

CONSTITUTIONAL FALSE POSITIVES AND THE POPULIST MOMENT

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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 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.¹

William Jennings Bryan (1896)

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.²

Allgeyer v. Louisiana (1897)

ABSTRACT

This Article examines how the failure of a broad and robust movement for constitutional change can displace the law in the opposite direction. The possibility of this legal false positive is a crucial missing link that explains why doctrine shifted so dramatically in the 1890s during the Populist Party's doomed attempt to achieve power. With its sharp attack on established principles and impressive popular support, the Populists triggered equally strong resistance from conservatives in the White House and the Supreme Court. That resistance was so intense that it warped the fabric of the law on issues including the role of the Commerce Clause, the meaning of the Fourteenth Amendment, and the incorporation of the Bill of Rights against the States. With this background, many of the great landmarks from this era and the modern interpretive assumptions drawn from them appear in a new light.

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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).