The Tragedy of William Jennings Bryan

Constitutional Law and the Politics of Backlash

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For Guido Calabresi, who made all of this possible

The humblest citizen in all the land, when clad in the armor of a righteous cause, is stronger than all the hosts of error.

—William Jennings Bryan

Acknowledgments

Writing one book was so much fun that I decided to write another. I am reluctant to call this one a sequel, as everyone knows that a sequel rarely tops the original. A better description is Norma Desmond's line in *Sunset Boulevard:* she was not making a comeback; it was a return.

Let me start by thanking Michael O'Malley, Mary Pasti, Niahm Cunningham, and Yale University Press for their support and confidence. I owe a special debt to Bruce Ackerman, Barry Friedman, John Hill, Rick Pildes, Mike Pitts, Tom Shakow, and Amanda Tyler for reading the draft manuscript and offering their thoughtful comments. Debra Denslaw and Kiyoshi Otsu provided vital assistance in gathering the photographs that help make the book come alive. The law journals that allowed me to reprint parts of my previously published work here, and whose

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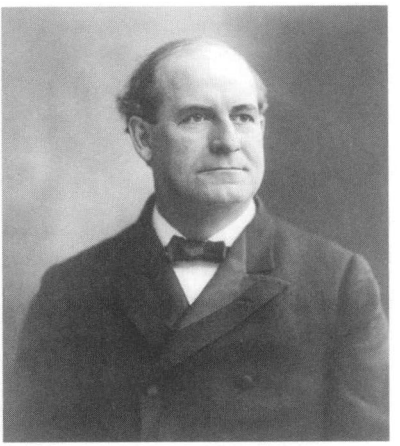
INTRODUCTION

On Constitutional Failure

When you strike at a king, you must *kill* him.
—Ralph Waldo Emerson

We learn more from failure than from success. Although this lesson is often a bitter one, everyone eventually learns its truth—everyone, it seems, except constitutional lawyers. Their story of how "We the People" created, amended, and then interpreted the Constitution is an uplifting drama. The Founding Fathers and the miracle that was the Constitutional Convention, the abolition of slavery and Abraham Lincoln's reconstruction of our ideals in the Gettysburg Address, Franklin D. Roosevelt's development of the welfare state to overcome the Great Depression, and the Supreme Court's decisions striking down racial segregation are the pillars of modern legal analysis. Those achievements are clearly worth studying, but what about the close calls that ended in frustration? Their omission from the standard



William Jennings Bryan,
"The Boy Orator of the Platte."
Library of Congress.

narrative creates a distortion in constitutional law no different from what scientists face when their laboratory experiments are incomplete.[1]

The most important constitutional failure that is missing from the professional conversation is the defeat of the Populist Party and its presidential candidate, William Jennings Bryan, in 1896. Today Bryan is remembered mainly for his role in challenging the teaching of evolution in public schools during the infamous Scopes Trial. But in his heyday he was widely acclaimed as the nation's greatest orator, and he carried the banner for liberalism in three presidential campaigns. Because he lost all three of those races (in 1896, 1900, and 1908) and was overshadowed by an even larger personality, we now associate progressive reform and, indeed, the entire political era with Theodore Roosevelt. Nevertheless, a central theme of this book is that Bryan, not the

Rough Rider, was the greatest constitutional figure at the turn of the twentieth century.

The 1890s present a fascinating puzzle for political scientists. Bryan's defeat in 1896 at the hands of William McKinley is commonly described as a "realigning" election that marked a major and long-lasting shift in public policy. Yet David Mayhew, a scholar at Yale, recently challenged this consensus by arguing that the 1896 result was not significant, in part because no dramatic legislative changes occurred after McKinley's victory.[2] Mayhew calls this inaction the "third rail of the realignments genre" and concludes that "the 1890s pose a basic interpretive difficulty" for the whole idea that there are political realignments.[3] Uncertainty about the meaning of the 1890s also appears in the work of Stephen Skowronek, the author of an influential theory on the presidency. Though his analysis succeeds in categorizing the presidents and reveals a pattern to their behavior across different time periods, the man in the White House during the 1896 campaign—Grover Cleveland—is an enigma. Skowronek observes that President Cleveland, who openly opposed Bryan's election even though he was a fellow Democrat, "found himself strangely at odds with the burgeoning new opposition movement, and the upshot was the most perplexing leadership performance in American history."[4]

A similar mystery surrounds constitutional law during the 1890s. Prior to that decade, the Supreme Court refused to hold that the Fourteenth Amendment—which guarantees the

privileges or immunities of citizens, due process of law, and the equal protection of the laws—imposed limits on state regulation of property and contract rights. In 1897 the Justices changed course and held that the Due Process Clause of the amendment secured a "liberty of contract," which launched an era of heightened judicial scrutiny of economic legislation that continued until the 1930s.[5] Well into the 1890s, the Justices expressed support for extending the substantive parts of the Bill of Rights (such as protection from cruel and unusual punishment) to the states.[6] But in 1900 the Court held that no part of the Bill of Rights other than the Takings Clause was "incorporated" against the states, a position that remained influential for decades.[7] Throughout the first century of the republic, cases on congressional power did not rely on the Commerce Clause.[8] During the 1890s, though, the Commerce Clause became the focal point for judicial inquiries into whether Congress could regulate private conduct.[9] Similarly, the Justices never struck down a federal tax as unconstitutional before 1895, but in that year they suddenly concluded that the Constitution imposed a substantial barrier to a federal income tax.[10] Before 1895, Chief Justice John Marshall's opinion in *Marbury v. Madison* was not considered especially significant and was never cited by the Court to invalidate a federal statute. In the 1896 presidential campaign, however, *Marbury* was celebrated, and it assumed its modern form as a great case.[11] Most important of all, before the 1890s African Americans voted in large numbers across the South, and the comprehensive system

of legal segregation that we call Jim Crow did not exist.[12] Just ten years later, compulsory segregation was the law, and African Americans in the old Confederacy were disenfranchised. On all of these questions, lawyers confront the equivalent of Planet X—a hidden force that exerts an observable pull. Since no constitutional amendments were ratified during the 1890s, what explains all of these dramatic changes?

The answer is that there was a powerful backlash against the protest movements associated with the Populists and their goals of wealth redistribution, nationalization of industry, and racial cooperation in the South.[13] William Jennings Bryan's unique constitutional contribution was not in what he did; it was what the fear of him and his followers caused others to do. As *The Nation* said after the 1896 election, "Probably no man in civil life has succeeded in inspiring so much terror, without taking life, as Bryan."[14] This fear spurred the political and legal establishment to fight back by increasing federal constitutional protection for property and contract rights, establishing Jim Crow to prevent an alliance between poor whites and African Americans in the South, and curbing civil liberties to ensure that Populist and labor activists could not rally support. There are many fine studies on the backlash phenomenon, but nobody has done an analysis of what may be the most significant constitutional backlash of all. This book takes up that challenge.

The idea that resistance is a powerful force that shapes the law was an important part of my first book.[15] In discussing the

"constitutional generation" led by Andrew Jackson, I argued that there is a cycle in our politics defined by broad popular movements that emerge on a regular basis to challenge constitutional orthodoxy. This call to arms, which occurs about once every thirty years, must overcome fierce opposition from a prior generation of leaders who believe in different ideals and cling to power until they are pushed aside. The pattern of reform, ossification, and rebirth started with the Founders' struggle against the British Empire in the 1770s and continued with Jefferson's "Revolution of 1800," Jacksonian Democracy in the 1830s, Lincoln Republicans in the 1860s, the New Deal in the 1930s, the Civil Rights Movement of the 1960s, the Reagan Revolution in the 1980s, and Barack Obama's victory in 2008.[16] Each of these crusades faced (or, in President Obama's case, is now facing) the kind of intense resistance that met Bryan's forces, but the conservative opposition was always defeated. What makes the 1890s unique is that Bryan lost, and the measures taken against him stayed in place to form a new set of first principles. This constitutional settlement was extraordinarily durable, setting the terms of debate in many areas until the 1960s. Bryan's failure, therefore, led to a legal transformation as profound as the successes that people spend so much time studying.[17]

By closely examining the backlash against Bryanism, I hope to dispel five misconceptions about the late nineteenth century. First, something important did occur as a result of the 1896 race, so the traditional view that that Bryan-McKinley cam-

paign led to a realignment of the electorate is right. Second, the legal doctrines that emerged during this time were not related to the original understanding of the Fourteenth Amendment and did not reflect a logical trend within the cases decided after Reconstruction.[18] Third, the same developments were also not the result of errors (negligent or deliberate) by the Supreme Court. Fourth, the Populist Party was not just the pitchfork-carrying mob depicted by some historians; Populists were in fact legal innovators who made significant contributions to constitutional thought.[19] Finally, the contraction of liberty that crippled so many of our citizens in this period was not inevitable. Millions marched and voted on behalf of a different vision during the 1890s, and their tale should be told.

In sum, this book is about the consequences of failure. A clear implication of Emerson's admonition "When you strike at a king, you must *kill* him" is that the king's vengeance will be fierce if he escapes, and the same point can be made about those who beat back a popular mobilization for constitutional change. The hosts of error, as Bryan called them, are not generous in victory.

ONE

Constructing Reconstruction

Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights—the rights of person and property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.
—*The Slaughter-House Cases*

Every solution creates another problem. The bloodshed of the Civil War paved the way for a set of constitutional amendments that settled forever the issue of whether Americans could hold slaves or whether those former slaves were citizens of the United States. At the same time, the amendments raised a new set of questions about the allocation of authority between the federal government and the states. To see how William Jennings Bryan's defeat transformed the law during the 1890s, we need to examine the doctrinal debate that followed Reconstruction. Accordingly, I focus here on three issues related to the meaning of the Fourteenth Amendment: (1) whether the states faced additional limits on their authority to regulate property and contract rights; (2) whether the Bill of Rights now applied to the states;