The Progressives: Racism and Public Law

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THE PROGRESSIVES: RACISM AND PUBLIC LAW

Herbert Hovenkamp*

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Introduction

American Progressivism, a political and intellectual movement that lasted roughly from the mid-1890s until 1920, began bringing the century old era of American scientific racism to an end. Its critics have been vocal, however. Progressives have been charged with promotion of eugenics, and thus with mainstreaming practices such as school and housing segregation, compulsory sterilization of those deemed unfit, and exclusion of immigrants on racial grounds.1

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The criticism has fueled movements to remove Woodrow Wilson’s name from Princeton’s School of Public and International Affairs, and opposition to naming a building at Iowa State University after suffragette Carrie Chapman Catt -- in both cases because of their racism or xenophobia. One question this raises is, if the Progressives were such racists, why is it that since the 1930s people of color have consistently supported self-proclaimed progressive political candidates, mostly Democrats, and typically by wide margins? The answer, as for most important movements, is that we must distinguish the set of ideas that the Progressives inherited from those that they developed for themselves and contributed.

The claim that many Progressives were racists is true. Some of them also held strongly exclusionary views about immigration and supported the sterilization of perceived mental defectives. Progressives inherited these views, however, and they were not appreciably different from those held by most of their non-Progressive predecessors and contemporaries. Progressives themselves were highly diverse on the question of race, ranging from the explicit racism of people like John R. Commons or Edward A. Ross, to the more egalitarian views held by the mainly white founders of the NAACP in 1909, including Jane Addams, John Dewey, Oswald Garrison Villard, and also Afro-Americans W.E.B. DuBois, Booker T. Washington, and Ida B. Wells. The NAACP immediately embarked on a strategy of using the courts to combat race discrimination and segregation. Its first major victory in the Supreme Court was Buchanan v. Warley, which struck down racially exclusive zoning.

While many scientists during the Progressive Era were scientific racists, not all were. Further, the approaches to science that progressive inherited from the past were sharply different from those that they developed and that we associate today with progressive science. For example, progressive reformer Franz Boas, the most prominent anthropologist of his era and developer of cultural relativism, was a sharp critic of scientific racism as well as eugenics. John B. Watson, the founder of behavioral psychology who wrote mainly in the 1910s and

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4The efforts are not limited to Progressives. For example, early in 2017 John C. Calhoun’s name was removed from a Yale University building. See https://www.nytimes.com/2017/02/11/us/yale-protests-john-calhoun-grace-murray-hopper.html. Calhoun, a racist political leader from South Carolina and seventh Vice President of the United States, died in 1850.
5JOHN R. COMMONS, RACES AND IMMIGRANTS IN AMERICA (1907).
9Buchanan v. Warley, 245 U.S. 60 (1917); see discussion infra, text at notes 244-50.
1920s, believed that genes had virtually nothing to do with a person’s character or intelligence; everything was a response to environmental stimuli.\(^\text{11}\) Progressive Sociologist Charles Horton Cooley, son of the famous Gilded Age Constitutional Scholar Thomas M. Cooley, complained bitterly that Afro-Americans were consistently subjugated to Jim Crow style treatment even though they were equal to whites in character and intelligence.\(^\text{12}\) These approaches to science, not the hereditary determinism of the era in which Progressives were educated, are the Progressives’ important contributions.

The development of these new approaches substantially brought about the death of scientific racism, which had been taught in American universities since the early nineteenth century and featured prominently in the debate over Darwin’s theory of evolution.\(^\text{13}\) Eugenics, which attempted to use genetics and mathematics to validate many racist claims, was its last gasp. The most notable thing about the Progressives is that they were responsible for bringing these views to an end, although that did not happen immediately.

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

Determining how genetic racism and eugenics fit into Progressivism requires first that we identify who the Progressives were. Numerous legislative reforms subsequently characterized as “Progressive” originated in the 1890s and 1900s, including the Sherman Act (1890), the Pure Food and Drug Act (1906), and many state statutes regulating hours of labor, working conditions, and professional licensing.\(^\text{14}\) The word “progressive” was not commonly used to describe this movement until 1910 or so, however. Prior to that, in 1908 the eminent Progressive tax scholar Edwin R.A. Seligman wrote a book entitled *Progressive Taxation in Theory and*

\(^\text{11}\) See discussion *infra*, text at notes 313-320.


\(^\text{13}\) E.g., Samuel George Morton, *Crania Americana; or, A Comparative View of the Skulls of Various Aboriginal Nations of North and South America, to Which Is Prefixed an Essay on the Varieties of the Human Species* (1839). See George M. Frederickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914* at 74 (1972) (crediting Morton with developing scientific racism). See also Josiah Clark Nott and George R. Gliddon, *Types of Mankind* (1854) (developing scientific arguments for polygenesis, or view that different races had distinct origins and were of different species); and see Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 630-635 (tracing history of nineteenth century scientific racism).

He was using the term “progressive” not to describe a wide ranging political movement, however, but rather a theory of taxation based on marginalist economics, which was only one important principle of progressivism. That same year Herbert Croly, founder of *The New Republic*, published his highly influential *The Promise of American Life*, which used the word “progressive” to advocate government economic planning as part of a transition to a more corporatist rather than individualistic conception of capitalism. The political label “progressive” became popular prior during the 1912 Presidential election campaign, where it was claimed to some extent by all three Presidential candidates, Theodore Roosevelt, William H. Taft, and Woodrow Wilson.

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

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

Those who self-identified with Progressivism were diverse. At risk of oversimplification, the movement’s most important intellectual characteristics were (1) marginalism in economics, with its increased emphasis on forward looking expected value and risk management, wealth distribution, and market failure; (2) a strong tendency to follow prevailing science, including a fascination for emergent social science; (3) a concern with broader political participation in all levels of government as well as business; and 4) a commitment to “institutionalism,” or the view that resources should and do move through society by diverse mechanisms, of which the

16 See id. at 17-35.
23 Id. at 17-35.
traditional market is only one. These views were shared by many Americans, but certainly not by all.

Just as any other movement, the Progressives inherited some theories and developed new ones. Among the former were well established scientific theories about the human race, many of which antedated the Civil War. As Progressive social science matured, however, it developed its own models that were much more environmentalist and dismissive, not only of hereditary determinism, but even of the very concept of race. The result was the views that we most strongly identify today with the Progressive social science revolution – namely, cultural relativism, behaviorism, instrumentalism, and other environmentally based theories of human behavior. ²⁴

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

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

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

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²⁴ For a chronicle of the decline, written by a contemporary, see J. B. Eggen, *The Fallacy of Eugenics*, 5 SOCIAL FORCES 104 (1926).
²⁵ See discussion *infra*, text at notes 40-42.
²⁸ To this day progressive Republicans continue to maintain a website. See http://progressiverpublicans.org/. See also Angelo Lopez, *The Rise and Fall of the Progressive*
lines, initially claiming Republican Theodore Roosevelt as the first Progressive President. Republicans William Howard Taft and Herbert Hoover both took the Progressive label at some point in their careers, although today neither is regarded as particularly Progressive. Woodrow Wilson, a Democrat, was the last President to be a self-acknowledged part of the original Progressive movement.

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

Second, if Progressive public policy on race differed from prevailing alternatives, it was that Progressives believed in a more active State. They were more supportive of legislative intervention than their more laissez faire predecessors and opponents. Racism supported by a legislative agenda can be much more aggressive and uglier than racism that is passively tolerated. One cannot characterize most of the segregationist, exclusionary, and other racist legislation passed during this era as "Progressive," however. Southern states actively promoted racial exclusion by an assortment of statutes that today go under the name “Jim Crow.” All of the racial zoning laws sometimes attributed to Progressives were passed in formerly slaveholding states. Whatever the ideological or scientific sources of these laws, they were supported by staunch anti-Progressives. The same thing is true of compulsory sterilization laws. For example, the Supreme Court Justices who voted consistently against Progressive labor protection and other regulatory legislation also largely voted to uphold compulsory sterilization of mental "defectives." While many Progressives advocated for more restrictive immigration laws, nothing passed during the Progressive Era matched the explicit restrictions on Chinese immigration that came earlier, or the racist immigration restrictions promoted by anti-

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29 See discussion infra, notes 81-82.


31 See discussion infra, notes 244-247.

32 See discussion infra, notes 129-133.
Progressive Presidents Harding and Coolidge and enacted during their terms of office in the 1920s.\textsuperscript{33}

Progressive racism cannot be defended. The Progressives did not invent racism, however, which was already present in several varieties, including scientific, historical, cultural, and religious. During the period prior to 1920 many of them did not do much to combat it either, although some did. But that gets to the next point.

Third, one distinctive feature of progressivism was its leadership in rejecting hereditary racism in favor of more environmentalist, nurture-based models of human nature and development. These views began to take hold in the social sciences already in the 1910s and 1920s and began to change legal thinking in the 1940s.\textsuperscript{34} They found expression in a Supreme Court that was almost unanimously self-acknowledged progressive. The result was gradual emergence of a division that has endured to this day, with progressives largely appearing as the champions of racial inclusion, diversity, and procedural due process.

The Progressive Era and the Science of Race

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

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

The beginning of the Progressive Era coincided with a broad-based revolution in the social science of race. One characteristic of progressive policy ever since its inception was its tendency to follow prevailing science, changing its political views when dominant scientific views changed. This fact has served to make the progressive state somewhat less stable than more ideologically driven alternatives, but it has also enabled them to step away from

\textsuperscript{33} See discussion infra, notes 270-272.

\textsuperscript{34} See discussion infra, notes 328-338.


\textsuperscript{36} See discussion infra, text at notes 52-53.

\textsuperscript{37} See discussion infra, text at notes 55-57.

\textsuperscript{38} CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX (1871).

\textsuperscript{39} For a good account, see JOHN S. HALLER, JR., OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900 (1971).
unappealing past commitments. The hereditary determinism that prevailed prior to and during the early Progressive Era tended to find strong hereditary explanations for criminal and other antisocial behavior, including sexual promiscuity and even differences in basic intelligence. Some writers describe these racial theories as "progressive" simply because someone asserted them during the Progressive Era. Some take this to uninformed extremes -- even characterizing strong anti-Progressives such as Oliver Wendell Holmes, Jr. or Justice James McReynolds, one of the Four Horsemen who voted to strike down so much Progressive legislation, as "progressive" simply because they lived during that era.

As is true of so many legal movements that incorporate science, however, the legal policy often lagged behind the science. One prominent example of this was the absorption of classical economic ideas into American statecraft. Americans first began to embrace laissez faire economic ideas with the election of President Jackson in 1828, roughly a half century after Adam Smith articulated them in *The Wealth of Nations*. The Constitutionalization of laissez faire economic policy largely occurred in the 1880s and after in the state courts, however, and not until the turn of the century in the federal courts. By that time the marginalist revolution in mainstream Anglo-American economics was well underway, with its rejection of the wage-fund doctrine, as well as increased concern about market failure and the need for regulatory intervention. Holmes was well aware of this already in his 1905 *Lochner* dissent, complaining that the majority was deciding the case based "upon an economic theory which a large part of the country does not entertain." In sum, American constitutional statecraft embraced laissez faire economic theory just as it was becoming obsolete within mainstream economics. The same thing happened in the case of genetic determinism and eugenics.

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43 See Jeffrey Lord, Two Presidents and the Court: When Bigotry Takes the Bench, AM. SPECTATOR (July 4, 2009), http://spectator.org/41259_two-presidents-and-court-when-bigotry-takes-bench/ (characterizing Justice McReynolds as a "political progressive" and attempting to associate his views with those of Justice Sotomayor simply because she occupies the same seat on the Court).  
45 E.g., in re Jacobs, 98 N.Y. 98 (1885) (striking down statute forbidding cigar-rolling in tenement houses, on Due Process grounds).  
47 HOVENKAMP, OPENING, supra note 14, at 27-35, 278-98.  
48 *Lochner*, 198 U.S. at 75.  
49 See discussion *infra*, text at notes 75-77.
Racial Science Before Genetics

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

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

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

No rational man, cognizant of the facts, believes that the average negro is the equal, still less the superior, of the white man. And if this be true, it is simply incredible that, when all his disabilities are removed, and our prognathous relative has a fair field and no

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50 On pre-Darwinian racial theory in the United States, see William Stanton, The Leopard's Spots: Scientific Attitudes Toward Race in America, 1815-1859 at 50 (1960).
52 David Hume, Essays and Treatise on Several Subjects 291 (1753).
favour, as well as no oppressor, he will be able to compete successfully with his bigger-brained and smaller-jawed rival, in a contest which is to be carried out by thoughts and not by bites.\textsuperscript{57}

For many, Darwinian evolution supported a linear, "scientific" view of racial superiority that lasted well into the twentieth century, including the period encompassed by the Progressive Era.\textsuperscript{58} During this period elite anti-evolutionists were just as racist, however. For example, the prominent Harvard University anti-evolutionary paleontologist Louis Agassiz was a believer in polygenesis, or the theory that the different races had distinct origins and were not even of the same species. Around 1850 Agassiz gave a lecture tour with a set of photographs of American slaves designed to illustrate their structural inferiority.\textsuperscript{59} Belief in polygenesis was not uncommon among scientifically trained Americans prior to the Civil War and died out only slowly thereafter. In fact, polygenesis offered one of the strongest rationales for maintaining slavery and opposing interracial marriage – the idea that the Afro-American was a distinct and inferior class of beings.\textsuperscript{60} Agassiz himself became one of the principal scientific opponents of Darwin in the United States, but his views were at least as racist as those of the Darwinians.\textsuperscript{61} One historian identifies his influence at Harvard in the 1850s and 1860s with the origins of American scientific racism.\textsuperscript{62}

The leading evolutionary anthropologists prior to the Progressive Era were Oxford University Professor Edward Tylor\textsuperscript{63} and Lewis Henry Morgan in the United States.\textsuperscript{64} Both patterned their work after Darwin, whose \textit{On the Origin of Species}\textsuperscript{65} had been published in 1859, and \textit{The Descent of Man} in 1871.\textsuperscript{66} Both Tylor and Morgan followed Darwin in presenting the human race as evolving through a series of stages, culminating in white Caucasians. For Morgan, the theory of evolution showed that the black man was inferior to the white, and second only to Australian aborigines on a scale of racial inferiority.\textsuperscript{67} Morgan granted to "Aryan and Semitic nations" the status of superior, "because they have carried [human progress] to the

\textsuperscript{57} Th\textit{omas H. Huxley, Lay Sermons, Addresses and Reviews} 20 (1871).

\textsuperscript{58} For a good account, see J\textit{ohn S. Haller, Jr.: Outcasts from Evolution: Scientific Attitudes of Racial Inferiority}, 1859-1900 (1971).


\textsuperscript{60} See C\textit{hristopher A. Luse, Slavery's Champions Stood at Odds: Polygenesis and the Defense of Slavery}, 53 CIVIL WAR HIST. 379 (2007). On polygenesis and interracial marriage, see polygenecist Josiah Clark Nott, \textit{The Mulatto a Hybrid – Probable Extermination of the Two Races if the Whites and Blacks are Allowed to Intermarr}y, 29 BOSTON MED. & SURGICAL J. 29 (1843).


\textsuperscript{63} E\textit{dward B. Tylor, Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art, and Custom} (1871).

\textsuperscript{64} L\textitewis H. Morgan, Ancient Society} (1877).

\textsuperscript{65} C\textit harles Darwin, On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life} (1859).

\textsuperscript{66} C\textit harles Darwin, The Descent of Man and Selection in Relation to Sex} (1871).

\textsuperscript{67} M\textit organ, Ancient Society, supra note 62, at 31.
highest point yet attained.” Both of their books were published in the 1870s, more than a generation prior to the rise of Progressivism.

**Genetics, Mathematics, and Eugenics**

Darwin, Tylor, and Morgan all wrote before the emergence of genetics as a distinct scientific field. Nevertheless, Darwin’s work inspired a great deal of scientific study about the link between race and inheritance. In 1877 Richard L. Dugdale, a member of the New York Prison Association, found a high correlation between inheritance and criminality in his book entitled *The Jukes: A Study in Crime, Pauperism, Disease, and Heredity*. Dugdale identified more than 700 people in the extended Jukes family that had been criminals, suffered from mental disease, or required public assistance for their support. Today it is widely believed that Dugdale fabricated much of his story -- that many of the people he identified as "Jukes" were not related by blood at all, and that much of what he said about them was fiction.

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

The rise of mathematical genetic science appeared not only to confirm the importance of heredity, but also to emphasize that environment and culture had little to do with intelligence, character, or ability. In his experiments with successive generations of peas, the Moravian cleric Gregor Mendel had already discovered what were widely perceived to be mathematical laws of inheritance. Mendel performed most of his experiments between 1856 and 1863, before

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68 *Id.* at 507.


70 *Id.* at 68 (out of 700 identified Jukes, 180 had either been sent to the poor house or received other public relief). See also *id.* at 47 (finding that among these, most of the crime was committed by illegitimate children, that eldest sons were the most likely to be criminal).


72 See discussion *infra*, text at notes 75-80.

73 See discussion *infra*, text at notes 281-310.
Darwin’s work was well known. Mendel's studies lay dormant for four decades, however, until they were uncovered at the turn of the century.74

Around 1889 English statistician Francis Galton, first cousin to Charles Darwin, tried to determine precise mathematical expressions that would predict a child's characteristics based on information about the characteristics of his or her parents.75 Galton concluded that inherited characteristics were extremely stable and predicted mental ability, physical features, and also behavioral features.76 For example, Galton's mathematical "law of natural inheritance" prescribed that the "offspring of any parentage, when considered in its entirety, inherits one half of its characteristics from its parents, one fourth from its grandparents, one-eighth from its great-grandparents and so on." 77 Galton's law of "regression from mediocrity" was that offspring's inherited characteristics tended to moderate the more extreme characteristics of their ancestors. For example, Mendel's studies of peas showed that the optimal size of seed for reproduction was 3.94mm, which produced the highest survival rate. As peas went through successive generations, the range of diameters grew smaller and moved toward this optimal size.78 In 1897 Galton presented a highly mathematical paper to the British Royal Society on the inheritance of coat color among Basset Hounds.79 He derived a formula for making precise predictions about a Basset pup’s various color combinations based on data about the coats of its ancestors. Galton’s work in this area, together with that of his mentor, the statistician Karl Pearson, was instrumental in developing modern regression analysis.80 Pearson would later write that:

It was Galton who first freed me from the prejudice that sound mathematics could only be applied to natural phenomena under the category of causation. Here for the first time was a possibility, I will not say a certainty, or reaching knowledge – as valid as physical knowledge was then thought to be – in the field of living forms and above all in the field of human conduct.81

The eugenics and Progressive movements were contemporary, and many of those who supported eugenics believed that legislation could be used to restrain biological deterioration. The perceived threats were the fertility of mental defectives and interracial sexual relations. Nevertheless, many other Progressives rejected eugenics, and many followers of eugenics were

76 See GALTON, NATURAL INHERITANCE, supra note 73 at, 102-03. For an explanation of his models, see Michael Bulmer, Galton's Law of Ancestral Heredity, 81 HEREDITY 579 (1998).
77 See George Harrison Shull, Galtonian Regression in the "Pure Line," 5 TORREYA 21 (1905). Shull was a prominent plant geneticist who spent most of his career at the Carnegie Institute, and founder of the journal Genetics. On Galton’s numerous statistical experiments with such things as intelligence tests, see GILLHAM, supra note 73, at 156-66.
78 GALTON, NATURAL INHERITANCE, supra note 73, at 102-03.
79 Francis Galton, The Average Contribution of Each of Several Ancestors to the Total Heritage of the Offspring, 61 PROC. ROYAL SOC’Y 401 (1897)
81 Quoted in GILLHAM, supra note 73, at 277.
not Progressives.\textsuperscript{82} Even anti-Progressives who opposed many other forms of control legislation, including protective labor legislation, nevertheless approved highly invasive legislation that sterilized those thought to be mentally unfit.

Building on the mathematical models of inheritance developed by Mendel and Galton, the science of eugenics reflected extreme emphasis on the genetic content of human character, to the point of disregarding environmental influences. At the time eugenics was not pseudoscience, however. A pseudoscience, such as astrology, must be rejected by the contemporary scientific mainstream. But that was hardly the case with eugenics, which took hold in elite American institutions and was taught in nearly 400 colleges and universities.\textsuperscript{83} Among its supporters were Chicago and later Harvard zoologist Charles Davenport, Stanford University President David Starr Jordan, University of Chicago Professor John Merle Coulter, Yale economist Irving Fisher, University of Michigan President Clarence Cook Little, businessmen John D. Rockefeller\textsuperscript{84} and Andrew Carnegie, inventors Alexander Graham Bell and Nikola Tesla, aviator and public figure Charles Lindberg, as well as others too numerous to mention.

Eugenics derived its scientific status from its impressive use of mathematics.\textsuperscript{85} The same was true of Progressive era economics, where marginalism invited mathematics into the discipline and greatly increased to its attractiveness to younger scholars.\textsuperscript{86} Other fields, such as anthropology, which was not mathematical and much more involved with empirical questions about inheritance, were more reticent. Economists lost their infatuation with eugenics in the late 1910s and after, as marginalism became more technical and focused strictly on preferences, rejecting the idea that the biological quality of preferences is a legitimate subject of economics. In the process, economics largely cut its ties with the theory of evolution, including eugenics.\textsuperscript{87}

During the Progressive Era many students of inheritance believed that Mendel and Galton provided the basis for a quantifiable theory of inheritance. Mainstream scientific journals from England and America were filled with their work.\textsuperscript{88} Most of it was purely theoretical or

\textsuperscript{82} See discussion infra, text at notes 72-75.
\textsuperscript{83}See ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016) (stating that eugenics was taught in 376 American colleges and universities); EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE (2003); DONALD K. PICKENS, EUGENICS AND THE PROGRESSIVES (1968); HALLER, EUGENICS, supra note 67.
\textsuperscript{84} On Rockefeller, see DAVID J. PETERSON, REVOKING THE MORAL ORDER 53 (1999).
\textsuperscript{85}E.g., Harry H. Laughlin, Illustrating the Structure and Mathematics of the Human Germ-Plasm, 1 J. HEREDITY 185 (1920); Frederick Adams Woods, Some Desiderata in the Science of Eugenics, 5 J. HEREDITY 244 (1909).
\textsuperscript{86} See HOVENKAMP, OPENING OF AMERICAN LAW, supra note 14, at 32-33.
\textsuperscript{87} See id. at 13-35, 91-106.
\textsuperscript{88}See, e.g., William Ernest Castle, The Laws of Heredity of Galton and Mendel, and Some Laws Governing Race Improvement by Selection, 39 PROC. AM. ACAD. ARTS & SCIENCE 223 (1903); Francis Galton, Kinship and Correlation, 150 N. AM. REV. 419 (1890); Karl Pearson, Mathematical Contributions to the Theory of Evolution: On a Generalised Theory of Alternative Inheritance, with Special Reference to Mendel's Laws, 203 PHIL. TRANSACTIONS ROY. SOC’Y LONDON 53 (1904); Karl Pearson and Alice Lee, On the Laws of Inheritance in Man: I. Inheritance of Physical Characters, 2 BIOMETRIKA 357 (1903); R.A. Fisher, The Correlation Between Relatives on the Supposition of Mendelian Inheritance, 52 TRANSACTIONS ROY. SOC’Y EDINBURGH 399 (1919); Raymond Pearl, The
investigative, without drawing explicit implications for public policy. There were some exceptions. For example, University of Chicago economist James Alfred Field wrote in 1911 that "Unless many signs fail, the study of eugenics has established its claim to recognition among the hopeful applications of science in social reform."\(^89\) In 1912 Popular Science Monthly included a report in its regular feature on "The Progress of Science" on the First International Eugenics Congress, which took place in London in July of that year.\(^90\) The article concluded that such congresses were "another witness of the growth of that best type of internationalism that leads scientific men to step unhesitatingly across political imaginary lines whenever they feel that they can work more effectively together than apart."

Darwin's own son Leonard Darwin became an enthusiastic advocate of eugenic human engineering. In 1912 he lectured to the Cambridge University Eugenics Society that the "primary object of Eugenics is, no doubt, to substitute for the slow and cruel methods of nature some more rational, humane, and rapid system of selection by which to ensure the continued progress of the race."\(^91\) Although he did not cite his father's book, Variation of Animals and Plants under Domestication,\(^92\) he must have had it in mind. Charles Darwin himself had concluded that evolution proceeds much more quickly under domestication and selective breeding, and that it can be directed through artificial as opposed to natural selection.

Most of the history writing about the eugenics movement, and particularly the legal history, has focused on the implications for human inheritance and the unappealing policy consequences. That picture mischaracterizes the movement as a whole, although it was the focus of some very popular texts, such as Popenoe & Johnson's Applied Eugenics.\(^93\) Eugenics actually cut much more broadly, dominating theories about plant and livestock breeding as well. For example, William Castle, a geneticist who did much of his research on fruit flies, wrote an important textbook on the use of eugenics in animal and plant breeding.\(^94\) Harvard Professor Edward Murray East's influential 1919 book Inbreeding and Outbreeding was concerned with the science of eugenics as applied to all plant and animal species.\(^95\) His co-author, David F.

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\(^{89}\) James A. Field, The Progress of Eugenics, 26 Q.J. Econ. 1 (1911).


\(^{92}\) CHARLES DARWIN, THE VARIATION OF ANIMALS AND PLANTS UNDER DOMESTICATION (1868).

\(^{93}\) PAUL POPENO E & ROSWELL HILL JOHNSON, APPLIED EU GENICS (1920).


\(^{95}\) EDWARD MURRAY EAST AND DONALD F. JONES, INBREEDING AND OUTBREEDING: THEIR GENETIC AND SOCIOLOGICAL SIGNIFICANCE (1919).
Jones was a geneticist at the Connecticut Agricultural Experiment Station and a pioneer inventor of hybrid corn seed.\(^96\) East and Jones were scientists, however, not policy makers. One disturbing feature of their book is the ease or even indifference with which the authors moved from discussions of selective breeding in plants or horses to engineering of human beings.

This point about the breadth of eugenics is also important when particular Progressive Era individuals are described as followers of eugenics. Some followers did believe in theories about human racial selection and sterilization, but others followed eugenics for no other reason than they had an interest in breeding plants or livestock, or else in its underlying mathematics. Approximately one third of the articles in the early issues of *Biometrika*, Galton’s mathematical eugenics journal, were concerned with human beings and inheritance. Most of the others were about mice, fruit flies, or other organisms, including plants.\(^97\) Further, most of those that were about human beings were not about racial superiority but about such technical matters as the relationship between inheritance and skull shape, or the correlation between human hair color and eye color.\(^98\)

Two elements of eugenics' mathematical approach to the laws of inheritance are critical for understanding early twentieth century scientific racism as well as the commonly accepted views about mental deficiency. They also help explain why eugenics failed. First, Galton's mathematical models functioned only if an individual’s character was *solely* a product of the genes of parents and other ancestors. That is, admitting any environmental influences at all undermined mathematical predictability. This fact serves to explain why the first generation of Galton's followers were so steadfastly genetic in their ideas about race and capacity, completely ruling out or ignoring environmental influences. It also made alternative models that mixed environmental and genetic influences, such as those of Franz Boas and his followers, much more complex and unwieldy.\(^99\) The other important result, however, was that when social science began to appreciate environmental factors more, the eugenicists’ confidence in their ability to re-engineer the human race began to look very naïve.

Second, the mathematical models that Galton and his followers developed also serve to explain why genetic determinism was so popular in the scientific community. Any science able to embrace mathematics was thought to be superior to less quantifiable alternatives. That same fact accounted for economists’ claims of methodological superiority. Beginning in the 1920s, however, economics retained its mathematics but largely began to assume that every individual’s utility preferences must be taken at face value. Searching out the biological or other sources of these preferences lay outside the boundaries of scientific economics.\(^100\) In the process economists largely lost their infatuation with eugenics.

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\(^{97}\) A complete table of contents of *Biometrika* back to 1901 can be found at http://biomet.oxfordjournals.org/content/by/year.

\(^{98}\) E.g., K.P., *On the Correlation Between Hair Colour and Eye Colour in Man*, 3 BIOMETRIKA 459 (1904).

\(^{99}\) See discussion infra, text at notes 280-95.

In 1901 Galton and his associates founded *Biometrika*, a journal historically dedicated to the mathematical determination of inheritance in all forms of biological organisms. These views were adopted largely wholesale and extended by American geneticists such as Edward M. East, zoologist Charles Davenport and William Ernest Castle, all members of Harvard’s scientific faculty. Among the views were strong recommendations against interracial sex and marriage. Because so many relationships are formed when people are students, they also counselled against integrated education. The general thrust of this literature was not only that genetics accounts for all of the important features of human development, but also that environment counts for almost nothing.

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

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

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102 EAD AND JONES, INBREEDING AND OUTBREEDING, supra note 92.
104 E.g., WILLIAM ERNEST CASTLE, THE LAW OF HEREDITY OF GALTON AND MENDEL AND SOME LAWS GOVERNING RACE IMPROVEMENT BY SELECTION (1903).
105 See, e.g., Francis Galton, *Natural Inheritance*, 14 MIND 414 (1889).
107 Id. at 13.
If we are right in our contention that intimate association in the school room will ultimately led to social equality and amalgamation, who, then will estimate the import of this "mental gap" between the white and the black."\textsuperscript{112}

It is easy to discount these views as "pseudoscience," and some have.\textsuperscript{113} But the fact is that they were widely held prior to the 1920s, by people of every political stripe, and even by academics at elite universities.

By the time of \textit{Berea College} the lawfulness of racial segregation in public elementary schools was well established. A provision in the proposed 1875 Civil Rights Act had forbidden the exclusion of black students from schools, but it was removed prior to passage.\textsuperscript{114} Even that proposal would merely have prohibited exclusion, or complete denial of educational facilities to black students. It would not have mandated integration. The 1875 Civil Rights Act, but without the school provision, remained in force until the Supreme Court struck it down in 1883 for exceeding Congressional power to legislate under §5 of the 14th Amendment.\textsuperscript{115} Judicial decisions in 1871\textsuperscript{116} and 1882\textsuperscript{117} upheld segregated schools in Ohio and Kentucky, provided that they were equal.\textsuperscript{118} A number of courts also agreed that nothing in state or federal constitutions prohibited segregated schools or, in some cases, the provision of no schools at all for black children.\textsuperscript{119} All of this long antedated the Progressive Era.

Who Supported Eugenics?

During the Progressive Era racism appeared often in the writings of liberals such as President Woodrow Wilson, economists Richard T. Ely and Irving Fisher, or sociologist Edward A. Ross. These views were just as staunchly held by anti-Progressives, however, including Justices Oliver Wendell Holmes, Jr. and James McReynolds, one of the "Four Horsemen" who voted so frequently to strike down protective labor legislation and other forms of regulation. Wilson’s successor, President Warren Harding, is believed to have been inducted into the Ku Klux Klan in a private Green Room ceremony in the White House while he was President.\textsuperscript{120} He

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\textsuperscript{112} Brief for Defendant in Error, \textit{supra} note 106, at 40.


\textsuperscript{114} GEORGE A. RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, and the CIVIL RIGHTS ACT of 1866, at 88–90 (2012).

\textsuperscript{115} The Civil Rights Cases, 109 U.S. 3 (1883).

\textsuperscript{116} State v. McCann, 21 Ohio St. 198 (1871).

\textsuperscript{117} United States v. Buntin, 3 Ky. Rptr. 630, 10 F. 730, 735 (C.C. Ohio 1882).

\textsuperscript{118} \textit{See} HOVENKAMP, OPENING OF AMERICAN LAW, \textit{supra} note 14, at 60-62.

\textsuperscript{119} Lehw v. Brummell, 103 Mo. 546 (1891) (upholding mandatory segregation of schools, even if it entailed that the afro-American plaintiffs could not go to any school at all); People v. Gallagher, 93 N.Y. 438 (1883) (upholding 1864 New York statute segregating public schools by race); State v. Garmes, 21 Ohio St. 198 (1871) (similar, rejecting claims based on both 14th Amendment and Ohio Constitution); Cory v. Carter, 48 Ind. 327 (1874) (similar); Ward v. Flood, 48 Cal. 36 (1874) (upholding statute that provided for separate schools for Afro-American and Native American children, but warning that if a district did not provide such schools these children would be entitled to attend the white school).

\textsuperscript{120} WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 163-66 (1987) (noting both the induction ceremony in the Green Room and the fact that Harding took the oath on the White House Bible because the Klansmen had forgotten their own). The Klan blamed Catholics for Harding's early
and his successor Calvin Coolidge also campaigned for race-based immigration restrictions, which were eventually enacted in 1924, after Harding’s death. The statute, popularly known as the Johnson-Reed Act, placed particularly severe restrictions on immigration from Africa and completely banned immigration of Arabs and Asians. Its stated purpose was "to preserve the ideal of American homogeneity." Coolidge himself wrote diatribes in popular journals favoring racial exclusion.

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

The historical writing on eugenics sees the movement as evolving from “mainline” to “reform.” "Mainline" eugenicists believed that heredity accounted for all elements of character, while later "reform" eugenicists acknowledged the importance of environmental sources. This development tracks changes in other social sciences, particularly anthropology and psychology, which rejected hereditary determinism early on. Mainline eugenicists were fairly orthodox followers of Galton, who advocated social policies concerning procreation based exclusively on genetic determinism. These included sterilization of those believed to be mentally unfit, opposition to interracial marriage, as well as to birth control for fear that it would be most practiced by racially superior families, tilting population growth in favor of inferior death three years into his first term as President. See Michael Newton, White Robes and Burning Crosses: A History of the Ku Klux Klan from 1866, at 61 (2014).

121 See Gossett, Race, supra note 33, at 404 (quoting a 1920 Harding speech to the fact that no one could "tranquilly contemplate the future of this Republic without anxiety for abundant provision for admission to our shores of only the immigrant who can be assimilated and thoroughly imbued with the American spirit.")


124 See discussion infra, text at notes 262-63.

125 See Leonard, Illiberal Reformers, supra note 1, at 115.

126 Earlier state court decisions had been divided on the question of compulsory sterilization of convicted rapists. See, e.g., State v. Feilen, 126 P. 75 (Wash. 1912) (approving); Davis v. Berry, 216 F. 413 (S.D. Ia. 1914) (disapproving, because), vacated as moot, 242 U.S. 468 (1917); Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918) (vasectomy is a form of mutilation, which is cruel and unusual punishment); Smith v. Board of Examiners of Feeble-Minded, 88 A. 963 (N.J. 1913) (statute violated equal protection clause because it was overly broad); Haynes v. Lapeer Circuit Judge, 201 Mich. 138 (1918) (same); Osborn v. Thomson, 169 N.Y.S. 638 (N.Y.S.Ct. 1918) (same); Williams v. Smith, 190 Ind. 526 (Ind. 1921) (striking down statute that denied inmate right of cross examination of experts); the classification comes from Daniel J. Kevles, In the Name of Eugenics: Genetics and the Uses of Human Heredity 85-100 (1985).

127 See discussion infra, text at notes 277-300.
Many eugenicists were also opposed to higher education for women, largely for fear that it would induce upper class women to have fewer children.130

The multi-ideological nature of Americans' support for eugenics made it fundamentally a very different thing from Progressive legislative reform in areas of employment and industry regulation. A case in point is Buck v. Bell.131 The Court ruled 8-1 to uphold a Virginia statute requiring Carrie Buck to be sterilized once it was determined that she was "feeble minded," and that both her mother and her illegitimate child were feeble minded. The attack was substantive and not procedural,132 and was based on the Fourteenth Amendment's due process and equal protection clauses.133

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

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their

129 KEVLES, supra note 123. See also POPENOE & JOHNSON, APPLIED EUGENICS, supra note 91 at 240-242 (white women were having too few children). The birth control issue divided those who supported eugenics. For example, Progressive birth control advocate Margaret Sanger accepted the validity of eugenics, but countered its opponents by arguing that the solution was not abolition of birth control among the higher classes, but rather its expansion among poorer classes. Margaret Sanger, The Eugenic Value of Birth Control Propaganda, BIRTH CONTROL REVIEW 5 (Oct. 1921).

130 KEVLES, Ibid. See, e.g., POPENOE & JOHNSON, APPLIED EUGENICS, supra note 91 at 240-242, 262-265 (college education for women harmful because such women bear fewer children).

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

132 See id. at 207.

133 Id. at 205.

134 Id. at 207.

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

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

Id. at 568. See Felix Frankfurter, Mr. Justice Holmes and the Constitution, 41 HARV. L. REV. 121 (1927) (emphasizing his quality of Holmes' Constitutional interpretation).
imbecility, society can prevent those who are manifestly unfit from continuing their kind.136

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

... not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.138

In *Buck*, however, three of the four Horsemen, including Justice McReynolds, voted to approve the sterilization order. The Fourth, Justice Pierce Butler dissented, but that was very likely because he was a Catholic. Catholics on principle objected to surgical sterilization for largely the same reasons that they subsequently became opposed to abortion.139 Progressive Louis Brandeis, who voted consistently to uphold Progressive legislation, also voted in favor, as did Chief Justice Taft, who by this time had become quite conservative. In sum, no case can be made that *Buck v. Bell* reflects a Progressive/Anti-Progressive divide insofar as the Supreme Court was concerned.

Eugenics dominated mainstream scientific discourse during the period 1900-1920 or so. By the early 1920s, however, it was being pushed aside by scientific views emphasizing nurture more and environmental rather than hereditary determinants of human nature, in particular cultural relativism and behaviorism.140 Increasingly, scholarly papers began to emphasize environmental factors in development. The work began with study of plants and agricultural products such as corn, but soon expanded to animal and then human inheritance.141 Further,
because humans create culture, environmental factors appeared to have much greater impact on human character than for plants and animals.142

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

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

As a general rule, members of judicial tribunals are not well informed as to the law of heredity. Even though they may be so informed, they may not take judicial notice that, if Esau Walton should have offspring, the same will be socially inadequate offspring likewise afflicted. Those who have made a thorough scientific study of the law of heredity are not in entire accord as to the operation of the so-called law, but doubtless persons so trained may lend valuable aid to judicial tribunals in determining the probable nature of the offspring of a given person. We doubt, however, that even the most ardent advocate of the immutability of the law of heredity would wish to determine the probable nature of the offspring of Esau Walton without more facts than appear in the record before us. Be that as it may, the record before us does not support the finding that “by the law of heredity Esau Walton is the probable potential parent of socially inadequate offspring likewise afflicted.”145

In 1933 professor Jacob Henry Landman agreed in his analysis of Brewer v. Valk. The North Carolina Supreme Court had struck down that state’s compulsory sterilization statute on procedural grounds because it provided for neither notice nor a hearing. Further, the court observed, the causes of “low mentality” can be numerous, including “the sins of the fathers,

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142 Burke Shartel, Sterilization of Mental Defectives, 16 J. Crim. L. & Criminology 537, 541 (1926).
144 Davis v. Walton, 276 P. 921, 924-925 (1929).
145 Id. at 172.
heredity, disease, poverty, undernourishment – the struggle for daily bread, dissipation, and many other things….”

Mary Brewer was one of twelve children, one of whom had died of meningitis. She worked in a textile plant from the age of ten, and later in a cigarette factory. She then married an unsupportive man who drank and gambled and was unstable. The family was forced to rely on state assistance. Landman concluded that there was "absolutely no evidence in the record to indicate that Mary Brewer has a bad inheritance. It might well be concluded from the testimony that society is at fault." By the late 1920s that view had largely moved into the mainstream, led mainly by Progressives.

In 1942 the Supreme Court struck down a state statute that mandated sterilization of criminals thrice-convicted of crimes involving moral turpitude. Justice Douglas’ opinion for the Court cited numerous scientific sources and repeatedly observed the lack of any evidence of the “inheritability of criminal traits” such as those that the defendant exhibited.

## Racism and Progressive Economics

### Racism in the Classical Economic Tradition

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

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

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148 See discussion infra, text at notes 270-75.


150 Id. at 537-538 & n. 1 (citing numerous scientific sources), 541-542. On Skinner and its aftermath, see VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS (2008).

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

Even the libertarian John Stuart Mill defended British colonization of India in an essay otherwise advocating non-intervention in the affairs of other countries. For Mill, the conquest of India was a justified example of a civilized nation improving a barbarous one. The main limitation he required is that the occupation be for the purposes of improving the barbarous civilization, not for ransacking it.\textsuperscript{155} He argued that negotiating with such nations or establishing norms by treaty would be useless:

... [B]arbarians will not reciprocate. They cannot be depended on for observing any rules. Their minds are not capable of so great an effort, nor their will sufficiently under the influence of distant motives.\textsuperscript{156}

American political economists spoke similarly. For example, Brown University's Francis Wayland, one of the better known nineteenth century American political economists and an abolitionist, continuously contrasted "savage" and "civilized" societies, principally in observing that only the latter were able to accumulate significant capital.\textsuperscript{157} In particular, Wayland praised Great Britain for attaining superiority over nearly all other nations, notwithstanding lack of "physical advantage." He placed great weight on England's free Constitution, but added that a constitution "is of no value, unless the moral and intellectual character of a people be sufficiently elevated to avail itself of the advantages which it offers."\textsuperscript{158} Henry Carey, an economic advisor to Abraham Lincoln, made similar observations in his \textit{Principles of Political Economy}.\textsuperscript{159}

\textbf{The Impact of Marginalism}

Between 1870 and 1930 marginalism completely upended classical political economy. Briefly, classical political economy had drawn its theory of value from the past. For example, the value of a good was thought to be a function of the amount of labor that had been used to make it. By contrast, for marginalists value was based entirely on willingness to pay, a forward looking concept. Further, ideas such as anticipated consumer demand, or marginal value, and marginal cost were capable of being quantified, making marginalism a playground for mathematics. At the same time, however, values estimated from the future are inherently less

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\item \textsuperscript{152} \textsc{Thomas Malthus}, \textit{An Essay on the Principle of Population} (1798).
\item \textsuperscript{153} \textit{Id.} at 12-13.
\item \textsuperscript{154} \textit{Id.} at 14.
\item \textsuperscript{155} 3 John Stuart Mill, \textit{A Few Words on Non-Intervention}, 153, 160-76, \textit{in John S. Mill, Dissertations and Discussions: Political, Philosophical and Historical} (1867).
\item \textsuperscript{156} \textit{Ibid.}
\item \textsuperscript{157} \textsc{Francis Wayland}, \textit{The Elements of Political Economy} 29, 76 (rev. ed. 1857).
\item \textsuperscript{158} \textit{Id.} at 67.
\item \textsuperscript{159} \textsc{Henry Charles Carey}, \textit{Principles of Political Economy} 109, 273 (1837).
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\end{footnotesize}
certain than those computed from the past, and the management of risk and uncertainty became an important feature of the new economics.\textsuperscript{160} This was to have profound implications for legal policy, transforming the theory of business finance\textsuperscript{161} and eventually making the management of foreseeable risk a central component in private law areas such as torts and even contracts.\textsuperscript{162}

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

During its early development, however, both the usefulness and the domain of marginalism were controversial. Some American economists, such as John Bates Clark, completely embraced it. Others, such as Thorstein Veblen on the left and Simon Newcomb on the right, largely rejected it.\textsuperscript{164} Many found compromises that permitted them to merge marginalism with some of the broader concerns about human nature that were characteristic of classical political economy. For example, the short lived movement called Institutionalism included economists who either rejected or qualified marginalism in significant ways, preferring assumptions about human choice that drew from a wider variety of sources, including history and biology.\textsuperscript{165} Most of the American economists who were publishing supporters of eugenics were also Institutionalists. As Institutionalism lost its favor in the 1920s, race talk largely disappeared from mainstream neoclassical economics.

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

\begin{quote}
depend greatly upon the character of the race.... A man of lower race, a negro for instance, enjoys possession less, and loathes labour more; his exertions, therefore soon stop. A poor savage would be content to gather the almost gratuitous fruits of nature, if
\end{quote}

\begin{footnotes}
\item[161] \textit{Id.} at 159-71.
\item[162] \textit{Id.} at 123-58.
\item[163] \textit{Ibid.}
\item[164] \textit{Id.} at 86. \textit{See also} Thorstein Veblen, \textit{The Limitations of Marginal Utility}, 17 J. POL. ECON. 620 (1909).
\item[165] On the Institutionalists, see Hovenkamp, \textit{Opening}, \textit{supra} note 14 at 106-22.
\item[166] William Stanley Jevons, \textit{A Deduction from Darwin's Theory}, 1 NATURE 231 (1869).
\end{footnotes}
they were sufficient to give sustenance; it is only physical want which drives him to exertion.\textsuperscript{167}

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

As noted above, many of the America’s economic institutionalists rejected neoclassical models in favor of more complex assumptions that took human biology and the theory of evolution into account.\textsuperscript{170} For example, Thorstein Veblen preferred to speak of "instincts" rather than preferences, and he expressly incorporated Darwinian survival instincts into his theory of human choice.\textsuperscript{171} His writing frequently linked racial diversity to differences in preferences.\textsuperscript{172} Later institutionalists such as Edward A. Ross,\textsuperscript{173} Richard T. Ely,\textsuperscript{174} and John R. Commons\textsuperscript{175} did the same thing.

Ross’s racial theories have been singled out as a particularly strong example of Progressive racism.\textsuperscript{176} However, his theories were actually a complex mixture of hereditary and environmental influences. In his 1901 address to the American Academy of Political and Social Science on "The Causes of Race Superiority" he argued that adaptability to different climates accounted for a great deal of cultural progress, and that the more favorable climates of the northern hemisphere were at least part of the explanation. This premise of adaptability led him to believe that immigration and movement are fundamentally a good thing. "Those branches of a race achieve the most brilliant success which have wandered the farthest from their ancestral home."\textsuperscript{177} He also praised democratic forms of government for facilitating progress, as well as

\begin{thebibliography}{99}
\bibitem{168} \textit{Alfred Marshall, Principles of Economics} 581, 723 (1890).
\bibitem{169} \textit{Id.} at 740-45.
\bibitem{170} \textit{E.g.}, Thorstein Veblen, \textit{Why is Economics not an Evolutionary Science?}, 12 Q.J. Econ. 373 (1898).
\bibitem{171} Veblen, \textit{Limitations of Marginal Utility}, supra note 162.
\bibitem{173} \textit{E.g.}, Edward A. Ross, \textit{The Causes of Race Superiority}, 18 ANNALS AM. ACAD. POL. 67 (1901); Edward A. Ross, \textit{The Menace of Migrating Peoples}, \textit{Century Mag.} (1921).
\bibitem{175} \textit{E.g.}, \textit{John R. Commons, Races and Immigrants in America} (1907).
\bibitem{176} \textit{E.g.}, Leonart, \textit{ILLIBERAL REFORMERS}, supra note 1, at 118-55 and passim.
\bibitem{177} Edward A. Ross, \textit{The Causes of Race Superiority}, 18 ANNALS AM. ACAD. POL. & SOC. SCI. 67, 71 (1901).
\end{thebibliography}
the fact that social status "depends little on birth and much on personal success." In sum, while a large amount of what Ross said was racist, he hardly believed that genetic inheritance was the exclusive cause. At the same time, however, Ross believed in eugenics and supported Wisconsin’s 1913 compulsory sterilization law. In fact, it was his views on eugenics that resulted in the termination of his professorship at Stanford University, in one of the great academic freedom controversies of the early twentieth century.

Racism and Progressive Labor Legislation

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

Further, during the early twentieth century the term “race” was often used in a noncomparative fashion, more similar to “human race” than as a reference to any particular race. A good illustration is then attorney Louis Brandeis defense of minimum wage legislation in an article he wrote for The Survey in 1915. Brandeis had represented workers in Stettler v. O’Hara, in which the Oregon Supreme Court upheld an Oregon minimum wage law that applied to women and children. The case was affirmed three years later by an equally divided Supreme Court. By that time Brandeis was on the Court but recused himself because of his prior representation. Had he participated the vote would certainly have been 5-4 to uphold the minimum wage.

In his article Brandeis defended minimum wage laws for largely the same reasons that he defended maximum hour provisions in Muller v. Oregon. Mainly, as the bearers of children women were particularly vulnerable if they did not receive a livable wage. Significantly, no part of Brandeis’ defense of minimum wage legislation made any reference to racial exclusion. He did speak of the necessity of a livable age to prevent the “degeneration of the race.” But nothing in the context suggests that he is talking about any particular race or comparing the white

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178 Rudolph Vecoli, Sterilization, a Progressive Measure?, 43 MAG. WISC. HIST.190 (1960).
183 Stettler v. O’Hara, 69 Or. 519, 139 P. 743 (1914).
185 208 US. 412 (1908).
186 Brandeis, Constitution and Minimum Wage, supra note 180, at 493-95.
race against others. He was talking about the damaging effects of substandard wages on the human race.

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

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

Most American economists identified with the Progressive movement did argue in favor of workers’ protective legislation, particularly maximum hour and minimum wage laws, and regulation of employee safety. Some of these statutes were addressed by the Supreme Court and struck down on grounds of liberty of contract, held to be protected by one of the Constitution’s Due Process clauses.192 The legal history of the conflict between Progressive economics and the Supreme Court prior to the Court Packing controversy in 1937 is in large part a story of these decisions. However, as noted below, only a tiny fraction of this literature, including the judicial decisions, ever suggested racial or ethnic exclusion as a rationale.

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187 JOSEPHINE GOLDMARK, **FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY** (1912).
188 Id. at 97-100
189 Id. at 97.
190 Id. at 98.
191 Id. at 96.
State minimum wage statutes developed in the United States in two stages. The first group was passed between 1912 and 1923 by 17 states and the District of Columbia. A few of these were upheld, but several were struck down by both state and federal courts, mainly on liberty of contract grounds. Some were upheld as applied to minors, but not to adults, and some applied only to women. Some were never enforced. In any event, the 1923 Supreme Court decision striking down the Washington, D.C., minimum wage statute for women was thought to kill the minimum wage movement in the states. New state initiatives emerged in the 1930s, however. A closely divided Supreme Court initially struck down a state statute just prior to the 1937 Court Packing controversy, but upheld one soon after. The judicial resolution to the Court Packing controversy actually occurred in a set of disputes about state minimum wage laws, not in the first instance about federal New Deal legislation.

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

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

For marginalists the proper rate of wages was seen, not as a function of what was previously paid in, but rather of the worker's anticipated contribution to the value of his employer. In the words of John Bates Clark, the most prominent technical American economist of his generation, this principle led to a "scientific law of wages." After completely dismantling the wage-fund doctrine, Clark explained that in a competitive economy the returns for every "factor," or element of production is driven to its marginal value. Lenders of capital, owners, suppliers, and laborers would all receive the value of their contribution, provided that

the markets in question were competitive.\textsuperscript{200} A vast amount of Progressive Era economic literature defended and developed this proposition.\textsuperscript{201}

The competition issue was where the rub came in. Labor markets, particularly for unskilled labor, were thought to be much more competitive than markets for production and capital. As a result, when it came to labor, employers had much greater buying power than workers had selling power. The economic term "monopsony," or buyer-side monopoly, would not enter the economic literature until the early 1930s, when Cambridge economist Joan Robinson introduced it in her book \textit{The Economics of Imperfect Competition}. Speaking of wages, Robinson showed explicitly what many Progressives had intuited: a monopoly employer, or monopsonist, suppresses the buying price, in this case wages, by suppressing employment. As she observed, "the rise in wages which reduces exploitation and transfers a part or the whole of the monopsony profit to labour will actually result in an increase of employment."\textsuperscript{202} To the extent this problem was corrected, higher wages would produce both greater income for workers and more jobs. To the extent that Progressives understood this, the argument that higher wages would suppress demand and exclude Afro-Americans or foreigners was fallacious. Eliminating monopsony would actually produce higher wages and \textit{more} jobs.

Many Progressive era economists believed that the market in which capitalists purchased labor was far less competitive than the market in which laborers sold it, particularly if the market in question was for unskilled labor.\textsuperscript{203} They saw correctly that American industry was producing ever increasing returns, most of which were not going to labor. For them, the question was who should be getting the benefits of the increase. Progressive’s put the question as who should be


the “residual claimant” of increased industrial productivity.\textsuperscript{204} Traditionalists and some Progressives argued that the increased returns properly belonged to capital because machinery, a product of capital, was responsible for nearly all of an enterprise’s increased productivity.\textsuperscript{205} But the emergent Progressive argument was that laborers were getting an ever smaller share of industrial growth because capital markets were much less competitive than labor markets. Well organized capitalists had complete control over unorganized labor markets. As a result, “the residual claimant is monopoly,” Wharton business college Dean Simon Patten concluded in 1908.\textsuperscript{206}

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

1. The maximum wage is determined, not by the wage-fund doctrine, but rather by the worker's marginal contribution to employer value.\textsuperscript{207}

2. If all markets were fully competitive, then laborers would earn precisely their contribution, but in fact wage earner markets are more competitive than capital markets; as a result, workers are not getting their fair share.\textsuperscript{208} Further, correcting this imbalance would not produce fewer jobs.

3. Laborers are entitled to a "living wage,"\textsuperscript{209} which can be determined by assessing cost of living for the typical wage earning family.\textsuperscript{210}

\textsuperscript{204}As far as I can determine William Graham Sumner was the first to use the term, and then took issue with the proposition that labor should be the residual claimant. WILLIAM GRAHAM SUMNER, PROBLEMS OF POLITICAL ECONOMY 34-35 (1889).

\textsuperscript{205} E.g., Francis A. Walker, The Doctrine of Rent, and the Residual Claimant Theory of Wages, 5 Q.J. ECON. 417 (1891) (arguing that after all other factors of production receive a reasonable return, labor should be the residual claimant of the balance); Jacob H. Hollander, The Residual Claimant Theory of Distribution, 17 Q.J. ECON. 261 (1903) (disputing Walker); John A. Hobson, The Law of the Three Rents, 5 Q.J. ECON. 263 (1891) (disagreeing with Walker); Simon N. Patten, The Political Significance of Recent Economic Theories, 32 ANNALS AM. ACAD. POL. & SOC. SCI. 82 (1908) (worker mobility should help labor obtain its fair share); Charles F. Dunbar, The Career of Francis Amasa Walker, 11 Q.J. ECON. 436 (1897) (agreeing with Walker).

\textsuperscript{206} Simon N. Patten, The Political Significance of Recent Economic Theories, 32 ANNALS, AM. ACAD. POL. & SOC. SCI. 82, 86 (1908).

\textsuperscript{207} See, e.g., citations supra, at notes 198, 203.

\textsuperscript{208} Walker, Doctrine of Rent, supra note 203; John R. Commons, Protection and Natural Monopolies, 6 Q.J. ECON. 479 (1892); Richard T. Ely, Economic Theory and Labor Legislation, 9 (3d series) AM. ECON. ASSN Q. 124 (1908) (discussions of Malthus and population, or maximum hour laws as employing more people, but nothing on race); Hale, Coercion and Distribution, supra note 201.


\textsuperscript{210} LOUISE BOLARD MORE, WAGE-EARNERS' BUDGETS: A STUDY OF STANDARDS AND COST OF LIVING IN NEW YORK CITY (1907); Charles E. Persons, Estimates of a Living Wage for Female Workers, 14 Q. PUB. AM. STAT. ASSN., 567 (1915). See also JOHN AUGUSTINE RYAN, A LIVING WAGE (1908). Ryan, a Catholic social activist, was not an economist but his book marshalled the sociological and economic arguments for a minimum wage; he did list include exclusion by race as a rationale.
4. Low wages and harsh conditions were being exacerbated by excessive use of child labor as well as excessively lenient immigration policies.

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

Further, in the literature that Bernstein and Leonard do cite, some of the statements appear to be taken out of context or interpreted differently than their authors intended.213 The strongest case for their position is Columbia University economist Henry Seager, who argued the eugenics line that sterilization of the unfit could reduce the supply of marginal workers.214 He also admitted, however, that this concern "may seem somewhat remote from the minimum wage but such a policy judiciously extended should make easier the task of each on-coming generation...."215 He then added that child labor provisions should be used, as well as "facilities for industrial and trade training" in the public schools.216 Bernstein and Leonard also quote a passage in which Seager stated that serious laborers needed protection from the "casual worker and the drifter,"217 but Seager himself made no attempt to identify this phrase with immigrants, eugenically unfit, racial minorities or any other particular group. Further, the thrust of his article was that society needed to provide education and training with a view toward creating a prosperous working class of participatory citizens. In his economics textbook, published the same year, Seager argued that many immigrants may have been deceived into coming to America:

In the cities of the United States competition for employment in the sweating trades is made especially severe by the steady influx of immigrants, many of whom find this

212 For example, Google Scholar lists 108 articles during the period 1890-1905 with the words "minimum wage" in the title, and 501 with the word "wages" in the title. It lists 2150 articles with the words "minimum wage" somewhere in the text. Many of the most important discussions of minimum wage laws did not include the term in the title -- e.g., Clark, The Possibility of a Scientific Law of Wages, supra note 197; Hollander, The Residual Claimant Theory of Distribution, supra note 203; Walker, The Doctrine of Rent, and the Residual Claimant Theory of Wages, supra note 203. Google Scholar also lists 69 articles or books discussing the “residual claimant” theory of wages.
213 Bernstein and Leonard also discussed the work of Sidney and Beatrice Webb and Sidney Ball, who were British and also Fabian socialists outside of the mainstream.
215 Id. at 12.
216 Ibid.
217 Id. at 12.
species of work the easiest to take up, and do not learn, until after they have been in the
country some time, how much worse they are than American workmen in other trades. 218

Bernstein and Leonard also cite a statement from A.B. Wolfe, another progressive
economist, that "If the inefficient entrepreneurs would be eliminated [by minimum wages], so
would the ineffective workers." 219 But the statement makes clear that Wolfe was acknowledging
the existence of inefficient employers as well as inefficient laborers, and his belief that a
minimum wage law would weed out both. Significantly, Wolfe never mentioned breeding,
eugenics, or race; but simply observed that some employers and laborers were less effective than
others. His central argument was that capital markets are noncompetitive, that stock prices were
greatly inflated and that stockholders demanded a return in proportion to this inflated value, and
that interest rates were too high. 220 All of these phenomena suggested to Wolfe that wages could
in fact be raised without damaging productivity, simply by squeezing some monopoly out of the
supply side. In redistributing from producers to labor there was much more surplus available on
the supply side than the demand side. Wolfe then added:

Turning now to labor supply, the idea that standard minimum wages would stimulate
further overgrowth of population is not well founded. One way to reduce the birth rate is
to raise the standard of living, and the only way to do that is to raise wages. 221

For that, he advocated giving women greater economic independence so that they would "not be
tempted to marry simply to escape long hours of hard work at low pay...." 222

Significantly, Wolfe said nothing having to do with eugenics or racism. He mainly
observed that, just as not all firms are equally efficient, so too not all laborers are, and a
mandatory minimum wage would put pressure on both. Although he cited immigration
restrictions as a possible way of keeping the workforce down, he did not suggest excluding
particular people based on race or nationality -- his suggestion appears to apply equally to
northern and central Europeans as to others. 223 To be sure, race-based or ethnic restrictions did
come, but these were at the behest of the anti-progressive administrations of Harding and
Coolidge. 224

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

218 HENRY ROGERS SEAGER, PRINCIPLES OF ECONOMICS 572 (1913).
219 A.B. Wolfe, et al., Some Phases of the Minimum Wage: Discussion, 7 AM. ECON. REV. 275, 278
(1917).
220 Id. at 277.
221 Ibid.
222 Ibid.
223 See also Henry P. Fairchild, The Restriction of Immigration, 2 AM. ECON. REV. 53 (1912) (advocating
restrictions immigration based on numbers and worker qualifications, but not race); Walter Lippman, The
Campaign Against Sweating, 2 NEW REPUBLIC 1 (March 27, 1915) (advocating immigration restrictions
in order to reduce the labor supply, but not suggesting that they be based on race but rather applied to all,
including Europeans: “If the European is compelled to work at not less than an American standard he
will be less useful to the employers of cheap labor, and less effort will be made to bring him over”; then
applying the “same reasoning … to the employment of children”).
224 See discussion infra, text at notes 270-272.
It is better to enact a minimum-wage law, even if it deprives these unfortunates of work. Better that the state should support the inefficient wholly and prevent the multiplication of the breed than subsidize incompetence and unthrift, enabling them to bring forth after their kind.225

However, it is clear from the context that Meeker is reacting to the reviewed author’s proposal that the state pay a supplement sufficient to get the wages of substandard workers up to an acceptable subsistence level.226 By contrast, Meeker himself advocated for worker training, speaking of the "duty of the state to provide manual and technical training to those born under its sovereignty, to the end that the inefficient may be diminished or eliminated."227 In other words, Meeker was not speaking about a problem of heredity or race, but rather of lack of training that could be remedied if the State would provide it. Indeed, he rejected the author’s view that "the poor are poor through their own laziness, inability or thriftlessness."228 This was not an essay about heredity at all, but rather about lack of job skills.

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

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

Workers’ protective legislation, just as all legislation, benefits some people and harms others. Sometimes one can generalize by dividing affected groups into categories, such as competitive or vertically related. Sometimes differential effects are caused by different cost structures, technologies, or education. Nevertheless, it is naïve to point to a policy as deficient

225 Royal Meeker, Review of Cours d’économie politique, by Clement Colson, 25 POL. SCI. Q. 543, 544 (1910). Colson was a relatively minor French liberal economist.
226 Id. at 544.
227 Ibid.
228 Ibid.
230 Id. at 75.
231 Ibid.
simply because it has particular effects on one certain group. For example, one does not "rehabilitate" *Lochner* simply by showing that unionized bakers approved of the ten hour law because it raised the costs of more marginal bakers. The law was also heavily supported by groups concerned about working conditions. Virtually every government action benefits some groups while harming others. Assessing welfare requires a mechanism for netting out these gains and losses.

**Racism and the Active State**

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

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

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

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235 The Civil Rights Cases, 109 U.S. 3 (1883).
236 See HOVENKAMP, OPENING OF AMERICAN LAW, supra note 14, Ch. 3.
237 *Id.* at 61-62.
240 HOVENKAMP, OPENING OF AMERICAN LAW, supra note 14, at 55-60.
Progressive movement, and its legacy in the South persisted well beyond the Progressive Era and to the mid-twentieth century. Indeed, the earliest cases upholding statutory school segregation date to the 1870s and 1880s.\textsuperscript{241}

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

The same thing is true of the segregationist zoning statutes leading up to the Supreme Court's \textit{Buchanan v. Warley} decision in 1917, which struck them down for interfering with liberty of contract. Some supporters of segregation by zoning were acknowledged Progressives, while others were not. All of the statutes were passed in what had been slave states prior to the Civil War, although three of them (Kentucky,\textsuperscript{247} Maryland,\textsuperscript{248} and Missouri) were border states that chose to remain in the Union. More than anything else the legislation reflected Jim Crow racial policies that long antedated the Progressive Movement. Other states passing the statutes

\textsuperscript{241} People v. Gallagher, 93 N.Y. 438 (1883) (upholding 1864 New York statute segregating public schools by race); State v. Garnes, 21 Ohio St. 198 (1871) (similar, considering both federal and state constitutions); Cory v. Carter, 48 Ind. 327 (1874) (similar); Ward v. Flood, 48 Cal. 36 (1874) (similar, segregated schools permissible as long as provision was made to educate Afro-American and Native American children).

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

\textsuperscript{243} \textsc{1 Marion B. Lucas, A History of Blacks in Kentucky: From Slavery to Segregation, 1760-1890}, 1 at 255-56 (rev. ed. 2003).


\textsuperscript{245} \textit{Berea College v. Commonwealth, 123 Ky. 209} (1906), \textit{aff'd}, 211 U.S. 45 (1908).

\textsuperscript{246} There was only one personnel change. In 1906 Roosevelt appointed William Henry Moody to replace Justice Henry Billings Brown. Brown had been the author of \textit{Plessy}.

\textsuperscript{247} \textit{Buchanan v. Warley, 245 U.S. 60} (1917) (Louisville, Ky.).

\textsuperscript{248} \textit{State v. Gurry, 121 Md. 534, 548-551}, 88 A. 546, 552-553 (1913) (ordinance unconstitutionally deprived home owners of vested property rights).
included Georgia, North Carolina, South Carolina, Oklahoma, Louisiana, and Virginia. These were not the nation's first segregationist zoning restrictions. Twenty years earlier the federal courts had considered and struck down legislation that excluded Chinese from certain residential areas.

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

Exactly how much of the political force supporting the racial zoning laws was a species of "Progressive reform" and how much was a simple application of Jim Crow? Long before the rise of Progressivism, every state that had passed a segregationist zoning law had also practiced de jure segregation of public facilities and operated segregated schools. Northern cities also experienced huge influxes of Afro-Americans, much of it just as the zoning statutes were being passed. Indeed, the great migration of Afro-Americans, which began early in the twentieth century, saw tens of thousands of Afro-Americans leaving southern cities for homes in the North. Nevertheless, none of these states or their municipalities ever passed a racial segregation zoning provision.

In defending their segregationist zoning ordinance to the Supreme Court, the City of Louisville, Kentucky, relied heavily on racial science. The Louisville Brief on Reargument,

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250 State v. Darnell, 166 N.C. 300, 305, 81 S.E. 338, 340 (1914) (ordinance unconstitutionally restricted transferability of property).
252 In re Lee Sing, 43 F. 359, 360-62 (C.C.N.D. Cal. 1890) (the statute provided that "It is hereby declared to be unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in that district ... hereinafter prescribed for their location."). See Rice, Residential Segregation, supra note 248.
255 See VAN WOODWARD, STRANGE CAREER, supra note 28, at 95-99.
256 See JAMES N. GREGORY, THE SOUTHERN DIASPORA: HOW THE GREAT MIGRATIONS OF BLACK AND WHITE SOUTHERNERS TRANSFORMED AMERICA (2007);
which was modelled after the Brandeis Brief in Muller v. Oregon, contained about a half dozen pages of legal argument and one hundred pages summarizing scientific evidence supporting the case against racial integration.\textsuperscript{257} Mainstream science had already rejected much of the evidence that the brief cited.\textsuperscript{258} It included a discussion of Benjamin A. Gould’s study of autopsy reports of Civil War soldiers indicating that “mulatto,” or mixed race soldiers were chronically unhealthy.\textsuperscript{259} A principal concern of the brief was with interracial marriage, which was the subject of many of the studies it cited.\textsuperscript{260}

Opposition to interracial marriage was neither novel nor Progressive. Many of the colonies had forbidden interracial marriage, beginning with a Maryland statute passed in 1661 that prohibited white women from marrying slaves.\textsuperscript{261} Subsequent to the Revolution many states, both slave and free, passed anti-miscegenation statutes as early as the 1820s.\textsuperscript{262} During the regional strife preceding the Civil War some northern states repealed their statutes.\textsuperscript{263} In sum, state anti-miscegenation statutes were hardly a progressive initiative, although contemporary racial science certainly served to strengthen long held prejudices.

One set of practices that did develop during the Progressive Era was widespread, mandatory sterilization of certain criminals and, more significantly, people who were deemed “defective” but had never been convicted of a crime. As noted previously, these statutes and procedures were a product of Gilded Age racial science and eugenics. It is equally clear, however, that support for them was widespread and hardly limited to Progressives. For example,

\textsuperscript{257} Supplemental and Reply Brief for Defendant in Error on Rehearing, Buchanan v. Warley, 245 U.S. 60 (1917).
\textsuperscript{258} For a fuller analysis of the contents of the scientific brief in Buchanan v. Warley, see Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 DUKE L.J. 624, 661-66.
\textsuperscript{259} BENJAMIN A. GOU LD, INVESTIGATIONS IN THE MILITARY AND ANTHROPOLOGICAL STATISTICS OF AMERICAN SOLDIERS 471 (1869).
Supreme Court Justices who opposed most Progressive labor protective legislation supported compulsory sterilization.264

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

One exclusionary statute passed during the Progressive Era was the Immigration Act of 1917, which required a literacy test for immigrants and barred most Asian laborers. Significantly, Progressive President Wilson vetoed the bill twice, but was eventually overridden by Congress.271 His veto message on the first bill described the Act – particularly its literacy test and quotas – as a distinct departure from a long American tradition of generally open immigration:

It [the bill] seeks to all but close entirely the gates of asylum which have always been open to those who could find nowhere else the right and opportunity of constitutional agitation for what they conceived to be the natural and inalienable rights of men; and it

264 See discussion supra, text at notes 134-136.
265 Naturalization Act of 1790, 1 Stat 103 (March 26, 1790).
266 Naturalization Act of 1870, 16 Stat. 254 (July 14, 1870).
267 18 Stat. 477, Sect. 141 (March 1875).
270 Ibid.: That from and after the expiration of ninety days after the passage of this act ... the coming of Chinese laborers to the United States be, and ... is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States.
excludes those to whom the opportunities of elementary education have been denied, without regard to their character, their purposes, or their natural capacity.\textsuperscript{272}

In sharp contrast, both Presidents Harding and later Coolidge favored stronger and explicitly race based restrictions. The Immigration Act of 1921, also known as the Emergency Quota Act, was passed early in Harding’s term. The Act employed a quota system that strongly favored western European immigrants over those from eastern and southern Europe or non-European countries.\textsuperscript{273} While he was Harding’s Vice President, Coolidge had written a popular article in \textit{Good Housekeeping} magazine entitled \textit{Whose Country is This?} “America must be kept American,” he wrote. "Biological laws show ... that Nordics deteriorate when mixed with other races.”\textsuperscript{274}

President Harding did not live to see the statute he really wanted enacted. The Immigration Act of 1924 (Johnson-Reed Act) was signed by his successor Calvin Coolidge six months after Harding’s death.\textsuperscript{275} That statute made the quotas in the 1921 Act permanent and also limited the annual number of immigrants from any country to 2% of the number who were already living in the United States in 1890, thirty-five years prior to the statute’s passage. The choice of 1890 as a base year might seem peculiar, but its purpose was undoubtedly that the quotas not reflect the large numbers of southern European immigrants that came in after 1890. The quota system strongly favored immigration from northern Europe and the UK, because that was where most people had immigrated from prior to that time. The statute also forbade immigration by any person who was otherwise barred from pursuing citizenship by virtue of race or nationality. At the time, existing law prohibited most Asians, including Chinese and Japanese, from obtaining citizenship. As a result, under the 1924 Act they were not permitted to immigrate either.

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

\textbf{Progressives and the Nature/Nurture Controversy}

When thinking about the Progressives, or any other movement for that matter, it is critical to distinguish the ideas they inherited from those they developed for themselves. The first generation of Progressives inherited scientific racism and did little to lift themselves out of it,

although there were some important exceptions. Before long, however, Progressives began to develop less historicist and more environmentalist conceptions of human nature. To be sure, neither they nor anyone else ever came close to eradicating racism from American society. Nevertheless, through a gradual process the social science of the 1910s and after undermined the scientific basis for genetically exclusive, natural science driven views about human intelligence and capacity. These views were distinctly Progressive, in that they were not simply borrowed from the scientific theories of the Gilded Age and earlier. They began to have an important impact on the public law of race relations in the 1940s.

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

The high point of historicism in American public law was the Supreme Court’s decision in Plessy v. Ferguson. In upholding the separate-but-equal segregation statute for passenger railroads, the Court observed that the Constitutional argument against the statute “assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured … except by an enforced commingling of the two races.” This argument, which would be played out repeatedly in the segregationist writings of the South, was that racial social relations were the product of long developed custom and could never be changed in the twinkling of an eye by legislation.

Likeminded historicist voices of the era, such as James Coolidge Carter, William Graham Sumner, and Thomas M. Cooley, were devoted to this proposition. Carter did so in his steadfast opposition to codification, or displacement of the common law by statutes. His most important book, posthumously published as Law, its Origin, Growth and Function, argued that historical practice as reflected in the common law was an inexorable result of human custom and instinct, which legislation was powerless to change. Yale political economist William Graham Sumner reflected that view in his more popular book, Folkways. Sumner’s theme, that “Folkways are not Stateways,” argued that legislation that attempts to change long held values and beliefs will simply fail. Legal scholar and Michigan Supreme Court Justice Thomas M. Cooley, one of the Gilded Age architects of substantive due process, protested the use of legislation to induce

276 See discussion supra, text at notes 5-8.
277 See discussion infra, text at notes 273-345.
278 See HOVENKAMP, OPENING OF AMERICAN LAW, supra note 14, at 16.
279 Id. at 26-27, 82-84. On the powerful influence of historicism in Gilded Age legal thought, see DAVID M. RABBAN, LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY (2013).
280 Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
281 See HOVENKAMP, OPENING OF AMERICAN LAW, supra note 14, at 26-27.
282 JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH, AND FUNCTION (1907).
283 WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMERS,莫RES, AND MORALS (1906).
economic change because it “casts overboard the wisdom of experience,” substituting “the winds
of mere speculative abstractions.” By contrast, the common law develops out of “the nature of
the people themselves” as an “outgrowth of their habits of thought and action.”

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

As far as the nature/nurture controversy was concerned, that Progressives would choose
nurture was methodologically inevitable. Their forward looking theory of value precluded any
other choice. In his History of Economic Analysis Joseph Schumpeter conceded as much, but he
nevertheless castigated marginalism for finding arguments from nature and heredity to be
unimportant. He put it, marginalist “economists, who are or should be vitally interested in
the range of variation of individual ‘abilities’ and in the question of their inheritance, are but
mildly interested in the specifically racialist aspect of the latter.” Schumpeter himself had
relatively little to say about the subject of genetics or eugenics, although he was sympathetic
with some parts of the eugenics agenda. For example, in 1941 he suggested that the urge to
procreate produced a bias against people of higher intelligence. “The men and women who want
to do something in this life don’t want children in the next room. They will be the ones to
restrict families first.”

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

284 Thomas M. Cooley, Sources of Inspiration in Legal Pursuits, 9 W. JURIST 515, 517 (1875); Thomas
M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE
POWER OF THE STATES OF THE AMERICAN UNION 21 (1868).
286 Id. at 759.
287 Joseph Schumpeter, An Economic Interpretation of Our Time 377 (Lowell Lectures, 1941), reprinted in
Joseph A. Schumpeter: The Economics and Sociology of Capitalism (Richard Swedberg, ed.,
289 Gary Dorrien, The Making of American Liberal Theology: Crisis, Irony, and
290 See Milan Zafrovski, Liberal Modernity and Its Adversaries: Freedom, Liberalism and
Cultural Relativism

The person most identified with cultural relativism in anthropology was German-born Franz Boas, whose *The Mind of Primitive Man* was published in 1911, a dozen years after he became a professor of anthropology at Columbia University.291 By that time Boas had been studying human culture for more than twenty years, after an early career in geography and physics, and ten years as a museum curator at the Smithsonian. He was in his early fifties when *Primitive Man* was published.292

Each chapter of Boas’ book dismantled a particular aspect of scientific racism. His opening chapter entitled “Racial Prejudices” completely undermined the notion of earlier evolutionary anthropologists that evolution had been a more-or-less linear progression with Aryan northern Europeans at the culmination. Even a minimal knowledge of history revealed that the world had experienced many periods in which non-Aryan groups such as the Chinese had developed advanced civilizations and culture. In fact, “Several races have developed a civilization of a type similar to the one from which our own had its origins.”293 He also attacked the view that a correlation exists between intelligence and brain weight,294 and argued that there was no observable correlation between race and intelligence.295

In a second chapter, entitled “Influence of Environment Upon Human Types,” Boas argued that environmental factors dominated inheritance in determining human typology. He believed that one of the biggest factors in determining which tribes or cultures were “primitive” and which were more advanced was the degree of interaction with other tribes or cultures.296 Further, “retarding” influences in the environment inevitably affected the extent of total human development. For example, a child who is afflicted with disease or other adverse circumstances at an early age might develop out of these conditions, but its total development would generally be less than the development of a child raised in healthier circumstances.297 “Illness in early childhood, malnutrition, lack of fresh air and physical exercise, are so many retarding causes, which bring it about that the growing individual of a certain age is in its physiological development younger than the healthy, well-nourished individual….“298

Boas could not find “any example in which the influence of [natural] selection has been proved beyond cavil.” However, he was “able to demonstrate the existence of a direct influence of environment upon the bodily form of man….”299 Apropos of this, he was able to show significant differences in bodily type between first and second generation immigrants to the

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291 *FRANZ BOAS, THE MIND OF PRIMITIVE MAN* (1911).
294 *Id.* at 18-29.
295 *Id.* at 120-25.
296 *Id.* at 43.
297 *Id.* at 48-49.
299 *Id.* at 52-53.
United States and the peoples from which they had come. The longer the time period since immigration, the more noticeable these differences. He concluded:

We are thus led to the conclusion that environment has an important effect upon the anatomical structure and physiological functions of man; and that for this reason differences of type and action between primitive and civilized groups of the same race must be expected. It seems plausible that one of the most potent causes of these modifications must be looked for in the progressive domestication of man incident to the advance of civilization.

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

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

In 1916 Boas published a withering attack on eugenics in the popular magazine Scientific Monthly. He noted that eugenics simply assumed that characteristics were inherited without making any serious attempt to distinguish genetic from environmental influences. “If an individual possess a desirable quality the development of which is wholly due to environmental causes, and that will not be repeated in the descendants, its selection will have no influence upon

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300 Id. at 54-55 (giving examples).
301 Id. at 55.
302 For example, he observed later: It has also been claimed that lack of control is exhibited by primitive man in his outbursts of passion occasioned by slight provocations. I think that in this case also the difference in attitude of civilized man and of primitive man disappears if we give due weight to the social conditions in which the individual lives.

Id. at 108.
303 Id. at 75.
304 Id. 76-99.
305 Id. at 94.
306 For example, on Afro-Americans Boas concluded: When we turn our attention to the negro problem as it presents itself in the United States, we must remember our previous considerations, in which we found that no proof of an inferiority of the negro type could be given, except that it seemed possible that perhaps the race would not produce quite so many men of highest genius as other races, while there was nothing at all that could be interpreted as suggesting any material difference in the mental capacity of the bulk of the negro population as compared to the bulk of the white population.

Id. at 368.
307 Id. at 174.
308 Franz Boas, Eugenics, 3 SCIENTIFIC MONTHLY 471 (1916).
the following generations.” As a result, it is “of fundamental importance to know what is hereditary and what not.” Looking at the various studies of “defective families” such as the Jukes, he concluded that in every case more “favorable home surroundings” and “possession of adequate means of support against the abuse of alcohol” would certainly have changed the result. In fact, “we know that in the great mass of a healthy population the social stimulus is infinitely more potent than the biological mechanism.”

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

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

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

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309 Ibid.
310 Id. at 473. On the Jukes, see discussion supra, text at notes 67-70.
311 Id. at 475-76.
312 Id. at 476.
313 Examples among Boas’ students include Ruth Benedict, Patterns of Culture (1934); Melville Herskovits, The American Negro (1928); Melville Herskovits, The Myth of the Negro Past (1941); Edward Sapir, Language: An Introduction to the Study of Speech (1921); Ashley Montagu, Man’s Most Dangerous Myth: The Fallacy of Race (1942); Alfred L. Koebel, Handbook of the Indians of California (1925); Gilberto Freyre, The Masters and the Slaves: A Study in the Development of Brazilian Civilization (1933, Portugese). See George G. Stocing, Jr., Race, Culture, and Evolution: Essays in the History of Anthropology (1968); Vernon J. Williams, Jr., Rethinking Race Franz Boas and His Contemporaries (1996).
social environment and personality as those of the more favored race.” The comment is interesting. By speaking of a “race so-called” Dewey indicated that he had already come around to what would a central tenant of progressive anthropology and cultural relativism – namely, that race is nothing more than a mental construct.

Behaviorism

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

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

If eugenics went to the extreme of ignoring environmental influences in favor of inheritance, behaviorism tended toward the opposite extreme. Luther L. Bernard, one of the founders of modern sociology, concluded in 1924 that “The naive partisanship of the biologists for ... the eugenic program in sociology has sometimes been pathetic. It reveals equally an appalling ignorance of the facts of sociology and social psychology.” In 1930 the first edition of the influential and heavily behaviorist *Encyclopaedia of the Social Sciences* could proclaim “At birth human infants, regardless of their heredity, are as equal as Fords.… Each ready to respond to its appropriate stimulus.” The metaphor of new cars rolling off an assembly line was powerful. For all practical purposes there were no differences among them.

Around 1920 sociology, also a very young discipline, began to embrace cultural relativism and environmentalism, rejecting the more racist views held by elders such as Edward A. Ross. For example William F. Ogburn, one of the most prominent sociologists of his era,

323 For an account, see HAMILTON CRAVENS, *TRIUMPH OF EVOLUTION*, supra note 140 at 148-151.
wrote his book on *Social Change* in 1922.\textsuperscript{324} He had nothing good to say about eugenics, repeatedly castigating it for overemphasizing biology at the expense of the environment in forming human social identities.\textsuperscript{325} In a 1922 article he attacked those who would use race as an explanation paradigm, arguing mainly that cultural change occurred much more rapidly than biological change.\textsuperscript{326}

Finally, major changes in genetics itself served to undermine eugenics.\textsuperscript{327} Most importantly, the Galton models were shown to be far too simple, and the complexities served to make selective breeding of humans completely impractical. Thomas Hunt Morgan, who later received the Nobel Prize for his work on chromosomes and heredity, argued in 1924 that “social and economic inheritance” were at least as important as biological inheritance in explaining mankind.\textsuperscript{328} Writing in a popular journal on the relative influences of inheritance and environment he concluded that:

The geneticist alone cannot hope to solve such a complex problem. The psychologist and the physiologist and the pathologist are needed, especially in the diagnosis of those characters that belong properly in their special fields. The failure of critical diagnosis accounts in large part for the disrepute into which some of the work on human mental traits has fallen.\textsuperscript{329}

The “nature-nurture” controversy began in the 1910s and ran its course through the 1920s and 1930s. By the mid-twenties eugenics had begun to lose its hold on the mainstream American academy. The disputes that dominated the nature-nurture debate included genetics and eugenics, mental testing, and the role of instinct in human development.\textsuperscript{330} In every area the environmentalists achieved the upper hand in the mainstream scientific community.

Further, as the science of race and mental defect progressed away from Gilded Age genetic determinism, it was entirely progressives who led the legal way out. In fact, they did so very quickly after more environmentalist, nurture-based theories came to dominate the social sciences. The culmination was a dramatic turnaround in Supreme Court decision making on race, particularly in the 1944 "white primary" case and Shelley v. Kraemer in 1948. In the first, of these, Smith v. Allwright, the Supreme Court overruled a ten year old decision,\textsuperscript{331} voting 8-1 that an election primary for the Democratic Party in Texas that excluded Afro-Americans involved sufficient state action to warrant Equal Protection condemnation.\textsuperscript{332} Justice Owen Roberts, the only dissenter, was the last surviving Hoover appointee. All the other eight Justices were appointed by Roosevelt.

\begin{thebibliography}{99}
\bibitem{324} WILLIAM F. OGBURN, *SOCIAL CHANGE WITH RESPECT TO CULTURE AND ORIGINAL NATURE* (1922).
\bibitem{325} \textit{Id.} at 39, 338-39.
\bibitem{327} See CRAVENS, *TRIUMPH OF EVOLUTION*, supra note 140, 157-77.
\bibitem{328} Thomas Hunt Morgan, \textit{Human Inheritance}, 58 THE AMERICAN NATURALIST 385 (1924).
\bibitem{329} \textit{Id.} at 409.
\bibitem{330} All of these have been treated numerous times. \textit{See}, e.g., STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (rev. ed. 2006); CRAVENS, *TRIUMPH OF EVOLUTION*, supra note 140.
\bibitem{331} See Grovey v. Townsend, 295 U.S. 45 (1935) (Texas’ Democratic Party’s restriction of primary voting to whites was merely a rule about private political party membership and did not involve state action).
\bibitem{332} Smith v. Allwright, 321 U.S. 659 (1944).
\end{thebibliography}
Justice Roberts retired from the Court in 1945, and President Truman replaced him with Justice Harold Burton, a progressive Republican who had built his reputation as the reformist mayor of Cleveland. Four years later the Supreme Court again reversed itself, and unanimously held in Shelley v. Kraemer that the enforcement of private racially restrictive covenants invoked state action and violated the Equal Protection clause.\textsuperscript{333} The Shelley Court was composed of eight Roosevelt appointees and one Truman appointee. From that point on Democratic appointees led the way to \textit{Brown}. The most noteworthy Republican was Earl Warren – state Attorney General, Governor and self-proclaimed progressive before he was appointed to the Court.\textsuperscript{334} He was appointed by a Republican President (Eisenhower), and led the most liberal Supreme Court in American history.

The history of social science, or Brandeis, Briefs in race cases tracks similar changes. The first two social science briefs filed in race discrimination cases defended scientific racism and were presented in the \textit{Berea College} case in 1908, and \textit{Buchanan v. Warley} in 1917.\textsuperscript{335} In the 1920s the NAACP turned that shield into a sword, however, using Brandeis Briefs to attack race discrimination in areas outside of housing.\textsuperscript{336} In the 1940s Thurgood Marshall adopted this strategy for desegregation cases, either through the NAACP directly or else through amicus briefs written by sympathetic third parties.\textsuperscript{337} The brief he filed in \textit{McGhee v. Sipes}, a companion case to \textit{Shelley v. Kramer}, provided evidence about the dangers or urban segregation, racial exclusion, and the deteriorating quality of Afro-American housing. The NAACP’s success in \textit{Shelley} prompted it to rely on social science data much more strongly in \textit{Brown v. Board of Education}.\textsuperscript{339} \textit{Shelley} was also the first time that the United States government filed an amicus brief in a civil rights case. Tom Clark, Attorney General under President Truman, filed the brief urging the court to prohibit the enforcement of private racially restrictive covenants.\textsuperscript{340}

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\item \textsuperscript{333} \textit{Shelley v. Kraemer}, 334 U.S. 1 (1948) (overruling \textit{Corrigan v. Buckley}, 271 U.S. 323 (1926), which had found no state action, and thus no constitutional infirmity, in enforcement of private racially restrictive covenants).
\item \textsuperscript{334} See \textit{ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN} (1997); Morton J. Horwitz, \textit{In What Sense was the Warren Court Progressive?}, 4 Widener L. Symp. J. 95 (1999).
\item \textsuperscript{335} See discussion supra, text at notes 244-250.
\item \textsuperscript{337} The National Consumers League did the same thing. See \textit{Clement Vose, The National Consumers’ League and the Brandeis Brief}, 1 MIDW. J. POL. SCI. 267 (1957).
\item \textsuperscript{338} 334 U.S. 1 (1948). See \textit{Brief for Petitioner, Sec. V.A.}, available at 1947 WL 30427 (Oct. Term, 1947).
\item \textsuperscript{339} \textit{Brief for Appellants, Board of Education, 347 U.S. 483 (1954)}, \textit{Nos. 1, 2, 4, 10},1952 WL 47265; \textit{Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, Brown, 347 U.S. 483 (1954)}, \textit{Nos. 1, 2, 4, 10}, 1953 WL 48699. See \textit{PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE} (1972).
\end{itemize}
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The social science briefs filed in the 1940s and 1950s race cases fall into two broad groups. The larger group simply looked at the impact of certain practices. For example, the amicus brief of the United States in *Shelley* contained data about the deteriorating condition of urban housing for racial minorities, relating it to the heavy presence of racially restrictive covenants that excluded Afro-Americans and sometimes Asians from better neighborhoods. A smaller group of briefs addressed the problem of race and segregation more theoretically, relying heavily on scientific work done after the 1920’s. One example of the latter was the amicus brief filed by the CIO in the *Shelley* case. It showed just how far cultural relativism had come in social science. One subtitle in the CIO brief described Race as a “vague and abstract concept,” asserting that:

The range of physical variability in mankind has given rise to repeated attempts to classify peoples into groups with similar inherited characteristics. Yet these characteristics are not fundamentally distinct and are overshadowed by the essential uniformities of man morphologically. An individual’s “race” cannot be determined with absolute certainty by his appearance. The variations in the physical appearance among “races” are not sharp and distinct but are a series of gradations.

It continued:

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

The brief then quoted a resolution of the American Anthropological Association from the late 1930s that “Anthropology provides no scientific basis for discrimination against any people on the ground of racial inferiority, religious affiliation, or linguistic heritage.”

The CIO is a labor organization, which was intervening in a housing discrimination case. Its position in *Shelley* deserves mention. Historically, many American labor unions had excluded Afro-Americans as well as some other racial minorities. Many of these unions formed into the AFL, or American Federation of Labor, dominated by skilled trades and crafts. By contrast, the Congress of Industrial Organizations (CIO) was composed largely of unions representing unskilled or semi-skilled labor. For much of the 1930s and 1940s the two groups took different positions.

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on racial exclusion and immigration.\textsuperscript{346} While the AFL was exclusionary, the CIO became more acceptant of Afro-Americans and also refused to support aggressive campaigns to restrict immigration.\textsuperscript{347} The two groups split over these issues in 1935, finally reuniting in 1955 after the AFL formally abandoned its policies of racial exclusion.\textsuperscript{348}

Conclusion

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

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

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

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

\textsuperscript{346} See \textsc{Vernon M. Briggs}, Jr., \textit{Immigration and American Unionism} (2001); \textsc{Ron Jacobson} \& \textsc{Kim Geron}, \textit{Unions and the Politics of Immigration}, 22 Socialism and Democracy 105 (2008).


\textsuperscript{348} Significantly, even as it was taking this position on racial and immigrant exclusion, the CIO was also involved in campaigns for higher minimum wage laws. Julie Meyer, \textit{Trade Union Plans for Post-War Reconstruction in the United States}, 11 Social Research 491 (1944). As noted above, some have attempted to tie support for a legislative minimum wage and racial exclusion together, but that was not the case with the CIO in the 1940s.