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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 Professor of Law, George Mason University School of Law. I am grateful to Elizabeth McKay and Michael Yadanza for helpful comments and suggestions. I am also grateful to the Law and Economics Center at George Mason University School of Law for funding this research. © Harry G. Hutchison

² THOMAS SOWELL, BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY 421 (3d ed. 2007) [hereinafter SOWELL, BASIC ECONOMICS].


⁴ Id.


African Americans.\textsuperscript{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. \ldots We have good reasons to buy and sell, to exchange, and to seek lives that can flourish on the basis of transactions.\textsuperscript{8}

Sen is a reflective defender of markets, and he supplies a nuanced view of income, wealth, and advantage.\textsuperscript{9} For example, he shows that women worldwide have been liberated through access to markets.\textsuperscript{10} This is true despite the commitment of early progressive elites to statutory innovation enforcing female inferiority.\textsuperscript{11} While society's intentional efforts to subordinate women and others have waned,\textsuperscript{12} the human yearning for regulation, not necessarily motivated by virtue ethics, abounds in market economies.\textsuperscript{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.\textsuperscript{14} If economics is more than "the theology of a new religion of abundance" and human progress,\textsuperscript{15} then it is likely that

\begin{thebibliography}{15}
\bibitem{Sen2009} Amartya Sen, \textit{The Idea of Justice} 253 (2009) ("[I]ncome or wealth is an inadequate way of judging advantage \ldots").
\bibitem{McCloskey2008} McCloskey, supra note 8, at 29.
\bibitem{Epstein2006} See, e.g., Richard A. Epstein, \textit{How Progressives Rewrote the Constitution} 90 (2006) [hereinafter Epstein, \textit{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. \textit{Id.} In the 1908 Supreme Court case \textit{Muller v. Oregon}, Brandeis, citing these studies, successfully defended an Oregon statute limiting hours of work for women on grounds of innate female inferiority. \textit{Id}.
\bibitem{McCloskey2008} See McCloskey, supra note 8, at 30.
\bibitem{Loder2008} See Reed Elizabeth Loder, \textit{Epistemic Integrity and the Environmental Future}, 32 \textit{Environ. Envtl. L. \\& Pol'y} J. 1, 3 n.6 (2008) (explaining that virtue ethics place an emphasis on human character).
\bibitem{McCloskey2001} McCloskey, supra note 8, at 196 (citing Robert Nelson, \textit{Economics as Religion} 267 (2001)).
\end{thebibliography}
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

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18. Id.


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.\(^{29}\)

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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.


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).

Coinciding with rising levels of economic inequality that place vulnerable workers at risk, the publication of Simon Deakin and Frank Wilkinson's article, *Minimum Wage Legislation*, provides impetus to a new body of social science research. 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. 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, despite the existence of an economic consensus that challenges the advisability of such a policy. 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).
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 investment, 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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.’”\textsuperscript{39} Equally disturbing are statistics suggesting that black males receive prison sentences rather than college diplomas at a ratio of one hundred to one.\textsuperscript{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.\textsuperscript{41} These disparities remain today, thus further isolating African Americans.\textsuperscript{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 . . . .”\textsuperscript{43} In the 1990s, for example, “the size of the black underclass [grew] disproportionately,” reinforced by the rise in the black unemployment rate.\textsuperscript{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

\begin{footnotesize}
\textsuperscript{36} Nichol, \textit{supra} note 2, at 1.
\textsuperscript{37} \textit{See generally}, \textsc{Thomas Sowell, The Vision of the Anointed: Self-Congratulation as a Basis for Social Policy} 1-2 (1995) [hereinafter, \textit{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).
\textsuperscript{39} \textsc{Henry Louis Gates, Jr. \\& Cornel West, The Future of the Race} 24 (1996).
\textsuperscript{40} \textit{Id.} at 24-25.
\textsuperscript{43} \textsc{Glenn C. Loury, The Anatomy of Racial Inequality} 101 (2002).
\textsuperscript{44} \textsc{Gates \\& West, \textit{supra} note 39, at xii.}
\end{footnotesize}
blacks increased from 16.3 percent to 17.0 percent. 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. 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. 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. Part II reviews Deakin and Wilkinson’s analysis. Part III refracts the authors’ claims and contentions through a prism provided by contrary empirical evidence.


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).


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, it is unfortunate that United States courts, like much of society, have rarely intervened to thwart the expansion of social justice legislation. Even though such legislation imposes a substantial burden on society and saddles vulnerable individuals and groups with disproportionate harm, 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. 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.

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.” Deakin and Wilkinson’s article functions as a plinth supporting the prevailing vision of our time: the necessity of government intervention within markets. 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, Bernstein, Bernstein and Leonard, Epstein, and Moreno 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.

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. . . .

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.” 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. 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. 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.
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’”).
64. Id.
65. Id.
naturally toward manipulation and control, 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." 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." They used noble notions of public interest and fairness to claim that their programs and policies actually helped the underprivileged citizens they targeted. Thus, some commentators "continue to insist that the New Deal was a positive step toward social justice and a new world order."

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. 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," labeling conservative opponents to eugenics as "social Darwinists." Progressive ideals, infused with Herbert Spencer's thinking, were "essentially a variant of English utilitarianism, with a more developed argument on progress through evolution." In fairness, Darwinian thought, as Spencer exemplified, could be taken in either a laissez-faire or statist direction. Progressives rejected "the notion of a republic founded on the natural rights tradition in favor of a living constitution . . . and ultimately
succeeded to the fiction that progress required the supervision of an educated class groomed for leadership.\textsuperscript{76} Hence, progressive elites proposed selective breeding and emphasized human perfection in combination with centralized power and restructured economic systems.\textsuperscript{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,\textsuperscript{78} and second, by exchanging or eliminating "unfit" citizens in favor of "desirable" ones.\textsuperscript{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,\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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,

\textsuperscript{76} Hutchison, Choice, Progressive Values, supra note 47, at 466 (citing PESTRITTO, supra note 74, at 11-12).
\textsuperscript{77} Hutchison, Employee Free Choice, supra note 42, at 381 (citing GOLDBERG, supra note 72, at 270-77).
\textsuperscript{78} Hutchison, Choice, Progressive Values, supra note 47, at 466.
\textsuperscript{79} See Hutchison, Waging War on the "Unfit"?, supra note 47, at 4.
\textsuperscript{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).
\textsuperscript{81} GOLDBERG, supra note 72, at 135 (quoting H. G. WELLS, THE WAR IN THE AIR 115 (Kessinger Publ'g 2004) (1908)).
\textsuperscript{82} Id. (quoting H. G. Wells).
\textsuperscript{83} Hutchison, Employee Free Choice, supra note 42, at 381 (citing GOLDBERG, supra note 72, at 86).
\textsuperscript{84} GOLDBERG, supra note 72, at 86.
Woodrow Wilson. 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." In 1913, he vowed to appoint only progressives to his administration. 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, Critical Race theorists, 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, Wilson assertively implemented "an agenda that created socially constructed racial categories, enforced racial disparity, and advanced racial stigma." It also diminished human liberty and ultimately placed a regulatory drag on the economy.

Emblematic of Wilson's approach to race was his "advocacy of progressive imperialism in order to subjugate, and thereby elevate, lesser races." Unlike classical liberals who fought racial discrimination,
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.” A necessary predicate for lasting democracy was, according to Wilson, “homogeneity of race and community of thought and purpose among the people.” Although Wilson, America’s preeminent liberal, had a historical reputation as a “far-sighted progressive,” and despite the fact that modern liberals consider themselves highly enlightened on the issue of race, the record shows that in addition to his commitment to Darwinian jurisprudence and eugenics, Wilson was a “racist retrograde.” Driven to attain social progress, and effectively presuming that Africans and South Americans were “savages,” he insisted that giving blacks the right to vote was “the foundation of every evil in this country.” Matching this intuition, it was no coincidence that the U.S. Civil Service was resegregated during Wilson’s Progressive regime. 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, which was implemented by Wilson’s former Assistant Secretary of the Navy and his ideological successor, FDR.
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. Early progressives were provoked by the deduction that a unified state required an increasingly centralized regulatory apparatus. 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." They believed that uniting the disciplines of socioeconomics, philosophy, biology, and the law would change the world for the better, perhaps forever.

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

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. Operating at times with either tunnel vision or willful blindness, they focused "their attention exclusively on the beneficiaries
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.
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,” progressives “judged an impressive array of human groups, male Anglo-Saxon heads of household excepted, to be unworthy of work, or ‘unemployable.’” And who were the “unemployables”? Those individuals “who, owing to putative hereditary debility, earned less than what American reformers called a ‘living wage.’”

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. 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. 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. 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.” 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. “Because race, not productivity, determined living standards, Commons could populate his low-wage-races category with the industrious and lazy alike.” According to Commons, “African Americans . . . were ‘indolent and fickle,’ which explained why slavery was defensible, even necessary.”

The widespread acceptance of such modern and highly racialized

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126. Id.
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)).
views\textsuperscript{136} 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,"\textsuperscript{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,\textsuperscript{138} gender-specific labor standards,\textsuperscript{139} and minimum wage and labor regulation.\textsuperscript{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."\textsuperscript{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."\textsuperscript{142} They were driven to prevent the Anglo-Saxon stock from being overwhelmed by racially inferior "defectives, delinquents and dependents."\textsuperscript{143} Believing that "social progress is 'a higher law than equality,'" progressive leaders "proposed the 'eradication of the vicious and inefficient.'"\textsuperscript{144} Operating in stark contrast to Lochnerian liberty-of-contract jurisprudence, which was invoked to justify expanding constitutional protection of African Americans and women,\textsuperscript{145} the social progress movement reached its

\textsuperscript{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").

\textsuperscript{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)).

\textsuperscript{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).

\textsuperscript{139} See id. at 188-90.

\textsuperscript{140} See id. at 186-87.

\textsuperscript{141} Id. at 183 (citing John Higham, Strangers in the Land: Patterns of American Nativism 1860-1925, at 41 (1978)).

\textsuperscript{142} Id. (quoting Irving Fisher, Impending Problems of Eugenics, 13 SCI. MONTHLY 214, 227 (1921)).

\textsuperscript{143} Id.

\textsuperscript{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)).

apotheosis in Justice Holmes' peroration in *Buck v. Bell*, which defended the benefits of majoritarianism, racialized science, and human exclusion. This social vision, predicated in part on the growing fear of "race suicide," 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.

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.'" 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. 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."

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

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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 unresentfully 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)).
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”).
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. 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 . . . ." 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." 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." As a consequence of unionists' tenacious surrender to racial hierarchy, the displacement of African American workers became a serious problem.

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. 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. 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,\(^\text{169}\) "[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."\(^\text{170}\) 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."\(^\text{171}\) Predicated on such theories, the Fair Labor Standards Act (FLSA),\(^\text{172}\) 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.\(^\text{173}\) 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."\(^\text{174}\)

The FLSA represents an explicit commitment to low-wage workers putatively protecting them from wage theft\(^\text{175}\) in accordance with the premise that "unregulated . . . labor conditions . . . negatively affected the 'health, efficiency and general well-being' of workers."\(^\text{176}\) 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."\(^\text{177}\) 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).


\(^{171}\) Id. at 1342.


\(^{173}\) See GEORGE C. LEEF, 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).


\(^{175}\) 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 Abdelmesseh & 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. 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.

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. Meanwhile, states and some municipalities (depending on state law) took advantage of an expansive interpretation of the police power "to set higher wage and hour standards and enforce those standards themselves." 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, the FLSA was reinforced by broad statutory definitions that were designed to accomplish the remedial purpose of the law. 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).
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).
183. See A.B.A. FED. LAB. STANDARDS LEGIS. COMM., THE FAIR LABOR STANDARDS ACT 3-11 (Ellen C. Keams 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." Premised on a faith in the now-familiar "race to the bottom" argument, 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."

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. 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." Congress's failure to amend the law to prohibit discrimination illustrates its ability to disrupt the lives of workers that social science had labeled "undesirables." Creating a corporatist process that benefited large economic entities by destroying their smaller and less politically-influential competition, the NIRA and its progeny produced a massive public policy disaster.

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.
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.” By taking “advantage of the monopoly powers granted to them by the NIRA and its minimum wage provisions” and conceiving of labor organizations as “white jobs trusts,” labor unions displaced black workers. 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. This ongoing process reified social stratification. 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. 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. The belief behind this system was that “African Americans were mentally inferior and therefore were incapable of performing these jobs.” 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.

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).
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.” 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. 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. 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. 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.” Providing useful historical background by adverting to the “solidaristic and egalitarian” nature of France’s minimum wage, 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.
216. See id.
217. Id. at 150.
218. See id. at 153.
collective self-regulation by trade unions and employers. 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. 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. This perspective accepts the contention that the payment of subsistence wages, if the practice exists, constitutes “an implicit subsidy from the rest of the community.” It also provides a rationale for wage regulation as an essential device to assure that workers receive a living wage. 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, 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.

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. See 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{232} Critics of the neoclassical viewpoint have suggested that “these studies could not be

\begin{itemize}
\item \textsuperscript{227} Deakin & Wilkinson, supra note 31, at 154.
\item \textsuperscript{228} Id. (claiming that “[firms 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”).
\item \textsuperscript{229} See id. at 154-55.
\item \textsuperscript{230} See id. at 155.
\item \textsuperscript{231} See id. at 158.
\item \textsuperscript{232} Id. at 155.
\end{itemize}
regarded as definitive since the estimated employment effects are small and also highly sensitive to the choice of sample period.\textsuperscript{233} Instead, Deakin and Wilkinson rest their judgment on American case studies authored by Card, Katz, and Krueger,\textsuperscript{234} which examine variations in minimum wage increases among the states.\textsuperscript{235} Premised on such studies, Card, Katz, and Krueger asserted that minimum wages increase both the earnings and the employment of vulnerable populations.\textsuperscript{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.\textsuperscript{237} Deakin and Wilkinson argue that such studies, when taken together, refute the neoclassical understanding of minimum wage increases.\textsuperscript{238}

Nevertheless, the authors concede that as of 2008, only two percent of America’s working population receives the minimum wage.\textsuperscript{239} They also admit that two-thirds of the relevant studies indicate that minimum wages produce negative employment effects.\textsuperscript{240} Such studies show “stronger disemployment effects for the least-skilled groups.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{243}

Emphasizing the empirical observations contained within David Card and Alan Krueger’s \textit{Myth and Measurement},\textsuperscript{244} Deakin and

\begin{itemize}
\item 233. \textit{Id.}
\item 234. \textit{See id. at 155-56.}
\item 235. \textit{See id.}
\item 236. \textit{See id. at 155.}
\item 237. \textit{See id. at 156.}
\item 238. \textit{See id.}
\item 239. \textit{Id. at 153.}
\item 240. \textit{Id. at 156.}
\item 241. \textit{See id.}
\item 243. \textit{See Deakin & Wilkinson, supra} note 31, at 156.
\item 244. \textit{CARD & KRUEGER, supra} note 32.
\end{itemize}
Wilkinson assert that this book and the prior research on which it was based were important markers in solidifying new empirical research and reigniting a new movement that views minimum wage increases as an essential anti-poverty device. Consistent with this view, poverty (in the sense of a lack of money and assets) 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, some economists contend that the studies show that the earnings and employment of teenagers correlate positively with increased minimum wages. "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."

Relying principally on U.S. findings, the authors insist that wage regulation cannot be seen as "an 'artificial' interference in the free market." 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." Although this statement is remarkable given the subordinating capacity of labor unions, 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." Based on this contention and the claim that some studies show that minimum wage increases produce a positive employment impact, 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.
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.
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.

If Deakin and Wilkinson are correct, then the cascade of popular and scholarly opinion favoring minimum wage increases 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. 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 have only a weak link to real-world conditions.” 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.”

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 necessaries of life."

This thesis is both presumptive and credulous: presumptive because the authors' claim assumes facts not in evidence, 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 necessaries of life since family members may cross-subsidize one another for a variety of reasons.

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. 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. 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, 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."

Since adducible data shows that the primary beneficiaries of wage-
rate minima are not necessarily members of poor households, 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.

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. 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.

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

268. See, e.g., WILLBORN ET AL., supra note 264, at 577.
270. Deakin & Wilkinson, supra note 31, at 150.
Leading minimum wage scholars Neumark and Wascher have built upon more than twenty years of original research to author a book 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.” 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. However, it is clear that Neumark and Wascher’s examination of early evidence of the lagged effects of minimum wages, of evidence associated with employment and school enrollment, of aggregate effects and trend differences in the state-level panel data approach, of data from industrialized countries (including data from the United Kingdom substantiating the disemployment effects of wage regulation), of studies from developing countries, 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.”

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

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

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

239. **Id.** at 57.

240. **See id.**

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

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

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

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

245. **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).

246. **See id.** at 95.

247. **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.

248. **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.\textsuperscript{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.\textsuperscript{285} Most of these studies have now generated replies arguing that raising the minimum wage significantly decreases employment in these populations.

Research shows that one could expect a 10% increase in the wage minimum to result in a 5.66% decline in teenage employment.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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. wages\textsuperscript{290}

In response, their research indicates:

\textbf{[H]}igher minimum wages tend, on average, to reduce the economic

\textsuperscript{284}. \textit{See Burkhauser, Couch & Wittenburg, supra note 35, at 19.}
\textsuperscript{285}. \textit{Id. at 17.}
\textsuperscript{286}. \textit{Id. at 23.}
\textsuperscript{287}. \textit{Id.}
\textsuperscript{288}. \textit{See id. at 16.}
\textsuperscript{289}. \textit{See NEUMARK & WASCHER, MINIMUM WAGES, supra note 35, at 106.}
\textsuperscript{290}. \textit{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

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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. 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 polices adopted so far have been successful.” 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”), 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. 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,” there is little reason to believe “that [CK’s] methodology is superior to more conventional forms of economic analysis.” 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. 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 makers 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

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298. See Deakin & Wilkinson, supra note 31, at 158.
299. NEUMARK & WASCHER, MINIMUM WAGES, supra note 35, at 291.
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).
303. Hutchison, Toward a Critical Race, supra note 89, at 115.
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.\(^\text{306}\)

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.\(^\text{307}\) 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,\(^\text{308}\) 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.”\(^\text{309}\) Wage minimums, more likely than not, benefit higher-income families.\(^\text{310}\)

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.\(^\text{311}\) 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 1 (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. 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. 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. 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, 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.’”

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

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. 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. Apparently validating John Stuart Mill’s commitment to Social Darwinism, which excludes an “inferior class of labourers” from the workforce, Deakin and Wilkinson also manage to ignore the Fabians’
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.


\[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”).

http://scholarlycommons.law.hofstra.edu/hlelj/vol29/iss1/3
Americans either at the federal or state level. 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.” 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. 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.”

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

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).
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 power 342 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.
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." 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.

Favoring a sharp expansion in regulation premised on the viewpoint that “social progress equate[s] active government with good government,” government intervention is offered under a broad banner of equality that appears to require the destruction of liberty of the most vulnerable among us. 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. 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.
351. See Sowell, Vision of the Anointed, supra note 37, at 5.
above public interest.\textsuperscript{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.\textsuperscript{353} Endeavoring to save the masses from themselves and society from itself, hierarchs favor solutions that rarely work.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{356} That is why recent efforts to raise the minimum wage have drawn strong labor union support.\textsuperscript{357} If

\begin{itemize}
\item \textsuperscript{352} Id.
\item \textsuperscript{353} See id.
\item \textsuperscript{354} See, e.g., Somin, supra note 93, at 650 (describing the decrease in America’s GNP as a result of the NIRA).
\item \textsuperscript{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).
\item \textsuperscript{356} See Hutchison, Reclaiming the First Amendment, supra note 16, at 705.
\item \textsuperscript{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. 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.

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.”