



School of Law

EXCLUDING UNFIT WORKERS: SOCIAL CONTROL VERSUS SOCIAL JUSTICE IN THE AGE OF ECONOMIC REFORM

**David E. Bernstein, Professor,
George Mason University School of Law**

**Thomas C. Leonard, Professor, Dept. of Economics,
Princeton University**

***Law and Contemporary Problems,*
Vol. 72, No. 3, Summer 2009, pp. 177-204**

**George Mason University Law and Economics
Research Paper Series**

10-04

This paper can be downloaded without charge from the Social Science Research Network at http://ssrn.com/abstract_id=1533570

EXCLUDING UNFIT WORKERS: SOCIAL CONTROL VERSUS SOCIAL JUSTICE IN THE AGE OF ECONOMIC REFORM

DAVID E. BERNSTEIN*

THOMAS C. LEONARD**

I

INTRODUCTION

Immigration, working poverty, and the relationship of women to the labor market are vital and contentious issues today, as they were a century ago, when some influential, progressive social scientists blueprinted and began constructing the house of American labor reform. New Deal liberals later expanded the edifice. This article documents that the original progressive architects, and some New Deal renovators, were partisans of human inequality. The labor legislation they pioneered was, in important respects, designed to exclude immigrants, women, and African Americans.

In section II of this article, we discuss the origins and development of a progressive economic ideology that favored, indeed demanded, the exclusion of various so-called “defective” groups from the American labor market. Xenophobia, race prejudice, and sexism certainly were not new to the United States in the Progressive Era. What *was* new was, first, the idea that protecting deserving workers required the social control of undeserving workers, enough so that labor-legislation advocates defended the exclusion of unfit workers not as an ostensibly necessary evil, but as a positive social benefit. Second, the exclusion of undesirables acquired a new scientific legitimacy: the Progressive Era marked not only the advent of the welfare state but also an extraordinary vogue for race thinking and for eugenics, the social control of human breeding. The new science of eugenics biologized the established discourses of bigotry and nativism, remaking undesirables into the hereditarily unfit and elevating exclusion to a matter of national and racial health. And the new sciences of society, especially economics, showed how unfit workers wrongly lowered the wages and employment of racially superior groups.

Copyright © 2009 by David E. Bernstein and Thomas C. Leonard.

This Article is also available at <http://law.duke.edu/journals/lcp>.

* Professor, George Mason University School of Law. Professor Bernstein acknowledges research support from the Law and Economics Center at the George Mason University School of Law.

** Lecturer in Economics, Department of Economics, Princeton University.

In section III, we discuss the practical impact progressive ideology had on labor reform in the 1930s. The intellectual heirs of progressivism used the prevailing economic crisis to promote previously unachievable government involvement in the labor market to the detriment of those deemed excludable. We first consider the Davis–Bacon Act, a law passed with the intent of preventing itinerant African American workers and others from competing with white labor unionists for jobs on federal construction projects. Next, we turn to New Deal minimum-wage legislation. The first national minimum wages were imposed by the National Industrial Recovery Act, which in turn begat the freestanding Fair Labor Standards Act. Architects of both laws knew the laws would create disproportionate unemployment among southern African Americans, an especially poor and vulnerable group. But most advocates of these laws saw the resulting unemployment, at worst, as an unfortunate necessity, and in many cases as a positive feature. The New Dealers were determined to destroy the low-wage industrial economy of the South and to promote a national “family wage,” regardless of the immediate human toll on the unemployed. And the most efficient way to destroy the low-wage industrial economy was to ban low-wage employment.

Finally, we consider the resurrection and expansion of single-sex, state minimum-wage laws in the 1930s. Such laws had been held unconstitutional by the Supreme Court in 1923¹ but were upheld by the Court in 1937.² The Court adopted the conventional wisdom in contemporary liberal circles: women who could not command a “living wage” as defined by statute should be expunged from the labor force. For the next several decades, the judiciary treated women workers’ claims to equal treatment by labor law dismissively.

II

THE RISE OF PROGRESSIVE LABOR IDEOLOGY

A. Setting the Stage

The last one-third of the nineteenth century witnessed truly spectacular changes in American economic life. Following the Civil War, the United States industrialized on a revolutionary scale; the ensuing growth in productivity, in output, and in wealth was unprecedented in human history. Industrialization coincided with the development of a transportation and communication infrastructure; railroad and telegraph networks both measured and fostered the new national scope of American markets. The transformation from an agricultural to an industrial economy gave rise to a set of profound social dislocations, among them “urbanization,” a rubric that characterizes the effects of the migration from farm to factory and of the explosive growth in American cities. Urban workers, particularly those residing in immigrant slums, faced

1. *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923).

2. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

substandard housing, poor public health, and unemployment, especially during the economic depression of the 1890s.

Growth in labor demand was met, in part, by immigration to America on a large scale, which introduced polyglot peoples with disparate cultural and religious traditions. By 1910, twenty-two percent of the U.S. labor force was foreign-born.³ Coincident with industrialization, nationalization, urbanization, and immigration were the 1880s rise of labor unions (craft and mass) and the 1890s consolidation of industry into pools and trusts. The concentration of labor and capital intensified the recurrent and sometimes violent labor conflict, for which names like Haymarket, Homestead, and Pullman still serve as synecdoches.

B. The Progressive Response: Bringing in the State

Academic economists and their reform allies played a leading role in the extraordinary Progressive Era expansion of the government's role in the American economy. By the outbreak of the first World War in 1914, the U.S. government had created the Federal Reserve banking system, amended the Constitution to institute a graduated personal-income tax, established the Federal Trade Commission, applied antitrust laws to industrial combinations, restricted immigration, regulated food and drug safety, and supervised railroad rates.⁴ State governments, where the reform impulse was stronger still, regulated working conditions, inspected factories, banned child labor, compelled education for children, capped working hours, set minimum wages, and taxed inheritances.⁵

Economic reformers were instrumental in effecting nearly all these Progressive Era reforms, none more so than the labor legislation that epitomizes the Progressive Era. But the original progressives, some hagiographic historiography notwithstanding, were not a one-dimensional band of "heroic liberals snatching helpless social science from the clutches of vile Social Darwinists."⁶ The progressives were, in fact, simultaneously conservative and liberal. Moreover, many were enthusiastic biologizers, and most were elitist. 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

3. Claudia Goldin & Lawrence F. Katz, *The Legacy of U.S. Educational Leadership: Notes on Distribution and Economic Growth in the 20th Century*, AM. ECON. REV., May 2001, at 18, 20.

4. For a useful summary of Progressive Era legislation, see Price Fishback, *The Progressive Era, in GOVERNMENT AND THE AMERICAN ECONOMY: A NEW HISTORY* 288, 288–322 (2007).

5. *See id.*

6. Donald C. Bellomy, "Social Darwinism" Revisited, 1 PERSP. AM. HIST. 1, 18 (1984).

welfare state they envisioned, and a faith that expertise could not only serve the social good, but also identify it.

Thus did labor reformers view the working poor and other economically marginal groups with great ambivalence. The reformers depicted the poor as victims in need of uplift but also as threats requiring social control. This fundamental tension was ultimately resolved by the appeal to hereditary fitness as a scientific basis for distinguishing workers worthy of uplift from workers who should be regarded as threats to the health and wellbeing of the economy and of society.

So, though progressives did, of course, advocate for labor, they also depicted many groups of poor workers as undeserving of uplift, indeed as the cause rather than the consequence of low wages.⁷ While progressives did advocate for women's rights, they also promoted a vision of economic and family life that would remove women from the labor force, the better to meet women's obligations to be "mothers of the race" and to defer to the male breadwinner, a model also known as the "family wage."⁸ 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."

C. The Unfit As "Unemployable"

American labor reformers judged an impressive array of human groups, male Anglo-Saxon heads of household excepted, to be unworthy of work, or "unemployable."⁹ The unemployable were those workers who, owing to putative hereditary debility, earned less than what American reformers called a "living wage." Reformers understood the difference between actual wages and living wages as entailing a shortfall that must be met by charity, by the state, or by other members of the worker's household. By this logic, reformers called firms that paid workers less than living wages "parasites," an epithet also attached to workers who received such wages.¹⁰ Fabian socialists Sidney and Beatrice Webb, to pick an influential example, classified as unemployable

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, the criminals and the incorrigibly idle, and all who are actually "morally deficient" . . . and [those] incapable of steady or continuous application, or who are so deficient in strength, speed, or skill that they are incapable . . . of producing their maintenance at any occupation whatsoever.¹¹

7. See Thomas C. Leonard, "More Merciful and Not Less Effective": *Eugenics and American Economics in the Progressive Era*, 35 HIST. POL. ECON. 687 (2003) (documenting labor-reformer hostility to poor workers belonging to classes deemed to cause low wages).

8. See Thomas C. Leonard, *Protecting Family and Race: The Progressive Case for Regulating Women's Work*, 64 AM. J. ECON. & SOC. 757 (2005) (documenting progressive opposition to women's labor-force participation, and its various rationales).

9. See Leonard, *supra* note 7.

10. See, e.g., SIDNEY WEBB & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 786 (2d ed. 1920).

11. *Id.* at 785.

Progressive Era reform economists argued that a worker's standard of living, not his productivity, determined market wages. 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. Economist-turned-sociologist Edward A. Ross, for example, argued that "the coolie, though he cannot outdo the American, can underlive him."¹² "Native" workers were more productive, claimed Ross, but because Chinese immigrants were racially disposed to work for lower wages, they displaced the "native" workers, the Anglo-Saxon race disposed to "American" wages.¹³

In *Races and Immigrants*, labor economist John R. Commons argued that "[t]he Jewish sweatshop is the tragic penalty paid by that ambitious race."¹⁴ For Commons, when inferior races were allowed to work, their economic competition not only lowered wages, it also biologically selected for the unfit races. "[C]ompetition has no respect for superior races," said Commons; "[t]he race with lowest necessities displaces others."¹⁵ Because race, not productivity, determined living standards, Commons could populate his low-wage-races category with the industrious and lazy alike. African Americans, he said, were "indolent and fickle," which explained why slavery was defensible, even necessary: "The negro could not possibly have found a place in American industry had he come as a free man [I]f such races are to adopt that industrious life which is second nature to races of the temperate zones, it is only through some form of compulsion."¹⁶

Few groups escaped the reformers' low-wage-race indictment. Labor leader Eugene Debs said in 1891 of Italian immigrant workers, "'The Dago . . . lives far more like a savage or a wild be[a]st than the Chinese' and therefore can 'underbid the American workingman.'"¹⁷ Wharton School reformer Scott Nearing volunteered that if "[a]n employer has a Scotchman working for him at \$3 a day [and] [a]n equally efficient Lithuanian offers to do the same work for \$2 . . . the work is given to the lowest bidder."¹⁸ Paul Kellogg, editor of *The Survey*, one of the most influential organs of progressive ideas, defended

12. EDWARD ALSWORTH ROSS, *SEVENTY YEARS OF IT* 70 (1936).

13. In the Progressive Era, an "American" standard of living referred not merely to a neutral measure of how U.S. workers lived, but also, more invidiously, to a category of deserving "native" workers, to be distinguished from immigrant workers. *See, e.g., AMERICAN PLANES AND STANDARDS OF LIVING* (Thomas Eliot ed., 1931).

14. JOHN R. COMMONS, *RACES AND IMMIGRANTS IN AMERICA* 148 (1907).

15. *Id.* at 151.

16. *Id.* at 136. In Commons's view, poor Appalachian whites, owing to their racial fitness as Anglo-Saxons, could be educated and thereby assimilated into American life. Poor African Americans could not be so uplifted. African American inferiority, Commons believed, could be remedied only by interbreeding with superior races. *Id.* at 213. In addition to the twelve percent of Americans who were African American, Commons estimated that "defectives" constituted fully 5.5 percent of the U.S. population in 1890 and that nearly two percent of the population was irredeemably defective. John R. Commons, *Natural Selection, Social Selection and Heredity*, *ARENA*, July 1897, at 90, 93.

17. LAWRENCE B. GLICKMAN, *A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY* 89 (1997).

18. Scott Nearing, *The Adequacy of American Wages*, 59 *ANNALS AM. ACAD. POL. & SOC. SCI.* 111, 122 (1915).

legislation “to exclude [Angelo] Lucca and [Alexis] Spivak and other ‘greeners’ from our congregate industries, which beckon to them now.”¹⁹

When U.S. labor reformers studied legislation in countries more precocious with respect to labor reform, they favorably commented on the eugenic efficacy of labor laws in excluding the low-wage races from work. Harvard’s Arthur Holcombe, a member of the Massachusetts Minimum Wage Commission, referred approvingly to the intent of the minimum-wage law in Victoria, Australia, to “protect the white Australian’s standard of living from the insidious competition of colored races, particularly of the Chinese.”²⁰

For labor reformers, the threat of the low-wage immigrant races was two-fold. The low-wage races threatened American wage levels, and their putatively greater fertility also threatened the health and viability of the Anglo-Saxon race. The latter claim was known as “race suicide,” a term for the idea that persons of inferior stock outbreed their biological betters. Races compete, argued race-suicide theorists, and racial competition is subject to a kind of Gresham’s law.

“Race suicide” was coined by Edward A. Ross, who bemoaned that “[t]he higher race quietly and unobtrusively eliminates itself rather than endure individually the bitter competition it has failed to ward off by collective action.”²¹ Ross’s theory was that the “native” Anglo-Saxon stock was biologically well adapted to rural, traditional life but less well suited to the new urban, industrial milieu of capitalism.²² Thus could the inferior immigrant races, “beaten members of beaten breeds,” outbreed the superior Anglo-Saxon race.²³ New immigrant stock, while racially inferior, was, said Ross, better adapted to the conditions of industrial capitalism.²⁴ Ross’s coinage gained enough currency to be used frequently by President Theodore Roosevelt, who called race suicide the “greatest problem of civilization.”²⁵

Confronted with this two-fold threat, the task for reformers was to devise scientific methods for identifying low-wage races and other inferior groups (for example, the “feeble-minded”)—such as cranial measurements, literacy tests, and intelligence tests—and to promote laws that would exclude inferiors from

19. Paul U. Kellogg, *Immigration and the Minimum Wage*, 48 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 75 (1913).

20. A.N. Holcombe, *The Legal Minimum Wage in the United States*, 2 AM. ECON. REV. 21, 21 (1912).

21. Edward A. Ross, *The Causes of Race Superiority*, 18 ANNALS AM. ACAD. POL. & SOC. SCI. 67, 88 (1901).

22. See EDWARD ALSWORTH ROSS, *SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER* (1901) (elaborating this theory).

23. See EDWARD ALSWORTH ROSS, *FOUNDATIONS OF SOCIOLOGY* 393 (1917).

24. Ross was no better disposed to African Americans. He wrote, “The theory that races are virtually equal in capacity leads to such monumental follies as lining the valleys of the South with the bones of half a million picked whites in order to improve the conditions of four million unpicked blacks.” Edward A. Ross, *Comment on D. Collin Wells’ “Social Darwinism,”* 12 AM. J. SOC. 695, 715 (1907).

25. Theodore Roosevelt, *A Letter from President Roosevelt on Race Suicide*, 35 AM. MONTHLY REV. REVS. 550, 550 (1907).

work and isolate them for eugenic treatment. Two historically important vehicles for exclusion were immigration barriers and statutory minimum wages.

D. Immigration and “Race Suicide”

The Emergency Quota Act of 1921 ended the era of open immigration to the United States.²⁶ Already stalled by World War I, the immigration of the eastern and southern European peoples, which had averaged 730,000 per year in the decade before World War I, plummeted to a scant 20,000 persons per year following the eugenics-inspired Immigration Act of 1924, which also barred immigration from Japan.²⁷ The 1920s quota acts culminated years of attempts by anti-immigration forces to prevent the immigration of groups whose innate incapacities they deemed a threat to American blood, American wages, and American democracy.

The American Economic Association (AEA), founded in 1885, almost immediately began offering annual prizes for the best essay on the evils of unrestricted immigration.²⁸ America’s academic and cultural leaders needed few such incentives, though, to spur the expression of anti-immigrant fervor. For many of them, the immigration issue concerned not numbers, but blood. In 1887, progressive economist Edward Bemis devised the idea of using a literacy test to exclude putatively unfit immigrants, particularly those from southern and eastern Europe.²⁹ In a presidential address to the Eugenics Research Association, leading economist Irving Fisher said, “If we could leave out of account the question of race and eugenics, I should, as an economist, be inclined to the view that unrestricted immigration . . . is economically advantageous to a country as a whole”³⁰ But, cautioned Fisher, “[t]he core of the problem of immigration is . . . one of race and eugenics”: the problem of the Anglo-Saxon racial stock being overwhelmed by racially inferior “defectives, delinquents and dependents.”³¹ “[Mine] is not an argument against immigration,” demurred University of Chicago sociologist Charles Henderson, “but only against the immigration of persons who can never be induced to demand a civilized scale of life.”³² Remove the unfit, said Henderson, and “the real workers will more easily rise in earning power.”³³ Wharton School reformer Simon Patten argued that social progress is “a higher law than equality” and

26. Chinese immigration was banned in 1882 by the Chinese Exclusion Act, legislation that stigmatized Chinese Americans as racially inferior and inassimilable. Chinese Exclusion Act, 8 U.S.C. §§ 262–97 (1882) (repealed 1943).

27. Claudia Goldin, *The Political Economy of Immigration Restriction in the United States, 1890 to 1921*, in *THE REGULATION OF THE ECONOMY* 223, 239 (Claudia Goldin & Gary Liebcap eds., 1994).

28. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925*, at 41 (1978).

29. E.W. Bemis, *Restriction of Immigration*, *ANDOVER REV.*, March 1888, at 251–64.

30. Irving Fisher, *Impending Problems of Eugenics*, 13 *SCI. MONTHLY* 214, 226 (1921).

31. *Id.* at 227.

32. Charles R. Henderson, *Are Modern Industry and City Life Unfavorable to the Family?*, 10 *AM. ECON. ASS’N Q.* 217, 232 (1909).

33. Charles R. Henderson, *Science in Philanthropy*, 85 *ATLANTIC MONTHLY* 249, 253 (1900).

proposed the “eradication of the vicious and inefficient.”³⁴ Henry Farnam, cofounder of the American Association for Labor Legislation (AALL) and later AEA president, thought the growth of the unfit classes rendered “more and more imperative the solution of that exceedingly difficult problem which Mr. Arnold White calls ‘the sterilization of the unfit.’”³⁵ Ross, well known for his militancy against immigration, once suggested that “should the wors[e] come to the worst, it would be better for us if we were to turn our guns upon every vessel bringing [Asiatics] to our shores rather than to permit them to land.”³⁶

Economists since Malthus had worried about the consequences of excess population, but as Simon Patten recognized, “the cry of race suicide has displaced the old fear of overpopulation.”³⁷ Francis Amasa Walker, president of MIT and of the AEA and director of the U.S. Census of 1870 and of 1880, offered an especially influential theory of race suicide. Walker argued that immigration itself checked the natural fertility of the native population, so that inferior foreign-born stock effectively displaced superior native stock: “[T]he native element failed to maintain its previous rate of increase *because* the foreigners came in such swarms.”³⁸ The American shrank from industrial competition with the low-wage races, Walker argued: “He was unwilling himself to engage in the lowest kind of day-labor with these new elements of the population; he was even more unwilling to bring sons and daughters into the world to enter into that competition.”³⁹ Walker characterized the low-wage races, “peasants” from “southern Italy, Hungary, Austria, and Russia,” as “beaten men from beaten races; representing the worst failures in the struggle for existence.”⁴⁰ Without immigration restriction, Walker warned, “every foul and stagnant pool of population in Europe, [in] which no breath of intellectual life has stirred for ages . . . [will] be decanted upon our shores.”⁴¹

Anti-immigrant groups were pleased to appeal to Walker’s authority. Henry Pratt Fairchild, Yale economist and author of *The Melting Pot Mistake*, said, “[O]ur immigrants are not additions to our total population, but supplanters of native children, to whom they deny the privilege of being born.”⁴² Prescott Hall, cofounder of the Immigration Restriction League, characterized Walker’s account thus: “[T]he main point is that the native children are murdered by

34. SIMON N. PATTEN, *THE DEVELOPMENT OF ENGLISH THOUGHT: A STUDY IN THE ECONOMIC INTERPRETATION OF HISTORY* 302–03 (1899).

35. Henry W. Farnam, *The State and the Poor*, 3 *POL. SCI. Q.* 282, 295 (1888).

36. MARY O. FURNER, *ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865–1905*, at 236 (1975).

37. S.N. Patten, *Theories of Progress*, 2 *AM. ECON. REV.* 61, 64 (1912).

38. FRANCIS A. WALKER, *DISCUSSIONS IN ECONOMICS AND STATISTICS* 423 (Davis R. Dewey ed., 1899) (emphasis added).

39. *Id.* at 424.

40. Francis A. Walker, *Restriction of Immigration*, 77 *ATLANTIC MONTHLY* 822, 828 (1896).

41. *Id.*

42. Henry Pratt Fairchild, *The Paradox of Immigration*, 17 *AM. J. SOC.* 254, 263 (1911).

never being allowed to come into existence, as surely as if put to death in some older invasion of the Huns and Vandals.”⁴³

Race-suicide theories were popular abroad as well, differing principally in their conception of which inferior races constituted the eugenic threat. In England, for example, Sidney Webb devised a novel term, “adverse selection,” to describe what he saw as English race suicide:

Twenty-five percent of our parents, as Professor Karl Pearson keeps warning us, is producing 50 percent of the next generation. This can hardly result in anything but national deterioration; or, as an alternative, in this country gradually falling to the Irish and the Jews.⁴⁴

Eugenic views of inferior groups were commonplace in the Progressive Era textbooks of leading economists. In his *Elementary Principles*, Irving Fisher declared that “if the vitality or vital capital is impaired by a breeding of the worst and a cessation of the breeding of the best, no greater calamity could be imagined.”⁴⁵ Fortunately, said Fisher, eugenics offered a means, “by isolation in public institutions and in some cases by surgical operation,” to prevent the calamity of “inheritable taint.”⁴⁶ Similarly, Princeton economist Frank Fetter lamented, “Democracy and opportunity are increasing the mediocre and reducing the excellent strains of stock . . . Progress is threatened unless social institutions can be so adjusted as to reverse this process of multiplying the poorest, and of extinguishing the most capable families.”⁴⁷ Eugenic policies would introduce “an element of rational direction into the process of perpetuating the race.”⁴⁸ In his *Principles of Economics*, Harvard’s Frank Taussig asked, rhetorically, “how . . . deal with the unemployable?”⁴⁹ Taussig identified two classes of unemployable workers, distinguishing the aged, infirm, and disabled from the “feeble minded[,] . . . those saturated by alcohol or tainted with hereditary disease . . . [and] the irretrievable criminals and tramps.” The latter class, Taussig proposed, “should simply be stamped out.” “We have not reached the stage,” Taussig allowed, “where we can proceed to chloroform them once [and] for all; but at least they can be segregated, shut up in refuges and asylums, and prevented from propagating their kind.”⁵⁰

43. Prescott F. Hall, *Selection of Immigration*, 24 ANNALS AM. ACAD. POL. & SOC. SCI. 169, 182 (1904).

44. Sidney Webb, *Fabian Tract No. 131: The Decline in the Birth-Rate*, in FABIAN TRACTS 17 (1907).

45. IRVING FISHER, *ELEMENTARY PRINCIPLES OF ECONOMICS* 476 (1912).

46. *Id.* at 476.

47. FRANK A. FETTER, 1 *ECONOMICS: ECONOMIC PRINCIPLES* 421 (1918).

48. *Id.* at 422.

49. FRANK W. TAUSSIG, *PRINCIPLES OF ECONOMICS* 300 (1912).

50. *Id.*

E. The (Purported) Eugenic Benefits of Minimum-Wage Laws

Minimum-wage legislation, passed by several states beginning with Massachusetts in 1912,⁵¹ was the *sine qua non* of progressive labor reform, and progressive economists championed minimum wages. But eugenically minded progressives advocated minimum wages precisely because binding minimums would cause job losses.⁵² They argued that minimum-wage-induced job loss was a social benefit because it performed the eugenic service of ridding the labor force of the “unemployable.” Sidney and Beatrice Webb, as ever, put it plainly: “With regard to certain sections of the population [the unemployable], this unemployment is not a mark of social disease, but actually of social health.”⁵³ “[O]f all ways of dealing with these unfortunate parasites,” Sidney Webb opined, “the most ruinous to the community is to allow them unrestrainedly to compete as wage earners”⁵⁴ Columbia’s Henry Rogers Seager, future AEA president and a leading progressive economist, argued that deserving workers needed protection from the “wearing competition of the casual worker and the drifter” and from the other “defectives” who drag down the wages of more deserving workers.⁵⁵ The minimum wage protects deserving workers from the competition of the unfit by making it illegal to work for less: “The operation of the minimum wage requirement would merely extend the definition of defectives to embrace all individuals, who even after having received special training, remain incapable of adequate self-support,”⁵⁶ that is, of earning a living wage.

Seager made clear what should happen to those who, even after remedial training, could not earn the legal minimum: “If we are to maintain a race that is to be made of 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”⁵⁷ A.B. Wolfe, an American progressive economist and future AEA president, also argued for the eugenic virtues of removing from employment those who are “a burden on society.”⁵⁸ “If the inefficient entrepreneurs would be eliminated [by minimum wages,] so

51. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS BULL. NO. 167, MINIMUM WAGE LEGISLATION IN THE UNITED STATES AND FOREIGN COUNTRIES 31 (1915).

52. Neoclassical critics, such as Alfred Marshall, Philip Wicksteed, and John Bates Clark, argued that legally induced unemployment should be seen as a social cost of minimum wages, not as a putative social benefit. See Thomas C. Leonard, *The Very Idea of Applying Economics: The Modern Minimum-Wage Controversy and Its Antecedents*, in TOWARD A HISTORY OF APPLIED ECONOMICS 117–44 (Roger E. Backhouse & Jeff Biddle eds., 2000).

53. WEBB & WEBB, *supra* note 10, at 785.

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

55. Henry R. Seager, *The Minimum Wage as Part of a Program for Social Reform*, 48 ANNALS AM. ACAD. POL. & SOC. SCI. 3, 12 (1913) [hereinafter Seager, *Social Reform*]; Henry Rogers Seager, *The Theory of the Minimum Wage*, 3 AM. LAB. LEGIS. REV. 81, 82–83 (1913).

56. Seager, *Social Reform*, *supra* note 55, at 9.

57. *Id.* at 10.

58. A.B. Wolfe, Robert L. Hale, & John A. Ryan, *Some Phases of the Minimum Wage: Discussion*, 7 AM. ECON. REV. 275, 278 (1917).

would the ineffective workers,” said Wolfe.⁵⁹ “I am not disposed to waste much sympathy upon either class. The elimination of the inefficient is in line with our traditional emphasis on free competition, and also with the spirit and trend of modern social economics.”⁶⁰

For economic progressives, a minimum wage, which is a wage floor, had the useful property of segregating the unfit, who would lose their jobs, from the deserving workers, who would not. Royal Meeker, a Princeton economist who served as Woodrow Wilson’s Commissioner of Labor, opposed subsidies of poor workers’ wages because wage subsidies *increase* employment. “It is much better to enact a minimum-wage law, even if it deprives these unfortunates of work,” argued Meeker.⁶¹

As with immigration restriction, the minimum-wage barrier was seen to meet the two-fold threat of inferior workers: it protected deserving workers’ wages by reducing the competition of inferior groups, and it identified (by disemploying) inferior groups, enabling eugenic treatment.⁶² Adopting a national minimum wage, argued the Webbs, would mark “out [weaklings and degenerates] . . . so that they could be isolated and properly treated.”⁶³ Sidney Ball, another Fabian, likewise promoted minimum wages for enabling “a process of conscious social selection by which the industrial residuum is naturally sifted and made manageable for some kind of restorative, disciplinary, or, it may be, surgical treatment.”⁶⁴ And Labor Commissioner Meeker argued, “Better that the state should support the inefficient wholly and prevent the multiplication of the breed than subsidize incompetence and unthrift, enabling them to bring forth after their kind.”⁶⁵

Felix Frankfurter, then the AALL’s legal counsel, found that the culling effects of minimum-wage laws helped buttress his legal defense of minimum wages. Instancing the police-power virtues of minimum wages for identifying (by disemployment) the class of the unemployable, Frankfurter argued that “[t]he state . . . may use means, like the present statute, of sorting the normal self-supporting workers from the unemployables and then deal with the latter appropriately as a special class”⁶⁶

59. *Id.*

60. *Id.*

61. Royal Meeker, *Book Review: Cours d’Économie Politique*, 25 POL. SCI. Q. 543, 544 (1910).

62. Some eugenicists without training in economics, such as Karl Pearson, opposed the minimum wage. But because Pearson incorrectly regarded minimum wages as subsidies rather than wage floors, he believed that minimum wages *benefited* the low-wage workers he regarded as inferior, and thus judged minimum wages to be dysgenic—selecting for the unfit—rather than eugenic in their effects. See DANIEL KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 33–34 (1995).

63. WEBB & WEBB, *supra* note 10, at 787.

64. Sidney Ball, *The Moral Aspects of Socialism*, 6 INT’L J. ETHICS 290, 295 (1896).

65. Meeker, *supra* note 61, at 544.

66. Thomas Reed Powell, *The Oregon Minimum-Wage Cases*, 32 POL. SCI. Q. 296, 310 (1917).

F. Women Workers as Unemployable⁶⁷

Florence Kelley, perhaps the most influential U.S. labor reformer of the period, endorsed the Victoria, Australia, minimum-wage law as “redeeming the sweated trades.”⁶⁸ It did so by preventing the “unbridled competition” of the unemployable, the “women, children, and Chinese [who] were reducing all the employees to starvation.”⁶⁹ Kelley’s exclusion of Chinese and women workers from the category of “employee,” and her grouping of these workers with children, characteristically treats women and Chinese as both victims and threats. Her conflation depicts women and Chinese as children, thus in need of paternalistic protection, but also as competitive threats to the deserving, white male workers, thus in need of social control.

Their current reputation for feminism notwithstanding, the 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 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.

The tension between the progressives’ impulse to protect women and their impulse to control women manifested itself in the sometimes contradictory arguments for regulating women’s market work. Some progressives argued that women, too, deserved living wages.⁷⁰ But even this more-egalitarian framing was often “maternalist”; that is, it conceived of women as mothers and guardians of the home first.⁷¹ So, when progressives calculated living wages, they assumed that male workers deserved a wage sufficient to support several dependents—the so-called “family wage.” Women, however, deserved only enough to support a single woman living alone, presumably until marriage could end the

67. A fuller treatment of the material in this section can be found in Leonard, *supra* note 7.

68. Florence Kelley, *Minimum-Wage Boards*, 17 AM. J. SOC. 303, 304 (1911).

69. *Id.*

70. See, e.g., Sophonsiba Breckenridge, *The Home Responsibilities of Women Workers and the Equal Wage*, 31 J. POL. ECON. 521, 543 (1923).

71. Even progressives prepared to dispense with traditional family arrangements made a virtue of motherhood, as suggested by the example of economist Charlotte Perkins Gilman and her *sui generis* feminist eugenics. In *Women and Economics*, Gilman aimed “[to] urge upon [thinking women] a new sense, not only of their social responsibility as individuals, but of their measureless racial importance as makers of men.” CHARLOTTE PERKINS STETSON GILMAN, *WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION* vii (1898). Gilman’s feminist eugenics, what she called “Humaniculture,” envisioned women as the enlightened society’s eugenic agents. As radical as was Gilman’s conception, her account frames women primarily as mothers, if professional ones, for it is mothers on whom should fall the “racial duty of right selection.” *Id.* at 201. The “maternalist” case for motherhood was thus, in its essentials, a case against the employment of women, unless women were to be employed as mothers.

misfortune of market employment.⁷² “So long as men cannot be mothers,” Florence Kelley wrote in defense of female difference and female deference, “the cry Equality, Equality, where Nature has created Inequality is as stupid and as deadly as the cry Peace, Peace where there is no Peace.”⁷³

Moreover, even when progressives spoke of “equal pay for equal work,” they often were not referring to comparable worth. In the Progressive Era, “equal pay for equal work” also referred to the reform idea that motherhood—which was seen to require removal from the labor force—should be recognized as socially vital work and should be compensated by the state.⁷⁴ Paying women to stay home to bear and raise children was a popular progressive idea in the United States and abroad. Indeed, from 1911 to 1919, all but nine states passed “mothers’ pensions” laws.⁷⁵

Other arguments for regulating women’s work reflected the tension between the goals of protecting women and controlling women. One strand of paternalism argued that women, as the biologically weaker sex, needed, like children, protection from the hazards of market work (if not from the hazards of domestic labor), usually in the form of hours restrictions.⁷⁶ Reformers also argued that minimum wages could serve a paternalistic (and moralistic) function by protecting wage-earning women (if not women working in the home) from the temptation of prostitution. Better-paid factory girls were less likely to succumb, a key selling point for promoters of social purity.⁷⁷

It is a peculiar sort of protection for women that proposes to protect men and to protect the Anglo-Saxon race from the labor-force participation of women. Indeed, the “family wage” and “mothers of the race” reasoning argued not for women’s rights but for women’s obligations, not for women’s welfare but for the welfare of men and the race. Nonetheless, the “family wage” argument was pervasive among reformers: “Almost all [progressive] welfare activists, male and female, endorsed the family-wage principle”⁷⁸

The “family wage” and “mothers of the race” rationales for women-only labor legislation essentially abandoned protection of women in favor of social

72. JOHN A. RYAN, *A LIVING WAGE: ITS ETHICAL AND ECONOMIC ASPECTS* 107 (1906).

73. Florence Kelley, *The New Women’s Party*, *THE SURVEY*, Mar. 5, 1921, reprinted in *SOCIAL FEMINISM, LABOR POLITICS, AND THE SUPREME COURT OF THE 1920s*, at 199 (Sybil Lipshultz ed., 2002).

74. PAUL POPENOE & ROSWELL JOHNSON, *APPLIED EUGENICS* 380–81 (1918).

75. DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 240 (1998).

76. JOSEPHINE GOLDMARK, *FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY* 39–42 (1912).

77. Henry Seager, for example, argued that minimum wages would lessen “that greatest disgrace of our civilization, prostitution in aid of inadequate wages The \$8-a-week girl . . . has more power to resist the temptations which our cities constantly present than the \$5-a-week-girl.” Seager, *Social Reform*, *supra* note 60, at 11. John Bates Clark’s reply reminded Seager of his own logic regarding the disemployment effects of minimum wages: “If five dollars a week forces persons into vice, no wages at all would do it more surely and quickly, and here is a further claim on the state which no one can for a moment dispute.” John Bates Clark, *The Minimum Wage*, 112 *ATLANTIC MONTHLY* 289, 294.

78. Linda Gordon, *Social Insurance and Public Assistance: The Influence of Gender in Welfare Thought in the United States, 1890–1935*, 97 *AM. HIST. REV.* 19, 47 (1992).

control of women. The family-wage argument portrayed wage-earning women as usurpers of jobs that rightfully belonged to male heads of household. Returning women to the home would also ensure that women properly carried out their eugenic duties as “mothers of the race.”

The arguments for women-only labor legislation were heterogeneous—variously paternalistic, moralistic, maternalistic, and eugenicist. They were, moreover, sometimes internally inconsistent, reflecting the tension between the two progressive desiderata, to protect women and to control women. But, however different or inconsistent, all these arguments for regulating women’s work were premised upon the idea that women workers should be legally inferior to men, owing to their biological weakness or to their “natural” obligations to husband, family, and race. And, most importantly, all these arguments for regulating women’s work had the intended effect of discouraging women’s labor-force participation.

III

DEPRESSION-ERA LABOR LEGISLATION

Despite the intellectual ferment of progressive economics, the progressives achieved relatively little in the way of major labor reform. Various states did pass workplace health and safety regulations,⁷⁹ establish mandatory workers’ compensation programs,⁸⁰ ban child labor,⁸¹ and institute maximum-hours laws for women.⁸² Yet the doctrine of liberty of contract, epitomized by *Lochner v. New York*,⁸³ stood in the way of more draconian and comprehensive regulation; the Court’s decisions restricting the scope of Congress’s commerce power prevented the federal government from addressing what progressives believed to be a “race to the bottom” among states to have lax labor rules to attract businesses; and World War I and the subsequent backlash against intrusive wartime government sapped the progressive reform agenda of its momentum. The 1920s were not the laissez faire “Roaring Twenties” of historical myth, but neither did American voters seem eager to return to the more statist agenda of the Progressive period.

When the economic crisis of the Depression hit, however, the progressive influence on the intellectual climate took on new cogency. Although some of the reformers of the 1930s had ideologies similar to modern liberalism, the statism and lack of sympathy for “outsider” groups that characterized progressivism retained an atavistic hold on the reform agenda. Not surprisingly, then, the goals of the major labor legislation of the 1930s reflected progressive

79. See, e.g., *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907).

80. See, e.g., *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917).

81. See *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325–26 (1913).

82. See, e.g., *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Miller v. Wilson*, 236 U.S. 373 (1915); *Riley v. Massachusetts*, 232 U.S. 671 (1914); *Muller v. Oregon*, 208 U.S. 412 (1908).

83. 198 U.S. 45 (1905).

priorities: to raise the wages of white men to a proper “family wage,” even if this meant limiting employment opportunities for minorities and women. Three examples of such legislation were the Davis–Bacon prevailing-wage law, New Deal federal minimum-wage legislation, and women-only state minimum-wage laws.

A. The Davis–Bacon Act

The Davis–Bacon Act of 1931 was designed to exclude African Americans and other workers deemed “defective” from the labor market for federal construction projects. The exclusion of African Americans was motivated by a combination of the self-interest of exclusionary unions, traditional racism, and the implicit (and sometimes explicit) view that migrant African American workers and other marginal members of the labor force should not be permitted to compete in the construction labor market.

Davis–Bacon had its origins in competition between African American workers and exclusionary unions in New York. African Americans were mostly banned from New York’s construction unions.⁸⁴ Nevertheless, by the late 1920s, African Americans, who made up about 4.8 percent of New York City’s total population, constituted about 2.5 percent of the city’s skilled construction workers and 7.3 percent of the unskilled.⁸⁵ By the mid-1920s, New York was one of several states to have a law requiring that contractors on public-works projects pay their employees the “prevailing wage.”⁸⁶ The prevailing wage was generally set at least as high as union wages to prevent union workers from being undercut by their competitors, including African Americans and others excluded from unions.

When a case challenging the constitutionality of the prevailing-wage law reached the New York Court of Appeals, Justice Benjamin Cardozo defended the law on behalf of the majority, arguing that the law prevented the “merciless exploitation of the indigent or the idle.”⁸⁷ Exactly how Cardozo thought the “indigent or idle” would be better off by being excluded entirely from public construction jobs is not clear. His opinion reflects the progressive sense that workers who could not command what the political process determined was an adequate wage should not be in the labor market at all.

New York’s prevailing-wage law affected only state, not federal, public-works projects. This discrepancy became an issue when Algernon Blair, a

84. David Bernstein, *The Shameful, Wasteful History of New York’s Prevailing Wage Law*, 7 GEO. MASON U. CIV. RTS. L.J. 1, 5 (1997); Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, 19 POL. & SOC’Y 291, 301 (1991).

85. Mark W. Kruman, *Quotas for Blacks: The Public Works Administration and the Black Construction Worker*, LAB. HIST., Winter 1975, at 37, 39.

86. In 1926, the United States Supreme Court found that an Oklahoma prevailing wage law unconstitutionally violated due process because its ill-defined terms were too vague for the employer to know what exactly he was or was not allowed to pay his employees. *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926).

87. *Campbell v. City of New York*, 244 N.Y. 317, 329 (1927).

contractor from Alabama, received a federal contract to build a Veteran's Bureau hospital in Long Island, New York. In 1927, Representative Robert Bacon, who represented the district in which the hospital was built, submitted a bill that would require contractors working on federal public-works projects to comply with state prevailing-wage laws.⁸⁸ According to Bacon's statement to the House Committee on Labor, workers Algernon Blair brought into his district

were herded onto this job, they were housed in shacks, they were paid a very low wage Of course, that meant that the labor conditions in that part of New York State where this hospital was to be built were entirely upset. It meant that the neighboring community was very much upset.⁸⁹

Congressman William Upshaw of Georgia, apparently aware that the workers in question were African Americans, responded, "You will not think that a southern man is more than human if he smiles over the fact of your reaction to that real problem you are confronted with in any community with a superabundance or large aggregation of negro labor."⁹⁰ Bacon denied anti-African American animus, but made clear his discomfort with "defective" workers taking jobs that were assumed to belong to white union men: "I just merely mention that fact because that was the fact in this particular case, but the same thing would be true if you should bring in a lot of Mexican laborers or if you brought in any nonunion laborer from any other State."⁹¹

In 1928, Bacon proposed "A Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Give Certain Preferences in the Employment of Labor."⁹² The committee hearings provide further evidence that poor African American workers were considered "defectives" who should not be permitted to compete for jobs thought to be reserved for white men. Bacon submitted a letter in support of his bill to the Committee on Labor from Secretary of Labor James J. Davis. The letter recounted that a contractor from the South brought an "entire outfit of negro laborers from the South" into Bacon's district, treated them poorly, and "employed no local labor."⁹³ Others reported likewise: William J. Spencer, Secretary of the Buildings Trades Department of the American Federation of Labor told the committee,

There are complaints from all hospitals of the Veteran's Bureau against the condition of employment on these jobs. That is true whether the job is in the States of Washington, Oregon, Oklahoma, or Florida. The same complaints come in. They are

88. A Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Comply with State Laws Relating to Hours of Labor and Wages of Employees on State Public Works, H.R. 17069, 69th Cong. (1927).

89. *Hours of Labor and Wages on Public Works: Hearing on H.R. 17069 Before the H. Comm. on Labor*, 69th Cong. 2 (1927).

90. *Id.* at 3.

91. *Id.* at 4.

92. See *Preferences in the Employment of Labor on Federal Construction Works: Hearings on H.R. 11141 Before the H. Comm. on Labor*, 70th Cong., 1st Sess. (1928). The bill would have required federal contractors to give preference to residents of the state where the work is performed who are veterans, non-veteran residents, American citizens, and aliens, in that order.

93. *Id.*

due to the fact that a contractor from Alabama may go to North Port and take a crew of negro workers and house them on the site of construction within a stockade and feed them and keep his organization intact thereby and work that job contrary to the existing practices in the city of New York.⁹⁴

Emil Preiss of New York's International Brotherhood of Electrical Workers reported that

[t]here are thousands of skilled mechanics in [Long Island] today who are unable to obtain employment on [the Veteran's hospital], owing to the fact that poorly-paid labor is imported and being housed somewhat like cattle on the job and that labor is living under conditions that an American workman could not countenance.⁹⁵

Preiss added that "the class of mechanics they are using out there today is an undesirable element of people. They are mixing with that community, but the community is refusing to house these people who can not be housed on the jobs."⁹⁶ Note that Preiss contrasted "American workmen," implicitly defined as white union men, with African American migrant workers, who were deemed to be either not American, or not proper workmen, or both.

In March 1930, the House Committee on Labor held hearings on two new bills to regulate labor on federal construction projects. Representative Sproul of Illinois spoke against low wages:

It is manifestly unfair that a contractor who pays the prevailing rate of wages in the locality in which the Government's work is done, and who bases his bid for the work upon the prevailing wage scales, should be underbid by a contractor whose intent is, if he is awarded the contract, to import labor at a much lower scale of wages What follows? He imports labor to which he pays less than the prevailing wage.⁹⁷

Sproul complained that at St. Elizabeth's Hospital the contractor paid bricklayers less than the local prevailing wage.⁹⁸ Later in the hearing, Representative John J. Cochran added that he had received "numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting the work and bringing the employees from the South. Just recently there was trouble at St. Elizabeth's Hospital."⁹⁹

In January 1931, the House Committee on Labor held hearings on a prevailing-wage bill that was destined to become the Davis-Bacon Act. Bacon argued that the bill would prevent federal contractors from importing "cheap, bootleg labor" into a federal construction site and would remove the temptation to import "cheap, bootleg, itinerant labor."¹⁰⁰ At a Senate hearing on the bill, American Federation of Labor president William Green noted that "[c]olored labor is being brought in to demoralize wage rates" in a federal post-office job

94. *Id.* at 17.

95. *Id.* at 21.

96. *Id.* at 22–23.

97. *Employment of Labor on Federal Construction Work, Hearings Before the Comm. on Labor, House of Representatives on H.R. 7995 and H.R. 9232, 71st Cong., 2d Sess. 18 (March 6, 1930).*

98. *Id.*

99. *Id.* at 26–27 (emphasis added).

100. *Id.* at 20.

in Kingsport, Tennessee.¹⁰¹ T.A. Lane, of the Bricklayers' Union, added that "cheap labor" was being imported from North Carolina to work on a post office in Alexandria.¹⁰² The Algernon Blair Company, he reported, had within the last six weeks acquired several additional federal contracts.¹⁰³

When the House debated the Davis–Bacon bill, several representatives alluded to the law's aim of preventing "cheap" or "bootleg" laborers from working on federal projects. No one expressed concern about the fate of these workers if the law passed.

Mr. LaGuardia: A contractor from Alabama was awarded the contract for the Northport Hospital, a Veterans' Bureau hospital. I saw with my own eyes the labor that he imported there from the South and the conditions under which they were working. These unfortunate men were huddled in shacks living under most wretched conditions and being paid wages far below the standard. These unfortunate men were being exploited by the contractor. Local skilled and unskilled labor [was] not employed. The workmanship of the cheap imported labor was of course very inferior.¹⁰⁴

Mr. Bacon: The unscrupulous contractor who hitherto came in with cheap, bootleg labor must now come in and pay the prevailing rate of wages in the community where the building is to be built¹⁰⁵

Mr. Bacon: Members of Congress have been flooded with protests from all over the country that certain Federal contractors on current jobs are bringing into local communities outside labor, cheap labor, bootleg labor¹⁰⁶

Mr. Cochran: What would result if cheap labor was brought into my city? It would be resented, and trouble would result.¹⁰⁷

Mr. Allgood: Reference has been made to a contractor from Alabama who went to New York with bootleg labor. That is a fact. That contractor has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country. This bill has merit, and with the extensive building program now being entered into, it is very important that we enact this measure.¹⁰⁸

The Davis–Bacon Act became law soon thereafter. As intended, the law prevented African Americans from working on federal construction projects, instead reserving the jobs for white union men.¹⁰⁹

101. *Wages of Laborers and Mechanics on Public Buildings: Before the S. Comm. Manufactures*, 71st Cong. 10 (1931).

102. *Id.* at 15–16.

103. *Id.*

104. 74 CONG. REC. 6510 (1931).

105. *Id.*

106. *Id.* at 6511.

107. *Id.* at 6512.

108. *Id.* at 6513.

109. For details regarding how this played out, see DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (2001).

B. New Deal Wage Legislation

The influence of the progressive economists' belief that low-paid African American workers were "defectives" who should not be permitted to compete on price with white workers continued during the New Deal. Dubious economic theories held by many New Dealers, along with perceived political self-interest, led the Roosevelt Administration to push for high mandatory-minimum wages for the South. Because the interests of unskilled African workers were considered of marginal importance at best, the New Dealers generally either ignored the devastating consequences minimum-wage legislation had for African Americans in the South or, in some cases, welcomed these consequences.

Like jobs held by women and children, jobs held by African Americans were often considered "substandard" by New Dealers and were slated for permanent elimination. The minority within the Roosevelt Administration who cared about the welfare of African American workers assumed that African Americans would benefit from new, higher-wage jobs.¹¹⁰ Yet there were obvious barriers to such an outcome. African Americans suffered from massive discrimination when competing for high-wage jobs traditionally dominated by whites. Moreover, because of segregation and Jim Crow laws, African Americans generally had less human capital than whites and therefore were often unable to compete for higher-paying jobs regardless of discrimination.¹¹¹

At the dawn of the New Deal era, productivity and the cost of living were far lower in the South than in the North.¹¹² Not surprisingly, wages were far lower as well.¹¹³ The South in 1938 was backward economically, had a simmering race problem, educated its youth in poor schools, and generally lacked air conditioning, which was still in its commercial infancy. The only advantage the South could offer employers was the region's low wages. So the South relied on lower wages to attract industry, much to the chagrin of northern labor unions and businesses, which resented the competition. African Americans disproportionately filled the lowest-wage positions in the South.

The Roosevelt Administration believed that the South functioned as a colonial economy, providing raw materials and cheap labor for the North.¹¹⁴ Roosevelt administration officials, with the support of southern liberals, therefore believed that merely attracting new jobs to the South would not solve the South's economic woes. They believed that low wages were the cause, not

110. One economist presciently predicted that enforced high wages in the South would lead to the loss of jobs for African Americans, which in turn would force them to go North. The economist concluded that although this process would be traumatic, it would redound to African Americans' ultimate benefit. See Mercer G. Evans, *Southern Wage Differentials Under the NRA*, 1 S. ECON. J. 3, 7, 11 (1934).

111. BRUCE J. SCHULMAN, FROM COTTON BELT TO SUNBELT: FEDERAL POLICY, ECONOMIC DEVELOPMENT, AND THE TRANSFORMATION OF THE SOUTH, 1938–1980, at 6 (1991).

112. For the relevant statistics, see GAVIN WRIGHT, OLD SOUTH, NEW SOUTH (1986).

113. *Id.*

114. *Id.* at 6.

the consequence, of the South's economic backwardness.¹¹⁵ Roosevelt himself believed that the South's low wages damaged its economic prosperity.¹¹⁶ Administration economists thought that despite much lower capital investment and productivity per worker in the South, lower regional wages had no economic justification.¹¹⁷

Not surprisingly, then, New Deal economists and other influential members of the Roosevelt Administration concluded that the way to reduce southern poverty and industrial backwardness was to impose high wages on the region.¹¹⁸ In effect, the Administration turned economic logic on its head, believing that wage increases would raise productivity.¹¹⁹ It is true, of course, that if employers are required to pay higher wages, they will hire better workers and make more and better use of technology. In that sense, requiring higher wages increases the average productivity of employed workers. But the New Dealers claimed that forcing employers to give workers higher wages would raise *existing workers'* productivity by making them happier and healthier, which is, at best, a highly speculative proposition. Similar arguments had been relied upon by progressive economists to justify earlier minimum-wage plans.¹²⁰

The National Industrial Recovery Act (NIRA) created the first New Deal wage-setting rules. NIRA set "code" wages for various southern industrial jobs that were frequently far higher than market wages for similar jobs in the region. For example, as a result of NIRA, wages in the South's largest industry, textiles, increased by almost seventy percent in five months.¹²¹ Predictably, the result of such massive wage increases was not an equally massive increase in the productivity of existing low-wage workers. Rather, employers invested in mechanization and dismissed their unskilled workers.¹²²

Instead of being ashamed or even concerned about these results, the Cotton Garment Code Authority, which set the relevant wage, bragged about reducing the use of "sweated, underpaid workers" in the garment industry.¹²³ This organization proclaimed, "[S]urely it is no tragedy that concerns operating 54 hours a week and paying less than ten cents an hour . . . have recorded losses in employment."¹²⁴ The Authority considered it necessary "to remove thousands of these substandard workers[,] . . . [who were] replaced by fewer, but far higher

115. *Id.* at 7.

116. *Id.* at 23.

117. *Id.*

118. *Id.* at 25.

119. *Id.* at 23.

120. See Robert E. Prasch, *American Economists and Minimum Wage Legislation During the Progressive Era: 1912–1923*, 20 J. HIST. ECON. THOUGHT 161 (1998).

121. SCHULMAN, *supra* note 111, at 22. It should be noted, however, that the textile codes were frequently circumvented. See generally BRYANT SIMON, *A FABRIC OF DEFEAT: THE POLITICS OF SOUTH CAROLINA MILLHANDS, 1910–1948* (1998).

122. WRIGHT, *supra* note 112, at 223–25.

123. SCHULMAN, *supra* note 111, at 29.

124. *Id.*

paid and more productive wage earners.”¹²⁵ They were apparently unconcerned about where the “substandard” employees of such concerns would find new employment.

Although NIRA existed for only about two years, an architect of the law estimated that its wage provisions directly or indirectly led to the dismissal of 500,000 African American workers.¹²⁶ Others consider such estimates exaggerated because NIRA lasted so briefly and was widely circumvented.¹²⁷ Regardless, it seems clear that NIRA’s wage provisions had a significant negative effect on African American employment, and that the African Americans’ only respite from the law was the incompetence of the government in enforcing it.¹²⁸

Despite the hardships it imposed on low-wage southerner workers, NIRA had at least made some accommodations for regional wage differentials. The Public Works Administration also took into account the situation on the ground, paying significantly lower wages in the South than elsewhere in the United States.¹²⁹ By contrast, the Fair Labor Standards Act (FLSA) created a national minimum wage and made no such adjustments.¹³⁰ Representatives of southern industry had pleaded that the South be subject to a lower wage, given that thirteen percent of southern workers earned less than the initial minimum of twenty-five cents an hour mandated by the minimum wage law, compared to less than one-tenth of one percent of workers in the rest of the country.¹³¹ But by 1938, when the FLSA was working its way through Congress, the Roosevelt Administration had decided to no longer accommodate southern interests.¹³²

The FLSA was not intended to reflect the status quo but to align the wage structure of southern industry with the rest of the nation by eliminating low-wage employment in the South.¹³³ Though standard economic theory suggests that wise investment in physical and human capital raises productivity, New Deal officials believed “improvements in physical well-being and morale” caused by government-imposed higher wages, would bring productivity gains.¹³⁴ FDR himself not only acknowledged that raising southern wages through legislation would imperil jobs in the short term, he welcomed this result. For example, in 1939, FDR stated that a southern mill with cheap labor and

125. *Id.*

126. CHARLES FREDERICK ROOS, *NRA ECONOMIC PLANNING* 173 (1937); *see also* WRIGHT, *supra* note 112, at 224.

127. *See, e.g.*, RAYMOND WOLTERS, *NEGROES AND THE GREAT DEPRESSION* 214 (1971).

128. *See id.* at 147. *See generally* Arthur F. Raper, *The Southern Negro and the NRA*, 64 GA. HIST. Q. 128, 134, 139–41 (1980).

129. SCHULMAN, *supra* note 111, at 58.

130. *See* Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. ch. 8 (2006)).

131. SCHULMAN, *supra* note 111, at 66.

132. *Id.* at 51.

133. *Id.*

134. BUREAU OF LABOR STATISTICS, *BLS BULL. NO. 898*, at 102 (1947), *quoted in* SCHULMAN, *supra* note 111, at 64; *see also id.* at 51, 54, 60, 66.

outdated equipment “ought not to be in existence.”¹³⁵ Roosevelt believed that long-term gains in efficiency and purchasing power would more than compensate the South, if not necessarily individual workers, for its short-term employment losses.¹³⁶

The New Dealers’ blasé attitude toward the unemployment the FLSA was expected to create resulted in part from their continued adherence to the old progressive “family wage” doctrine that only jobs paying high enough wages to properly support a family were acceptable.

[I]f the FLSA imperiled any southern jobs, the President and other New Dealers assumed only substandard jobs were at risk and bade them good riddance Stable family employment and high family wages mattered more to federal authorities than did the total number employed. One of the perceived evils of low southern wages was that they made a man unable to support his family and forced his wife and children to work.¹³⁷

The New Dealers’ ideological predispositions were reinforced by raw political considerations. Northern branches of national industries such as textiles supported a national minimum wage specifically to suppress competition from lower-wage southern competitors.¹³⁸ Labor unions with great influence in the Roosevelt Administration also supported a national minimum wage to suppress labor-market competition.¹³⁹ Indeed, the American Federation of Labor took credit for the failure of the FLSA to provide for a lower minimum wage in the South.¹⁴⁰ The administrator of the FLSA acknowledged that “[o]ne of the declared objectives” of the FLSA “was to bring to an end this migration of plants solely to obtain a source of cheap labor.”¹⁴¹ Other New Dealers hoped the FLSA would “break the political stranglehold of the planter and merchant-manufacturer oligarchy” in the South and so improve long-term prospects for New Deal liberalism to thrive in southern politics.¹⁴²

The disemployment effects of the FLSA were felt mainly by unskilled African American workers in the South, who were most likely to work in jobs that paid less than the government-imposed minimum wage.¹⁴³ Some companies simply could not afford to pay the new wages and either replaced workers with productivity-enhancing technology or went out of business.¹⁴⁴ Other firms managed to pay the new wages but replaced their African American workers

135. SCHULMAN, *supra* note 111, at 72.

136. *Id.* at 65–66.

137. *Id.* at 65.

138. *Id.* at 59, 65, 70.

139. *Id.* at 70; *see also* WRIGHT, *supra* note 112, at 221–22.

140. Elizabeth Brandeis, *Organized Labor and Protective Labor Legislation*, in *LABOR AND THE NEW DEAL* 195, 228 (Milton Derber & Edwin Young eds., 1957).

141. SCHULMAN, *supra* note 111, at 70.

142. Steve Fraser, *The “Labor Question,”* in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980*, at 55, 75 (Steve Fraser & Gary Gerstle eds., 1989); *see also* SCHULMAN, *supra* note 111, at 68.

143. GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 398 (1944); WRIGHT, *supra* note 112, at 219.

144. SCHULMAN, *supra* note 111, at 65–66.

with whites.¹⁴⁵ The Labor Department reported that between 30,000 and 50,000 workers, mostly southern African Americans, lost their jobs because of the minimum wage within *two weeks* of the FLSA's imposition¹⁴⁶—and that was before the scheduled increases to raise the minimum wage by an additional sixty percent over three years. African Americans in the tobacco industry were particularly hard hit. In Wilson, North Carolina, for example, machines replaced 2,000 African American tobacco stemmers in 1939.¹⁴⁷

The Act's medium-term disemployment effects on African American workers were masked by other factors. In 1939, the Works Progress Administration provided temporary employment to about one million African Americans,¹⁴⁸ some of whom would otherwise have been left unemployed by the FLSA. By the time the Supreme Court upheld the FLSA in 1941,¹⁴⁹ the Great Depression's labor surplus was replaced with a wartime labor shortage,¹⁵⁰ substantially increasing the employment opportunities for African Americans in the private sector.¹⁵¹ Schulman concludes that “[t]he defense boom [probably] averted an economic catastrophe for southern industry” because war-related production, and the accompanying demand for labor, drove wages well above the forty-cent minimum.¹⁵² The World War II military also absorbed hundreds of thousands of working-age African American men.

By 1943, however, economist Gunnar Myrdal was able to predict the negative effects that the FLSA was to have on postwar African American employment, particularly in the South:

As low wages and sub-standard labor conditions are most prevalent in the South, this danger [of unemployment] is mainly restricted to Negro labor in that region. When the jobs are made better, the employer becomes less eager to hire Negroes, and white workers become more eager to take the jobs from the Negroes. There is, in addition, the possibility that the policy of setting minimum standards might cause some jobs to disappear altogether or to become greatly decreased. . . . If labor gets more expensive, it is more likely to be economized and substituted for by machines. Also inefficient industries . . . may be put out of business when the government sets minimum standards.¹⁵³

145. *Id.*

146. William A. Keyes, *The Minimum Wage and the Davis–Bacon Act: Employment Effects on Minorities and Youth*, 3 J. LAB. RES. 399, 401 (1982).

147. Douglas Carl Abrams, *Irony of Reform: North Carolina Blacks and the New Deal*, 66 N.C. HIST. REV. 149, 156 (1989).

148. ELI GINZBERG & ALFRED S. EICHNER, *THE TROUBLESOME PRESENCE: AMERICAN DEMOCRACY AND THE NEGRO* 297 (1964).

149. *United States v. Darby*, 312 U.S. 100 (1941).

150. African Americans also benefited from the wartime Fair Employment Practices Commission, which enforced civil-rights norms in war industries. See LOUIS RUCHAMES, *RACE, JOBS, AND POLITICS: THE STORY OF FEPC* 22, 45 (1953). See generally ANDREW E. KERSTEN, *RACE, JOBS, AND THE WAR: THE FEPC IN THE MIDWEST, 1941–46* (2000); MERL E. REED, *SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT’S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941–1946* (1991).

151. See JOHN B. KIRBY, *BLACK AMERICANS IN THE ROOSEVELT ERA* 223 (1980).

152. SCHULMAN, *supra* note 111, at 72.

153. MYRDAL, *supra* note 143, at 397–98.

Moreover, as Myrdal noted, the South's main selling point in its attempt to lure industry was its cheap labor. The FLSA partially negated this advantage, resulting in fewer opportunities for African Americans in southern industry.¹⁵⁴ Instead, many young African Americans, displaced by a combination of the FLSA, the Agricultural Adjustment Act, and emerging technologies, moved north, where unemployment rates for unskilled young African Americans were already very high.¹⁵⁵ The result was a massive, long-term increase in unemployment in African American men, with the attendant social dislocations.

C. Protective Legislation for Women

The belief that women workers were “defective” and should not be permitted to compete with male workers seeking a “family wage” continued well beyond the Progressive Era. Nevertheless, reformers were stymied by the Supreme Court's controversial 1923 decision in *Adkins v. Children's Hospital*.¹⁵⁶ In *Adkins*, the Court held that sex-based minimum-wage laws were unconstitutional as a violation of both liberty of contract and women's rights.¹⁵⁷

When the Great Depression hit, several states decided to begin enforcing their minimum-wage laws for women, hoping that the Supreme Court would reconsider its holding in *Adkins* in light of economic circumstances. In 1936, the Supreme Court invalidated New York's minimum-wage law.¹⁵⁸ Justice Owen Roberts, a moderate Hoover appointee, joined the Court's conservative “Four Horsemen” in the 5–4 decision. The Court wrote that “the State is without power . . . [to regulate] contracts between employers and adult women workers as to the amount of wages to be paid.”¹⁵⁹ The Court added that “proscribing minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work.”¹⁶⁰

Secretary of the Interior Harold Ickes, a strong critic of the opinion, revealed that many reformers continued to believe that the legal status of women, at least in the workplace, should be similar to that of minor children. Even though child labor was not an issue in the case, and the Supreme Court had previously upheld state child-labor laws, Ickes wrote sarcastically that the *Adkins* Court upheld the “sacred right of . . . an immature child or helpless woman to drive a bargain with a great corporation.”¹⁶¹ In fact, the Court's opinion was based on the notion that adult women should be treated the same as men, and not like children.

154. *Id.* at 398.

155. See WRIGHT, *supra* note 112, at 246.

156. 261 U.S. 525 (1923).

157. *Id.*

158. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

159. *Id.* at 611.

160. *Id.* at 616–17.

161. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 105 (1995).

In 1937, following much public outrage and the overwhelming reelection of President Franklin Roosevelt, Justice Roberts switched sides, and the Court issued a broad opinion, authored by Chief Justice Charles Evans Hughes, upholding a minimum-wage law for women.¹⁶² The Court's primary argument did not directly challenge the constitutional right to liberty of contract. Instead, the Court narrowed liberty of contract's scope and signaled its acquiescence to protective laws for both men and women. The Court argued that liberty of contract was merely a subset of liberty and could be abrogated in the public interest, as shown by other Supreme Court precedents, such as *Muller v. Oregon*,¹⁶³ in which the Court upheld a maximum-hours law for women workers. Given the economic conditions during the Depression, a state legislature could reasonably try to guarantee women workers in general a living wage, even if this attempt resulted in unemployment among some fraction of women who could not command the minimum.¹⁶⁴

The Court's conclusion was consistent with the view of many progressive economists, who, as noted previously, argued that "defective" workers who could not command "decent wages" should be forced out of the labor market rather than be allowed to depress wages for men seeking to support their families. In other words, many believed that it was a feature, not a bug, that minimum-wage laws caused unemployment for women at the bottom rung of the economic ladder.

Progressives celebrated their victory in *West Coast Hotel*, and that ruling helped clear the way for extensive federal and state regulation of the labor market, a longstanding reformist goal. Yet the opinion was a significant step backwards for women's rights. In *West Coast Hotel*, the Court adopted a patriarchal view of women's place in society, even though the decision's reasoning did not hinge on differentiating between the rights of male and female workers. Chief Justice Hughes quoted *Muller v. Oregon* for the proposition that "though limitations upon personal and contractual rights may be removed by legislation, there is that in [women's] disposition and habits of life which will operate against a full assertion of those rights."¹⁶⁵

By contrast, Justice Sutherland, in dissent, penned a rousing defense of women's rights:

The common-law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and

162. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 84–106 (1998) (arguing that not only was Roberts' "switch" not motivated by political considerations, but that Roberts maintained a consistent position in these cases, and his votes turned on how the cases were argued).

163. 208 U.S. 412 (1908).

164. *West Coast Hotel*, 300 U.S. at 398–400. Chief Justice Hughes also raised a more direct challenge to liberty of contract. He asserted that when an employer pays a worker less than a living wage, the employer is implicitly relying on subsidies from taxpayers in the form of relief payments to sustain the worker. "The community," Hughes wrote, "is not bound to provide what is in effect a subsidy for unconscionable employers." *Id.* at 399.

165. *Id.* at 394–95.

political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so.¹⁶⁶

Justice Sutherland added that “[t]he ability to make a fair bargain, as everyone knows, does not depend upon sex.”¹⁶⁷ An unidentified woman wrote to Sutherland, “May I say that the minority opinion handed down in the Washington minimum wage case is, to me, what the rainbow was to Mr. Wordsworth? . . . You did my sex the honor of regarding women as persons and citizens.”¹⁶⁸

Although superfluous to the Court’s holding, Chief Justice Hughes’s assertion that women were properly subject to special regulations was relied upon for the next three decades to uphold the constitutionality of laws that excluded women from various occupations. In 1948, for example, the Supreme Court upheld a Michigan law prohibiting women from working as bartenders.¹⁶⁹ The purported purpose of the law was to protect women’s morals, but the law’s primary lobbyists were not social reformers or church groups, but labor unions representing male bartenders. Moreover, the law permitted women to work as cocktail waitresses,¹⁷⁰ which would seem at least as great a threat to their moral standing. Nevertheless, Justice Frankfurter wrote a mocking opinion dismissing an equal-protection challenge to the law, stating that the situation was “one of those rare instances where to state the question is in effect to answer it.”¹⁷¹ The right of women to compete in the labor force on the same terms as men remained a dead issue until the 1960s.¹⁷²

IV

CONCLUSION

American labor reformers promoted an ideology that advocated excluding from the workplace those they regarded undesirable, undeserving, or defective. Undesirable workers were those who were deemed unable, for genetic, social, or other reasons, to command what the reformers considered sufficiently high wages. Not coincidentally, the set of these undesirable workers overlapped considerably with members of groups deemed defective in some way or inferior to the norm, defined as native, white, male workers—in particular, African Americans, women, and, to a lesser extent, immigrants and the disabled.

166. *Id.* at 411–12 (Sutherland, J., dissenting).

167. *Id.* at 413.

168. LEUCHTENBURG, *supra* note 161, at 176.

169. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

170. SALLY J. KENNEY, FOR WHOSE PROTECTION? REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITAIN 48 (1992).

171. *Goesaert*, 335 U.S. at 465.

172. *See* KENNEY, *supra* note 170, at 50.

Once progressive ideology came to dominate government policy during the Great Depression, labor legislation was enacted that intentionally set out to exclude “undesirable” workers from the workplace. The Davis–Bacon Act of 1931 sought to banish itinerant African American workers from federal construction projects; the National Industrial Recovery Act and the Fair Labor Standards Act established minimum-wage levels intended to destroy low-wage jobs primarily held by African Americans in the South; and various states enacted and enforced special minimum-wage laws for women. The Supreme Court upheld sex-specific minimum-wage laws with the knowledge that they would substantially narrow employment opportunities for women.

The New Deal period, however, also saw the rise of a new egalitarian liberalism that promised to promote racial, and later gender, equality. This version of liberalism eventually carried the day, and modern liberals, including those who have embraced the “progressive” moniker, are no longer partisans of human inequality. By the time this transformation occurred, however, progressive labor legislation had wreaked havoc on the employment prospects of African Americans¹⁷³ and women.

Moreover, the older progressive habits of thought have not completely died out, especially when the interests of foreign or immigrant workers are at issue. For example, opponents of liberalized international trade claim that such trade improperly allows multinational corporations to “exploit” unskilled workers in labor-intensive industries in impoverished countries. Exploitation, in this context, seems to have no specific definition beyond “we don’t think they are getting paid enough.” Yet, basic economic theory suggests that if one substantially raised the wage levels of such workers, without improving their productivity via capital investment or otherwise, their employers would become less competitive and their jobs would be terminated. Given that calls for tighter trade rules are rarely accompanied by plans to increase the productivity of the workers allegedly suffering “exploitation,” the implicit argument is that it is better that the jobs held by these workers not exist at all.

Relatedly, debates over the costs and benefits of immigration rarely take into account the benefits to the immigrants themselves. Debate over the impact of immigration on the wages and job prospects of “workers” rarely considers the welfare gains from immigration to the immigrants. Michael Dukakis and Daniel Mitchell, for example, advocate raising American minimum wages to deter undocumented Mexican workers: “[I]f we want to reduce illegal immigration, it makes sense to reduce the abundance of extremely low-paying [U.S.] jobs that fuels it.” Dukakis and Mitchell acknowledge that some “low-end jobs may be lost” from a higher minimum wage, but they regard this job loss as a social good precisely because it would deny employment to (among others) “people who aren’t supposed to be here in the first place.”¹⁷⁴

173. See Bernstein, *supra* note 84.

174. Michael S. Dukakis & Daniel J. B. Mitchell, *Raise Wages, Not Walls*, N.Y. TIMES, July 25, 2006, at A19. The failure to consider the interests of the immigrants in the immigration debate is true not

That is not to say that one cannot make legitimate arguments against liberalized trade or increased immigration, legal or illegal. Nor, for that matter, can one reasonably expect that the average person will consider the interests of “strangers,” such as potential immigrants or low-wage workers in the Third World, to be as important as the interests of existing members of his own political polity. But the history of labor reform in the Progressive and New Deal eras is a timely reminder that “progressive” economic arguments can be illiberal if they treat some individuals as less worthy of concern than others.

only in popular writing but also in scholarly studies. *See, e.g.*, George J. Borjas & Lawrence F. Katz, *The Evolution of the Mexican-Born Workforce in the United States* (Nat'l Bureau of Econ. Research, Working Paper No. 11281, 2005), available at <http://www.nber.org/papers/w11281>.