created the National Recovery Administration (NRA) and paved the way to exclude members of disadvantaged groups by encouraging industry and labor to write regulation codes.\textsuperscript{231} The NRA approved hundreds of codes covering roughly ninety-five percent of all industrial workers, benefiting large businesses by destroying their small and politically weak competitors.\textsuperscript{232} This corporatist process became a “massive public policy disaster.”\textsuperscript{233} Although, there seems little uncertainty about the exact meaning of Section 1 of the Fourteenth Amendment,\textsuperscript{234} which abolished the “Black Codes” that southern states made notorious during the Reconstruction Era,\textsuperscript{235} it is equally clear that the NIRA effectively contravened the tenor and tone of the Fourteenth and Fifth Amendments.\textsuperscript{236} It did so by “granting new collective bargaining powers to unions, [since] the New Deal gave them the

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  \item \textsuperscript{228} See infra Part III.B.
  \item \textsuperscript{229} Somin, supra note 41, at 651.
  \item \textsuperscript{230} National Industrial Recovery Act, 15 U.S.C. § 703 (1933).
  \item \textsuperscript{231} Id.
  \item \textsuperscript{232} Goldberg, supra note 42, at 293.
  \item \textsuperscript{233} Hutchison, Racial Exclusion, supra note 47, at 10–11.
  \item \textsuperscript{234} Section 1 of the Fourteenth Amendment provides in pertinent part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
  \item \textsuperscript{235} See Lund & McGinnis, supra note 59, at 1567.
  \item \textsuperscript{236} See U.S. CONST. amend. XIV, § 1. The Fifth Amendment, in pertinent part, states that “No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. V.
\end{itemize}
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power to lock blacks out of the labor force.... Taking advantage of the monopoly power granted by the NIRA, trade unions displaced black workers and reified social stratification.”

The evidence shows that “the minimum wage imposed by the [NRA]... destroyed the jobs of half a million blacks.”

Taken together, granting these privileges to labor unions effectively extinguished the right of African-American workers to work within the meaning of the liberty of contract jurisprudence established in *Lochner*.

Building on this grim record, and in response to the Court rejecting the NIRA as unconstitutional, Congress removed a proposed provision from the NLRA that prohibited unions from discriminating against African Americans.

Indeed, labor unions were only too happy to exclude such workers from their organizations.

Burnishing this repugnant practice, Congress passed the Fair Labor Standards Act of 1938 (FLSA), which caused between 30,000 and 50,000 workers, mostly Southern African Americans, to lose their jobs within two weeks.

Nonetheless, the Supreme Court upheld both the NLRA and the FLSA.

In consequence, the effects of this labor cartelization continue to disrupt marginalized Americans today.

It is beyond dispute that “the ghosts of the Progressive Era” ideals instantiated by the New Deal persist in subjugating African Americans today.

[The] relevant repercussions of Progressive Era ideas [] have

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238. Beito, supra note 33, at 296.

239. See Mayer, supra note 178, at 170–71, 178–80, 174 n.42; Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, supra note 144, at 133–34 (arguing that minimum wage laws “are connected to, and illustrative of, a tradition of subordination, dominance, and hierarchy”).

240. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (holding unanimously that the mandatory codes section of NIRA was unconstitutional as an impermissible delegation of legislative power to the executive branch).


245. The NLRA was upheld by the Supreme Court’s decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937), and the Court upheld the FLSA in *United States v. Darby*, 312 U.S. 100, 125 (1941).

246. See Goldberg, supra note 42, at 268–69.

escaped the light of scrutiny. The architects of the New Deal, the Fair Deal, and the Great Society all inherited and built upon the progressive welfare state. And they did this in explicit terms, citing such prominent race builders as Theodore Roosevelt and Woodrow Wilson as their inspirations. Obviously, the deliberate racist intent in many of these policies was not shared by subsequent generations of liberals. But that didn’t erase the racial content of the policies themselves. The Davis-Bacon Act still hurts low-wage blacks, for example. FDR’s labor and agricultural policies threw millions of blacks out of work and off their land.248

As a consequence, “the widening unemployment gap between white and black Americans that commenced during the Great Depression remains with us today.”249 In more recent cases, all-white or largely white labor unions claimed that a policy that excluded workers who were not related to current members by blood or marriage was unlawful.250 Congruent with these observations, contemporary state statutes replicating the ongoing effects of labor law reform initiatives from the Great Depression continue to exclude African Americans from work in various parts of the country.251 State initiatives continue to honor the legacy of labor union advocates who denied any anti-African-American animus but expressed discomfort when “defective” workers (African Americans) took jobs belonging to members of a racially superior category (Caucasian men).252

By any standard, except one devoted to the subjugation of African Americans and other outsiders, this record remains indefensible. Despite evidence of human dislocation on a massive scale, contemporary progressives continue to support exclusionary legal regimes253 on grounds that such regimes are highly beneficial.254 The stubborn resilience of such exclusionary animus has not yet been effaced from the lexicon of

251. Hutchison, Employee Free Choice, supra note 36, at 412 (showing how Pennsylvania’s prevailing wage law, fashioned after the federal Davis–Bacon Act, a Depression era statute, is the root cause behind the limited number of African-American workers on city funded projects).
252. Id.
253. Hutchison, Toward a Critical Race Reformist Conception of Minimum Wage Regimes, supra note 144, at 132–34 (describing various efforts to support minimum wage regimes).
progressive elites in the United States.\textsuperscript{255} Hence, it came as no surprise that during a June 2010 congressional hearing, then-Democratic Congressman Paul Kanjorski exhibited common cause with the proponents of biological purity by publicly supporting legislation on grounds that it benefited “‘average, good American people[]’” as opposed to irresponsible minorities and defectives.\textsuperscript{256}

\section*{IV. Implications for the Obama Administration}

As Congressman Kanjorski’s statement demonstrates, liberals and progressives remain dedicated to language and grammar that, when properly interpreted, advance exclusion and subordination of African Americans and other minorities. Whether or not Kanjorski’s bracing views represent the values of contemporary progressives, progressive policies, authored with the best intentions, still harm the present and future lives of African Americans.\textsuperscript{257} This observation leads inevitably to another: the haunting potential of progressive policies does not lie in explicit evidence of exclusionary intent, although such evidence does exist, but rather lies in the fact that the pernicious effects of such policies endure even when progressive policies are supported by good intentions.\textsuperscript{258} American and South African labor history, often associated with the regulation of wages, verify the grim potential of progressive policies.\textsuperscript{259} The rise of authoritarianism fortifies the exclusionary effects of these policies.\textsuperscript{260}

\subsection*{A. Intent, Intentionality, and Racist Effects}

During the early twentieth century, the South African government sanctioned union demands for monopoly power with the Mines and Works Act of 1911, legislation that served as the first national “color-bar” law, a statutory rule limiting opportunities for black South Africans.\textsuperscript{261} After the

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\textsuperscript{255} Hutchison, \textit{Waging War on the “Unfit”?}, supra note 14, at 42.


\textsuperscript{258} See id.

\textsuperscript{259} Hutchison, \textit{Toward a Critical Race Reformist Conception of Minimum WagesRegimes}, supra note 144, at 118–33 (examining minimum wage history in the United States and South Africa).

\textsuperscript{260} Hutchison, \textit{Employee Free Choice}, supra note 36, at 393–95 (showing how powerful interest deploy authoritarianism and capture to disadvantaged marginalized Americans).

\textsuperscript{261} WALTER E. WILLIAMS, \textit{SOUTH AFRICA’S WAR AGAINST CAPITALISM} 52 (1989).
\end{flushleft}
South African Supreme Court held color-bar provisions of the act unconstitutional, white supremacists and unions revolted. In response, members of the Mine Workers Union demanded a minimum wage law. Reflected a fiercely accurate understanding of economic theory and practice, the ruling political party determined that minimum wage regimes “would make legalized racial discrimination unnecessary since it would mandate wages exceeding black productivity, and hence the incentive for hiring blacks . . . would be reduced.”

Although fewer South Africans support outright racial discrimination today, the racist effects of minimum wage laws persist. In the United States, Nigeria, and South Africa, poor and marginalized citizens most heavily bear the costs of labor law reform. Consistent with analysis of South African labor history, eighty-three percent of the benefits of the United States minimum wage law accrue to young people living in middle and upper-income families. Conversely, young African-American males constitute a disproportionate share of the unemployed population. Indeed, architects of the minimum wage and other similar labor legislation knew that such laws would inevitably and disproportionately separate African Americans from the United States workforce. However, “most advocates of these laws saw the resulting unemployment, at worst, as an unfortunate necessity, and in many cases as a positive feature.”

Complementing the record in the United States, evidence from other


263. Id. at 128.

264. Williams, supra note 261, at 63.


266. See id. at 216–17 (describing the effects of artificially high wages on the employment of people in developing countries).

267. Steven L. Willborn et al., Employment Law: Cases and Materials 577 (4th ed. 2007) (describing Gillian Lester’s analysis, which shows that although the minimum wage continues to enjoy widespread support, only seventeen percent of low-wage workers in the United States were living in poor households in 2003, and thus, the people who are generally favored by this type of intervention in the market are not poor); see also Richard V. Burkhauser, Kenneth A. Couch & David C. Wittenburg, Who Minimum Wage Increases Bite: An Analysis Using Monthly Data from the SIPP and the CPS, 67 S. Econ. J. 16, 31 (2000) (“[L]ess than 20 cents of every dollar of the increased wage bill associated with raising the minimum wage . . . actually flowed to poor families.”).

268. See, e.g., Sowell, supra note 265, at 214 (showing minimum wages disproportionately reduce employment of younger, less-skilled, and minority workers).


270. Id.
countries shows the devastating impact of minimum wage regimes. For example, some South African companies responded to artificially high minimum wages by recently expanding output through moving some of their production to Poland—a move that is unlikely to benefit black workers in South Africa.\(^\text{271}\) This poignant example demonstrates that the racist effects of the law are often independent of past or current intentions.\(^\text{272}\) The South African example further illustrates that minimum wage laws realize the dreadful calculus of progressive theorists who believe that the best way to deal with individuals labeled as “parasites” or “unfit” is simply to get rid of them or otherwise expel them from the workforce.\(^\text{273}\) Since the racist effects of minimum wage laws are well known, advocates of the Critical Race Reformist Theory argue that proponents of wage regimes “must take responsibility for the propriety of what is done, and should not hide behind assertions that they are neither aware of the corrosive effects of minimum wages, nor the empirical verification of these effects by economists.”\(^\text{274}\) Hence, “[w]age regulation, properly deconstructed, constitutes a form of institutionalized racism.”\(^\text{275}\) Sadly, it is likely that this conclusion applies to much of the labor reform canon in the United States as well.\(^\text{276}\)

### B. Reform and the Obama Administration: Grounds for Suspicion?

The Supreme Court has declined to invalidate FLSA\(^\text{277}\) despite available evidence that its minimum wage provisions have a disproportionately adverse effect on African-American employment.\(^\text{278}\) Given the consequences of this policy and that its ramifications continue to mirror similarly disastrous policies in South Africa,\(^\text{279}\) it is unnerving to observe that then-Senator Obama supported an ongoing series of increases in

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\(^{271}\) Sowell, supra note 265, at 217.  
\(^{272}\) See id.  
\(^{273}\) Bernstein & Leonard, supra note 33, at 180–83 (showing that labor reformers sought to “devise scientific methods for identifying low-wage races and other inferior groups . . . and to promote laws that would exclude inferiors from work and isolate them for eugenic treatment.”).  
\(^{274}\) Hutchison, Toward a Critical Race Reformist Conception of Minimum Wage Regimes, supra note 144, at 132–33.  
\(^{275}\) Id. at 133.  
\(^{276}\) Hutchison, Employee Free Choice, supra note 36, at 396–414 (exposing United States labor reform agenda and its disastrous effect on African Americans).  
\(^{277}\) See United States v. Darby, 312 U.S. 100 (1941) (upholding the FLSA).  
\(^{278}\) See supra Part IV.A.  
\(^{279}\) Hutchison, Toward a Critical Race Reformist Conception of Minimum Wage Regimes, supra note 141, at 126–33.
minimum wage in the United States just before the United States entered into the Great Recession in 2008.\textsuperscript{280} Moreover, as President, he has supported raising the minimum wage still further.\textsuperscript{281} Indeed, President Obama is undoubtedly committed to advancing the interest of African Americans. Equally likely, he rejects the racist legacy of labor law reform. But, sadly, as the history of labor law innovation shows, \textit{if} his commitments are wedded to the implementation of progressive policies, then African Americans and other outsiders are sure to face adverse consequences.\textsuperscript{282} Indeed, few statutory innovations have been nearly as effective as the minimum wage in launching a rapacious war on the present and future aspirations of African Americans or black South Africans.\textsuperscript{283} Hence, support for such policies often propelled by the pursuit of special interest benefits, provides ample grounds for suspicion and verifies the deduction that an ostensible commitment to good intentions is simply not enough.\textsuperscript{284}

Similarly, President Obama’s decision to sign Executive Order 13502\textsuperscript{285} in 2009 is suspect, because it encourages federal agencies to use project labor agreements favoring labor unions in large-scale, federally-funded construction projects.\textsuperscript{286} Through this executive order, operating in conjunction with the Davis–Bacon Act (a federal prevailing wage law),\textsuperscript{287} a law that originated from the “competition between African-American workers and exclusionary unions in New York,”\textsuperscript{288} the President may have unintentionally, but effectively, advanced an agenda that has historically


\textsuperscript{282} See supra Parts III, IV.A.


\textsuperscript{284} See supra Part IV.A.


\textsuperscript{286} Id.


\textsuperscript{288} Bernstein & Leonard, supra note 33, at 191.
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conceived African Americans as inferior.\footnote{289} Recall that Robert Bacon, as co-author of the Davis–Bacon Act, disavowed any anti-African-American enmity while opposing efforts by “defectives” to take jobs that “belonged” to white union men.\footnote{290} Paralleling the racial stereotypes deeply embedded in the enactment of the Davis–Bacon Act, the State of Pennsylvania passed its version of a prevailing wage law.\footnote{291} Enacted in 1961, this law is currently the root cause behind the limited number of African-American workers on city-funded projects.\footnote{292} Ever since construction began on the Philadelphia Convention Center, the city’s African-American construction workers have protested the lack of opportunity for minority workers on public construction projects.\footnote{293} Originally designed to limit opportunities for out-of-state African-American workers,\footnote{294} the Pennsylvania law, as currently enforced, inverts this process.\footnote{295} The Pennsylvania wage law actually enables unions to transport predominantly Caucasian workers from other states to Philadelphia to preclude the city’s African-American population from working on wage projects, rather than preventing African-American workers in other states from taking construction jobs in Philadelphia.\footnote{296} Operating as a form of discrimination,\footnote{297} this paradigm considers African Americans as “undeserving” workers who “wrongly lower the wages and employment of racially superior groups.”\footnote{298} Hence, “[e]ven if a trustworthy judge could strip the prevailing wage policy of its racist heritage, its exclusionary effect remains intact.”\footnote{299} Indeed, Critical Race Reformists assert that “the degree of blameworthiness does not necessarily limit the capacity of a policy to stifle Black progress.”\footnote{300} Just as “Pennsylvania’s wage law enhances the economic returns and social status that accrue to White workers and...
dislocates Black workers, thereby eviscerating their economic and social status. It is possible, if not likely, that the implementation of Executive Order 13502 expands this exclusionary process.

In the interest of time, this Article offers one final basis for suspicion. At the end of 2011, President Obama rang in the New Year by signing a Department of Defense bill, allowing the United States military to confine citizens of the United States indefinitely without a trial. This bill echoes FDR’s success in creating internment camps and virtual slave camps for citizens of the United States during World War II as well as President Wilson’s dreadfully effective program of arresting without just cause tens of thousands of citizens during World War I. The passage of this bill threatens the future of African Americans as a disproportionate number of African Americans are already imprisoned. Whether the bill advances the interests of entrenched sources of power or not, it is doubtful that the bill advances the interests of African Americans. Endowed with bipartisan enthusiasm, this law would expand the discretionary power of government, while diminishing the liberty interest of citizens of the United States.

Indeed, democratic governments “give the greatest benefits to those who are best organized[,] have the most influence[,]” and are the least disenfranchised—populations that include few African Americans. Therefore, President Obama’s surrender to the demands of a centralizing and

301. Id. at 412–13.
304. See GOLUBOFF, supra note 57, at 1–3 (describing the creation of virtual slave camps for African Americans).
305. See GOLDBERG, supra note 42, at 114. This era also saw the passage of the Espionage Act of June 1917 and the Sedition Act of May, 1918, which banned “any criticism of the government, even in your own home.” Id.
308. BERNSTEIN, ONLY ONE PLACE OF REDRESS, supra note 33, at 103.
309. Hutchison, Employee Free Choice, supra note 36, at 399.
ever-expanding state unfortunately mirrors the performance of FDR during World War II, who “issued an executive order authorizing military commanders to exclude persons from vast areas” of the United States. In *Korematsu v. United States*, the Supreme Court confirmed its complete capitulation to the combined war powers of the President and Congress despite the fact that the detention of Japanese citizens far exceeded anything necessary to protect the country. Corresponding with this sweeping deprivation of constitutional rights, African Americans were also caught up in both FDR’s and the Court’s willingness to subjugate minority groups during World War II. Both institutional and personal indifference to the plight of disadvantaged Americans sheltered society from viewing their subjugation as a clarion call for justice.

FDR’s transparent indifference to subordination appeared to follow an all too familiar pattern. During the 1940s, the United States Department of Justice (DOJ) and the central office of the National Association for the Advancement of Colored People (NAACP) received many letters from across the nation, reporting violations of constitutional rights and demanding action. One series of letters described the situation of hundreds of young African-American men who traveled from cities across the South to work for the U.S. Sugar Corporation during World War II. Flyers produced by the United States Employment Service, a federal agency that linked unemployed workers with available work, told poor men that they would receive relatively high wages, free transportation, and free rent in exchange for work. Of course things did not go as expected: free transportation turned out to cost up to two weeks’ worth of wages, high wages were non-existent; and workers had to incur debts to stay alive. Employers locked workers up at night and threatened to shoot them or permanently waterboard them if they tried to leave. Against the odds, some workers managed to escape

312. *Nowak & Rotunda*, supra note 181, at 752.
313. *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting).
314. *See, e.g.,* GOLUBOFF, supra note 57, at 1–3 (describing the virtual slave camps created during World War II populated by African-American workers).
315. *See id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.* at 2.
these slave camps.\textsuperscript{321} Predictably, the FBI and the Civil Rights section of FDR’s Justice Department greeted their appeals with silence and indifference.\textsuperscript{322}

Although no rational person believes that President Obama would remain indifferent to the plight of African Americans who might be placed into military camps or interned in Florida work sites,\textsuperscript{323} it is possible to imagine that some president down the road might recapture FDR’s apathy and expose a disproportionate number of African-American males to imprisonment without trial. Possessing virtually limitless power, a president, who is drawn to either a progressive agenda or conservative one, might take a page out of President Wilson’s subordinating handbook.\textsuperscript{324} Believing that the president “is at liberty, both in law and in conscience, to be as big a man as he can,” Wilson embodied the view that the president should remain unhampered by “quaint” documents like the Constitution.\textsuperscript{325} Hence, it was also no accident that President Wilson, as a progressive icon,\textsuperscript{326} created the American Protective League, whose members were charged with keeping an eye on neighbors and friends and whom the army asked to help extract confessions from African-American soldiers accused of assaulting white women.\textsuperscript{327} African Americans ought to be wary of the probability that history repeats itself.

Taken together, adequate grounds for suspicion surface whenever and wherever progressive programs are promoted.\textsuperscript{328} Just like FDR and Wilson, President Obama’s espousal of progressive policies is apparently energized by the pursuit of the “Good,” a term that is embedded in the progressive

\begin{thebibliography}{99}
\bibitem{321} Id.
\bibitem{322} Id.
\bibitem{323} This proposition finds support in a number of sources, including a press release by leading Black religious leaders. \textit{See} Press Release, Obama for America, Renowned Faith Leaders Come Together to Support Obama (Dec. 4, 2007), available at \url{http://www.gwu.edu/~action/2008/obama/obama120407pr.html} (noting that then-Senator Obama was a longtime advocate for those less fortunate, forgotten individuals, and maintained a faith devoted to uniting individuals, rather than dividing them).
\bibitem{324} \textsc{Goldberg}, supr\a note 42, at 84 (discussing Wilson’s commitment to racial supremacy best illustrated by the claim that giving blacks the right to vote was the foundation of every evil in American society).
\bibitem{325} Id. at 86.
\bibitem{326} Hutchison, \textit{Waging War on the “Unfit”?}, supra note 14, at 11 (describing Wilson as having a historical reputation as a far sighted progressive).
\bibitem{327} Id. at 114.
\bibitem{328} \textit{See} Hutchison, \textit{Employee Free Choice}, supra note 36, at 396–414 (describing the racist history associated with progressive programs particularly in the labor arena).
\end{thebibliography}
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mantra. In the absence of skeptical judicial review, the government can commandeer all citizens in pursuit of this objective. Sadly this remains true, even when public policy elites seek to rid the labor force of unemployables in order to advance the nation’s social health. While no one can rightly claim that President Obama supports the consequences of such a move, this Article illustrates that virtually any effort to sustain policies that operate consistently with progressive architecture may place African Americans and other so-called “parasites” at risk, unless the courts eviscerate their predisposition to favor progressive values and policies. The act of commandeering the “Good,” in the form of an advancement of the regulatory state, features a morass of moral ambiguity and expediency in a survival-of-the-fittest world. This Article suggests that neither the advancement of the “Good” through command, nor the defense of this move by contemporary commentators, favor the interests of African Americans. Instead, this process, featuring an overly crabbed conception of judicial review, advances the substantive inequality of African Americans.

C. Commandeering the “Good” while Fleeing the Truth?

Commandeering the “Good,” even when achieved through facially neutral policies, leads to an erosion of civil society by an expansionist state that gives way to an outbreak of a political war of redistribution. Progressive constitutionalism paves the way for this political war for resources by expanding the role of the government; as government power, scope, and size increases, this unleashes private interests to pursue their preferences by capturing government. Rather than curtail the dominance of richly endowed interests, this war bolsters the power of members of entrenched groups who understandably seek a lead role in this redistributional praxis.

329. See, e.g., David Bernstein, Obama’s Progressive Mythology, VOLOKH CONSPIRACY (Dec. 7, 2011, 3:48 AM), http://www.volokh.com/2011/12/07/obamas-progressive-mythology/ (describing President Obama’s commitment to child labor legislation and support for minimum wages for women which are all part and parcel of the commitment of progressives to the “Good” in the form of a larger role by federal and state governments in the lives of American citizens).


331. Goldberg, supra note 42, at 186.

332. See, e.g., Hutchison, Waging War on the “Unfit”? supra note 14, at 44–46 (describing the creation of a survival of the fittest world by progressives and others, who are committed to a world driven by the imperatives of quasi-evolutionary thought).


334. See id.

335. See id.
Taken together, this move accomplishes two things: first, it enables elites to capture the benefits of majoritarianistic paternalism and claim the moral high ground as part of an asserted attempt to shore up fairness and equality; second, capture of political power by rich private interests correspondingly diminishes the power of outsiders (African Americans) in the process. In contemporary times, this ongoing war for political and economic goods has been augmented by a rise in the size and scope of government and a consequent diminution of civil society that is fortified by the absence of substantive judicial review of so-called economic regulation.

Rather than remain a neutral “umpire which enforces the rules of the game of civil association, the state has become the most potent weapon in an incessant political conflict for resources.” Thus, the government’s power is pursued “because of the vast assets it already owns or controls, but also because no private or corporate asset is safe from invasion or confiscation by the state.” Rather than simply sustaining the peaceful coexistence of civil associations, the state has become “an instrument of predation, the arena within which a legal war of all against all is fought out.” In this survival-of-the-fittest world, the rules of civil association—the laws specifying property rights, contractual liberties, and acceptable modes of voluntary association, which ought to restrain the state—are now themselves objects of capture by individuals and groups claiming that their self-interested pursuits are actually in the public interest, or, alternatively, are driven by fairness or the exigencies of the nation’s progress.

In reality, corporate interests and pressure groups are continuously active by lobbying, colonization, cooptation of regulatory authorities, or through intentional efforts to corrupt politicians, in order to mold these rules to suit their own highly politicized selfish interests. This facially neutral

336. See id. (describing the capture of government power by private interest groups).


338. See MAYER, supra note 178, at 115–18 (summarizing some of the effects of the demise of liberty of contract jurisprudence, including the demise of personal freedom).


340. Id.

341. Id.

342. Id.

343. Id.

344. Id.
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process advances on a track that mirrors the imperatives of quasi-evolutionary science focused on the presumed relative value of gene pools that various and sundry groups possess.\textsuperscript{345} Fitness is actually measured by influence; hence, those without influence in the intensely Darwinian world are at a distinct disadvantage.\textsuperscript{346} This pernicious process is richly illustrated by the reification of Carolene Products, which is simply “an utterly unprincipled example of special interest legislation.”\textsuperscript{347}

In harmony with these various deductions, in the alternative energy sector of the United States, special interest firms blessed with influence often receive federal loan guarantees as a reward and then just before the firm goes under, the firm’s executives receive hefty bonuses.\textsuperscript{348} This move appears to disproportionately disfavor African Americans who are poorly represented in the executive class\textsuperscript{349} and in the alternative energy arena.\textsuperscript{350} Congruently, members of the Congressional Black Caucus have rightly criticized President Obama’s facially neutral attempt to prop up Solyndra and other so-called green energy initiatives,\textsuperscript{351} because they instinctively know that such efforts benefit rich political donors\textsuperscript{352} and rarely benefit the public interest, let alone disadvantaged groups.

Thus, in praising the good that can come from the flourishing of government’s often arbitrary prerogatives, society should recapture a prior commitment to the truth,\textsuperscript{353} which mandates that every citizen of the United States receive a fair share of the benefits of our governmental development.

\textsuperscript{345}. For a discussion of this issue, see Hutchison, \textit{Waging War on the “Unfit”?}, supra note 14, at 44–46.

\textsuperscript{346}. \textit{See id.}

\textsuperscript{347}. \textit{See MAYER, supra} note 178, at 110 (citing legal scholar Geoffrey Miller).

\textsuperscript{348}. \textit{See, e.g.}, Ronnie Greene & Matthew Mosk, \textit{The Politics of Energy: Energy-Based Firms Award Bonuses, File Bankruptcy}, CENTER FOR PUB. INTEGRITY (Mar. 6, 2012, 7:00 AM), http://www.publicintegrity.org/2012/03/06/8325/energy-backed-firms-award-bonuses-file-bankruptcy (showing how numerous government backed firms paid large bonuses to executives, just before the firms declared bankruptcy).

\textsuperscript{349}. \textit{See, e.g.}, African American CEO’s of Fortune 500 Companies, BLACKENTREPRENEURPROFILE.COM (Apr. 7, 2012), http://www.blackentrepreneurprofile.com/fortune-500-ceos/ (showing that only thirteen African-American executives have ever made it to the Chairman or CEO position of a “Fortune 500” listed company).


\textsuperscript{351}. \textit{Id.}


\textsuperscript{353}. As used here, the phrase “prior commitment to truth” means attaining a shared understanding of truth as an essential component of a pluralistic society. \textit{See} Harry G. Hutchison,
States should never forget the evils that the state has wrought and continues to commit as part of its highly ossified pursuit of hegemony in virtually all aspects of human life. An extremely sharp contrast with this pursuit of hegemony comes into view when one reconsiders *Lochner* in the mirror of African-American progress: “Lochnerian jurisprudence, when applied, protected African Americans from facially neutral legislation that restricted their access to, and mobility in, the labor market.”

Moreover, despite opposition by Progressive Era commentators, a development that has now been transmuted into indifference by contemporary progressive scholars, liberty of contract jurisprudence that is premised on substantive due process review became an effective weapon against de jure segregation of the kind practiced in jurisdictions like Louisville, Kentucky during the early part of the twentieth century. Since this substantive due process review was rarely applied, it is no surprise that between Reconstruction and the New Deal, African-American workers viewed Lochnerism as “much too timid and ineffectual; courts gave far too much leeway to the regulatory powers of government, allowing powerful interest groups to profit from labor regulations at the expense of African Americans.”

Hence, if the Supreme Court could find the courage to act as a trustworthy judge and strip the subordinating effects from progressive law and policy initiatives that, perhaps unwittingly, are advanced by President Obama’s gallantly progressive administration, then marginalized citizens in the United States might have cause to celebrate any prospective confrontation between the president and the Court.

Unswerving from the provisional prognosis, described in Part I, this Article concludes that such a confrontation is highly unlikely, because the Court has succumbed to the allure of living constitutionalism that is predisposed to accommodate the needs of an evolving, ever expanding, state. As Lund and McGinnis observe, even the *Lochner* Court gives

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356. *See MAYER,* supra note 178, at 91–95 (discussing the Supreme Court’s application of liberty of contract jurisprudence in *Buchanan v. Warley,* 245 U.S. 60 (1917) in order to invalidate de jure segregation).

357. *BERNSTEIN, ONLY ONE PLACE OF REDRESS,* supra note 33, at 7.

358. For a brief introduction to the possibility of a confrontation between President Obama and the Supreme Court, see *supra* Part I.

359. *See,* e.g., Balkin, *supra* note 23, at 139 (claiming that the New Deal is consistent with the Constitution’s original meaning and that New Deal jurisprudence reflects a series of new
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substance to the notion that the judiciary was prepared to reify the forces of majoritarian paternalism so long as the challenged policy could be completely sheltered by the states’ police power. This meant that in the absence of evidence that a state’s public health initiative was calculated to advance a special interest, a majority of the *Lochner* Court was not prepared to intervene on substantive due process or any other grounds. *Carolene Products*, which chronologically and conceptually follows the pathway blazed by *Buck v. Bell*, confirms the Supreme Court’s wide-ranging surrender to entrenched interests as it backed away from even a tangential commitment to core economic rights summed up by liberty of contract and the protection of property rights. Although Footnote 4, if forcefully applied, remains a useful vehicle to limit formal discrimination, it remains limp in the face of more subtle forms of subordination. Despite the fact that special interest groups, such as Big Business, Big Labor, and Big Lobbyists, are mindful of the legal force of Footnote 4’s putative protections, and hence have incentive to avoid proposing legislation or policies that formally harm African Americans, these groups adhered to formal discrimination that appeared to violate the explicit or implicit objectives of Footnote 4. This process was advanced by federal power.
Shrewdly or inadvertently, modern-day special interest groups, particularly those that wish to engage in “willful blindness,” realize that the best way to disguise the discriminatory effects of their favored legislation and policies is to emphasize formal equality as a sanctuary for policy initiatives, which when accurately examined, disadvantage citizens considered “undesirable,” “unfit,” or “defective.”

Today’s presentation constitutes a rather modest interruption of the United States’ ongoing surrender to the acclaimed force of Footnote 4. Skeptical and suspicious observers recognize progressive constitutionalism and progressive values as central components of a tripartite commitment to collective values, centralized power, and evolving standards of decency. This maneuver is predicated on the pursuit of predictability in human life that is sheltered by an ostensible pledge to protect “discrete and insular minorities.” Safeguarding the plausible pursuit of predictability, power, and an expansionist state within a linguistic commitment to the anti-discrimination principle enables progressive scholars to embrace New Deal achievement without questioning the substantive discrimination that remains richly embedded in much of state and federal social progress legislation. This development empowers progressives, such as Professor Bruce Ackerman, to portray federal interventionism during the New Deal as part of an encouraging pursuit of social equality that set the stage for later civil rights measures. Frequently imprisoned by progressive mythology, progressive scholars, defenders, and jurists are evidently prepared to shun the obvious contradictions that are fashioned by

require white unions to admit blacks.”). Id. at 239.


369. See, e.g., id. at 33–45, 63–69 (demonstrating that the ongoing support for minimum wage legislation effectively amounts to an attempt to expunge the poor, the “defective” and the “unemployable” from the labor workforce).

370. See, e.g., Hutchison, Protecting Liberty?, supra note 65, at 10, 18, 20 (showing that a tripartite commitment to collective values leads inevitably to centralization as part of an often collusive corporatist process).

371. See, e.g., Roper v. Simmons, 543 U.S. 551, 563 (2005) (suggesting that the Constitution ought to be interpreted according to judicially determined and evolving standards of decency).


374. Hutchison, Employee Free Choice, supra note 36, at 391–414 (discussing the substantive discrimination embedded in United States labor law).

375. Bernstein, Only One Place of Redress, supra note 33, at 105–06 (disputing Ackerman’s claims).
progressive teleology.\textsuperscript{376} Overall, this approach was, and is, lubricated by diminishing the role and importance of individual actors premised on the hypothesis that no individual strategy could achieve socially-optimal results.\textsuperscript{377} By shrinking the role of individuals in exchange for elite-led governance by both political parties and captive experts, this approach has sacrificed the interests of African Americans and their futures in exchange for the attainment of the greater good instantiated by expansive federal or state power.\textsuperscript{378} Hence, FDR’s legal and policy innovations could proceed without serious obstacles, secure in the knowledge that such laws—consistent with the preferences of many early progressives—would deliberately or inadvertently expunge large numbers of African Americans from the labor force and thus reward large labor unions and large corporations for their continued participation in remaking the United States.\textsuperscript{379} Properly appreciated, any sustained inspection of the New Deal reveals a paradox: the attempt to attain social justice through government planning and regulation often produces the opposite result.\textsuperscript{380} The salience of this paradox has become more significant, “because the American character is not inclined to look to the state for meaning and direction (except during wartime) . . . .”\textsuperscript{381} As a consequence, liberals, including contemporary members of the progressive movement, have responded to this observation by insistently “searching for new crises as the moral equivalents of war.”\textsuperscript{382} This move reifies the oligarchical, if not autocratic, tendencies of modern democracies.\textsuperscript{383} 

\textsuperscript{376} See id. (showing Ackerman’s willingness to ignore the contradictions that are fashioned by progressive teleology).

\textsuperscript{377} Samuel Issacharoff & Catherine M. Sharkey, \textit{Backdoor Federalization}, 53 UCLA L. REV. 1353, 1369 (2006) (explaining the move toward federalization grounded in part in the notion that in complex societies there is a need for a national coordinator); \textit{but see} Hutchison, \textit{Protecting Liberty}?, \textit{supra} note 65 (arguing that uniformity may aid the forces of subordination).

\textsuperscript{378} See generally Issacharoff & Sharkey, \textit{supra} note 377, at 1353–1432 (defending increasing federalization, centralization, regulation, and uniformity as necessary approaches to preclude predation in markets).

\textsuperscript{379} The National Recovery Administration during the New Deal is perhaps the best illustration of this process. Goldsberg, \textit{supra} note 42, at 150–57 (describing the creation of labor and corporate cartels). The creation of cartels was later extended to the realm of agriculture in order to drive up prices, a process supervised by the Agricultural Adjustment Administration. \textit{See id.} at 155. Many white framers were paid to not work their land, which resulted in hungry African-American tenant farmers who, of course, were not paid. \textit{See id.} This process continues to plague the lives of African Americans today. \textit{Id.} at 268–69.

\textsuperscript{380} Hutchison, \textit{Racial Exclusion}, \textit{supra} note 47, at 8 (discussing Professor Goldberg’s analysis).

\textsuperscript{381} \textit{Id.}

\textsuperscript{382} \textit{Id.}

\textsuperscript{383} See generally Richard H. Pildes, \textit{The Inherent Authoritarianism in Democratic Regimes},
Footnote 4, for all its rhetorical elegance, has regularly remained powerless in the face of exclusionary efforts enforced by the indifference and discretion of members of the legislative or executive branches. This is best exemplified by (1) the Supreme Court’s vindication of labor union exclusion on the basis of race in Steele v. Louisville, several years after its celebrated decision in Carolene Products; (2) the Court’s deference to Congress and FDR made tangible by its decision in Korematsu, again several years after its ostensible defense of “discrete and insular minorities;” and (3) FDR’s impotent response to the creation of what were virtually slave camps during the 1940s. Such failures are expediently reinforced by the quest of modern humans for organizational predictability derived through social science. Since organizational success and organizational predictability exclude one another, the project of creating a wholly or largely predictable society is doomed by the very facts of social life. Humans respond in unexpected ways to new regulatory initiatives, thereby rendering successful organization grounded in bureaucratic managerialism—a concept that characterizes the United States Government as nothing more than a contemporary moral fiction. Unavoidably, the cumulative effects of such regulatory initiatives in democratic states, like the United States, lead to totalitarianism. While totalitarianism most often produces a kind of rigidity and inefficiency, which may contribute in the long run to its defeat, no one should forget the haunting voices from Auschwitz, Treblinka, the Gulag, and the slave camps in Florida that illustrate the duration of the long run.

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385. Steele v. Louisville & N.R. Co., 323 U.S. 192 (1994) (finding that the Railway Labor Act implied a duty to refrain from “hostile discrimination” against members of minority groups within the bargaining unit but upheld the labor union’s right to exclude on the basis of race).
388. GOLUBOFF, supra note 57, at 1–3.
389. MACINTYRE, supra note 9, at 88–108 (discussing the human search for predictability through social science generalizations).
390. Id. at 106.
391. Id. at 106–07.
393. MACINTYRE, supra note 9, at 106.
V. CONCLUSION

Representing the views of progressives with characteristic brilliance, Professor Weinberg has argued that the Ninth Amendment acknowledges the existence of certain fundamental yet unenumerated rights that call for active judicial protection. In her earlier writings, she quite rightly enumerates Justice Holmes’s transparent failures, including his belief in the rigid separation between law and morality. Nonetheless, Professor Weinberg’s analysis is constrained by the inherent elegance of Footnote 4’s protection of “discrete and insular minorities.” Just like other progressive scholars who recognize the appeal of monochromatic uniformity in centralized power, she appears unwilling to fully acknowledge New Deal constitutionalism’s hearty contribution to subordination and contradiction. Uniform with this observation, the true legacy of Carolene Products lies in its unrivaled commitment to the primacy of interest group politics and legal “formalism” as an inescapable constituent of progressive constitutionalism. Rather than truthfully creating a double standard within the realm of substantive due process jurisprudence that might serve to block legislation that disfavors members of minority groups, the Carolene Products decision, in practice, favors entrenched groups at the expense of African Americans and other outsiders “[s]o long as the government’s action bears some connection to a minimally rational economic policy. . . .”

Dr. Martin Luther King, Jr. rightly maintained that “[n]othing in all the world is more dangerous than sincere ignorance . . . .” Yet, many scholars,

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394. Weinberg, Unlikely Beginnings, supra note 1, at 292 n.6 (noting and implicitly agreeing with the Supreme Court’s decision to sustain a “state minimum wage law for women and minors against a Lochner-like due process challenge”). She therefore avoids noting that the law as a general matter has been one of the principal methods of oppressing women and minorities. See Epstein, How Progressives Rewrote the Constitution, supra note 28, at 90.

395. Weinberg, Holmes’ Failure, supra note 19, at 696.


397. See generally Weinberg, Unlikely Beginnings, supra note 1, at 291–324 (including her contribution to the University of Pennsylvania Law Symposium).

398. Mayer, supra note 178, at 110 (showing that this move is facilitated by “minimal rational basis test” review of substantive due process claims, which functions as a rather formalistic presumption in favor of the constitutionality of special interest group legislation and reverses the Lochner Era presumption in favor of liberty, which requires rather strict scrutiny of the real motive or effect of the challenged policy).

399. See id. at 111 (arguing that Carolene Products created a double standard in the Supreme Court’s modern substantive due process jurisprudence).

400. Id. at 110 (citing Timothy Sandefur, The Right to Earn a Living, 6 Chap. L. Rev. 207, 262 (2003)).

policymakers, and members of the Supreme Court, rather than engage in a searching inquiry of the New Deal, prefer to remain blinkered, acquiescing to majoritarian paternalism led by powerful elites and entrenched interests. Rather than establishing a radiant future for all citizens of the United States, the Court’s approach, fortified by commentators’ ongoing surrender to sincere ignorance, signifies that Footnote 4 is nothing more than a self-preoccupied falsifying veil that conceals reality. Thus, in admiring the good that can come from government discretion, society should recommit to the pursuit of the truth while remaining eternally vigilant regarding the tribulations that the state has wrought and continues to fashion as part of its pursuit of control and predictability in human life. Energized by this truth and driven to achieve a distinctly different future—one that bears no resemblance to the past—African Americans and indeed all Americans must, without malice or bitterness, pursue an enduring form of jurisprudence that condemns progressive constitutionalism and its correlative policies to history’s dustbin.

402. Epstein, Lest We Forget, supra note 354, at 795.