SUSPENSION

ERIE COUNTY LEGISLATURE

HON. RAYMOND W. WALTER
LEGISLATOR

January 4, 2011

Hon. Barbara Miller-Williams
Chairperson of the Erie County Legislature
92 Franklin Street – Fourth Floor
Buffalo, New York 14202

RE: Articles Regarding the Davis-Bacon Act
Request to Direct to Economic Development Committee

Dear Chairperson Miller-Williams:

At the most recent meeting of the Economic Development Committee there was a lengthy discussion on Comm. 24E-4 (2010) which, if approved, grants authorization to the Buffalo & Erie County Industrial Land Development Corporation (ILDC) to issue bonds. During the discussion opponents of the resolution argued that the absence of language requiring a prevailing wage, for workers working on not-for profit organization's projects, financed through the ILDC, would discourage the use of local labor.

Part of their argument referenced the federal Davis-Bacon Act which created the prevailing wage controversy in the 1930's. It was mentioned that this act helped workers, encouraged local employment, and was introduced by Republican lawmakers. In my quest to keep our discussions on this item intellectually honest, I think it's also important to mention the inherent racism in prevailing wage requirements and the Davis-Bacon Act.

Attached are several articles that I encourage my colleagues to read as we continue debating this important issue. It is my request that, on your motion, these items be directed to the Economic Development Committee. Thank you, in advance, for your consideration.

Sincerely,

RAYMOND W. WALTER
Erie County Legislator

Briefing Paper No. 17 January 18, 1993

The Davis-Bacon Act: Let's Bring Jim Crow to an End

by David Bernstein

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Executive Summary

The Davis-Bacon Act, which requires that federal construction contractors pay their workers "prevailing wages," was passed by Congress in 1931 with the intent of favoring white workers who belonged to white-only unions over non-unionized black workers. The act continues to have discriminatory effects today by favoring disproportionately white, skilled and unionized construction workers over disproportionately black, unskilled and non-unionized construction workers. Because Davis-Bacon was passed with discriminatory intent and continues to have discriminatory effects, its enforcement violates the Constitution's guarantee of equal protection of the law. President-elect Clinton and Labor Secretary-designate Reich should therefore exercise their power of "executive review" and refuse to enforce Davis-Bacon.

Introduction

On the 64th anniversary of Martin Luther King's birth, we can be proud of the strides we have made over the past several decades toward ensuring legal equality for black Americans. Especially since the passage of the Civil Rights Act of 1964, whatever its infirmities,[1] the federal government has engaged in massive efforts to stamp out discrimination in America. Yet that same government, since 1931, has itself aided and abetted racial discrimination in this country through its enforcement of an expensive Jim Crow law known as the Davis-Bacon Act.

Passed at the beginning of the Depression at the instigation of the labor union movement, Davis-Bacon was designed explicitly to keep black construction workers from working on Depression-era public works projects. The act continues today to restrict the opportunities of black workers on federal and federally subsidized projects by favoring disproportionately white, unionized and skilled workers over disproportionately black, non-unionized and unskilled workers. Since President-elect Clinton has promised to significantly increase federal spending on America's infrastructure, it is a particularly appropriate time to challenge the act. If the Clinton administration continues to enforce the act, it will make a mockery of the president-elect's promise to expand job opportunities for the disadvantaged--to say nothing of his promise to bring economic efficiencies to government.

Davis-Bacon has survived the civil rights revolution, every attempt to repeal it, and most attempts to reform it, because it is a legislative jewel in organized labor's crown. Civil rights groups--with the political clout to challenge the act--should be natural enemies of Davis-Bacon. But over the years they have agreed to swallow their principles and support the law in exchange for political and economic support from the AFL-CIO.

The irony of Davis-Bacon's survival is that the act so clearly violates the constitutional principle of equal protection of the law that the president would be well within his authority in refusing to enforce it. Indeed, President-elect Clinton and his Secretary of Labor-designate, Robert Reich, will be under an affirmative constitutional duty to refuse to execute the act.

To support these conclusions, this paper discusses the discriminatory origins of Davis-Bacon, the discriminatory effects of the act from the 1930s until today, and recent attempts to make Davis-Bacon less onerous. Finally, the paper outlines the affirmative constitutional duty that President-elect Clinton and Secretary-designate Reich will be under to refuse to enforce the act.

Discriminatory Intent

By the 1930s, most major unions in America that represented skilled construction workers completely excluded blacks from their ranks. A few others relegated blacks to segregated locals. Despite the general exclusion of blacks from craft unions and discrimination in vocational education and occupational licensure, in the South in 1930 the construction industry provided blacks with more jobs than any industry except agriculture and domestic service.[2] Because the effects of union and educational discrimination were hardly felt in unskilled construction work,[3] blacks performed most of that work in the South.[4] Blacks also did much skilled construction work there, composing 17 percent of southern carpenters, for example.

At the same time, many black construction workers were migrating north. By 1930 they composed a proportion of the northern urban construction work force that approximated the black proportion of the total northern urban population.[5] As in the South, blacks held a disproportionate share of unskilled construction jobs, while discriminatory union and licensing policies resulted in a more limited presence for blacks in skilled construction work. As one historian points out: "By 1930 Black workers had obtained a foothold in the northern construction work force, but the low proportion of skilled construction workers who were Black suggests that the foothold was a tenuous one."[6] Davis-Bacon was soon to help destroy that foothold in both the South and North.

The story of Davis-Bacon begins, one might say, in 1927 when a contractor from Alabama won a bid to build a Veterans' Bureau hospital in Long Island, New York.[7] He brought a crew of black construction workers from Alabama to work on the project. Appalled that blacks from the South were working on a federal project in his district, Representative Robert Bacon of Long Island submitted H.R. 17069, "A Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Comply with State Laws Relating to Hours of Labor and Wages of Employees on State Public Works,"[8] the antecedent of the Davis- Bacon Act.

The discriminatory implications of Bacon's bill were recognized immediately. On the floor of the House of Representatives, Congressman Upshaw said: "You will not think that a southern man is more than human if he smiles over the fact of your

reaction to that real problem you are confronted with in any community with a superabundance or large aggregation of negro labor."[9]

Over the next four years Bacon introduced thirteen more bills to establish regulation of labor on federal public works projects.[10] Finally, a bill submitted by Bacon and Senator James J. Davis, with the support of the American Federation of Labor,[11] passed in 1931. The law provided that all federal construction contractors with contracts in excess of $5,000 or more must pay their workers the "prevailing wage," which in practice meant the wages of unionized labor.

The measure passed because Congressmen saw the bill as protection for local, unionized[12] white workers' salaries in the fierce labor market of the Depression.[13] In particular, white union workers were angry that black workers who were barred from unions were migrating to the North in search of jobs in the building trades and undercutting "white" wages.[14]

The comments of various congressmen reveal the racial animus that motivated the sponsors and supporters of the bill. In 1930, Representative John J. Cochran of Missouri stated that he had "received numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South."[15] Representative Clayton Allgood, supporting Davis-Bacon on the floor of the House, complained of "cheap colored labor" that "is in competition with white labor throughout the country."[16]

Other congressmen were more circumspect in their references to black labor. They railed against "cheap labor,"[17] "cheap, imported labor,"[18] men "lured from distant places to work on this new hospital,"[19] "transient labor,"[20] and "unattached migratory workmen."[21] While the congressmen were not referring exclusively to black labor,[22] it is quite clear that despite their "thinly veiled"[23] references, they had black workers primarily in mind. Similar sentiments were expressed in the Senate.[24]

Discriminatory Effects Depression Era

Davis-Bacon became law on March 31, 1931, just as the federal government was embarking on an ambitious public works program that would soon account for half of all money spent on construction work in the country. Because of Davis-Bacon, as explained below, almost all federal construction jobs flowing from this spending spree went to whites.

Soon after Davis-Bacon became law, unions began to complain that the law as written was not successfully protecting their members' jobs. Congress responded in 1935 by amending the Act, reducing the minimum contract amount covered to $2,000 and providing for predetermination of prevailing wage rates by the Department of Labor.[25] With that, the Department of Labor promulgated regulations for Davis-Bacon that remained largely unchanged until 1983.[26]

Under those regulations, wages on federal construction projects had to follow union scale in any area that was at least 30 percent unionized. Given the manner in which the Labor Department enforced them, the regulations guaranteed that almost all wages would be set according to union wages.[27] In fact, contractors often limited their hiring to the more highly skilled union workers since there was no economic benefit to hiring non- union labor. Indeed, because they had to pay the same wages regardless of who they hired, contractors working on large-scale federal construction found it most efficient simply to recruit construction workers directly through (whites-only) AFL union locals.[28] Because the craft unions had few or no black members, federal contractors rarely hired blacks for skilled positions.

But if Davis-Bacon's effects on skilled blacks were substantial, its effects on unskilled blacks were devastating. According to Census Bureau statistics, as of 1940 blacks composed 19 percent of the 435,000 unskilled "construction laborers" in the United States and 45 percent of the 87,060 in the South.[29] The Department of Labor's regulations failed to recognize categories of unskilled workers other than union apprentices, even in the rare instances when such categories were sanctioned by local craft union rules.[30] They required that if a contractor wanted to hire an unskilled worker who was not a union apprentice, the worker had to be paid the same as a skilled worker. Since unions rarely allowed blacks into their apprenticeship programs, the result was the almost complete exclusion of unskilled black workers from Davis-Bacon projects. Not only did this limit the employment opportunities of unskilled blacks but it prevented them from acquiring skills as well, for with discrimination in union and public school vocational training programs, the only way blacks could become skilled workers was for them to accept unskilled employment and learn on the job.[31] But that employment was now effectively foreclosed to them

World War II

In 1941 the federal government extended Davis-Bacon to cover military construction contracts.[32] At the start of World War II, federal agencies began signing "stabilization agreements"--that is, agreements preserving the status quo with unions.[33] In the construction industry, those agreements granted a closed shop to the affiliated unions of the Building Construction Trades' Department of the AFL.[34] Because those unions were closed to blacks, the stabilization pacts often resulted in the disqualification of black skilled and semi-skilled construction workers from federal projects.[35]

The federal government was sometimes able to pressure unions to relent and allow blacks into their unions, or at least to form new segregated locals.[36] Far more often, however, blacks were excluded from major construction projects, and in some cities were banned from defense construction work altogether by the unions.[37]

In response to complaints of discrimination in public works projects during World War II, the federal government established the Fair Employment Practices Committee (FEPC). At its worst, the FEPC was completely ineffective. At its best, it froze an unfavorable status quo. In any event, it was not renewed in the post-war period.[38]

Post World War II

By the late 1950s, exclusionary construction unions dominated the market in skilled construction labor, particularly for large-scale projects. As a result, the percentage of skilled black construction workers declined precipitously.[39] The remnant of skilled black construction workers was almost entirely excluded from federal projects because of Davis-Bacon's bias for unionized labor. As for unskilled black workers, they too were generally unable to get jobs on Davis-Bacon projects since they were barred from union apprenticeship programs approved by the Department of Labor for Davis-Bacon purposes.

Presidents Eisenhower and Kennedy attempted to alleviate discrimination on public works projects through executive action, but their efforts were generally unavailing because of union intransigence, strengthened by Davis-Bacon. As late as

the Kennedy administration, blacks were still barred from the unions of the electrical workers, operating engineers, plumbers, plasterers, and sheet metal workers, among others.[40]

Even efforts by the Johnson administration to ensure compliance with the 1964 Civil Rights Act did not shield blacks from the discriminatory effects of Davis-Bacon. Craft unions held work stoppages to prevent the employment of blacks on such publicly funded construction projects as the Cleveland Municipal Mall (1966), the U.S. Mint in Philadelphia (1968), and the building site of the New York City Terminal Market (1964).[41] A 1968 Equal Employment Opportunity Commission study showed that "the pattern of minority employment is better for each minority group among employers who do not contract work for the government [and are therefore not subject to Davis-Bacon] than it is among prime contractors who have agreed to nondiscrimination clauses in their contracts with the federal government [who are subject to Davis-Bacon]."[42]

To encourage the use of skilled minority workers in federal construction projects, the Nixon administration's Department of Labor launched its "Philadelphia Plan," followed by other city affirmative action "plans."[43] Despite its resort to quotas, however, the Department of Labor continued otherwise to stunt black employment on federal projects by recognizing unskilled workers as appropriate Davis-Bacon workers only when they participated in a bona fide apprenticeship program registered with a certified state apprenticeship agency or with the Federal Bureau of Apprenticeship and Training.[44] This harmed blacks because unions continued to discriminate in their apprenticeship programs. Meanwhile, the number of registered apprenticeships available was dwarfed by the number of blacks who could have acquired gainful employment as unskilled "helpers" on federal projects.

Nevertheless, a 1978 Congressional Research Service (CRS) report alleged that "repealing or weakening . . . Davis-Bacon would adversely affect apprenticeship programs in the construction industry and hurt minority groups." According to the CRS report, unionized employers would be forced to cut costs by reducing training outlays, and 20.7 percent of trainees in union-sponsored programs in 1976 were members of minority groups, compared to less than 10 percent in non-union-sponsored programs.[45]

The CRS report, which was based on statistics provided by unions, has been refuted by various later studies. A report issued by the Comptroller General of the United States in 1979, for example, stated that "Davis-Bacon wage requirements discourage nonunion contractors from bidding on federal construction work, thus harming minority and young workers who are more likely to work in the nonunionized sector of the construction industry."[46]

A 1980 report of the American Enterprise Institute agreed that Davis-Bacon was harmful to minority workers because so few positions were available on Davis-Bacon covered work under the categories of helper, learner, or trainee.[47] The report pointed out that very few union journeymen were minority-group members, and it was in nonjourneyman categories that most would begin their construction careers.[48] The report added that union apprenticeship programs, even if they did not discriminate, severely limited the number of people who might enroll, and imposed arbitrary educational requirements, thus freezing out the most disadvantaged workers.[49] Abolishing Davis-Bacon, the report concluded, would allow more participation by non-union firms in construction, thus advancing the employment opportunities of minority workers.[50]

Former NAACP general counsel Herbert Hill noted that even when the number of black union apprentices increased because of government pressure, many of those apprentices never graduated to journeyman status.[51] Hill concluded that as of 1982 "the pattern of racial exclusion in the building trades . . . remained intact."[52] As another economist observed, the low percentage of skilled black construction workers "is due primarily to Davis- Bacon."[53]

The most recent study of Davis-Bacon notes that "one would much more likely find minorities among the helpers and trainees of non-union firms than in the registered apprenticeship programs."[54] Recent statistics also show that minorities are a larger percentage of the non-union construction labor force than of the union labor force.[55] Open-shop firms not only hire more minorities but hire them for better positions. As the study concludes, "Open shop firms employ . . . a higher proportion of minority workers as craftsmen."[56]

Ralph C. Thomas III, executive director of the National Association of Minority Contractors (which represents over 60,000 minority contractors,[57] more than 90 percent of which are non- union), believes that the key to solving the problem of underrepresentation of minorities in the building trades is on-the-job training in non-union, minority-owned construction firms.[58] According to Thomas, however, Davis-Bacon prevents minority contractors from successfully training workers. A minority contractor who successfully bids for a Davis-Bacon covered contract has "no choice but to hire skilled tradesmen, the majority of which are of the majority. This defeats a major purpose in the encouragement of minority enterprise development-- the creating of jobs for minorities. . . . Davis-Bacon . . . closes the door on such activity in an industry most capable of employing the largest numbers of minorities."[59]

Recent Reforms

In 1982 the Department of Labor changed certain Davis-Bacon regulations, making it somewhat easier for open shop firms to compete for contracts covered by Davis-Bacon. The department redefined "prevailing wages" from the old 30 percent rule to a new 50 percent rule.[60] That change, combined with the fact that far fewer construction workers are unionized today than was the case several decades ago,[61] means that Davis-Bacon wage rates will be set according to union rates only in highly unionized cities.

Unfortunately, those are often cities with large minority populations. Thus non-unionized minority workers and contractors in those cities will continue to be frozen out of Davis-Bacon projects. Moreover, the 1982 reform also fails to reduce the burdensome paperwork requirements that keep many small, often minority-owned, companies from bidding on Davis-Bacon projects.

In 1982 the Department of Labor also changed its Davis-Bacon regulations to allow the use of unskilled "helpers" on Davis-Bacon projects in any area where helpers were used at all, partly in an effort to help minorities and women gain more opportunities in federal construction projects. The construction unions challenged the new regulation on the ground that it violated the department's mandate to establish prevailing wages. The courts agreed,[62] and the department was forced to rewrite the regulation.

The new rule, which went into effect only on February 4, 1991,[63] defines a helper as "a semiskilled worker who works under the direction of, and assists journeymen."[64] When fully implemented, this rule, while not removing all of the

discriminatory effects of Davis-Bacon,[65] will be a boon to black construction workers,[66] who are still best represented in the construction industry in the unskilled categories; as of 1987, blacks were only three-quarters as likely as whites to be skilled construction workers, but almost one-and-one-half times as likely as whites to be unskilled workers.[67] Thus far, however, Congress has prohibited the secretary of labor from using any funds to implement the rule. The construction unions, moreover, will almost certainly try to persuade the Clinton administration's Labor Department to repeal the helper regulation.

Executive Review of Davis-Bacon

No legal challenge to Davis-Bacon itself has ever been brought. Yet under current Supreme Court precedent, and a fair reading of the Constitution, the law is clearly unconstitutional as having both discriminatory intent and lingering discriminatory effects. As the Supreme Court noted in 1985 in an analogous situation involving a facially neutral but discriminatory provision of the Alabama Constitution, "without deciding whether [the provision] could be enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to have that effect. As such, it violates equal protection [and is therefore unconstitutional]."[68]

As members of the executive branch, President-elect Clinton and Labor Secretary-designate Reich will be charged with executing Davis-Bacon. At the same time, on taking office they will both have sworn an oath to uphold the Constitution of the United States. The Constitution is, of course, the highest law in the land, and a statute that conflicts with it does not have the force of law. Members of the executive branch have both the power and the duty to engage in "executive review" and to refuse to enforce unconstitutional legislation.[69] Given the clear unconstitutionality of Davis-Bacon, neither Clinton nor Reich should wait for a court challenge to nullify the act. Indeed, they would be violating their oaths of office if they did not immediately refuse to execute it.[70]

Doing so would obviously entail political risk for Clinton and Reich. But one would hope that as Yale-trained lawyers they will put duty to the Constitution and fealty to their oaths of office ahead of narrow political concerns. Moreover, the exercise of executive review in the case of Davis-Bacon might actually achieve some important political goals for the new president: it would be a tangible demonstration of his concern for struggling black workers; it would show his independence from special-interest pleading; it would allow him to achieve infrastructure improvement without busting the budget (Davis-Bacon costs the federal government billions every year); and, perhaps most importantly, it would establish Clinton as a strong leader, willing to do the right thing. Much as President Reagan stood down the air traffic controllers union early in his administration, setting a tone of strength thereafter, so could Mr. Clinton set a similar tone by eliminating this vestige of Jim Crow.

Conclusion

An estimated $60 billion in annual construction and maintenance work is covered by Davis-Bacon, and even more is covered by state and municipal prevailing wage legislation. Yet despite the pernicious effects of Davis-Bacon on blacks, and its blatantly discriminatory origins, civil rights activists have generally ignored or quietly supported the law. Only one of the many histories of black workers mentions the law, and then only once, and not by name.[71] No lawsuits have been filed by civil rights groups against the law; in fact, the NAACP, among other mainstream civil rights organizations,[72] actually supports the law because of the group's close political alliance with organized labor. Grass-roots community activists, in contrast, generally oppose Davis-Bacon and its state and local equivalents because they reduce employment opportunities and make government efforts to help the poor far more expensive.[73]

Given the incentives that have enabled Davis-Bacon to endure, it will be negated most easily only by strong leadership from the top. Failing that, Davis-Bacon can be repealed legislatively, or, more likely, successfully challenged in court. When that occurs, minority contractors will find it easier to get federal contracts without divisive quotas, black workers will find it easier to get construction jobs, and the federal government will be able to accomplish more with a smaller burden on the taxpayer. Most important, however, one of the remaining racist stains on American law will be removed.

Notes

1. For recent criticisms see Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (Cambridge, Mass.: Harvard University Press, 1992); Roger Pilon, "Uncivil Rights," Regulation, Summer 1991, pp. 9-13.

2. Mark W. Kruman, "Quotas for Blacks: The Public Works Administration and the Black Construction Worker," Labor History 16, Winter 1975, p. 38.

3. Charles S. Johnson, "Negro Workers and the Unions," The Survey 60, April 15, 1928, p. 114.

4. In at least six southern cities blacks composed more than 80 percent of the unskilled construction force. Kruman, pp. 38-39.

5. Ibid., p. 39.

6. Ibid.

7. U.S. Congress. House. Committee on Labor. Hearings on H.R. 7995 & H.R. 9232, 71st Cong., 2d Sess., March 6, 1930, p. 17. (Letter of Ethelbert Stewart, commissioner of labor statistics: "A contractor from a Southern State secured a contract to build a Government marine hospital, as I remember it, on Long Island; that he brought with him an entire outfit of Negro laborers from the South. . . .") Ethelbert Stewart was Davis-Bacon co-author Senator Davis's commissioner of labor statistics when Davis was secretary of labor in 1928. Davis was a supporter of public works labor legislation as secretary of labor.

8. See generally U.S. Congress. House. Committee on Labor. Hearings on H.R. 17069, 69th Cong., 2d Sess. Feb. 28, 1927, pp. 2-4.

9. Ibid., p. 3.

10. Stuart Schulman, "The Case Against the Davis-Bacon Act," Government-Union Review, Winter 1983, p. 23.

11. "This type of legislation has been agitated and urged for many years and has the united support of all elements of organized labor, and particularly that great, progressive, and constructive labor organization, the American Federation of Labor." Congressional Record, February 28, 1931, p. 6,516 (remarks of Representative McCormack); Ibid., p. 6,520 (remarks of Representative Zihlman); See Armand J. Thieblot, Jr., The Davis-Bacon Act (Philadelphia: University of Pennsylvania Press, 1975), pp. 8-9.

12. Thieblot, The Davis-Bacon Act, p. 8.

13. See Richard C. Weaver, Negro Labor: A National Problem (Port Washington, N.Y.: Kennikat Press, 1948), p. 10.

14. Sterling D. Spero & Abram L. Harris, The Black Worker (New York: Columbia University Press, 1931), p. 178.

15. U.S. Congress. House. Committee on Labor. Hearings on H.R. 7995 & H.R. 9232, 71st Cong., 2d Sess., Mar. 6, 1930, pp. 26-27.

16. Congressional Record, February 28, 1931, p. 6,513 (remarks of Representative Allgood).

17. Ibid., pp. 6,515, 6,519, 6,520 (remarks of Representatives Kopp, Condon, and Prall).

18. Ibid., p. 6,516 (remarks of Representative McCormack).

19. Ibid., p. 6,517 (remarks of Representative Fitzgerald).

20. Ibid., p. 6,518 (remarks of Representative Glover).

21. Ibid., p. 6,520 (remarks of Representative Zihlman).

22. See ibid., p. 6,520 (remarks of Representative Prall who was recounting an incident in which half the workers on a project at Fort Eadsworth Reservation in his district were aliens).

23. Thieblot, The Davis-Bacon Act, p. 9.

24. AFL President William Green, testifying before the Senate Committee on Manufacturers on the Davis-Bacon bill, complained: "Colored labor is being brought in to demoralize wage rates [in Tennessee]." Congress. Senate. Committee on Manufactures. Hearings on S. 5904, 71st Cong., 3d Sess., Feb. 3, 1931, p. 10.

25. Public Law No. 403, 74th Congress.

26. Armand Thieblot, "Prevailing Wage Laws of the States," Government-Union Review, Fall 1983, p. 23.

27. Thieblot, The Davis-Bacon Act, pp. 37-39.

28. Weaver, p. 12.

29. Herbert R. Northrup, Organized Labor and the Negro (New York and London: Harper and Brothers Publishers, 1946), p. 46.

30. Armand J. Thieblot, Jr., Prevailing Wage Legislation (Philadelphia: University of Pennsylvania Press, 1986), p. 59.

31. Northrup, p. 38.

32. Amendment, P.L. Nos. 22, 241 (H.R. 3325, 5312), 77th Congress (1941).

33. Weaver, p. 35.

34. Ibid.

35. Ibid., pp. 35-36.

36. Ibid., pp. 28-32.

37. Ibid., p. 35.

38. See generally Louis Ruchames, Race, Jobs & Politics: The Story of the FEPC (New York: Columbia University Press, 1953).

39. Herbert Bloch, "Craft Unions and the Negro in Historical Perspective," Journal of Negro History 43, 1958, p. 24.

40. Herbert Hill, "Racism Within Organized Labor: A Report of Five Years of the AFL-CIO, 1955-1960," Journal of Negro Education 30, 1961, p. 113.

41. Herbert Hill, "Black Labor and Affirmative Action: An Historical Perspective," in Steven Shulman & William Darity, Jr., eds., The Question of Discrimination (Middletown, Conn.: Wesleyan University Press, 1989), pp. 190, 238, and 258 n. 181.

42. Quoted in Herbert Hill, Black Labor and the American Legal System (Washington, D.C.: Bureau of National Affairs, 1977): p. 389.

43. Herbert Hill, "The AFL-CIO and the Black Worker: Twenty-Five Years After the Merger," Journal of Intergroup Relations 10, 1982, p. 20. The Philadelphia Plan was upheld by the Third Circuit in Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

44. According to the Department of Labor's 1969 Field Operations Handbook: "The use of helpers who use tools in assisting journeymen and who are paid below the minimum rates for journeymen is ordinarily not proper, since the apprentice is recognized as the individual who is to perform the less skilled craft work of his training period level." U.S.

Department of Labor. Field Operations Handbook, entry no. 15611 (Nov. 26, 1969), quoted in Thieblot, The Davis-Bacon act, p. 23.

45. Congressional Research Service, The Davis-Bacon Act: History Administration. Pro and Con Arguments and Congressional Proposals, No. 78-161 E 33-34 (July 11, 1978).

46. The Comptroller General of the United States, Report to the Congress HRD-79-18: The Davis-Bacon Act Should Be Repealed 32 (April 27, 1979).

47. John P. Gould and George Billingmayer, The Economics of the Davis-Bacon Act (Washington, D.C.: American Enterprise Institute, 1980), p. 62.

48. Ibid.

49. Ibid.

50. Ibid.

51. Hill, "The AFL-CIO and the Black Worker," p. 8.

52. Ibid.

53. William A. Keyes, "The Minimum Wage and the Davis-Bacon Act: Employment Effects on Minorities and Youth," Journal of Labor Research 3, 1982, p. 407.

54. Thieblot, Prevailing Waqe Laws, p. 128.

55. Ibid.

56. Ibid.

57. Testimony by National Association of Minority Contractors before House Subcommittee on Labor Standards of the Committee on Education and Labor, Sept. 30, 1986.

58. Ibid., pp. 2-3.

59. Ibid., p. 3.

60. 29 C.F.R. 21 1.2(a) (July 1, 1989 ed.). This rule was challenged but was upheld in Building and Construction Trades' Department. AFL-CIO v. Donovan, 712 F.2d 611 (D.C. Cir. 1983).

61. In 1970, only 30 percent of the United States's contracting firms were open shop. By 1987, that number had grown to 70 percent. Among the top 400 construction firms, 45 percent are now open shop, compared to just 8 percent in 1973. Barry, "Congress's Deconstruction Theory," Washinqton Monthly, January 1990, pp. 15-16.

62. Building and Construction Trades' Department AFL-CIO v. Donovan, 712 F.2d 611 (D.C. Cir. 1983).

63. 55 Federal Register 50148.

64. 29 C.F.R. 5.2(n)(4).

65. Even in the limited area of unskilled labor the rule does not go far enough. First, it restricts the use of helpers to areas where their use "prevails," a legally mandated but harmful qualification. Unionized cities where the use of helpers doesn't "prevail" are home to millions of unskilled minority youths who will continue to be frozen out of Davis-Bacon projects. Second, the rule limits the allowable ratio of helpers to journeymen employed by a contractor to two helpers for every three journeymen. In non-union construction, almost one-third of all workers are typically helpers. Obviously, the ratio varies depending on the project, and in small-scale construction, where highly skilled labor is not critical, the ratio must sometimes rise above the maximum 2:3. Thus, the new regulation (if upheld and implemented) will be a major improvement, but will still at times prove a barrier to the development of skills by minority laborers, particularly those in the most desperate straits. To take a specific example, public housing residents who are managing their own buildings will still find it difficult to affordably hire unskilled tenants to renovate their buildings.

66. But compare affidavit of John Dunlop, Building and Construction Trades' Department, AFL-CIO v. Dole, No. 82-1631 (D.D.C. filed Jan. 4, 1991), reported in "Unions Sue to Block Implementation of New Davis-Bacon Helper Regulation," Federal Contracts Reporter (BNA) 55, 1991, p. 72 (arguing that the new helper rules will harm minorities).

67. Roger Waldinger and Thomas Bailey, "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in the Construction Industry," Politics and Society 19, 1991, p. 297.

68. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

69. For more on the power of executive review, see Frank H. Easterbrook, "Presidential Review," Case Western Reserve Law Review 40 (1990): 905.

70. For other examples of similar uses of executive power, see Easterbrook, "Presidential Review." See also Executive Order No 12630, "Government Action and Interference with Constitutionally Protected Property Rights" (March 1988), requiring the executive branch to ensure that its regulatory policies do not violate the Fifth Amendment's takings clause.

71. Weaver, "Negro Labor," p. 10.

72. According to Representative Ron Dellums, another Davis-Bacon supporter, the NAACP, the Mexican-American Unity Council, the National Women's Political Caucus, and the Navajo Tribal Council have all endorsed Davis-Bacon. Record 136 (1990): 2355. The latter group's support is especially ironic, given that Davis-Bacon has particularly harsh effects on Native Americans. See Keyes, "The Minimum Wage and The Davis-Bacon Act," p. 405.

73. See, for example, "The Bronx Gets a Flea Market," Issues & Views, Fall 1990, p. 2.

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Davis-Bacon: Jim Crow's Last Stand

by John Frantz

The ugliest and most disturbing events in American history have usually been linked with state- sponsored or sanctioned racism: Incidents of police brutality, symbolized by the Rodney King trials. Slavery. The *Dred Scott* decision. The post-Civil War Jim Crow laws. School segregation.

Today, however, most people like to believe that their government fairly represents the interests of everyone, regardless of race. Unfortunately, the states and the federal government still discriminate against blacks, but this state-sponsored racism has taken on more subtle forms. Thus while great strides have been made since the Jim Crow era, some relics remain. One of them is the Davis-Bacon Act.

Davis-Bacon, passed in 1931, requires private contractors to pay "prevailing wages" to employees on all construction projects receiving more than $2,000 in federal funding. The Secretary of Labor is charged with conducting surveys of a region's wages and setting rates for up to 100 various classifications of workers. Most often, the "prevailing wage" corresponds to the union wage, especially in urban areas, where union membership tends to be higher. The Davis-Bacon Act covers approximately 20 percent of all construction projects in the United States and affects more than 25 percent of all construction workers in the nation at any given time.

The Act was passed in order to prevent non-unionized black and immigrant laborers from competing with unionized white workers. The discriminatory effects continue, as even today minorities tend to be vastly under-represented in highly unionized skilled trades, and over- represented in the pool of unskilled workers.

Davis-Bacon restricts the economic opportunities of low-income individuals in a number of ways. Minority contracting firms are often small and non-unionized, and cannot afford to pay the "prevailing wage." The Act also requires contractors to pay unskilled laborers the prevailing wage for any job they perform, essentially forcing contractors to hire skilled tradesmen, selecting workers from a pool dominated by whites.

Thus, the Davis-Bacon Act constitutes a formidable barrier to entry into the construction industry for unskilled or low-skilled workers. This is especially harmful to minorities because work in the construction industry pays extraordinarily well compared to that for other entry-level positions, and could otherwise provide plentiful opportunities for low-income individuals to enter the economic mainstream.

In November 1993, the Institute for Justice, a Washington, D.C., based public-interest law firm, filed suit challenging Davis-Bacon constitutionality, as part of the Institute's litigation program to help restore judicial protection of "economic liberty" the basic right to pursue a business or profession free from arbitrary government regulation.

The History of the Davis-Bacon Act

Prior to the enactment of the Davis-Bacon Act, the construction industry afforded tremendous opportunities to blacks, especially in the South. In at least six southern cities, more than 80 percent of unskilled construction workers were black. Blacks

also represented a disproportionate number of unskilled construction workers in the North, and constituted a sizable portion of the skilled labor force in both parts of the country.

This was so despite the fact that most of the major construction unions excluded blacks, and that blacks faced widespread discrimination in occupational licensing and vocational training. These unions felt seriously threatened by competition from blacks, and favored any attempt to restrict it.[1]

The co-author of the Act, Representative Robert Bacon, represented Long Island. Bacon was a racist who was concerned lest immigration upset the nation's "racial status quo." In 1927, he introduced H.R. 17069, "A Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Comply With State Laws Relating to Hours of Labor and Wages of Employees on State Public Works." This action was a response to the building of a Veterans' Bureau Hospital in Bacon's district by an Alabama contractor which employed only black laborers.

Representative William Upshaw, understanding the racial implications of Bacon's proposal, stated: "You will not think that a southern man is more than human if he smiles over the fact of your reaction to that real problem you are confronted with in any community with a superabundance or large aggregation of negro labor."[2] Over the next four years, Bacon submitted 13 more bills to regulate labor on federal public works contracts. Finally, the bill submitted by Bacon and Senator James Davis was passed in 1931, at the height of the depression, with the support of the American Federation of Labor. The Act required that contractors working on federally funded projects over $5,000 pay their employees the "prevailing wage." The law was amended in 1935, reducing the minimum to $2,000 and delegating the power of determining the "prevailing wage" to the Department of Labor. The Department's regulations governing the determination of wages, remained basically unchanged for five decades and equated the prevailing wage with the union wage in any area that was at least 30 percent unionized. In practice, the "prevailing wage" was almost universally determined to be the same as the union wage.

The debate over Bacon's bills betrayed the racial animus that motivated passage of the law. Representative John Cochran stated, "I have received numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South."[3] Representative Clayton Algood similarly complained, "That contractor has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country."[4] Other derogatory comments were made about the use of "cheap labor," "cheap, imported labor," "transient labor," and "unattached migratory workmen."[5] While supporters of the Act intended to disadvantage immigrant workers of all races, they were particularly concerned with inhibiting black employment.

Supporters of Davis-Bacon were also full of anti-capitalist rhetoric. Representative McCormack said of Davis-Bacon, "It will force the contractor who heretofore has used cheap, imported labor to submit bids based upon the 'prevailing wage scale' to those employed. It compels the unfair competitor to enter into the field of fair competition."[6]This rhetoric of "fairness" dominates much of the contemporary debate over Davis-Bacon, as well.

Two important modifications have recently been made in the way that the Davis-Bacon Act is enforced. In 1982, the Department of Labor altered the basis for determining the prevailing wage, deciding to equate the union wage with the "prevailing wage" only in places where the construction industry was 50 percent unionized. This change has had little effect on minority-owned firms' ability to secure contracts because union membership tends to be much higher in urban areas, where large minority populations reside.

The Department of Labor has also attempted to alter its regulations to allow contractors to hire a limited number of unskilled "helpers" to work on Davis-Bacon projects for less than the prevailing wage. This change, which was to go into effect on February 4, 1991, would help to diminish some of the discriminatory effects of the Act, but Congress has so far prevented the Department from enforcing it.

Moreover, labor unions are now pressuring Congress and the Clinton Administration to repeal the changes. Similarly, while President Bush suspended the Act in South Florida, coastal Louisiana, and Hawaii in October of 1992 following Hurricanes Andrew and Iniki, President Clinton reversed course upon entering office.

Last year Senator Hank Brown (R-Col.) sponsored legislation to repeal the Davis-Bacon Act. A similar bill was introduced in the House by Representative Tom DeLay (R-Tex.). Both proposals have attracted congressional co-sponsors, but, not surprisingly, have failed to attain majority support.

Effects of the Davis-Bacon Act

The Davis-Bacon Act imposes tremendous economic and social costs—at least $1 billion in extra federal construction costs and $100 million in administrative expenses each year. Industry compliance costs total nearly $190 million per year. Repeal of the Act would also create an estimated 31,000 new construction jobs, most of which would go to members of minority groups.

Davis-Bacon's impact on the ability of minorities to find work in the construction industry has been particularly devastating. The Department of Labor's initial set of regulations did not recognize categories of unskilled workers except for union apprentices. As a result, contractors had to pay an unskilled worker who was not part of a union apprenticeship program as much as a skilled laborer, which almost completely excluded blacks from working on Davis-Bacon projects.[7] This effectively foreclosed the only means by which unskilled blacks could learn the necessary skills to become skilled workers.

As a result, while black and white unemployment rates were similar prior to passage of the Davis-Bacon Act, they began to diverge afterwards. This problem persists today. In the first quarter of 1992, the black unemployment rate was 14.2 percent, even though the overall national rate was only 7.9 percent.

The racial difference in unemployment rates is especially pronounced in the construction industry. According to a recent study by the National Urban League, in the fourth quarter of 1992, 26.8 percent of all blacks involved in the construction industry were jobless compared to only 12.6 percent of white construction workers.[8]

Despite recent racial progress, Davis-Bacon continues to inhibit minority economic progress in several ways. For instance, union apprenticeship programs, even if they no longer discriminate, still strictly limit the number of enrollees and impose arbitrary educational requirements on potential applicants, thereby excluding the most disadvantaged workers.[9]

Moreover, unskilled workers must be paid the same wage as a skilled worker, forcing the contractor to pay laborers considerably more than the market value of their work. For example, in Philadelphia, electricians working on projects covered by the Davis-Bacon Act must be paid $37.97 per hour in wages and fringe benefits. The average wage of electricians working for private contractors on non-Davis-Bacon projects is $15.76 per hour, with some laborers working for as little as $10.50 per hour.

Thus, even minority, open-shop contractors have no incentive to hire unskilled workers. Ralph C. Thomas, former executive director of the National Association of Minority Contractors, stated that a minority contractor who acquires a Davis-Bacon contract has "no choice but to hire skilled tradesmen, the majority of which are of the majority." As a result, Thomas said, "Davis-Bacon closes the door in such activity in an industry most capable of employing the largest numbers of minorities."[10]

The paperwork a contractor must fill out pursuant to Davis-Bacon contracts also discriminates against small, minority-owned firms. Many do not have personnel with the necessary expertise to complete the myriad forms and reports required.

As a result of all these factors, the Davis-Bacon Act prevents rural and inner-city laborers and contractors from working on projects in their own communities.

Ironically this is one problem Davis-Bacon was intended to prevent. Bacon said during debate over the Act, "Members of Congress have been flooded with protests from all over the country that certain Federal con tractors on current jobs are bringing into local communities outside labor," and "that the government is in league with contract practices that make it possible to further demoralize local labor conditions."[11]

Such a claim could easily be made today by inner-city and rural contractors. Yale Brozen, an economist at the University of Chicago, found that the "prevailing wage" for the Appalachian region of western Pennsylvania is set at the same level as that of Pittsburgh, despite the fact that the wages normally paid by the rural contractors are only half the levels of union contractors in Pittsburgh. The same is true of inner cities, where small, minority-owned, open-shop firms are forced to pay union wages when working on Davis-Bacon projects, because of the high concentration of unionized workers in other parts of the city.

As a result, rural and inner-city contractors are deterred from seeking Davis-Bacon contracts because they cannot afford to pay the higher wages to their employees and larger and more highly unionized firms are encouraged to seek out such contracts. The result makes it clear that the government is in fact "in league with contract practices" that "demoralize local labor conditions," only now at the expense of minorities rather than whites.

The results of this practice were clearly demonstrated in Los Angeles. In the parts of the city where the riots occurred, the rate of unemployment for black workers is 27.6 percent. Despite an ample supply of local labor to help rebuild the city, Davis-Bacon has and continues to freeze out local unskilled minority workers from those available jobs. In contrast is the situation in South Florida and coastal Louisiana, where the suspension of Davis-Bacon created 5,000 to 11,000 jobs.

In addition to this statistical evidence, individuals involved in the construction and renovation of low-cost public housing have testified as to the disastrous effects of the Act. When Ralph L. Jones, president of a company that manages housing projects for the Department of Housing and Urban Development, gained control of a pair of dilapidated 200-unit buildings in Tulsa, Oklahoma, he intended to hire many of the building's unemployed residents to help restore the property. But the Davis-Bacon Act required him to pay everyone working on the project union wages, forcing him to hire only skilled laborers, very few of whom were minorities.

Mary Nelson, director of Bethel New Life, Inc., a social service organization located in Chicago, has found that Davis-Bacon adds up to 25 percent to her total costs and frequently prevents her from hiring unskilled, low-income workers to work on projects renovating the public housing that they themselves live in. Elzie Higgin-bottom, builder of low-income housing in Chicago's South Side, has had similar problems. Davis-Bacon requires him to pay carpenters (defined by the Act as someone who hammers in a nail) $23 per hour. As a result, he complained, "I've got to start out a guy at $16 per hour to find out if he knows how to dig a hole. I can't do that."[12]

Conclusion

The constitutional challenge to Davis-Bacon is a cornerstone of the Institute for Justice's program to restore economic liberty as a fundamental civil right. The Institute is challenging Davis-Bacon on the grounds that it is racially discriminatory, since it was passed to discriminate against blacks and immigrants, and as a result, violates the equal protection guarantee of the Fifth Amendment. The courts need only look to the legislative and administrative history of the law to determine that racial discrimination was among its purposes. The courts could also void the Davis-Bacon Act for impinging on the right of individuals to pursue employment opportunities, thereby violating the Fifth Amendment's due process clause. The Institute for Justice has brought together a unique coalition of plaintiffs to challenge the law. Complainants range from individual minority contractors, who have either lost opportunities to successfully acquire government contracts or who have gone out of business altogether because of the application of Davis-Bacon, to resident-management corporations who because of the law have been unsuccessful in their attempts to involve public-housing residents in rebuilding programs at their own developments.

Borne of racial animus, the Davis-Bacon Act has undermined the efforts of economic outsiders to find employment in the construction industry for more than six de-cades. Given the influence of organized labor over Congress and the extent to which the Clinton administration's support of NAFTA alienated this key constituency, it is highly unlikely that either branch will risk further undermining union support by pursuing reform or repeal of the Davis-Bacon Act. Thus, the only avenue that remains open is the judiciary. The courts should bury this relic of the Jim Crow era. []

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1. Johnson, "Negro Workers and the Unions," *The Survey,* April 15, 1928.

2. *Ibid.*, p. 3.

3. *Employment of Labor on Federal Construction Work,* Hearings on H.R. 7995 and H.R. 9232 Before the House Committee on Labor, 71st Congress, 2nd Session, March 6, 1930, p. 26- 27.

4. *Rates of Wages for Laborers and Mechanics on Public Buildings of the United States, 74 Congressional Record* 6504, 6513, (1931).

5. *Ibid.,* pp. 6515-6520.

6. *Employment of Labor on Federal Construction Work,* p. 6516.

7. *Ibid.*, p. 4.

8. *National Urban League, Quarterly Economic Report on the African American Worker,* Fourth Quarter, 1992, Table 7 (presently unpublished).

9. John Gould and George Billingmayer, *The Economics of the Davis-Bacon Act,* (Washington, D.C.: American Enterprise Institute, 1980), p. 62.

10. Testimony by National Association of Minority Contractors before House Subcommittee on Labor Standards of the Committee on Education and Labor, Sept. 30, 1986, p. 3.

11. *Employment of Labor on Federal Construction Work,* p. 6511.

12. Patrick Barry, "Congress's Deconstruction Theory," *The Washington Monthly,* January, 1990, p. 11.

About The Author

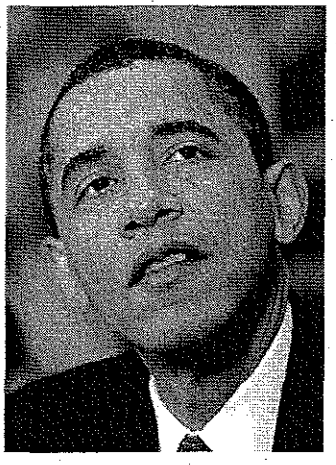
John Frantz is a law student at Harvard University in Cambrifge, Massachusetts.The Foundation for Economic Education (FEE), one of the oldest free-market organizations in the United States, was founded in 1946 by Leonard E. Read to study and advance the freedom philosophy. FEE's mission is to offer the most consistent case for the "first principles" of freedom: the sanctity of private property, individual liberty, the rule of law, the free market, and the moral superiority of individual choice and responsibility over coercion.

The Washington Times

ROOT: Outdated union red tape strangles recovery

By

Saturday, March 20, 2010



For nearly 80 years, contractors working on federally funded construction projects have been forced to pay their workers artificially inflated wages that rip off American taxpayers while lining the pockets of organized labor. The culprit is the Davis-Bacon Act of 1931, which requires all workers on federal projects worth more than $2,000 to be paid the "prevailing wage," which typically means the local union wage.

Here's what happens. Unskilled construction workers possess one clear advantage over their skilled, unionized competitors: They're willing to work for less money. But Davis-Bacon destroys that advantage. After all, why would contractors working on a federal project hire any unskilled workers when the government forces them to pay all of their workers what amounts to a union wage? Contractors make the rational choice and get their money's worth by hiring skilled unionized labor even when the project calls for much less.

Davis-Bacon is a blatant piece of special-interest, pro-union legislation. It hasn't come cheap for taxpayers. According to research by Suffolk University economists, Davis-Bacon has raised the construction wages on federal projects 22 percent above the market rate.

James Sherk of the Heritage Foundation finds that repealing Davis-Bacon would save taxpayers $11.4 billion in 2010 alone. Simply suspending Davis-Bacon would allow government contractors to hire 160,000 new workers at no additional cost, according to Mr. Sherk.

To make matters worse, the Davis-Bacon Act has explicitly racist origins. It was introduced in response to the presence of Southern black construction workers on a Long Island, N.Y.. veterans hospital project. This "cheap" and "bootleg" labor was denounced by Rep. Robert L. Bacon, New York Republican, who introduced the legislation. American Federation of Labor (AFL) president William Green eagerly testified in support of the law before the U.S. Senate, claiming that "colored labor is being brought in to demoralize wage rates."

Emil Preiss, business manager of the New York branch of the International Brotherhood of Electrical Workers (a powerful AFL affiliate that banned black workers from its ranks) told the House of Representatives that Algernon Blair's crew of black workers were "an undesirable element of people." The bill's co-sponsor, Republican Sen. James Davis of Pennsylvania, was an outspoken racist who had argued in 1925 that Congress must restrict immigration in order "to dry up the sources of hereditary poisoning."

The result was that black workers, who were largely unskilled and therefore counted on being able to compete by working for lower wages, essentially were banned from the upcoming New Deal construction spree. Davis-Bacon nullified their competitive advantage just when they needed it most.

More recently, the Obama administration extended Davis-Bacon via the American Recovery and Reinvestment of Act of 2009, known as the stimulus bill. According to an All-Agency Memorandum issued by the Department of Labor, Davis-Bacon now applies to all "projects funded directly by or assisted in whole or in part by and through the Federal Government."

In other words, even projects that are only partially funded by the stimulus must obey the costly pro-union requirements of Davis-Bacon. With the economy floundering and the government apparently set on another New Deal-style construction spree, the last thing taxpayers needed were rules that force stimulus projects to cost even more.

In sum, we have a law that drives up the costs of federal projects, hurts unskilled workers, unfairly advantages organized labor and has explicitly racist roots. It's time for Davis-Bacon to go.

Damon W. Root is an associate editor at Reason magazine and Reason.com.

Strike down racism-based wage act - Davis-Bacon Act of 1931, requiring payment of local union wages for federal construction projects, needs to eliminated - Column

Insight on the News, March 8, 1993 by Bruce Fein

President Clinton can strike a blow for civil rights and dent the federal budget deficit by attacking the constitutionality of the 1931 Davis-Bacon Act. Requiring federal construction contractors to pay local prevailing (i.e., union) wages, the act was born in an atmosphere of racism and, more specifically, white union fear of competition from blacks willing to work for free market rewards. Davis-Bacon's discriminatory effects on black construction workers, furthermore, persist. The statute seems clearly unconstitutional under the teaching of the Supreme Court in Hunter vs. Underwood (1985), because racial discrimination was a "substantial" or "motivating" factor behind enactment of the law.

The origins of the Davis-Bacon Act speak volumes. In 1927, an Alabama contractor pursuant to competitive bidding received an award to construct a Veterans' Bureau hospital on New York's Long Island. The contractor brought black construction workers from Alabama to perform the work. That provoked hostility from both white, racist building-trade unions and Rep. Robert Bacon of Long Island. They collaborated in urging federal legislation that would require payment of prevailing union wage scales on federal construction projects. A substantial or motivating factor was the shielding of all-white unions from wage competition from black workers.

In introducing the proposal that became the Davis-Bacon Act four years later, Bacon referred to the Alabama award and emphasized that "the attitude of organized labor . . . is entirely favorable to this bill." In denying that the bill was prompted solely by racial animus, Bacon betrayed at least a partial racial motivation: "The same [undercutting of union wage scales] would be true if you should bring in a lot of Mexican laborers or if you brought in any nonunion laborers from any other State."

As Bacon's bill made its way toward enactment, Rep. John J. Cochran of Missouri pointed to his receipt of "numerous complaints in recent months about Southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South."

Racial animus was inarguably a "but for" impetus of the Davis-Bacon Act, although nonracial factors were also at work. Its discriminatory effects remain acute.

A 1979 comptroller general report found that "Davis-Bacon wage requirements discourage nonunion contractors from bidding on federal construction work, thus harming minority . . . workers who are more likely to work in the nonunionized sector of the construction industry."

Former NAACP general counsel Herbert Hill complained that as of 1982, "the pattern of racial exclusion in the building trades . . . remained intact." Ralph C. Thomas III, former executive director of the National Association of Minority Contractors, testified to a congressional committee in 1986 that Davis-bacon compels minority enterprises to hire largely white skilled tradesmen, thus frustrating their ability to create jobs for minorities.

President Clinton should thus proclaim an intent to decline enforcement of the law on the ground of clear unconstitutionality, thereby invite a court challenge by white-dominated construction unions through declaratory-judgment suits. That tactic would leave the ultimate say on the constitutional question to the federal judiciary. It would also show an abhorrence of racism, a concern for black workers and a commitment to cutting the $60 billion bloat in annual federal construction and maintenance work due to Davis-Bacon.