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**WAGING WAR ON "UNEMPLOYABLES"?
RACE, LOW-WAGE WORK, AND MINIMUM
WAGES:
THE NEW EVIDENCE**

*Harry G. Hutchison**

ABSTRACT

Capturing both popular and academic imaginations, recent literature contributions contest the standard treatment of minimum wage statutes as vehicles that enlarge the economic and social dislocation of vulnerable workers. A persistent strain of the current scholarship dedicated to progressive labor ideology implies that minimum wages, or, alternatively, living wage statutes, are necessary to preclude the degradation of low-wage workers. The publication of Simon Deakin and Frank Wilkinson's recent article, *Minimum Wage Legislation*, constitutes yet another effort to destabilize the neoclassical consensus that emphasizes the adverse employment effects of wage regulation. Prescinding from orthodox economic analysis, Deakin and Wilkinson insist that there is a good efficiency-based case for minimum wage legislation. If the authors are correct, and if efficiency standing alone supports their normative viewpoint, then the contention that such legislation ought to be seen as a societal good might become tenable.

Unfortunately, their claims are highly doubtful. Perceived through the lenses of American labor history, classical liberalism, Critical Race Theory, and neoclassical economics, the authors' allegations signify the capitulation of reasoned analysis to ideology. Rather than supporting the interest of the public or of vulnerable workers, their starkly conventional and progressive approach to labor law reform recalls John Stuart Mill's embrace of Social Darwinism and consequent exclusion of inferior classes of workers. The authors' approach also verifies Mill's observation that modern liberal democracy—operating consistently with the goals of exclusion—is insufficient to protect disfavored groups and individuals from the coercive power authorized by a majority or its

hierarchs. Since Deakin and Wilkinson's credulous claims are in harmony with more than a century of progressive policies, and since the normative and prudential case for raising or retaining the minimum wage remains weak, marginalized members of society have much to fear from their analysis.

Minimum wage laws, . . . are often advocated by those who see themselves as taking the side of the workers against their employers, when in fact the employers may end up less harmed by such laws than are the workers themselves, whose unemployment can deprive them of both current income and the human capital that work experience could build up for them and enable them to earn higher incomes in the future.¹

INTRODUCTION

Although the United States is beginning "to emerge from one of the most devastating economic slides in [its] history," Americans are still experiencing the highest rates of unemployment in the last fifty years.² Exacerbating this state of affairs, substantial wealth and pension assets have vanished while entire communities have been debilitated.³ Meanwhile, falling or stagnant wages, mounting employment uncertainty, and escalating disparities between nonwhite and white unemployment rates aggravate the troubles America's workers face.⁴ A lively debate continues over who or what has caused America's latest financial and economic implosion: politics and government policy⁵ or risk-taking speculators and banks.⁶ There is also a renewed emphasis on the necessity of government intervention and nostalgia for New Deal-era law reforms despite the past and present impacts of the New Deal on

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1. THOMAS SOWELL, BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY 421 (3d ed. 2007) [hereinafter SOWELL, BASIC ECONOMICS].

2. Gene R. Nichol, *Foreword: Wages, Work, Privilege, and Legal Education*, 5 HARV. L. & POL'Y REV. 1, 2 (2011).

3. *Id.*

4. Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?*, 26 QUINNIPIAC L. REV. 799, 800 (2008) [hereinafter Hutchison, *What Workers Want*].

5. See, e.g., Jeffrey Friedman, *Introduction: A Crisis of Politics, Not Economics: Complexity, Ignorance, and Policy Failure*, 21 CRITICAL REV. 127, 128 (2009).

6. See, e.g., Joseph E. Stiglitz, *The Anatomy of a Murder: Who Killed America's Economy?*, 21 CRITICAL REV. 329, 330 (2009).

African Americans.⁷

Against this backdrop, Nobel Laureate Amartya Sen offers a solid defense of markets:

The freedom to exchange words, or goods, or gifts does not need defensive justification in terms of their favorable but distant effects; they are part of the way human beings in society live. . . . We have good reasons to buy and sell, to exchange, and to seek lives that can flourish on the basis of transactions.⁸

Sen is a reflective defender of markets, and he supplies a nuanced view of income, wealth, and advantage.⁹ For example, he shows that women worldwide have been liberated through access to markets.¹⁰ This is true despite the commitment of early progressive elites to statutory innovation enforcing female inferiority.¹¹ While society's intentional efforts to subordinate women and others have waned,¹² the human yearning for regulation, not necessarily motivated by virtue ethics, abounds in market economies.¹³ This appetite for regulation has surfaced with explosive force in the domain of transactions in which human capital is exchanged for wages, and many observers are dissatisfied with the resulting outcomes.¹⁴ If economics is more than "the theology of a new religion of abundance" and human progress,¹⁵ then it is likely that

7. Harry G. Hutchison, *Racial Exclusion in the Mirror of New Deal Responses to The Great Crash*, 15 CHAP. J. OF L. & POL'Y 5, 5-6 (2009-2010) [hereinafter Hutchison, *Racial Exclusion*].

8. DEIRDRE N. MCCLOSKEY, *THE BOURGEOIS VIRTUES: ETHICS FOR AN AGE OF COMMERCE* 29 (2007) (quoting AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 6, 112 (2000)).

9. AMARTYA SEN, *THE IDEA OF JUSTICE* 253 (2009) ("[I]ncome or wealth is an inadequate way of judging advantage . . .").

10. MCCLOSKEY, *supra* note 8, at 29.

11. See, e.g., RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 90 (2006) [hereinafter EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*]. Justice Brandeis, acting as a stalwart progressive before joining the U.S. Supreme Court, served as "the architect of the detailed sociological studies" used to support differential treatment of women against a Fourteenth Amendment challenge. *Id.* In the 1908 Supreme Court case *Muller v. Oregon*, Brandeis, citing these studies, successfully defended an Oregon statute limiting hours of work for women on grounds of innate female inferiority. *Id.*

12. See MCCLOSKEY, *supra* note 8, at 30.

13. See Reed Elizabeth Loder, *Epistemic Integrity and the Environmental Future*, 32 ENVIRONS ENVTL. L. & POL'Y J. 1, 3 n.6 (2008) (explaining that virtue ethics place an emphasis on human character).

14. See, e.g., Luca Enriques, *Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View*, 30 U. PA. J. INT'L L. 1147, 1151-52 (2009) (describing skepticism toward the increase in "do something" reforms from United States and European Union regulators in response to the financial crisis).

15. MCCLOSKEY, *supra* note 8, at 196 (citing ROBERT NELSON, *ECONOMICS AS RELIGION* 267 (2001)).

all observers must take sides on important public policy debates armed with more than a prudential calculation about overall wealth maximization.

Within the United States, this debate takes place against a background of cultural division reflecting a clash of orthodoxies, signifying that “there is an interminable and unsettleable character of much of what passes for [Americans’] contemporary moral and philosophical debates.”¹⁶ In part, the character of public policy debates in Western democracies reflects the failure of progressive aspirations. As political philosopher Chantal Delsol clarifies through her studies of “the spirit of late modernity,” “modern man” has been “confounded, dazed, and confused” by a growing recognition that the collapse of communism and other “isms” has failed to provide a solution for his anxieties.¹⁷ The fall of these progressive ideologies has instead made way for a “‘return’ of social and human problems that Progress was supposed to have relegated to History’s dustbin”¹⁸ Instead of evolving toward the apex of Enlightenment ideas grounded in the belief that progressives have been an essential part of modernity’s inevitable march toward permanent progress, modern man must deal with “disconcerting shadows” after realizing that progress, in some final collective sense, is a “debilitating illusion.”¹⁹ Rather than witnessing the birth of a new world order premised on the hopeful claim that “all human beings are born free and equal in dignity and rights,” moderns have observed a world order that features “a morass of moral ambiguity and expediency.”²⁰ As a consequence, modern man is now unsure of how to face a future filled with doubt.²¹ Meanwhile, social scientists and labor advocates continue to insist that uncertainty can be resolved through more studies, particularly those supporting a greater role for

16. Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. PA. J. BUS. & EMP. L. 663, 674 (2008) [hereinafter Hutchison, *Reclaiming the First Amendment*] (citing ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 226 (2d ed. 1984)).

17. Paul Seaton, *Translator’s Preface* to CHANTAL DELSOL, *UNJUST JUSTICE: AGAINST THE TYRANNY OF INTERNATIONAL LAW*, at vii (Paul Seaton trans., 2008) [hereinafter Seaton, *Translator’s Preface*].

18. *Id.*

19. See Thomas Hibbs, *Seeking with Groans: The Moral Universe of Film Noir*, BOOKS & CULTURE, Mar.– Apr. 2007, at 41, 41 (explaining the worldview of modernity prevalent in film noir).

20. DAVID ANDRESS, *THE TERROR: CIVIL WAR IN THE FRENCH REVOLUTION* 1 (2005) (quoting the Universal Declaration of Human Rights and decrying “eugenic experimentation . . . and the vile perversions of Darwinist science”).

21. See Seaton, *Translator’s Preface*, *supra* note 17, at viii.

government within society, the economy, and the world of work.²² Arguing against this tendency, social science critic Christopher Shannon intuits that the effort of progressives to extract meaning from the study of social science is "inherently self-defeating" because it problematizes human life while concurrently breathing life into the "iatrogenic" probability, a disease caused by the modern process of incessant diagnosis and treatment.²³ Uncertainty, in combination with the failure of the modern process of quasi-scientific diagnosis, gives rise to American gloom, which reflects the deduction that our world and its foundational philosophical, moral, and spiritual assumptions have fallen apart.²⁴

Since it is difficult to find agreement regarding "a complete, transcendent, and immanent set of propositions about right and wrong,"²⁵ few principles can be fully legitimated against this twitchy postmodern background. Nevertheless, it can be tentatively argued that one of our greatest flaws is an increasing willingness to ignore those trapped at the bottom of American life.²⁶ As such, the pursuit of a defensible moral position regarding wage regulation, including an appraisal of the motivation and consequences of minimum wage advocacy, is vitally important for vulnerable participants in the labor market. This is particularly true during an epoch in which the nation slowly recovers from its financial malaise while anger, both real and manufactured, rages.²⁷ Few groups are as vulnerable as young adults without a high school diploma or young minorities.²⁸ Furthermore, if we gaze past America's borders, poor South Africans straining to thrive in a twenty-first century world are also particularly vulnerable.²⁹

22. See generally Wilfred M. McClay, *Foreword* to CHRISTOPHER SHANNON, *CONSPICUOUS CRITICISM: TRADITION, THE INDIVIDUAL, AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT*, at xi (rev. ed. 2006) (discussing Shannon's criticism of social science's proposed solutions for American society and culture).

23. *Id.*

24. See Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1197-98 (2005).

25. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1229 (1979).

26. Nichol, *supra* note 2, at 1.

27. See *id.* at 3.

28. See SOWELL, *BASIC ECONOMICS*, *supra* note 1, at 214 (explaining the results of empirical studies that show that young, unskilled, and minority workers face the greatest reduction in employment as a result of minimum wage laws).

29. *Id.* at 216-17 (quoting Sharon LaFraniere, *Low Labor Standard Leads South Africans to Export Jobs*, N.Y. TIMES, Mar. 13, 2004, <http://www.nytimes.com/2004/03/13/world/low-labor-standard-leads-south-africans-to-export-jobs.html?pagewanted=all&src=pm>) (illustrating the adverse employment effects of informal minimum wages on poor South Africans).

Coinciding with rising levels of economic inequality that place vulnerable workers at risk,³⁰ the publication of Simon Deakin and Frank Wilkinson's article, *Minimum Wage Legislation*,³¹ provides impetus to a new body of social science research.³² This revisionist analysis largely rejects times-series studies based upon the U.S. Current Population Survey and favors a comparative approach that examines variations in minimum wages between states.³³ Eagerly embracing the supposed demise of neoclassical theory, Deakin and Wilkinson create a revisionist panegyric that justifies minimum wage law as an attractive labor reform and income redistribution device,³⁴ despite the existence of an economic consensus that challenges the advisability of such a policy.³⁵ For skeptics of the new body of research, the publication of Deakin and Wilkinson's piece offers a fresh opportunity to reexamine the empirics of the minimum wage and consider anew the foundational presuppositions and enduring effects of progressive policies that in pursuit of "social justice" were spawned by the belief that scientific experimentation, when blended with coercive market intervention, necessarily leads to social improvement and egalitarianism. On the contrary, the instantiation of progressive paradigms, including minimum wage regimes, may signify the pursuit of inadvertent or deliberate forms of racial and gender subordination that resemble what the late Senator Paul Wellstone labeled as "willful blindness," which "enable[s] a vibrant and boastful democracy to take the economic travails of so many low-

30. See Nichol, *supra* note 2, at 2-3 (describing escalating racial wealth disparities).

31. Simon Deakin & Frank Wilkinson, *Minimum Wage Legislation*, in 2 LABOR AND EMPLOYMENT LAW AND ECONOMICS 150 (Kenneth G. Dau-Schmidt et al. eds., 2d ed. 2009).

32. See, e.g., DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995); David Card, *Using Regional Variation in Wages to Measure the Effects of the Federal Minimum Wage*, 46 INDUS. & LAB. REL. REV. 22, 22 (1992) [hereinafter Card, *Using Regional Variation in Wages*]; David Card, *Do Minimum Wages Reduce Employment? A Case Study of California, 1987-1989*, 46 INDUS. & LAB. REL. REV. 38, 38 (1992) [hereinafter Card, *Do Minimum Wages Reduce Employment?*].

33. Deakin & Wilkinson, *supra* note 31, at 155 (rejecting time-series studies because the "employment effects are small and also highly sensitive to the choice of sample period").

34. *Id.* at 156 (stating that a "return to the neoclassical orthodoxy seems unlikely").

35. See, e.g., DAVID NEUMARK & WILLIAM L. WASCHER, MINIMUM WAGES 286-88 (2008) [hereinafter NEUMARK & WASCHER, MINIMUM WAGES] (showing that minimum wages are an ineffective social policy for aiding the poor, entail "disemployment effects" that are felt most heavily by low-skilled workers, discourage human capital formation, increase prices for products frequently consumed by low-income families, and do little to raise the incomes of poor and near-poor families); Richard V. Burkhauser, Kenneth A. Couch & David C. Wittenburg, *Who Minimum Wage Increases Bite: An Analysis Using Monthly Data from the SIPP and the CPS*, 67 S. ECON. J. 16, 30-31 (2000) (finding that minimum wage increases consistently have a significant negative employment effect on vulnerable groups within the labor market, and further confirming the "neoclassical predictions that minimum wage increases significantly reduce employment").

wage working Americans" off the table.³⁶ Instead of giving careful consideration to the difficulties facing low-wage workers, much of the liberal/modern calculus that sustains progressive labor ideology (including wage regulation) substitutes self-congratulation for defensible policy analysis.³⁷

Although Deakin and Wilkinson's scholarship typifies the work of a growing cohort of scholars who see minimum wage regimes as innately good, an achievement worth defending on the basis of progressive architecture,³⁸ progressive labor paradigms do not seem to be working for marginalized Americans. For instance, Henry Louis Gates, Jr. and Cornel West have documented evidence that "[m]ore than half of all black males between twenty-five and thirty-four are jobless or 'underemployed.'"³⁹ Equally disturbing are statistics suggesting that black males receive prison sentences rather than college diplomas at a ratio of one hundred to one.⁴⁰ Moreover, while the evidentiary record shows that dramatic racial differences in unemployment did not exist prior to 1930, the unemployment rate for non-whites has risen relative to whites ever since.⁴¹ These disparities remain today, thus further isolating African Americans.⁴² While various explanations abound, economist Glenn Loury observes that the unemployment gap is caused by a "substantial gap in skills between blacks and whites [which] is itself the result of processes of social exclusion"⁴³ In the 1990s, for example, "the size of the black underclass [grew] disproportionately," reinforced by the rise in the black unemployment rate.⁴⁴ Between August 2010 and August 2011, for example, the unemployment rate for white workers shifted from 8.6 percent to 7.9 percent, while the rate for

36. Nichol, *supra* note 2, at 1.

37. See generally, THOMAS SOWELL, THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY 1-2 (1995) [hereinafter, SOWELL, VISION OF THE ANOINTED] (stating that even when public policy is debated, the conclusions are often reached based on inherent assumptions and narrow visions of social processes).

38. See David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177, 186-87 (2009) (explaining the eugenic benefits of wage regulation under progressive labor ideology).

39. HENRY LOUIS GATES, JR. & CORNEL WEST, THE FUTURE OF THE RACE 24 (1996).

40. *Id.* at 24-25.

41. RICHARD VEDDER & LOWELL GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA 272-273 (1993).

42. Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. RACE & L. 369, 371 (2010) [hereinafter Hutchison, *Employee Free Choice*].

43. GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 101 (2002).

44. GATES & WEST, *supra* note 39, at xii.

blacks increased from 16.3 percent to 17.0 percent.⁴⁵ Nor is this dire picture confined to the United States, as evidence from Nigeria and South Africa indicates that the costs of labor law reform are borne most heavily by the poor and marginalized.⁴⁶ Given the persistent disadvantage experienced by members of minority groups, perhaps they can be forgiven for seeking evidence of prejudice or racial animus that is directly attributable to the implementation of progressive suppositions. With this situation facing many minorities, as well as African Americans in particular, it ought to be commonplace to challenge the deficiencies of the progressive paradigm. This article expands the literature as part of an ongoing effort to lay bare the pernicious economic and moral consequences that attend the implementation of progressive ideals.⁴⁷ Placed within this morally dubious context, *Minimum Wage Legislation* represents a conservative effort to protect the presuppositions of labor law reform architects and labor union advocates from justifiable criticism, rather than offering a fresh contribution to the literature.

Part I situates minimum wage advocacy within progressive labor ideology, American labor history, and mankind's quest for perfection as a prelude to examining Deakin and Wilkinson's various claims and contentions. Emphasizing the plight of African American workers in particular, this analysis concentrates on the assumptions and consequences of progressive architecture, as well as on the objectives and goals of progressives in the realm of economic and labor legislation, often referred to as "social justice" legislation.⁴⁸ Part II reviews Deakin and Wilkinson's analysis. Part III refracts the authors' claims and contentions through a prism provided by contrary empirical evidence,

45. U.S. Dep't of Labor, *Table A-2: Employment Status of the Civilian Population by Race, Sex, and Age*, U.S. BUREAU OF LAB. STATISTICS, <http://data.bls.gov/cgi-bin/print.pl/news.release/empsit.t02.htm> (last modified Sept. 2, 2011) (not seasonally adjusted).

46. See, e.g., SOWELL, *BASIC ECONOMICS*, *supra* note 1, at 216-17 (describing the effects of artificially high wages on employment in both countries and indicating that at least some South African companies are expanding output by moving some of their production to Poland, which is unlikely to benefit black workers in South Africa).

47. See, e.g., Harry G. Hutchison, *Waging War on the "Unfit"? From Plessy v. Ferguson to New Deal Labor Law*, 7 STAN. J. C.R. & C.L. 1, 1-2 (2011) [hereinafter Hutchison, *Waging War on the "Unfit"*] (critiquing PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND BUCK V. BELL* 7-19 (2008)); Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437, 443 (2010) [hereinafter Hutchison, *Choice, Progressive Values*] (criticizing Kent Greenfield, *Corporate Law and the Rhetoric of Choice*, in 24 RESEARCH IN LAW AND ECONOMICS: LAW AND ECONOMICS: TOWARD SOCIAL JUSTICE 61 (Dana L. Gold ed., 2009)).

48. See, e.g., Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913) (defining "social justice" legislation as "[s]tate law[s] involving a social or economic question").

American labor history, and neoclassical theory. Although Deakin and Wilkinson suggest otherwise,⁴⁹ it is unfortunate that United States courts, like much of society, have rarely intervened to thwart the expansion of social justice legislation.⁵⁰ Even though such legislation imposes a substantial burden on society and saddles vulnerable individuals and groups with disproportionate harm,⁵¹ most courts and commentators remain unmoved. After revisiting the entire record, impartial observers (as well as commentators committed to redressing economic and social injustice) ought to be wary of Deakin and Wilkinson's hopeful claims, which indicate that wage regulation delivers positive freedom and economic relief to low-wage workers.⁵² Such claims, when stripped of the patina of progress, consist of contradiction and coercion that punish and further disadvantage marginalized Americans, in addition to expanding racial disparities.⁵³

I. CONTROLLING THE "UNFIT"

A. *Prolegomena*

On one account, "[d]angers to a society may be mortal without being immediate. One such danger is the prevailing social vision of our time—and the dogmatism with which the ideas, assumptions, and attitudes behind that vision are held."⁵⁴ Deakin and Wilkinson's article functions as a plinth supporting the prevailing vision of our time: the necessity of government intervention within markets.⁵⁵ Before examining their claims and the empirical evidence they discount, it is important to examine the history of progressive thought that led to the creation of America's minimum wage movement. Understanding minimum wage law requires a brief review of progressive impulses, progressive labor ideology, biology, and America's remarkable history

49. See Deakin & Wilkinson, *supra* note 31, at 152 (discussing the so-called *Lochner* era).

50. See, e.g., Warren, *supra* note 48, at 294-95 (stating that out of 560 Supreme Court cases involving the validity of social justice legislation from 1887-1911, the Court only declared two state laws unconstitutional, in addition to the *Lochner* decision).

51. See Hutchison, *Waging War on the "Unfit," supra* note 47, at 33.

52. See generally Deakin & Wilkinson, *supra* note 31, at 155-56 (discussing empirical studies that found that minimum wages had positive effects on wages and employment).

53. See, e.g., Walter Williams, *Punished by Minimum Wages*, INVESTOR'S BUS. DAILY, May 11, 2011, at A11 (discussing a study showing that each 10% increase in a state or federal minimum wage decreased employment of white males by 2.5%, Hispanic males by 1.2%, and black males by 6.5%).

54. SOWELL, *VISION OF THE ANOINTED, supra* note 37, at 1.

55. See Deakin & Wilkinson, *supra* note 30, at 167.

of racial subjugation. Scholars Black,⁵⁶ Bernstein,⁵⁷ Bernstein and Leonard,⁵⁸ Epstein,⁵⁹ and Moreno⁶⁰ have made enormous contributions to the literature by documenting the reach, consequences, and philosophic deficiencies of the progressive movement. The picture that emerges from their work is complex yet ultimately repulsive as progressives sought to remake the world by taking control of the “unfit” and the “undeserving,” who were seen as obstacles to the establishment of the New Republic.⁶¹

B. Progressive Labor Ideology and the “Unemployables”

And how will the New Republic treat the inferior races? How will it deal with the black? . . . the yellow man? . . . the Jew? . . . those swarms of black, and brown, and dirty-white, and yellow people, who do not come into the new needs of efficiency? Well, the world is a world, and not a charitable institution, and I take it they will have to go. . . .⁶²

As this quote from H. G. Wells demonstrates, humanity has been “[c]ontinuously catapulted from misery to exhilaration and back,” and has therefore “repeatedly struggled to overcome vulnerability and improve upon its sense of strength.”⁶³ Our instinct is to “play God,” an impulse that too frequently is not just to progress but to suppress people who society has deemed inferior.⁶⁴ Although racism and group hatred have existed in most cultures throughout history, it took thousands of years for these hostilities to permeate scientific thought and therefore rationalize disparaging actions against the despised.⁶⁵ Since power tends

56. See EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE* (2003).

57. See DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (2001) [hereinafter BERNSTEIN, *ONLY ONE PLACE OF REDRESS*].

58. See Bernstein & Leonard, *supra* note 38.

59. See EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, *supra* note 11.

60. See PAUL D. MORENO, *BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY* (2006).

61. See, e.g., Bernstein & Leonard, *supra* note 38, at 180 (“Progressive economists and their reform allies offered uplift only to those groups they deemed deserving of work, arguing that in the name of social control the labor force should be rid of unfit workers: the immigrants, African Americans, women, and other ‘defectives’”).

62. Stephen M. Barr, *The Devil’s Chaplain Confounded*, *FIRST THINGS*, Aug.-Sept. 2004, at 25, 25-26 (quoting H. G. Wells).

63. BLACK, *supra* note 56, at 9.

64. *Id.*

65. *Id.*

naturally toward manipulation and control,⁶⁶ it would be unwise to claim that social groups, public intellectuals, and institutions operating during the Progressive Era invented contempt as a weapon against the "unfit." However, this longing to transmute contempt into subordinating action reinforced by pseudo-science intensified the effort to acquire power, which "in its most coarse expressions would exploit, subjugate, and even enslave."⁶⁷ Putatively possessing an aristocracy of knowledge and refusing to offer a completely consistent philosophic edifice, American progressives campaigned "against 'undesirables' with great subtlety and sophistication."⁶⁸ They used noble notions of public interest and fairness to claim that their programs and policies actually helped the underprivileged citizens they targeted.⁶⁹ Thus, some commentators "continue to insist that the New Deal was a positive step toward social justice and a new world order."⁷⁰

Stemming from the notion that, "in the struggle to survive in a harsh world, many humans were not only less worthy, [but] actually destined to wither," progressives argued that preserving the needy in society was a potentially harmful act.⁷¹ Consistent with this thesis, early progressives "believed strongly in eugenics and presumed that the state could create a pure race, a society of new men,"⁷² labeling conservative opponents to eugenics as "social Darwinists."⁷³ Progressive ideals, infused with Herbert Spencer's thinking, were "essentially a variant of English utilitarianism, with a more developed argument on progress through evolution."⁷⁴ In fairness, Darwinian thought, as Spencer exemplified, could be taken in either a laissez-faire or statist direction.⁷⁵ Progressives rejected "the notion of a republic founded on the natural rights tradition in favor of a living constitution . . . and ultimately

66. JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* 188 (2010).

67. *Id.*

68. Hutchison, *Waging War on the "Unfit"?*, *supra* note 47, at 22.

69. *Id.*

70. *Id.*

71. BLACK, *supra* note 56, at 12-13.

72. Hutchison, *Employee Free Choice*, *supra* note 42, at 380-81 (citing JONAH GOLDBERG, *LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT, FROM MUSSOLINI TO THE POLITICS OF CHANGE* 114 (2009)).

73. GOLDBERG, *supra* note 72, at 257. In fact, progressives created the notion of "social Darwinism," meaning "anyone who opposed Sidney Webb's notion that the state must aggressively 'interfere' in the reproductive order of society." *Id.*

74. RONALD J. PESTRITTO, *WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM* 11 (2005) (citing BERNARD CRICK, *THE AMERICAN SCIENCE OF POLITICS: ITS ORIGINS AND CONDITIONS* 41-46 (1964)).

75. *Id.*

succumbed to the fiction that progress required the supervision of an educated class groomed for leadership.”⁷⁶ Hence, progressive elites proposed selective breeding and emphasized human perfection in combination with centralized power and restructured economic systems.⁷⁷ Seeking to change the structure of society for the better, progressives endeavored to supervise evolution in ways that would fundamentally alter society: first, by substituting a statist economy for the free markets,⁷⁸ and second, by exchanging or eliminating “unfit” citizens in favor of “desirable” ones.⁷⁹ Described more fully below, this remarkable intuition set the stage for subordinating action by governments.

While not all progressives favored the diminution of economic opportunities and political rights for marginalized Americans,⁸⁰ it is undeniable that, for some, remaking the world required the liquidation of what was seen as America’s “black and sinister polyglot population.”⁸¹ Typifying this radical viewpoint and attesting to the transformative power of hierarchy born from racial supremacy, prominent author and devout progressive H. G. Wells saw Franklin Delano Roosevelt as “the most effective transmitting instrument possible for the coming of the new world order.”⁸² Believing that “government must submit to the Darwinian theory of organic life,” progressives saw the state as “a living thing freighted by irresistible impulses and requiring ever-expanding power as part of the natural evolutionary process.”⁸³ Corresponding with this proposition, “[g]overnmental ‘experimentation,’ the watchword of pragmatic liberals from Dewey and Wilson to FDR, was the social analogue to evolutionary adaptation.”⁸⁴

It is difficult to fully appreciate the inseparable connection between race, the demands of progress, and American Progressivism without briefly reviewing the history of the Progressive movement’s leader,

76. Hutchison, *Choice, Progressive Values*, *supra* note 47, at 466 (citing PESTRITTO, *supra* note 74, at 11-12).

77. Hutchison, *Employee Free Choice*, *supra* note 42, at 381 (citing GOLDBERG, *supra* note 72, at 270-77).

78. Hutchison, *Choice, Progressive Values*, *supra* note 47, at 466.

79. See Hutchison, *Waging War on the “Unfit”?*, *supra* note 47, at 4.

80. See EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, *supra* note 11, at 102-03 (showing that some progressives opposed Woodrow Wilson’s attempt to subjugate blacks).

81. GOLDBERG, *supra* note 72, at 135 (quoting H. G. WELLS, *THE WAR IN THE AIR* 115 (Kessinger Publ’g 2004) (1908)).

82. *Id.* (quoting H. G. Wells).

83. Hutchison, *Employee Free Choice*, *supra* note 42, at 381 (citing GOLDBERG, *supra* note 72, at 86).

84. GOLDBERG, *supra* note 72, at 86.

Woodrow Wilson.⁸⁵ After winning the 1912 election, Wilson "immediately set about to convert the Democratic Party into a progressive party and, in turn, make it the engine for a transformation of America."⁸⁶ In 1913, he vowed to appoint only progressives to his administration.⁸⁷ It is doubtful that these maneuvers, which ultimately led to the inception of the minimum wage movement, could be seen as a positive development when examined from the perspectives of African Americans, classical liberals,⁸⁸ Critical Race theorists,⁸⁹ or neoclassical economists. On the contrary, and in sharp contrast with President Calvin Coolidge's call for religious and racial tolerance during his 1924 election campaign,⁹⁰ Wilson assertively implemented "an agenda that created socially constructed racial categories, enforced racial disparity, and advanced racial stigma."⁹¹ It also diminished human liberty⁹² and ultimately placed a regulatory drag on the economy.⁹³

Emblematic of Wilson's approach to race was his "advocacy of progressive imperialism in order to subjugate, and thereby elevate, lesser races."⁹⁴ Unlike classical liberals who fought racial discrimination,⁹⁵

85. Hutchison, *Employee Free Choice*, *supra* note 42, at 380.

86. GOLDBERG, *supra* note 72, at 104.

87. *Id.*

88. See, e.g., Jonathan J. Bean, *Introduction to THE INDEP. INST., RACE & LIBERTY IN AMERICA: THE ESSENTIAL READER* 1, 2-7 (Jonathan J. Bean ed., 2009) (explaining that classical liberals were consistent advocates of racial freedom).

89. See Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 99 (1997) [hereinafter Hutchison, *Toward a Critical Race*] ("Race critics endorse extensive sociolegal tradeoffs favoring people of color, including deployment of a culturally informed intent test[,] [w]hile . . . classical-liberal reformists look to the effects of allegedly racist laws in order to find discrimination"); Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CALIF. L. REV. 787 (1994) ("Because it brings an 'outsider' perspective to the discussion, [Critical Race Theory] has substantial transformative potential.").

90. See Calvin Coolidge, *Coolidge Denounces White Racism* (1924), in THE INDEP. INST., RACE & LIBERTY IN AMERICA: THE ESSENTIAL READER 147, 147 (Jonathan J. Bean ed., 2009). It is noteworthy that Coolidge's Democratic opponent, segregationist John W. Davis, is best known for defending segregation in *Brown v. Board of Education*. *Id.*

91. Hutchison, *Employee Free Choice*, *supra* note 42, at 380.

92. See, e.g., Hoover *Desegregates the Commerce Department* (1928), in THE INDEP. INST., RACE & LIBERTY IN AMERICA: THE ESSENTIAL READER 154, 154 (Jonathan J. Bean ed., 2009) (describing Wilson's successful effort to segregate government offices).

93. Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 650 (2003) (illuminating the failures of Wilson's disciple, FDR, whose attempt to supply centrally planned price controls and production limits caused a massive six to eleven percent decline in America's GNP).

94. GOLDBERG, *supra* note 72, at 83.

95. Bean, *supra* note 88, at 1.

Wilson, along with other academics, was convinced that social progress, inevitable as it was, had to “take into account the innate differences between the races” because the “various races were at different stages of evolution.”⁹⁶ A necessary predicate for lasting democracy was, according to Wilson, “homogeneity of race and community of thought and purpose among the people.”⁹⁷ Although Wilson, America’s preeminent liberal, had a historical reputation as a “far-sighted progressive,”⁹⁸ and despite the fact that modern liberals consider themselves highly enlightened on the issue of race,⁹⁹ the record shows that in addition to his commitment to Darwinian jurisprudence¹⁰⁰ and eugenics,¹⁰¹ Wilson was a “racist retrograde.”¹⁰² Driven to attain social progress, and effectively presuming that Africans and South Americans were “savages,”¹⁰³ he insisted that giving blacks the right to vote was “the foundation of every evil in this country.”¹⁰⁴ Matching this intuition, it was no coincidence that the U.S. Civil Service was resegregated during Wilson’s Progressive regime.¹⁰⁵ In addition, Wilson’s influential views set the stage for the implementation of a progressive labor law reform agenda that ultimately included the federal minimum wage,¹⁰⁶ which was implemented by Wilson’s former Assistant Secretary of the Navy and his ideological successor, FDR.¹⁰⁷

96. GOLDBERG, *supra* note 72, at 260.

97. PESTRITTO, *supra* note 74, at 73.

98. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 11, at 102.

99. GOLDBERG, *supra* note 72, at 243.

100. David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 816-817, n. 89 (1998) [hereinafter Bernstein, *Philip Sober Controlling Philip Drunk*] (highlighting Wilson’s desire to “interpret the Constitution according to the Darwinian principle” and his belief that “government is not a machine, but a living thing . . . accountable to Darwin”).

101. GOLDBERG, *supra* note 72, at 254-56 (showing that Wilson was a forthright defender of eugenics based on a social vision requiring people to organize themselves into collective spiritual and biological units). See also LOMBARDO, *supra* note 47, at 26 (describing Wilson as a “eugenics enthusiast” and noting that, while serving as governor, Wilson signed New Jersey’s sexual surgery law, which was enacted on grounds of eugenics).

102. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 11, at 102 (quoting Charles Paul Freund, *Dixiecrats Triumphant: The Menacing Mr. Wilson*, REASON ONLINE (Dec. 18, 2002), <http://reason.com/archives/2002/12/18/dixiecrats-triumphant>).

103. GOLDBERG, *supra* note 72, at 260.

104. *Id.* at 84.

105. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 11, at 102.

106. GOLDBERG, *supra* note 74, at 220 (showing that Wilson’s government intruded deeply into the private sector in unprecedented ways and launched an effort, carried forward by FDR, of “turning the economy into a ‘cooperative’ enterprise where labor, business, and government sat around a table and hashed things out on their own”).

107. See *id.* at 126 (describing Roosevelt’s tenure as Assistant Secretary of the Navy under leading progressive and notorious racist Josephus Daniels).

Unlike classical liberalism, which requires a limited government in order to protect individual rights and liberties, progressives believed in an expansive role for government grounded in the proposition that society was one indivisible whole that left no room for those who did not want to comply.¹⁰⁸ Early progressives were provoked by the deduction that a unified state required an increasingly centralized regulatory apparatus.¹⁰⁹ Dedicating themselves to societal advancement and the evisceration of social evil, they were seduced by the temptation to see science as a vehicle "[t]o forge the new science of human oppression—a race science."¹¹⁰ They believed that uniting the disciplines of socioeconomics, philosophy, biology, and the law would change the world for the better, perhaps forever.¹¹¹

Prescinding from this noxious brew, progressives became "enthusiastic biologizers" and "elitist[s]."¹¹² As a result, in "its origins and its consequences, the Progressive Era was both liberal and conservative."¹¹³ Bernstein and Leonard recapitulate this development:

Their liberal (progressive) instincts led them to call for social justice, to uplift the poor and disenfranchised. Their conservative instincts led them to call for social control, to impose order upon the causes of economic and social disorder. As elitists, the progressives believed that intellectuals should guide social and economic progress, a belief erected upon two subsidiary faiths: a faith in the disinterestedness and incorruptibility of the experts who would run the welfare state they envisioned, and a faith that expertise could not only serve the social good, but also identify it.¹¹⁴

From the Progressive Era into the New Deal and continuing into the current epoch, progressives have a rather mixed record in reducing human subordination, despite their ambition to serve the social good. First, this record reflects the fact that progressive intellectuals-turned-New Dealers have often enacted programs without seeing the entire picture.¹¹⁵ Operating at times with either tunnel vision or willful blindness, they focused "their attention exclusively on the beneficiaries

108. *Id.* at 87-88.

109. *See, e.g.,* PESTRITTO, *supra* note 74, at 71-73 (discussing Woodrow Wilson's views on unity and modern democracy).

110. BLACK, *supra* note 56, at 9.

111. *Id.*

112. Bernstein & Leonard, *supra* note 38, at 179.

113. Hutchison, *Choice, Progressive Values*, *supra* note 47, at 438.

114. Bernstein & Leonard, *supra* note 38, at 179-80.

115. *See* EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, *supra* note 11, at 72.

of their programs, be they union members or farmers, while taking no note of the adverse effects that their programs had on the parties excluded from the market.”¹¹⁶ Second, progressives were often hampered by overconfidence in both themselves and the state. For example, during the Progressive Era, hopeful progressives were provoked by asylums where mentally ill and handicapped patients passively rotted away, “often spending their days restrained by camisoles and straitjackets and their nights locked into covered cribs.”¹¹⁷ Progressives entered this arena armed with policy initiatives that were reinforced by coupling a “blithe self-confidence in [their] own capacity to design effective” programs with a “dangerous faith in the benevolence of the state and its agents.”¹¹⁸ Moreover, it was precisely the commitment of progressives to expanding the scope of state action¹¹⁹ that often exacerbated the exclusion and mistreatment of individuals and groups that were seen as threats to the vitality of the nation.¹²⁰

Blinded by doctrinal assumptions and standing on a morally wobbly superstructure erected by experts, “many progressives saw the contemporary social and economic position of [undesirables] as the irremediable, inevitable effect of Darwinism.”¹²¹ Provoked by quasi-religious and pseudo-scientific imagery, progressives forged a link between economic reform, socialism, Prohibition, eugenics, and other elements of the progressive agenda in order to achieve their vision of the “New Jerusalem.”¹²² Seeking national salvation through this faith-based agenda, American labor reformers often demanded the exclusion of defective groups from American labor markets,¹²³ impelled by the hypothesis that “unfit workers wrongly lowered the wages and employment of racially superior groups.”¹²⁴ For reformers, the threat posed by low-wage races was two-fold: first, they threatened American wage levels, and second, their putatively greater fertility threatened the health and the survival of the Anglo-Saxon race.¹²⁵ Premised on the

116. *Id.*

117. Andrew Scull, *Progressive Dreams, Progressive Nightmares: Social Control in 20th Century America*, 33 STAN. L. REV. 575, 576-77 (1981).

118. *Id.* at 577.

119. *Id.*

120. See generally Hutchison, *Waging War on the “Unfit”?*, *supra* note 47, at 31 (discussing the implementation of labor law as a weapon used by progressives to displace “unworthy” and “unemployable” groups).

121. Hutchison, *Employee Free Choice*, *supra* note 42, at 381.

122. See GOLDBERG, *supra* note 72, at 219.

123. See Bernstein & Leonard, *supra* note 38, at 180.

124. *Id.* at 177.

125. *Id.* at 182.

claim that "persons of inferior stock outbreed their biological betters,"¹²⁶ progressives "judged an impressive array of human groups, male Anglo-Saxon heads of household excepted, to be unworthy of work, or 'unemployable.'"¹²⁷ And who were the "unemployables"? Those individuals "who, owing to putative hereditary debility, earned less than what American reformers called a 'living wage.'"¹²⁸

Taking their cues from the work of Fabian socialists such as Sidney and Beatrice Webb, progressives were propelled by this centripetal assumption: workers who received less than the "living wage," and employers who paid less, were parasites.¹²⁹ Such parasites consisted of "children, the aged, and the child-bearing women[,] . . . the sick and the crippled, the idiots and lunatics, the epileptic, the blind and the deaf and dumb," immigrants, and members of minority ethnic and racial groups.¹³⁰ This irrepressible insight—making wages a function of living standards—"opened the door to the eugenic claim that immigrant groups were hereditarily predisposed to low standards of living," along with the conviction that Anglo-Saxon workers were more productive yet would be displaced by the Chinese, who were racially disposed to work for less pay.¹³¹ Building on this astonishing theology and impelled to extirpate "parasites," economist John R. Commons argued that "[t]he Jewish sweatshop is the tragic penalty paid by that ambitious race."¹³² For Commons, permitting inferior races to work engendered an economic competition that lowered wages since "[c]ompetition has no respect for superior races," leading the race with the lowest level of necessities to displace the others.¹³³ "Because race, not productivity, determined living standards, Commons could populate his low-wage-races category with the industrious and lazy alike."¹³⁴ According to Commons, "African Americans . . . were 'indolent and fickle,' which explained why slavery was defensible, even necessary."¹³⁵

The widespread acceptance of such modern and highly racialized

126. *Id.*

127. *Id.* at 180 (quoting Thomas C. Leonard, "More Merciful and Not Less Effective": Eugenics and American Economics in the Progressive Era, 35 HIST. POL. ECON. 687, 702 (2003)).

128. *Id.*

129. *Id.*

130. *Id.* (quoting SIDNEY WEBB & BEATRICE WEBB, INDUSTRIAL DEMOCRACY 785 (2d ed. 1920)).

131. *Id.* at 181.

132. *Id.* (quoting JOHN R. COMMONS, RACES AND IMMIGRANTS IN AMERICA 148 (1907)).

133. *Id.* (quoting COMMONS, *supra* note 132, at 151)).

134. *Id.*

135. *Id.* (quoting COMMONS, *supra* note 132, at 136)).

views¹³⁶ begged the question of what was to be done about the large numbers of inferior people who might begin to outbreed superior races. Premised on the irresistible judgment that law must “take lessons from biology,”¹³⁷ new legal doctrines and innovations surfaced. Three popular solutions emerged in response to the urgent need to curtail the growth of inferior people: eugenics,¹³⁸ gender-specific labor standards,¹³⁹ and minimum wage and labor regulation.¹⁴⁰ On doctrinal, practical, philosophical, and moral levels, these proposals were both overlapping and inextricably related.

First consider eugenics. Consistent with this moral imperative, “[t]he American Economic Association (AEA), founded in 1885, almost immediately began offering annual prizes for the best essay on the evils of unrestricted immigration.”¹⁴¹ This immigration issue “concerned not numbers, but blood,” as leading thinkers were persuaded that the “core of the problem . . . [was] one of race and eugenics.”¹⁴² They were driven to prevent the Anglo-Saxon stock from being overwhelmed by racially inferior “defectives, delinquents and dependents.”¹⁴³ Believing that “social progress is ‘a higher law than equality,’” progressive leaders “proposed the ‘eradication of the vicious and inefficient.’”¹⁴⁴ Operating in stark contrast to Lochnerian liberty-of-contract jurisprudence, which was invoked to justify expanding constitutional protection of African Americans and women,¹⁴⁵ the social progress movement reached its

136. See, e.g., DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 1-2 (4th ed. 2000) (explaining that “[r]ace, racialization, and racism are largely modern-day concepts” that ultimately lead to “the assignment of negative value to the traits commonly associated with a particular race and the subordinate ranking of that race on the social hierarchy”).

137. LOMBARDO, *supra* note 47, at 44 (quoting C. B. Davenport, *Marriage Laws and Customs*, in *PROBLEMS IN EUGENICS: PAPERS COMMUNICATED TO THE FIRST INTERNATIONAL EUGENICS CONGRESS* 155 (1912)).

138. See, e.g., Bernstein & Leonard, *supra* note 38, at 183-85 (describing the race-suicide thesis and the movement among elites to stamp out the unemployables).

139. See *id.* at 188-90.

140. See *id.* at 186-87.

141. *Id.* at 183 (citing JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 41 (1978)).

142. *Id.* (quoting Irving Fisher, *Impending Problems of Eugenics*, 13 *SCI. MONTHLY* 214, 227 (1921)).

143. *Id.*

144. *Id.* at 183-84 (quoting SIMON N. PATTEN, *THE DEVELOPMENT OF ENGLISH THOUGHT: A STUDY IN THE ECONOMIC INTERPRETATION OF HISTORY* 302-03 (1899)).

145. *Lochner: A Notorious Case Reconsidered*, CATO POL’Y REP., May-June 2011, at 17, available at http://www.cato.org/pubs/policy_report/v33n3/cprv33n3-7.pdf (describing DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011)).

apotheosis in Justice Holmes' peroration in *Buck v. Bell*,¹⁴⁶ which defended the benefits of majoritarianism, racialized science, and human exclusion.¹⁴⁷ This social vision, predicated in part on the growing fear of "race suicide,"¹⁴⁸ culminated in the conclusion that the state has virtually unlimited power to regulate activities (such as the work hours of healthy bakers and able-bodied women) and to control the "socially inadequate" through discretionary salpingectomies.¹⁴⁹

Second, operating in a similar vein by focusing on gender-specific solutions for "undesirables," Florence Kelley, one of the most influential U.S. labor reformers of the Progressive Era, "endorsed the Victoria, Australia, minimum-wage law as 'redeeming the sweated trades.' It did so by preventing the 'unbridled competition' of the unemployable, the 'women, children, and Chinese [who] were reducing all the employees to starvation.'"¹⁵⁰ Consistent with this thesis, Louis Brandeis, a progressive lawyer and later a Supreme Court justice, spent a good deal of his career as an attorney, arguing that government had a duty to protect women through minimum wage laws and other regulations governing the employment of women.¹⁵¹ Since women, in his view, were unfit for work, the notion that a woman stood on the same plane with a man and had the right to enter into contracts was simply "gilded sophistry."¹⁵² As Bernstein and Leonard make clear:

[T]he original progressives were in fact deeply ambivalent about women's participation in the labor force—and sometimes hostile to it. The reform case against women's market work, couched as it often was in the language of protection, was subtler than the eugenic hysteria directed at immigrants and mental and moral defectives. Nonetheless, as with other groups they deemed unemployable, leading progressives portrayed women's labor-force participation as socially and

146. 274 U.S. 200 (1927).

147. See Hutchison, *Waging War on the "Unfit"?*, *supra* note 47, at 28 (discussing Justice Holmes' views drawn from a number of sources, including his opinion in *Buck v. Bell* and the *Lochner* case).

148. Bernstein & Leonard, *supra* note 38, at 182 (defining race suicide in Edward A. Ross's words as the situation in which "[t]he higher race quietly and unobtrusively eliminates itself rather than endure individually the bitter competition it has failed to ward off by collective action").

149. See *id.* at 182-83 (discussing progressive reformers' efforts to create scientific methods for identifying low-wage workers and to implement legislation that would exclude social inferiors from work and target them for eugenics).

150. *Id.* at 188 (quoting Florence Kelley, *Minimum-Wage Boards*, 17 AM. J. SOC. 303, 304 (1911)).

151. TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* 8 (2010).

152. *Id.*

economically destructive—a threat to the wages of deserving workers (white, male heads of household), a threat to the sanctity of the home, and a threat to the eugenic health of the race.¹⁵³

Hence, the coercive power of the state ought to be deployed to protect “deserving” white men by constraining the liberty of the “weaker sex” to earn a living.¹⁵⁴

Finally, turning to the pseudo-scientific case for minimum wages, it should be noted that during the early part of the twentieth century, “[m]inimum-wage legislation, passed by several states beginning with Massachusetts in 1912 was the *sine qua non* of progressive labor reform, and progressive economists championed minimum wages.”¹⁵⁵ Fostering this perspective was the work of eugenically minded progressives who “advocated minimum wages precisely because binding minimums would cause job losses.”¹⁵⁶ Tempted by the rather conventional deduction “that minimum-wage induced job loss was a social benefit because it performed the eugenic service of ridding the labor force of the ‘unemployable,’”¹⁵⁷ progressive hierarchs sought to remake the world by controlling wages and population growth.¹⁵⁸ Influential British intellectuals Sidney and Beatrice Webb deserve singular recognition for the success of this move. They observed: “With regard to certain sections of the population [the unemployable], this unemployment is not a mark of social disease, but actually of social health.”¹⁵⁹ Flaunting his talent for pulverizing rhetoric, Sidney Webb opined that “of all ways of dealing with these unfortunate parasites . . . the most ruinous to the community is to allow them unrestrainedly to compete as wage earners . . .”¹⁶⁰ As members of the philosophic vanguard obligated by a duty to protect deserving workers from the revolting menace of competition from “defectives” and the “unfit,” progressive architects yearned to make it “illegal to work for less.”¹⁶¹

Captured by this surging *zeitgeist*, Columbia’s Henry Rogers

153. Bernstein & Leonard, *supra* note 38, at 188.

154. See SANDEFUR, *supra* note 151, at 8 (highlighting Brandeis’ argument in *Muller v. Oregon* that “government had to protect the weaker sex, to aid women in their natural roles as wives and mothers”).

155. Bernstein & Leonard, *supra* note 38, at 186.

156. *Id.*

157. *Id.*

158. See *id.* at 186-87.

159. *Id.* at 186 (quoting WEBB & WEBB, *supra* note 130, at 785).

160. *Id.* (citing Sidney Webb, *The Economic Theory of a Legal Minimum Wage*, 20 J. POL. ECON. 973, 992 (1912)).

161. See *id.*

Seager, future president of the American Economic Association and a leading progressive economist, offered a clear social vision of what should happen to those who, even after remedial training, could not earn the legal minimum.¹⁶² Evoking H. G. Wells' admonition, he stated: "If we are to maintain a race that is to be made up of capable, efficient and independent individuals and family groups we must courageously cut off lines of heredity that have been proved to be undesirable by isolation or sterilization"¹⁶³ Gleaming with racial animus, Progressive Era trade unionists "used local ordinances controlling licensing and apprenticeship to keep blacks out of their trades," or, in a concession to the humanity of African Americans, "forced blacks into segregated auxiliary unions."¹⁶⁴ Racial hostility, inescapably tied to union exclusion, flourished a decade later, "[a]s the [Great Depression] worsened, [and] undesirable jobs traditionally held by blacks became attractive to whites."¹⁶⁵ As a consequence of unionists' tenacious surrender to racial hierarchy, the displacement of African American workers became a serious problem.¹⁶⁶

This approach, grounded at the intersection of biology and the law, was not unique to the United States, as the history of pre-Mandela South Africa shows.¹⁶⁷ White South African craft unionists, like their American counterparts, demanded an exclusion of blacks that was consistent with the evolving tenets of a racial hierarchy betraying its progressive assumptions.¹⁶⁸ Progressive aspirations transformed into eugenic-tinged legislation, gender-specific wage regulation, and minimum wages. Whether within the United States or elsewhere, these various moves were largely designed to solve the problem of the "unemployables" by excluding and subjugating them. Thriving under the broad banners of biology and manifest destiny, these propositions sustained a shrewd calculus that led, as the next subsection shows, to labor law reform, which included federal, as well as a growing number of state and local, minimums.

162. *Id.*

163. *Id.* (quoting Henry R. Seager, *The Minimum Wage as Part of a Program for Social Reform*, 48 ANNALS AM. ACAD. POL. & SOC. SCI. 3, 10 (1913)).

164. MORENO, *supra* note 60, at 96.

165. *Id.* at 163.

166. Hutchison, *Toward a Critical Race*, *supra* note 89, at 120-21 (highlighting the prevalence of discriminatory treatment of African Americans throughout the history of American labor unions and the labor movement's "commitment to the norms of separation and white supremacy").

167. *See id.* at 126-29.

168. *Id.* at 127.

C. THE FLSA

Rejecting the idea that underpaid workers can exercise their power of exit, which plainly operates as an abuse-limiting device for employees,¹⁶⁹ “[e]very country in the world has established a complex system of laws and institutions intended to protect the interests of workers and to help assure a minimum standard of living for its population.”¹⁷⁰ The theory favors state intervention because “free labor markets are imperfect” and provide an opportunity for employers to extract rents by abusing workers, which is a source of “injustice and inefficiency.”¹⁷¹ Predicated on such theories, the Fair Labor Standards Act (FLSA),¹⁷² enacted more than seventy years ago, epitomizes an explosion of government intervention facilitated by a flurry of statutory enactments that commenced during President Hoover’s administrations.¹⁷³ The FLSA’s stated purpose is to constrain “labor conditions detrimental to maintenance of the minimum standard of living . . . without substantially curtailing employment or earning power.”¹⁷⁴

The FLSA represents an explicit commitment to low-wage workers putatively protecting them from wage theft¹⁷⁵ in accordance with the premise that “unregulated . . . labor conditions . . . negatively affected the ‘health, efficiency and general well-being’ of workers.”¹⁷⁶ In addition, the FLSA is similar in some respects to laws enacted in France and Britain, and it mirrors the wage boards in Australia and New Zealand, which legally enforced “minimum standards in pay and working conditions for all sectors of the economy.”¹⁷⁷ Various justifications for this form of regulation have surfaced, including

169. See generally McCLOSKEY, *supra* note 8, at 198 (discussing the viability of “exit” as an option for rectifying one’s social situation).

170. Juan C. Botero, *The Regulation of Labor*, 119 QUARTERLY J. ECON. 1339, 1339 (2004).

171. *Id.* at 1342.

172. 29 U.S.C. § 201 (2006).

173. See GEORGE C. LÉEF, *FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT 7-12* (2005) (arguing that Hoover was an interventionist who set the stage for even greater government involvement and control during the Roosevelt administration).

174. 29 U.S.C. § 202 (2006).

175. See Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 759 (2010) (stating that the FLSA provides a “longstanding statutory remedy” for violations of workers’ rights “to receive what they lawfully earn”).

176. *Id.* at 731 (citing Carol Abdelmessen & Deanne M. DiBlasi, *Why Punitive Damages Should Be Awarded for Retaliatory Discharge Under the Fair Labor Standards Act*, 21 HOFSTRA LAB. & EMP. L.J. 715, 719 (2004)).

177. Deakin & Wilkinson, *supra* note 31, at 151-52.

contentions that minimum wage laws: (1) are a laudable antipoverty measure; (2) guarantee progressive wealth redistribution; and (3) strengthen workplace affiliation.¹⁷⁸ Deakin and Wilkinson suggest a fourth justification: combating the monopsony power of employers in the low-wage sectors who hold a degree of market control over their employees.¹⁷⁹

The FLSA regulates the wage rate as part of a broad interpretation of federal power within the meaning of the Commerce Clause of the U.S. Constitution.¹⁸⁰ Meanwhile, states and some municipalities (depending on state law) took advantage of an expansive interpretation of the police power¹⁸¹ "to set higher wage and hour standards and enforce those standards themselves."¹⁸² The FLSA represents the culmination of progressive objectives that undergirded both the Progressive Era and the New Deal. Building upon a number of federal and state initiatives,¹⁸³ the FLSA was reinforced by broad statutory definitions that were designed to accomplish the remedial purpose of the law.¹⁸⁴ Regardless of whether the FLSA represents society's capitulation to the inevitability of human progress led by a class of expert hierarchs or a flight from freedom of contract, arguments favoring wage controls are often fortified by the contention that "market

178. SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT LAW* 368 (3d ed. 2008) (considering but largely dismissing these claims).

179. See Deakin & Wilkinson, *supra* note 31, at 157.

180. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, *supra* note 11, at 72-77 (discussing the development of an expansive interpretation of the Commerce Clause).

181. See, e.g., Richard A. Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the "Progressive Era,"* 51 VAND. L. REV. 787, 791 (1998) [hereinafter Epstein, *Lest We Forget*] (discussing how the Supreme Court's race relations jurisprudence embraced broad deference to state action under the states' police power set the stage for Progressives' social policies).

182. CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 55-56 (2010).

183. See A.B.A. FED. LAB. STANDARDS LEGIS. COMM., *THE FAIR LABOR STANDARDS ACT* 3-11 (Ellen C. Kearns et al. eds., 1999) (listing wage and hour law initiatives that commenced in 1840, federal statutes that commenced in 1868, the Seaman's Act of 1915, the Motor Carrier Act enacted in 1935, the Merchant Marine Act commenced in 1936, the Davis-Bacon Act of 1931, the Walsh-Healy Government Contracts Act enacted in 1936, the National Industrial Recovery Act of 1933, and various state minimum wage laws).

184. See, e.g., *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945) (interpreting the terms "each," "any," and "employee" broadly to reflect Congress's intent to "include all employees within the scope of the [FLSA] unless specifically excluded"). Evidently, under FLSA, "employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 299 (5th Cir. 1975) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

mechanisms . . . [are] intrinsically flawed and prone to failure.”¹⁸⁵ Premised on a faith in the now-familiar “race to the bottom” argument,¹⁸⁶ this claim insists that “[c]ompetition could be destructive” and must therefore be “channeled and disciplined lest . . . responsible firms [be] undercut and the public interest injured by opportunistic cost cutters.”¹⁸⁷

Whatever the justification for minimum wages may be, their immediate consequences are not in doubt. An examination of the immediate outcomes associated with the enactment of the FLSA and other New Deal labor reforms will enable the reader to ascertain whether the federal minimum wage and other closely-related programs, such as the National Industrial Recovery Act (NIRA), function consistently with the goals and objectives of progressive labor ideology. This inspection will equip readers with important background for accurately assessing the state of current empirical debates regarding minimum wage outcomes.

D. The Immediate Consequences of Minimum Wage Law

Prior to the adoption of the FLSA, Congress enacted the NIRA, the flagship program of the New Deal, in 1933.¹⁸⁸ The NIRA facilitated the creation of the National Recovery Administration (NRA), which enabled industry and labor “to write the codes under which they would be regulated.”¹⁸⁹ Congress’s failure to amend the law to prohibit discrimination¹⁹⁰ illustrates its ability to disrupt the lives of workers that social science had labeled “undesirables.”¹⁹¹ Creating a corporatist process that benefited large economic entities by destroying their smaller and less politically-influential competition,¹⁹² the NIRA and its progeny produced a massive public policy disaster.¹⁹³

185. See, e. g., ESTLUND, *supra* note 182, at 54-55.

186. *Id.* at 55; see also Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 464-65 (2008) (arguing that the proliferation of at-will employment was the result of under-industrialized southern and western states seeking to induce capital investment away from industrialized northeastern states, which in turn adopted at-will employment to maintain their competitive edge in the labor market).

187. ESTLUND, *supra* note 182, at 55.

188. See Hutchison, *Waging War on the “Unfit”?*, *supra* note 47, at 30.

189. See GOLDBERG, *supra* note 72, at 293.

190. MORENO, *supra* note 60, at 165.

191. Hutchison, *Waging War on the “Unfit”?*, *supra* note 47, at 30.

192. See GOLDBERG, *supra* note 72, at 293-94.

193. Somin, *supra* note 93, at 650.

While labor unions thrived, this policy "impose[d] costs on the overall economy and disproportionately disfavor[ed] members of marginalized groups."¹⁹⁴ By taking "advantage of the monopoly powers granted to them by the NIRA and its minimum wage provisions"¹⁹⁵ and conceiving of labor organizations as "white jobs trusts,"¹⁹⁶ labor unions displaced black workers.¹⁹⁷ Coherent with the tenets of Public Choice Theory, exclusion is frequently defended in the name of progress, yet is actually incentivized by the naked self-interest of powerful groups.¹⁹⁸ This ongoing process reified social stratification.¹⁹⁹ As part of this course of action, the NIRA codified wage differentials in such a way that even when a black employee performed more important tasks than a white employee, he would frequently have a lower job classification, and hence a lower wage, than his white counterpart.²⁰⁰ Building on this exclusionary edifice, "racist labor unions in both the South and North supported establishment of a caste system" in which African Americans were designated to the unskilled low-paying jobs while whites performed skilled high-wage jobs.²⁰¹ The belief behind this system was that "African Americans were mentally inferior and therefore were incapable of performing these jobs."²⁰² In fact,

"White labor constructed an ideology of white supremacy to secure and to justify their power and status in their places of work and in the community." Many rank-and-file union members adopted this ideology and came to believe that they were the white workingman's vanguard against incursions by the darker races.²⁰³

Inspired by this commanding imperative and consistent with the fact that the architects of the New Deal knew that labor innovation

194. Hutchison, *Employee Free Choice*, *supra* note 42, at 397.

195. Hutchison, *Toward a Critical Race*, *supra* note 89, at 124.

196. See MORENO, *supra* note 60, at 4 (quoting Herbert Hill, *Lichtenstein's Fictions Revisited: Race and the New Labor History*, 7 NEW POLS. 148, 157 (1999)).

197. Hutchison, *Toward a Critical Race*, *supra* note 89, at 124.

198. See Hutchison, *Racial Exclusion*, *supra* note 7, at 12.

199. *Id.* at 11.

200. See BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note 57, at 86-87.

201. *Id.* at 90-91.

202. *Id.* at 91. This is not to absolve employers of their own racism. "Employers, like the rest of white society, typically believed in African American inferiority, but experience frequently overcame ideology." *Id.* Thus, "[e]mployers continued to hire African Americans for occupations where African American workers had proved themselves competent before the rise of labor unions." *Id.*

203. *Id.* at 90 (quoting HARRY M. MCKIVEN JR., IRON AND STEEL: CLASS, RACE, AND COMMUNITY IN BIRMINGHAM, ALABAMA, 1875-1920, at 168 (1925)).

“would create disproportionate unemployment among . . . African Americans,”²⁰⁴ the minimum wage provisions of the NIRA eliminated the jobs of half a million blacks in less than a two-year period.²⁰⁵

Building on this particularly pungent record, the enactment of the FLSA produced results that mirrored a similarly disastrous policy in Apartheid-era South Africa.²⁰⁶ The Labor Department determined that “between 30,000 and 50,000 workers [mostly southern blacks] lost their jobs because of the minimum wage within two weeks of the [FLSA’s] imposition.”²⁰⁷ This result confirmed the inescapable linkage between minimum wages and the eugenic virtues of removing from employment those who are a burden on society.²⁰⁸ As leading progressive economist and future American Economics Association president A.B. Wolfe predicted, eugenic objectives could be achieved by eliminating inefficient entrepreneurs through minimum wage regulation, resulting in the elimination of “ineffective” workers.²⁰⁹

In combination with other New Deal programs, minimum wage regulation contributed to a persistent decline in the African American employment rate, which is consistent with the deduction that democratic governments give “the greatest benefits to those who are the best organized” and the least disenfranchised—categories that include few blacks.²¹⁰ “Although minimum wage regimes exhibit *prima facie* neutrality,”²¹¹ it is not difficult to show that labor cartels, sheltered by progressive labor ideology and minimum wage law, enforced a philosophy that decisively conceives of blacks and other minorities as inferior outsiders.²¹² It would therefore require legerdemain of epic proportions for the instantiation of this ideology to produce actual economic and social gains for vulnerable populations.

Since evidence of heroic legerdemain cannot be found, it is quite

204. Hutchison, *Employee Free Choice*, *supra* note 42, at 398.

205. David T. Beito, *Review of Only One Place of Redress*, 10 GEO. MASON L. REV. 293, 296 (2001). See also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (declaring the NIRA unconstitutional less than two years after it was enacted).

206. Hutchison, *Employee Free Choice*, *supra* note 42, at 398.

207. David E. Bernstein, *Roots of the “Underclass”: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 130 (1993) (quoting William A. Keyes, *The Minimum Wage and the Davis-Bacon Act: Employment Effects on Minorities and Youth*, 3 J. LAB. RES. 399, 401 (1982)).

208. See Bernstein & Leonard, *supra* note 38, at 186.

209. *Id.* at 186-87 (citing A.B. Wolfe, Robert L. Hale, & John A. Ryan, *Some Phases of the Minimum Wage: Discussion*, 7 AM. ECON. REV. 275, 278 (1917)).

210. See BERNSTEIN, *ONLY ONE PLACE OF REDRESS*, *supra* note 57, at 103.

211. Hutchison, *Waging War on the “Unfit”?*, *supra* note 47, at 33.

212. See Hutchison, *Employee Free Choice*, *supra* note 42, at 401.

easy to show that minimum wage regimes fulfilled the aspirations of early progressive innovators by controlling and disenfranchising the "undeserving" as part of an evolutionary move that ultimately reclassified them as "unemployable."²¹³ Hence, progressive architecture has justly earned a place of honor in America's pantheon of racial subjugation despite the fact that the progressive establishment generally refused to defend its commitment to exclusionary labor regimes on explicitly racial terms.²¹⁴ Now it is time to discover whether the new body of minimum wage research and the scholarship of Deakin and Wilkinson serve to destabilize this remarkable record of subordination that is unavoidably derived from Progressivism's doctrinal assumptions and history of minimum wage advocacy in the United States.

II. CLAIMS AND CONTENTIONS

A. The Wage Regulation Movement

Deakin and Wilkinson's advocacy draws considerable inspiration from the regulatory urge that characterized government experimentation during the early to mid-twentieth century in Western countries, including the United States.²¹⁵ In response to progressive currents percolating in New Zealand, Britain, and the United States, minimum wage regulation became firmly established in the U.S. and other countries by the 1930s and featured legislative as well as judicial intervention in the setting of wages and hours for adult women and young workers.²¹⁶ Deakin and Wilkinson establish that "[m]inimum wage laws come in a variety of forms which reflect the wide range of rationales which have been given for this type of legislation and, to some degree, different national approaches to labour market regulation."²¹⁷ Providing useful historical background by adverting to the "solidaristic and egalitarian" nature of France's minimum wage,²¹⁸ the authors demonstrate that "the British minimum wage system for most of the twentieth century was based on partial and selective statutory regulation and [was] subordinate to the wider goals of labour law policy" that sought to preserve "a system of

213. See Bernstein & Leonard, *supra* note 38, at 177, 180.

214. See, e.g., Beito, *supra* note 205, at 296.

215. See Deakin & Wilkinson, *supra* note 31, at 150-52.

216. See *id.*

217. *Id.* at 150.

218. See *id.* at 153.

collective self-regulation by trade unions and employers.”²¹⁹ For instance, the objectives of Britain’s wage minimums can be seen in early laws that were based on the policy of curbing extreme forms of low pay and were associated with the “sweated trades,” meaning that some employers paid less than a so-called subsistence wage.²²⁰ In order to bridge the gap between subsistence and a living wage, the Australian and New Zealand model aimed at ensuring a “breadwinners” wage to full-time workers.²²¹ This perspective accepts the contention that the payment of subsistence wages, if the practice exists,²²² constitutes “an implicit subsidy from the rest of the community.”²²³ It also provides a rationale for wage regulation as an essential device to assure that workers receive a living wage.²²⁴ Although Deakin and Wilkinson allege that American efforts in the domain of labor relations were motivated by the same concerns that fueled foreign labor legislation,²²⁵ this contention appears to gloss over the possibility that labor regulation, whether within the U.S. or abroad, may have had a more pernicious rationale.²²⁶

B. Deakin and Wilkinson’s Empirical Claims

Neoclassical economic theory suggests:

[L]abour market[] competition between firms for labour and between workers for jobs ensures that wage rates for labour of comparable productivity are more or less equal throughout the market and beyond the power of any individual economic actor to affect. The movement of the market towards equilibrium acts as an implicit regulator of individual decisions on whether to trade and at what price. Firms which attempt to pay below the market rate risk losing their workers to competitors in the same way that workers who attempt to force up wages above the competitive level risk losing their jobs as firms at the

219. *Id.* at 151.

220. *See id.* at 150 (discussing Britain’s Trade Boards Act of 1909).

221. *See id.* at 152.

222. *See infra* Part III (contesting this claim).

223. *See Deakin & Wilkinson, supra* note 31, at 150.

224. *See id.* at 151-52.

225. *Id.* at 152.

226. *See, e.g., Bernstein & Leonard, supra* note 38, at 178 (showing how “the intellectual heirs of progressivism used the prevailing economic crisis” to promote laws and programs that disemployed African American workers). *See also* GOLDBERG, *supra* note 72, at 155-56 (describing the deleterious effects of New Deal policies for blacks, including giving unions the power to lock blacks out of the labor force).

margin substitute labour for capital or cease to trade.²²⁷

However appealing this model may be, Deakin and Wilkinson assert that "repeated empirical studies . . . dating back to the first large-scale studies of low pay in Britain and the USA have-shown that labour markets do not display the[] characteristics" associated with standard neoclassical theory.²²⁸ Evidently intending to leave neoclassical economists in high dudgeon and resting their analysis on a lynchpin supplied by the rhetoric of social justice and progress, the authors argue that this lacuna in orthodox economic theory provides space for a new assessment of minimum wage regimes.²²⁹

Correspondingly, Deakin and Wilkinson dismiss frequently repeated arguments that have been used to sustain the neoclassical consensus, including: (1) the contention that wage regulation itself may cause inequality by preventing the market from clearing; (2) the possibility, as Public Choice Theory implies, that minimum wages, like other labor legislation, are a predictable outcome of organized pressure-group activity wherein labor unions, operating as labor monopolists, "seek to cartelise the labour market" and drive wages above the market rate by depressing demand for employment and diverting resources into wasteful rent seeking; and (3) the probability that minimum wage laws have a disproportionately adverse impact on the young, who lack formal training or qualifications.²³⁰ Despite the inherent strength of these orthodox claims, the authors remain unconvinced. Apparently satisfied that low-wage employers suffer from a disabling ecological fragility that prevents them from paying a "living wage," the authors suggest that there is scope for bureaucratic paternalism to remedy this situation.²³¹

Although Deakin and Wilkinson acknowledge the vast empirical literature that minimum wage legislation has spawned, they criticize the consensus view on grounds that it rests "mainly upon time-series studies using long-term aggregate data of teenage unemployment derived from a single source: the US Current Population Survey."²³² Critics of the neoclassical viewpoint have suggested that "these studies could not be

227. Deakin & Wilkinson, *supra* note 31, at 154.

228. *Id.* (claiming that "[f]irms do not automatically adjust wages to changes in demand for labour and there is considerable divergence in the pay and conditions offered by different employers to workers doing similar jobs," and dismissing the neoclassical claim that "freely competitive markets tend towards equilibrium").

229. *See id.* at 154-55.

230. *See id.* at 155.

231. *See id.* at 158.

232. *Id.* at 155.

regarded as definitive since the estimated employment effects are small and also highly sensitive to the choice of sample period.”²³³ Instead, Deakin and Wilkinson rest their judgment on American case studies authored by Card, Katz, and Krueger,²³⁴ which examine variations in minimum wage increases among the states.²³⁵ Premised on such studies, Card, Katz, and Krueger asserted that minimum wages increase both the earnings and the employment of vulnerable populations.²³⁶ In harmony with this contention, the authors point to a British study showing that, after minimum wage regulation was weakened during the 1980s, econometric analysis demonstrated a decline in employment in low-paying service sectors as a result of the decreasing effectiveness of wages councils in setting higher wages.²³⁷ Deakin and Wilkinson argue that such studies, when taken together, refute the neoclassical understanding of minimum wage increases.²³⁸

Nevertheless, the authors concede that as of 2008, only two percent of America’s working population receives the minimum wage.²³⁹ They also admit that two-thirds of the relevant studies indicate that minimum wages produce negative employment effects.²⁴⁰ Such studies show “stronger disemployment effects for the least-skilled groups.”²⁴¹ Hence, the empirical evidence favoring a negative view of minimum wages remains robust, and “the oft-stated assertion that new minimum wage research fails to support the traditional view . . . is clearly incorrect.”²⁴² Despite such evidence, Deakin and Wilkinson decline to offer any original empirical evidence to dispute the neoclassical consensus and insist that a return to the neoclassical view of wage regulation is unwarranted.²⁴³

Emphasizing the empirical observations contained within David Card and Alan Krueger’s *Myth and Measurement*,²⁴⁴ Deakin and

233. *Id.*

234. *See id.* at 155-56.

235. *See id.*

236. *See id.* at 155.

237. *See id.* at 156.

238. *See id.*

239. *Id.* at 153.

240. *Id.* at 156.

241. *See id.*

242. David Neumark & William Wascher, *Minimum Wages and Employment: A Review of Evidence from the New Minimum Wage Research* 121 (Nat’l Bureau of Econ. Research, Working Paper No. 12663, 2006), available at <http://www.nber.org/papers/w12663.pdf> [hereinafter Neumark & Wascher, *Employment*].

243. *See Deakin & Wilkinson, supra* note 31, at 156.

244. CARD & KRUEGER, *supra* note 32.

Wilkinson assert that this book and the prior research on which it was based²⁴⁵ were important markers in solidifying new empirical research and reigniting a new movement that views minimum wage increases as an essential anti-poverty device.²⁴⁶ Consistent with this view, poverty (in the sense of a lack of money and assets)²⁴⁷ can be explained by other indices, such as limited educational opportunity, political marginalization, unemployment, underemployment, and being a victim of racism, rather than increasing wage minimums. Taking advantage of the opportunity for comparative study, which arose from the variations in rates of increase between state and federal minimums after the implementation of minimum wage reforms in various U.S. states in the late 1980s and early 1990s,²⁴⁸ some economists contend that the studies show that the earnings and employment of teenagers correlate positively with increased minimum wages.²⁴⁹ "Similarly, a study comparing New Jersey, which increased its minimum wage, with Pennsylvania, which did not, found evidence of increasing employment in the former state."²⁵⁰

Relying principally on U.S. findings, the authors insist that wage regulation cannot be seen as "an 'artificial' interference in the free market."²⁵¹ The authors argue that statutory wage minimums are necessary because "certain groups in the labour market will not have access to voluntary means of labour organization, such as collective bargaining."²⁵² Although this statement is remarkable given the subordinating capacity of labor unions,²⁵³ Deakin and Wilkinson contend that low pay is an exception to "the neoclassical 'norm' of free competition" and operates as "a subsidy enabling otherwise uncompetitive firms and industries to survive."²⁵⁴ Based on this contention and the claim that some studies show that minimum wage increases produce a positive employment impact,²⁵⁵ the authors assert that "[m]inimum wage regulation is therefore necessary in order to help

245. See generally Card, *Using Regional Variation in Wages*, *supra* note 32; Card, *Do Minimum Wages Reduce Employment?*, *supra* note 32.

246. See Deakin & Wilkinson, *supra* note 31, at 155-56.

247. See Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 246 n. 4 (1995).

248. See Deakin & Wilkinson, *supra* note 31, at 155.

249. See *id.* at 155-56.

250. *Id.* at 156.

251. See *id.* at 157-58.

252. *Id.* at 158.

253. See *supra* Part I.

254. Deakin & Wilkinson, *supra* note 31, at 158.

255. See *id.* at 157.

create an environment in which firms compete not on the basis of low pay but instead through high labour quality and product and process innovation.”²⁵⁶

If Deakin and Wilkinson are correct, then the cascade of popular and scholarly opinion favoring minimum wage increases²⁵⁷ ought to reach its inflection point in the following set of observations: (1) that wage regulation can be implemented without any ill effects; (2) that minimum wage increases are not only cost-free in terms of negative employment effects but also constitute a form of societal advancement wherein productivity, skill levels, and perhaps even Gross Domestic Product rise; and (3) that not only does wage regulation increase the level of employment, but the quality of the resulting employment also rises.²⁵⁸ While admitting that an overwhelming majority of studies do not support these observations, Deakin and Wilkinson state that the body of research disfavoring their claims and the “apparently clear-cut normative conclusions” arising from such studies “were drawn from models which ha[ve] only a weak link to real-world conditions.”²⁵⁹ Using the now-familiar irreducible complexity defense, the authors offer the postmodern observation that the empirical consequences attending minimum wage increases are highly complex and that empirical work is insufficient to provide clear, normative guidance to policy makers. Thus, at the end of the day, complexity implies that “the case for social policy interventions will continue to be based on a range of grounds, of which efficiency is only one.”²⁶⁰

III. DECONSTRUCTING THE AUTHORS’ CLAIMS

A. Minimum Wages and Subsistence

The authors allege that “it is doubtful whether there is any more important condition of individual and general well being than the possibility of obtaining an income sufficient to enable those who earn it

256. *Id.* at 158.

257. *See, e.g.,* NEUMARK & WASCHER, MINIMUM WAGES, *supra* note 35, at 249-252 (explaining the popularity of minimum wage regimes).

258. *See* Deakin & Wilkinson, *supra* note 31, at 159 (“Minimum wage laws, when introduced for the first time, would lead to unemployment in firms and industries which previously benefited from a subsidy, but the workers thereby displaced would find better paying jobs elsewhere and the capacity of the economy to offer high quality employment would be enhanced”).

259. *See id.* at 166-67.

260. *See id.* at 167.

to secure . . . the necessities of life."²⁶¹ This thesis is both presumptive and credulous: presumptive because the authors' claim assumes facts not in evidence,²⁶² and credulous because they seem to have been misled by their own presumptions. The pertinent question becomes whether low wage beneficiaries of minimum wage regimes are actually poor or, alternatively put, whether they receive the benefits that minimum wage advocates allege. To answer such questions, it is important to appreciate that not every worker within a family *needs* to earn a sufficiently high wage in order to secure all of the necessities of life since family members may cross-subsidize one another for a variety of reasons.²⁶³ Contrary to Deakin and Wilkinson's supple claims, the legal and economics literature shows that *most* of the actual (as opposed to theoretical) beneficiaries of wage minimums in the United States do not live in low-income households, nor are they the primary breadwinners for their families.²⁶⁴ Thus, it is easy to see why neoclassical economics "is hostile to minimum wage legislation and to labour standards more generally, seeing them as an unwarranted interference with the operation of the market and a cause of unemployment" and human misery.²⁶⁵ Furthermore, these results may be reinforced by regressive distributional consequences. While it is important to note that poverty includes more than economic considerations, which imply that minimum wages or earned-income tax credits cannot alleviate all forms of impoverishment,²⁶⁶ it is also worth noting that "[n]eoclassical competitive models of firm behavior predict that wage increases reduce the quantity of labor demanded by firms and . . . that the least valued workers are the first fired or the last hired."²⁶⁷

Since adducible data shows that the primary beneficiaries of wage-

261. *Id.* at 151.

262. This claim implies but does not prove that in the absence of regulation, low-wage workers necessarily have difficulty attaining the necessities of life.

263. Reasons for this could include the absence of skills or experience, age, or maturity, currently possessed by one or more family members. Over time, such family members may acquire more marketable skills and subsidize other members of the family.

264. See STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 577 (4th ed. 2007) (showing that although the minimum wage continues to enjoy wide-spread support, only 17% of low-wage workers in the United States were living in poor households in 2003, and thus, the people who are generally favored by this type of intervention in the market are not poor). See also Burkhauser, Couch & Wittenburg, *supra* note 34, at 31 (showing that "less than 20 cents of every dollar of the increased wage bill associated with raising the minimum wage from \$3.35 to \$4.25 actually flowed to poor families").

265. Deakin & Wilkinson, *supra* note 31, at 150.

266. R. R. Reno, *The Preferential Option for the Poor*, *FIRST THINGS*, June-July 2011, at 3, 4.

267. Burkhauser, Couch & Wittenburg, *supra* note 35, at 16.

rate minima are not necessarily members of poor households,²⁶⁸ two observations emerge. First, such data is consistent with the orthodox economics consensus suggesting that marginalized workers (and not teenagers or young adults) living in middle-class or upper-middle-class families are placed within the crosshairs by ongoing attempts to raise wage minima. Second, and equally important, if the primary beneficiaries are members of relatively affluent families, it is doubtful that Deakin and Wilkinson's objective of providing a living wage to workers is achievable through statutory wage regulation, notwithstanding the existence of some data that shows that living wage ordinances, in contradistinction to minimum wage increases, may help to achieve modest reductions in urban poverty, despite their strong negative effect on employment.²⁶⁹

B. Revisiting the Empirical Record

Central to Deakin and Wilkinson's thesis is the observation that modest increases to the minimum wage have no employment effects or, alternatively, positive ones.²⁷⁰ If this is true,

[T]he appropriateness of this method in helping the working poor is strictly a distributional issue. However, if minimum wage increases reduce employment and if the jobs lost are concentrated among the vulnerable groups the policy claims to assist, then policy makers must consider this unintended consequence. Hence, estimating the elasticity of employment with respect to minimum wage increases is more than simply an empirical test of economic theory.²⁷¹

Deakin and Wilkinson's central and correlative claims noticeably overlook an enormous amount of contrary minimum wage research.²⁷²

268. See, e.g., WILLBORN ET AL., *supra* note 264, at 577.

269. See David Neumark & Scott Adams, *Do Living Wage Ordinances Reduce Urban Poverty?* 29-30 (Nat'l Bureau of Econ. Research, Working Paper No. 7606, 2000), available at <http://www.nber.org/papers/w7606.pdf>.

270. Deakin & Wilkinson, *supra* note 31, at 150.

271. Burkhauser, Couch & Wittenburg, *supra* note 35, at 16-17.

272. See, e.g., Michael Baker, Dwayne Benjamin & Shuchita Stanger, *The Highs and Lows of the Minimum Wage Effect: A Time-Series Cross-Section Study of the Canadian Law*, 17 J. LAB. ECON. 318 (1999) (studying the effects of Canadian minimum wage legislation on teenagers); Donald Deere, Kevin M. Murphy & Finis Welch, *Employment and the 1990-1991 Minimum Wage Hike*, 85 AM. ECON. REV. 232 (1995) (discussing the effects of minimum wage increases on teens and adult high school dropouts categorized by sex and race); Kenneth A. Couch & David Wittenberg, *The Response of Hours of Work to Increases in the Minimum Wage*, 68 S. ECON. J. 171 (2001) (examining the effects of minimum wage increases on teenagers); Neumark & Wascher,

Leading minimum wage scholars Neumark and Wascher have built upon more than twenty years of original research to author a book²⁷³ and numerous other studies that, taken together, dispute many of Deakin and Wilkinson's claims.

As they summarize the theoretical models of minimum wage effects on employment, Neumark and Wascher admit that "the neoclassical model does not predict that an increase in the minimum wage will reduce employment in every instance."²⁷⁴ They also concede that scholars have disagreed about the disemployment effects of wage minimums ever since Card and Krueger's early claims contesting the neoclassical consensus view that emerged in the early 1990s.²⁷⁵ However, it is clear that Neumark and Wascher's examination of early evidence,²⁷⁶ of the lagged effects of minimum wages,²⁷⁷ of evidence associated with employment and school enrollment,²⁷⁸ of aggregate effects and trend differences in the state-level panel data approach,²⁷⁹ of data from industrialized countries²⁸⁰ (including data from the United Kingdom substantiating the disemployment effects of wage regulation),²⁸¹ of studies from developing countries,²⁸² and of the overall evidence point to one conclusion: "[T]he literature—when read broadly and critically— [solidifies] the view that minimum wages reduce employment of low-skilled workers, and . . . [suggests] that the low-wage labor market can be reasonably approximated by the neoclassical competitive model."²⁸³

Indeed, as Burkhauser and his colleagues show, the elasticity of demand for labor with respect to increases in the minimum wage is

Employment, *supra* note 242, at 40-49 (discussing various studies regarding minimum wages).

273. NEUMARK & WASCHER, *MINIMUM WAGES*, *supra* note 35.

274. *Id.* at 57.

275. *See id.*

276. *See generally id.* at 57-63 (outlining the results of minimum wage research studies).

277. *See generally id.* at 63-65 (evaluating the amount of time it should take "for minimum wages to have their full effect on employment").

278. *See generally id.* at 65-66 (describing the use of school enrollment as a variable in research studies).

279. *See generally id.* at 67-71 (explaining "the possibility that differences in underlying trends in employment growth across states" can bias research results).

280. *See generally id.* at 89-99 (detailing studies of the effects of minimum wage legislation in seventeen Organisation for Economic Co-operation and Development (OECD) countries, including Canada, the United Kingdom, France, Spain, Portugal, and New Zealand).

281. *See id.* at 95.

282. *See generally id.* at 99-103 (describing the complicated factors encountered when analyzing minimum wage effects in countries such as Mexico, Colombia, Costa Rica, Honduras, and Indonesia).

283. *Id.* at 106.

greatest for the most vulnerable groups in the working-age population: young adults with low levels of education, young black adults and teens, and all teenagers.²⁸⁴ Although,

The new minimum wage literature is dominated by studies that find that minimum wage increases have an insignificant or, in some cases, a positive and significant effect on the employment of young adults and teenagers (aged 16-24) or on other subgroups Most of these studies have now generated replies arguing that raising the minimum wage significantly decreases employment in these populations.²⁸⁵

Research shows that one could expect a 10% increase in the wage minimum to result in a 5.66% decline in teenage employment.²⁸⁶ Furthermore, the estimated elasticity of employment with respect to the minimum wage for black young adults and teenagers was more than four times the elasticity for nonblack young adults and teenagers.²⁸⁷ This body of research reconfirms the neoclassical consensus, which forecasts that the most vulnerable are the ones most adversely affected by the establishment of wage minimums.²⁸⁸ Even so, Neumark and Wascher rightly concede that the effect of wage regulation on employment is only one factor in evaluating the efficacy of minimum wage regimes as a tool to improve the economic position of those at the bottom of the income distribution.²⁸⁹

Supplying one of the most comprehensive sets of analyses available, Neumark and Wascher examine minimum wage effects on the distribution of wages and earnings:

Given the evidence that minimum wages create spikes in the wage distribution at the minimum, as well as the evidence of spillover effects on wages higher up in the distribution, it was only natural for economists to explore the role of minimum wages in the trend towards greater inequality in U.S. wages²⁹⁰

In response, their research indicates:

[H]igher minimum wages tend, on average, to reduce the economic

284. See Burkhauser, Couch & Wittenburg, *supra* note 35, at 19.

285. *Id.* at 17.

286. *Id.* at 23.

287. *Id.*

288. See *id.* at 16.

289. See NEUMARK & WASCHER, MINIMUM WAGES, *supra* note 35, at 106.

290. *Id.* at 125.

well-being of affected workers. Evidence regarding the effects on workers initially paid at or just above the minimum suggests that their labor income declines as a result of minimum wage increases, reflecting negative effects of minimum wages on employment and hours. For workers earning above the minimum, such effects do not accord well with the simple neoclassical model, in which a higher minimum wage increases demand for more-skilled workers. Instead, [the effects] may reflect a desire among employers to maintain wage differentials between workers, so that a higher minimum wage puts upward pressure on other wages, amounting to cost increases.²⁹¹

Turning next to complex issues regarding the effects of minimum wages on the distribution of income, Neumark and Wascher confirm that many minimum wage workers are not members of poor families, making it more difficult for lower-income families to feel the beneficial distributional effects of minimum wages.²⁹² Although it is possible that wage minimums could reduce employment (a view supported by the evidence), it is equally possible that minimum wages could have overall benefits on poor families.²⁹³ Despite these contrasting possibilities, "the research tends to find either no evidence of distributional effects or evidence that minimum wages increase poverty."²⁹⁴

Enhanced by reference to their own original research, which has withstood academic scrutiny, Neumark and Wascher's wide-ranging analysis of minimum wage research supports two important conclusions. First, higher minimums "impose costs on low-skilled workers and low-income families without delivering benefits that offset these costs."²⁹⁵ Second, and in direct contrast to Deakin and Wilkinson's line of reasoning, the results "indicate that reductions in minimum wages would yield net benefits."²⁹⁶ On a more hypothetical level, Neumark and Wascher "are skeptical that eliminating the minimum wage would, as non-economists sometimes argue, lead to a widespread decline in wages to subsistence levels."²⁹⁷ These observations dispute Deakin and Wilkinson's fundamental claim that minimum wage regimes are justified

291. *Id.* at 139.

292. *See id.* at 148 (noting that the evidence shows that minimum wages tend to lower earnings of low-wage workers rather than raising them, but concluding that none of the factors raised in this subsection of their book are decisive).

293. *See id.* at 189.

294. *Id.*

295. *Id.* at 290.

296. *Id.*

297. *Id.* at 291.

by the goal of eliminating subsistence.²⁹⁸ Additionally, Neumark and Wascher “wonder whether eliminating the minimum wage might improve conditions of our nation’s most blighted and depressed urban areas, where one can hardly argue that policies adopted so far have been successful.”²⁹⁹ If Neumark and Wascher are correct, then Deakin and Wilkinson’s thesis that minimum wages necessarily help the poor is dubious.

Finally, since Deakin and Wilkinson rely so heavily on the work of Card and Krueger (“CK”),³⁰⁰ a few words about the deficiencies of this research is useful. Scholars backed by rich original and comparative research have questioned the validity of CK’s claims for a number of reasons.³⁰¹ Although it has been argued that CK’s study, which relies on telephone survey data, is the result of the “most sophisticated techniques available to economists,”³⁰² there is little reason to believe “that [CK’s] methodology is superior to more conventional forms of economic analysis.”³⁰³ Scholars who inspected state employment by reviewing actual payroll records, as opposed to CK’s preferred survey approach, found that an increase in wage minimums inevitably led to a decrease in employment.³⁰⁴ Although proof of cause and effect may be difficult since Deakin and Wilkinson rely heavily on CK’s largely-refuted analysis, it can be safely assumed that the authors have failed to validate their claims. However, if Deakin and Wilkinson’s contention that economic analysis fails to provide clear normative guidance to policy makers³⁰⁵ were to be momentarily accepted, it would become important to reexamine the aspirations, assumptions, goals, and objectives of minimum wage proponents from a historical perspective that is fully cognizant of the immediate consequences of implementing progressive

298. See Deakin & Wilkinson, *supra* note 31, at 158.

299. NEUMARK & WASCHER, MINIMUM WAGES, *supra* note 35, at 291.

300. See, e.g., David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772 (looking at evidence gleaned from the fast-food industry and focusing largely on the evidence from New Jersey and Pennsylvania).

301. See, e.g., Finis Welch, *Comment*, 48 INDUS. & LAB. REL. REV. 842, 842-43 (1995) (demonstrating that one of the major weaknesses of the Card-Krueger approach is a deficient data collection methodology).

302. Richard B. Berman, *Dog Bites Man: Minimum Wage Hikes Still Hurt*, WALL ST. J., Mar. 29, 1995, at A12.

303. Hutchison, *Toward a Critical Race*, *supra* note 89, at 115.

304. *Id.* (citing David Neumark & William Wascher, *The Effect of New Jersey’s Minimum Wage Increase on Fast-Food Employment: A Re-Evaluation Using Payroll Records* (1996) (on file with author)).

305. Deakin & Wilkinson, *supra* note 31, at 167.

labor ideology. This is the subject to which I now turn.

C. Assumptions, Corollaries, and Dangers to Society

We are often the captives of our pictures of the world, and in the end, if the world does not look *just* like them, their influence on our perceptions is nevertheless profound. . . . Pictures lead not only to predictions but also to principles. Our vision of what *is* guides our approach to what *ought* to be.³⁰⁶

Given Sowell's admonition that danger to society arises from the prevailing social vision of America's current era, it is noteworthy that much social commentary and a plethora of public opinion polls confirm the extraordinary popularity of minimum wages.³⁰⁷ Responding to a social vision that is ably assisted by the dogmatic assumption that such programs necessarily aid the poor and act to diminish economic inequality,³⁰⁸ the public largely accepts wage regulation as a defensible element of progressive labor ideology. Nonetheless, as we have seen, the literature plainly shows this perception to be outdated because "it is no longer the case that the beneficiaries of a minimum wage increase are disproportionately from poor households."³⁰⁹ Wage minimums, more likely than not, benefit higher-income families.³¹⁰

Stubbornly committed to the hypothesis that wage minimums benefit low-wage workers, Deakin and Wilkinson postulate that neoclassical hostility to wage minimums fails to adequately account for market failure in the low-wage sector, which constitutes a subsidy that facilitates the survival of otherwise uncompetitive firms and industries.³¹¹ In other words, this foundational claim is sustained by the assertion that neoclassical economics is fundamentally flawed. This lachrymose syllogism permits scholars to justify paternalistic intervention within markets in order to restrain the choices of parties to exchange human capital for certain levels of wages, and this process may constrain human freedom in exchange for authoritarianism led by elite hierarchs. While the market failure thesis has gained traction within the marketplace of ideas, it is not persuasive. First, prescinding

306. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW I (1997).

307. See NEUMARK & WASCHER, MINIMUM WAGES, *supra* note 35, at 249.

308. See *id.* at 249-50.

309. See *id.* at 252.

310. See WILLBORN ET AL., *supra* note 264, at 577.

311. See Deakin & Wilkinson, *supra* note 31, at 158.

from the core claim embedded in the authors' market failure allegation, alert readers will ponder the implications of the authors' foundational "survival of the fittest" argument, which celebrates the demise of uncompetitive firms. This is due to little difference between the authors' survival of the fittest preference and early progressive claims that celebrate the social benefits resulting from eliminating uncompetitive people who work in uncompetitive firms and industries and, hence, are a drag on the nation's economic and moral health.³¹² Although there is more to say about the propensity of leading progressives to tie the nation's health to the elimination of uncompetitive people, Deakin and Wilkinson's repeated market failure assertion pushes dangerously forth with little evident concern for vulnerable workers who are likely to be terminated from their jobs when society raises the minimum wage rate.

It bears repeating that the literature shows a disproportionate number of individuals disemployed by wage minimums to be, in fact, African American teenagers and young adults.³¹³ Additionally, data concerning the longer-run effects of wage minimums involving skills acquisition and schooling, which affect future labor market outcomes, shows that wage minimums have a much more adverse effect on blacks.³¹⁴ Deakin and Wilkinson's objective of eliminating uncompetitive firms, in combination with their admission that two-thirds of the relevant studies support the hypothesis that minimum wages have a negative employment impact,³¹⁵ suggest two possible conclusions: (1) either they have surrendered to willful blindness toward the plight of low-wage workers; or (2) they have embraced the teachings of early progressives who agreed that "minimum-wage-induced job loss was a social benefit because it performed the eugenic service of ridding the labor force of the 'unemployable.'"³¹⁶

Although the "[p]rogressive position in contemporary times has been reconfigured to reflect a stronger commitment to personal autonomy and freedom in arenas such as abortion and civil rights,"³¹⁷ and while charity commends that readers absolve the authors of bad intentions, lurking in the shadows of Deakin and Wilkinson's analysis is evidence that indicates striking parallels between their claims and the stated objectives of early progressives in the United States or labor union

312. See, e.g., Bernstein & Leonard, *supra* note 38, at 186.

313. See, e.g., NEUMARK AND WASCHER, MINIMUM WAGES, *supra* note 35, at 221.

314. See *id.*

315. Deakin & Wilkinson, *supra* note 31, at 156.

316. See Bernstein & Leonard, *supra* note 38, at 186.

317. Hutchison, *Choice, Progressive Values*, *supra* note 47, at 454.

exclusionists in pre-Mandela South Africa. Recall Seager's audacious admonition that in order to maintain a capable and efficient race of people, society must "courageously cut off lines of heredity that have been proved to be undesirable by isolation or sterilization,"³¹⁸ or Commons' contention that allowing inferior races to work engenders an economic competition that pays no deference to superior races and lowers overall wages, leading the race with the lowest level of necessities to displace the others.³¹⁹ Commons' and Seager's statements signify that an efficient way to make the nation safe for "deserving" workers is to reduce the employment opportunities of "unemployables."³²⁰ Evenhanded observers can be pardoned for concluding that such assertions are on all fours with ongoing minimum wage advocacy. Alternatively, consider the claims made by white supremacist workers in pre-Mandela South Africa who "saw the payment of low wages to blacks as exploitation of the whites."³²¹ Indeed, in South Africa and elsewhere, there was and is a widespread belief that raising the minimum wage would make "legalized racial discrimination unnecessary since it would mandate wages exceeding black productivity" and thereby reduce the incentive to hire blacks.³²²

Striving to achieve a world where social justice presumptions overrule the empirical evidence, Deakin and Wilkinson's minimum wage advocacy reflects the insistent influence of exclusionary values. This influence can be seen most poignantly in their explicit dependence on the rhetoric of Fabians such as Sidney and Beatrice Webb, who sought to promote the efficient use of labor and stabilize its supply with a series of institutional reforms, including minimum wages.³²³ Inexplicably, the authors ignore the Webbs' incandescent embrace of state-sponsored unemployment as both the solution to the problems posed by "unemployables" and a sign of the nation's health.³²⁴ Apparently validating John Stuart Mill's commitment to Social Darwinism, which excludes an "inferior class of labourers" from the workforce,³²⁵ Deakin and Wilkinson also manage to ignore the Fabians'

318. Bernstein & Leonard, *supra* note 38, at 186 (quoting Seager, *supra* note 163, at 10)).

319. *See id.* at 181 (citing COMMONS, *supra* note 132, at 151)).

320. *See id.* at 181, 186.

321. *See* WALTER E. WILLIAMS, SOUTH AFRICA'S WAR AGAINST CAPITALISM 64 (1989).

322. *Id.* at 63.

323. *See* Deakin & Wilkinson, *supra* note 31, at 165.

324. *See* Bernstein & Leonard, *supra* note 38, at 186 (citing WEBB & WEBB, *supra* note 130, at 785)).

325. W.H. HUTT, THE THEORY OF COLLECTIVE BARGAINING: 1930-1975, at 10 (1980) (quoting John Stuart Mill)).

repugnant observation that employers who paid less and workers who received less than the hierarchically-determined “living wage” were parasites.³²⁶ Whether the parallels between Deakin and Wilkinson’s contentions completely mirror those of avowed opponents of marginalized workers or are purely coincidental is a question that requires future exploration. For our present purposes, what is beyond dispute and subsists beyond the question of whether progressive policy preferences are infected with racist intent is the fact that the *racist effects* of progressive policies survive.

Additionally, we should note the conspicuous weakness at the core of Deakin and Wilkinson’s market failure argument. Frequently posited as ontology of necessity and embraced as a compelling faith, market failure claims ignore the probability of government failure or, alternatively (due to the rich possibilities associated with majoritarian capture),³²⁷ the probability that government intervention disfavors the individuals and groups that lack economic and political clout.³²⁸ Since it was only natural that progressive programs were justified to the wider world by focusing on intended and “deserving” beneficiaries of such programs without fairly considering the adverse effects that such policies had on those harmed,³²⁹ and since the victims lacked sufficient political and economic influence to protect themselves from the inherent authoritarianism of democratic government,³³⁰ the specter of intentional domination and control has always been a threat to the viability of African Americans and others. Nor has this threat ended. For example, consider the motivation behind labor union support for the Davis-Bacon Act or state-based versions of this law.³³¹ Such laws honor the legacy of Robert Bacon who wished to protect “white union men” from losing their jobs to “defectives.”³³² Unsurprisingly, such statutes operating as super-minimum-wage laws, protect, and are intended to protect, white workers from competing with low-skilled and lower-wage African

326. See Bernstein & Leonard, *supra* note 38, at 180.

327. See, e.g., JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 4 (1993) (“Modern democratic states have themselves become weapons in the war of all against all, as rival interest groups compete with each other to capture government and use it to seize and redistribute resources among themselves”).

328. See Hutchison, *Racial Exclusion*, *supra* note 7, at 13.

329. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 11, at 72.

330. See, e.g., Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in OUT OF AND INTO AUTHORITARIAN LAW 125, 125 (Andras Sajó ed. 2002) (stating that “[a]uthoritarianism is an inherent structural tendency of democratic regimes”).

331. See Hutchison, *Employee Free Choice*, *supra* note 42, at 412.

332. See *id.* (“Bacon denied anti-African American animus, but made clear his discomfort with ‘defective’ workers taking jobs that ‘belonged’ to White union men”).

Americans³³³ either at the federal or state level.³³⁴ This illustration demonstrates that "[m]ajoritarian seizure gains traction by invoking social justice rhetoric" (protecting the deserving from unfair competition from "defectives" or other "unemployables"), "but allows powerful interest groups to exclude their weaker competitors from the labor markets they wish to dominate."³³⁵ This observation provides readers with a partial explanation for the durability and justificatory power of the market failure thesis.

A fuller explanation emerges upon reconsidering the empirics of minimum wages, including the adverse employment and distributional effects (i.e., income effects) for vulnerable individuals and groups, coupled with a recapitulation of the immediate and continuing consequences of New Deal labor law. Although markets fail, this composite explanation fractures the legitimating force of the market failure thesis. Promising more than it could ever deliver, this thesis, when merged with the fact that minimum wage beneficiaries are unlikely to consist of low-wage minority workers, is strongly suggestive of two alternative explanations for the existence of wage regulation: government failure on one hand, or a deliberate effort to improve society by ridding the nation of "unemployables" on the other.³³⁶ Within the limits established by bounded rationality, either explanation seems dreadfully promising in view of the fact that "the ghosts of the Progressive Era continue to subjugate African Americans today."³³⁷ Goldberg cogently explains:

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

333. See John Stossel, *Government Against Blacks*, TOWNHALL.COM (June 1, 2011), http://townhall.com/columnists/johnstossel/2011/06/01/government_against_blacks.

334. See, e.g., Hutchison, *Employee Free Choice*, *supra* note 42, at 412 (describing the exclusionary effects of Pennsylvania's prevailing wage law on African American workers).

335. Hutchison, *Choice, Progressive Values*, *supra* note 47, at 438.

336. See Bernstein & Leonard, *supra* note 38, at 186-187.

337. Hutchison, *Racial Exclusion*, *supra* note 7, at 13 (citing GOLDBERG, *supra* note 72, at 268-69)).

threw millions of blacks out of work and off their land.³³⁸

Since the racially-tinged effects of New Deal labor law persist, such as the yawning unemployment gap between white and black Americans,³³⁹ and since vulnerable workers are still disproportionately and predictably harmed by minimum wage regimes³⁴⁰ such as the FLSA, the Davis-Bacon Act, and state wage minimums, sophisticated hermeneutics are not necessary to show that dependence upon the market failure thesis that justifies such regulation remains a clear and present danger to the future of low-wage workers. This is true even if one assumes that the results of progressive labor ideology were not deliberate.

Informed by empirical evidence, conscious of the progressive suppositions, and responding to the likelihood of regulatory failure made real by apparatchiks brimming with overconfidence in both themselves and the benevolence of the state, minimum wage skeptics can be forgiven for perceiving persistent political and scholarly support of wage reform initiatives as part of a policy preference that would rid society of the “unfit” and the “unemployables.”³⁴¹ This possibility implies that minimum wage regimes, however justified, are an abuse of power³⁴² responding favorably to the demand by progressives to exclude various groups in the name of progress.³⁴³

History verifies that various strands of American progressive thought, nimbly supported by progressive ideas from abroad, symbolize the ossification of the belief that the government has a responsibility to protect deserving workers.³⁴⁴ Recall that in its origins, this morally-problematic platform required the social control of undeserving workers so much so that early “labor-legislation advocates defended the exclusion of unfit workers not as an ostensibly necessary evil, but as a positive social benefit.”³⁴⁵ Enlisting either an expansive conception of state police power or a broad interpretation of federal authority premised on the Commerce Clause,³⁴⁶ this contagious move “marked not only the

338. GOLDBERG, *supra* note 72, at 268-69.

339. Hutchison, *Racial Exclusion*, *supra* note 7, at 13.

340. See Burkhauser, Couch & Wittenburg, *supra* note 35, at 17.

341. For a discussion of such issues, see Bernstein & Leonard, *supra* note 38.

342. See generally Hutchison, *Toward a Critical Race*, *supra* note 89 (analyzing minimum wage regimes to determine if they are masking abuses of power).

343. See Bernstein & Leonard, *supra* note 38, at 177.

344. See *id.* at 186.

345. See *id.* at 177.

346. See, e.g., Epstein, *Lest We Forget*, *supra* note 181, at 791 (stating that *Plessy v. Ferguson* “marked an unwarranted aggrandizement of the state police power”).

advent of the welfare state but also an extraordinary vogue for race thinking and for eugenics."³⁴⁷ While today's policy makers refuse to defend exclusionary wage legislation or other forms of "social justice" legislation on grounds of racial superiority, they are prepared to look to the Progressive Era and the New Deal as sources of inspiration for renewed legal innovation as part of their insistence that centralized government power is the correct solution to human problems.³⁴⁸

Favoring a sharp expansion in regulation premised on the viewpoint that "social progress equate[s] active government with good government,"³⁴⁹ government intervention is offered under a broad banner of equality that appears to require the destruction of liberty of the most vulnerable among us.³⁵⁰ This evisceration of human liberty is accomplished through a policy of reclassifying low-wage workers as uncompetitive and thereby unworthy of work. This process, which actually worsens the condition of purported beneficiaries rather than delivering benefits to them, is filled with contradictions. The pertinent question becomes whether such a process benefits the public interest, national efficiency, and the interest of marginalized Americans, particularly African Americans. In the context of minimum wage law, this article responds to this question in the negative. Whether one relies exclusively on the empirical record (which undermines the normative and efficiency case), or, alternatively, refracts Deakin and Wilkinson's argument through a prism supplied by an analysis of the history, foundational assumptions, and consequences of the progressive movement (which undermines the moral case), it appears that the authors' wage regulation advocacy is Panglossian.

IV. CONCLUSION

Throughout the world, the great ideological crusades fought by twentieth-century intellectuals spanned a diverse array of fields: the eugenics movement, progressive labor initiatives, the welfare state, socialism, and communism.³⁵¹ Such highly disputed crusades are alike in their moral exaltation of the progressive ideology that is anointed

347. Bernstein & Leonard, *supra* note 38, at 177.

348. See Hutchison, *Choice Progressive Values*, *supra* note 47, at 454.

349. See EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 11, at 7.

350. See Roger Scruton, *Liberty and Equality: American Liberalism Sacrifices the Former to Impose the Latter, Not to Mention What It's Done to Morality*, AM. SPECTATOR, June 2008, at 38, 38.

351. See SOWELL, VISION OF THE ANOINTED, *supra* note 37, at 5.

above public interest.³⁵² Hence, the very different views of rank-and-file citizens, including members of vulnerable populations, are superseded by progressive presumptions that are imposed through government power.³⁵³ Endeavoring to save the masses from themselves and society from itself, hierarchs favor solutions that rarely work.³⁵⁴ Correlatively, society's most vulnerable populations remain prey to subjugating policies.

Relying on more than pure empirical evidence and conventional policy prescriptions, this reply essay explains why Deakin and Wilkinson's analysis is, in several respects, inadequate. Although the authors' analytic inadequacy arises from many sources, three sources deserve special attention. First, Deakin and Wilkinson fail to impartially consider the entire body of empirical evidence. Since wage minimums have largely achieved their subordinating potential, it is noticeable that the authors neglect to clarify the unintended consequences of minimum wages or, alternatively and more ominously, the nefarious intent of many minimum wage proponents. For instance, Deakin and Wilkinson ignore the fact that "labor unions have an incentive to support the minimum wage because it shifts labor demand toward higher-skilled unionized workers."³⁵⁵ While neither labor advocates (i.e., present-day progressives) nor contemporary labor unions boast about labor unions' racially exclusionary past or offer a prescription for attaining a racially discriminatory future, subordinating motives remain deducible. Battered by the vagaries of modern history, including declining private sector union density rates that threaten unions' political and economic influence, and burdened by the irreparable disintegration of worker solidarity, labor unions and their ideological allies have succumbed, as Public Choice Theory predicted, to the incentive to pursue hegemony through politics and pro-labor legislation.³⁵⁶ That is why recent efforts to raise the minimum wage have drawn strong labor union support.³⁵⁷ If

352. *Id.*

353. *See id.*

354. *See, e.g.,* Somin, *supra* note 93, at 650 (describing the decrease in America's GNP as a result of the NIRA).

355. *See* NEUMARK & WASCHER, MINIMUM WAGES, *supra* note 35, at 253. *See also* MORGAN O. REYNOLDS, MAKING AMERICAN POORER: THE COST OF LABOR LAW 29 (1987) ("To the extent that unions are successful, they redistribute income toward their members, who are predominantly white, male, and well paid, at the expense of consumers as a whole, taxpayers, nonunion workers, the poor, and the unemployed—groups with lower average incomes than union members"); ESTLUND, *supra* note 182, at 55 (showing that the FLSA was largely supportive of collective bargaining, which was seen as the primary vehicle for improving wages and working conditions).

356. *See* Hutchison, *Reclaiming the First Amendment*, *supra* note 16, at 705.

357. *See, e.g.,* Steven Malanga, *Let Them Eat Minimum Wage: How a Group of Gotham*

minimum wage regimes inflict pain, it is foreseeable that the adverse effects of such regimes are largely borne by the most vulnerable among us, giving rise to the distinct probability that racially tinged effects will result, irrespective of the stated motive. Although minimum wages are defended as positive vehicles that diminish marginalization, the neoclassical evidence still shows that wage regulation contributes to human misery, and the empirical record provided by Deakin and Wilkinson fails to destabilize this traditional view.

Second, and in relation to the first observation, the authors plainly fail to substantiate their concluding claim that there is probably a good efficiency-based case for minimum wage legislation.³⁵⁸ This is because the empirical record neither supports the contention that wage minimums have either no impact or a positive impact on the employment of low-wage workers, nor does it substantiate the authors' contention that market efficiency is improved by the removal of so-called uncompetitive firms and workers from the economy. Wage minimums, rather than improving national efficiency and the well being of low-wage workers, expand inequality and social exclusion by further constraining the income, employment, and liberty of vulnerable groups.³⁵⁹

Third, the authors' analytical shortcomings betray their palpable sympathy for progressive values and assumptions. As we have seen on countless occasions, social justice dogma, forged in the crucible of exclusionary presumptions and propelled by the logic of Social Darwinism, leads inevitably to disproportionately adverse racial effects. Since such results are foreseeable, it is highly likely that the progressive labor ideology sustaining Deakin and Wilkinson's analysis constitutes a self-preoccupied falsifying veil that conceals reality and places the lives and dignity of disadvantaged Americans at risk. Properly appreciated, the authors' advocacy snubs the strong normative case against wage regulation and implies that wage minimums can be seen as part of a hopeful ideological crusade that wages war on "unemployables."

Business Leaders Plans to Help the Poor, THE CITY J. (July 16, 2004), <http://www.city-journal.org/printable.php?id=1663> (explaining that a raise in the minimum wage will strengthen unions and result in a loss of jobs for low-wage workers who are not unionized). See also James Sherk, *Union Members, Not Minimum-Wage Earners, Benefit When the Minimum Wage Rises*, THE HERITAGE FOUND. (Feb. 7, 2007), www.heritage.org/research/economy/wm1350.cfm (explaining how "organized labor led the fights to raise the minimum wage in six states and to give Democrats control of Congress, in part on a platform for raising the [federal] minimum wage").

358. See Deakin & Wilkinson, *supra* note 31, at 167.

359. See NEUMARK & WASCHER, MINIMUM WAGES, *supra* note 35, at 141-48 (describing the effects of minimum wage increases on employment).

