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“UNEMPLOYABLES”? RACE,
LOW-WAGE WORK, AND MINIMUM
WAGES: THE NEW EVIDENCE**

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

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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 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 a half-century.² Exacerbating this state of affairs, massive wealth and pension assets have vanished while whole communities have been debilitated.³ Meanwhile, workers are forced to tackle a neuralgia elevated by falling or stagnant wages, increasing uncertainty, and increasing disparities in nonwhite versus white unemployment rates.⁴ While a lively debate exists regarding who or what has caused America's latest financial and economic implosion (politics and government policy⁵ or risk-taking speculators and banks⁶), there is also a renewed emphasis on the necessity of government intervention and a renewed nostalgia for New Deal-era law reforms despite the past and current consequences imposed upon African Americans and others by the New Deal.⁷

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

² Gene R. Nichol, *Wages, Work, Privilege and Legal Education*, 5 *HARV. L & POL'Y REV.*, 401, 401 (2011).

³ *Id.*

⁴ Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?*, 26 *QLR* 799, 800 [hereinafter, Hutchison, *What Workers Want*].

⁵ See e.g., Jeffrey Friedman, *A Crisis of Politics, Not Economics: Complexity, Ignorance and Policy Failure*, in 21 *CRITICAL REVIEW: A JOURNAL OF POLITICS AND SOCIETY*, 127-183 (2009) ("The financial crises was caused by the complex, constantly growing web of regulations designed to constrain and redirect modern capitalism. This complexity made investors, bankers, and perhaps regulator themselves ignorant of regulations previously promulgated across decades and in different 'fields' of regulation. . . [thus calling] into question the feasibility of the century-old attempt to create a hybrid capitalism in which regulations are supposed to remedy economic problems as they arise.").

⁶ Joseph E. Stiglitz, *The Anatomy of a Murder: Who Killed America's Economy?* in 21 *CRITICAL REVIEW: A JOURNAL OF POLITICS AND SOCIETY*, 329-339 (2009) ("The main cause of the crisis was the behavior of the banks—largely a result of misguided incentives unrestrained by good regulation. Conservative ideology, along with unrealistic economic models of perfect information, perfect competition, and perfect markets, fostered lax regulation, and campaign contributions helped the political process along. . . [While] low interest rates can be a boon; it was the financial institutions that turned them into a bust.").

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

Against this backdrop, Nobel Laureate Amartya Sen offers a solid defense of markets: “The freedom to exchange words, or goods, or gifts does not need defensive justification in terms of their favorable, but distant effects; they are part of the way human beings in society live. . . We have good reasons to buy and sell, to exchange and to seek lives that can flourish on the basis of transactions.”⁸ Sen is not an unreflective defender of markets, and he supplies a nuanced view of income, wealth, and advantage.⁹ He shows, for example, that women worldwide have been liberated through access to markets.¹⁰ This is true despite the commitment of early progressive elites to statutory innovation enforcing female inferiority.¹¹ While society’s intentional efforts to subordinate women and others has waned, the human appetite for regulation (a yearning that is not necessarily motivated by virtue ethics) abounds in market economies. The appetite for regulation has surfaced with explosive force in the domain of transactions wherein human capital is exchanged for wages and where many observers are dissatisfied with the resulting outcomes. If economics is more than the theology of a new religion of abundance and human progress,¹² then it is likely that 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,¹³ signifying that there is an interminable and unsettled character about much of what passes for America’s contemporary moral and philosophical debates.¹⁴ In part, the character of public policy debates in Western democracies reflects the failure of progressive aspirations. As philosopher Chantal Delsol clarifies in her analysis of the spirit of late modernity, “modern man” has been

⁸ DEIRDRE N. MCCLOSKEY, *THE BOURGEOIS VIRTUES: ETHICS FOR AN AGE OF COMMERCE* 29 (2007) (quoting Sen).

⁹ AMARTYA SEN, *THE IDEA OF JUSTICE*, 253-268 (2009) (income or wealth is an inadequate way of judging advantage).

¹⁰ MCCLOSKEY, *supra* note ___ at 29 (citing Sen).

¹¹ *See e.g.*, RICHARD EPSTEIN, *HOW PROGRESSIVE REWROTE THE CONSTITUTION* 90 (2006) (Justice Brandeis, acting as a stalwart progressive before joining the U.S. Supreme Court, served as the architect of detailed sociological studies used to support differential treatment of women against a Fourteenth Amendment challenge and successfully defended a statute limiting hours of work for women on grounds of innate female inferiority in a Supreme Court case decided in 1908).

¹² MCCLOSKEY, *supra* note ___ at 196.

¹³ Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 *UNI. OF PA. J. OF BUS., AND EMPL. L.* 663, 674 (2008) [hereinafter, Hutchison, *Reclaiming the First Amendment*].

¹⁴ *Id.*

confounded, dazed, and confused by a growing recognition that the collapse of communism and other isms, rather than providing a solution for his anxieties, has made way for a return of the social and human problems that Progress was supposed to have relegated to History's dustbin.¹⁵ Instead of evolving toward the apex of Enlightenment hopes grounded in the belief that progressives have been an essential part of modernity's inevitable march toward permanent progress, moderns must deal with disconcerting shadows after realizing that progress, in some final collective sense, is a debilitating illusion.¹⁶ 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.¹⁷ As a consequence, modern man, both within and outside the labor arena, is now unsure of how to orient himself toward a future filled with doubt.¹⁸ Meanwhile, social scientists and labor advocates persistently insist that uncertainty can be resolved through more studies, particularly those supporting a greater role for government within society, the economy, and, in particular, the world of work. Arguing against this tendency, social science critic Christopher Shannon intuits that the effort of progressives to extract meaning from work on the basis of social science study 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.¹⁹ 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 philosophic, moral, and spiritual assumptions have fallen apart.²⁰

Few principles can be fully legitimated against this twitchy postmodern background since it is difficult to find agreement regarding a complete, transcendent, and

¹⁵ Paul Seaton, *Translator's Preface* in CHANTAL DELSOL, *UNJUST JUSTICE: AGAINST THE TYRANNY OF INTERNATIONAL LAW* vii (2008) (summarizing Delsol).

¹⁶ Thomas Hibbs, *Seeking with Groans: The Moral Universe of Film Noir*, in *BOOKS & CULTURE*, at 41, 41, (March/April 2007).

¹⁷ DAVID ANDRESS, *THE TERROR: CIVIL WAR IN THE FRENCH REVOLUTION*, 1 (2005) (quoting the Universal Declaration of Human Rights and decrying eugenic experimentation and the vile perversions of Darwinist science).

¹⁸ Seaton, *supra* note ___ at vii.

¹⁹ CHRISTOPHER SHANNON, *CONSPICUOUS CRITICISM: TRADITION, THE INDIVIDUAL, AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT* 199-201 (2006).

²⁰ Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 *DEPAUL L. REV.* 1197, 1197 (2005).

immanent set of propositions about right and wrong.²¹ Nevertheless, it can be tentatively argued that one of our greatest shortcomings as a people is a growing willingness to turn our gaze away from those locked at the bottom of American life.²² As such, the moral pursuit of a defensible 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 (real, imagined, and created) roils.²³ Few groups are as vulnerable as young adults without a high school degree or young black adults and teenagers,²⁴ or, alternatively, if we gaze past America's borders, poor black South Africans straining to thrive in a twenty-first century world.²⁵

Coinciding with rising levels of economic inequality²⁶ that place vulnerable workers at risk, the publication of Simon Deakin and Frank Wilkinson's recent article, *Minimum Wage Legislation*,²⁷ provides impetus to a new body of social science research.²⁸ This revisionist analysis largely rejects times-series studies for a number of reasons,²⁹ in favor of a comparative approach that examines variations in minimum wages among states.³⁰ 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

²¹ Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L. J. 1229, 1229 (1979).

²² Nichol, *supra* note ___ at 401.

²³ *Id.* at 403.

²⁴ See e.g., SOWELL, BASIC ECONOMICS, *supra* note ___ at 214 (minimum wages especially reduce employment of younger, less-skilled, and minority workers).

²⁵ *Id.* at 216-217 (illustrating the adverse employment effects of minimum wages on poor South Africans).

²⁶ Nichols, *supra* note ___ at 402.

²⁷ Simon Deakin and Frank Wilkinson, *Minimum Wage Legislation*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS, 150 (ed. Kenneth G. Dau-Schmidt, Seth D. Harris, and Orly Lobel, 2009).

²⁸ See e.g., David Card, *Using Regional Variation in Wages to Measure the Effects of the Federal Minimum Wage Law*, 46 INDUST. AND LABOR REL. REV. 22-37(1992); David Card, *Do Minimum Wages Reduce Employment? A Case Study of California, 1987-1989*, 46 INDUST. AND LABOR REL. REV. 38-54 (1992); David Card, Lawrence F. Katz and Alan B. Krueger, *Comment on David Neumark and William Wascher, Employment Effects of Minimum and Subminimum Wages: Panel data on state minimum wage laws*, 48 INDUST. AND LABOR REL. REV. (1994); David Card and Alan B. Krueger, *Minimum Wages and Employment: A case study of the fast-food industry in New Jersey and Pennsylvania*, 84 AMER. ECON. REV. 772—93 (1994); DAVID CARD AND ALAN B. KRUGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995).

²⁹ Deakin and Wilkinson, *supra* note ___ at 155 (rejecting time-series analysis from a single source (U.S. Current Populations Survey) because the employment effects are small and highly sensitive to choice of sample period).

³⁰ *Id.*

economic consensus that challenges³¹ 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 recall what the late Senator Paul Wellstone labeled as willful blindness, enabling vibrant and boastful democracies to take the economic travails of so many low-wage workers off the table.³² 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.³³

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,³⁴ progressive labor paradigms do not seem to be working for marginalized Americans. For instance, Henry Louis Gates and Cornel West have documented evidence that more than half of all black males between the ages of twenty-five and thirty-four are jobless or underemployed.³⁵ Other

³¹ See e.g., DAVID NEUMARK AND WILLIAM L. WASCHER, MINIMUM WAGES 285-287 (2010) (showing that minimum wages are an ineffective social policy for aiding the poor, entail disemployment effects that are felt most heavily by low-skilled workers, discourage human capital formation, increase prices for products frequently consumed by low-income families, and do little to raise the incomes of poor and near-poor families). See also, Richard V. Burkhauser, Kenneth A. Couch and David C. Wittenburg, *Who Minimum Wage Increases Bite: An Analysis Using Monthly Data from the SIPP and the CPS*, 67 SOUTHERN ECON. J. 16, 30-31 (2000) (measuring the consequences of minimum wage increases for the employment of vulnerable groups within the labor market and consistently finding that minimum wage increases have a significant negative employment effect on each vulnerable group, and further confirming the neoclassical predictions that minimum wage increases significantly reduce employment).

³² Nichols, *supra* note ___ at 401.

³³ See generally, THOMAS SOWELL, THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY (1995) [hereinafter, SOWELL, VISION OF THE ANOINTED].

³⁴ David E. Bernstein and Thomas C. Leonard, *Excluding Unfit Workers: Social Control versus Social Justice in the Age of Economic Reform*, 72 LAW AND CONT. PROB. 176, 178-200 (2009) (explaining the rise of progressive labor ideology and the implementation of wage regulation, which had a significant negative effect on African American employment).

³⁵ HENRY LOUIS GATES JR. & CORNEL WEST, THE FUTURE OF THE RACE 24-25 (1996).

social indices are equally discouraging, suggesting that ten times the number of black males receive prison sentences rather than college diplomas.³⁶ Moreover, while the evidentiary record shows that dramatic racial differences in unemployment did not exist 60 to 100 years ago, the unemployment rate for non-whites has risen relative to whites since the 1930s.³⁷ Today, this unemployment gap remains in effect, thus contributing to the isolating particularities that afflict African Americans. 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.³⁸ In response to social exclusion, the size of the black underclass has grown disproportionately in recent years,³⁹ reinforced by the rise in the black unemployment rate. Between April 2010 and April 2011, for example, the unemployment rate for white workers ranged from 8.6 and 8.0 percent, while the rate for blacks ranged from 15.9 and 16.1 percent.⁴⁰ 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 is borne most heavily by the poor and marginalized.⁴¹ 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. Given the 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.⁴² Placed within this morally dubious context,

³⁶ *Id.*

³⁷ See RICHARD VEDDER & LOWELL GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA* 269-87 (1993).

³⁸ GLENN C. LOURY *THE ANATOMY OF RACIAL INEQUALITY*, 101 (2002).

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

⁴⁰ Table A-2, Employment status of the civilian noninstitutional population by race, Hispanic or Latino ethnicity, sex, and age, U.S. BUREAU OF LABOR STATISTICS *available at* <http://data.bls.gov/cgi-bin/print.pl/news.release/empsit.t02.htm> (accessed May 7, 2011).

⁴¹ See e.g., SOWELL, *BASIC ECONOMICS*, *supra* note ___ at 216-217 (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).

⁴² Harry G. Hutchison, *Waging War on the "Unfit" From Plessy v. Ferguson to New Deal Labor Law*, 7 *STAN. J. OF CIVIL RTS. & CIVIL LIB.*, 1, 1-46 (prepublication pagination) (forthcoming, 2011) [hereinafter, Hutchison, *Waging War on the "Unfit"?*]; Harry G. Hutchison, *Employee Free Choice or Employee Forged*

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 particularly the plight of African American workers, 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.⁴³ Part II reviews Deakin and Wilkinson's analysis. Part III refracts the authors' claims and contentions through a prism provided by contrary empirical evidence, American labor history, and neoclassical theory. Although Deakin and Wilkinson suggest otherwise,⁴⁴ it is unfortunate that U.S. courts, like much of society, have rarely intervened to thwart the expansion of social justice legislation.⁴⁵ 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 punish⁴⁶ and further disadvantage marginalized Americans, in addition to expanding racial disparities.⁴⁷

I. CONTROLLING THE "UNFIT"

A. Prolegomena

Choice? Race in the Mirror of Exclusionary Hierarchy, 15 MICH. J. OF RACE & LAW, 369-416 (2010) [hereinafter, Hutchison, *Employee Free Choice*]; Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL J. OF CORP. L. 437, 437-482 (2010) [hereinafter, Hutchison, *Choice, Progressive Values*]; and Hutchison *Racial Exclusion*, *supra* note ___ at 5-13.

⁴³ See e.g., Charles Warren, *The Progressiveness of the United States Supreme Court* 13 COLUM L. REV. 294, 295 (1913).

⁴⁴ Deakin and Wilkinson, *supra* note ___ at 152 (discussing the so-called *Lochner* era)

⁴⁵ See e.g., Warren, *supra* note ___ at 294-313 (describing the courts response to the growth in social justice legislation).

⁴⁶ See e.g., Walter Williams, *Punished by Minimum Wages*, INVESTOR'S BUSINESS DAILY, May 11, 2011 at A11.

⁴⁷ See *id.*

On one account, “[d]angers to a society maybe mortal without being immediate and one such danger is the prevailing social vision of our time—and the dogmatism, which the ideas, assumptions and attitudes behind that vision are held.”⁴⁸ 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 of racial subjugation. Scholars Black,⁴⁹ Bernstein,⁵⁰ Bernstein and Leonard,⁵¹ Epstein,⁵² and Moreno⁵³ 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 . . .⁵⁴

As this introductory quote from H.G. Wells demonstrates, humanity has been continuously catapulted from misery to exhilaration and back, and has therefore

⁴⁸ SOWELL, VISION OF THE ANOINTED, *supra* note____ at 1.

⁴⁹ EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE, (2003).

⁵⁰ See e.g., DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICANS, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL, (2001).

⁵¹ David E. Bernstein and Thomas C. Leonard, *Excluding Unfit Workers: Social Control versus Social Justice in the Age of Economic Reform*, 72 LAW AND CONT. PROB. 176-204 (2009).

⁵² See e.g., EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note____ at 1-127.

⁵³ PAUL D. MORENO, BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY (2006).

⁵⁴ Stephen M. Barr, *The Devil’s Chaplain Confounded*, in FIRST THINGS 25, 26 (August/September 2004) (quoting H. G. Wells).

repeatedly struggled to overcome vulnerability and improve upon its sense of strength.⁵⁵ The instinct is to “play God,” and too often this impulse is not just to improve, but to repress those who are deemed inferior.⁵⁶ Although racism and group hatred have existed in most cultures throughout history, it took millennia for these hostilities to migrate into the safe harbor of scientific thought, thus rationalizing destructive actions against the despised.⁵⁷ Since power tends naturally toward manipulation and control,⁵⁸ 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.⁵⁹ Putatively possessing an aristocracy of knowledge, and refusing to offer a completely consistent philosophic edifice, “American progressives frequently advanced their campaigns against “undesirables” with great subtlety and sophistication. On the basis of the moral high ground of public interest and fairness, they claimed that their programs and policies actually benefited the disadvantaged citizens they targeted. This is why some commentators continue to insist that the New Deal was a positive step toward social justice and a new world order.”⁶⁰

Stemming from the notion that, in the struggle to survive in a harsh world, many humans are not only less worthy but actually destined to wither, the argument was made that preserving the weak and the needy is, in essence, an unnatural and potentially harmful act.⁶¹ Coherent with this thesis, early progressives were Social Darwinists⁶² who believed strongly in eugenics and presumed that the state could remake the world by creating a pure race, a society of new men.⁶³ Progressive ideals, infused with Herbert

⁵⁵ BLACK, *supra* note ____ at 9.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD*, 188 (2010).

⁵⁹ *Id.*

⁶⁰ Hutchison, *Waging War on the “Unfit”?*, *supra* note ____ at 22 (prepublication pagination).

⁶¹ BLACK, *supra* note ____ at 10-11.

⁶² Progressives often labeled conservative opponents of eugenics as Social Darwinists. Indeed progressives invented the term “Social Darwinism” to describe anyone who opposed leading progressive, “Sidney Webb’s notion that the state must aggressively interfere with the reproductive order of society.” GOLDBERG, *supra* note ____ at 257.

⁶³ Hutchison, *Employee Free Choice*, *supra* note ____ at 380 (citing Goldberg).

Spencer's thinking, were "essentially a variant of English utilitarianism, with a more developed argument on progress through evolution."⁶⁴ In fairness, Darwinian thought, as exemplified by Spencer, could be taken in either a laissez-faire or statist direction.⁶⁵ Rejecting the notion of a republic founded on the natural rights tradition in favor of a living constitution, and pursuing hegemony in virtually every aspect of the nation's life, progressives ultimately succumbed to the fiction that progress, catalyzed by the emergence of a new world order, required the supervision of an educated class groomed for leadership.⁶⁶ Hence, progressive elites proposed selective breeding and emphasized human perfection coupled with centralized power and restructured economic systems.⁶⁷ Seeking to change the structure of society for the better, progressive endeavored to supervise evolution in ways that would fundamentally alter society: first, by substituting a statist economy for the free markets,⁶⁸ and second, by exchanging or eliminating "unfit" citizens in favor of "desirable" ones. 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,⁶⁹ it is undeniable, that for some, remaking the world required the liquidation of what was seen as America's black and sinister polyglot population.⁷⁰ 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 for the coming new world order.⁷¹ Believing that the government must submit to the Darwinian theory of organic life, progressives saw the state as a living thing freighted by irresistible impulses requiring expanding power as part of the natural evolutionary process.⁷² Corresponding with this proposition, governmental "experimentation" (the

⁶⁴ RONALD J. PESTRITTO, *WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM*, 11 (2005).

⁶⁵ *Id.*

⁶⁶ Hutchison, *Choice, Progressive Values*, *supra* note __ at, 467.

⁶⁷ Hutchison, *Employee Free Choice*, *supra* note __ at 381 (citing Goldberg).

⁶⁸ Hutchison, *Choice, Progressive Values*, *supra* note __ at 467.

⁶⁹ See EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, *supra* note ____ at 102-03 (showing that some progressives opposed Wilson's attempt to subjugate blacks).

⁷⁰ GOLDBERG, *supra* note __ at 135.

⁷¹ *Id.* (quoting H. G. Wells).

⁷² Hutchison, *Employee Free Choice*, *supra* note __ at 381.

watchword of pragmatic liberals from Dewey and Wilson to FDR) was seen as the social analogue to evolutionary adaptation.⁷³

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 fugleman, Woodrow Wilson.⁷⁴ After winning the 1912 election, Wilson immediately set about to convert the Democratic Party into a progressive party and make it the engine for the transformation of America.⁷⁵ In 1913, he vowed to appoint only progressives to his administration.⁷⁶ 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,⁷⁷ Critical Race Theory,⁷⁸ or neoclassical economics. On the contrary, and in sharp contrast with President Calvin Coolidge's call for religious and racial toleration during the 1924 election campaign,⁷⁹ Wilson did much to implement an agenda that socially constructed racial categories, enforced racial disparity, advanced racial stigma,⁸⁰ diminished human liberty⁸¹ and ultimately placed a regulatory drag on the economy.⁸²

⁷³ GOLDBERG, *supra* note ____ at 83.

⁷⁴ Hutchison, *Employee Free Choice*, *supra* note ____ at 380.

⁷⁵ GOLDBERG, *supra* note ____ at 104.

⁷⁶ *Id.*

⁷⁷ See e.g., Jonathan Bean, *Introduction: Civil Rights and Classical Liberalism*, in RACE & LIBERTY IN AMERICA: THE ESSENTIAL READER 1-12 (ed. Jonathan Bean, 2009) (classical liberals were consistent advocates of racial freedom).

⁷⁸ Race Critics endorse extensive socio-legal tradeoffs that favor people of color, including the deployment of a culturally-informed intent test, while classical-liberal reformists look at the effects of allegedly racist laws in order to find evidence of discrimination. See Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy and Hierarchy*, 34 HARV. J. ON LEGIS. 94, 99-102 (1997) [hereinafter, Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*]. See generally, Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787 (1994).

⁷⁹ *Coolidge Denounces White Racism (1924)* in RACE & LIBERTY IN AMERICA: THE ESSENTIAL READER, *supra* note __ 147-148. It is noteworthy that Coolidge's Democratic opponent, segregationist, John W. Davis, is best known for defending segregation in the *Brown v. Board of Education* case. *Id.* at 147.

⁸⁰ Hutchison, *Employee Free Choice*, *supra* note ____ at 380.

⁸¹ See e.g., *Hoover Desegregates the Commerce Department (1928)*, in RACE & LIBERTY IN AMERICA: THE ESSENTIAL READER *supra* note ____ at 154 (describing Wilson's successful effort to segregate government offices).

⁸² Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 650 (2003) (illuminating the failures of Wilson's disciple, FDR, whose attempt to supply centrally-planned price-controls and production limits caused a massive six to eleven percent decline America's GDP).

Emblematic of Wilson's approach to race was his advocacy of progressive "imperialism 'in order to subjugate and thereby elevate lesser races.'"⁸³ Unlike classical liberals, who fought slavery, lynching, segregation, imperialism and racial distinctions in the law,⁸⁴ Wilson, along with other academics, were convinced that social progress, "inevitable" as it was, had to take into account the "innate" differences in race since the various races were at different stages of evolution.⁸⁵ A necessary predicate for lasting democracy was, according to Wilson, a "'homogeneity of race and community of thought and purpose among the people.'"⁸⁶ Although Wilson, America's preeminent liberal, had an historical reputation as a far-sighted progressive, and despite the fact that there is no issue on which modern liberals consider themselves more enlightened than that of race,⁸⁷ the record shows that in addition to his commitment to Darwinian jurisprudence⁸⁸ and eugenics,⁸⁹ Wilson was a racist retrograde.⁹⁰ Driven to attain social progress, and effectively presuming that Africans and South Americans were savages,⁹¹ he insisted that giving Blacks the right to vote was the foundation of every evil in this country.⁹² Matching this intuition, it was no accident that the resegregation of the U.S. Civil Service was brought about under Wilson's Progressive regime.⁹³ In addition, Wilson's influential views set the stage for the implementation of a progressive labor law reform agenda that

⁸³ GOLDBERG, *supra* note ___ at 83.

⁸⁴ Jonathan Bean, *Introduction: Civil Right and Classical Liberalism*, in RACE & LIBERTY IN AMERICA, THE ESSENTIAL READER, *supra* note ___ at 1.

⁸⁵ GOLDBERG, *supra* note ___ at 260.

⁸⁶ PESTRITTO, *supra* note ___ at 73.

⁸⁷ GOLDBERG, *supra* note ___ at 243.

⁸⁸ David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 816-817, n. 89 (1998) [hereinafter Bernstein, *Philip Sober Controlling Philip Drunk*].

⁸⁹ GOLDBERG, *supra* note ___ at 254-256 (showing that Wilson was a forthright defender of eugenics based on a social vision requiring people to organize themselves into collective spiritual and biological units). See also PAUL LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS AND THE SUPREME COURT, AND *BUCK V. BELL* 26 (2008) (noting that, while serving as governor, Wilson signed New Jersey's sex surgery, which was enacted on grounds of eugenics).

⁹⁰ EPSTEIN, HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note ___ at 102.

⁹¹ GOLDBERG, *supra* note ___ at 260.

⁹² *Id.* at 84.

⁹³ EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTIONS, *supra* note ___ at 102.

ultimately included the federal minimum wage,⁹⁴ which was implemented by Wilson's former Assistant Secretary of the Navy and his ideological successor, FDR.⁹⁵

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 by the proposition that society was one indivisible whole that left no room for those who did not want to comply.⁹⁶ Early progressives were provoked by the deduction that a unified state required an increasingly centralized regulatory apparatus.⁹⁷ Dedicating themselves to societal advancement and the evisceration of social evil, they were seduced by the temptation to see science as a vehicle to forge a new pseudo-science of human oppression: race science.⁹⁸ They believed that uniting the disciplines of socioeconomics, philosophy, biology, and the law would change the world for the better, perhaps forever.⁹⁹

Arising out of this noxious brew, progressives became enthusiastic biologizers and elitists.¹⁰⁰ As a result, in both its origins and consequences, the Progressive Era was both liberal and conservative.¹⁰¹ 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

⁹⁴ *Id.* at 220 (showing that Wilson's government intruded deeply into the private sector in unprecedented ways and launched an effort, carried forward by FDR, of turning the economy into a "cooperative" enterprise where labor, business, and government sat around a table and hashed things out).

⁹⁵ *Id.* at 126 (describing Roosevelt's tenure as Assistant Secretary of the Navy under leading progressive and notorious racist Josephus Daniels).

⁹⁶ *Id.* at 87-88.

⁹⁷ See e.g., PESTRITTO, *supra* note ___ at 71-73 (discussing Woodrow Wilson's views).

⁹⁸ BLACK, *supra* note ___ at 9.

⁹⁹ *Id.*

¹⁰⁰ Bernstein and Leonard, *supra* note ___ at 179.

¹⁰¹ Hutchison, *Choice, Progressive Values, and Corporate Law*, *supra* note ___ at 438.

the welfare state they envisioned, and a faith that expertise could not only serve the social good, but also identify it.¹⁰²

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.¹⁰³ 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.¹⁰⁴ Second, progressives were often hampered by overconfidence in both themselves and the state. For example, during the Progressive Era, provoked by asylums where mentally-ill and handicapped patients passively rotted away after spending their day retrained by camisoles and straitjackets and their nights locked into covered cribs, hopeful 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.¹⁰⁵ Moreover, it was precisely the commitment of progressives to a widening of the scope of state action that often exacerbated the exclusion and mistreatment of individuals and groups that were seen as threats to the vitality of the nation.¹⁰⁶

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 and inevitable effect of Darwinism.¹⁰⁷ 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.”¹⁰⁸ Seeking

¹⁰² Bernstein and Leonard, *supra* note ___ at 179.

¹⁰³ ESPTEIN, HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note ___ at 72.

¹⁰⁴ *Id.*

¹⁰⁵ Andrew Scull, *Progressive Dreams, Progressive Nightmares: Social Control in 20th Century America*, 35 STAN. L. REV. 575, 576-577 (1981).

¹⁰⁶ *Id.* at 577.

¹⁰⁷ Hutchison, *Employee Free Choice or Employee Forged Choice?*, *supra* note ___ at 381.

¹⁰⁸ GOLDBERG, *supra* note ___ at 104.

national salvation through this faith-based agenda, American labor reformers often demanded the exclusion of defective groups from American labor markets, impelled by the hypothesis that “unfit workers wrongly lowered the wages and employment of racially superior groups.”¹⁰⁹ 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.¹¹⁰ Premised on the claim that persons of inferior stock outbreed their biological betters,¹¹¹ progressives judged “an impressive array of human groups, male Anglo-Saxon heads of household excepted, to be unworthy of work, or ‘unemployable.’”¹¹² And who were the “unemployables”? Those individuals “who, owing to putative hereditary debility, earned less than what American reformers called a ‘living wage.’”¹¹³

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.¹¹⁴ Such parasites consisted of children, the aged, child-bearing women, the sick, the crippled, the idiots and lunatics, the epileptic, the blind, immigrants, and members of minority ethnic and racial groups.¹¹⁵ 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 lower wages.¹¹⁶ 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.”¹¹⁷ For Commons, allowing inferior races to work engendered an economic competition that lowered wages, since competition has no respect for superior races, leading the race with the lowest level of

¹⁰⁹ Bernstein and Leonard, *supra* note ___ at 180.

¹¹⁰ *Id.* at 182.

¹¹¹ *Id.*

¹¹² *Id.* at 177.

¹¹³ *Id.* at 180.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 180-181.

¹¹⁶ *Id.* at 181.

¹¹⁷ JOHN R. COMMONS, RACES AND IMMIGRANTS IN AMERICA 148 (1907) (as cited in Bernstein and Leonard, *supra* note ___ at 181).

necessities to displace the others.¹¹⁸ “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.”¹¹⁹

The widespread acceptance of such modern and highly racialized views¹²⁰ 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,¹²¹ new legal doctrines and innovations surfaced. Three popular solutions emerged in response to the urgent need to curtail the growth of inferior people: eugenics,¹²² gender-specific labor standards,¹²³ and minimum wage and labor regulation.¹²⁴ On doctrinal, practical, philosophical, and moral levels, these proposals were both overlapping and inextricably related.

First consider eugenics. Consistent with this moral imperative, the American Economic Association, founded in 1885, almost immediately began to offer annual prizes for the best essay on the evils of unrestricted immigration.¹²⁵ This immigration issue was concerned not with numbers but with blood, as leading thinkers were persuaded that the core problem was one of race and eugenics.¹²⁶ They were driven to prevent the Anglo-Saxon stock from being overwhelmed by racially-inferior “defectives,” delinquents and dependents.¹²⁷ Believing that social progress is of a higher law than equality, progressive leaders proposed the eradication of the vicious and the inefficient.¹²⁸ Operating in stark contrast to Lochnerian liberty-of-contract jurisprudence, which was invoked to justify

¹¹⁸ Bernstein and Leonard, *supra* note__ at 181.

¹¹⁹ *Id.*

¹²⁰ *See e.g.*, DERRICK BELL, RACE, RACISM AND AMERICAN LAW 1-2 (4th ed. 2000) (explaining that race, 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 to the subordinate ranking of that race on the social hierarchy).

¹²¹ LOMBARDO, *supra* note__ at 44.

¹²² *See e.g.*, Bernstein and Leonard, *supra* note__ at 183-185 (describing the race-suicide thesis and the movement among elites to stamp out the unemployables).

¹²³ *See id* at 188-190.

¹²⁴ *See id* at 186-187.

¹²⁵ *Id* at 183.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 183-184.

expanding constitutional protection of African Americans and women,¹²⁹ the social progress movement reached its apotheosis in Justice Holmes,' peroration in *Buck v. Bell*, which defended the benefits of majoritarianism, racialized science and human exclusion.¹³⁰ This social vision, predicated in part on the growing fear of "race suicide,"¹³¹ 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.¹³²

Second, operating in a similar vein by focusing on gender-specific solutions for "undesirables," Florence Kelley, perhaps the most influential U.S. labor reformer 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 employees to starvation.'"¹³³ Consistent with this thesis, Louis Brandeis, a progressive lawyer and later 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.¹³⁴ Since women, in his view, were unfit for work, the notion that a woman stands on the same plane with a man and had the right to enter into contracts was simply "gilded sophistry."¹³⁵ As Bernstein and Leonard make clear:

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

¹²⁹ *Lochner: A Notorious Case Reconsidered*, 23 CATO POLICY REPORT, 17 (May/June 2011) (describing David Bernstein's book, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM*, (2011)).

¹³⁰ Hutchison, *Waging War on the "Unfit"?*, *supra* note ___ at 29 (discussing Justice Holmes' views drawn from a number of sources including his opinion in *Buck v. Bell* and the *Lochner* case).

¹³¹ See e.g., Bernstein and Leonard, *supra* note ___ at 182.

¹³² Hutchison, *Waging War on the "Unfit"?*, *supra* note ___ at 28.

¹³³ Bernstein and Leonard, *supra* note ___ at 188.

¹³⁴ TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING* 8 (2010).

¹³⁵ *Id.*

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.¹³⁶

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.¹³⁷

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 economist championed minimum wages.”¹³⁸ Fostering this perspective was the work of eugenically-minded progressives who advocated “minimum wages precisely because binding minimums would cause job losses.”¹³⁹ 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,”¹⁴⁰ progressive hierarchs sought to remake the world by controlling wages and population growth. Influential British intellectuals Baron Sidney and Baroness 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.””¹⁴¹ 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. . .”¹⁴² As members of the philosophic vanguard, obligated by a duty to protect deserving workers from the revolting menace of

¹³⁶ *Id.* at 188.

¹³⁷ SANDEFUR *supra* note ___ at 8.

¹³⁸ Bernstein and Leonard, *supra* note ___ at 186.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (quoting Baron and Baroness Webb).

¹⁴² *Id.* at 186 (citing Sidney Webb, *The Economic Theory of a Legal Minimum Wage*, 20 J. POL. ECON. 973, 992 (1912)).

competition from “defectives” and the “unfit,” progressive architects yearned to make it illegal to work for less.¹⁴³

Captured by this surging *zeitgeist*, Columbia’s Henry Rogers 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 . . .”¹⁴⁴ 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.¹⁴⁵ Racial hostility, inescapably tied to union exclusion, flourished a decade later, as the Great Depression worsened and undesirable jobs, traditionally held by blacks, became attractive to whites.¹⁴⁶ As a consequence of unionists’ tenacious surrender to racial hierarchy, the displacement of African American workers became a serious problem.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹ Progressive aspirations metamorphosed into eugenic-tinged legislation, gender-specific wage regulation, and minimum wages. Whether within the United States or elsewhere, these various moves were designed to largely 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,

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ MORENO, *supra* note ___ at 96.

¹⁴⁶ *Id.* at 163.

¹⁴⁷ Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note ___ at 120-21.

¹⁴⁸ *See e.g., id.* at 126-129.

¹⁴⁹ *Id.* at 127.

as the next subsection shows, to labor law reform, which included federal as well as a growing number of state and local minimums.

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,¹⁵⁰ “every country in the world has enacted a system of laws and institutions intending to protect the interests of workers and to help assure a minimum standard of living for its people.”¹⁵¹ Theory, on this account, favors state intervention since 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.¹⁵² Predicated on such theories, the Fair Labor Standards Act (FLSA),¹⁵³ enacted more than 70 years ago, epitomizes an explosion of government intervention facilitated by a flurry of statutory enactments that commenced during President Hoover’s administrations.¹⁵⁴ The FLSA’s stated purpose is to constrain “labor conditions detrimental to maintenance of the minimum standard of living . . . [while not] substantially curtailing employment or earning power.”¹⁵⁵

The FLSA represents an explicit commitment to low-wage workers putatively protecting them from wage theft¹⁵⁶ in accordance with the premise that unregulated labor conditions negatively affected the health, efficiency and general well-being of workers.¹⁵⁷ 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.¹⁵⁸ Various justifications for this form of regulation have surfaced, including contentions that minimum wage laws (1) are a laudable antipoverty measure, (2) guarantee progressive

¹⁵⁰ For a discussion of the morality and power of exit, see MCCLOSKEY, *supra* note ___ at 198.

¹⁵¹ Rohan Price and John Kong Shan Ho, *Implementing a statutory minimum wage in Hong Kong; Appreciating International Experiences but Recognizing Local Conditions*, 40 COMMON L. WORLD REV. 95, 95 (2011).

¹⁵² *Id.*

¹⁵³ 29 U.S. C. § 201 (2007).

¹⁵⁴ 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).

¹⁵⁵ 29 U.S. C. § 202 (2007).

¹⁵⁶ 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).

¹⁵⁷ *Id.* at 731.

¹⁵⁸ Deakin and Wilkinson, *supra* note ___ at 151-152.

wealth redistribution, (3) strengthen workplace affiliation,¹⁵⁹ and (4) combat the monopsony power of employers in the low-wage sectors who hold a degree of market control over their employees.¹⁶⁰

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.¹⁶¹ Meanwhile states and some municipalities (depending on state law) took advantage of an expansive interpretation of the police power¹⁶² to set higher wage and hour standards and to enforce those standards themselves.¹⁶³ 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,¹⁶⁴ the FLSA was reinforced by broad statutory definitions that are designed to accomplish the remedial purpose of the law.¹⁶⁵ Whether or not this law represents society's capitulation to the inevitability of human progress led by a class of expert hierarchs, as well as a flight from freedom of contract, arguments favoring wage controls are often fortified by the contention that market mechanisms are intrinsically flawed and prone to failure.¹⁶⁶ Premised on a faith in the now-familiar race to the bottom argument, which has been advanced by a number of scholars,¹⁶⁷ this claim insists that competition could be destructive and must therefore be channeled and disciplined lest responsible firms be undercut and the public interest injured by opportunistic cost-cutters.¹⁶⁸

¹⁵⁹ SAMUEL ESTREICHER AND MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT LAW* 368 (3rd ed. 2008) (considering but largely dismissing these claims).

¹⁶⁰ Deakin and Wilkinson, *supra* note ___ at 157.

¹⁶¹ EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, *supra* note ___ at 53-77 (discussing the creation of an expansive interpretation of the Commerce Clause).

¹⁶² *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*].

¹⁶³ CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION*, 55-56 (2010).

¹⁶⁴ *THE FAIR LABOR STANDARDS ACT*, 3-11 (ed., Ellen Kearns, 1999) (listing wage and hour law initiatives that commenced in 1840, federal statutes commencing in 1868, the Seaman's Act of 1915, the Motor Carrier Act of 1935, the Merchant Marine Act of 1936, the Davis-Bacon Act of 1931, the Walsh-Healy Act of 1936, the National Industrial Recovery Act scheme of 1933, and various state minimum wage laws).

¹⁶⁵ *See e.g.*, *United States v. Ropsenwasser*, 323 U.S. 360, 362-63 (1945). 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 Enterprises, Inc.*, 508 F. 2d 297 (5th Cir. 1975).

¹⁶⁶ *See e.g.*, ESTLUND, *supra* note ___ at 54-55.

¹⁶⁷ ESTREICHER and HARPER, *supra* note ___ at 367.

¹⁶⁸ ESTLUND, *supra* note ___ at 55.

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 objective 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 codes under which they could be regulated.¹⁶⁹ Eschewing proposals to amend the law to prevent discrimination,¹⁷⁰ the final version of the law illustrated Congress's capacity to wreak mayhem on the lives that social science had classified as "undesirable."¹⁷¹ Creating a corporatist process that benefited large economic entities by destroying their smaller and less politically-influential competition,¹⁷² the NIRA and its progeny produced a massive public policy disaster.¹⁷³

While labor unions thrived, this policy imposed costs on the overall economy that disproportionately disfavored members of marginalized groups.¹⁷⁴ Taking advantage of the monopoly power granted to them by the NIRA and its minimum wage provisions, and conceiving of labor organizations as "white jobs trust,"¹⁷⁵ labor unions displaced black workers.¹⁷⁶ Coherent with the tenets of Public Choice Theory, exclusion is frequently defended in the name of progress yet actually incentivized by the naked self-interest of

¹⁶⁹ GOLDBERG, *supra* note ___ at 293.

¹⁷⁰ MORENO, *supra* note ___ at 165.

¹⁷¹ Hutchison, *Waging War on the "Unfit"?*, *supra* note ___ at 30.

¹⁷² GOLDBERG, *supra* note ___ at 293-94.

¹⁷³ Somin, *supra* note ___ at 650 (showing that FDR's attempt to supply centrally-planned price-controls and production limits caused a massive six to eleven percent decline the America's GDP).

¹⁷⁴ Hutchison, *Employee Free Choice*, *supra* note ___ at 40-47.

¹⁷⁵ MORENO, *supra* note ___ at 4.

¹⁷⁶ Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Laws*, *supra* note ___ at 124.

powerful groups.¹⁷⁷ And, 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.¹⁷⁸ Building on this exclusionary edifice, racist labor unions in both the South and North supported the establishment of a caste system that reserved unskilled, low-paying jobs for African Americans and skilled high-wage jobs for whites.¹⁷⁹

“The ideology that supported this system held that African Americans were mentally inferior and therefore incapable of performing these jobs.”¹⁸⁰ “‘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’ and [m]any rank-and-life union members adopted this ideology and came to believe that they were the white workingman’s vanguard against incursions by the darker races.”¹⁸¹ Inspired by this commanding imperative, and consistent with the fact that the architects of the New Deal knew that labor innovation “would create disproportionate unemployment among African Americans,”¹⁸² the minimum wage provisions of the NIRA eliminated the jobs of half a million blacks in less than a two year period.¹⁸³

Building on this particularly pungent record, the enactment of the FLSA produced results that mirrored a similarly disastrous policy in apartheid-era South Africa.¹⁸⁴ “The Labor Department determined that the FLSA caused between 30,000 and 50,000 workers, mostly Southern blacks, to lose their jobs within two weeks.”¹⁸⁵ This result confirmed the inescapable linkage between minimum wages and the eugenic virtues of removing from

¹⁷⁷ Hutchison, *Racial Exclusion*, *supra* note___ at 11.

¹⁷⁸ BERNSTEIN, *ONLY ONE PLACE OF REDRESS*, *supra* note___ at 86-87.

¹⁷⁹ *Id.* at 90-91.

¹⁸⁰ *Id.* at 90-91. 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. Thus, employers continued to hire African Americans before the rise of labor unions. *Id.* at 91.

¹⁸¹ *Id.* at 90.

¹⁸² Hutchison, *Employee Free Choice*, *supra* note___ at 398.

¹⁸³ David T. Beito, *Review of Only One Place of Redress*, 10 GEO. MASON L. REV. 293, 296 (2001).

¹⁸⁴ Hutchison, *Employee Free Choice*, *supra* note___ at 41-42.

¹⁸⁵ David E. Bernstein, *Roots of the “Underclass”: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 120 (1993) [hereinafter, Bernstein, *Roots of the “Underclass”*].

employment those who are a burden on society.¹⁸⁶ 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.¹⁸⁷ In combination with other New Deal programs, minimum wage regulation conduced to a persistent decline in the African American employment rate, which is coherent 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.¹⁸⁸ Although minimum wage regimes exhibit *prima facie* neutrality,¹⁸⁹ 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.¹⁹⁰ 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 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.¹⁹¹ 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

¹⁸⁶ Bernstein & Leonard, *supra* note ___ at 186.

¹⁸⁷ *Id.* at 186-176.

¹⁸⁸ BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note ___ at 103.

¹⁸⁹ Hutchison, *Waging War on the “Unfit”?*, *supra* note ___ at 33.

¹⁹⁰ Hutchison, *Employee Free Choice*, *supra* note ___ at 41.

¹⁹¹ Beito, *supra* note ___ at 296.

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.¹⁹² 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.¹⁹³ Deakin and Wilkinson establish that minimum 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."¹⁹⁴ Providing useful historical background by advertent to the "solidaristic" and egalitarian nature of France's minimum wage,¹⁹⁵ 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 labor policy that sought to preserve a system of collective self-regulation by trade unions and employers.¹⁹⁶ 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.¹⁹⁷ In order to bridge the gap between subsistence and a living wage, Australian and New Zealand models were aimed at ensuring a "breadwinners" wage to full-time workers.¹⁹⁸ This perspective accepts the contention that the payment of subsistence wages, if the practice exists,¹⁹⁹ constitutes "an implicit subsidy from the rest of the community."²⁰⁰ It also provides a rationale for wage regulation as an essential device to assure that workers receive a living wage.²⁰¹ Although Deakin and Wilkinson allege that American efforts in the domain of labor relations were

¹⁹² See Deakin and Wilkinson, *supra* note ____ at 150-52.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 150.

¹⁹⁵ *Id.* at 153.

¹⁹⁶ *Id.* at 151.

¹⁹⁷ *Id.* at 150 (discussing Britain's Trade Boards Act of 1909).

¹⁹⁸ *Id.* at 152.

¹⁹⁹ See *infra*, Part III (contesting this claim).

²⁰⁰ Deakin and Wilkinson, *supra* note ____ at 150.

²⁰¹ *Id.* at 151

motivated by the same concerns that fueled foreign labor legislation,²⁰² 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.²⁰³

B. Deakin and Wilkinson's Empirical Claims

Neoclassical economic theory suggests that labor market competition between firms for labor and between workers for jobs ensures that wage rates for labor of comparable productivity are more or less equal and beyond the power of any individual economic actor to affect.²⁰⁴ “The movement of the market towards equilibrium acts as an implicit regulator of individual decisions on whether to trade and at what price.”²⁰⁵ If a firm attempts to pay below the market rate, it risks losing its workers to competitors; moreover, workers who attempt to force wages above the competitive level risk losing their jobs as firms at the margin substitute capital for labor or cease to trade.²⁰⁶ 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 United States have demonstrated that labor markets do not display the characteristics associated with standard neoclassical theory.²⁰⁷ 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 lacunae in orthodox economic theory, provides space for a new assessment of minimum wage regimes.²⁰⁸

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

²⁰² *Id.* at 152.

²⁰³ *See e.g.* Bernstein and Leonard, *supra* note ___ at 178 (showing how the intellectual heirs of Progressivism used the economic crises to promote laws and programs that disemployed African American workers). *See also*, GOLDBERG, *supra* note ___ at 155-156 (describing the deleterious effects of New Deal policies for blacks, including giving unions the power to lock blacks out of the labor force).

²⁰⁴ Deakin and Wilkinson, *supra* note ___ at 154.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* (claiming that firms do not automatically adjust wages to changes in demand for labor and that 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).

²⁰⁸ *Id.* at 154-155.

legislation, are a predictable outcome of organized pressure-group activity, wherein labor unions operating as labor monopolists seek to cartelize the labor 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 are without formal training or qualifications.²⁰⁹ 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.

Although Deakin and Wilkinson acknowledge the vast empirical literature that minimum wage legislation has spawned, they criticize the consensus view on the 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.²¹⁰ Critics of the neoclassical viewpoint have suggested that these studies could not be regarded as definitive because the estimated employment effects are small and highly sensitive to the choice of sample period.²¹¹ Instead, Deakin and Wilkinson rest their judgment on American case studies authored by Card, Katz, and Krueger,²¹² which examine variations in minimum wage increases among the states. Premised on such studies, Deakin and Wilkinson assert that minimum wages increase both the earnings and the employment of vulnerable populations (e.g., teenagers).²¹³ 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.²¹⁴ Deakin and Wilkinson argue that such studies, when taken together, refute the neoclassical understanding of minimum wage increases.

²⁰⁹ *Id.* at 155.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 155-156.

²¹³ *Id.* at 155.

²¹⁴ *Id.* at 156.

Nevertheless, the authors concede that only two percent of America's working population receives the minimum wage.²¹⁵ They also admit that two-thirds of the relevant studies indicate that minimum wages produce negative employment effects.²¹⁶ Such studies show stronger disemployment effects for the least-skilled groups.²¹⁷ Hence, the empirical evidence favoring a negative view of minimum wages remains robust, and the oft-stated assertion that recent research fails to support the neoclassical view appears to be incorrect.²¹⁸ 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.²¹⁹

Emphasizing the empirical observations contained within David Card and Alan Kruger's *MYTH AND MEASUREMENT*,²²⁰ Deakin and Wilkinson assert that this book and the prior research on which it was based²²¹ were important markers in solidifying new empirical research and reigniting a new movement that views minimum wage increases as an essential anti-poverty device.²²² 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,²²³ 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,²²⁴ some economists contend that

²¹⁵ *Id.* at 153.

²¹⁶ *Id.* at 156.

²¹⁷ *Id.*

²¹⁸ See e.g., David Neumark and William Wascher, *Minimum Wages and Employment: A Review of Evidence from the New Minimum Wage Research*, NBER Working Paper 12915 (2006) (indicating that while there is a wide range of existing estimates and, accordingly, a lack of consensus regarding the overall effects of minimum wage increases on low-wage employment, the oft-stated assertion that recent research fails to support the traditional view that the minimum wage reduces the employment of low-wage workers is clearly incorrect).

²¹⁹ Deakin and Wilkinson, *supra* note ____ at 156.

²²⁰ DAVID CARD AND ALAN KRUEGER, *MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE* (1995).

²²¹ See e.g., David Card, *Using regional variation in Wages to measure the effects of the federal minimum wage*, 46 *INDUST. REL. REV.*, 22-37 (1992) and David Card, *Do minimum wages reduce employment? A case study of California, 1987-1089*, 46 *INDUST. REL. REV.* 38-54 (1992).

²²² See e.g., Daryl Marc Shapiro, *Will an Increased Minimum Wage Help the Homeless?*, 45 *U. MIAMI L. REV.* 651, 659 (1990-91).

²²³ Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 *B.U. PUB. INT. L. J.* 245, 247 (1995).

²²⁴ Deakin and Wilkinson, *supra* note ____ at 155.

the studies show that the earnings and employment of teenagers correlate positively with increased minimum wages.²²⁵ “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.”²²⁶

Relying principally on U.S. findings the authors insist that wage regulation cannot be seen as an artificial interference in the free market.²²⁷ The authors argue that statutory wage minimums are necessary because certain groups in the labor market will not have access to voluntary means of unionization and collective bargaining.²²⁸ Although this statement is remarkable given the subordinating capacity of labor unions,²²⁹ 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.²³⁰ Based on this contention and the claim that some studies show that minimum wage increases produce a positive employment impact,²³¹ the authors assert that “[m]inimum wage regulation is therefore necessary in order to help 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.”²³²

If Deakin and Wilkinson are correct, then the cascade of popular and scholarly opinion favoring minimum wage increases²³³ ought to reach its inflection point in the following set of observations: (1) that wage regulation can be implemented without any ill effects;²³⁴ (2) that minimum wage increases are not only cost-free in terms of negative employment effects but also constitute a form of societal advance 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

²²⁵ *Id.*

²²⁶ *Id.* at 156.

²²⁷ *Id.* at 157.

²²⁸ *Id.* at 158.

²²⁹ See *supra* Part I (discussing the subordinating capacity of labor unions).

²³⁰ Deakin and Wilkinson, *supra* note ___ at 158.

²³¹ *Id.*

²³² *Id.*

²³³ NEUMARK and WASCHER, *supra* note ___ at 248-266 (explaining the popularity of minimum wage regimes).

²³⁴ Price and Ho, *supra* note ___ at 101.

employment also rises.²³⁵ 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 that have only a weak link to real-world conditions.²³⁶ 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 intervention will continue to be based on a range of grounds, of which efficiency is only one.²³⁷

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 to secure . . . the necessities of life.”²³⁸ This thesis is both presumptive and credulous: presumptive because the authors’ claim assumes facts not in evidence,²³⁹ and credulous because they seem to have been misled by their own presumptions. The pertinent question becomes whether low wage beneficiaries of minimum wage regimes are actually poor or, alternatively put, whether they receive the benefits that minimum wage advocates allege. To answer such questions, it is important to appreciate that not every worker within a family *needs* to earn a sufficiently high wage in order to secure all of the necessities of life since family members may cross-subsidize one another for a variety of reasons.²⁴⁰ Contrary to Deakin and Wilkinson’s supple claims, the legal and economics literature shows that *most* of the actual (as opposed to

²³⁵ Deakin and Wilkinson, *supra* note ____ at 159 (minimum wage laws, when introduced for the first time, might lead to unemployment in firms and industries that previously benefited from a wage 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).

²³⁶ *Id.* at 167.

²³⁷ *Id.*

²³⁸ *Id.* at 151.

²³⁹ This claim implies but does not prove that in the absence of regulation, low-wage workers necessarily have difficulty attaining the necessities of life.

²⁴⁰ Reasons for this could include the absence of skills experience, age or maturity currently possessed by one or more family members. Over time, such family members may acquire more marketable skills and subsidize other members of the family.

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.²⁴¹ Thus, it is easy to see why neoclassical economics is hostile to minimum wage legislation and, more generally, to labor standards, viewing them as an unwarranted interference with market operations and a cause of both unemployment²⁴² and human misery. Furthermore, these results may be reinforced by regressive distributional consequences. While it is important to notice that poverty includes more than economic consideration, which implies that minimum wages or earned-income tax credits can't alleviate all forms of impoverishment,²⁴³ it is also worth noting that neoclassical 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.²⁴⁴

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 teen-agers 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.²⁴⁵

B. Revisiting the Empirical Record

²⁴¹ STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR., & GILLIAN L. L. LESTER, *EMPLOYMENT LAW: CASES AND MATERIALS*, 577 (2007) (showing that although the minimum wage continues to enjoy wide-spread support, only 17% of low-wage workers in the United States were living in poor households in 2003, and thus, the people who are generally favored by this type of intervention in the market are not poor). *See also*, Richard V. Burkhauser, Kenneth A. Couch and David Wittenburg, *Who Minimum Wage Increases Bite: An Analysis Using Monthly Data from the SIPP and the CPS*, 67 *SOUTHERN ECON. J.* 16, 31 (2000) (showing that less than 20 cents of every dollar of the increased wage bill associated with raising the minimum wage actually flowed to poor families).

²⁴² Deakin and Wilkinson, *supra* note __ at 150.

²⁴³ R. R. Reno, *The Preferential Option for the Poor*, in *FIRST THINGS*, 3, 4 (June/July 2011).

²⁴⁴ Burkhauser, Couch and Wittenburg, *supra* note __ at 16.

²⁴⁵ *See* David Neumark and Scott Adams, *Do Living Wage Ordinance Reduce Urban Poverty?*, NBER Working Paper Series, Working Paper 7606, National Bureau of Economic Research, *available at* <http://www.nber.org/papers/w7606>, 29-30 (2000).

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 they are correct, then the appropriateness of this method in helping the working poor is strictly a distributional issue.²⁴⁶ However if minimum wage increases reduce employment and if the lost jobs are concentrated among the vulnerable groups that the policy claims to assist, then policy makers must consider this consequence, regardless of whether or not it was intended.²⁴⁷ “Hence, estimating the elasticity of employment with respect to minimum wage increases is more than simply an empirical test of economic theory.”²⁴⁸ Deakin and Wilkinson’s central and correlative claims noticeably miss an enormous amount of contrary minimum wage research.²⁴⁹ 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 wage minimum will reduce employment in every instance.²⁵⁰ They also concede that scholars have disagreed about the disemployment effects of wage minimums ever since Card and Krueger’s (CK) early claims contesting the neoclassical consensus view that emerged in the early 1990s.²⁵¹ However, it is clear that Neumark and Wascher’s examination of early evidence,²⁵² of the lagged effects of minimum wages,²⁵³ of evidence associated with employment and school enrollment,²⁵⁴ of aggregate effects

²⁴⁶ Burkhauser, Couch and Wittenburg, *supra* note __ at 16.

²⁴⁷ *Id.* at 16-17

²⁴⁸ *Id.* at 17.

²⁴⁹ Among the important studies that appear to be missing from Deakin and Wilkinson’s analysis are works by Neumark and Wascher (1992) (focusing on teenagers and youth); Baker, Benjamin and Stanger (1992) (teenagers in Canada); Deere, Murphy and Welch (1995) (teens and adult high school dropouts categorized by sex and race); Neumark and Wascher (1994) (teenagers and 16-to-24 year olds); Neumark and Wascher (2000) (fast-food employment in New Jersey and Pennsylvania based on payroll data collected from establishments); and Couch and Wittenburg (2001) (teenagers). *See* NEUMARK and WASCHER, *supra* note __ at 40-49.

²⁵⁰ NEUMARK AND WASCHER, *supra* note __ at 57.

²⁵¹ *Id.* at 57.

²⁵² *Id.* at 57-63.

²⁵³ *Id.* at 63-65.

²⁵⁴ *Id.* at 65-66.

and trend difference in the State-Level Panel Data approach,²⁵⁵ of data from industrialized countries²⁵⁶ (including data from the United Kingdom substantiating the disemployment effects of wage regulation),²⁵⁷ of studies from developing countries,²⁵⁸ and of the overall evidence point to one conclusion:²⁵⁹ the literature, when read broadly and critically, solidifies the view that minimum wages reduce employment of low-skilled workers and that the low-wage market reasonably approximates the neoclassical competitive model.²⁶⁰

Indeed, as Burkhauser and his colleagues show, the elasticity of demand for labor with respect to increases in the minimum wage is greatest for the most vulnerable groups in the working-age population: young adults with low levels of education, young black adults and teens, as well as, all teenagers.²⁶¹ Although the new minimum wage literature, is dominated by studies that find that minimum wage increases have either an insignificant or, in some cases, a significant positive effect on the employment of young adults and teenagers or other subgroups, most of these studies have now generated responses that explain how raising the minimum wage significantly decreases employment among vulnerable populations.²⁶² Research shows that a 10 percent increase in the wage minimum results in a 5.66 percent decline in teenage employment.²⁶³ The same 10 percent minimum wage increase results in an 8.46 percent decline in black young adult and teenage employment, more than four times the elasticity for nonblack young adults and teenagers.²⁶⁴ 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. Even so, Neumark and Wascher rightly concede that the effect of wage regulation on employment is only one factor in evaluating the

²⁵⁵ *Id.* at 67-71.

²⁵⁶ *Id.* at 89-99.

²⁵⁷ *Id.* at 95.

²⁵⁸ *Id.* at 99-103.

²⁵⁹ *Id.* at 103-106.

²⁶⁰ *Id.* at 106.

²⁶¹ Burkhauser, Couch, and Wittenburg, *supra* note __ at 17.

²⁶² *Id.*

²⁶³ *Id.* at 23.

²⁶⁴ *Id.*

efficacy of minimum wage regimes as a tool to improve the economic position of those at the bottom of the income distribution.²⁶⁵

Supplying one of the most comprehensive set 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 effect on wages higher up in the distribution, it is only natural for economists to explore the role of minimum wages in the trend toward greater inequality in U. S. wages . . .”²⁶⁶ In response, their research indicates that higher minimum wages tend, on average, to reduce the economic well-being of affected workers.²⁶⁷ The data “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.”²⁶⁸ On the other hand, for workers earning above the minimum, the “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.”²⁶⁹

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, which makes it more difficult for minimum wages to have beneficial distributional effects on lower-income families.²⁷⁰ Although it is possible that wage minimums could reduce employment (a view supported by the evidence), it is equally possible that minimum wages could, on the whole, benefit poor families.²⁷¹ Despite these contrasting possibilities, the research tends to find either *no*

²⁶⁵ NEUMARK AND WASCHER, *supra* note ___ at 106.

²⁶⁶ *Id.* at 125.

²⁶⁷ *Id.* at 139.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 148 (also noting the evidence showing 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).

²⁷¹ *Id.* at 189.

evidence of distributional effects or evidence showing that minimum wages *increase* poverty.²⁷²

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.²⁷³ 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."²⁷⁴ On a more hypothetical level, Neumark and Wascher are skeptical that eliminating minimum wages would lead, as non-economists sometimes argue, to a widespread decline in wages to subsistence level.²⁷⁵ These observations dispute Deakin and Wilkinson's fundamental claim that minimum wage regimes are justified 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 policies adopted so far have been successful."²⁷⁶ 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 research²⁷⁷ have questioned the validity of CK's claims²⁷⁸ 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,"²⁷⁹ there is little reason to believe that CK's methodology is

²⁷² *Id.*

²⁷³ *Id.* at 290.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 291.

²⁷⁶ *Id.*

²⁷⁷ See e.g., Finis Welch, *Comment*, 48 *INDUST. & LAB. REL. REV.* 842 (1995) (demonstrating that one of the major weaknesses of the Card-Krueger approach is a deficient data collection methodology).

²⁷⁸ See generally, CARD AND KRUEGER, *MYTH AND MEASUREMENT*, *supra* note ___ at 20-77 (looking at evidence gleaned from the fast-food industry and focusing largely on the evidence from New Jersey and Pennsylvania).

²⁷⁹ Douglas K. Adie & Lowell Gallaway, *Book Review: Myth and Measurement: The New Economics of the Minimum Wage*, 15 *CATO J.* 137, 38 (Spring/Summer 1995).

superior to more conventional forms of economic analysis.²⁸⁰ 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.²⁸¹ 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 makers²⁸² were to be momentarily accepted, it would become important to reexamine the aspirations, assumptions, goals, and objectives of minimum wages proponents from an historical perspective that is fully cognizant of the immediate consequences of implementing progressive 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.²⁸³

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.²⁸⁴ 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,²⁸⁵ 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 minimum wage

²⁸⁰ Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note ____ at 115.

²⁸¹ *Id.*

²⁸² Deakin and Wilkinson, *supra* note ____ at 167.

²⁸³ JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 1* (1997).

²⁸⁴ NEUMARK AND WASCHER, *supra* note ____ at 249.

²⁸⁵ *Id.* at 250.

increases are disproportionately from poor families.²⁸⁶ Wage minimums, more likely than not, benefit higher-income families.²⁸⁷

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.²⁸⁸ 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 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.²⁸⁹ 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 issues 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 minimum to be, in fact, African American teenagers and young adults.²⁹⁰ Additionally, data concerning the longer-run effects of wage

²⁸⁶ *Id.*

²⁸⁷ WILLBORN, SCHWAB, BURTON, JR., & LESTER, *supra* note ___ at 577.

²⁸⁸ Deakin and Wilkinson, *supra* note __ at 158.

²⁸⁹ *See e.g.*, Bernstein and Leonard, *supra* note __ at 186.

²⁹⁰ *See e.g.*, Hutchison *Toward A Critical Race Reformist Conception of Minimum Wages*, *supra* note ____ at 117 n. 142 and accompanying text. *See also* Donald Deere, Kevin M. Murphy and Finis Welch, *Employment and the 1990-1991 Minimum-Wage Hike*, 85 AM. ECON. REV. PAPERS AND PROCEEDINGS 232-237 (1995) (as cited in NEUMARK AND WASCHER, *supra* note ___ at 41).

minimums involving skills acquisition and schooling, which affect future labor market outcomes, shows that wage minimums have a much more adverse effect on blacks.²⁹¹ 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,²⁹² suggest two possible conclusions. Either they have surrendered to willful blindness toward the plight of low-wage workers or, alternatively, they have embraced the teachings of early progressives who agreed "that minimum-wage induced job losses were a social benefit because it performed the eugenic service of ridding the labor force of the "unemployable."²⁹³

Although the progressive position in contemporary times has been reconfigured to reflect a stronger commitment to personal autonomy and freedom in arenas such as civil rights,²⁹⁴ 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 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 heredity lines that have been proven undesirable either through isolation or sterilization,²⁹⁵ or Commons' contention that allowing inferior races to work engenders an economic competition that pays no deference to superior races and lower overall wages, leading the race with the lowest level of necessities to displace the others.²⁹⁶ 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." And evenhanded observers can be pardoned for concluding 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 even of low wages to blacks as an

²⁹¹ NEUMARK AND WASCHER, *supra* note ____ at 221.

²⁹² Deakin and Wilkinson, *supra* note ____ at 156.

²⁹³ Bernstein and Leonard, *supra* note ____ at 186.

²⁹⁴ Hutchison, *Choice, Progressive Values*, *supra* note ____ at 454.

²⁹⁵ Bernstein and Leonard, *supra* note ____ at 186.

²⁹⁶ *Id.* at 181.

exploitation of whites.²⁹⁷ 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 a wage that exceeds black productivity and thereby reduce the incentive for hiring blacks.²⁹⁸

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 stabilize the labor supply and promote the efficient use of labor by a series of institutional reforms, including minimum wages.²⁹⁹ 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.³⁰⁰ Apparently validating John Stuart Mill's commitment to Social Darwinism, which excludes an "inferior class of labourers" from the workforce,³⁰¹ 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.³⁰² 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 or not progressive policy preferences are infected with racist intent, is the fact that the *racist effects* of progressive policies survive.

Second, we should note the conspicuous weakness at the core of Deakin and Wilkinson's market failure argument. Frequently posited as an 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),³⁰³ the probability that government intervention disfavors the

²⁹⁷ WALTER E. WILLIAMS, *SOUTH AFRICA'S WAR AGAINST CAPITALISM* 64 (1989).

²⁹⁸ *Id.* at 63.

²⁹⁹ Deakin and Wilkinson, *supra* note ___ at 165.

³⁰⁰ Bernstein and Leonard, *supra* note ___ at 186.

³⁰¹ W. H. HUTT, *THE THEORY OF COLLECTIVE BARGAINING: 1930-1975* 10 (1980, 1975).

³⁰² Bernstein and Leonard, *supra* note __ at 180.

³⁰³ *See e.g.*, JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT*, 4 (1996) ("Modern democratic states have themselves becomes weapons in the war of all against all, as rival interest groups

individuals and groups that lack political and economic clout.³⁰⁴ 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,³⁰⁵ and since the victims lacked sufficient political and economic influence to protect themselves from the inherent authoritarianism of democratic government,³⁰⁶ 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. Such laws honor the legacy of Robert Bacon who wished to protect “white union men” from losing their jobs to “defectives.”³⁰⁷ 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 Americans³⁰⁸ either at the federal or state level.³⁰⁹ This illustration demonstrates that majoritarian seizure gains traction by invoking social justice rhetoric (protecting the deserving from unfair competition from “defectives” or other “unemployables”), but it allows powerful interest groups to expunge their weaker competitors from the labor markets that they wish to dominate.³¹⁰ 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

compete with each other to capture government and use it to seize and redistribute resources among themselves.”).

³⁰⁴ Hutchison, *Racial Exclusion*, *supra* note ____ at 13.

³⁰⁵ EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note ____ at 72.

³⁰⁶ See e.g., Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in OUT OF AND INTO AUTHORITARIANISM, 125, 125(Andras Sajo ed. 2002) (showing that authoritarianism is an inherent structural tendency of democratic regimes).

³⁰⁷ Hutchison, *Employee Free Choice*, *supra* note ____ at 412 (Bacon denied anti-African American animus but made clear his discomfort with “defective” workers taking jobs that “belonged” to White union men.)

³⁰⁸ See e.g., John Stossel, *Government Against Blacks*, *Townhall.com* available at http://townhall.com/columnists/johnstossel/2011/06/01government_against-blacks/print (accessed June 1, 2011) (explaining the Davis-Bacon and its deleterious effects on African Americans).

³⁰⁹ Hutchison, *Employee Free Choice*, *supra* note ____ at 412 (describing the exclusionary effects of Pennsylvania’s prevailing wage law on current African American workers)

³¹⁰ Hutchison, *Choice, Progressive Values*, *supra* note ____ at 438.

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 the 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 Progressivism continue to subjugate African Americans and others today. Goldberg cogently explains that:

The architects of the New, 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 threw million of blacks out of work and off their land.³¹¹

Since the racially-tinged effects of New Deal labor law persist, such as the yawning unemployment gap between white and black Americans,³¹² and since vulnerable workers are still disproportionately and predictably harmed by minimum wage regimes, 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, 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

³¹¹ GOLDBERG, *supra* note 7 at 268-69.

³¹² Hutchison, *Racial Exclusion*, *supra* note ____ at 13.

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.”³¹³ This possibility implies that minimum wage regimes, however justified, are an abuse of power,³¹⁴ responding favorably to the demand by progressives to exclude various groups in the name of progress.³¹⁵

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. 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.³¹⁶ Enlisting either an expansive conception of state police power or a broad interpretation of federal authority premised on the commerce clause,³¹⁷ this contagious move marked not only the advent of the welfare state but also an extraordinary vogue for race thinking and eugenics.³¹⁸ While today’s policy makers refuse to defend exclusionary wage legislation or other forms of “social justice” legislation on the grounds of racial superiority, they are prepared to look to the Progressive Era and the New Deal as a source of inspiration for renewed legal innovation as part of their insistence that centralized government power is the correct solution to human problems.³¹⁹

Favoring a sharp expansion in regulation premised on the viewpoint that that social progress equates active government with good government,³²⁰ government intervention is offered under a broad banner of equality that appears to require the destruction of liberty of the most vulnerable among us.³²¹ This evisceration of human liberty is accomplished through a policy of reclassifying low-wage workers as uncompetitive and thereby

³¹³ For a discussion of such issues, see, Bernstein and Leonard, *supra* note ___ at 176-204.

³¹⁴ See generally, Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regime*, *supra* note ___ at 94-134.

³¹⁵ Bernstein and Leonard, *supra* note ___ at 177.

³¹⁶ *Id.*

³¹⁷ See e.g., Epstein, *Lest We Forget*, *supra* note ___ at 791.

³¹⁸ Bernstein and Leonard, *supra* note ___ at 177.

³¹⁹ Hutchison, *Choice Progressive Values*, *supra* note ___ at 455.

³²⁰ EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note ___ at 7.

³²¹ Roger Scruton, *Liberty and Equality: American liberalism sacrifices the former to impose the latter, not to mention what it's done to morality* THE AMERICAN SPECTATOR 38, 38 (June 2008)

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, if one 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 of twentieth century intellectuals have ranged across the most disparate of fields: the eugenics movement, progressive labor initiatives, the welfare state, Socialism, Communism, etc.³²² What all such highly-disputed crusades have in common is the moral exaltation of progressive ideology³²³ that is anointed above the public interest. Hence, the very different views of rank-and-file citizens (including those of members of vulnerable populations), are superseded by progressive presumptions that are imposed through government power.³²⁴ Endeavoring to save the masses from themselves and society from itself, hierarchs favor solutions that rarely work.³²⁵ 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

³²² SOWELL, VISION OF THE ANOINTED, *supra* note ___ at 5.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ Somin, *supra* note ___ at 650.

ominously, the nefarious intent of many minimum wage proponents. For instance, Deakin and Wilkinson ignore the fact that labor unions have every incentive to support minimum wage increases because this move shifts labor demand toward “deserving,” higher-skilled, unionized workers.³²⁶ 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.³²⁷ That is why recent efforts to raise the minimum wage have drawn strong labor union support.³²⁸ If 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.

³²⁶ NEUMARK and WASCHER, *supra* note ___ at 253. *See also* MORGAN O. REYNOLDS, MAKING AMERICAN POORER: THE COST OF LABOR LAW 29 (1987) (“To the extent that unions have been 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”). *See also*, ESTLUND, *supra* note__ at 55 (showing that the minimum wage was largely supportive of collective bargaining, which was seen as the primary vehicle for improving wages and working conditions).

³²⁷ Hutchison, *Reclaiming the First Amendment*, *supra* note___ at 705.

³²⁸ *See e.g.*, Steven Malanga, *Let Them Eat Minimum Wage: How a group of Gotham business leaders plans to help the poor*, in THE CITY JOURNAL (July 16, 2004) available at <http://www.city-journal.org/printable.php?id=1663> (accessed on June 2, 2011) (explaining that a raise in the minimum wage will strengthen unions and result in a loss of jobs for low-wage workers who are not unionized). *See also*, *Union Members, Not Minimum-Wage Earners, Benefit When the Minimum Wage Rises*, WEBMEMO, THE HERITAGE FOUNDATION, No. 1350 (February 7, 2007) available at, www.heritage.org/research/economy/wm1350.cfm (accessed on June 2, 2011) (explaining how organized labor led the fights to raise the minimum wage in six states and to give Democrats control of Congress, as part of a platform for raising the federal minimum wage).

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.³²⁹ This is due to the fact that 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,³³⁰ 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, which sustains Deakin and Wilkinson's analysis, constitutes a self-preoccupied falsifying veil, which conceals reality,³³¹ 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."

³²⁹ Deakin and Wilkinson, *supra* note ____ at 167.

³³⁰ NEUMARK AND WASCHER, *supra* note __ at 139-148.

³³¹ Iris Murdoch, *The Sovereignty of Good Over Other Concepts*, in *EXISTENTIALISTS AND MYSTICS* 363, 368 (Peter Conradi, ed., 1998).