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CONSTITUTIONAL FALSE POSITIVES AND THE POPULIST MOMENT

*Gerard N. Magliocca**

We are engaged in just such a contest as every generation must pass through. In times of quiet, abuses spring up. . . . The people suffer until suffering ceases to be a virtue; they are patient until patience is exhausted, and then they arouse themselves, take the reins of government and put the government back upon its old foundation.

William Jennings Bryan (1896)¹

The liberty mentioned in . . . [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person . . . [but] to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential [W]e do not intend to hold that in no such case can the state exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.

Allgeyer v. Louisiana (1897)²

INTRODUCTION

You have probably never heard of the Punktation of Olmutz.³ In the fall of 1850, however, the great European powers were on the

* Associate Professor, Indiana University School of Law, Indianapolis. Many thanks to Brian C. Kalt, Amanda L. Tyler, and the participants at the Southeastern Association of Law Schools Conference for their comments.

1 WILLIAM J. BRYAN, *THE FIRST BATTLE: A STORY OF THE CAMPAIGN OF 1896*, at 596 (Chicago, W.B. Conkey & Co. 1896).

2 165 U.S. 578, 589–90 (1897).

3 This example comes from Bruce Bueno de Mesquita, whose course in game theory and war was a memorable part of my undergraduate education. See BRUCE BUENO DE MESQUITA & DAVID LALMAN, *WAR AND REASON: DOMESTIC AND INTERNATIONAL IMPERATIVES* (1992) (setting forth a predictive model for war).

brink of war over this dispute in the German state of Hesse.⁴ As Prussia and France ordered a general mobilization, the *Times* stated that this was “a bloody drama that is now unfolding . . . and that nobody will triumph in except Germany’s enemies.”⁵ Fortunately, cooler heads prevailed and the crisis was defused.⁶ Like the Cuban Missile Crisis, the Punktation of Olmutz had all the hallmarks of a war but did not lead to one.

This story describes a false positive, which is something that meets the criteria for a particular outcome yet does not yield that result. Perhaps the best example of this is a medical test that indicates the presence of an illness when none exists, but the concept is not limited to biology. Researchers in the social sciences must also incorporate false positives into their work to get an accurate view of a phenomenon. For instance, a scholar cannot create a sound theory of how wars happen by looking only at wars that happen. That would present a misleading picture because the study would be using incomplete data skewed toward a particular segment of the underlying pattern.

Constitutional theory is probably the only major discipline that ignores false positives. While there is no lack of interest on how higher law is made or interpreted, almost all of those analyses focus on when authority is established while skipping over the near misses and false starts.⁷ It is understandable that lawyers are more interested in concrete achievements like constitutional text or judicial opinions, since they are the reference points that bind courts. Taking that approach for developing an interpretive model, however, is flawed for the same reason that ignoring the Punktation of Olmutz hurts a war model—it omits key evidence and lets false premises go unchallenged. In constitutional theory, this distortion is particularly acute

4 See *id.* at 115–17. The crisis was the result of competition between Prussia and Austria for influence within the German Confederation. See *id.* at 114–15. Russia said that any attack on Hesse by Prussia would be deemed an act of war, France was preparing to help Russia “dismember” Prussia, and England’s view was uncertain. See *id.* at 116.

5 *Id.* at 116 (quoting *Collision Between the Armies in Hesse*, *TIMES* (London), Nov. 13, 1850, at 6).

6 See *id.* at 116–17.

7 One prominent exception is Robert M. Cover’s discussion of the “jurisgenerative” and “jurispathic” aspects of law. See generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983) (recognizing that courts both create and destroy law by choosing between the arguments in a case suggests the existence of paths not taken that must be considered for a complete picture of how doctrine evolves).

because the set of canonical events (or data points) that academics and judges usually rely upon is small.⁸

This Article starts filling that gap by exploring the most powerful constitutional false positive in our history—the rise and fall of the Populist Party in the 1890s.⁹ Rising from the heartland like a prairie fire, this coalition of agrarian interests and disaffected industrial workers went from a group of rabble-rousers to the brink of power in only

8 See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75–101 (1980) (building an interpretive theory on footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), and on a set of textual clauses); Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 *CONST. COMMENT.* 271, 271 (1997) (“Contemporary constitutional theory rests on three premises. *Brown v. Board of Education* was correct, *Lochner v. New York* was wrong, and *Dred Scott v. Sandford* was also wrong.”).

9 While this Article looks at the economic doctrine implicated by the Populist false positive, two other essays will examine its influence on the application of the Bill of Rights to the states and on racial justice. A theme of all three pieces is that the reaction against Populism by the legal establishment sharply redefined the Fourteenth Amendment and moved the law away from the goals of Reconstruction. See *infra* text accompanying notes 52–55.

On incorporation, the Supreme Court’s decisions were influenced by antagonism towards Populism. The first case raising a comprehensive incorporation claim involved the Haymarket Rioters, who were so loathed by conservatives that their appeal was called *The Anarchists’ Case*. See *Ex parte Spies (The Anarchists’ Case)*, 123 U.S. 131 (1887); Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases*, 109 *YALE L.J.* 643, 711–12 (2000). Likewise, the first part of the Bill of Rights applied to the states was the Takings Clause—in a case decided right after William Jennings Bryan’s defeat—and this set up an obstacle to any future redistributive programs. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897); *infra* notes 343–53 and accompanying text. Before the mid-1890s, almost every Justice who stated a view on pure incorporation said the Fourteenth Amendment did extend the Bill of Rights to the states. See *O’Neil v. Vermont*, 144 U.S. 323, 361–64 (1892) (Field, J., dissenting); *id.* at 370–71 (Harlan, J., dissenting). Yet the Justices did not take up this question until 1900, when they rejected the idea for everything other than the Takings Clause. See *Maxwell v. Dow*, 176 U.S. 581, 601–02 (1900). The intervening event that caused this about-face was the Populist false positive.

On race relations, the Populist Party was the most egalitarian force in the South between the Civil War and the Civil Rights Movement. According to the famous thesis of C. Vann Woodward, it was the response to the Populists—not the withdrawal of federal troops in 1877—that led to the disenfranchisement of African Americans and to the segregation validated in *Plessy v. Ferguson*, 163 U.S. 537 (1896). See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 77–90 (3d ed. 2002). With the foundation laid in this essay, Woodward’s argument can be considered in a constitutional context. This reversal in federalism priorities from Reconstruction (more national protection for property and less for race) was part of a broader adjustment in the balance between local and federal authority triggered by the Pullman Railroad Strike of 1894. See *infra* notes 169–80 and accompanying text.

ten years.¹⁰ In the course of that decade, the Populists presented one of the most radical reform programs ever supported by a major party in a presidential campaign.¹¹ That agenda was accompanied by a lucid critique of the legal order and a claim that the Supreme Court needed a drastic overhaul.¹² Love them or hate them, the Populists at their peak had the vision and the will to remake constitutional law just as the Framers and the Reconstruction Republicans did.¹³ The difference is that the Populists lost the 1896 election and never recovered.¹⁴

That defeat did not just prevent Populist ideas from coming to pass. A constitutional false positive actually moves the law away from what the doomed reformers supported. There is a deep truth underlying this assertion, which is that almost every movement for broad legal change triggers strong opposition.¹⁵ Since scholars tend to focus on the times when the resistance is overcome and reformers win, those tactics are usually dismissed as stubborn “mistakes” with no last-

10 For an overview of Populism, see H.W. BRANDS, *THE RECKLESS DECADE: AMERICA IN THE 1890s* (1995); LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (1978); JOHN D. HICKS, *THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY* (1961); RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955).

11 See HICKS, *supra* note 10, at 439–44 (reproducing the Populist platform of 1892, which called for fiat money, a progressive income tax, public ownership of railroads and utilities, a secret ballot, the direct election of Senators, and limiting the President to one term).

12 See JAMES B. WEAVER, *A CALL TO ACTION: AN INTERPRETATION OF THE GREAT UPRISING, ITS SOURCES AND CAUSES* 67–135 (Des Moines, Iowa Printing Co., 1892); *infra* notes 322–31 and accompanying text; see also 2 ARTHUR SCHLESINGER, JR., *HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1828–29* (1971) (quoting the 1896 platform of William Jennings Bryan, which denounced the Court's recent opinions and suggested their “reversal by the court as it may hereafter be constituted”).

13 The forthcoming discussion should not be read as a naïve endorsement of Populist ideology, which was, among other things, backward-looking, nativist, anti-Semitic, and conspiratorial. See HOFSTADTER, *supra* note 10, at 60–93.

14 Of course, many ideas that the Populists championed were adopted in later decades, so it is an oversimplification to say that the movement lost. The point is that the Populist Party never gained power, and hence its unique constitutional philosophy was never implemented. For more on the crucial 1896 campaign, see ROBERT F. DURDEN, *THE CLIMAX OF POPULISM: THE ELECTION OF 1896* (1965); STANLEY L. JONES, *THE PRESIDENTIAL ELECTION OF 1896* (1964).

15 See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 38 (2d ed. 1997); see also ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 315 (1941) (“The judiciary is thus the check of a preceding generation on the present one; a check of conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being.”).

ing impact.¹⁶ In a false positive, however, conservatives win and their defensive actions establish the baseline for a new set of governing principles.

This was the scenario that played out in the 1890s, as the Populist false positive hurled the law onto a new path that still leaves experts scratching their heads. It was in 1897, right after Populism's defeat, that judges first identified the "liberty of contract" in the Due Process Clause and thus began the *Lochner* era of greater scrutiny over economic and social legislation.¹⁷ That landmark was foreshadowed by a trio of groundbreaking cases in 1895 that marked the parameters for federal power until the 1930s.¹⁸ The first one concluded, in what one observer describes as a "stunning defeat," that Congress's reach over interstate commerce did not cover manufacturing and therefore the Sherman Act could not be applied to the sugar trust.¹⁹ Another held that federal judges could enjoin strikes to protect interstate com-

16 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (triggering the clash between the Court and the New Deal by holding that the National Industrial Recovery Act exceeded Congress's power); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (denying national citizenship to African Americans and voiding the Missouri Compromise); see also Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 900–02 (2003) (describing preemptive opinions).

17 See *Allgeyer v. Louisiana*, 165 U.S. 578, 589–90 (1897) (invalidating a law barring maritime insurance contracts with a company that did not comply with other state policies); see also *Lochner v. New York*, 198 U.S. 45 (1905) (voiding a maximum hours law for bakers for violating the liberty of contract).

18 See *Pollock v. Farmers' Loan & Trust Co. (Pollock II)*, 158 U.S. 601, 618 (1895) (voiding a federal income tax as inconsistent with the Direct Tax Clause); *In re Debs*, 158 U.S. 564, 599 (1895) (holding that federal courts could enjoin strikes); *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895) (reading the Sherman Antitrust Act narrowly to avoid constitutional difficulties under the Commerce Clause). This does not mean that the specific rules in these cases were controlling until the 1930s (though the holding in *Debs* was). Rather, the decisions symbolize the turn triggered by the Populist false positive. Before 1895, the Court never invalidated a federal tax on constitutional grounds. See Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 25 (1999). After 1895, it did so more than once. See, e.g., *United States v. Butler*, 297 U.S. 1, 63–64 (1936) (voiding a regulatory tax on agriculture because farming was "a purely local activity"). Similarly, before 1895 the Justices largely ignored the affirmative reach of the Commerce Clause. See *United States v. Lopez*, 514 U.S. 549, 553 (1995) (stating that until the late nineteenth century "the Court's Commerce Clause decisions dealt rarely with the extent of Congress' power"). After 1895, however, that provision became the focal point for most assertions of federal power. See *infra* notes 104–22 and accompanying text.

19 See *E.C. Knight*, 156 U.S. at 16; OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 112 (1993). *E.C. Knight* was not as controversial for Populists as *Pollock II* and *Debs* because the latter two struck at the core of their platform. See *infra* notes 212–14 and accompanying text.

merce, but only after the Justices strained to find the broadest possible basis for decision.²⁰ Finally, the Court voided the federal income tax and overturned nearly a century of precedent in a move that William Howard Taft called one of its biggest mistakes.²¹ On these issues and others that shifted during the 1890s, scholars confront the legal equivalent of Planet X—a hidden force that still exerts an observable pull. Once the concept of a false positive is introduced, however, the mystery is solved. Hostility to Populist values drove these rulings, and that ire was so intense that it actually altered the Constitution's meaning in ways that still affect us.²²

Part I of this Article looks at the role of resistance in constitutional law and explains how false positives can reshape doctrine. Part II explores the roots and agenda of the Populists in an age of class division and rapid industrialization. Part III recounts the mounting tension between these upstarts and the political establishment that culminated in President Grover Cleveland's decision to use troops to break the Pullman Railroad Strike, an act that transformed the meaning of federalism for a generation. Part IV shifts the focus to the Supreme Court and documents how the Justices also vigorously intervened against the Populist tide. Part V follows the 1896 campaign between William McKinley and William Jennings Bryan and focuses on the debate over Bryan's implied threat to engage in Court-packing if he won. Finally, Part VI reveals how the case law evolved after the McKinley-Bryan showdown to guard against a Populist come-

20 See *Debs*, 158 U.S. at 599; Fiss, *supra* note 19, at 61–62 (remarking that the case “raised profound questions about the constitutional system and called for answers that were couched in the highest terms of generality”). For an excellent analysis of how the major cases of this era, including *Debs*, were shaped by the Populist movement, see L.H. LaRue, *Constitutional Law and Constitutional History*, 36 BUFF. L. REV. 373 (1987).

21 See 1 ARCHIBALD BUTT, *TAFT AND ROOSEVELT* 134 (1930); see also *Pollock v. Farmers' Loan & Trust Co.* (*Pollock I*), 157 U.S. 429, 608 (1895) (White, J., dissenting) (“[T]he result of the opinion . . . just announced is to overthrow a long and consistent line of decisions, and to deny to the legislative department of the government the possession of a power conceded to it by universal consensus for one hundred years . . .”).

22 See *Pollock II*, 158 U.S. at 674 (Harlan, J., dissenting) (“[B]y much eloquent speech this court has been urged to stand in the breach for the protection of the just rights of property against the advancing hosts of socialism.”); *Debs*, 158 U.S. at 599 (“[T]he means of redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it the legal warrant to invite as a means of redress the coöperation of a mob . . .”); see also Edward S. Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52, 66 (1911) (stating that in “the middle nineties . . . the Supreme Court began to regard itself as the last defense of the country against socialism”).

back and redefined the Fourteenth Amendment in a way that inaugurated the era of laissez-faire constitutionalism.

I. THE VIRTUES OF STANDING ATHWART HISTORY

This Part develops a framework for understanding constitutional false positives by assessing how opposition contributes to the creation of law. There are some general lessons that can be drawn from the efforts of constitutional conservatives.²³ For present purposes, the main point is that while unsuccessful resistance can deepen the scope of change by forcing reformers to intensify their efforts, when that resistance prevails it can also enlarge the scope of a reformist defeat into what effectively becomes a new legal regime.

A. *The Power of Negation*

The utility of opposition is presupposed by the adversarial shape of our legal institutions. At its core, resistance is just another way of describing debate. Aggressive questioning of reform proposals is healthy because it exposes flaws that might exist and stops bad ideas in their tracks. Moreover, these criticisms frequently improve what emerges from the deliberative process. After all, that is how the Bill of Rights came into being. The Framers did not think that these protections were necessary, but the conservatives of the time—the Antifederalists—strongly disagreed and extracted the first ten amendments as a concession in exchange for support on the original Constitution's ratification.²⁴ Thus, it is vital for people to give voice to their objections—not just because they have a right to speak, but because they serve a useful filtering role even if they are in the minority.

Along with refining the content of constitutional reform, resistance can sometimes alter the mode through which those concepts are expressed. In this respect, the Fourteenth Amendment also owes its existence to conservatives. The 39th Congress first tried to protect basic rights and extend citizenship to African Americans (and many Native Americans) through the Civil Rights Act of 1866.²⁵ President

23 The text is talking about conservatives with a small “c” (i.e., anybody who is against radical change). The title of this Part, however, refers to William F. Buckley's slogan for *The National Review*, which is clearly a big “C” publication.

24 See THE FEDERALIST NO. 84, at 575–81 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (attacking a bill of rights); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 536–43 (1969) (outlining the Antifederalist response and James Madison's decision to accept that view).

25 See Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 71–83

Andrew Johnson, however, vetoed the bill as unconstitutional and invoked traditional principles of white supremacy and federalism to support his conclusion.²⁶ To overcome this opposition and secure the Act from challenge, Reconstruction Republicans passed Section 1 of the Fourteenth Amendment.²⁷ If Johnson had signed the Civil Rights Act, the Amendment we know would not exist. Instead, its substance would have migrated to the Thirteenth Amendment or the other textual provisions on which the Act relied. As a result, the enemies of constitutional transformation sometimes alter its form but not its effect.²⁸

On the other hand, resistance helps burnish the legitimacy of any change that does occur. Rules of recognition and procedural integrity do confer authority on the actions of deliberative bodies, but the more a topic is discussed the more likely it is that people will accept the outcome. A statutory provision inserted in the middle of the night and passed without debate gets the same formal approval in a legislature as a free-standing bill that is contested for months before passage, but these acts do not command the same respect. The airing of grievances that forces proponents to defend their rationale leads neutral parties to conclude that whatever decision is made represents the considered view of a majority and not the work of a few insiders who are manipulating the system. Accordingly, conservatives spoiling for a fight face a sobering prospect—their opposition may end up strengthening the mandate for measures they are trying to defeat.²⁹ In other words, standing on principle can sometimes backfire.

(1986); *see also* Magliocca, *supra* note 16, at 944–45 (discussing the impact of the Civil Rights Act on Native Americans).

26 Andrew Johnson, Veto Message (Mar. 27, 1866) (vetoing the Civil Rights Act), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 405, 405–13 (James D. Richardson ed., 1899) [hereinafter MESSAGES].

27 *See, e.g.*, ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 114 (1990). Congress did override the President's veto, but only after the Senate expelled a Democratic member to get the necessary margin. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE 173 (1998). This left the Act open to a challenge on procedural grounds (i.e., the override was illegitimate) and on substantive grounds, as Johnson's contention that the Act was unconstitutional gave this position credibility when litigation ensued.

28 The situation during Reconstruction was more complex than the text indicates, because Johnson's failed resistance also ended up enhancing other parts of the reform agenda beyond what would have occurred otherwise. *See* RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 160–68 (1999) (showing how the Fifteenth Amendment evolved in response to conservative opposition to Reconstruction); *infra* notes 29–40 and accompanying text.

29 *See* 2 ACKERMAN, *supra* note 27, at 164 (describing the paradox of resistance).

That risk is compounded by the idea, which is central to an analysis of constitutional false positives, that fierce resistance also polarizes the debate and leads reformers to increase their demands beyond what they would have settled for initially. This behavior should be familiar to anyone with experience in civil litigation, but another example from Reconstruction makes the point even better. In 1861, the Republican Party held that slavery should be abolished only in the territories, as Lincoln explained in his First Inaugural.³⁰ In 1865, these same Republicans ratified an amendment abolishing slavery everywhere.³¹ What explains this dramatic turn? The best answer is that citizens and officials in the North were radicalized by the Confederacy's intransigence. Certainly this was a rational response to the increasing costs of the Civil War, as voters could have reasoned that only more sweeping objectives could justify those costs. Yet there was also an emotional component to this reaction. Simply put, people get angry when confronted with steadfast (or what looks like unreasonable) opposition. In that exercised state, they begin rejecting modest measures in favor of more radical solutions out of a sense of outrage or from a desire for revenge.³² Thus, resisting change entails risks not only because it might increase the legitimacy of reform, but because it often increases the scope of reform.

To capture how opposition can boomerang against its practitioners, the best analogy comes from the renowned war scholar Carl von Clausewitz and his principle of mutual transformation.³³ The Prussian's dictum that "war is nothing but the continuation of policy with other means" can be turned on its head to show that politics and war

30 See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) ("I have no purpose, directly or indirectly, to interfere with the institution of slavery in the states where it exists."), in *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* 742, 742 (William Safire ed., 1992) [hereinafter *GREAT SPEECHES*].

31 See U.S. CONST. amend. XIII.

32 One of the things that made Lincoln unique was his benign emotional response that Divine Providence was behind the opposition for its own reasons. See RONALD C. WHITE, JR., *LINCOLN'S GREATEST SPEECH: THE SECOND INAUGURAL* 18–19 (2002) (quoting Lincoln's view that "[t]he Almighty has his own purposes" and wondering if "He gives to both North and South, this terrible war, as the woe due to those by whom the offense [of slavery] came").

33 See CARL VON CLAUSEWITZ, *ON WAR* 75–77 (Michael Howard & Peter Paret eds., Princeton Univ. Press 1984) (1832); see also GARRY WILLS, *CERTAIN TRUMPETS: THE CALL OF LEADERS* 86 (1994) (calling mutual transformation the insight that "[e]ach side is increasingly enraged by the other's efforts to meet violence with greater violence").

also share a lot in common.³⁴ In both instances, there is a tension between the rational objectives pursued and the passions stirred up for (and needed to motivate) the people fighting for these goals. Clausewitz said it was “an obvious fallacy to imagine war between civilized peoples as resulting merely from a rational act on the part of their governments and to conceive of war as gradually ridding itself of passion.”³⁵ These emotions tend to drive parties in conflict toward extremes. The intense feelings unleashed by war and constitutional law escalate because they are part of a competition between different sides that react to what the other does.³⁶ Clausewitz called this the mutual transformation of forces, wherein an act by one side “compels its opponent to follow suit; a reciprocal action is started which must lead, in theory, to extremes.”³⁷ This instinct to respond with greater strength rests to some extent on uncertainty about the outcome, because “so long as I have not overthrown my opponent I am bound to fear he may overthrow me. Thus I am not in control: he dictates to me as much as I dictate to him.”³⁸ Conflicts also escalate because each camp tries to use just enough force to achieve its goals, and therefore a cycle of marginal retaliation is likely as they probe each other’s resolve and challenge each other for supremacy.³⁹ Naturally, there is a limit to this principle because eventually one side is overwhelmed or capitulates when the costs of continuing become too great. As the slavery example shows, however, the final product of this interaction

34 CLAUSEWITZ, *supra* note 33, at 69; see RICHARD A. POSNER, AN AFFAIR OF STATE 248–58 (1999) (using war theory to explain the Clinton impeachment saga). These similarities should not be overstated since one activity involves violence and the other does not. Nevertheless, war and constitutional politics are both conducted in an atmosphere of high uncertainty. See *id.* at 249–50. Moreover, luck plays a critical role in shaping their respective outcomes, though in the law that fact is not given enough recognition. See CLAUSEWITZ, *supra* note 33, at 85 (“No other human activity is so continuously or universally bound up with chance [as is war].”); Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 561 (2002) (explaining how the sudden death of President William Henry Harrison was the only thing that saved *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), from being overruled).

35 CLAUSEWITZ, *supra* note 33, at 76.

36 See *id.* at 77 (stating that war “is not the action of a living force upon a lifeless mass (total nonresistance would be no war at all) but always the collision of two living forces”).

37 *Id.* (calling this the first extreme of war).

38 *Id.* (characterizing this as the second extreme of war).

39 See *id.* (labeling this the third extreme of war); see also *id.* (explaining that once enemy resistance is assessed “you can adjust your own efforts accordingly But the enemy will do the same; competition will again result and, in pure theory, it must again force you both to extremes”).

often looks quite different from the parties' initial expectations.⁴⁰ In sum, unsuccessful resistance carries the risk of turning a modest setback into a catastrophic defeat.

B. *False Positives Defined*

All of the scenarios discussed thus far assume that conservatives do not succeed in their effort to defeat change, but that is not always true. Most of the time victorious resistance just preserves the status quo.⁴¹ Yet if the threat posed by reformers is strong and they still fail (i.e., the requirements for a false positive are met), then the process of mutual transformation moves in the other direction. Rather than exaggerating the impact of reform, the opposition creates authorities that state an aggressive set of principles rejecting the change movement.⁴² Those actions then remain in place and become the new reference points that courts use to implement this constitutional "negative implication" as doctrine.

While anger is behind many reformers' efforts to sharpen their demands in the face of resistance, fear is the driving force for conservatives seeking to stop change. To borrow another concept from Clausewitz, in war and constitutional politics people frequently overstate the consequences of defeat and fill "the stage with scenery crudely daubed with fearsome apparitions."⁴³ Even the most sober lawyers display signs of panic when their principles come under attack by a new popular movement.⁴⁴ Indeed, there is a regular pattern in our higher law under which officials conclude that extraordinary acts of resistance must be taken to save the Constitution from destruction, even if

40 See *supra* notes 30–32 and accompanying text.

41 After all, in most situations reform proposals either have little support or seek to implement fairly minor changes. In these circumstances, the intensity of feeling that is necessary for an escalation is simply not present.

42 A prior work of mine describes the most powerful act of judicial resistance as a "preemptive opinion." See Magliocca, *supra* note 34, at 491–510. Though that category is explored in the *Pollock* decisions, see *infra* note 250 and accompanying text, one difference between that case and the other members of this select group, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), is that the latter were swept aside in their time because reformers won.

43 CLAUSEWITZ, *supra* note 33, at 118; see *id.* at 117 (discussing the concept of friction in war and noting that most soldiers "tend to exaggerate the bad news").

44 See, e.g., G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 960 (1988) (quoting John Marshall's reaction to the rise of Jacksonian Democracy and his statement that "I yield slowly and reluctantly to the conviction that our Constitution cannot last").

that means striking against the insurgents before they assume power.⁴⁵ In effect, a constitutional false positive stands at the opposite end of the cycle of mutual transformation described in the last Part.⁴⁶

Continuing with this inverse parallel, just as conservatives can accelerate the pace of change with resistance, reformers who fail risk triggering a backlash that can push the new legal equilibrium to a position much less friendly to their cause than where it stood before their movement began. Ironically, the most successful defenses of the status quo (measured by the stakes involved) can still end up changing the law dramatically. Since the main goal of resistance is to discredit reform, conservatives are often presented with a choice between applying precedent (even if that means letting their foes obtain some concrete political victories) and recasting the law to ensure that the reformers lose. There is no consistent answer to that dilemma, but in many cases fear of defeat outweighs respect for the rules.⁴⁷ The leading example is *Dred Scott v. Sandford*,⁴⁸ in which the Supreme Court held that the Republican goal of barring slavery in the territories was unconstitutional even though the precedents did not come close to supporting such a conclusion.⁴⁹

That kind of judicial performance indicates how a false positive can reshape the law. Consider for a moment how doctrine would have developed following *Dred Scott* if Democrats had won their debate with Republicans in 1860. In that case, Chief Justice Taney's opinion would have altered doctrine merely by withstanding attack, as its distortions forged under political pressure would have become a new fixed point for judicial reasoning. In addition, the opinion would be seen as the new model for courts—a heroic decision that was criticized but then vindicated by the people, much as *Brown v. Board of*

45 See 1 THE AMERICAN PARTY BATTLE: ELECTION CAMPAIGN PAMPHLETS 1828–1876, at 36 (Joel H. Silbey ed., 1999) [hereinafter PAMPHLETS] (describing the Jacksonian view “that the Republicans posed a particular threat to the nation’s safety. . . and had to be put down”); *infra* notes 269–70 and accompanying text.

46 See *supra* notes 37–39 and accompanying text.

47 See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–61 (1832) (asserting that Native Americans had broad sovereignty and that the federal government had exclusive power over interactions with the tribes); Magliocca, *supra* note 16, at 898–903 (explaining that these conclusions were not supported by existing doctrine but were inspired by opposition to Jacksonian Democracy).

48 60 U.S. (19 How.) 393 (1857).

49 See *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (“In legislating for [the territories], Congress exercises the combined powers of the general, and of a state government.”). See generally THOMAS HART BENTON, EXAMINATION OF THE DRED SCOTT CASE (photo. reprint 1969) (1857) (making the same point).

*Education*⁵⁰ is viewed today. Indeed, judges in that scenario would not be stretching matters much in concluding that the electorate had endorsed an emphatic move away from what the defeated reformers believed.⁵¹ And once courts get shoved in that direction, they are unlikely to change course for years. The law that then emerges will be quite different from how the background principles would have evolved if no Republican challenge (and no *Dred Scott*) had occurred at all.

This hypothetical, which closely tracks how the 1890s actually unfolded, also shows why the exclusion of false positives wrecks havoc on legal theory.⁵² The problem is that any acts of resistance must utilize existing constitutional text, as there is rarely enough time to pass an Article Five amendment to stop reform.⁵³ If the reformers are defeated, judges in subsequent years will apply the principles laid down by these acts of resistance as though they were normal extensions of the constitutional provision's original understanding. Thus, if the intervening false positive is ignored, scholars will either get a false view of what the clauses meant or a negative view of the Justices reading them. In the example discussed here, the decisions from the Populist era lead some scholars to attribute values to the Fourteenth Amendment that are not there, while others wonder why the Court did such a poor job in preserving the text's meaning.⁵⁴ The answer is that these judges were faithfully construing the backlash of the 1890s as if it was a constitutional amendment.⁵⁵

50 347 U.S. 483 (1954).

51 This happened in an affirmative fashion several times, most notably during the New Deal when the Court concluded (under duress) that the people were endorsing a new set of principles based on enhanced federal and state power over economic matters. See JACKSON, *supra* note 15, at vi. (stating that the Justices "confessed legal error and saved themselves from political humiliation").

52 Though the text refers only to the 1890s, this period is not the only false positive in our constitutional history. In 1840, the Whig Party won control of the political branches and threatened to roll back the work of Jacksonian Democracy. See Magliocca, *supra* note 34, at 565–70. The Whigs failed in that effort so quickly, though, that this period did not see a sustained backlash. See *id.* at 570.

53 In 1861, the Democrats did try to pass an amendment that would have expressly protected slavery, but this was not ratified by the states. See EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION* 59–60 (Washington, D.C., Philip & Solomons 1864).

54 Certainly not all of the distortions that occurred in this period involved the Fourteenth Amendment. Nevertheless, this is the part of the Populist false positive that is most relevant for modern constitutional theory. See *supra* note 9; see also *infra* Part VI.

55 One point that should be clarified is that this Article draws no normative conclusions about the legitimacy of change caused by a false positive. Without a doubt,

Accordingly, a constitutional false positive is part of the natural give-and-take that occurs when sharply divergent philosophies collide in a political arena. Just as fierce resistance magnifies the scope of a reformist victory, so too does it intensify the power of a conservative triumph. The Populist moment witnessed the greatest popular mobilization in our history that ever failed, and a close look at those years shows how a false positive can warp the fabric of the law.

II. THE BANNER OF REFORM IS HOISTED

This Part probes the background of the Populist Party and explains the philosophy that its leaders brought into the mainstream. At its heart, Populism was an agrarian movement that followed in the footsteps of Jeffersonian and Jacksonian Democracy by insisting that the wealthy were abusing their power and threatening democracy.⁵⁶ Unlike their forebears, however, the Populists responded to this crisis by holding that the government needed more authority to counter the influence of business.⁵⁷ In particular, they gave a new reading to the Commerce Clause that made it a strong tool for federal action and began a shift in how lawyers assessed the reach of Congress.

A. *Discontent at the Grass Roots*

Farmers in the late nineteenth century sensed that their status was in decline due to forces that they could not control. In 1893, Frederick Jackson Turner advanced his argument that the frontier was central to the American experience and that its disappearance had

there is a strong argument that distortions of constitutional meaning done in the name of opposing “dangerous” reforms are illegitimate. Even if this view is correct, though, the acts of resistance remain and should be assessed.

56 See EDWARD IRVING, *BREAKERS AHEAD!: AN ANSWER TO THE QUESTION WHERE ARE WE AT?* 59 (Stockton, Cal., T.W. Hummel Co. 1894) (“There is but one party which is ready, willing and eager to tear from off the people the OCTOPUS CLASP of the money power. That party is the PEOPLE’S PARTY.”); *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 259 (Adrienne Koch & William Peden eds., 1993) (“Those who labor in the earth are the chosen people of God”); Andrew Jackson, Veto Message (July 10, 1832), in 2 *MESSAGES*, *supra* note 26, at 576, 590 (vetoing the Bank of the United States because “[m]any of our rich men have not been content with equal protection and equal benefits, but have besought us to make them richer by act of Congress”).

57 Compare PAMPHLETS, *supra* note 45, at 16 (quoting a Jacksonian mantra that “[t]he only use of government is . . . to keep[] off evil. We do not want its assistance in seeking after good”), with WILLIAM A. PEPPER, *POPULISM, ITS RISE AND FALL* 175 (Peter H. Argersinger ed., Univ. Press of Kan. 1992) (1899) (“Populists believe in the exercise of national authority in any and every case where the general welfare will be promoted thereby.”).

significant consequences.⁵⁸ Though this particular view is contested, Turner's metaphor did capture the reality that rural life was in the midst of a painful transition brought on by the Industrial Revolution.⁵⁹ Innovations in technology raised the productivity of agriculture and linked regional markets into one global market.⁶⁰ That surge in available goods led to a sustained deflation in prices that made it increasingly difficult for farmers to obtain credit.⁶¹ Indeed, the only way to survive was by mortgaging part of a current crop to buy seed and equipment for the next year. This "crop-lien" plan, though, just served to deepen the debt cycle in a deflationary time.⁶²

Mounting debts were not the only problem facing farmers, as they also found their livelihood increasingly controlled by corporate interests. The independent yeoman of old now depended on banks for loans, grain elevators for storing produce, and railroads for bringing goods to market. None of these industries were regulated, and so all of them could charge discriminatory rates because they held a significant bargaining advantage over individual farmers.⁶³ Furthermore, rural voters thought that trusts had a stranglehold on government and were using that influence to turn farmers into serfs.⁶⁴ Thomas E. Watson, the firebrand who became the Populist leader in the South, expressed these fears in vivid language:

These Corporations are the Feudal Barons of this Century.
Their Directors live in lordly Palaces and Castles. . . . They keep

58 See BRANDS, *supra* note 10, at 22–27. See generally FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920) (laying out this view).

59 For the classic rebuttal to Turner's view that the agrarian revolt in the 1890s was caused by the scarcity of open land, see HOFSTADTER, *supra* note 10, at 47–57 (noting that Populism was also strong in areas where the frontier had vanished long before the 1890s and that other factors were more relevant).

60 See HICKS, *supra* note 10, at 57–59; see also LOUIS W. KOENIG, *BRYAN: A POLITICAL BIOGRAPHY OF WILLIAM JENNINGS BRYAN 67–68* (1971) (explaining how the boost in production influenced rural life).

61 See GOODWYN, *supra* note 10, at 69; see also HICKS, *supra* note 10, at 55 ("The period from 1870 to 1897 was one of steadily declining prices.").

62 See C. VANN WOODWARD, *TOM WATSON: AGRARIAN REBEL 129–31* (1938); see also JAMES L. HUNT, *MARION BUTLER AND AMERICAN POPULISM 23* (2003) (stating that merchants commonly charged an interest rate of fifty percent in rural areas).

63 See JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM 108–09* (1983); see also HOFSTADTER, *supra* note 10, at 58 (stating that farmers faced a "high cost of credit," "discriminatory railroad rates," and "unreasonable elevator and storage charges").

64 See James Baird Weaver, *The Threefold Contentment of Industry*, in *FARMER DISCONTENT 1865–1900*, at 80, 87 (Vernon Rosco Carstensen ed., 1974); see also IRVING, *supra* note 56, at 33 ("We have over us the money king, the iron king, the coal king, the cattle king, the pork king, the wheat king, the corn king, the lumber king, the railroad magnate, the telegraph monopolist, and the coffin despot.").

bands of Militia to do their fighting. . . . At the word of command these hireling assassins shoot down men, women and children. . . .

Not only do the Corporations keep armed Retainers: they keep oily and servile Courtiers to do their bidding in other walks of life. Their paid Lobby bribes the voter. Their paid editor feeds the public with lies. Their corrupt Lawyers and Judges peddle out justice to the highest bidder. Their Attorneys go on the Bench or into Senates to vote the will of their Masters.⁶⁵

The omnipresent corporate power that Watson described was especially galling because farmers adhered to the Jeffersonian view that they were the backbone of the republic and that freedom could not long endure in a commercial world.⁶⁶

Driven by these economic and social concerns, agrarian interests made efforts to organize through the Granger Movement and the Greenback Party, but these attempts came to naught until the formation of the Farmers' Alliance in the 1880s.⁶⁷ Initially, this umbrella organization, which was the antecedent of the Populist Party, avoided politics and stressed the need for rural folk to join together as a way of enhancing their leverage with creditors.⁶⁸ That appeal for collective action struck a chord, as more than three million people flocked to the reform banner.⁶⁹ One sympathetic newspaper said that "[t]he people are aroused at last. Never in our history has there been such a union of action among farmers as now."⁷⁰ In spite of this impressive result, Alliance leaders quickly realized that self-help would not be enough to address the problem. They needed to enter the political arena and bring the full power of government to bear.⁷¹

65 THOMAS E. WATSON, *THE PEOPLE'S PARTY CAMPAIGN BOOK 1892*, at 206-07 (Arno Press 1975) (1892). The tragic story of Watson's descent from reformer to racist reactionary, which is a metaphor for the Populist movement as a whole, is told by WOODWARD, *supra* note 62.

66 See HOFSTADTER, *supra* note 10, at 28-30; HUNT, *supra* note 62, at 22; William Jennings Bryan, *The Cross of Gold Speech*, in GREAT SPEECHES, *supra* note 30, at 768, 771 ("[T]he great cities rest upon our broad and fertile prairies. Burn down your cities and leave our farms, and your cities will spring up again as if by magic; but destroy our farms, and the grass will grow in the streets of every city in the country.").

67 See HICKS, *supra* note 10, at 27-28, 96-97; JONES, *supra* note 14, at 74.

68 See GOODWYN, *supra* note 10, at 27; see also BRANDS, *supra* note 10, at 184 ("While farmers watched the corporations with which they did business get larger and more consolidated, they increasingly felt the need to consolidate in self-defense.").

69 See HICKS, *supra* note 10, at 103; WOODWARD, *supra* note 62, at 136.

70 BRANDS, *supra* note 10, at 184 (quoting the Chicago *Western Rural*).

71 See St. Louis Demands (Dec. 1889) [hereinafter St. Louis Demands], in HICKS, *supra* note 10, app. A, at 427, 427-30; see also HUNT, *supra* note 62, at 30 (calling this the Alliance's "first platform expressing a unitary set of national political demands").

To see why agrarian activists made the expansion of federal authority a central pillar of their ideology, let us begin by examining the issue that is most closely associated with the movement: currency reform and the free coinage of silver.⁷² Most farmers rejected the argument that deflation in commodity prices was the result of technology. Instead, they blamed a restrictive monetary policy based on the gold standard.⁷³ That was the basis for Bryan's famous vow that "you shall not crucify mankind upon a cross of gold,"⁷⁴ which Senator William Allen of Nebraska explained as "the operation of a shrinking volume of money . . . [by which] the East has placed its hands on the throat of the West."⁷⁵ When the Farmers' Alliance held its first national congress in 1889, the platform called for the issuance of legal tender "in sufficient volume to do the business of the country on a cash system" and "the free and unlimited coinage of silver."⁷⁶ So while both planks sought to reverse the fall in agricultural prices, they were also acknowledging that only federal action could address the farmers' plight.⁷⁷

This new enthusiasm for public intervention and collective action was on full display in the Alliance's position that the best way to deal with the railroads and other industries was for the government to own them.⁷⁸ The most popular novel of the time, *Looking Backward*, was set in the year 2000 and described a utopia based on nationalizing the

72 The Populist passion for silver shines at other points in this Article, but the best example is *Coin's Financial School*, a fictional account of a teenager who debates the issue with the financial titans of Chicago. See WILLIAM H. HARVEY, *COIN'S FINANCIAL SCHOOL* (Richard Hofstadter ed., Harvard Univ. Press 1963) (1894). This book, which is after all about a pretty dry topic, became a sensation. See JONES, *supra* note 14, at 32–33; see also KOENIG, *supra* note 60, at 158 ("Seldom, if ever, has a publication educated so vast a public on a serious political issue.").

73 See HICKS, *supra* note 10, at 87–91. It is fair to say that price declines were caused by a combination of the gold standard and technology, though that does not mean that aggressive inflation was the best solution.

74 Bryan, *supra* note 66, at 772. It is interesting to note that my students know Bryan only for his role in the Scopes Trial, which can be seen as a metaphor for the shift in our politics from economic to cultural issues.

75 HICKS, *supra* note 10, at 90.

76 St. Louis Demands, *supra* note 71, at 427–28.

77 This did not increase the scope of federal power, since Congress had established the gold standard in 1873. See GOODWYN, *supra* note 10, at 16. The background of the currency issue is laid out in BRANDS, *supra* note 10, at 199–201.

78 See St. Louis Demands, *supra* note 71, at 428 ("We demand that the means of communication and transportation shall be owned by and operated in the interest of the people as is the United States postal system.").

means of production.⁷⁹ Though this gave the federal establishment a greater role than was ever contemplated before or since, reformers contended “[w]here a business is so clearly of a public nature that the individual can only get fair treatment by having the government to act for all, then individualism ceases to be wise and nationalism becomes . . . necessary.”⁸⁰ The scope of this concept was never fully explored, but the Populists would call for a takeover of railroads, the telegraph, the telephone network, and banks.⁸¹

Driven by the unprecedented hardships facing farmers, these proposals reflected a broader judgment that in the industrial age government should secure positive rights and redistribute income.⁸² Ignatius Donnelly, a leading drafter of the Populist platform, dismissed the idea that freedom consisted only of a lack of restraints imposed by the state.⁸³ He wondered “[w]hat is freedom worth to a man who is dying of hunger? . . . Can you keep a room warm, next winter, with the thermometer at 30° below zero, by reciting the Declaration of Independence?”⁸⁴ Spurred on by this belief in affirmative liberty, the Alliance made a progressive income tax a central goal and demanded the phase-out of corporate subsidies in favor of the poor to prevent the “governmental injustice [that] breed[s] the two great classes—tramps and millionaires.”⁸⁵ With all of these reforms, the Populists vowed “to restore the government of the Republic to the hands of ‘the plain people,’ with whose class it originated.”⁸⁶

79 See EDWARD BELLAMY, *LOOKING BACKWARD, 2000–1887* (Am. Reprint Co. 1987) (1887); see also FISS, *supra* note 19, at 38 (stating that *Looking Backward* sold more copies than any other nineteenth-century book except *Ben-Hur* and *Uncle Tom’s Cabin*).

80 WOODWARD, *supra* note 62, at 260 (quoting Tom Watson’s article on “The Railroad Question”).

81 See The Omaha Platform (July 1892) [hereinafter 1892 Populist Platform], in HICKS, *supra* note 10, app. F, at 439, 443; see also T.C. JORY, *WHAT IS POPULISM?: AN EXPOSITION OF THE PRINCIPLES OF THE OMAHA PLATFORM ADOPTED BY THE PEOPLE’S PARTY IN NATIONAL CONVENTION ASSEMBLED 9* (Salem, Ross E. Moores & Co. 1895) (“[E]very citizen of the United States who wishes to do so shall have an opportunity to go to work directly for his government . . .”).

82 See FISS, *supra* note 19, at 37–40; see also HOFSTADTER, *supra* note 10, at 61 (“Populism was the first modern political movement of practical importance in the United States to insist that the federal government has some responsibility for the common weal . . .”).

83 See GOODWYN, *supra* note 10, at 105–06; WOODWARD, *supra* note 62, at 202.

84 MARTIN RIDGE, *IGNATIUS DONNELLY: THE PORTRAIT OF A POLITICIAN* 324 (1962).

85 1892 Populist Platform, *supra* note 81, at 440; see St. Louis Demands, *supra* note 71, at 428–29.

86 1892 Populist Platform, *supra* note 81, at 441.

While this was a powerful agenda, in retrospect the major weakness of the agrarian movement was its failure to present a compelling message to labor.⁸⁷ Just as the Gilded Age brought dislocation to rural households, industrialization also triggered turmoil in cities where people struggled to earn a living wage. Faced with the power of trusts, workers followed the logic of the times and embraced collective action through unions. In an era where labor law did not exist and firms refused to recognize the right of workers to organize, violent conflict between labor and capital was not uncommon.⁸⁸ For instance, in 1886 alone there were nearly 1400 strikes across the nation involving 500,000 employees.⁸⁹ That same year brought the Haymarket Riot, in which anarchists set off a bomb in the center of Chicago in the midst of clashes between strikers and the police.⁹⁰ Thus, addressing working conditions had the potential to draw new support to a reform coalition. While the Alliance tried to formulate appealing urban policies, they had little interest in or cultural affinity with factory workers, particularly since farmers saw city folk as the problem rather than as part of the solution.⁹¹

87 Another problem was that the Alliance offered nothing to the growing population of recent immigrants. In a sense, the Populist movement was the last hurrah of the white, Anglo-Saxon, and Protestant population that formed the backbone of the movements led by Jefferson, Jackson, and Lincoln. By the 1890s, though, that group was no longer a majority and could not win without allies. Nevertheless, the Party rejected opening "our ports to the pauper and criminal classes of the world . . . and demand[ed] the further restriction of undesirable immigration." 1892 Populist Platform, *supra* note 81, at 444; *see* JORY, *supra* note 81, at 17. Even Tom Watson, for all of his reforming zeal in these years, said "[t]he scum of creation has been dumped on us. Some of our principal cities are more foreign than American. . . . The vice and crime which they have planted in our midst are sickening and terrifying." HOFSTADTER, *supra* note 10, at 82.

88 For a particularly chilling account of the Homestead Strike of 1892, see BRANDS, *supra* note 10, at 129–44 (describing the deaths that resulted from skirmishes between strikers and Pinkerton detectives).

89 *See* FISS, *supra* note 19, at 57.

90 *See* DAVID RAY PAPKE, *THE PULLMAN CASE* 16 (1999); *see also* JEAN STROUSE, *MORGAN: AMERICAN FINANCIER* 256 (1999) ("The Haymarket affair sharply divided the country."). For a discussion on the role Governor Altgeld of Illinois played in pardoning the Haymarket Rioters and supporting the Pullman Strike, *see infra* notes 152–54, 161–63 and accompanying text.

91 *Compare* St. Louis Demands, *supra* note 71, at 430 ("We sympathize with the just demands of labor of every grade and recognize that many of the evils from which the farming community suffers oppress universal labor . . ."), *with* HOFSTADTER, *supra* note 10, at 62 ("According to the agrarian myth, the health of the state was proportionate to the degree to which it was dominated by the agricultural class . . .").

Notwithstanding these difficulties, the Alliance and other like-minded groups formed the People's Party in 1891.⁹² A modern reader may think it odd that reformers would form a new party rather than capture control of one of the existing parties, but the example fresh in their minds was the movement led by the new Republican Party in the 1850s. Indeed, Populist activists often invoked the struggle against slavery, as one did by paraphrasing *Dred Scott's* infamous declaration on the status of African Americans: "The oppressed of today are white laborers and mechanics who, evidently, though without a Supreme Court decision, have no rights which millionaires and moneyed corporations are bound to respect."⁹³ In 1892, the Populists nominated James B. Weaver as their standard bearer in the presidential election.⁹⁴ Weaver's innovative constitutional views are the focus of the next Part.

B. *Populism and the Commerce Clause*

The history of the agrarian revolt is well known, but the creativity of Populist lawyers gets little recognition. Given the Party's ambitious agenda, its leaders needed new ideas to sustain these actions in the courts. On some issues, such as replacing the gold standard or implementing an income tax, precedent supported (or so it seemed) the power of Congress to act.⁹⁵ For other proposals, especially the goal of nationalizing industries, the Party tried to develop a new source of constitutional power from existing textual provisions. The solution of people like Weaver and Marion Butler, the Populist leader in North Carolina, was to turn the Commerce Clause into a strong tool for fed-

92 See HUNT, *supra* note 62, at 38; see also KOENIG, *supra* note 60, at 83 (calling this a "political miracle"). In the 1890 election, pro-Alliance candidates were elected to state and congressional offices, but this narrative skips over that to concentrate on the campaigns following the creation of the Populist Party.

93 WILLIAM H. CARWARDINE, *THE PULLMAN STRIKE* 121 (Charles H. Kerr & Co. 1971) (1894); see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (stating that the Framers believed African Americans "had no rights which the white man was bound to respect"); see also WEAVER, *supra* note 12, at 133 ("We distinctly remember that the same Court and *Dred Scott* once differed in their conceptions of human rights under our Constitution. But *Dred Scott's* views are now generally accepted. It is probable that the controversy between the farmers and the Court will end in the same way.").

94 See SUNDQUIST, *supra* note 63, at 136; WOODWARD, *supra* note 62, at 230.

95 See *Juilliard v. Greenman*, 110 U.S. 421, 450 (1884) (holding that the creation of legal tender was a political question committed to the sole discretion of Congress); *Springer v. United States*, 102 U.S. 586, 602 (1881) (upholding a federal income tax). With respect to the income tax, however, that assumption was misplaced. See *infra* notes 271-98 and accompanying text.

eral action.⁹⁶ Yet the fog of time obscures how innovative this was and diminishes what became the most lasting legal contribution of that era.

Weaver framed his 1892 campaign with a book entitled *A Call to Action* and several articles that laid out the Populist platform and presented an analysis of how prevailing case law impinged on the goals of reformers.⁹⁷ Starting as Lincoln did with the Declaration of Independence, Weaver asked if it could “be denied that all men have a natural right to a portion of the soil” as part of their inalienable rights.⁹⁸ His conclusion was that this was “as sacred as their right to life itself” and that “[t]hese propositions are so manifestly true as to lie beyond the domain of controversy.”⁹⁹ The problem in Weaver’s view was that these rights could not be exercised without access to credit and transportation since “they are the instrumentalities through which the natural rights of man are rendered available in organized society.”¹⁰⁰ He was therefore troubled by a set of recent holdings that the Dormant Commerce Clause barred the states from regulating some goods and services that crossed over their border.¹⁰¹ Weaver’s deeper concern, which was shared by other rural lawyers, was that the Justices were laying the predicate for a reversal of the *Granger Cases* of the 1870s, in which the Court rejected a constitutional attack on state laws limiting storage prices and shipping rates and affirmed that states were generally free to regulate business.¹⁰²

96 See HUNT, *supra* note 62, at 42; see also WEAVER, *supra* note 12, at 5 (“The sovereign right to regulate commerce among our magnificent union of States, and to control the instruments of commerce . . . have been leased to associated speculators.”).

97 See WEAVER, *supra* note 12, at 94–135; Weaver, *supra* note 64, at 83–87.

98 See Weaver, *supra* note 64, at 82; see also PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 202–06* (1997) (recounting Lincoln’s use of the Declaration in his arguments against slavery).

99 Weaver, *supra* note 64, at 82; see JORY, *supra* note 81, at 15 (stating that a “man’s right to life involves his right to occupy a *place to live on*. Some place to live on is a necessary condition to life itself”).

100 Weaver, *supra* note 64, at 84.

101 See *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 498–500 (1888) (striking down state laws barring the importation of liquor without a license); *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 577 (1886) (holding that the regulation of interstate railroad rates could only “be done by the Congress of the United States under the commerce clause of the Constitution”); WEAVER, *supra* note 12, at 111–25 (arguing that these cases were inconsistent with the precedents governing the police power of the states when Congress did not act).

102 See *Stone v. Wisconsin*, 94 U.S. 181, 183 (1877) (Field, J., dissenting) (rejecting the reasoning of the *Granger Cases*); *Peik v. Chi. & Nw. Ry. Co.*, 94 U.S. 164, 177–78 (1877) (rejecting a Dormant Commerce Clause attack on railroad rate regulation); *Munn v. Illinois*, 94 U.S. 113, 130–35 (1877) (rejecting other challenges to these state

Weaver responded that the present state of affairs was inconsistent with first principles because the Framers recognized that the natural right to the soil was “practically inseparable” from the control of credit and transportation.¹⁰³ He said that this was why “they incorporated the [Commerce Clause] among other far-reaching and sweeping provisions” in the Constitution.¹⁰⁴ And “[w]hatever may be the meaning of this provision, it is certain that the framers . . . regarded the power to be exercised as too important to be confided to the discretion of individuals or left to the control of the States.”¹⁰⁵ Likewise, Marion Butler said that the Commerce Clause should be read more expansively due to “the greatest social, industrial and political evolution the world has ever seen.”¹⁰⁶ In Weaver’s eyes, Congress was ignoring its obligations by delegating its commerce power to the trusts and allowing them to “crush out the inalienable rights of the people.”¹⁰⁷ Thus, he said that “the great object of the Industrial movement now challenging public attention, is to restore to Congress its Constitutional and exclusive control over the great limbs of commerce, money, transportation and telegraphy.”¹⁰⁸

This reasoning was groundbreaking at the time because nobody else saw the Commerce Clause as such a far-reaching and sweeping provision. Virtually all lawyers learn that the clause was first interpreted by Chief Justice Marshall in *Gibbons v. Ogden*.¹⁰⁹ It is also well known that the Court paid little attention to the reach of the commerce power until the *annus mirabilis* of 1895.¹¹⁰ In fact, none of the

statutes); JORY, *supra* note 81, at 26 (lamenting that “[t]hese decisions have been practically annulled”); RIDGE, *supra* note 84, at 297 (describing Ignatius Donnelly’s fear that the *Granger Cases* would be overruled); WEAVER, *supra* note 12, at 84–85 (stating that it “was the purpose in certain circles to overthrow . . . the Grange decisions of 1876”). Ironically, that fear would be realized because of the Populist failure. See *infra* notes 361–64 and accompanying text.

103 See HUNT, *supra* note 62, at 42; Weaver, *supra* note 64, at 84.

104 Weaver, *supra* note 64, at 84. Weaver then went on to quote the Commerce Clause in full. *Id.*

105 *Id.*; see WEAVER, *supra* note 12, at 410 (“The power which the people originally possessed to regulate commerce among the States for themselves was by the adoption of the Constitution, solemnly transferred to Congress and . . . [t]he Congress can not escape the responsibility if it would.”).

106 HUNT, *supra* note 62, at 42 (internal quotation marks omitted).

107 Weaver, *supra* note 64, at 85–86; see WEAVER, *supra* note 12, at 265–66 (comparing Congress’s actions to granting letters of marque to privateers).

108 WEAVER, *supra* note 12, at 436.

109 22 U.S. (9 Wheat.) 1 (1824).

110 See *United States v. Lopez*, 514 U.S. 549, 553–54 (1995) (stating that until the late nineteenth century “the Court’s Commerce Clause decisions dealt but rarely with the extent of Congress’s power”); *infra* Part IV.A–B.

great nineteenth-century decisions on congressional authority—*McCulloch v. Maryland*,¹¹¹ *Dred Scott*,¹¹² the *Legal Tender Cases*,¹¹³ the *Trade-Mark Cases*,¹¹⁴ or the *Civil Rights Cases*¹¹⁵—were about the Commerce Clause.¹¹⁶ To the extent that broad assertions of national power were made, the Court relied either on other textual provisions or on a generalized claim that Congress could act.

Though the Commerce Clause began to assume its modern form with the creation of the Interstate Commerce Commission in 1887 and the passage of the Sherman Antitrust Act in 1890, the discussion was still rather cautious.¹¹⁷ The creation of the Commission to regulate railroad rates was only a response to a Supreme Court opinion in the prior year holding that such an act could only be undertaken by Congress pursuant to the Commerce Clause.¹¹⁸ When Senator Sherman introduced his bill to regulate the trusts, he denied that the commerce power was applicable.¹¹⁹ His idea was to break up monopolies by imposing punitive taxes on them under what he saw as the more robust taxing power.¹²⁰ Though Congress concluded that the Commerce Clause could support the Sherman Act, even at this late date considerable doubts remained about the breadth of that provision. This shows how revolutionary Weaver's position was.

111 17 U.S. (4 Wheat.) 316 (1819).

112 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

113 See *Juilliard v. Greenman*, 110 U.S. 421 (1884); *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870).

114 100 U.S. 82 (1879).

115 109 U.S. 3 (1883).

116 In the *Trade-Mark Cases*, counsel did suggest that the Commerce Clause could sustain a federal law regulating marks, but the Court declined to address the issue because Congress did not consider that option. See 100 U.S. at 94–98. Likewise, the *Civil Rights Cases* said the question of whether Congress could bar private racial discrimination under the commerce power was not presented. See 109 U.S. at 19.

117 See Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890); Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887); see also *United States v. Lopez*, 514 U.S. 549, 554 (1995) (“These laws ushered in a new era of federal regulation under the commerce power.”).

118 See *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 577 (1886) (holding that regulating interstate railroad rates could only “be done by the Congress of the United States under the commerce clause of the Constitution”).

119 See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 88 (1965) (describing Sherman's view that “the only constitutional provision enabling Congress to legislate against trusts was the power to levy taxes”).

120 See *id.* This was the solution favored by Weaver, who was skeptical that the Sherman Act would work. See WEAVER, *supra* note 12, at 393–94.

A great unanswered question in constitutional law is why the Commerce Clause became the principal source of federal authority in the modern era. One explanation is that the sweeping language in *Gibbons* was rediscovered in the 1890s after being ignored for decades.¹²¹ Even if that view is correct, however, that would not explain why the epiphany occurred when it did. The real answer to the riddle is that the Populist Party made the Commerce Clause a centerpiece of its constitutional philosophy and thereby catapulted that concept into the legal mainstream. Weaver's emphasis on the commerce power is telling in this respect, and more evidence can be found in the debate on the Sherman Act. It turns out that the Farmers' Alliance was a leading force behind the Act, and the Senate spent time trying to shape its commerce theory to exempt the Alliance from antitrust liability.¹²² In other words, there was a nexus between the expansion of the Commerce Clause and the agrarian reformers who were carrying a new reading of that text into the courts. This would force the Court to articulate a new commerce theory, though its position would be far different from James B. Weaver's.

Backed by this new and exciting Populist message, Weaver received more than a million votes and carried five states in the 1892 election.¹²³ The down-ticket results were even more encouraging, as Populist governors won in three states and scores of other party members or allies were swept into office.¹²⁴ While the actual winners of the presidential and congressional elections were Grover Cleveland and the Democrats, there was a feeling at the time that the Populists were poised to enter the pantheon of successful constitutional movements.¹²⁵ As one contemporary pamphleteer stated, "[A] party which

121 See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.").

122 See 21 CONG. REC. 2562, 2562 (1890) (statement of Sen. Sherman); LETWIN, *supra* note 119, at 89; see also Robert P. Faulkner, *The Foundations of Noerr-Pennington and the Burden of Proving Sham Petitioning: The Historical-Constitutional Argument in Favor of a "Clear and Convincing" Standard*, 28 U.S.F. L. REV. 681, 697-99 (1994) (stating that Senator Sherman was well aware of Alliance lobbying efforts on behalf of the Interstate Commerce Act and antitrust legislation).

123 See SUNDQUIST, *supra* note 63, at 136-37. Weaver carried Colorado, Idaho, Kansas, Nevada, and North Dakota. See HICKS, *supra* note 10, at 263 (displaying a map with the distribution of the Populist vote).

124 See HICKS, *supra* note 10, at 267; see also JONES, *supra* note 14, at 77 ("The first Populist successes in the West in 1891 and 1892 were spectacular for a political movement so recently established.").

125 See JONES, *supra* note 14, at 36; see also SKOWRONEK, *supra* note 15, at 48 ("Cleveland rode to victory in 1892 on the heels of a potentially significant electoral shift.").

comes into existence in the summer and polls considerably over a million votes in the fall cannot be ignored much longer.”¹²⁶

III. PRESIDENTIAL RESISTANCE AND THE PULLMAN STRIKE

This Part traces the opposition to Populism from the White House and shows the process of mutual transformation in action. Prior to the 1892 election, conservatives did not seem all that concerned about the prospect of an agrarian takeover. That all changed, however, with the onset of the Panic of 1893, which was the worst economic disaster this country faced until the Great Depression.¹²⁷ As unemployment skyrocketed to about thirty percent, the nation entered “the *année terrible* of American history between Reconstruction and the [First] World War.”¹²⁸ In this charged atmosphere, President Cleveland chose a strategy of massive resistance to reform, and this led the parties to increase their demands and reconsider first principles with respect to federalism.

A. Grover Cleveland and the Transformation of Federalism

This part of the story begins by examining the pivotal role that Grover Cleveland played in shaping the dynamic that culminated in the Populist false positive.¹²⁹ On the heels of his 1892 victory, the Panic gave the President a rare opportunity to expand his coalition. By embracing some Populist proposals and offering relief to dispossessed farmers and workers, he could have neutered the new third-party while putting Republicans in the difficult position of opposing these emergency measures. Indeed, Franklin D. Roosevelt would use a similar strategy to build the New Deal majority. Cleveland was a skilled politician capable of pulling this off—he was, after all, the only Democrat to capture the Presidency between 1860 and 1912. The problem was that he represented the faction of the party that supported the gold standard and opposed government intervention in

126 IRVING, *supra* note 56, at 37.

127 See JONES, *supra* note 14, at 3; see also HERBERT CROLY, MARCUS ALONZO HANNA: HIS LIFE AND WORK 210 (1912) (“[T]he business depression, coincident with Mr. Cleveland’s second administration, stirred the American people more deeply and had graver political consequences than had any previous economic famine.”).

128 ALLAN NEVINS, GROVER CLEVELAND: A STUDY IN COURAGE 649 (1932); see FISS, *supra* note 19, at 39 (noting that unemployment in manufacturing may have reached fifty percent).

129 See SUNDQUIST, *supra* note 63, at 144 (“The variable of leadership seems singularly important in the realignment of the 1890s. To be sure, Cleveland was at once a cause and a result.”).

the economy.¹³⁰ Thus, Cleveland faced a moment of truth that conservatives in every era confront: should he limit the damage to his principles by joining the popular uprising or stand fast and risk an even greater defeat?¹³¹

The President was in a fighting mood. Rather than compromising with the Populists, he decided that the Panic could only be addressed through more conservative policies. Cleveland blamed the meltdown on an 1890 statute that ordered the Treasury to buy a limited amount of silver and issue notes against those purchases to placate the demand for unlimited silver coinage.¹³² Claiming that this policy undermined confidence in the banking system, the President summoned a special session of Congress and rammed through a repeal of the law.¹³³ Thereafter, Cleveland maintained a strict gold standard, and when the Treasury's reserves dropped he even called upon J.P. Morgan to form a syndicate that would sell bonds to wealthy investors in order to raise more gold.¹³⁴

These actions marked the first escalation in the standoff between the Populists and the establishment. While Marion Butler lambasted the President as a "tool of corporate interest, a traitor, and a drunkard," other reformers took a more sanguine view.¹³⁵ Tom Watson declared that the return to a pure gold standard was "a God-send to us" because it would bring conservative attitudes "'[i]nto the clear light, where all honest citizens can see.'"¹³⁶ He predicted that this would lead to greater polarization that could only redound to the benefit of the Populist Party, as "Democrats who hold Republican doc-

130 See *id.* at 142; see also Grover Cleveland, Inaugural Address (Mar. 4, 1893), in 9 MESSAGES, *supra* note 26, at 389, 390 ("[W]hile people should patriotically and cheerfully support their Government[,] its functions do not include the support of the people.").

131 See *supra* Part I.A.

132 The Act required the Treasury to purchase silver with notes that could be redeemed in gold or silver. See BRANDS, *supra* note 10, at 83; STROUSE, *supra* note 90, at 305.

133 See HUNT, *supra* note 62, at 61; see also Grover Cleveland, Special Session Message (Aug. 8, 1893), in 9 MESSAGES, *supra* note 26, at 401, 402-03 (outlining the President's opposition to the Silver Purchase Act).

134 See STROUSE, *supra* note 90, at 341-49; see also Grover Cleveland, Annual Message (Dec. 2, 1895), in 9 MESSAGES, *supra* note 26, at 626, 644 ("With a reserve perilously low and a refusal of Congressional aid, everything indicated that the end of gold payments by the Government was imminent. . . . An agreement [to sell bonds] was therefore made with a number of financiers and bankers . . .").

135 HUNT, *supra* note 62, at 68 (internal quotation marks omitted).

136 WOODWARD, *supra* note 62, at 252-53; cf. STROUSE, *supra* note 90, at 350 ("No President for two decades forgot the intensity of public outrage at Washington's deal with Wall Street.").

trines will be driven to the Republican Party, and *vice versa*. Members of the two old parties who really hold Populist views, finding no support in either Democratic or Republican ranks, will be driven to the People's Party.'"¹³⁷ Watson's comments state the essence of a mutual transformation in the law.¹³⁸ By taking stern action to snuff out the constitutional movement, Cleveland risked provoking an even greater reaction from reformers that would intensify their support and demands.

The Populists and their allies responded by seeing the President's bet and raising it with a campaign of protests and civil disobedience. In the spring of 1894, a Populist activist from Ohio, Jacob Coxey, led a march of unemployed workers to demand action on a vast public jobs program.¹³⁹ As his supporters converged on Washington, *The New York Times* declared that this was a "Battle between Law and Anarchy" and officials rushed weapons and troops into the city.¹⁴⁰ When the "petition in boots" reached the Capitol, Coxey's Army was welcomed by the police with beatings and arrests.¹⁴¹ Protests broke out in other cities, and "in no civilized country in this century, not actually in the throes of war or open insurrection, has society been so disorganized as it was in the United States during the first half of 1894."¹⁴²

1. The Pullman Strike

Without a doubt, the most important clash between reformers and the President came that summer during the Pullman Strike. This violence was the backdrop for the *Debs* case and helped reshape attitudes toward federalism.¹⁴³ In my view, the reaction to the strike is one of the most underrated legal events of the nineteenth century. Like the link between the rise of Populism and the Commerce Clause, however, this development comes into focus only when the false positive model is introduced.

137 WOODWARD, *supra* note 62, at 253.

138 See *supra* notes 33–40 and accompanying text.

139 See BRANDS, *supra* note 10, at 160–76; STROUSE, *supra* note 90, at 336–37.

140 See BRANDS, *supra* note 10, at 171–73.

141 See RIDGE, *supra* note 84, at 329–30 (internal quotation marks omitted); see also BRANDS, *supra* note 10, at 174 ("The police responded by laying all about them with billy clubs.")

142 STROUSE, *supra* note 90, at 336 (quoting ROBERT SOBEL, PANIC ON WALL STREET 260 (1968)).

143 See *In re Debs*, 158 U.S. 564 (1895) (upholding the injunction against the Pullman Strike); *infra* Part IV.B.

The strike grew out of a dispute between Pullman, the main producer of railroad cars, and the American Railway Union led by Eugene V. Debs. Most of the firm's work occurred in a company town near Chicago where workers paid rent to Pullman and bought supplies from its stores.¹⁴⁴ Following the Panic, the company slashed wages by more than twenty-five percent but refused to reduce rents and prices for employees who had nowhere else to live.¹⁴⁵ When the workers complained, their ringleaders were fired.¹⁴⁶ This led to a strike that caught the attention of Debs, who called Pullman's interest in its workers "'the same as the interest of a slave holder in his human chattels.'"¹⁴⁷ When Pullman rejected a suggestion that the strike be resolved through arbitration, the umbrella union responded by calling for a boycott of Pullman.¹⁴⁸ That transformed a local dispute into a national crisis by bringing railroad traffic across the country to a halt.¹⁴⁹ *Harper's Weekly* stated that the nation was "fighting for its own existence just as truly as in suppressing the great rebellion."¹⁵⁰

This latest escalation of the constitutional confrontation created a legal minefield for the President. The railroad barons were clamoring for an end to this "attempt at blackmail" and wanted troops sent into Chicago "because that was the center and headquarters of the strike and that, *if smashed there*, it would collapse everywhere else."¹⁵¹ One problem with that plan, though, was that the Governor of Illinois, John Peter Altgeld, was sympathetic to the strikers and opposed federal intervention.¹⁵² Altgeld was a bogeyman for conservatives due to his recent decision to grant clemency to the Haymarket Rioters.¹⁵³ Now he raised a large obstacle for Cleveland by claiming that the fed-

144 See BRANDS, *supra* note 10, at 147; PAPKE, *supra* note 90, at 11-14.

145 See BRANDS, *supra* note 10, at 147-48; PAPKE, *supra* note 90, at 17-18.

146 See BRANDS, *supra* note 10, at 148; PAPKE, *supra* note 90, at 18.

147 PAPKE, *supra* note 90, at 19; see BRANDS, *supra* note 10, at 148-49. Actually, Debs was a moderate in contrast with his union brethren. See PAPKE, *supra* note 90, at 27; see also BRANDS, *supra* note 10, at 149 (stating that Pullman's obstinacy undercut Debs's restrained position).

148 See BRANDS, *supra* note 10, at 149; PAPKE, *supra* note 90, at 24-25.

149 See BRANDS, *supra* note 10, at 150; see also FISS, *supra* note 19, at 73 ("The Chicago disturbance started as an ordinary strike but quickly took on extraordinary dimensions. It created a mass disorder, paralyzing the national rail and postal systems and threatening the very idea of an economic union.").

150 PAPKE, *supra* note 90, at 35 (internal quotation marks omitted).

151 WOODWARD, *supra* note 62, at 261 (quoting Attorney General Olney); see BRANDS, *supra* note 10, at 151.

152 See FISS, *supra* note 19, at 65; see also BRANDS, *supra* note 10, at 153 ("[A]mong business circles Altgeld possessed a reputation as a flaming radical . . . [who] consistently took the side of labor in industrial quarrels . . .").

153 See BRANDS, *supra* note 10, at 153; FISS, *supra* note 19, at 65.

eral government had no power to enter a sovereign state and interfere with its domestic affairs.¹⁵⁴ Thus, a Democratic President was presented with the argument that federalism, the Party's touchstone for nearly a century, protected Debs and his cohorts. Cleveland now faced a second hard choice that challenges all conservatives who are in the throes of resistance. When their principles faithfully applied would give their foes a victory, what should they do?¹⁵⁵

The President's Attorney General, Richard Olney, answered that question by ignoring federalism and asserting that the Commerce Clause gave President Cleveland the power to act. Of course, this claim was most ironic since the Populists were relying on the commerce power to back their vision of a more egalitarian industrial system.¹⁵⁶ Olney argued that the strike was disrupting mail deliveries, even though the unions had pledged to exempt mail from the work stoppage.¹⁵⁷ Railroad owners, though, prevented the mail trains from moving and gave the Attorney General the excuse he needed to obtain an injunction ordering the union to cease its activities.¹⁵⁸ When Debs refused to comply, the President ordered in the troops and issued a decree stating that "[t]hose who disregard this warning and persist in taking part with a riotous mob in forcibly resisting and obstructing the execution of the laws of the United States . . . can not be regarded otherwise than as public enemies."¹⁵⁹

As workers and soldiers fought bloody clashes in the city, Governor Altgeld telegraphed the President demanding an end to the invasion.¹⁶⁰ The Governor explained his position this way:

154 See *infra* notes 161–63 and accompanying text.

155 See *supra* notes 46–49 and accompanying text. I do not deny that there was a plausible case for federal action in the Pullman Strike, though the text shows that a lot of work was required to develop a rationale. But see David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 184–85 (2002) (calling Cleveland's justification "altogether unpersuasive").

156 See *supra* notes 104–22 and accompanying text. For a discussion on this emerging dialogue about the proper use of federal power, see *infra* Part III.A.2.

157 See *In re Debs*, 158 U.S. 564, 568–69 (1895); BRANDS, *supra* note 10, at 151; see also PAPKE, *supra* note 90, at 30–31 (reviewing Olney's corporate background).

158 See *Debs*, 158 U.S. at 570–72; see also BRANDS, *supra* note 10, at 151 (observing that railroad officials forcibly halted mail trains).

159 Proclamation No. 11 (July 8, 1894), 28 Stat. 1249 (1894), reprinted in 9 MESSAGES, *supra* note 26, at 499 ("[I]t has become impracticable in the judgment of the President to enforce by the ordinary course of judicial proceedings, the laws of the United States within the State of Illinois, and especially in the city of Chicago . . ."); see also BRANDS, *supra* note 10, at 152 (laying out the timeline).

160 See BRANDS, *supra* note 10, at 154–55; see also PAPKE, *supra* note 90, at 33 (stating that eleven were killed and fifty wounded).

I submit that local self government is a fundamental principle of our constitution. . . . Especially is this so in matters relating to the exercise of the police power and the preservation of law and order. To absolutely ignore a local government in matters of this kind, . . . not only insults the people of this state . . . , but is in violation of a basic principle of our institutions.¹⁶¹

Consistent with this principled defense of federalism, Altgeld denied that the federal government had the authority to send troops into Illinois unless he requested assistance.¹⁶² In making this claim, he argued that “[t]he question of federal supremacy is in no way involved; . . . under our constitution federal supremacy and local self government must go hand in hand and to ignore the latter is to do violence to the constitution.”¹⁶³

The President answered Altgeld’s protest with a telegram outlining his constitutional prerogatives. He began by observing that there was a request for assistance by “the post office department that obstructions of the mails should be removed,” and hence “[f]ederal troops were sent to Chicago in strict accordance with the constitutions and laws of the United States.”¹⁶⁴ In a terse summary of his analysis, Cleveland said that his decision was based “upon abundant proof that conspiracies existed against commerce between the states.”¹⁶⁵ This position was backed by voices in the press who called the Governor a “sympathizer with riot, with violence, with lawlessness and with anarchy.”¹⁶⁶ While critics said that “from the White House down it has been determined to put forth every effort even to Gatling guns, . . . to destroy this strike and the laboring people,” in the end the strike did crumble under military pressure and a judicial injunction.¹⁶⁷

161 W.F. BURNS, *THE PULLMAN BOYCOTT* 63 (St. Paul, McGill Printing Co. 1894) (internal quotation marks omitted).

162 *See id.* at 64 (stating that until he asked for federal help, “I protest with all due deference against this uncalled for reflection upon our people and again ask [for] the immediate withdrawal of the troops”).

163 *Id.*

164 *Id.* at 64–65.

165 *Id.* at 65.

166 BRANDS, *supra* note 10, at 153 (internal quotation marks omitted); *see* MATTHEW JOSEPHSON, *THE POLITICOS 1865–1896*, at 587 (1938) (“The respectable press of the country is a unit in applauding and sustaining the President.” (quoting *The Week*, *THE NATION* (New York), July 12, 1894, at 19)).

167 BURNS, *supra* note 161, at 45; *see* PAPKE, *supra* note 90, at 38.

2. A New Paradigm

Though the legality of Cleveland's actions would be tested in the High Court, it is worth pausing here to consider how the strike affected the debate on federalism in the coming years. The first point that leaps from the page is that both sides in this struggle were focused on the Commerce Clause. It was in 1894 that the modern understanding of the Clause as the wellspring of federal power was established. While the Populists had introduced the idea that the commerce power served this function, the President's resistance led to the development of an equally revolutionary alternative of what the Clause meant.¹⁶⁸ This emerging dialogue demonstrates the dynamic quality of constitutional discourse as each camp sought to overthrow the other through mutually escalating actions. At the core of the disagreement in the 1890s was the scope of the federal government's proper role in regulating the national economy.

As the Cleveland-Altgeld correspondence indicates, the more subtle feature of the Pullman Strike was its impact on the age-old debate over states' rights. Contemporary observers were struck by the fact, long since forgotten, that the fight between Altgeld and Cleveland was the most serious challenge to federal authority since the Civil War.¹⁶⁹ For the Populists and William Jennings Bryan, state governments were now the only remaining bulwark "against a threatened military government of the railroads and their associate monopolies."¹⁷⁰ Indeed, Bryan's 1896 platform made a full-throated defense of federalism on the strike issue:

We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which Federal judges, in contempt of the laws of the

168 The left-wing activist Matthew Josephson put it best: "By a shift in the interpretation of our constitutional government, and by a most devious usage of laws recently enacted to regulate interstate corporations, a Democratic President and his lieutenants introduced truly 'revolutionary' doctrines . . ." JOSEPHSON, *supra* note 166, at 586; see WOODWARD, *supra* note 62, at 261–62.

169 See REPUBLICAN CAMPAIGN TEXT-BOOK 138 (Washington, D.C., Hartman & Cadick 1896) [hereinafter GOP TEXTBOOK]; see also DELMORE ELWELL, A WALL STREET VIEW OF THE CAMPAIGN ISSUES OF 1896, at 4 (1896) (discussing the "railroad strike riots of 1894" and stating that "[t]here are still a few blue-coated veterans of the Civil War who will . . . register a prayer for a revival of the spirit of 1860").

170 BURNS, *supra* note 161, at 113 (quoting a letter sent by local activists to the national chair of the Populist Party).

States and rights of citizens, become at once legislators, judges, and executioners¹⁷¹

Besides denouncing Cleveland's actions for violating state sovereignty, Bryan claimed that the President contravened the Guarantee Clause, which secures "to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."¹⁷² In Bryan's view, that provision embodied the idea that local officials are "better qualified than the President to judge of the necessity for federal assistance."¹⁷³

Conservatives replied that this was an invitation to anarchy and that robust federal action was necessary to protect property rights. One Republican pamphlet commented that the Populists wanted to take "us back to 1861, when governors were abetting rebellion This country is not ripe for such another struggle, nor ready to approve the doctrine that the Federal Government cannot fight for its own life in spite of all the mayors, governors, or sheriffs."¹⁷⁴ And supporters of Cleveland pointed out that "[t]he great Chicago railroad strike of 1894 was anything but a 'local affair.' It involved the railroad employees of fifteen states and was, incidentally, the cause of violence and rioting which almost amounted to open insurrection."¹⁷⁵ The Attorney General went so far as to say that federalism was "'a far more serious matter than the money question, or any of the other questions now before the people, grave as they all are."¹⁷⁶ If the Populists would "'do nothing to protect the property . . . of the United States

171 GOP TEXTBOOK, *supra* note 169, at 138. The story of how Bryan became the standard bearer of the Populists and a newly reconstituted Democratic Party is told in Part V. See *infra* notes 309–12 and accompanying text.

172 U.S. CONST. art. IV, § 4; see BRYAN, *supra* note 1, at 410 (quoting his letter accepting the Democratic nomination); see also CAMPAIGN TEXT-BOOK OF THE NATIONAL DEMOCRATIC PARTY 1.93 (Chicago & New York, Nat'l Democratic Comm. 1896) [hereinafter GOLD DEMOCRAT TEXTBOOK] (stating the Gold Democrats' view and quoting a response to Bryan from Attorney General Harmon).

173 BRYAN, *supra* note 1, at 411; see GOLD DEMOCRAT TEXTBOOK, *supra* note 172, at 1.93.

174 GOP TEXTBOOK, *supra* note 169, at 138; see *The Nation's Honor Must Be Preserved*, HARPER'S WKLY., Sept. 26, 1896, at 938 ("In 1861, some of the States undertook to enforce the doctrine that the Federal government had not the power to prevent them from leaving the Union To-day Mr. BRYAN is asserting that the Federal government cannot enforce its laws or protect its property against the violence of mobs except by the consent of the State").

175 GOLD DEMOCRAT TEXTBOOK, *supra* note 172, at 1.91.

176 *Id.* at 1.93 (quoting Attorney General Harmon).

unless and until the officers of another government request or consent, then we really have no Federal Government.’”¹⁷⁷

The rapt attention given to this episode altered the way people thought about federalism by changing its focus from the protection of civil liberties to the protection of property rights.¹⁷⁸ In other words, the leading narrative on states’ rights is that national action is especially important to protect racial and cultural minorities from discrimination by states. This was the lesson from the struggle against slavery and segregation. The Framers of the Constitution, though, had another model in mind. They saw the national government as the greater danger to personal freedom and the states as a more dangerous threat to property interests. As a consequence, they applied the Bill of Rights to only the federal government and inserted clauses into the body of the text that expressly limited how states could regulate property.¹⁷⁹

The conservative backlash against the Pullman Strike reinforced the older understanding of federalism and diminished the substance of Reconstruction by presenting a clear example, in conservative eyes, of a state acting as an enemy of property.¹⁸⁰ Moreover, the Populists and William Jennings Bryan promised that if they got into power states would have broad latitude to act against corporate interests. Just as the President needed a new Commerce Clause theory to rebut the Populist view that it granted power to nationalize industry, he also needed to reassess the relationship between state and federal authority in response to the Pullman Strike. In that context, conservative leaders were far more concerned about the present danger from the states with respect to property than with distant tales about violations of individual rights.

177 *Id.*

178 One demonstration of just how much attention the crisis received is that the press used more visual images to cover the Pullman Strike than they did for any prior event. See PAPKE, *supra* note 90, at 36 (noting that the famed artist Frederic Remington penned illustrations for a Chicago newspaper).

179 U.S. CONST. art. I, § 10, cl. 5 (“No State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts”); *id.* art. I, § 10, cl. 8 (stating that no state could pass any “Law impairing the Obligation of Contracts”); see *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights did not apply to the states).

180 That is a central idea of this project, though its relevance will be clearer in the article discussing incorporation. See *supra* note 9. The Pullman Strike was a leading event that drove the Court away from applying the Bill of Rights to the states and toward an interpretation of the Fourteenth Amendment that stressed the protection of property rights. See *infra* Part VI.A.

B. *The Political Fallout from Cleveland's Resistance*

These events were a dazzling backdrop for the 1894 midterm elections, as Cleveland's opposition to the Populists split the Democrats and created the chance for a new political alignment.¹⁸¹ As Tom Watson had predicted, the President's escalation sparked an even stronger reaction from reformers that was straining the established party system.¹⁸² An officer involved in the Pullman crackdown reflected the polarization of the age by declaring that "[m]en must take sides . . . either for anarchy, secret enclaves, unwritten law, mob violence, and universal chaos under the red or white flag of socialism on the one hand; or on the side of established government."¹⁸³ The Populists responded by taunting Cleveland for "bunco[ing] the country in a huge confidence game," and embraced the tumult with the radical mantra that "to make an omelet, you must break some eggs."¹⁸⁴ As one scholar said, "Populists had reason to forecast that the Democratic party, caught in the middle as the country polarized, would be pulled apart—just as the Whigs had been split by another polarization forty years before—and the country would be left with two parties, Populists and Republicans."¹⁸⁵

A vivid example of the fear in Democratic ranks about the President's course of action can be found in a letter from the Party's leadership in Georgia imploring Cleveland to cease his resistance or face disaster. These experienced politicians told the President that "[t]he conditions of this State are fearful and threatening" and fretted about "the long-continued delay in helpful legislation by Congress."¹⁸⁶ As a result of his refusal to compromise, Georgia Democrats were "rapidly losing strength in this State. Every election held in the State for the past three (3) months has gone against the Demo-

181 See SKOWRONEK, *supra* note 15, at 49 (explaining that Cleveland's actions were devastating to the party). This decision was not so surprising because it was Cleveland's conservatism that enabled him to get elected as a Democrat in a Republican time. Moreover, his career was built on a reputation for public moral rectitude and distaste for compromise that made it difficult for him to switch positions in a credible way. See *id.* at 460–61; SUNDQUIST, *supra* note 63, at 127.

182 See *supra* notes 136–38 and accompanying text; see also WOODWARD, *supra* note 62, at 264 ("One year ago this country was being fed on the ambrosia of Democratic expectations. Today it is gnawing the cobs of Democratic reality." (quoting Tom Watson)).

183 PAPKE, *supra* note 90, at 32.

184 WOODWARD, *supra* note 62, at 262; see RIDGE, *supra* note 84, at 334.

185 SUNDQUIST, *supra* note 63, at 149.

186 ALEX MATHEWS ARNETT, *THE POPULIST MOMENT IN GEORGIA 168–70* (1922) (quoting Letter from William J. Northen, Governor of Georgia, to Grover Cleveland, President of the United States (Sept. 15, 1893)).

cratic party and in favor of the Populists.’”¹⁸⁷ This letter concluded with a warning that “[e]x-Congressman Watson, the leader of the Populists, has taken advantage of the conditions, and is speaking over the State to assemblies never less than 2,000, and sometimes as many as 5,000 people.’”¹⁸⁸ Not surprisingly, the President was unmoved by this appeal, responding that he “‘hardly [knew] how to reply to your letter’” since “‘I am quite plainly on record concerning the financial question.’”¹⁸⁹

Both sides emerged from the midterm election with renewed hope that they would ultimately be vindicated. The Populists were pleased because they increased their overall vote share from 1892.¹⁹⁰ On the other hand, the main beneficiaries of the disarray in the Democratic Party were the Republicans, who have been absent from the story so far but now swept into control of the House of Representatives.¹⁹¹ Thus, Cleveland’s resistance did not douse the flames of Populism. Instead, he polarized the country and caused each camp to ratchet up its demands. One conservative author suggested a way out of the deadlock by asking “[w]hat shall minister to a mind diseased like the Populist’s? *Only constitutional remedies.*”¹⁹² The Court was about to put its fist on the scale.

IV. THE JUSTICES ENTER THE FRAY

This Part surveys the resistance of the Justices and shows how that led to the creation of broad anti-Populist precedents that formed the nucleus of this constitutional false positive. The progressive gadfly Matthew Josephson once said that “by a series of fateful decisions in 1895, with which it intervened boldly in the controversies of the age, the Supreme Court . . . assumed the commanding role in our Government. It was a kind of legal ‘revolution’ or coup d’état.”¹⁹³ While this

187 *Id.* at 169.

188 *Id.*

189 *Id.* at 170; *see id.* at 170–71 (reprinting Letter from Grover Cleveland, President of the United States, to William J. Northen, Governor of Georgia).

190 *See* HOFSTADTER, *supra* note 10, at 100; JONES, *supra* note 14, at 29; *see also* SUNDQUIST, *supra* note 63, at 149 (stating that the Party’s national vote increased from one million to 1.5 million).

191 *See* SUNDQUIST, *supra* note 63, at 149 (describing the massive Republican victory with a net gain of 117 House seats).

192 Frank Basil Tracy, *Rise and Doom of the Populist Party*, in *FARMER DISCONTENT 1865–1900*, *supra* note 64, at 94, 96 (emphasis added).

193 JOSEPHSON, *supra* note 166, at 605. The fact that the cases analyzed in this Part were decided in the same year is largely coincidental. As the Court did not have certiorari jurisdiction at the time, the Justices could not control the timing of their docket in the way they do now. *See* FISS, *supra* note 19, at 112.

statement was over the top, in two major opinions the Justices did reject the Populist reading of the Commerce Clause.¹⁹⁴ In its most controversial ruling, *Pollock v. Farmers' Loan & Trust Co.*,¹⁹⁵ the Court struck down the federal income tax and said in no uncertain terms that it was crafting doctrine in response to Populism.¹⁹⁶

A. E.C. Knight and the Diminution of the Sherman Act

While the constitutional debate was raging in the political branches, the Supreme Court started its assault on reformers in a statutory case. In *United States v. E.C. Knight Co.*,¹⁹⁷ the Attorney General filed suit against the sugar trust, which controlled ninety-eight percent of national production.¹⁹⁸ He relied on the Sherman Act and argued that the trust should be divested of some of its assets. This trust was declared by Sherman himself as one of the two most outrageous monopolies of the time (the other was Pullman) because sugar was a necessity of life.¹⁹⁹ The issue before the Court was whether the trust fell within the statutory language regulating combinations that restrained "commerce among the several states."²⁰⁰ And in a pattern that would be familiar in the great cases of this era, the Court ruled against the Populist stance over the dissent of John Marshall Harlan.²⁰¹

194 See *In re Debs*, 158 U.S. 564 (1895) (upholding the injunction against the Pullman Strike); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding that the Sherman Antitrust Act did not apply to manufacturing).

195 The *Pollock* decision was rendered in two parts. See *Pollock II*, 158 U.S. 601 (1895); *Pollock I*, 157 U.S. 429 (1895).

196 This Part discusses *Pollock* last even though the opinions were handed down before *Debs*. This organization keeps the Commerce Clause cases together and integrates them with the preceding analysis that focused on that provision and on the Pullman Strike.

197 156 U.S. 1.

198 See *id.* at 2–8; *supra* notes 117–22 and accompanying text. Clearly, the Cleveland administration was not against all efforts to regulate the economy. See *infra* note 256 and accompanying text (noting that Cleveland let an income tax become law, though without his signature).

199 See CARWARDINE, *supra* note 93, at 63; see also *E.C. Knight*, 156 U.S. at 19 (Harlan, J., dissenting) (implying that sugar was "essential to the comfort of every household in the land").

200 156 U.S. at 10–11 (stating that the other issues were irrelevant).

201 See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (stating that "[o]ur Constitution is color-blind," which echoed the views of some Southern Populists); *Pollock II*, 158 U.S. 601, 685 (1895) (Harlan, J., dissenting) (arguing that people "ought not to be subjected to the dominion of aggregated wealth"); cf. *Maxwell v. Dow*, 176 U.S. 581, 614 (1900) (Harlan, J., dissenting) ("[I]t would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen.").

E.C. Knight held that the Sherman Act did not apply to the trust because sugar production was “manufacturing” and not commerce. Chief Justice Fuller said that “[c]ommerce succeeds to manufacture, and is not a part of it.”²⁰² While “the power to control the manufacture of a given thing involves in a certain sense the control of its disposition . . . [and] may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly.”²⁰³ This distinction came from a Dormant Commerce Clause opinion, *Kidd v. Pearson*,²⁰⁴ which held that state regulation was not subject to preemption merely because the regulated items were intended for export.²⁰⁵ The Court also expressed concern that the line between federal authority and the states’ police power would be obliterated if a broad definition of commerce was accepted.²⁰⁶

Beyond these formalities, the Court indicated that its views were colored by the policy implications of the Government’s position.²⁰⁷ After giving only a perfunctory nod to *Gibbons*, the opinion quoted *Kidd*’s view that if commerce included manufacturing then “Congress would be invested . . . with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.”²⁰⁸ In the Court’s view, “[a]ny movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it.”²⁰⁹ That outcome “would be

202 *E.C. Knight*, 156 U.S. at 12.

203 *Id.*

204 128 U.S. 1 (1888).

205 See *E.C. Knight*, 156 U.S. at 13–16; *Kidd*, 128 U.S. at 20 (“No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce.”).

206 See *E.C. Knight*, 156 U.S. at 13 (“It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized . . .”).

207 In this respect, *E.C. Knight* followed in a tradition established by the second *Legal Tender Case*, whereby the scope of Congress’s enumerated power is judged through an explicit or implicit balancing test that weighs the federal interest against the autonomy rights of the several states. See *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 553 (holding that the creation of paper money by Congress was a valid exercise of implied power as a wartime exigency).

208 *E.C. Knight*, 156 U.S. at 14 (quoting *Kidd*, 128 U.S. at 21). *Gibbons* was cited once for its definition of commerce. See *id.* at 12. The other reference came when the Court distinguished *Gibbons* on the ground that there “the state laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce.” See *id.* at 15–16.

209 *Id.* at 15 (quoting *Kidd*, 128 U.S. at 21–22).

about the widest possible departure from the declared object of the [Commerce Clause].'²¹⁰

Viewed in context, this was a response to the Populist reading of the Commerce Clause. Indeed, the discussion just quoted is a textbook argument against nationalizing industry, though this reading of the opinion requires a full understanding of the contemporary political background. Since the Court drew no distinction between the meaning of commerce in the Sherman Act and in the Constitution, *E.C. Knight* suggested that there would be constitutional roadblocks to public ownership at the federal level.²¹¹ Yet the opinion was a shot across the bow; an overture for the intense resistance that was coming. After all, the Court did not challenge the Populists' central goal of nationalizing railroads, the telegraph, or the telephone system, which were all still commerce under the new definition.²¹² Likewise, reformers were blasé about the fate of the Sherman Act given their preference for direct state control rather than regulation.²¹³ Thus, *E.C. Knight* generated little comment in the press or in the political arena.²¹⁴

Though the Court's criticism of Populism was oblique, the trajectory of the majority's thinking was not lost on Justice Harlan. His analysis of the Commerce Clause focused on the language in *Gibbons* that supported the power of Congress to act whenever commerce was affected.²¹⁵ Refuting the Court's argument on the difference between manufacturing and commerce, he said "it is equally true that when manufacture ends, that which has been manufactured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation, and are as much commercial intercourse" as moving

210 *Id.* (quoting *Kidd*, 128 U.S. at 22).

211 *See id.* at 16; *see also id.* at 42–43 (Harlan, J., dissenting) ("[T]he opinion of the court in this case does not declare the act of 1890 to be unconstitutional . . . [I]t is, in effect, held that the statute would be unconstitutional if interpreted as embracing such unlawful restraints . . .").

212 *See supra* notes 78–81 and accompanying text.

213 *See Fiss, supra* note 19, at 111. The Farmers' Alliance did lobby for the Sherman Act, but recall that in 1892 Weaver argued that the Act would prove ineffective and should be trumped by public ownership. *See supra* notes 120, 122 and accompanying text.

214 *See Fiss, supra* note 19, at 112. The author can personally attest that a comprehensive review of contemporary press reports disclosed hardly any interest in the case.

215 *See E.C. Knight*, 156 U.S. at 19–21, 36, 45 (Harlan, J., dissenting); *see also Fiss, supra* note 19, at 115 (stating that Harlan focused on the impact of the regulated activity on commerce rather than on the activities that could be regulated).

purchased goods.²¹⁶ Moreover, Harlan said he was “unable to perceive that [the Act] would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.”²¹⁷ Antitrust regulation was problematic for a state not only because a corporation could simply relocate, but because an attempt by a state to regulate a trust’s operation beyond that state’s borders might well run afoul of the Dormant Commerce Clause.²¹⁸

While Justice Harlan’s dissent made reasonable points against the Court’s doctrinal analysis, he also engaged the broader constitutional debate by adopting the Populist view of the commerce power. In words that tracked the reasoning of James B. Weaver, Harlan said *E.C. Knight* undermined one “primary object of the Union, which was to place commerce *among the States* under the control of the common government of all the people, and thereby relieve or protect it against burdens or restrictions imposed, by whatever authority, for the benefit of particular localities or special interests.”²¹⁹ More important, he responded to the majority’s lecture against nationalizing industry by embracing the reformers’ call for action against the danger posed by the growth of corporate power.²²⁰ Harlan argued that these “overshadowing combinations” were “governed entirely by the law of greed and selfishness—so powerful that no single State is able to overthrow them . . . and so all-pervading that they threaten the integrity of our institutions.”²²¹ Harlan’s comments were ignored at the time, but a few months later critics would be condemning him for espousing radical ideas from the bench.²²²

In sum, the first encounter between the Justices and reformers articulated significant limitations on federal power. As one might expect from an initial act of resistance, though, *E.C. Knight* took a modest step in a conservative direction, as the lack of any hostile reaction to the decision shows. Nonetheless, the process of mutual transforma-

216 *E.C. Knight*, 156 U.S. at 35–36 (Harlan, J., dissenting).

217 *Id.* at 37.

218 *See id.* at 37–38. This Catch-22, of course, would give no government the power to regulate trusts. While that was not a foregone conclusion, Harlan was clearly suggesting that *E.C. Knight* was driven more by a disagreement with the Populist agenda than by federalism concerns.

219 *Id.* at 24; *see supra* notes 103–08 and accompanying text.

220 *See E.C. Knight*, 156 U.S. at 43 (Harlan, J., dissenting) (“[T]he general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines . . . to destroy competition, not in one state only, but throughout the entire country . . .”).

221 *Id.* at 44.

222 *See infra* notes 302–04 and accompanying text.

tion was at work within the Court as well, and the judicial resistance to Populism was on an escalating path.

B. Debs and the Sword of Commerce

The Court was not done with the Commerce Clause, for soon after the ruling in *E.C. Knight* the leaders of the Pullman Strike brought their fight with President Cleveland to the Justices. For refusing to obey the injunction against the strike, Debs and his cohorts were found guilty of contempt and sent to jail.²²³ The prisoners sought a writ of habeas corpus and assembled a crack legal team led by former Senator Lyman Trumbull, one of the Framers of the Fourteenth Amendment, and the up-and-coming Clarence Darrow.²²⁴ Yet the Court unanimously upheld the President's actions and threw its prestige behind his resistance to Populism.²²⁵

While the din of politics was muffled in *E.C. Knight*, the advocates for Debs used sharp language to inform the Justices that if they joined the opposition that would only inflame public opinion. Trumbull told the Court that "[r]efusing to work for a railroad is no crime And though such action may incidentally delay the mails or interfere with interstate commerce, it being a lawful act and not done for the purpose, it is no offense."²²⁶ Meanwhile, his co-counsel warned that attempting to crush the constitutional insurgents would only fuel "dynamic social forces until they gather an accumulated and resistless energy by such compression, precipitate an explosion which shall wreck the social order."²²⁷ The Justices were approaching the same point of no

223 See *In re Debs*, 158 U.S. 564, 572-73 (1895).

224 See *id.* at 573 (noting that this was a habeas action); BRANDS, *supra* note 10, at 157; PAPKE, *supra* note 90, at 71. For more on Trumbull's role in crafting the Fourteenth Amendment, see Magliocca, *supra* note 16, at 933, 944-46.

225 Justice Harlan's vote to join the Court in this case is not surprising given his relatively broad view of the commerce power. See *supra* notes 216-21 and accompanying text.

226 BRANDS, *supra* note 10, at 158; see PAPKE, *supra* note 90, at 63 (stating that upholding an injunction would "turn over the workingmen of this country, bound hand and foot, to the mercy of corporate rapacity and greed" (internal quotation marks omitted)).

227 PAPKE, *supra* note 90, at 63 (emphasis added). An interesting aside is that Justice Harlan sensed this danger and, in a private letter to the judge presiding over the *Debs* case, urged him to set aside the contempt order on remand. See LaRue, *supra* note 20, at 390 ("If Debs and his companions remain in jail during the summer, are they not likely to be regarded as martyrs by a large number of people? . . . I take it that you could, if you saw proper, set aside the order fining and imprisoning and discharge the parties in contempt.") (quoting Letter from Justice John M. Harlan, United States Supreme Court, to Judge W.A. Woods, United States Court of Appeals

return that President Cleveland had faced two years earlier—should they join the reformers and help modulate their demands, or fight back and risk institutional damage from an enraged opposition bent on changing the courts?²²⁸

What made that choice remarkable was not the result but the breadth of the ruling against the strikers. The circuit court upheld the injunction under the Sherman Act because Debs and his union colleagues were obstructing interstate commerce.²²⁹ Instead of adopting this modest approach, the Justices rested their conclusion on constitutional grounds.²³⁰ The Court framed the question as whether “the relations of the general government to interstate commerce and the transportation of the mails such as authorized a direct interference to prevent a forcible obstruction thereof” without the need for any statutory authorization.²³¹ In essence, the Court responded to the strikers and their lawyers by pulling out its trump card—judicial review—and writing limitations on strikes directly into the Constitution for the first time.

This escalation was based on the innovative idea that the Dormant Commerce Clause gave the President the power to remove private as well as state-sponsored impediments to interstate commerce. After noting that Article I, Section 8 expressly granted Congress authority over commerce, the Court asked, “If a state with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power that the State itself does not possess?”²³² Not only was the answer a resounding “no,” but the Justices offered a fervent defense of the President, stating that “[t]he strong

for the Seventh Circuit (May 28, 1895), in Alan F. Westin, *The First Justice Harlan: A Self-Portrait from His Private Papers*, 46 *Ky. L.J.* 321, 359–60 (1958)).

228 See *supra* notes 131–32 and accompanying text. The risk of institutional harm, as opposed to damage inflicted on the substantive principles represented by the established order, became a very real prospect in the 1896 campaign. See *infra* notes 322–31 and accompanying text.

229 See *Debs*, 158 U.S. at 600. The Court’s course was even more problematic given that the issue presented was whether there was jurisdiction to hear the habeas petition. See Fiss, *supra* note 19, at 61 (“According to the standard rule, the Court was not to determine whether the injunction that Debs had disobeyed was appropriately issued; . . . the only issue open for review was whether the circuit court had jurisdiction.”).

230 See *Debs*, 158 U.S. at 600 (“[W]e prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed.”).

231 *Id.* at 577.

232 *Id.* at 581.

arm of the national government may be put forth to brush away all obstructions If the emergency arises, the army of the Nation, and all its militia, are at the service of the nation, to compel obedience to its laws."²³³

This cavalier dismissal of a state action requirement in *Debs* must have come as a cruel joke to African Americans who were being lynched at the time.²³⁴ After all, a decade earlier in the *Civil Rights Cases*²³⁵ the Court had held that even an express statutory authorization under the Fourteenth Amendment did not give federal prosecutors the power to attack private racial discrimination in public transportation, hotels, and other institutions.²³⁶ The Commerce Clause does not contain language suggesting a state action limit, but a ruling that the negative implication of that text reached state and private action was far from obvious and at odds with the deference given to the states in cases such as *E.C. Knight*.²³⁷ The thread that connected this new law together was hostility to the goals of Populism. Congress did not possess the general power to regulate business as reformers wanted, but the refusal of Congress to act did not prevent the federal government from stopping strikes assisted by sympathetic local governments.

The reactive quality of the *Debs* opinion was even more apparent in its discussion of why an injunction was an appropriate remedy. Petitioners argued that they could only be punished by the criminal law and were being deprived of their right to a jury trial through equitable contempt proceedings. Indeed, their brief stated that “[n]o more tyrannous and arbitrary government can be devised than the administration of criminal law by a single judge by means of injunction and

233 *Id.* at 582.

234 Ironically, Southern Populists were trying to stop the growing abuses of Jim Crow. See *The Georgia Populists Platform*, reprinted in PEOPLE'S PARTY PAPER, Sept. 11, 1896, at 8 (“We condemn lynching and demand of our public servants the rigid enforcement of our laws against this barbarous practice.”). Just as their economic demands ended up backfiring, though, the Populist defeat would make racial discrimination worse in the South. See *supra* note 9.

235 109 U.S. 3 (1883).

236 *Id.* at 24–25; *id.* at 11 (“It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

237 The inconsistency between *Debs* and the *Civil Rights Cases* again explains why Justice Harlan joined the former holding, since he dissented in the latter. See *id.* at 58–59 (Harlan, J., dissenting) (explaining that railroads, hotels, and public amusements should be considered state agents because they perform public duties and act under public authority).

proceedings in contempt.”²³⁸ Furthermore, traditional principles of equity provided that an injunction could not issue unless the ordinary processes of law were not available.²³⁹ In this instance, however, state and federal tribunals were available; even if it was difficult to make out a criminal case because—and this was a central point of Trumbull and Darrow’s argument—it was unclear that the strike leaders had violated any law at all.

The answer was an extraordinary rebuke to popular government—*Debs* said local juries could not be relied upon to punish people who blocked interstate commerce, and hence, the ordinary processes of law were not open. In the Court’s view, “[i]f all the inhabitants of a state, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure.”²⁴⁰ Unless federal officials had another means of enforcing their will, “the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state.”²⁴¹ This new and irrefutable presumption of jury nullification is one illustration of how the Pullman Strike pushed elites to rewrite the law out of fear that localism posed a threat to property rights.²⁴²

As the opinion reached its climax, the Court used blunt rhetoric to tell the country that Populism should be resisted. *Debs* said that “[i]f ever there was a special exigency, one which demanded that the court should do all that courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms

238 PAPKE, *supra* note 90, at 64 (internal quotation marks omitted); see JOSEPHSON, *supra* note 166, at 606 (explaining that an injunction “was a formidable legal weapon, making possible imprisonment for contempt of court without a hearing, and without trial by jury, of those who organized labor action”).

239 See *Debs*, 158 U.S. at 591 (“[I]t is well settled that, as a general rule, equity will not interfere, where the object sought can be as well attained in the ordinary tribunals.” (quoting Attorney Gen. *ex rel.* Gloucester City v. Brown, 24 N.J. Eq. 89, 91 (1873))).

240 *Id.* at 581–82.

241 *Id.* at 582.

242 See *supra* Part III.A.2. In the same landmark year of 1895, the Court held that juries had no right to evaluate the validity of a law. See *Sparf & Hansen v. United States*, 156 U.S. 51, 102–03 (1895). When I was a student, I wrote about jury nullification and was puzzled about why a custom of jury lawmaking that dated back to the Founding came to an end at that time. See Gerard N. Magliocca, *The Philosopher’s Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175, 209 (1998). Now I am persuaded that this was another byproduct of the Populist false positive, as the Court was influenced by the threat of widespread civil disobedience to preclude resistance from juries.

with clearest emphasis all its allegations.”²⁴³ In addition, “it is a lesson which cannot be learned too soon or too thoroughly that under this government . . . no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob, with its accompanying acts of violence.”²⁴⁴ This view was reinforced in the *Chicago Tribune*, which hailed the case as “a notice to all Anarchists and other disturbers of the public peace that the hands of the General Government are not fettered.”²⁴⁵

Unlike *E.C. Knight*, which garnered no adverse reaction outside of the Court, reformers vehemently objected to *Debs*. Governor Altgeld denounced the Court for transforming the republic into government by judicial decree, and said that “[t]he corrupt money power has its withering finger on every pulse in the land.”²⁴⁶ He then lifted a quote from an antebellum critic of slavery and changed “Slave Power” to “Money Power” before stating that “[i]t sits in the White House and legislates in the capitol. Courts of justice are its ministers and legislatures are its lackeys.”²⁴⁷ Debs asked why the Court “stab[bed] the Magna Charta of American liberty to death in the interest of corporations, that labor might be disrobed of its inalienable rights and those who advocated its claim to justice imprisoned as if they were felons.”²⁴⁸ The answer, as should be clear by now, is that in politics every action provokes a reaction, and Debs’s challenge was the cause of the Court’s creation of new law to stop him. A writer captured this by saying that “Debs, Altgeld & Co. have thus unconsciously rendered the country a great service by their course last year, for it is an immense gain to have so important a principle of constitutional construction definitely settled.”²⁴⁹

C. *The Pinnacle of Resistance: Pollock and the Income Tax*

The final act of judicial opposition came in the *Pollock* cases challenging the federal income tax. These rulings were “preemptive opinions,” which are the most extreme examples of resistance characterized by (1) a reckless effort to decide every issue in the case, (2) the gross inflation of some established values in a way that targets the opposition, and (3) an attack on precedent that is justified by a

243 *Debs*, 158 U.S. at 592.

244 *Id.* at 598–99.

245 *The Debs Insurrection Unlawful*, CHI. TRIB., May 28, 1895, at 6.

246 BRANDS, *supra* note 10, at 159.

247 *Id.*

248 *Id.* at 160.

249 *The Week*, NATION (New York), May 30, 1895, at 413.

new normative approach to constitutional interpretation.²⁵⁰ Some of these traits were in *E.C. Knight* and *Debs*, but they reached their apotheosis in *Pollock*. Not only was the Court told that its support was required to prevent a Populist takeover, but the opinion made it clear that the Justices—or at least a majority of five—were willing to answer this call in spite of a formidable array of contrary precedent.

1. Background on the Income Tax

The *Pollock* litigation stemmed from the enactment of a federal income tax in 1894. A legislative coalition led by William Jennings Bryan got behind a bill imposing a two percent flat tax on corporations and personal incomes over \$4000.²⁵¹ For the Populists, of course, an income tax was central to their effort to redistribute wealth and “the most effective weapon against Plutocratic policy.”²⁵² Moderates supported the tax to facilitate tariff reduction while ensuring that the Treasury had the revenue to support the gold standard.²⁵³ Leading opponents such as Senator David Hill of New York responded that the income tax was “‘pressed upon Congress by a lot of Populists, Socialists, cranks, and disturbers It was class legislation of the worst kind.’”²⁵⁴ When the bill passed, Cleveland was put in a difficult position because he supported tariff reform notwithstanding his qualms

250 See Magliocca, *supra* note 16, at 900–03 (describing the idea of preemptive opinions); see also *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (launching a preemptive strike against the Republicans); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (taking the same action against Jacksonian Democracy); *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709) (Chase, J.) (advancing a preemptive opinion against Jeffersonian Democracy).

251 See ROBERT W. CHERNY, *A RIGHTEOUS CAUSE: THE LIFE OF WILLIAM JENNINGS BRYAN* 45–46 (Univ. of Okla. Press 1994) (1985); KOENIG, *supra* note 60, at 130–33; see also *History of the Income-Tax Law*, N.Y. TIMES, Apr. 9, 1895, at 3 (“The authorship of the income tax has been variously credited to Mr. McMillin of Tennessee and Mr. Byran [sic] of Nebraska.”).

252 KOENIG, *supra* note 60, at 130; see *supra* note 85 and accompanying text. Granted, the 1894 tax was not progressive by modern standards, but it was an important first step for establishing that principle.

253 See FISS, *supra* note 19, at 78; see also KOENIG, *supra* note 60, at 130 (“In a shrewd tactical move, Bryan sought to link the income tax to tariff reform.”).

254 *Senator Hill Is Elated*, N.Y. TIMES, Apr. 9, 1895, at 3; see ELWELL, *supra* note 169, at 3–4 (stating that an income tax would “change the character of the people, to reorganize them also, changing honest citizens into perjured liars and to set loose on the community a body of sneaking detectives”).

about progressive taxation.²⁵⁵ In the end, he allowed the income tax to become law but protested by refusing to sign the bill.²⁵⁶

Though the debate on the income tax was hotly contested, there was a broad consensus that the bill was constitutional. Only thirteen years earlier, in *Springer v. United States*,²⁵⁷ the Justices unanimously upheld an income tax imposed during the Civil War.²⁵⁸ Moreover, the Court had never invalidated a federal tax on constitutional grounds despite many invitations to do so.²⁵⁹ These challenges all said that the tax in question was governed by the Direct Tax Clauses of Article I, which state that a head tax and other "direct Taxes shall be apportioned among the several states . . . according to their respective Numbers."²⁶⁰ Pursuant to these provisions, a direct tax cannot be collected unless it is divided among the states according to each state's share of the population. As a practical matter, this rule would bar an income tax by requiring that the rates assessed vary from state to state in order to generate the proper amount of revenue.²⁶¹

One reason that the Court was reluctant to describe taxes as "direct" was that the original purpose of the Clauses was to prevent the taxation of slaves. In the first case interpreting these provisions, *Hylton v. United States*,²⁶² Justice William Paterson, a member of the Constitutional Convention, explained that they were written because the South had many slaves and the North had few, hence "[t]he southern states, if no provision had been introduced in the constitution, would

255 See FISS, *supra* note 19, at 81. Cleveland did support an income tax on corporations, but was less keen on taxing individuals that way. See *id.* at 80.

256 See KOENIG, *supra* note 60, at 132-33.

257 102 U.S. 586 (1880).

258 *Id.* at 602.

259 See *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 351 (1874) (rejecting a challenge to inheritance taxes); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 549 (1869) (rejecting a challenge to taxes on state bank notes); *Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 446 (1868) (upholding a tax on insurance premiums); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) (upholding an excise tax on carriages).

260 U.S. CONST. art. I, § 2, cl. 3; see *id.* art. I, § 9, cl. 4 ("No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").

261 This is because income levels vary by state. Consider two states with the same population but different per capita incomes. Since the Direct Tax Clauses require that each state contribute to such a tax based on its share of the census, each of these two states would have to hand over the same amount of money. To accomplish this, the tax rate in the poorer state would have to be higher than in the richer state, or else the poorer state would have to make up the shortfall with other taxes. This would be unfair and politically unacceptable. *Hylton*, 3 U.S. (3 Dall.) at 174 (opinion of Chase, J.).

262 3 U.S. (3 Dall.) 171.

have been wholly at the mercy of the other states. Congress in such case, might tax slaves.”²⁶³ This reading is supported by evidence that the Framers wanted to prevent sectional strife by forcing the entire nation, North and South, to bear the burden of a slave tax.²⁶⁴ Naturally, the abolition of slavery erased this purpose and rendered these Clauses a relic no different from the Fugitive Slave Clause.²⁶⁵

Nevertheless, when a corporate shareholder objected to the income tax and sought equitable relief in the courts, the great conservative lawyers of the day urged the Justices to give the Direct Tax Clauses a new anti-redistribution reading.²⁶⁶ Joseph H. Choate, a leader of the corporate bar, took on the case because he feared that unless he built “a rampart around the rights of property,” Populists would establish a dangerous new order.²⁶⁷ He told the Court that upholding the tax would be “the beginning of socialism and communism” and would cause “the destruction of the Constitution itself.”²⁶⁸ In response to the argument that the Justices should stay out of the issue because “opposing forces of sixty millions of people have become arrayed in hostile political ranks upon a question which all men feel is not a question of law, but of legislation,”²⁶⁹ Choate offered this emotional peroration:

If it be true, as my friend said in closing, that the passions of the people are aroused on this subject, if it be true that a mighty army of sixty million citizens is likely to be incensed by this decision, it is more vital to the future welfare of this country that this court again resolutely and courageously declare, as Marshall did, that it *has* the power to set aside an act of Congress violative of the Constitution,

263 *Id.* at 177 (opinion of Paterson, J.).

264 *See* Ackerman, *supra* note 18, at 6–12 (summarizing the deliberations in the Constitutional Convention).

265 *See Pollock II*, 158 U.S. 601, 684 (1895) (Harlan, J., dissenting) (stating that the majority “interprets constitutional provisions, originally designed to protect the slave property against oppressive taxation, as to give privileges and immunities never contemplated by the founders of the government”); *id.* at 687 (Brown, J., dissenting) (explaining that the Direct Tax Clauses were “adopted for a special and temporary purpose, that passed away with the existence of slavery”).

266 Petitioner was a shareholder who sued to stop a corporation from paying the income taxes that it owed. *See Pollock I*, 157 U.S. 429, 430 (1895). This looked like a collusive suit, but the complaint stated that this was not the case. *Id.* at 433. The prayer for relief asked that the corporation’s officers be enjoined from paying the tax because the statute was unconstitutional. *Id.* at 434.

267 JOSEPHSON, *supra* note 166, at 610.

268 *Id.*

269 *Pollock I*, 157 U.S. at 531–32 (argument of Mr. Carter, Attorney for Appellee).

and that it will not hesitate in executing that power, *no matter what the threatened consequences of popular or populist wrath may be.*²⁷⁰

As Justice Harlan said in his dissent, Choate all but urged the Court “to stand in the breach for the protection of the just rights of property against the advancing hosts of socialism.”²⁷¹

2. The *Pollock* Opinions

The Justices responded by issuing a set of opinions that declared the income tax statute unconstitutional. In overturning a century of doctrine, the Court deviated from professional norms to such an extent that Charles Evens Hughes called *Pollock* a self-inflicted wound on a par with *Dred Scott*.²⁷² This comparison is instructive, because in both instances the Court was driven by the pressure of resistance to cast aside precedent and deny its ideological foes a victory.²⁷³

As an initial matter, the majority’s holding that the income tax law was invalid under the Direct Tax Clauses was *ultra vires* because the courts had no authority to grant the relief sought. Petitioner was asking that the income tax be enjoined.²⁷⁴ The problem with this request, as the dissenters loudly pointed out, was that a federal statute barred courts from enjoining the collection of federal taxes.²⁷⁵ Indeed, the law was clear that the only route for an aggrieved taxpayer was to pay the disputed tax and sue for damages.²⁷⁶ Accordingly, the proper disposition of the case was a dismissal without reaching the

270 *Id.* at 553 (argument of Mr. Choate, Attorney for Appellants) (second emphasis added).

271 *Pollock II*, 158 U.S. 601, 674 (1895) (Harlan, J., dissenting).

272 See CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 52–55 (1936); Francis R. Jones, *Pollock v. Farmers’ Loan and Trust Company*, 9 HARV. L. REV. 198, 198 (1895) (stating that the Court rendered “an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years”).

273 See Magliocca, *supra* note 16, at 919–23 (analyzing *Dred Scott*); *supra* notes 48–52 and accompanying text.

274 See *Pollock I*, 157 U.S. at 434; *id.* at 609 (White, J., dissenting) (“The bill . . . presents two substantial questions for decision: the right of the plaintiff to relief in the form in which he claims it, and his right to relief on the merits.”).

275 See *id.* at 609–12; see also *id.* at 653 (Harlan, J., dissenting) (“Giving due effect to the statutory provision that ‘no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,’ the decree below dismissing the bill should be affirmed.” (citation omitted)).

276 See *id.* at 610 (White, J., dissenting) (“[T]he general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed.” (quoting *Cheatham v. United States*, 92 U.S. 85, 89 (1875))).

merits, as the Court did not have the power to grant the requested relief. In essence, the *Pollock* litigation was brought in the wrong way.

To this objection, the Court responded that “the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument.”²⁷⁷ Even assuming that a subject-matter jurisdictional defect could be waived, which was highly dubious given the limited scope of Article III courts, judges normally do not rule on major legal issues unless they are clearly presented. Yet there was an odd symmetry at work here. *Debs* said that courts had the equitable power to bar strikes without statutory authorization, while *Pollock* held that an express statutory denial did not bar equitable relief against taxation. Once again, the link tying these holdings together was an animus towards the Populists. If the Court dismissed *Pollock* without reaching the merits like it should have, then there would have been no occasion for a broad ruling denouncing the insurgents’ constitutional vision before the crucial 1896 election.²⁷⁸

The Court began its substantive analysis in *Pollock* by quoting *Marbury v. Madison* for the proposition that constitutional review is “‘the very essence of judicial duty.’”²⁷⁹ To a modern ear, this sounds like boilerplate. In fact, this was another revolutionary step—like the embrace of the Commerce Clause—that is obscured by the lack of recognition given to the Populist false positive. Davison M. Douglas points out that *Marbury* was never cited by the Justices in support of judicial review prior to 1887, and most legal commentators referred to

277 *Id.* at 554 (majority opinion). The majority also suggested that this was a suit to prevent the misappropriation of corporate funds rather than a claim to restrain tax collection. *See id.* That argument is unpersuasive. Since the point of limiting the judiciary’s equitable power was to prevent tax collection from being hindered, allowing an exception for corporate shareholders would seriously disrupt the federal scheme.

278 More evidence that the majority was chomping at the bit to engage in an act of heroic resistance was supplied by their decision to hear *Pollock* twice. During the first argument, one Justice was ill and the Court reached a decision on only whether taxes on income from real estate and municipal bonds were direct. *See Pollock II*, 158 U.S. 601, 618 (1895) (“Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds.”); Fiss, *supra* note 19, at 76 (noting Justice Jackson’s illness). When the ill Justice returned, the Court granted a rehearing and ruled that all income taxes were direct. *See Pollock II*, 158 U.S. at 618 (“We are now permitted to broaden the field of inquiry . . . [to] a tax upon a person’s entire income . . .”). The Court was not required to hear the broader argument again. But instead of confining itself to a narrow holding, the Court asserted that its prior conclusions “must be enlarged by the acceptance of their logical conclusions.” *Id.* at 617.

279 *Pollock I*, 157 U.S. at 554 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

the case as an authority only for original jurisdiction, writs of mandamus, or other technical matters.²⁸⁰ In the 1890s the case enjoyed a revival, which Douglas attributes to the controversy surrounding *Pollock* and the need to defend that opinion from Populist attacks.²⁸¹ Choate's oral argument was a prime example of that change in alluding to *Marbury* as a way of reminding the Justices of their duty to act even in the face of popular resistance.²⁸² That reference had an impact, as *Pollock* marked the first time that the Court used *Marbury* as a justification for voiding a statute.²⁸³ This illustrates the creative power of mutual transformation better than any example discussed so far. The Court's hunt for new authorities to fight a growing popular movement led to the canonization of what is now the most famous case in American law.²⁸⁴

This novelty was followed by an even greater one, as the Justices set aside longstanding doctrine and invalidated a federal tax for the first time. Mustering a set of rather unimpressive quotes from some Framers, some eighteenth-century economists, and some English cases on direct taxes, the Court held that the Direct Tax Clauses were designed "to prevent an attack upon accumulated property by mere force of numbers."²⁸⁵ Indeed, these provisions were "one of the bulkwarks of private rights and private property."²⁸⁶ I use "unimpressive" to describe this claim because the majority ignored the purpose of these clauses (i.e., to block a slave tax) while conceding that there was no clear evidence to support the argument that income taxes were direct.²⁸⁷ Besides, Justice Harlan's dissent observed that these materi-

280 See Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375, 376-77 (2003); see also *id.* at 382-86 (showing that treatise writers either ignored or dismissed *Marbury*).

281 See *id.* at 387-97 (discussing the link between the rise of Populism and the canonization of *Marbury*).

282 See *supra* note 270 and accompanying text.

283 See Douglas, *supra* note 280, at 395 ("[D]uring the ninety-two years between *Marbury* and *Pollock*, the Court had never once seen it necessary when declaring a congressional statute unconstitutional to defend its power to exercise judicial review by reference to the authority of an earlier decision.").

284 See *id.* at 398-406 (describing the lavish attention given to *Marbury* and to Chief Justice Marshall in the decade following the Populist defeat).

285 *Pollock I*, 157 U.S. 429, 583 (1895); see *id.* at 559-69 (discussing the Framers and the economists); see also *Pollock II*, 158 U.S. 601, 629-32 (1895) (discussing the English authorities).

286 *Pollock I*, 157 U.S. at 583.

287 Indeed, the Court conceded that when a delegate at the Constitutional Convention asked for "the precise meaning of direct taxation. No one answered." *Id.* at 563 (quoting Mr. Madison's records); see *id.* at 614 (White, J., dissenting) ("[I]t will, in my opinion, serve no useful purpose . . . to seek to ascertain the meaning of the

als “have been several times directly brought to the attention of this court” and were rejected every time.²⁸⁸

The majority’s behavior only got worse when it tried to run the gauntlet established by the precedents declaring that only head and land taxes were direct for constitutional purposes.²⁸⁹ In fact, the challenge for lawyers seeking to void the income tax was even more formidable because the Court had often said that income taxes were not direct.²⁹⁰ *Pollock* distinguished these cases by calling their direct tax statements dicta.²⁹¹ The Court had a tougher time dealing with *Hylton v. United States*²⁹²—the first case construing the Direct Tax Clauses as applying to only land and people—and resorted to the strange claim that “[t]he case [was] badly reported” and should not be read as authority against extending those provisions to income taxes.²⁹³ As for the *Springer v. United States*²⁹⁴ case that upheld an income tax, the Court said this “grew out of the war of the rebellion . . . and aban-

word ‘direct’ in the Constitution by resorting to the theoretical opinions on taxation found in the writings of some economists”); *supra* notes 263–65 and accompanying text.

288 See *Pollock II*, 158 U.S. at 641 (Harlan, J., dissenting).

289 The view that land taxes were direct was well established as far back as the Court’s first interpretation of the Direct Tax Clauses. See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 174 (1796) (opinion of Chase, J.) (“[T]he direct taxes contemplated by the Constitution, are only two, to wit, a capitation . . . and a tax on land.”); Fiss, *supra* note 19, at 87. The rationale for calling land taxes direct was similar to the one for slaves—it alleviated sectional strife by barring small states from abusing their power in the Senate to tax large states.

290 See, e.g., *Springer v. United States*, 102 U.S. 586, 602 (1881) (upholding an income tax and stating “that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate”); *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 347–48 (1874) (stating that a direct tax “does not include the tax on income”).

291 Compare *Pollock I*, 157 U.S. at 576–78 (discussing these cases only to dismiss them), with *Pollock II*, 158 U.S. at 651–59 (Harlan, J., dissenting) (refuting that view of the precedents).

292 3 U.S. (3 Dall.) 171.

293 *Pollock II*, 158 U.S. at 626 (White, J., dissenting). Compare *Pollock I*, 157 U.S. at 571–72 (arguing that *Hylton* “distinctly avoided expressing an opinion upon that question or laying down a comprehensive definition, but confined [each] opinion to the case before the court”), and *Pollock II*, 158 U.S. at 626–27 (White, J., dissenting) (same), with *Pollock I*, 157 U.S. at 616–20 (White, J., dissenting) (explaining that *Hylton*’s reasoning was contrary to the majority’s analysis), and *id.* at 619 (stating that “the decision in that case the legislative department of the government has accepted the opinions . . . as conclusive in regard to the meaning of the word ‘direct’”).

294 102 U.S. 586.

done as soon after the war was ended as it could be done safely.”²⁹⁵ By contrast, the present tax came “in a time of profound peace” and this “furnishes an additional reason for circumspection and care in disposing of the case.”²⁹⁶ Yet nothing in *Springer* indicated that it rested on an emergency rationale, and in any event is hard to see the relevance of this distinction for the Direct Tax Clauses.²⁹⁷ Given this performance, it is no wonder that the dissenters accused the Court of threatening the rule of law.²⁹⁸

Contemporary observers understood that the source of *Pollock's* unholy trinity of errors—disregarding the Court’s equitable limits, distorting the original understanding of the Direct Tax Clauses, and ignoring layers of precedent—was the spirit of resistance against Populism. Justice Field’s concurrence was the most explicit about this motivation, observing that “[t]he present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.”²⁹⁹ With this statement, Field was acknowledging that the process of escalation was well underway and that he was not going to just stand by and watch. Instead, he called the income tax an “arbitrary discrimination” and argued for the legal equivalence of racial, religious, and wealth discrimination.³⁰⁰

While Justice Brown’s dissent denounced the influence of “the spectre of socialism,”³⁰¹ the real fireworks came from Justice Harlan. The most effective way of conveying the impact of Harlan’s dissent is

295 *Pollock I*, 157 U.S. at 573 (majority opinion) (quoting *R.R. Co. v. Collector*, 100 U.S. 595, 598 (1879)) (internal quotation marks omitted).

296 *Id.* at 574.

297 In a related case, the Court upheld the use of paper money during the Civil War as a wartime exigency, which suggests that the omission of that explanation in *Springer* is telling. See *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 550–51 (1870) (ruling that Congress has implied power in wartime that it would not have in peacetime).

298 See *Pollock II*, 158 U.S. at 662–63 (Harlan, J., dissenting) (“It seems to me that the court has not given to the maxim of *stare decisis* the full effect to which it is entitled.”); *Pollock I*, 157 U.S. at 652 (White, J., dissenting) (“[L]et it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our constitution will . . . be bereft of value . . .”).

299 *Pollock I*, 157 U.S. at 607 (Field, J., concurring).

300 *Id.* at 596 (stating that the Fourteenth Amendment should intervene “[w]henver a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society”).

301 *Pollock II*, 158 U.S. at 695 (Brown, J., dissenting).

not with an exegesis of his text, but with a sampling of the critical commentary. For instance, *The New York Times* said “[l]awyers who have practiced for years before the Supreme Court say they never before listened to such revolutionary statements from the bench. The most rampant Populist could not have . . . shown greater contempt for the views of the majority than Justice Harlan did in [his] long harangue.”³⁰² Likewise, *The Chicago Tribune* noted that “Justice Harlan led off with a sensational address which will make him the Presidential candidate of the Populist party next year if he cares for the empty honor.”³⁰³ Lastly, *The Nation* opined that “[t]he heat with which Justice Harlan expounded the Marx gospel from the bench showed that the brake [on Populism] was applied none too soon. The Judge’s observations on the need of the tax to keep the rich in their places was as odd as anything that has fallen from a court.”³⁰⁴ At this point, there was no denying that the Court was now engaged in the broader constitutional dialogue, with the majority of its members firmly in the conservative camp.

There was also no denying the fact, however, that mutual transformation was working against the Populists. In 1893, there were no legal impediments to strikes and clear precedent supporting the validity of the income tax. Now both acts were under a constitutional shadow created by a resistance more interested in victory than in fidelity.³⁰⁵ On the other hand, the controversy surrounding *Pollock* gave the Populists new momentum as they approached the 1896 presidential election.³⁰⁶ Only the voters could settle this dispute, as one Populist pamphleteer argued that “it is not only just but expedient that incomes be taxed. I am aware that the people have heard from the Supreme Court on this subject. The Supreme Court will hear from the people in the near future.”³⁰⁷

302 *Income Tax Law Dead*, N.Y. TIMES, May 21, 1895, at 1.

303 *Tax Is Knocked Out*, CHI. TRIB., May 21, 1895, at 3.

304 *The Income-Tax Decision*, NATION (New York), May 23, 1895, at 394.

305 See JOSEPHSON, *supra* note 166, at 611 (quoting the *New York Tribune*’s view that “[t]he fury of ignorant class hatred . . . has dashed itself in vain against the Constitution of the United States”); *The Debs Insurrection Unlawful*, CHI. TRIB., May 28, 1895, at 6 (noting that *Pollock* “is the second defeat the Populists and demagogues have met with at the hands of the Supreme Court this year”).

306 See, e.g., Alan Furman Westin, *The Supreme Court, The Populist Movement and the Campaign of 1896*, 15 J. POL. 3, 22 (1953) (stating that *Pollock* became “a topic of heated discussion in every bank, barbershop, and barroom”).

307 JORY, *supra* note 81, at 13.

V. THE 1896 ELECTION AND THE COURT-PACKING DEBATE

This Part recounts the campaign between Republicans led by William McKinley and the Democrat/Populist coalition led by William Jennings Bryan. One important facet of that campaign was the public discussion of transforming the Supreme Court as the ultimate constitutional remedy. Andrew Jackson did pack the Court in 1837 and Franklin D. Roosevelt famously failed to do so in 1937, but 1896 was the only time when the idea was debated in a presidential election season.³⁰⁸ In effect, the parties were calling upon the American people to render a final verdict on the great issue of the day: should the Populist vision of egalitarian reform go forward or not?

A. *The Fusion of Reform Forces*

As Republicans were united behind a conservative platform, the political intrigue in 1896 centered on whether the Democrats or the Populists would be the main opposition party. Within Populist ranks, there was a division between “fusionists” like James B. Weaver, who thought the lesson of 1894 was that they could not win without joining forces with reform Democrats, and “middle of the roaders” like Tom Watson, who wanted to stay independent and avoid a world where “we play Jonah while they play whale.”³⁰⁹ In the midst of this debate, the party leadership made a crucial decision to hold its nominating convention after the Democratic Convention.³¹⁰ This left the initiative with the Democrats, for if they adopted a pro-reform stance the momentum for fusion would be tough to stop. And when the Democrats met in Chicago—the center of the Pullman Strike—a combination of shrewd management and fiery oratory convinced the delegates to nominate William Jennings Bryan on a platform that endorsed the

308 For more on Jackson’s Court-packing scheme, see Magliocca, *supra* note 34, at 554–57 (summarizing the debate). See also Act of Mar. 3, 1837, ch. 34, 5 Stat. 176 (outlining Jackson’s court-packing plan). Franklin D. Roosevelt’s Court-packing plan was not discussed during the 1936 campaign.

309 See BRANDS, *supra* note 10, at 270 (quoting Tom Watson); SUNDQUIST, *supra* note 63, at 152–53. Another factor was that the Party was divided between its western wing, which cooperated with Democrats, and its southern wing, which had to cooperate with Republicans against traditional southern Democrats. Consequently, a choice for fusion was damaging for Populists in the South (and explains why people like Watson were opposed). See ARNETT, *supra* note 186, at 190 (quoting Watson’s editorial against fusion).

310 Marion Butler was apparently behind this decision, and it was based on an assumption that the Democrats would not choose a reform candidate. See HUNT, *supra* note 62, at 95. If this premise had borne out, then the Populists, not the Democrats, would have united reformers under their banner.

goals of the agrarian movement.³¹¹ Most Populists accepted the logic of fusion and endorsed Bryan's candidacy a few weeks later.³¹²

Conservatives were stunned by this latest escalation of the crisis, as their resistance had unified reformers rather than burying them. *The New York Times* ran headlines such as "Bryan the Demagogue" and "Logical Candidate of the Party of Fantastic Ideas," and in an editorial said he "must at any cost and by whatever means are most effective be beaten."³¹³ *The Philadelphia Press* argued that "[t]his riotous platform is the concrete creed of the mob. It is rank Populism intensified and edged with hate and venom. It rests upon the four corner stones of organized Repudiation, deliberate Confiscation, chartered Communism, and enthroned Anarchy."³¹⁴ Mark Hanna, who was McKinley's campaign guru, said "[t]he Chicago convention from beginning to end was in the hands of a clique of radicals and revolutionists Altgeld[] and Bryan will never be allowed to wreck a nation they are seeking to ruin."³¹⁵ Even Theodore Roosevelt, who is now regarded as a progressive, was aghast at Bryan's nomination and warned against "a red government of lawlessness and dishonesty as phantastic [sic] and vicious as the Paris Commune itself."³¹⁶

311 See DURDEN, *supra* note 14, at 112–25; KOENIG, *supra* note 60, at 178–208; see also ARNETT, *supra* note 186, at 201 (laying out the many similarities between the Democratic and Populist platforms). Governor Altgeld probably would have been nominated (at a convention in his state) had he been a native-born citizen. See BRANDS, *supra* note 10, at 258; see also U.S. CONST., art. II, § 1, cl. 4 ("No Person except a natural born Citizen . . . shall be eligible to the Office of President . . .").

312 See CHERNY, *supra* note 251, at 62–63 (explaining that the Populists endorsed Bryan but nominated a different Vice President to preserve their independence).

313 See *Bryan the Demagogue*, N.Y. TIMES, July 11, 1896, at 3; *The One Issue*, N.Y. TIMES, July 11, 1896, at 4; *W.J. Bryan, Populist*, N.Y. TIMES, July 26, 1896, at 1.

314 James A. Barnes, *Myths of the Bryan Campaign*, in WILLIAM JENNINGS BRYAN AND THE CAMPAIGN OF 1896, at 68, 73 (George F. Whicher ed., 1953) (internal quotation marks omitted); see *The Week*, NATION (New York), July 16, 1896, at 39 (describing the "overpowering necessity of keeping the Tillmans, Blands, Bryans, Altgelds, and the indescribables who believe them to be statesmen, out").

315 *They Fire on the Flag*, CHI. TRIB., July 12, 1896, at 6; see GOP TEXTBOOK, *supra* note 169, at 4 ("Its majority is simply a howling mob of Populists, free-silverites and Anarchists, dominated by Altgeld . . .").

316 SUNDQUIST, *supra* note 63, at 156; see Douglas Dutro Woodard, *The Presidential Election of 1896*, at 352 (Sept. 1949) (unpublished masters thesis, Georgetown University) (on file with Georgetown University Library) (quoting Letter from John Hay to Henry Adams (Aug. 4, 1896), stating that "'many worthy Republicans are scared blue'"). Indeed, most of the great progressives, such as Robert La Follette, Woodrow Wilson, and Louis Brandeis, worked against Bryan's election. See KEVIN PHILLIPS, WILLIAM MCKINLEY 126 (2003) ("The year 1896, however, was not a time in which progressivism could risk the boldness so easy in 1906 or 1909.").

The nomination of Bryan shattered the party that President Cleveland represented, and many Democrats walked out of the Chicago Convention and formed a "Gold Democrat" ticket. Cleveland himself opposed the takeover by the Populists and told his supporters that "[a] cause worth fighting for is worth fighting for to the end."³¹⁷ At their convention, the Gold Democrats said "all good citizens of the republic are bound to repudiate [Bryan's principles] and exert every lawful means to insure the defeat of the candidates that represent these false doctrines."³¹⁸ Moreover, their platform said "[t]he Democratic party has survived many defeats, but could not survive a victory won in behalf of the doctrine and the policy proclaimed in its name at Chicago."³¹⁹ The climax of the constitutional struggle was at hand, as the power of mutual transformation was shearing away old loyalties and reorienting the parties along the ideological fault line drawn by the Populists.³²⁰ As *The Nation* said, "[p]robably no man in civil life has succeeded in inspiring so much terror, without taking life, as Bryan."³²¹

B. *Transforming the Supreme Court—The Final Flanking Maneuver*

One portion of the Democratic platform that became a flash point in the campaign concerned its response to *Pollock*, which was widely interpreted as a promise to pack the Court with Populist Justices.³²² Specifically, one plank criticized *Pollock* and said it "is the duty of the Congress to use all the Constitutional power which re-

317 JAMES LOWRY WHITTLE, *GROVER CLEVELAND* 239 (London, Bliss, Sands & Co. 1896).

318 W.D. Bynum, Chairman, Executive Comm. of the Nat'l Democratic Party, Address Before the National Democratic Party (Aug. 17, 1896), in *GOLD DEMOCRAT TEXTBOOK*, *supra* note 172, at 1, 4.

319 *Id.* at 6.

320 This was the result that Watson had predicted when President Cleveland started on the path of resistance. See *supra* notes 136–39 and accompanying text.

321 *The Week*, *NATION*, (New York) Nov. 5, 1896, at 337.

322 This does not mean that the Court was the central issue of the campaign. Reformers put their focus on the unlimited coinage of silver. Indeed, the point of Bryan's "Cross of Gold" speech at the Democratic Convention was to make that question the centerpiece of the election, and this had such a powerful impact that free silver is now the chief thing the Populists are remembered for. See Bryan, *supra* note 66, at 772 ("You shall not press down upon the brow of labor this crown of thorns; you shall not crucify mankind upon a cross of gold."). Though agrarian leaders saw this as a winning issue, other activists worried that this was a flawed strategy because higher prices held no appeal for urban voters. See BRANDS, *supra* note 10, at 282–83 ("[I]t was hard for city-dwelling factory workers to get excited . . . Higher prices for wheat and cotton meant little to them except higher prices for bread and clothes."). Richard Hofstadter once said that this sort of poor choice was typical for Populists who

mains after the decision, or which may come from its reversal by the court as it may hereafter be constituted.”³²³ Conservatives leapt on this as the “smoking gun” indicating that the Populists were bent on destroying the Constitution through revolutionary means.³²⁴

In the view of many observers, this plank in the Democratic platform meant nothing less than an end to judicial independence. The Gold Democrats were especially concerned, contending that Bryan “assails the independence of the judiciary by a covert threat to reorganize the courts whenever their decisions contravene the decree of the party caucus.”³²⁵ Indeed, the Gold Democrat vice presidential candidate said that “the Chicago convention would wipe virtually out of existence that Supreme Court which interprets the law, forgetting that our ancestors in England fought for hundreds of years to obtain a tribunal of justice which was free from executive control.”³²⁶ Republicans were also critical, and their campaign manual explained that “[f]rom the days of *Marbury v. Madison* to those of the income-tax cases, there have been many criticisms of the opinions of the Supreme Court, but the platform at Chicago is the first party assault upon the constitutional tenure of the Justices.”³²⁷ With this statement, we can see that the rediscovery of *Marbury* now extended beyond the Court to the electorate at large as conservatives asserted their alternative to the Populist vision.³²⁸

The view that Bryan was planning to pack the Court was echoed in the press, as exemplified by this cartoon that appeared on the cover

“had been subsisting for long years upon a monotonous diet of failure.” HOFSTADTER, *supra* note 10, at 102.

323 2 SCHLESINGER, *supra* note 12, at 1829.

324 See J.S. BARCUS, *THE BOOMERANG, OR BRYAN'S SPEECH WITH THE WIND KNOCKED OUT* 43 (New York, J.S. Barcus & Co. 1896) (“It is not the fact that the Chicago platform criticized the judiciary that has brought down our condemnation, but it is the un wisdom and the un-Americanism of their implied threat to reconstruct the Supreme Court for partisan purposes.”); ELWELL, *supra* note 169, at 3 (“Imbued with a holy enthusiasm these zealots . . . propose among their early doings to reorganize the Supreme Court of the United States.”); Woodard, *supra* note 316, at 352 (quoting John Hay’s view that Bryan sought the “abolition of the Supreme Court”).

325 W.D. Bynum, *supra* note 318, at 4; see *id.* at 9 (stating that the Court’s “independence and authority to interpret the law of the land without fear or favor must be maintained. We condemn all efforts to degrade that tribunal or impair the confidence and respect which it has deservedly held”).

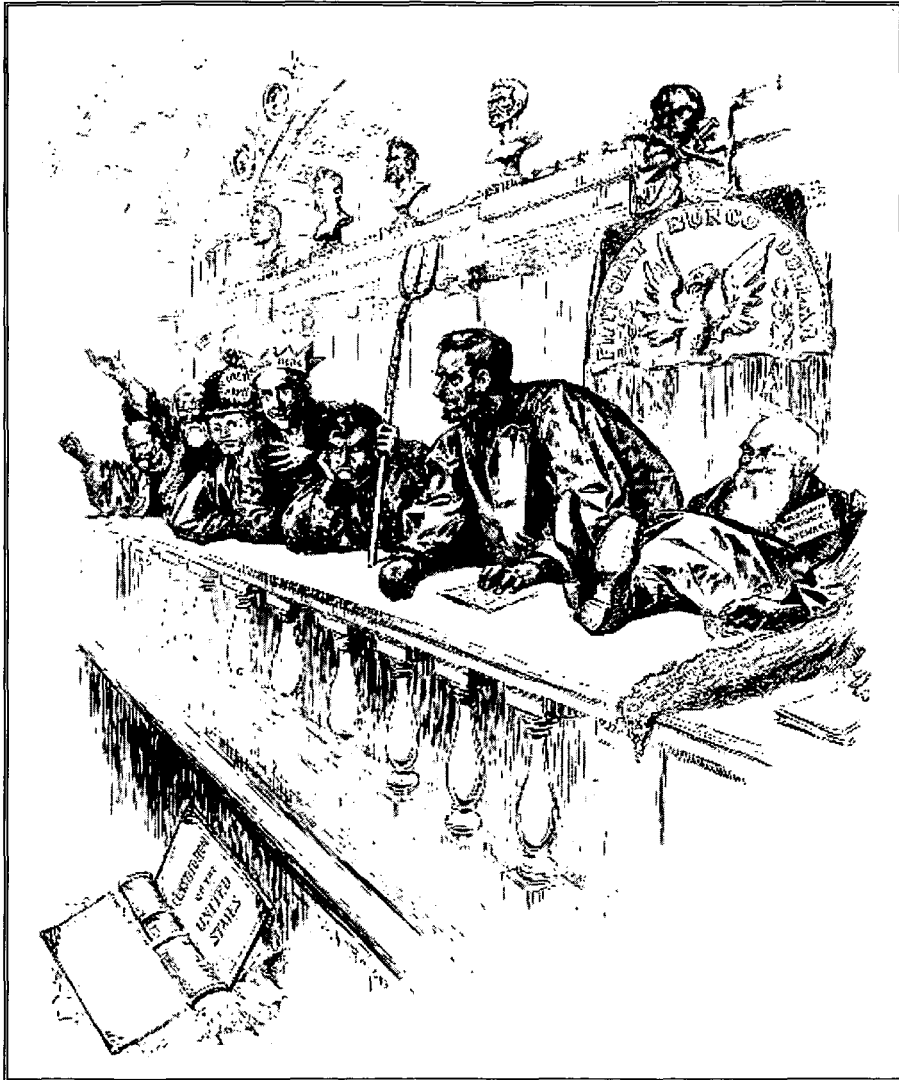
326 Simon B. Buckner, Vice Presidential Nominee, Acceptance Speech at the National Democratic Convention (Sept. 3, 1896), in GOLD DEMOCRAT TEXTBOOK, *supra* note 172, at 22, 23.

327 GOP TEXTBOOK, *supra* note 169, at 139; see *id.* (quoting a prior statement by Bryan in favor of a constitutional amendment applying term limits to Justices).

328 See *supra* notes 270, 279–84 and accompanying text.

of *Harper's Weekly* on September 12, 1896, entitled "A Forecast of the Consequence of a Popocratic Victory to the Supreme Court of the United States."³²⁹

FIGURE 1. "A FORECAST OF THE CONSEQUENCE OF A POPOCRATIC VICTORY TO THE SUPREME COURT OF THE UNITED STATES"



In this rendering, the Constitution is tossed to the ground by a Court sitting under a skull-and-crossbones and including Chief Justice Altgeld (standing in the center), "Pitchfork" Ben Tillman, the radical

329 HARPER'S WKLY., Sept. 12, 1896 (cover image).

Governor of South Carolina, Eugene Debs (wearing the “King Debs” crown), and Jacob Coxey (wearing a helmet for Coxey’s Army).³³⁰ The message was clear: Bryan’s plans for the Court were part of a scary agenda that should be rejected at the polls.³³¹

Bryan denied that he was attacking judicial review, but he did not hide the fact that he wanted changes in the Court. In a speech at Madison Square Garden, the candidate explained that “[o]ur opponents endeavored to make it appear that the income tax plank of our platform assailed the Supreme Court. This criticism was entirely without foundation. The platform commended the income tax, and suggested the possibility that the court might hereafter reverse its decision and return to the earlier precedents.”³³² After all, “[a] future court has a right to declare a similar income tax law constitutional. Even the present members of the court have a right to change their opinions on this subject as judges have in the past changed their opinions.”³³³ During another speech, Bryan made a classic legal realist argument, stating that “[t]he Supreme court changes from time to time. Judges die or resign, and new judges take their places. Is it not possible, my friends, that future judges may adhere to the precedents of a hundred years, instead of adhering to a decision rendered by a majority of one?”³³⁴ This defense was a fascinating blend of law and politics. In one sense, Bryan was saying that once the pressure of mutual transformation was removed the Court might return to its senses and to its precedents. At the same time, his comments left open the possibility of making this change happen by appointing rabid Populists to the bench as per the *Harper’s* cartoon.³³⁵

330 The busts above the Court are less interesting, but they represent Charles Guiteau, the assassin of President James A. Garfield, and three of the anarchists convicted for taking part in the Haymarket Riot.

331 See, e.g., *Bryan and Sewall*, N.Y. TIMES, July 12, 1896, at 1 (declaring that Bryan wanted “a packed Supreme Court”); *The Nation’s Honor Must Be Preserved*, *supra* note 174 (noting that “Mr. BRYAN’s government would destroy that safeguard by packing the Supreme Court with judges who would agree with the Constitutional views of the legislative branch if that branch happened to be in the hands of the Populists”); *The Triumph of Sectionalism and Communism*, HARPER’S WKLY., July 18, 1896, at 697 (stating that the Democratic Party “announces its readiness to make war upon the Supreme Court”).

332 BRYAN, *supra* note 1, at 415.

333 *Id.* at 416.

334 *Id.* at 480.

335 There is no indication, except in the ambiguous language of the platform itself, that Bryan supported expanding the membership of the Court or ending judicial review as some conservatives maintained.

What stands out about this debate is the willingness of both sides to engage the voters on this central question. The cycle of escalation begun by President Cleveland's decision to oppose the Populists in 1893 had culminated just three years later in a sharp ideological polarization that forced the people to consider first principles anew, up to and including the role of the Supreme Court in the constitutional system. The time for political tactics was over; the voters were about to return a decision.

C. *The Outcome*

With voter turnout reaching an astounding eighty percent, McKinley carried the country and in the process realigned the electorate in a conservative direction.³³⁶ The Republican margin was 600,000 votes out of 13.9 million cast, and Bryan lost in the Electoral College by 271 to 176.³³⁷ Reformers failed because their rural orientation did not connect with urban citizens, as the Democrat/Populist ticket failed to win any major city other than New Orleans.³³⁸ Naturally, conservatives breathed a sigh of relief, with *The Nation* opining that “[w]e have escaped from . . . an immense danger, the danger of having our currency adulterated and our form of government changed, and a band of ignoramuses and Anarchists put at the head of what remained of the great American republic.”³³⁹ Principled resistance had succeeded in turning back the agrarian charge.

Not only was this defeat decisive, but the 1896 election realigned partisan loyalties and ushered in an era of Republican dominance. There was no way to know this at the time, as a single election—like a single opinion—cannot change the law by itself. When Bryan and McKinley squared off again in 1900, however, the Republicans won by an

336 This record participation was the result of unprecedented mobilization efforts. See CHERNY, *supra* note 251, at 69 (observing that 1896 saw the highest turnout of eligible voters in any national election). Prior to 1896, presidential candidates did not personally campaign because it was considered undignified. See BRANDS, *supra* note 10, at 279–80. See generally JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987) (describing this aspect of presidential campaigning). Bryan demolished this taboo by embarking on a whistle-stop tour that included six hundred speeches, and it is said that five million people saw him speak. See BRANDS, *supra* note 10, at 281; CHERNY, *supra* note 251, at 66. McKinley responded similarly, as the GOP brought thousands of supporters to his house where they could hear the candidate. See BRANDS, *supra* note 10, at 272–74; JONES, *supra* note 14, at 283–85.

337 CHERNY, *supra* note 251, at 70; SUNDQUIST, *supra* note 63, at 157.

338 CHERNY, *supra* note 251, at 70; JONES, *supra* note 14, at 345; see also SUNDQUIST, *supra* note 63, at 162 (“The massive swing to the Republicans in the North was predominantly urban.”).

339 *The Week*, *supra* note 321, at 337.

even greater margin.³⁴⁰ And over the coming years, the evidence would accumulate that “the switching voters were not coerced into voting for McKinley; they were *converted*.”³⁴¹ The impact of this conversion on the Populist Party was devastating, as they evaporated as a force in American politics. By daring greatly and failing, the Populists only solidified the grip of conservatives on power. The law pronounced by the High Court would soon reflect the gravitational pull exerted by this constitutional false positive.

VI. THE AGONY OF DEFEAT

This Part summarizes how doctrine was transformed by the Populist failure. In particular, the text analyzes two opinions issued immediately after the election that redefined the Fourteenth Amendment in a manner consistent with the negative implication of Populism. Then the text gives an explanation of how a false positive approach offers the best explanation for these developments.

A. *The Fourteenth Amendment Reborn*

The most important element missing in the story so far is the Fourteenth Amendment. All of the great decisions issued in 1895 focused on provisions in the original Constitution (i.e., the Commerce Clause and the Direct Tax Clauses). The argument over federalism after the Pullman Strike, however, was about the appropriate role of states in regulating property rights. Even if Populists were barred from the levers of national power and federal courts could enjoin strikes supported by local officials, reformers still had plenty of room to develop their egalitarian economic policies at the state level. Recall that in the *Granger Cases* the Supreme Court held that states were generally free—notwithstanding the Fourteenth Amendment—to exercise their police power.³⁴²

Before McKinley was even inaugurated, however, the Justices abruptly changed course and issued two unanimous opinions holding that the Fourteenth Amendment imposed substantive limits on state regulatory authority.³⁴³ These rulings, which came down on the same

340 CHERNY, *supra* note 251, at 89; *cf.* JONES, *supra* note 14, at 346 (“[T]he skillful leadership of McKinley and Hanna[] produced a combination of votes which gave it the victory in 1896 and which promised Republican ascendancy for many years . . .”).

341 SUNDQUIST, *supra* note 63, at 158; *see id.* at 159–69 (providing a close analysis of the election returns and the partisan realignment).

342 *See supra* notes 101–02 and accompanying text.

343 *See Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (holding that the Fourteenth Amendment incorporated the Takings Clause); *Allgeyer v.*

day, were shocking because the Court had repeatedly rejected this construction of the Amendment in the past.³⁴⁴ For example, in the *Slaughter-House Cases*³⁴⁵—the first ones construing the Fourteenth Amendment—the Justices held that neither the Privileges or Immunities Clause nor any other provision barred a state from creating a monopoly that excluded citizens from a trade.³⁴⁶ A few years later, in *Davidson v. New Orleans*,³⁴⁷ the Court held that the Fourteenth Amendment's Due Process Clause did not bar the states from taking private property without just compensation.³⁴⁸ While *Davidson* said, consistent with past precedent, that there might be a constitutional problem in an extreme case where a state just confiscated property and gave it to someone else, as a practical matter the Court made it clear that the states had wide latitude.³⁴⁹ Indeed, the Court went out of its way to express its exasperation with litigants who claimed that the police power was restricted by the Due Process Clause, explaining that "there exists some strange misconception of the scope of this provision as found in the fourteenth amendment."³⁵⁰

Louisiana, 165 U.S. 578 (1897) (holding that the Fourteenth Amendment secured the "liberty of contract"). Both cases were decided on March 1, a few days before McKinley's inaugural.

344 See, e.g., *Adamson v. California*, 332 U.S. 46, 79–81 (1947) (Black, J., dissenting) (laying out the history of this jurisprudence); *Munn v. Illinois*, 94 U.S. 113, 134 (1877) ("For protection against abuses by legislatures the people must resort to the polls, not to the courts."). There was one case before 1897 that voided a state railroad regulation under a procedural due process theory. See *Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890).

345 83 U.S. (16 Wall.) 36 (1873), *abrogated by* *Allgeyer v. Louisiana*, 165 U.S. 578.

346 See *id.* at 80–81. There were, of course, dissenting opinions that argued for protection for property rights from state action. See *id.* at 96–101 (Field, J., dissenting). Those contrary views, though, did not garner a majority until after the Populist false positive.

347 96 U.S. 97 (1878), *abrogated by* *Chi. Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226.

348 *Id.* at 104–05 (rejecting a due process attack on a state property assessment scheme).

349 Compare *Davidson*, 96 U.S. at 102 ("It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law . . ."), with *id.* at 105 ("[I]t is not possible to hold that a party has, without due process of law, been deprived of his property, when . . . he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."). See also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) ("[A] law that takes property from A. and gives it to B . . . is against all reason and justice . . .").

350 See *Davidson*, 96 U.S. at 104.

1. The Takings Clause Expands

Yet in its first blockbuster prior to McKinley's inaugural, the Justices overruled *Davidson* and held that the Fourteenth Amendment extended the Takings Clause to the states. Asserting that "protection of the rights of property has been regarded as a vital principle of republican institutions," the Court in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*³⁵¹ explained that "a judgment of a state court . . . whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner is . . . wanting in the due process of law required by the fourteenth amendment."³⁵² The Court reasoned that if the pure confiscation and transfer of property was suspect, as the earlier cases said, then surely due process must be "applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen."³⁵³ Of course, this is exactly the chain of logic that *Davidson* had rejected twenty years earlier.

One potential explanation for this turnabout is that the Court was finally implementing the will of the Fourteenth Amendment's framers to incorporate the Bill of Rights. Assuming *arguendo* that this represents the correct reading of the constitutional text, one would then expect that *Chicago* would be followed by other cases extending that principle to the other provisions of the Bill of Rights. But this did not happen. Instead, three years later the Court held in *Maxwell v. Dow*³⁵⁴ that the grand and petit jury requirements of the Fifth and Sixth Amendments were not extended to the states by the Fourteenth.³⁵⁵ Furthermore, the Court rejected any evidence that the Reconstruction Framers wanted to incorporate the Bill of Rights, as "[w]hat individual Senators or Representatives may have urged in debate . . . does not furnish a firm ground for its proper construction."³⁵⁶ Justice Harlan, the lone dissenter in *Maxwell*, argued that the majority's view was inconsistent with *Chicago* and observed that "it

351 166 U.S. 226.

352 *Id.* at 235–36, 241; *see also* *Adamson v. California*, 332 U.S. 46, 79–80 (1947) (Black, J., dissenting) (stating that *Chicago* "in effect, overruled" *Davidson*).

353 166 U.S. at 236. Thus, the Court did not say that it was overruling *Davidson*. In fact, Justice Harlan implausibly cited *Davidson* as support for his conclusion. *See id.* at 235–36.

354 176 U.S. 581 (1900).

355 *Id.* at 595–96.

356 *Id.* at 601.

would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen."³⁵⁷

Since a general pursuit of incorporation cannot explain the extension of the Takings Clause to the states, the only other plausible explanation is that the Court, as Harlan suggested, was now giving property rights a privileged status against state action. The importance of *Chicago* should not be exaggerated, as the Takings Clause was rarely invoked afterwards.³⁵⁸ There was no doubt, though, that something significant had changed in the wake of Bryan's defeat.

2. The "Liberty of Contract"

The companion case to *Chicago* was more consequential, as the Court struck down a state regulatory statute with a novel theory that the Fourteenth Amendment guaranteed a "liberty of contract." In *Allgeyer v. Louisiana*,³⁵⁹ Justice Peckham laid the groundwork for his opinion in *Lochner v. New York*³⁶⁰ with words quoted at length in the beginning of this Article: "The liberty mentioned in that amendment means . . . [the right] to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential . . ." ³⁶¹ Just as *Chicago* overturned *Davidson*, so *Allgeyer* overturned *Slaughter-House* and its proposition that the Fourteenth Amendment did not protect a right to pursue the butcher trade or any other avocation.³⁶² The Court also made it clear that this

357 *Id.* at 614 (Harlan, J., dissenting). Harlan joined *Chicago* because he believed that every part of the Bill of Rights applied to the states, not just the ones that protect property. *See id.*

358 Indeed, *Chicago* itself held that the state action at issue was not a taking. 166 U.S. at 241–58; *see also id.* at 259 (Brewer, J., concurring in part and dissenting in part) (rejecting the Court's analysis on the merits).

359 165 U.S. 578 (1897).

360 198 U.S. 45 (1905).

361 *Allgeyer*, 165 U.S. at 589; *see also id.* at 591 (describing the "liberty to contract"). This case involved a state law regulating marine insurance contracts with out-of-state firms. For more on *Allgeyer* and Justice Peckham, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 43–46 (1990).

362 *See Adamson v. California*, 332 U.S. 46, 80 (1947) (Black, J., dissenting) (explaining that *Allgeyer* "substantially adopted the rejected argument of counsel in the *Slaughter-House* cases, that the Fourteenth Amendment guarantees the liberty of all persons under 'natural law' to engage in their chosen business or vocation"). This *sub silentio* reversal of *Slaughter-House* is also relevant for the debate on incorporation. Some scholars argue that *Slaughter-House* is consistent with a pro-incorporation view. *See Newsom, supra* note 9, at 675–83; *see also id.* at 710–11 (explaining that counsel raising incorporation claims relied on *Slaughter-House* for support). Newsom's claim is that the standard reading of *Slaughter-House* as an anti-incorporation opinion actually flows from *Maxwell's* misreading of the case. *See id.* at 742–44. Rather than arguing

new restriction on state authority over property rights was open-ended, for while states had a police power “[w]hen and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.”³⁶³ The fears of James B. Weaver and his Populist allies were realized, as a laissez-faire philosophy was now firmly entrenched in the Constitution.³⁶⁴

B. A Summary of the New Fourteenth Amendment

Upon reviewing the circumstances surrounding *Chicago* and *Allgeyer*, it is hard not to conclude that the Populist false positive was the cause of the Court’s final escalation in the constitutional process. Together these decisions imposed robust limits on the regulation of property in the public interest and struck at the heart of the Populist ideology. The timing of these rulings, coming on the heels of Bryan’s defeat, suggests a causal relationship. And there are parallels between the trio of great cases in 1895, which were about fighting Populism, and the pair of remarkable cases in 1897, particularly in their cavalier treatment of precedent. On the other hand, the need to resist Populism was greater in 1895 because the outcome of the presidential election was still in doubt.

One explanation for the Justices’ behavior is that they read the election results as a vindication of conservative resistance and a signal that voters wanted to move away from the rejected ideals of Populism.³⁶⁵ *Chicago* and *Allgeyer* can be viewed as building blocks for a new legal regime defined by the negative implication of Populism,

that the Court misconstrued *Slaughter-House* for some inexplicable reason, a better explanation may be that *Maxwell* accurately reflected the fact that *Slaughter-House’s* interpretation of Reconstruction on all counts (race, incorporation, and property rights) was repudiated by the Populist false positive. The text explains that this was certainly true with respect to state property regulation, and the future articles in this project will make the same point for incorporation and race. See *supra* note 9.

363 *Allgeyer*, 165 U.S. at 590. It is not easy to reconcile Justice Harlan’s views with his decision to join *Allgeyer*. At best, one could say that Harlan construed the liberty of contract narrowly, as demonstrated by his dissent in *Lochner*. See *Lochner*, 198 U.S. at 65–74 (Harlan, J., dissenting).

364 See *supra* note 102 and accompanying text.

365 In fact, this was the era in which Finley Peter Dunne uttered his famous quip, through the fictitious Mr. Dooley, that the Supreme Court “follows th’ illiction [sic] returns.” FINLEY PETER DUNNE, MR. DOOLEY’S OPINIONS 26 (1902). Dunne was commenting on the Court’s decision in the *Insular Cases*, in which the Justices held that the recent conquests from the Spanish-American War were not subject to a variety of constitutional provisions. See *Downes v. Bidwell*, 182 U.S. 244 (1901). That case came on the heels of Bryan’s defeat in 1900, where he made anti-imperialism the theme of his campaign against McKinley.

which added to the Court's tentative steps in that direction in 1895. This point comes into focus when 1897 is compared to the famous "switch-in-time" of 1937. In each case, the Court overturned precedent regarding the power of government to regulate property rights, even though no constitutional amendment was enacted. To the extent that the shift during the New Deal was a product of external forces, the explanation is that the Court was responding to a powerful desire expressed by the electorate for a new governing framework.³⁶⁶ The Populist false positive did the same thing but in the opposite direction. That process is harder to see because it was more attenuated than the New Deal revolution. Ascertaining the meaning of the negative implication of Populism is a step removed from interpreting an affirmative call for change.

The advantage of reading the Court's actions as an interpretation of the Populist false positive is that it provides a more elegant explanation than the competing alternatives. Indeed, the lack of attention in constitutional theory to false positives leads scholars reviewing this period into two false choices. The first is that the Court made gross errors of judgment in cases such as *Pollock* and *Allgeyer*, which is exemplified by the criticism of the liberty of contract cases.³⁶⁷ There is some truth in this observation, as was shown in the earlier discussion of *Pollock's* flaws.³⁶⁸ But it is hard to sustain the argument that this Court was, for some reason, far more willing to impose its value judgments and distort the law than courts of other eras. The second is that the Fourteenth Amendment really did embody a laissez-faire principle, and hence decisions such as *Allgeyer* and *Lochner* were correct.³⁶⁹ There is also some truth to this observation, since a text that facilitated the shift from slave to free labor cannot be read as being wholly indifferent to the issue of economic regulation. Unfortunately

366 In both the New Deal and Populist examples, the claim can be made that the Court's actions were entirely driven by internal dynamics. Put another way, one cannot dismiss the argument that *Chicago* and *Allgeyer* would have occurred even if the Populists had not appeared. All one can do is evaluate the available evidence and ask whether that explanation is persuasive given the magnitude of the change and the circumstantial links between the Supreme Court's results and developments in the political world. My view, after considerable reflection, is that, at least in the Populist case, a purely doctrinal answer is not compelling.

367 See, e.g., Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244-45 (1998) (describing *Lochner* as a "paradigmatic example[] of what is *not* the law").

368 See *supra* notes 272-300 and accompanying text.

369 See Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 340-41 (1992). See generally William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767 (offering a defense of this position).

for this position, there is no credible indication that the framers of that Amendment wanted courts to exercise supervisory power over state property regulation. Furthermore, this analysis provides no answer for why the Supreme Court refused to construe the Amendment as restrictive of the states' substantive police power until 1897.

Neither of these conventional explanations works because each misses the big picture; it was the failure of Populism and the resulting displacement of the law that accounts for the revision of the Fourteenth Amendment. The evidence for this hypothesis is even more powerful when one reflects on the other major developments at this time.³⁷⁰ For instance, the transformation of the Commerce Clause from a backwater into the main provision for assertions of federal power was not the product of a renegade Court or a rediscovery of the original intent of that provision. The unprecedented authorization of strike injunctions cannot be attributed to the idiosyncratic preferences of the Court given Grover Cleveland's role in opposing the Pullman Strike. Even the invalidation of the federal income tax, which is the most suspect action in this era, is more consistent with systemic opposition to Populism than with a willful act by some judges. In all of these areas, the false positive of the 1890s set the standard for the next forty years. The cord linking them together was the negative implication of Populism.

CONCLUSION

The constitutional equivalent of the Punktion of Olmutz is the defeat of the Populist Party. Proving that every action provokes a reaction, the powerful reform initiative from the heartland sparked an escalating campaign of resistance through the Pullman Strike, the great cases of 1895, and the debate over Court-packing. While the rewards of leading a successful political movement are great, the risks associated with the failure of that effort are just as great. Ralph Waldo Emerson's adage that "[w]hen you strike at a king, you must *kill* him" was never more apt than in the 1890s, as the inability of the Populists to overcome conservative resistance led to a dramatic shift away from the goals of reformers.³⁷¹

The recognition that false positives have a profound effect on doctrine not only clears away the fog that obscures our constitutional history, but makes an important point that is lost in the modern dis-

370 Of course, the evidence considered here deals only with economic matters. The hypothesis asserted in the text is even more convincing when the issues of race and incorporation are added to the mix. See *supra* note 9.

371 ELIZABETH SHEPLEY SERGEANT, FIRE UNDER THE ANDES 315 (1927).

cussion of judicial review. At most of the key turning points in the path of the law, the Supreme Court resists the popular will at its peril. In 1896, the American people held in their hands the power to assert a contrary constitutional vision and made it stick. Accordingly, voters hold the power to withdraw their mandate from decisions of the Court that they disagree with. The Populist failure dramatizes the pitfalls of challenging judicial supremacy, but that rugged path is still open for every generation of reformers.