

RACE AND INCOME DISPARITY: AN IDEOLOGY-NEUTRAL APPROACH TO RECONCILING CAPITALISM AND ECONOMIC JUSTICE

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Income and wealth disparities along racial lines in the United States constitute a continuing threat to the political and democratic stability upon which the economy and government of the United States fundamentally depends. The quest for solutions to these economic disparities has thus far been frustrated by ideological battles between political groups and coalitions. In particular, ideological preconceptions have prevented these groups from listening to the ideas and proposals of opposing groups and working together to find real solutions to the problem of income disparities that actually work. Instead, they have created policies which, while fitting within a preconceived ideological framework, may exacerbate the problems sought to be addressed, and in many cases cause both unintended and undesired consequences. The fault for society's failure to adequately address income disparity along racial lines does not lie exclusively with any one political group or party. Both liberals and conservatives have permitted ideology to cloud their search for meaningful solutions. If these solutions are to be found, conservatives must discard ideological preconceptions in such areas as abortion rights, family planning, and drug policy; liberals must likewise discard ideology in their approach to tax policy, immigration, housing, and education. Both conservatives and liberals must discard ideological preconceptions and abandon politically seductive, but ultimately demagogic and self-defeating policies relating to international trade, and residential exclusionary policies, particularly in the areas of zoning.

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I. INTRODUCTION

According to the U.S. Census Bureau, there are vast disparities in income between racial groups.¹ In 2009 constant dollars, the median annual income of Asian and Pacific households is \$65,469, \$51,861 for whites, \$38,093 for Hispanics, and just \$32,684 for blacks.² These disparities in income have in turn generated distortions in the percentages of total federal income taxes paid by different racial groups, which in turn serves to lower the percentage of Americans with an economic stake in the body politic.³

When measured along racial lines, such income disparities have inspired a plethora of books, articles, and manifestos,⁴ the titles of which suggest the ideological undertones to be found within them:

¹ U.S. CENSUS BUREAU, *Money Income of Families—Number and Distribution by Race and Hispanic Origin: 2009*, http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth.html (last visited Feb. 12, 2012); U.S. CENSUS BUREAU, *Money Income of Families—Percent Distribution by Income Level in Constant (2009) Dollars: 1908 to 2009*, http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth.html (last visited Feb. 12, 2012).

² U.S. CENSUS BUREAU, *Money Income of Households—Percent Distribution by Income Level, Race, and Hispanic Origin, in Constant (2009) Dollars: 1990 to 2009*, http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth.html (last visited February 12, 2012).

³ For example, in 2007 the top one percent of income earners in the U.S. paid forty percent of all federal income taxes collected in the U.S. Catherine Rampell, *Top 1% Paid More in Federal Income Taxes Than Bottom 95% in '07*, N.Y. TIMES (Jan. 30, 2009, 7:39 PM), <http://economix.blogs.nytimes.com/2009/07/30/top-1-paid-more-in-federal-income-taxes-than-bottom-95-in-07/#>. In 2009, the top ten percent of income earners paid seventy percent of all income taxes, and the top fifty percent of income earners paid over ninety percent. David S. Logan, *Fiscal Facts: Summary of the Latest Federal Individual Income Tax Data*, THE TAX FOUND (Oct. 24, 2011), available at <http://www.taxfoundation.org/news/show/250.html#table1>. Forty-seven percent of Americans paid no federal income tax at all, and many of those actually received income from the government in the form of so-called “reverse” income taxes. Jared Spurbeck, *By the Numbers: What the 47 Percent Who Pay No Income Taxes Look Like*, YAHOO! NEWS (Oct. 12, 2011), <http://news.yahoo.com/numbers-47-percent-pay-no-income-tax-look-170500327.html>. It should be noted, however, that while forty-seven percent of Americans pay no federal income tax, most of those earners who are not in the underground economy do make contributions (often under the misnomer of “payroll taxes”) to their individual retirement accounts administered by Social Security, and also pay regressive sales taxes to support local government.

⁴ Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1224 (2007) (“[B]y restricting benefits to whites either explicitly—as in the federal home mortgage arena—or implicitly—as in Social Security—these government programs helped ensure that government benefits would enforce an income and wealth gap between white Americans and their non-white counterparts.”); EMMA

Economic Apartheid in America,⁵ *Destiny Revolutionized: Economic Enslavement of African-Americans*,⁶ *Black Wealth, White Wealth*.⁷

This article seeks to look beyond the traditional and ideological explanations for income disparities and screens them for arguments and assertions that may reflect the pursuit of a political agenda rather than the pursuit of a rational solution to an undeniable social problem.⁸ Since income disparities by race create the potential for social conflict, diminishment of economic opportunity, and threats to political and democratic stability,⁹ it is all the more critical that the political ideologies that contribute to such disparities be rationally explained and examined, and that ideology-neutral solutions be proposed to those who make policy in a democratic society.¹⁰ Blind adherence to ideological preconceptions on the part of representatives of both the right and the left have effectively blocked or neutralized the good faith efforts of each other. Consequently, little has been done in addressing the deep social and economic problems that flow from racial disparities in income in the United States.

COLEMAN JORDAN & ANGELA P. HARRIS, *WHEN MARKETS FAIL: RACE & ECONOMICS* (2006); Tukufu Zuberi, *The Dynamic Racial Composition of the United States*, in *RACE, POVERTY, AND DOMESTIC POLICY* 157, 158 (C. Michael Henry ed., 2004) (summarizing that the failure to assimilate is one of the purported causes of racial inequality); DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* 151–52 (1999); Michael Reich, *Racial Inequality*, in *RADICAL POLITICAL ECONOMY: EXPLORATIONS IN ALTERNATIVE ECONOMIC ANALYSIS* 197, 197 (Victor D. Lippit ed., 1996); Samuel L. Myers, Jr. & William J. Sabol, *Unemployment and Racial Differences in Imprisonment*, in *THE ECONOMICS OF RACE AND CRIME* 189, 207 (Margaret C. Simms & Samuel L. Myers eds., 1988).

⁵ CHUCK COLLINS, *ECONOMIC APARTHEID IN AMERICA: A PRIMER ON ECONOMIC INEQUALITY & INSECURITY* (2000).

⁶ JOSEPH R. GIBSON, *DESTINY REVOLUTIONIZED: THE ECONOMIC ENSLAVEMENT OF AFRICAN-AMERICANS* (2d ed. 2000) (“The vast majority of Black people in the world are slaves to the White power establishment without ever truly realizing it. Just because you can’t see any chains doesn’t mean they’re not there. Camouflaged in petty paychecks, political promises, and diplomas certifying our mis-education, our neo-enslavement encompasses the aspirations of true freedom in a blanket of ignorance, complacency, and despair, while suffocating the initiating breath of Black revolution before it is ever conceived.”).

⁷ OLIVER L. MELVIN & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (10th ed. 2006).

⁸ Paul Krugman, *How Fares the Dream?*, N.Y. TIMES, Jan. 16, 2012, available at <http://www.nytimes.com/2012/01/16/opinion/krugman-how-fares-the-dream.html>; Desmond S. King & Rogers S. Smith, *On Race the Silence is Bipartisan*, N.Y. TIMES, Sept. 2, 2011, available at <http://www.nytimes.com/2011/09/03/opinion/on-race-the-silence-is-bipartisan.html> (“The economic crisis in the United States is also a racial crisis. White Americans are hurting, but nonwhite Americans are hurting even more.”); George Wilson, *Racialized Life-Chance Opportunities Across the Class Structure: The Case of African Americans*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 215, 228–29 (2007); GEORGE WILSON, *RACE, ETHNICITY, AND INEQUALITY IN THE U.S. LABOR MARKET: CRITICAL ISSUES IN THE NEW MILLENNIUM* (2007); KATHERINE NEWMAN, *NO SHAME IN MY GAME* 43 (1999) (arguing that racial wealth disparity is not just the result of an “educational disadvantage concentrated among minorities: African-Americans in the labor force are more likely to be poor than their white counterparts at all levels of the educational continuum.”).

⁹ Elijah Anderson, *Violence and the Inner-City Street Code*, in *RACE, POVERTY, AND DOMESTIC POLICY* 670, 670 (C. Michael Henry ed., 2004) (“The inclination to violence springs from the circumstances of life among the ghetto poor—the lack of jobs that pay a living wage, the stigma of race, the fallout from rampant drug use and drug trafficking, and the resulting alienation and lack of hope for the future.”).

¹⁰ THOMAS SOWELL, *RACE AND ECONOMICS* 165 (1975) (“If a group is paid less, or employed or promoted less often, because it is disliked by employers, co-workers, or customers, then it may continue to suffer low wages and higher unemployment rates even if its current capabilities are equal to those of others.”); THOMAS SOWELL, *THE THOMAS SOWELL READER* 17 (2011) (“[W]hile today’s underclass is not only denied those tools, but receives excuses for remaining in poverty—and ideologies blaming their plight on others, whom they are encouraged to envy and resent. The net result is an underclass generation that has trouble spelling simple words or doing elementary arithmetic, and which has no intention of developing skills.”).

Part II will survey how conservative ideology and government policies promulgated thereunder have served to exacerbate racial disparities in income. It will discuss counter-productive conservative policies related to population, family planning, abortion, and drug policy. Part III will in turn discuss how liberal ideology has also led to policies that exacerbate income inequality between races, and includes subsections on housing policy, immigration, labor policy, tax policy, and educational policy. Part IV will survey policies contributing to racial income disparities that have been fostered by, at different times and in different contexts, both conservative and liberal policymakers. It includes an analysis of local residential exclusionary policies and trade policy.

Finally, Part V concludes that true progress toward addressing the social and economic consequences of income disparities can only be made through a non-ideological approach in which both conservatives and liberals set aside ideological preconceptions and political agendas, give adequate consideration to the values and arguments of the other, and work together to alleviate the problems of racial disparities in income that both sides agree are a blot on the American dream.

In looking for both explanations and answers, it will be noted throughout this article that the greatest obstacles to rational discourse have come in the form of ideologically inspired litmus tests to which policymakers and politicians so often feel obliged to adhere. Such adherence has led policymakers to adopt self-defeating policies which serve to exacerbate rather than alleviate the problems of racial disparities in income.

II. CONSERVATIVE IDEOLOGY AND POLICIES

Although political lines between liberals and conservatives are often blurred, the prevailing conservative agenda includes opposition to a woman's right to abortions,¹¹ opposition to the widespread dissemination of contraceptives (particularly dissemination at government expense),¹² opposition to drug legalization, and opposition to taxes on products harmful to health such as tobacco and liquor.¹³

A. Family Planning and Abortion

A conservative agenda of denying the poor access to contraceptives and family planning has led to poor families having more children than they can adequately educate and care for.¹⁴ This in turn initiates a cycle of dependency on government, which leads inexorably to income disparities.

¹¹ REPUBLICAN NATIONAL CONVENTION, REPUBLICAN PLATFORM 2012, WE BELIEVE IN AMERICA (2012), available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf>.

¹² Robert Pear, *As Ryan Looks to Focus on Economy, Spotlight Shines on his Other Views*, N.Y. TIMES, Aug. 13, 2012, <http://www.nytimes.com/2012/08/13/us/politics/paul-ryans-views-on-abortion-guns-and-same-sex-marriage-come-to-forefront.html>.

¹³ Paul Ryan *On Medical Marijuana Legalization: 'Let the States Decide'*, HUFFINGTON POST (Sept. 8, 2012), http://www.huffingtonpost.com/2012/09/07/paul-ryan-marijuana-legalization_n_1866180.html; *The Tobacco Tax*, WASH. POST, Oct. 17, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/16/AR2007101601817.html>; Dennis Cauchon, *Tax Hike Cuts Tobacco Consumption*, USA TODAY (Sept. 13, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-09-10/cigarette-tax-smoking/57737774/1>.

¹⁴ Louise Radnofsky, *Texas Medicaid Funds Cut Over Planned Parenthood*, WALL ST. J., Mar. 16, 2012, at A7; *Arizona Wades into Contraception Controversy*, CNN POLITICS (Mar. 15, 2012), http://articles.cnn.com/2012-03-15/politics/politics_arizona-contraception-controversy_1_religious-beliefs-employers-health-insurance?s=PM:POLITICS [hereinafter *Arizona Wades into Contraception Controversy*]; Eric Mayes, *Planned Parenthood Faces Cuts*, PHILA. TRIB., Feb. 22, 2011, at 1A. "Nearly 15 million children in the United States—21% of all children—live in families with incomes below the federal poverty level—\$22,350 a year for a family of four. Research shows that, on

The evangelical wing of the right is ideologically opposed to government assistance to the poor in the form of providing contraceptives, family planning, and abortion services. Even assuming both of the right's ideological premises that a fetus is a human being and that it is immoral for a woman to have an abortion, adherents of this ideology rarely examine whether denial to the poor of access to family planning, and the criminalization of abortion, actually achieve the goal of "preserving life." Nor do they acknowledge the demonstrated consequences of such criminalization.¹⁵

A comparison of countries with the strictest enforcement of anti-abortion laws with countries where abortion is available on demand reveals the very limited effect that abortion laws have on the actual number of abortions. For example, Romania under the Ceausescu regime in the 1980s had the most draconian anti-abortion laws in modern times, and like Nazi Germany, imposed the death penalty for abortion. Women in Romania under the age of forty-five were routinely rounded up by the secret "menstrual police" and herded into clinics to be examined for signs of pregnancy, and if revealed to be pregnant, were monitored by the police and hauled into police stations for interrogation.¹⁶ Not surprisingly under such a regime, sixty percent of pregnancies resulted in illegal abortions and infant mortality skyrocketed to eighty-three out of 1,000 births (compared to ten out of 1,000 births in western countries where abortion was available on demand).¹⁷ Systems like this, where abortion continues to be criminalized, demonstrate how some anti-abortion measures may be characterized as pro-death rather than pro-life. If the United States reverted to the abortion policies that pre-dated *Roe v. Wade*, as the blind adherents to conservative ideology might like, we may see a similar rise in risky abortions and infant mortality.¹⁸

In the Netherlands, where abortion is available on demand, the abortion rate continues to be one of the lowest in the world: 8.6 per 1000 women.¹⁹ While these differences in abortion rates can be explained at least in part by the fact that contraceptives are legal and freely available in countries where abortion is legal, it is also true that countries which restrict abortion are also more likely to restrict contraception, which in turn triggers an increase in abortion. Even in the United States, the use of contraceptives by married couples in many states was not legalized until 1965 in *Griswold v. Connecticut*,²⁰

average, families need an income of about twice that level to cover basic expenses. Using this standard, 44% of children live in low-income families." *Child Poverty*, NAT'L CTR. FOR CHILDREN IN POVERTY, <http://www.nccp.org/topics/childpoverty.html> (last visited Nov. 3, 2012).

¹⁵ It was not until 1869 that Pope Gregory XIV declared that abortion of any fetus, regardless of quickening, was grounds for excommunication. See LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 32 (1990). Conveniently, this new religious dictate synced nicely with the campaign launched by doctors around this same time to criminalize all abortion as a means of defending their turf against midwives. JAMES MOHR, *ABORTION IN AMERICA* 147–70 (1979). Prior to 1800, in accordance with established religious doctrine, abortion before quickening was legal in every state of the union. *Id.* at 3. By the time the doctors' campaign reached its zenith at the end of the nineteenth century, however, every state had adopted the Pope's (and the doctors') revolutionary new dictate outlawing abortion even before quickening. See *id.* at 224–25. It was not until seventy years later in the 1970s when states such as Hawaii and New York legalized abortion that ancient Catholic doctrine and the common law was restored. However, it was not legalized on a national basis until *Roe v. Wade* in 1973. POPULATION, LAW, AND THE ENVIRONMENT, *supra* note 1, at 117.

¹⁶ Karen Breslau, *Overplanned Parenthood: Ceausescu's Cruel Law*, NEWSWEEK, Apr. 22, 1990, at 35.

¹⁷ *Id.*

¹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹ *FAQ: Abortion in the Netherlands 2010*, NETHERLANDS MINISTRY OF FOREIGN AFFAIRS <http://www.government.nl/ministries/bz> (last visited Dec. 2012).

²⁰ *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965).

and the use of contraception by unmarried couples was not legalized until 1972 in *Eisenstadt v. Baird*.²¹ Only after these two cases set the stage were abortion rights upheld in *Roe v. Wade*.²²

To date, the Catholic Church in the U.S. proclaims contraception by married couples to be a mortal sin on a par with the sin of abortion.²³ This policy in turn has contributed to a population explosion, particularly in undeveloped countries, which had the unintended consequence of increasing poverty. From this we can see that the very history upon which an ideological principle is based often gets lost in the quest for being perceived as an adherent to an ideological principle.²⁴

The religious²⁵ and right-wing's²⁶ war against contraception has resulted in unwanted children being born, many of whom end up on welfare and thereby contribute to income disparities between the rich and poor.²⁷ When the poor have large families, their resources are stretched so thinly among their children that they are unable to provide the same medical, educational, and cultural advantages as they could if they had fewer children. Because a disproportionate number of minority children already come from poor families, this reinforces the cycle of poverty that serves to exacerbate the disparity in incomes across racial lines.²⁸ Unfortunately, however, government policies have long sought to deprive poor

²¹ *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

²² *Roe v. Wade*, *supra* note 18.

²³ POPE PAUL VI, HUMANAE VITAE: ENCYCLICAL OF POPE PAUL VI ON THE REGULATION OF BIRTH 5–6 (1969), available at http://www.scborromeo.org/docs/humanae_vitae.pdf; Janet E. Smith, *Humanae Vitae: A Generation Later*, SACRED HEART MAJOR SEMINARY, 8, <http://www.archdioceseofdetroit.org/aodonlinesqlimages/shms/faculty/SmithJanet/Publications/HumanaeVitae/09AGenerationLater.pdf> (last visited Dec. 5, 2012) (“To engage in an act of contracepted sexual intercourse is to engage in an act that has the potential for creating new life and an act that has the potential for creating tremendous emotional bonds between male and female and simultaneously to undercut those potentials. Sex is for babies and for bonding; if people are not ready for babies or bonding they ought not to be engaging in acts of sexual intercourse.”).

²⁴ One wonders how many who adhere to an anti-abortion ideology today are even aware that as early as medieval times, the eminent Catholic theologian St. Thomas Aquinas stated in *Politicorum* that “seed and what is not seed is determined by sensation and movement.” SAINT THOMAS AQUINAS & RAIMONDO M SPIAZZI, IN OCTO LIBROS POLITICORUM ARISTOTELIS EXPOSITIO 12 (1660); *Immigration Reform, Incentives Suggested as Remedies to Worker Shortage*, 59 PAYROLL GUIDE NEWSL., Mar. 3, 2000, available at 2000 WL 34005042. Additionally, Martin Azplicueta, “the guide in moral questions of three Popes, and the leading canonist of the 16th Century” and a consultant to the Sacred Penitentiary, the Roman Tribunal for deciding cases of conscience to confessors, stated in *Consilia* that “the rule of the Penitentiary was to treat the fetus over forty days as ensouled. Hence therapeutic abortion was accepted in the case of a fetus under this age.” HUGO HURTER, NOMENCLATOR LITERARIUS RECENTIORIS THEOLOGIA CATHOLICA THEOLOGOS EXHIBENS QUI INDE A CONCILIO TRIDENTINO FLORUERUNT AETATE, NATTONE, DISCIPLINIS DISTINCTOS 344–47 (Nabu Press 2010). In other words, ancient Catholic religious doctrine was within a whisker of mirroring precisely the rule of *Roe v. Wade* some six hundred years later.

²⁵ POPE PAUL VI, HUMANAE VITAE: ENCYCLICAL OF POPE PAUL VI ON THE REGULATION OF BIRTH 5–6, http://www.scborromeo.org/docs/humanae_vitae.pdf (last visited Feb. 16, 2012).

²⁶ Z. Byron Wolf, *Rick Santorum Declared Contraception ‘Harmful to Women’ in 2006*, ABC NEWS (Feb. 15, 2012) <http://abcnews.go.com/blogs/politics/2012/02/rick-santorum-declared-contraception-harmful-to-women-in-2006>.

²⁷ U.S. DEP’T OF HEALTH AND HUMAN SERV., TRENDS IN FOSTER CARE AND ADOPTION – FY 2002–2011 (2012), available at http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption.pdf (In 2011, over 400,000 American children were in foster care.).

²⁸ TRINA SHANKS, ET AL., DIVERGING PATHWAYS: HOW WEALTH SHAPES OPPORTUNITY FOR CHILDREN 2 (2011) available at <http://www.insightcced.org/uploads/CRWG/DivergingPathways-InsightCenter-FinalEmbargoed.pdf> (minorities under the age of five are three times more likely than corresponding white children to live in households with little income and no assets).

families of access to family planning programs and contraception.²⁹ Yet again, these policies illustrate how ideology serves to exacerbate racial disparity in incomes.

In early 2012, a coalition of conservative and religious groups lobbied to deny coverage for contraception.³⁰ This effort was a culmination of a long history in the United States of criminalizing or discouraging family planning and contraception. As early as 1872, Anthony Comstock introduced a bill in Congress defining contraception as “filthy or vile” and making it a crime to “sell, lend or give away any article whatever for the prevention of conception.”³¹ The Tariff Act of 1930 banned the import of a number of articles, placing the sale of contraceptive devices in the same category as treason and murder.³² It was not until 1965 that the Supreme Court finally struck down draconian state laws which made it a felony for any person, married or not, to use any kind of contraceptive device.³³ Nevertheless, states continued to find ways to discourage the use of contraceptives; in 1972, Massachusetts passed a law making it a felony for anyone other than a doctor to dispense condoms, and even then, only to married couples.³⁴ A lecturer at Boston University who dispensed a contraceptive was convicted under this law, which carried a five-year prison term of hard labor in the penitentiary.³⁵

While *Roe v. Wade* effectively reinstated the ancient Catholic doctrine of quickening as the dividing line between legal and illegal abortion,³⁶ states continue to push the envelope by passing laws that restrict or discourage abortion.³⁷ The irony is that a significant percentage of abortions can be accounted for by the very laws and policies which make contraceptives and family planning services unavailable.

B. U.S. Drug Policy

²⁹ See, e.g., Louise Radnofsky, *supra* note 14; *Arizona Wades into Contraception Controversy*, *supra* note 14; Mayes, *supra* note 14; Kim Bell, *Abortion Dispute Puts Budget in Jeopardy*, ST. LOUIS POST DISPATCH, May 10, 1997, at 12.

³⁰ *Opposition Strikes at ‘ObamaCare’ on Birth Control*, CBS News (Feb. 17, 2012, 6:45 PM), http://www.cbsnews.com/8301-505245_162-57380657/opposition-strikes-at-obamacare-on-birth-control/; Jackie Calmes, *Obama Plans Big Effort to Build Support Among Women*, N.Y. TIMES, Mar. 11, 2012, http://www.nytimes.com/2012/03/11/us/politics/obama-campaign-plans-big-effort-to-court-women.html?_r=1&ref=abortion; *Ron Paul Statement on new Obamacare/HHS Regulation*, RON PAUL 2012 PRESIDENTIAL CAMPAIGN COMMITTEE, <http://www.ronpaul.tv/ron-paul/ron-paul-statement-on-new-obamacarehhs-regulation.php> (last visited Dec. 4, 2012).

³¹ Ch. 258 §2, 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. § 1461). Comstock soon found sport in baiting doctors with forged letters from women claiming that their husbands were mentally ill and they were afraid their children would inherit the illness. Thus, they needed advice on avoiding pregnancy. MILTON LADER & LAWRENCE MELTZER, MARGARET SANGER: PIONEER OF BIRTH CONTROL 44 (1969). Doctors were expected to respond by telling such patients to “sleep on the roof”—a phrase, which became the rallying cry of Margaret Sanger. MARGARET SANGER, MARGARET SANGER: AN AUTOBIOGRAPHY 89 (Dover Publications 1971) (1938). When the doctors took the bait and provided advice, Comstock would have the doctor arrested and sentenced to seven years of hard labor. LADER & MELTZER, *supra*, at 44.

³² Tariff Act of 1930, tit. 3, ch. 497, § 305, 46 Stat. 688 (1930) (codified at 19 U.S.C. § 1305 (2012)) (current version at 19 U.S.C. § 1305 (2012)).

³³ *Griswold*, 381 U.S. at 479.

³⁴ MASS. GEN. LAWS ch. 272 § 21 (West 1972).

³⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972).

³⁶ *Roe*, 410 U.S. at 161. See *supra*, notes 18 and 27 setting forth the ancient catholic doctrine of “quickening” as the basis for ensoulment.

³⁷ *Women’s Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 414 (5th Cir. 2001); *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 160 (4th Cir. 2000); *Planned Parenthood Arizona, Inc. v. Am. Ass’n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 186–87 (Ariz. Ct. App. 2011); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 3–4 (Tenn. 2000).

American drug policy is another primary cause of racial disparity in income in the U.S.³⁸ Drug offenders fill up almost half of America's federal prison capacity, necessitating the early release of murderers, rapists, and child molesters.³⁹ Despite studies showing that people of all races use drugs at approximately the same rate,⁴⁰ blacks nevertheless make up a disproportionate percentage of those incarcerated for drug offenses,⁴¹ with the result that in some communities as many as eighty percent of black male breadwinners are in prison, primarily for drug-related offenses.⁴² Not surprisingly, the effects of such disproportionate incarceration rates of black breadwinners on income disparities are catastrophic.⁴³

Michelle Alexander, in her controversial book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, documents the disproportionate effect the War on Drugs has on the black population.⁴⁴ At least part of the causes of this disproportionate effect is that punishments for use of crack cocaine are more severe than punishments for use of cocaine favored by upper class whites. Human Rights Watch has observed that:

Although crack was the least used of all illicit drugs in the U.S., and although more whites used illicit drugs than blacks . . . , the "war on drugs" has been targeted most notoriously at the possession and sale of crack cocaine by blacks. Crack cocaine in black neighborhoods became a lightning rod for a complicated and deep-rooted set of racial, class, political, social, and moral dynamics. To the extent that the white majority in the U.S. identified both crime and drugs with the "dangerous classes"—i.e., poor urban blacks—it was easier to endorse, or at least acquiesce in, punitive penal policies that might have been rejected if members of their own families and communities were being sent to prison at comparable rates.⁴⁵

Whatever one might think of her assertion that the mass incarceration of blacks “is the new Jim Crow,”⁴⁶ the data showing the high percentage of blacks in prison on drug offenses is well documented.⁴⁷

Every year, over 400,000 Americans die from tobacco use,⁴⁸ over 75,000 from alcohol abuse,⁴⁹ and almost 16,000 die from abuse of illegal drugs.⁵⁰ In terms of deaths per 100,000 users, “tobacco kills

³⁸ Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQ. 475, 475 (1994).

³⁹ *Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp> (last visited Mar. 23, 2012).

⁴⁰ *Illicit Drug Use, by Race/Ethnicity, in Metropolitan and Non-Metropolitan Counties: 2004 & 2005*, NAT'L SURVEY ON DRUG USE & HEALTH (June 21, 2007), <http://oas.samhsa.gov/2k7/popDensity/popDensity.htm>.

⁴¹ Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 751 (1993).

⁴² MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 96 (2012) [hereinafter *THE NEW JIM CROW*].

⁴³ *Criminal Justice Fact Sheet*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited April 10, 2012).

⁴⁴ “The single greatest force behind the growth of the U.S. prison system since the mid-1980s has been the national ‘war on drugs.’ Spearheaded by major federal drug policy initiatives that significantly increased penalties for drug offenses and markedly increased federal funds for state anti-drug efforts, federal and state measures to combat drugs have concentrated on criminal law enforcement rather than prevention and treatment.” *The Impact of the War on Drugs on US Incarceration*, HUMAN RIGHTS WATCH, <http://www.hrw.org/reports/2000/usa/Rcedrg00-03.htm> (last visited Dec. 5, 2012).

⁴⁵ *Racially Disproportionate Drug Arrests*, HUMAN RIGHTS WATCH, http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm#P323_67487 (last visited Dec. 5, 2012).

⁴⁶ *THE NEW JIM CROW*, *supra* note 42, at 11.

⁴⁷ *Id.* at 97; Blumstein, *supra* note 41, at 751; *Criminal Justice Fact Sheet*, *supra* note 43.

650, alcohol 150, heroin 80, and cocaine 4.”⁵¹ No direct deaths from marijuana use have been documented.⁵²

Given the relatively small number of deaths resulting from illegal drug use compared to that of tobacco and alcohol, the government policy of legalizing the most deadly substances (tobacco and alcohol), while spending billions to criminalize the least deadly remains a great puzzle to the social scientist—especially when the consequences of such criminalization serves to corrupt government,⁵³ siphon billions in drug profits to cartels and crime lords,⁵⁴ and create an army of addicts.⁵⁵ A Cato Institute study has revealed that a mere “243 addicts committed more than 437,738 crimes and that 26 addicts (denied their drugs by prohibitionists) commit 22 major crimes per day.”⁵⁶

Regardless of whether the War on Drugs is an effort deliberately directed at incarcerating and disenfranchising black Americans and undermining the economic base of an entire racial group, the evidence is overwhelming that it has had that effect.⁵⁷ While it may charitably be claimed that the War on Drugs reflects only a pathological failure of policy makers to learn the lessons of Prohibition, and thus reflects no discriminatory intent, the disastrous consequences of the War on Drugs are nevertheless well-documented.

Prohibition, like the War on Drugs demonstrates how blind adherence to ideology can lead to perverse policies that exacerbate rather than alleviate social ills. In the case of Prohibition, the idea championed by social conservatives was that criminalizing the use of alcohol would lead to a reduction in the social ills caused by excessive use of alcohol.⁵⁸ Yet despite overwhelming evidence that the

⁴⁸ *Tobacco Use: Targeting the Nation's Leading Killer at A Glance 2011*, CTR. FOR DISEASE CONTROL AND PREVENTION (Feb. 22, 2011), <http://www.cdc.gov/chronicdisease/resources/publications/AAG/osh.htm> (“Each year, an estimated 443,000 people die prematurely from smoking or exposure to secondhand smoke, and another 8.6 million live with a serious illness caused by smoking.”); *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States 2000-2004*, CENT. D.C. (Nov. 14, 2008), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.

⁴⁹ *Alcohol-Attributable Deaths and Years of Potential Life Lost—United States, 2001*, CTR. FOR DISEASE CONTROL (Sept. 24, 2004), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5337a2.htm>.

⁵⁰ OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: 2000 ANNUAL REPORT 29 (2000), available at http://www.erowid.org/psychoactives/prohibition/ondcp/ondcp_2000_ndcs.pdf; HARDAWAY, NO PRICE TOO HIGH, *supra* note 1, at 1.

⁵¹ *Id.* (quoting Doug Bandow, *War on Drugs or War on America*, 3 STAN. L. & POL’Y. REV. 242, 245 (1991))

⁵² *Drug Fact Sheet: Marijuana*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/druginfo/drug_data_sheets/Marijuana.pdf (last visited Dec. 1, 2012).

⁵³ *Id.*

⁵⁴ Ginger Thompson, *U.S. Drug Agents Launder Profits of Mexican Cartels*, N.Y. TIMES, Dec. 3, 2011, at A1, available at <http://www.nytimes.com> (estimating 18–39 billion dollars a year in drug money crosses from the U.S. to Mexico).

⁵⁵ *Drugs and Crime Facts*, Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/content/def/duc.cfm> (10.6% of Federal and 30.3% of State inmates committed property offenses to obtain money for drugs.) (last visited Jan. 17, 2013).

⁵⁶ HARDAWAY, *supra* note 1, at 2 (citing James Ostrowski, *Thinking About Drug Legalization*, CATO INSTITUTE POLICY ANALYSIS, No. 121, May 1989, at 25).

⁵⁷ See generally THE NEW JIM CROW, *supra* note 42. HOWARD N. SNYDER, US DEP’T OF JUSTICE, ARREST IN THE UNITED STATES, 1980-2009 13 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/aus8009.pdf>. (“During the 30-year period from 1980 to 2009, the white arrest rate of drug possession or use doubled and the black arrest rate tripled. The black arrest rate ended the period at 3 times the white arrest rate. Overall, the racial disparity in arrests for drug sale or manufacture was greater than for drug possession or use.”).

⁵⁸ HARDAWAY, NO PRICE TOO HIGH, *supra* note 1, at 50.

ideological preconceptions did not conform to reality, the “War on Alcohol” was imposed for fourteen long years.⁵⁹ The suffering caused during those years was incalculable.⁶⁰

At the beginning of Prohibition, the annual consumption of spirits was 101 million gallons.⁶¹ By 1926, after the government allocated over one-third of scarce prison space to those convicted of alcohol offenses, the consumption of alcohol doubled. Death rates from alcoholism and alcohol poisoning quadrupled from a rate of 1.4 per 100,000 users in 1919 to 4.1 in 1926. By 1931, there were more prisoners serving long sentences for alcohol offenses than for any other crime, including murder, than there were in 1921.⁶² As historian Sean Cashman has documented in his book, *Prohibition: The Lie of the Land*, the lucrative profit from the liquor trade, which might otherwise have been taxed and regulated by government, was instead diverted to violent gangsters and corrupt public officials.⁶³

Only after an “overwhelming tide of events that included suffering and hardship to millions of people” did policymakers abandon ideology and revoke Prohibition.⁶⁴ Today the lessons of Prohibition have been forgotten. Ideology again holds sway in the form of the War on Drugs despite the devastating effects it has had (and will continue to have) on racial disparities in income.

III. LIBERAL IDEOLOGIES AND POLICIES

A. Housing Policy

Though not the result of policies promoted solely by liberals, a liberal agenda of expanding home ownership to those who could not afford to take on the debt associated with home ownership has significantly contributed to the housing crisis.⁶⁵ No group has suffered more from the housing bubble collapse of 2007 than minorities.⁶⁶ Seduced into buying over-priced homes they could not afford, minorities have borne the brunt of foreclosures, victimized by a government policy of pressuring banks to make loans to those who can least afford oppressive debt and encouraging the “securitization” of those home mortgages.⁶⁷

A clue to the current distortions caused by government housing policy surely arises when one hears from policymakers and media pundits saying words to the effect that “it would be a tragedy for the

⁵⁹ See U.S. CONST. amend. XVIII (enacted 1919), *repealed by* U.S. CONST. amend. XXI (enacted 1933).

⁶⁰ HERMAN FELDMAN, PROHIBITION; ITS ECONOMIC AND INDUSTRIAL ASPECTS (1930).

⁶¹ *Id.* at 45.

⁶² *Id.*

⁶³ See SEAN DENNIS CASHMAN, PROHIBITION: THE LIE OF THE LAND 59–125 (1981).

⁶⁴ HARDAWAY, NO PRICE TOO HIGH, *supra* note 1, at 47.

⁶⁵ President George Bush stated the following on October 15, 2002: “We can put light where there's darkness, and hope where there's despondency in this country. And part of it is working together as a nation to encourage folks to own their own home.” Jo Becker, Sheryl Gay Stolberg, & Stephen Labaton, *Bush Drive for Home Ownership Fueled Housing Bubble*, N. Y. TIMES, Dec. 21, 2008, http://www.nytimes.com/2008/12/21/business/worldbusiness/21iht-admin.4.18853088.html?pagewanted=all&_r=0.

⁶⁶ Interview by PBS with Paul Taylor, Pew Research Center & Roderick Harrison, Howard University (July 26, 2011), *available at* http://www.pbs.org/newshour/bb/business/july-dec11/wealthgap_07-26.html; RAKESH KOCHHAR, RICHARD FRY & PAUL TAYLOR, PEW RESEARCH CENTER, WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS, HISPANICS: TWENTY-TO-ONE (2011), *available at* <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

⁶⁷ HARDAWAY, HOUSING BUBBLE, *supra* note 1, at xxii–xxiii; Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1313–14 (2006); Douglas S. Massey, *Isolated, Vulnerable and Broke*, N.Y. TIMES, Aug. 4, 2011, *available at* <http://www.nytimes.com/2011/08/05/opinion/hispanic-families-isolated-and-broke.html>.

economy if we allowed the prices of homes to fall to levels at which people could actually afford to buy them.”⁶⁸ And yet that statement is a concise summary of government housing policy.⁶⁹

Before the government created Fannie Mae and Freddie Mac⁷⁰ in order to “securitize” mortgages by slicing and dicing them for sale to investors,⁷¹ there was little need for regulation.⁷² Banks were not tempted to make unsound loans since they knew that if the loans were not repaid, the bank itself would be on the hook. But once banks were permitted and even encouraged to unload their mortgages on to taxpayer supported entities (and ultimately to hapless “investors” via the investment banks), all considerations of prudence and moral hazard were ultimately sacrificed on the altar of ideology, populism, and political opportunism.⁷³

On the populist ideology of “expanding home ownership,”⁷⁴ the government threatened to punish banks which did not meet loan quotas—first in the Community Reinvestment Act,⁷⁵ and later in the even more comprehensive and draconian regulations promulgated in the mid-1990’s.⁷⁶ When the banks responded to this unprecedented pressure by informing regulators that such quotas could not be met without extending mortgages to unqualified buyers, the banks were effectively told to “be more creative.”⁷⁷ Creative they soon became, lowering standards, and reducing down payments, often to zero.⁷⁸ The explosion in demand for houses wrought by these easy loans to unqualified buyers pushed home prices to astronomical levels⁷⁹ in what would soon become the greatest economic bubble since the South Sea Bubble of 1720,⁸⁰ and before that the Dutch Tulip Bubble of 1637.⁸¹

⁶⁸ Joseph E. Stiglitz, *Reversal of Fortune*, VANITY FAIR, Nov. 2008, <http://www.columbia.edu/cu/news/clips/2008/10/09/ReversalVANITY.pdf>.

⁶⁹ “Still another ‘solution’ proposed by the politicians who created the bubble is to keep the bubble going as long as possible. An example of this agenda is the 2009 bill that hands out \$8,000 to people who want to buy a house.” HARDAWAY, HOUSING BUBBLE, *supra* note 1, at 66; First-Time Homebuyer Credit Act 26 U.S.C. § 36 (2010).

⁷⁰ Kate Pickert, *A Brief History of Fannie Mae and Freddie Mac*, TIME BUSINESS, July 14, 2008, <http://www.time.com/time/business/article/0,8599,1822766,00.html>; Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, 84 Stat. 450 (1970); *Fannie Mae About Us: Our Charter*, FANNIE MAE (Sept. 23, 2011), <http://www.fanniemae.com/portal/about-us/governance/our-charter.html>; *Freddie Mac: Company Profile*, FREDDIE MAC, http://www.freddiemac.com/corporate/company_profile/ (last visited March 9, 2012).

⁷¹ W. Scott Frame & Lawrence J. White, *Fussing and Fuming over Fannie and Freddie: How Much Smoke, How Much Fire?*, 19 J. ECON. PERS. 159, 179 (2005).

⁷² Peter J. Wallison, *Cause & Effect: Government Policies and the Financial Crisis*, 21 CRITICAL REV. J. POL. & SOC’Y 365 (2009) [hereinafter *Cause & Effect*].

⁷³ Frame & White, *supra* note 71, at 179 (Certain “transaction costs are actually shifted rather than eliminated: investors believe that they are shielded from credit risk not only by Fannie Mae and Freddie Mac, but also ultimately by taxpayers.”).

⁷⁴ Mikael Atterhog & Han-Suck Song, *A Survey of Policies that May Increase Access to Home Ownership for Low-Income Households*, 26 HOUSING, THEORY & SOC’Y 248, 256 (2009).

⁷⁵ The Community Reinvestment Act, 12 U.S.C. § 2901–2908 (2012).

⁷⁶ *Cause & Effect*, *supra* note 72, at 369–70.

⁷⁷ Dorit Samuel, *The Subprime Mortgage Crisis: Will New Regulations Help Avoid Future Debacles?*, 2 ALB. GOV. L. REV. 217, 221–23 (2009).

⁷⁸ *Cause & Effect*, *supra* note 72, at 366–70.

⁷⁹ *Id.* at 366.

⁸⁰ Richard S. Dale, Johnnie E. V. Johnson, & Leilei Tang, *Financial Markets Can Go Mad: Evidence of Irrational Behaviour During the South Sea Bubble*, 58 ECON. HIST. REV. 233, 234–236 (2005); PETER M. GARBER, FAMOUS FIRST BUBBLES: THE FUNDAMENTALS OF EARLY MANIAS 115–19 (2000).

⁸¹ ANNE GOLDFAR, TULIPMANIA: MONEY, HONOR AND KNOWLEDGE IN THE DUTCH GOLDEN AGE 231–33 (2007); DIDIER SORNETTE, WHY STOCK MARKETS CRASH: CRITICAL EVENTS IN COMPLEX FINANCIAL SYSTEMS 9 (2003).

Such bubbles always collapse,⁸² as do all Ponzi schemes, the only question being when. However, when the housing bubble inevitably burst in 2007,⁸³ government policy makers and politicians were unwilling to admit their responsibility for the catastrophe.⁸⁴ Instead of allowing home prices to fall to natural market levels at which average wage earners could afford to buy them, policy makers are now perversely trying to reignite the bubble by demanding that banks once again lend money to those without twenty percent down payments or the equivalent equity for refinancing.⁸⁵ Banks that tightened their lending standards to avoid a repeat of the bubble after learning the hard way that the financial consequences of unsound lending can be severe, are now being threatened once again with sanctions if they do not lower their lending standards and waive down payments.⁸⁶

Like the compulsive gambler who throws good money after bad in hopes of recouping his losses, policymakers are yet again printing money like mad⁸⁷ to reignite the housing bubble and thus prevent home prices from falling to levels at which the average American could afford to buy a house without incurring a lifetime of oppressive debt. Meanwhile, hapless under-water homeowners are being left to dangle in the wind while short sales and foreclosures are delayed for years.⁸⁸

Because the government-created housing bubble encouraged homebuyers to treat the equity in their home as a piggy bank from which withdrawals could be made for the purchase of consumer goods,⁸⁹ the inevitable collapse of the housing market wiped out over seven and a quarter trillion dollars of effective purchasing power and aggregate demand.⁹⁰ While the wealthiest homeowners enjoyed either a cushion of equity or cash reserves that allowed them to keep their homes even as the housing market collapsed, the poorest homeowners (in particular sub-prime mortgagors, and to a lesser extent Alt-B⁹¹ mortgagors) faced foreclosure and financial ruin. Since minorities were the primary holders of these mortgages, the collapse of the housing bubble in turn exacerbated the already great wealth disparities between races.

⁸² *Famous Bubbles*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/dotcon/historical/> (last visited Mar. 11, 2012).

⁸³ Kathryn J. Byun, *The U.S. Housing Bubble and Bust: Impacts on Employment*, MONTHLY LAB. REV., Dec. 2010, at 4.

⁸⁴ Jeff Jacoby, *Frank's Fingerprints are All Over the Financial Fiasco*, BOSTON GLOBE, Sept. 28, 2008, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/09/28/franks_fingerprints_are_all_over_the_financial_fiasco/.

⁸⁵ Lucy Madison, *Obama Unveils Mortgage Refinancing Plan*, CBS NEWS (Feb. 1, 2012, 12:51 PM), http://www.cbsnews.com/8301-503544_162-57369731-503544/obama-unveils-mortgage-refinancing-plan/; MAKING HOME AFFORDABLE, <http://www.makinghomeaffordable.gov/pages/default.aspx> (last visited Mar. 16, 2012).

⁸⁶ James Pethokoukis, *No Surprise: TARP Bailout Encouraged Banks to Make Riskier Loans*, THE AMERICAN (Mar. 7, 2012, 12:48 PM), <http://blog.american.com/2012/03/no-surprise-tarp-bailout-encouraged-banks-to-make-riskier-loans/>.

⁸⁷ Mark Whitehouse, *Number of the Week: Government's Overwhelming Role in Mortgages*, WSJ BLOGS (Feb. 12, 2011 5:00 AM), <http://blogs.wsj.com/economics/2011/02/12/number-of-the-week-governments-overwhelming-role-in-mortgages/>; Sewell Chan, *Bernanke Weighs Risks of New Action*, N.Y. TIMES, Oct. 15, 2011, http://www.nytimes.com/2010/10/16/business/economy/16fed.html?_r=1&hp=&pagewanted=print.

⁸⁸ Kathleen M. Howley, *Delays in Short Sales Frustrate Home Buyers*, BLOOMBERG BUSINESSWEEK (Apr. 14, 2011 5:00 PM), http://www.businessweek.com/magazine/content/11_17/b4225013122956.htm.

⁸⁹ Peter J. Brady, Glenn B. Canner & Dean M. Maki, *The Effects of Recent Mortgage Refinancing*, FED. RESERVE BULLETIN (July 2009), <http://www.federalreserve.gov/pubs/bulletin/2000/0700lead.pdf>.

⁹⁰ STABILIZING AND HEALING THE HOUSING MARKET, ECONOMIC REPORT OF THE PRESIDENT 110 (2012), available at http://www.whitehouse.gov/sites/default/files/microsites/ERP_2012_ch_4.pdf.

⁹¹ Michael J. Kling, *Subprime and Nonprime are Blurring In the Indistinct World of Alt-B Lending*, MORTGAGEORB (Sept. 10, 2007), http://www.mortgageorb.com/e107_plugins/content/content.php?content.388 (“The exact definitions vary by company, but all agree the category is between Alt-A and subprime, a classification for loans that don’t quite qualify for Alt-A.”).

B. Immigration

According to the most recent data released by the U.S. Department of Labor, the black unemployment rate at the height of the 2008-2012 recession was 17.3%,⁹² while among Hispanics it was 13.9%.⁹³ Among black teenagers, the unemployment rate rose to a staggering 49.1%.⁹⁴ This compares unfavorably with the highest white unemployment rate of 9.7%.⁹⁵ These relative unemployment rates explain much of the difference in incomes between the races.⁹⁶

The effect of immigration policy on both unemployment rates and incomes was recognized by the policy makers of the New Deal during the Great Depression.⁹⁷ During the prior administration of Herbert Hoover, the government had encouraged the importation of cheap foreign labor in excess of 300,000 immigrants a year in order to accommodate the demands of “Big Business” for lower wages and higher profits.⁹⁸ But with unemployment reaching almost twenty-five percent in 1933,⁹⁹ the Roosevelt Administration immediately recognized the need to drastically cut the quota for cheap foreign labor to but 23,000 a year.¹⁰⁰ Despite the complaints of large corporations, which had grown accustomed to paying the low wages made possible by the massive import of cheap foreign labor, the Roosevelt administration began to vigorously enforce the immigration laws in an effort to address massive unemployment.¹⁰¹ Illegal immigrants were deported in large numbers.¹⁰²

⁹² *Labor Force Statistics from the Current Population Survey, Unemployment Level – African Americans January 2010*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cps/cpsatabs.htm> (follow “Table A-2. Employment Status of the Civilian Population by Race, Sex and Age” hyperlink; then select “Unemployment Rate, Black or African American”; then follow “Retrieve Data” hyperlink).

⁹³ *Id.* (follow “Table A-3. Employment Status of Hispanic or Latino Population by Sex and Age” hyperlink; then select “Unemployed, Hispanic or Latino Ethnicity”; then follow “Retrieve Data” hyperlink).

⁹⁴ *Id.* (follow “Table A-2. Employment Status of the Civilian Population by Race, Sex and Age” hyperlink; then select “Unemployed, Black or African American, Both Sexes, 16 to 19 Years”; then follow “Retrieve Data” hyperlink).

⁹⁵ *Id.* (follow “Table A-2. Employment Status of the Civilian Population by Race, Sex and Age” hyperlink; then select “Unemployed, Whites”; then follow “Retrieve Data” hyperlink).

⁹⁶ U.S. DEP’T OF LABOR U.S. BUREAU OF LABOR STATISTICS, *LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2010 REPORT 1032* (2011).

⁹⁷ The effect has only gotten worse in more recent times. For example, in the 1970s, “office buildings in Los Angeles hired union workers as janitors, paying high wages and substantial benefits. Then greedy businessmen thirsty for cheap labor and high profits began to hire independent contractors who in turn hired illegal immigrants. Within a year wages were cut by two-thirds and benefits were eliminated.” Robert Hardaway, *Reagan/Bush Amnesty Agenda an Economic Catastrophe for Minorities and Legal Immigrants*, HUFFINGTON POST COLLEGE (Aug. 15, 2012) http://www.huffingtonpost.com/robert-hardaway/illegal-immigration-amnesty_b_1729649.html. Likewise, “at a time when unemployment among African Americans approached eighty percent, greedy American garment workers petitioned the INS to import more cheap labor on grounds that there was an unskilled labor shortage, repeating the tired mantra that Americans won’t do the dirty work that illegal immigrants are willing to do—ignoring the fact that it isn’t the dirty wages that Americans disdain” *Id.* Rather it is the low wages that are disdained, which in turn are caused by the expansion of labor supply caused by illegal immigration. *Id.*; see generally POPULATION, LAW AND THE ENVIRONMENT, *supra* note 1, at 138-39.

⁹⁸ Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924).

⁹⁹ Robert VanGiezen & Albert E. Schwenk, *Compensation from Before World War I through the Great Depression*, BUREAU OF LABOR STATISTICS (2001), <http://www.bls.gov/opub/cwc/cm20030124ar03p1.htm>.

¹⁰⁰ UNITED STATES IMMIGRATION HANDBOOK VOL. I. STRATEGIC AND PRACTICAL INFORMATION 57 (2013).

¹⁰¹ *History of Illegal Immigration in U.S.*, END ILLEGAL IMMIGRATION, http://www.endillegalimmigration.com/History_of_Illegal_Immigration_in_US/index.shtml (last updated Apr. 11, 2012) (“Some Mexicans repatriated themselves either voluntarily or under pressure from local welfare officials. Others were deported. Eventually between about 500,000 to 1,000,000 Mexicans left the United States between 1929 and 1939. This was due to deportation, as well as other factors such as the threat of deportation and acute unemployment.”). While this policy of the Democratic Party seems harsh today, it pales compared to its policy of herding over 100,000

Roosevelt and his administration understood that the economic principle of supply and demand applied to labor. As Paul Samuelson's elementary, first-year textbook explains: "The overall effect of recent immigration has been an increase in the supply of low-skilled workers in the United States relative to high-skilled workers. Studies have estimated that this change in supply has contributed to the decline in the wages of less educated groups relative to the college-educated."¹⁰³ Despite the invocation of ideology by populist politicians seeking the votes of black Americans, a Harris Poll revealed that sixty-three percent of African Americans recognized that the importation of cheap labor was a major factor in the unemployment rate of black Americans.¹⁰⁴

Examples of the devastating effects of immigration policy on income disparity by race in the U.S. abound. In the 1970s, most large office buildings in Los Angeles hired black Americans and paid generous wages and benefits. But with the dramatic influx of cheap foreign labor, building managers reverted to hiring independent contractors paying pittance wages to immigrants, many of them illegal.¹⁰⁵ Thousands of black Americans lost their jobs, and wages remained depressed.¹⁰⁶

In 1965, just when the Civil Rights Act was raising the hopes of black Americans, Congress acted to nullify their economic hopes by importing millions of additional cheap foreign laborers.¹⁰⁷ Indeed, over 25 million immigrants were added to the U.S. population between 1970 and 1990.¹⁰⁸

The Center for Immigration Studies has concluded:

When blacks ask why their economic plight has not improved since the Civil Rights Act took effect in 1965, one answer is the Immigration Act passed the same year. Since then, the importation of millions of foreign workers has done two things: It has provided an alternative supply of labor so that urban employers have not had to hire available black jobseekers, and the foreign workers have oversupplied labor to low skill markets. That has kept jobs in a perpetual state of declining real wages that are incapable of lifting unskilled black workers out of poverty.¹⁰⁹

Perhaps the most devastating conclusion of the Study was that "whether intended or not, the present immigration policy is a revived instrument of institutional racism."¹¹⁰

A study by immigration researcher Gary Imhoff has revealed that the rich reap most of the benefits of illegal immigration:

Americans into concentration camps. See, e.g., Donna K. Nagata, *The Japanese American Internment: Exploring the Transgenerational Consequences of Traumatic Stress*, 3 J. TRAUMATIC STRESS 47 (1990).

¹⁰² *Id.*

¹⁰³ PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 253 (19th ed. 2010).

¹⁰⁴ Mandel et. al., *The Immigrants*, BUSINESSWEEK, Jul. 13, 1992, <http://www.businessweek.com/stories/1992-07-12/the-immigrants>.

¹⁰⁵ RICHARD D. LAMM & GARY IMHOFF, *THE IMMIGRATION TIME BOMB: THE FRAGMENTING OF AMERICA* 62-63 (1985).

¹⁰⁶ *Id.*

¹⁰⁷ Vlae Kershner, *A Hot Issue for the 90s: California Leads in Immigration—and Backlash*, S.F. CHRON., June 21, 1993, at A6.

¹⁰⁸ Vernon M. Briggs, *Despair Behind the Riots: The Impediment of Mass Immigration*, 11 CTR. FOR IMMIGRATION STUD. 1 (1992).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

. . . [I]f an influx of illegal professionals could lower the wages of the overpaid, of doctors and lawyers, rather than the wages of the poor, there might be some economic benefit to their coming to this country. Instead, it is low-wage labor markets, the wages at the bottom that are being depressed.¹¹¹

The Study concludes that immigration “widens the difference between classes in the United States; it keeps down the price of hiring a maid or a gardener for the rich while it makes things worse for the poor.”¹¹²

As early as 1895, the preeminent black educator, Booker T. Washington, in a famous speech to the titans of industry at the Atlanta International Exposition, pleaded with the audience of robber barons to stop their racist policies of importing cheap white foreign labor to avoid having to hire freed black slaves. He told the allegory of a ship lost at sea:

Suddenly the ship sighted a friendly vessel. From the mast of the unfortunate vessel was seen a signal “water, water; we die of the thirst”. (The answer came back): “Cast down your bucket where you are.” The captain of the distressed vessel . . . cast down his bucket, and it came up full of the fresh sparkling water from the mouth of the Amazon River . . . To those of you who look to the incoming of those of foreign birth, ‘cast down your bucket where you are . . . and we shall stand by you with a devotion that no foreigner can approach, ready to interlac(e) our industrial, commercial, civil and religious life with yours.’¹¹³

Washington’s plea to the titans of industry to eschew the importation of cheap foreign labor in favor of hiring African Americans was ignored, and continues to be ignored today by politicians unwilling to enforce the law against illegal immigration.¹¹⁴

C. Tax Policy

The current U.S. income tax code awards the highest subsidies (in the form of deductions for mortgages up to a million dollars) to the wealthiest one-third of Americans who can afford the grandest and most expensive houses.¹¹⁵ No subsidies at all are given to the bottom two thirds of American homeowners, either because they can’t afford to buy a house at all, or because the housing deduction does not exceed the standard deduction given to all taxpayers.¹¹⁶ Because a higher percentage of the wealthy are white and housing represents a large percentage of total wealth, this subsidy to the richest homeowners, over time, exacerbates the pre-existing disparity between black and white wealth.

¹¹¹ LAMM & IMHOFF, *supra* note 105, at 62–63.

¹¹² Mandel, *supra* note 104, at 119.

¹¹³ Booker T. Washington, *The Atlanta Exposition Address*, in UP FROM SLAVERY: AN AUTOBIOGRAPHY (1901) available at <http://www.bartleby.com/1004/14.html>.

¹¹⁴ See, e.g., Tom Cohen, *Obama Administration to Stop Deporting Some Young Illegal Immigrants*, CNN (June 16, 2012), <http://www.cnn.com/2012/06/15/politics/immigration/index.html>.

¹¹⁵ HARDAWAY, HOUSING BUBBLE, *supra* note 1, at 131; Roger Lowenstein, *Who Needs the Mortgage-Interest Deduction*, N.Y. TIMES, Mar. 5, 2006, <http://www.nytimes.com/2006/03/05/magazine/305deduction.1.html?pagewanted=all>.

¹¹⁶ HARDAWAY, HOUSING BUBBLE, *supra* note 1, at 131; Lowenstein, *supra* note 115.

In the 2012 presidential campaign, Mitt Romney advocated an overall marginal tax rate reduction of twenty percent in exchange for the elimination of many of the current deductions.¹¹⁷ Critics of this plan have noted that such deductions would almost certainly have to include a reduction, if not the elimination, of the one million dollar home mortgage deduction currently enjoyed by America's richest homeowners.¹¹⁸ President Obama rejected any such formula,¹¹⁹ although it is true that many conservatives would also oppose the elimination of the home mortgage deduction as well.

Superficial solutions to racially based income disparities, such as raising the taxes on the rich or big oil companies as a means of redressing income disparities have proved self-defeating. Policy makers of both the left and the right must consider the actual consequences of their policies rather than blindly relying on ideological preconceptions.

For example, when the marginal tax rates in the U.S. were ninety percent, income disparities were not significantly different than when marginal rates were reduced to thirty-five percent under Kennedy and Reagan. The non-ideological explanation for this is that when rates were confiscatory, the wealthy either took advantage of complex tax deductions that required professional tax assistance unaffordable by the poor, or else invested in unproductive high-risk schemes. This is why incomes of those in the poorest quartile of income earners increased by five percent during the Reagan tax cut years (1981–89), but declined by five percent during the pre-Reagan years (1973–81) when marginal tax rates were higher.¹²⁰ One has only to compare the income disparity in socialist countries (such as Cuba or North Korea, or until the 1990's, the Soviet Union) in which a political elite enjoys a standard of living many times above that of the common people, to realize that economic freedom and equality of opportunity is the key to wealth for both the lower and middle classes.¹²¹

Without knowledge of the economics of corporate America, economically disadvantaged voters can fall pray to populist politicians calling for policies imposing discriminatory taxes on such entities as "Big Oil." In a basic economics class, they would learn that forty-one percent of oil companies are owned by pension funds (including union pension funds) and retirement accounts, and another forty-three percent are owned by mutual funds and small investors.¹²² Only 1.5% are owned by executive

¹¹⁷ MITT ROMNEY, BELIEVE IN AMERICA: MITT ROMNEY'S PLAN FOR JOBS AND ECONOMIC GROWTH, TAX POLICY 3 (2012) available at <http://www.thepoliticalguide.com/Items/MittRomney/TaxPolicy.pdf>.

In the long run, Mitt Romney will pursue a conservative overhaul of the tax system that includes lower and flatter rates on a broader tax base. The approach taken by the Bowles-Simpson Commission is a good starting point for the discussion. The goal should be a simpler, more efficient, user-friendly, and less onerous tax system. Every American would be readily able to ascertain what they owed and why they owed it, and many forms of unproductive tax gamesmanship would be brought to an end. Conversely, tax reform should not be used as an under-the-radar means of raising taxes. Where reforms that simplify the code or encourage growth have the effect of increasing the tax burden, they should be offset by reductions in marginal rates. Washington's problem is not too little revenue, but rather too much spending. *Id.*

¹¹⁸ Jim Zarroli, *Romney's Plan to Broaden Tax Base Finds Critics*, NPR (Aug. 27, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/08/27/160083532/romney-s-plan-to-broaden-tax-base-finds-critics>; Sam Stein, *Mark Rubio on Romney Tax Plan: Don't Touch the Biggest Deductions*, HUFFINGTON POST (Oct. 16, 2012), http://www.huffingtonpost.com/2012/10/16/marco-rubio-mitt-romney-tax-plan_n_1970484.html.

¹¹⁹ Ezra Klein, *The Massive Policy Gap Between Obama and Romney*, WASH. POST, Aug. 6, 2012, <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/08/06/the-massive-policy-gap-between-obama-and-romney/>.

¹²⁰ WILLIAM A. NISKANEN & STEPHEN MOORE, CATO INSTITUTE POLICY ANALYSIS, SUPPLY-SIDE TAX CUTS AND THE TRUTH ABOUT THE REAGAN ECONOMIC RECORD (1996) at Figure 12.

¹²¹ Francis Fukuyama, *Dealing with Inequality*, J. OF DEMOCRACY 79, 84 (2011);

¹²² Robert Hardaway, *Who is big oil? Not the fat guy smoking a cigar?* DENVER BUS. J., Sept. 5–11, 2008, at A39.

insiders.¹²³ They would also learn from a basic economics course that any discriminatory tax on Big Oil constitutes a cost input in the same way that steel constitutes a cost input. Since the price of a gallon of gas reflects all cost inputs, any increase in those costs—whether it is the cost of a tax or the cost of steel—must ultimately be reflected in the gas price. Therefore, from an economic standpoint, a tax on Big Oil is the substantial equivalent of a gas tax at the pump. Since gasoline costs constitute a higher percentage of the income of the poor than the rich, the cost of the tax falls disproportionately on the poor.¹²⁴ An economically disadvantaged voter who does not understand this is likely to vote against her own economic interest by voting for a demagogic politician’s call for a higher tax on Big Oil.

Similar heavy tax burdens fall disproportionately on the poor and disadvantaged in the form of high corporate taxes, which are now among the highest in the world. Few realize that corporate taxes are really nothing more than disguised regressive sales taxes on the poor.

D. Educational Policy and Busing

Numerous studies have shown that school segregation harms the educational aspirations of minorities.¹²⁵ As a result, minorities continue to languish in America’s public schools.¹²⁶ Rich and mostly white families are able to buy a safe learning environment for their children in private schools.¹²⁷ An entrenched educational establishment has fiercely obstructed attempts to level the playing field for minority children, many of whom seek to attend safer charter schools,¹²⁸ or to use public vouchers to attend private schools.¹²⁹

In 1966, the U.S. Office of Education commissioned the “Coleman Report” which revealed that “schools are not very important in determining student achievement.¹³⁰ Families, and to a lesser extent peers, are the primary determinant of variations in performance.¹³¹ Despite this, demagogic politicians continue to claim that more money is the key to providing an adequate education to minorities.¹³² In fact, schools with the lowest expenditures per student often perform the best, while schools that spend the most perform the worst. The reasons why students in school systems with the lowest funding, including parochial schools, so often perform better than students in school systems where more per capita is spent on their education has been explained by the Coleman Report for the U.S. Office of Education: “[W]ith less money, . . . schools are less flexible and retain traditional curriculum and academic structures that have fallen victim to pop trends and political pressure in public schools since

¹²³ *Id.*

¹²⁴ Sarah E. West, *Should Distributional Considerations Hold Up Higher Gasoline Taxes?*, RESOURCES FOR THE FUTURE (Jun. 22, 2009), <http://www.rff.org/Publications/WPC/Pages/09-06-22-should-distributional-considerations-hold-up-higher-gasoline-taxes.aspx>.

¹²⁵ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

¹²⁶ *Status and Trends in the Education of Racial and Ethnic Minorities*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2010015> (last visited Dec. 5, 2012).

¹²⁷ Robert W. Fairlie & Alexandra M. Resch, *Is there “White Flight” into Private Schools?: Evidence from the National Educational Longitudinal Survey*, INSTITUTE FOR POLICY RESEARCH, NORTHWESTERN UNIVERSITY 20–21 (Nov. 2000), http://www.ipr.northwestern.edu/jcpr/workingpapers/wpfiles/fairlie_resch.pdf.

¹²⁸ Erica Frankenberg & Chungmei Lee, *Charter Schools & Race: A Lost Opportunity for Integrated Education*, 32 EDUC. POL’Y ANALYSIS ARCHIVES 12 (2003), available at <http://epaa.asu.edu/ojs/article/view/260/386>.

¹²⁹ William McGurn, *The NAACP vs. Black Schoolchildren*, WALL ST. J., June 7, 2011, at A16.

¹³⁰ J. COLEMAN, ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

¹³¹ Eric A. Hanushek, *When School Finance “Reform” May Not be Good Policy*, 28 HARV. J. ON LEGIS. 423, 431 (1991).

¹³² Linda Darling-Hammond, *President Obama and Education: The Possibility for Dramatic Improvements in Teaching and Learning*, 79 HARV. EDUC. REV. 210, 212 (2009).

the 1960's."¹³³ A National Assessment of Educational Progress report revealed that Iowa, which ranked twenty-seventh in per capita expenditures ranked number one in SAT test scores, and Utah, which ranked dead last in per capita expenditures, finished fourth in achievement tests.¹³⁴ Meanwhile, students in countries that spend less than half what American schools spend rank highest in international achievement tests, while students in American schools ranked near the bottom.¹³⁵

A major cause of income disparity, particular between racial groups, is the failure of public education in the United States to teach basic economic theory.¹³⁶ This failure falls heaviest on minorities inasmuch as a higher percentage of minority students leaving school must begin to make a living from a lower family economic base. Without knowledge of basic economic theory, both microeconomic and macroeconomic, a higher percentage of minority students face far more challenges than their white counterparts in achieving higher incomes.¹³⁷

The National Center for Education Statistics' 2006 study revealed that half of all public school students tested did not understand what banks did with money deposited in their checking account.¹³⁸ Only thirty-six percent could identify the government's primary source of revenue, and only one-third could explain how interest rates might affect a borrower's decision to borrow money. Only three percent performed at an "advanced" level.¹³⁹

While the economic consequences of not being taught how to balance a checkbook might be obvious, less patent is how a lack of knowledge of macroeconomic theory might result in minority wage earners voting for politicians and policies that serve to exacerbate, rather than alleviate racial disparities in income.

In the 1970's it became an ideological imperative of the liberal wing of the Democratic Party that busing should be an indispensable element of ensuring desegregation of public schools.¹⁴⁰ Accordingly, in 1974 Senator Joseph Biden cast the deciding vote in the Senate to defeat an anti-busing amendment.¹⁴¹

¹³³ AMERICA GOES TO SCHOOL, *supra* note 1, at 43. See Secretary Arne Duncan, *Remarks at OECD's Release of the Program for International Student Assessment (PISA) 2009 Results*, U.S. DEP'T OF EDUC. (Dec. 7, 2010), <http://www.ed.gov/news/speeches/secretary-arne-duncans-remarks-oecd-release-program-international-student-assessment-> [hereinafter PISA 2009 Results]; see generally OECD, PISA 2009 RESULTS: WHAT STUDENTS KNOW AND CAN DO (2010), available at <http://www.oecd.org/edu/pisa/pisaproducts/48852548.pdf> (ranking fifteen-year-old American students fourteenth in literacy, and twenty-fifth in mathematics, and seventeenth in sciences among the other PISA countries, despite the fact that the United States spends more money per student on education than every other study participant except Luxemburg).

¹³⁴ *SAT Mean Scores of College-Bound Seniors and Percentage of Graduates Taking SAT by State or Jurisdiction: Selected Years 1995–1996 and 2009–2010*, NAT'L. CTR. FOR EDUC. STATISTICS (Sept. 2010), http://nces.ed.gov/programs/digest/d10/tables/dt10_154.asp.

¹³⁵ See PISA 2009 Results, *supra* note 133 (showing the United States ranks below Korea, Finland, China, and many others on the mathematics scale).

¹³⁶ NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS. & U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: ECONOMICS 2006, NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADE 12, at 4–5 (2007), available at nces.ed.gov/nationsreportcard/pdf/main2006/2007475.pdf [hereinafter The Nation's Report Card]. ("In 2006, in the first ever national assessment of economics, . . . forty-two percent performed at the *Proficient* level or higher. On average, male students scored higher than female students, and White and Asian/Pacific Islander students scored higher than other racial/ethnic groups." Only three percent of students "demonstrated *Advanced* economics knowledge and skills.")

¹³⁷ See generally HARDAWAY, HOUSING BUBBLE, *supra* note 1, at 59–61.

¹³⁸ THE NATION'S REPORT CARD, *supra* note 136, at 13.

¹³⁹ *Id.* at 5.

¹⁴⁰ STEPHEN J. CALDAS & CARL L. BANKSTON III, FORCED TO FAIL 161 (2005).

¹⁴¹ JEFFREY A. RAFFEL, THE POLITICS OF SCHOOL DESEGREGATION: THE METROPOLITAN REMEDY IN DELAWARE 115 (1980).

This vote followed on the heels of the 1971 Supreme Court decision to uphold a federal district court judge's order to force students in a North Carolina school district to be bussed according to the color of their skin.¹⁴² This was in order to ensure that all 107 schools in the district be made approximately seventy-one percent white.¹⁴³ According to this order, the school district was required to take note of the skin color of each student and then assign the student to a school according to that color. Despite a provision in Title IV of the Civil Rights Act of 1964, which strictly forbade the "assignment of students in order to overcome racial imbalance," the Supreme Court upheld the order.¹⁴⁴ This was followed in 1973 with an even more draconian Supreme Court decision in *Keyes v. District No 1* striking down a Denver School district's attempt to establish a race-neutral assignment of students.¹⁴⁵

The consequences of *Mecklenburg* and *Keyes* turned out to be catastrophic for the desegregation cause. Due to the white flight to suburban and private schools triggered by busing, the percentage of whites in the Denver public schools dropped precipitously from sixty-four percent to thirty-one percent.¹⁴⁶ Nationally, the subsequent abandonment of inner-city schools resulted in the percentage of African Americans attending predominately minority schools rising from 63.3% to 66% in 1992.¹⁴⁷ For Hispanics the rise was even more dramatic, rising from 56% in 1972 to 73.4% in 1992.¹⁴⁸ In large urban areas such as New York, the resegregation of the public schools reached staggering proportions, until over eighty-four percent of African Americans were relegated to all-minority schools.¹⁴⁹

While few doubted the original "good intentions" manifested in the Democratic ideology of busing, it soon became apparent that ideology had served to trump both rationality and good sense. As the renowned African American economist Thomas Sowell noted in his treatise "Patterns of Black Excellence,"

The very real educational problems of black children, and the early hopes that desegregation would solve them. . . degenerated into a numerical fetish and a judicial unwillingness to lose face. What actually happens to black children. . . has been relegated to a secondary consideration in principle, and less than that in practice.¹⁵⁰

Meanwhile, despite polls revealing that at least "half of the American Black population now opposes busing,"¹⁵¹ and that a majority of Mexican Americans vehemently opposed it,¹⁵² the liberal agenda continued to advocate the implementation of busing even in the face of its tragic consequences.¹⁵³

¹⁴² *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

¹⁴³ Lino A. Graglia, *From Prohibiting Segregation to Requiring Integration: Developments in the Law of Race and the Schools Since Brown*, in *SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE* 69, 80 (Walter G. Stephan & Joe R. Feagin eds., 1980).

¹⁴⁴ 42 U.S.C. § 2000c(b) (1964).

¹⁴⁵ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208–09 (1973).

¹⁴⁶ HARDAWAY, *AMERICA GOES TO SCHOOL*, *supra* note 1, at 122.

¹⁴⁷ GARY ORFIELD ET AL., *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968, REPORT OF THE HARVARD PROJECT ON SCHOOL DESEGREGATION TO THE NATIONAL SCHOOL BOARDS ASSOCIATION* 14 (1993).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 19.

¹⁵⁰ Thomas Sowell, *Patterns of Black Excellence*, 43 *THE PUB. INT.* 26, 43 (1976).

¹⁵¹ Andrew M. Greeley, *School Desegregation and Ethnicity*, in *SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE* 133, 153 (Walter G. Stephan & Joe R. Feagin eds., 1980).

¹⁵² David J. Armor, *White Flight and the Future of School Desegregation*, in *SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE* 216 (Walter G. Stephan & Joe R. Feagin eds., 1980).

IV. MIXED CONSERVATIVE AND LIBERAL POLICIES

A. Local Residential and Exclusionary Policies

In the years since the passage of the Civil Rights Act and the Fair Housing Act, the U.S. has progressed far beyond the point where racist homebuilders and homeowners are free to openly advertise racially discriminatory restrictions on home purchases. Nevertheless, despite significant progress, many neighborhoods in the U.S. remain substantially segregated by socioeconomic status, and therefore race.¹⁵⁴ The prevalence of racially-segregated neighborhoods is a major reason why many neighborhood schools in the U.S. remain more racially segregated than they were in the years immediately before the Supreme Court decision in *Brown v. Board of Education* in 1954.¹⁵⁵ Segregation by race in both housing and education remains a significant contributing factor in creating racial disparity in incomes.¹⁵⁶

While underlying differences in wealth and socio-economic backgrounds explain much of the de facto segregation in housing that exists today, another major factor is local exclusionary policies in the form of discriminatory zoning.

In 1926, the legal basis for exclusionary zoning was first established in *Village of Euclid v. Amber Realty Company*, in which the Supreme Court upheld the constitutional power of local governments to promulgate restrictions which serve, in practice, to exclude persons of low socio-economic status from buying housing in a particular community.¹⁵⁷ The Court held that a zoning ordinance can only be declared unconstitutional if its provisions are clearly arbitrary and unreasonable.”

Since that case, local zoning bodies—cities, counties, townships, and states—have been careful to couch the rationale for the zoning ordinances they promulgate in terms of the “health and safety of the community” in order to avoid any challenges based on unlawful takings under the Fifth Amendment or violation of the “substantive due process” rights of those who suffer financial loss or the diminution of the value of property from the ordinance.¹⁵⁸

In a series of articles and books, Professor Edward Ziegler of the University of Denver Sturm College Of Law has revealed the catastrophic effects that *Euclid* and its progeny have had on the environment and living standards of the poor.¹⁵⁹ These effects have, in turn, contributed significantly to the disparity in incomes between racial groups.

¹⁵³ Stephanie M. Jackson, *School Desegregation; the Myth and the Reality: An Essay Based on Common Ground*, 11 NAT'L BLACK L.J. 361, 364 (1988) (discussing how forced busing pitted poor whites against poor blacks without the elite liberals having to pay a price).

¹⁵⁴ DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 131 (1993).

¹⁵⁵ *Brown v. Bd.*, *supra* note 125.

¹⁵⁶ MASSEY & DENTON, *supra* note 154, at 85–86.

¹⁵⁷ *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

¹⁵⁸ *Constr. Indus. Assoc. of Sonoma Cnty. v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 638 F. Supp. 125 (1986).

¹⁵⁹ Edward H. Ziegler, *The Case for Megapolitan Growth Management in the 21st Century: Regional Urban Planning and Sustainable Development in the United States*, 41 URB. LAW. 147, 147–49 (2009); DANIEL P. SELMI, JAMES A. KUSHNER & EDWARD H. ZIEGLER, *LAND USE REGULATION* 551 (Vicki Been et al. eds., 3d ed. 2008) [hereinafter *LAND USE*]; Edward H. Ziegler, *Statewide and Regional Land Use Controls*, in ARDEN H. RATHKOPF, *RATHKOPF'S THE LAW OF ZONING AND PLANNING* CH. 36 (1975); Edward H. Ziegler, *Constitutional Taking Claims in Land Use Regulation*, in ARDEN H. RATHKOPF, *RATHKOPF'S THE LAW OF ZONING AND PLANNING* CH. 6 (1975); Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA.

In Boulder, Colorado, for example, zoning requirements currently require large lot sizes so that only the wealthiest of its residents can afford to buy lots and build houses within the city.¹⁶⁰ While such requirements ensure that wealthy homeowners will not be threatened by the building of affordable multi-dwelling units in proximity to their neighborhoods (which might adversely affect the market value of their expensive homes), these restrictions effectively exclude persons of lower socio-economic status from the city limits. By effectively restricting the supply of housing in the city center, the exclusionary policies ensure dramatic increases in the values of the homes of the wealthiest homeowners at the expense of the poor. Those who are excluded from living in the city limits, but who work in the city, are thereby relegated to living many miles outside the limits and commuting long distances at considerable expense.¹⁶¹

Not surprisingly, the wealthier members of the zoning boards which promulgate and enforce such exclusionary policies aim to justify these self-serving restrictions in terms of “protecting the environment.” In fact, their policies create the opposite effect by encouraging urban sprawl and relegating the poor to outlying areas that require expensive and time-consuming commutes to the city center.¹⁶² In such a way, a policy of “keeping the riff raff out” masquerades on the liberal ideological foundations of protecting the environment—as if the farmland and meadows near the house of the rich are more sacrosanct than the farmland and meadows in the outlying areas to which the poor are ultimately relegated.

A study by Peter Whoriskey, cited by Ziegler, has concluded that such exclusionary zoning policies have in fact “accelerated the consumption of woods and fields and pushed developers outward in their search for home sites.”¹⁶³ Perhaps the most notorious example of exclusionary restrictions contributing to income disparities is *Construction Industry Association of Sonoma County v. City of Petaluma*, in which Petaluma placed an arbitrary 500-unit limitation on residential development units “in order to protect its small town character and surrounding open space.”¹⁶⁴ In that case, the Ninth Circuit acknowledged that the ordinance has “a purpose and effect of exclusion,” and that if similar ordinances were implemented across the state that there would be “a decline in regional housing stock . . . and a deterioration in the quality and choice of housing available to income earners with real incomes of \$14,000 per year or less.” Nevertheless, the Court upheld the exclusionary zoning ordinance based on its purported purpose to “protect [the city’s] small town character.”¹⁶⁵

As long as the powerbrokers sitting on zoning boards and city councils receive sound legal advice when promulgating exclusionary policies, even the most transparent motives of greed and racism can be couched in the language of ideologically liberal objectives which will meet the minimal due process standards of Euclidian zoning ordinances. It should be noted that at least Justice Scalia has expressed concern that because such justification “can be formulated in practically every case, this

J. SOC. POL’Y & L. 26, 47–50 (2003); Edward H. Ziegler, *Partial Taking Claims, Ownership Rights in Land and Urban Planning Practice: The Emerging Dichotomy Between Uncompensated Regulation and Compensable Benefit Extraction Under the Fifth Amendment Takings Clause*, 22 J. LAND RESOURCES & ENVTL. L. 1 (2002).

¹⁶⁰ See Heath Urie, *Questions Persist on House-Size Rules*, DAILY CAMERA, July 11, 2010, at A1 (showing that the city of Boulder passed a new law limiting house footprints in an effort to ameliorate this problem).

¹⁶¹ See LAND USE, *supra* note 159, at 580–81.

¹⁶² *Id.* at 549.

¹⁶³ Peter Whoriskey, *Gucci Sprawl: Density Limits Only Add to Sprawl*, WASH. POST, Mar. 8, 2003, as reprinted in LAND USE, *supra* note 159, at 560.

¹⁶⁴ *City of Petaluma*, 522 F.2d at 902.

¹⁶⁵ *Id.*

amounts to whether the legislation has a stupid staff. We think that the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.”¹⁶⁶

The 2000 case of *Woodwind Estates v. Gretkowski* may well illustrate what may happen if a planning commission fails to get good legal advice.¹⁶⁷ In *Gretkowski*, an obviously conservative planning commission demanded that plaintiff developers make “socioeconomic background and income levels of prospective tenants a condition of subdivision approval.”¹⁶⁸ With their true conservative motives exposed, the Third Circuit reversed a lower court’s ruling upholding the restrictions on development.¹⁶⁹

Journalist Michael Berger reported on this case as follows:

While trying to develop affordable houses. . . Woodland Estates ran smack into the NIMBY (not in my backyard) syndrome. Neighbors of the proposed project didn’t like the idea, at least, not in their neighborhood. Banding together (as such groups always do). . .the concerned Neighbors of Woodwind Estates . . . sought to stop the project by peppering the Stround Township Planning commission with euphemisms. They were concerned about the income level of potential residents, as well as their socioeconomic background. Fretting about the effect of such people on local property values, they urged project denial simply because they were opposed to low-income residents moving into their community.¹⁷⁰

While the most blatantly racist housing policies have long since been stricken as violations of the Equal Protection Clause of the U.S. Constitution,¹⁷¹ local exclusionary policies based on neutral characteristics have achieved the same results as their openly racist progenitors and have become a significant factor in creating racial disparities in income. Both liberal “environmentalists” and conservatives seeking to preserve the value of their homes by excluding those with a lower socioeconomic status have thus contributed significantly to racial income disparities.

B. Trade Policy

Without knowledge of the basic economic concept of the Law of Comparative Advantage,¹⁷² voters can fall pray to populist politicians who espouse protectionist measures and tariffs, claiming that such policies will “protect American jobs.” As any basic economic text reveals, however, the overall economic impact of tariffs falls most heavily on consumers.¹⁷³ In one typical example illustrated in the Samuelson text, the effect of a two dollar tariff is a “gain to producers of \$250, a gain to the government

¹⁶⁶ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

¹⁶⁷ *Woodwind Estates v. Gretkowski*, 205 F.3d 118 (3d Cir. 2000).

¹⁶⁸ *Id.* at 125.

¹⁶⁹ *Id.*

¹⁷⁰ Michael Berger, *Building Blues*, L.A. DAILY JOUR., May 3, 2001, at 7.

¹⁷¹ See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Clark v. Universal Builders Inc.*, 501 F.2d 324 (7th Cir. 1974); *Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974); *Male v. Crossroads Assocs.*, 469 F.2d 616 (2d Cir. 1972).

¹⁷² *Crossroads Assocs.*, 469 F.2d at 688. (“The principle of comparative advantage holds that a country can benefit from trade even if it is absolutely more efficient (or absolutely less efficient) than other countries in the production of every good. Indeed, trade according to comparative advantage provides mutual benefits to all countries.”).

¹⁷³ SAMUELSON & NORDHAUS, *supra* note 103, at 353.

of \$200, and a loss to consumers of \$550.00. The net social cost (counting each of these dollars equally) is therefore \$100.”¹⁷⁴

An even more devastating result of tariffs is that they invite retaliatory tariffs by the countries on which they are imposed, thus increasing the cost to consumers of imported goods.¹⁷⁵ Thus, the typical tariff is the equivalent of a regressive sales tax on basic goods, which falls most heavily on the lowest economic groups, particularly minorities. In the late 1920’s, for example, conservative Republican politicians pushed through the infamous “Smoot-Hawley” tariffs, which invited retaliatory tariffs from Europe, virtually halved trade, and thereby ushered in the Great Depression.¹⁷⁶

Liberal politicians, particularly those in constituencies with a high number of union members, are more likely to support an agenda of protectionism that results in high tariffs that ultimately result in higher prices for consumer goods.¹⁷⁷ Conservative politicians, whose philosophical roots trace back to Smoot-Hawley also advocate protectionist policies—most recently by supporting high tariffs on tires.¹⁷⁸ By falling most heavily on the poor, these higher prices constitute an effective regressive tax on the incomes of the poor, and thereby exacerbate income disparities. Perhaps most cynical on the part of groups advocating protectionist tariffs is the claim that they are concerned about the environmental or labor policies of the countries on which tariffs are imposed to justify the enormous financial burdens placed on America’s poorest consumers.¹⁷⁹

V. CONCLUSION

Adherence to ideology by both liberals and conservatives has often proven to be an insuperable obstacle to the adoption of sound policies directed toward reducing race-based disparities in income.

Policymakers will best achieve this goal by: providing the poor with access to family planning services; ensuring that women—especially poor women—enjoy the right to choose the size of their family and whether to have an abortion; eschewing ideologically driven policies such as minimum wage laws which encourage employers to out-source jobs to foreign countries, and fall most heavily on the poor, particularly minorities; rejecting higher taxes on the poor in the form of high tariffs on goods; reforming archaic drug laws that fall mostly heavily on minorities; and implementing immigration reform

¹⁷⁴ *Id.* at 342 (“In America, it takes 1 hour of labor to produce a unit of food, while a unit of clothing requires 2 hours of labor. In Europe the cost is 3 hours of labor for food and 4 hours of labor for clothing. We see that America has the *absolute advantage* in both goods, for it can produce either one with greater absolute efficiency than can Europe. However, America has *comparative advantage* in food, while Europe has *comparative advantage* in clothing. The reason is that food is *relatively inexpensive* in America compared to Europe, while clothing is *relatively inexpensive* in Europe compared to America. From these facts, Ricardo proved that both regions will benefit if they specialize in their areas of comparative advantage—that is, if America specializes in the production of food while Europe specializes in the production of clothing.”).

¹⁷⁵ Klint W. Alexander & Bryan J. Soukup, *Obama’s First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on U.S. Compliance Under NAFTA*, 28 BERKELEY J. INT’L L. 313, 324–25 (2001) (discussing the causes and effects of retaliatory practices between nations).

¹⁷⁶ Tariff Act of 1930 (Smoot-Hawley), 19 U.S.C. §§ 1641–1654 (1930); RICHARD E. CAVES, ET AL., WORLD TRADE AND PAYMENTS: AN INTRODUCTION 237 (Denise Clinton & Roxanne Hoch eds., 9th ed. 2002).

¹⁷⁷ Nina Easton, *Why Obama is Taxing Chinese Tires*, CNNMONEY.COM (Oct. 8, 2009), http://money.cnn.com/2009/10/07/news/economy/obama_china_tires_tariff.fortune/?postversion=2009100808.

¹⁷⁸ Gene Epstein, *Trampled in the Presidential Debate: Adam Smith*, BARRON’S (Oct. 20, 2012), <http://online.barrons.com/article/SB50001424053111904034104578058623256267956.html> (Romney stated he would impose “tariffs where I believe that they [the Chinese] are taking unfair advantage of our manufacturers.”).

¹⁷⁹ Environmental Review of Trade Agreements, 3 C.F.R. § 235 (1999).

that protects both racial minorities and legal immigrants from the ravages of wage declines wrought by illegal cheap foreign labor.

In short, liberals and conservatives must put aside ideological preconceptions, be willing to listen to each other, and work together to find meaningful solutions to the problems of income and wealth disparity in the United States.