APPLICATION OF THE DAVIS-BACON ACT IN THE 21ST CENTURY: A UNION LAWYER'S PERSPECTIVE

The Davis-Bacon Act has become a defining issue for Republicans and Democrats on legislation ranging from building new schools to cleaning up after hurricanes. The latest dispute concerns application of Davis-Bacon prevailing wages to a $ 40 billion water pollution control bill. Opponents like Senator Robert C. Smith (R – N.H.) have vowed to block the bill unless its Davis-Bacon provision is removed. Since 1994, opponents and advocates of Davis-Bacon requirements have repeatedly wrangled over the law – advocates trying to extend its coverage and opponents trying to pare it back.

There have been repeated attempts to repeal or limit application of Davis-Bacon requirements to federally assisted construction work that have been to no avail. Davis-Bacon opponents tried and failed to exempt disaster relief projects, including hurricane recovery efforts and the rebuilding of Oklahoma City's federal buildings after the 1995 bombing from Davis-Bacon coverage. Additionally, last year, legislation to increase funding for the Federal Government's cleanup of abandoned industrial sites known as brownfields was held up when Davis-Bacon supporters in Congress insisted on applying Davis-Bacon requirements to brownfields projects conducted by state and local governments with federal financial assistance. Ultimately, the House leadership acquiesced. In addition to the water pollution control legislation now pending in Congress, there is also a bill pending that would provide a massive infusion of federal assistance for school construction that includes a Davis-Bacon provision. The House leadership has vowed not to allow any legislation to be brought to the floor if it includes a Davis-Bacon provision, and Senate opponents have threatened to filibuster such legislative proposals.

A bill entitled the "Davis-Bacon Modernization Act, H.R. 2094, sponsored by North Carolina Republican Congressmen Cass Ballenger and Howard Coble would exempt projects worth less than $ 100,000 from Davis-Bacon coverage. This bill is stalled in a House subcommittee. Other members of Congress have suggested that legislation is needed that would automatically extend Davis-Bacon coverage to all federally assisted construction programs created under new federal statutes without revisiting the Davis-Bacon issue every time. However, such legislation has not even been introduced.

All of this debate raises the obvious question – Why is the 71-year-old Davis-Bacon Act a defining issue for many members of Congress?

The Davis-Bacon Act enacted in 1931 applies to contracts and subcontracts with the United States and the District of Columbia for the construction, repair and/or alteration, including painting and decorating, of public buildings and public works that cost more than $2,000. The Davis-Bacon Act does not apply to contracts and subcontracts for construction, repair and/or alteration, including painting and decorating, of projects that are federally assisted. A separate Davis-Bacon provision must be

incorporated in federal legislation that authorizes federally assisted construction programs. The federal laws that include Davis-Bacon provisions are commonly known as “Davis-Bacon Related Acts.” There are approximately 60 “Davis-Bacon Related Acts” including many statutes that authorize federally assisted housing construction.

THE ORIGINS OF DAVIS-BACON REQUIREMENTS

There is a reason why Congress did not originally extend coverage of the Davis-Bacon Act to federally assisted construction as well as federal construction. The Davis-Bacon Act was enacted in 1931 and substantially amended in 1935. In 2001, most lawyers and lay people alike seem surprised to learn that there was ever a dispute about whether the Federal Government could constitutionally require an employer to pay a particular wage.

In fact, as constitutional scholars well know, the U.S. Supreme Court struggled for a number of years with the question of whether it was lawful for the Federal Government to require payment of a minimum wage, and if so, how such a wage could lawfully be determined. For example, in 1923, the Court declared that an Act of Congress that established a minimum wage for the District of Columbia was unconstitutional because it interfered with the liberty of individuals to enter into employment contracts under the terms of their choice. This was because, at the time the Davis-Bacon Act was passed, the generally accepted interpretation of the U.S. Constitution was that the United States is a government of limited and enumerated powers, and that the Federal Government possesses only such powers as have been expressly conferred by the Constitution and those that can reasonably be implied from the expressly-granted powers.

On the other hand, there was already precedent for using federal contracting power to accomplish social and economic change. In 1912, Congress had enacted a law that required inclusion of an 8-hour day provision in all contracts made by or on behalf of the Federal Government, its territories, or the District of Columbia. This statute and several predecessor statutes and an executive order issued by President Martin Van Buren in 1840, were adopted at a time when 10-, 11-, and 12-hour workdays were common in the private sector. In addition, in 1915, Congress continued its limited assault on “the right of contract” by placing strict limitations on the rights of ship owners with respect to employment of seamen in the Seaman’s Act of 1915, which not only limited the number of hours a seaman could work-establishing a 9--hour limit for days spent in port--but also addressed a multitude of other employment issues relating to seamen.

Thus, Congress gradually began changing labor standards by using the Federal Government’s clout as a purchaser in the marketplace by imposing them on its own contractors as a condition of doing business with the Government. But constitutional limits on the power of Congress to regulate local matters was perceived as precluding federal regulation of employment conditions in general. Not surprisingly, therefore, in the early to mid-1930’s the Supreme Court derailed as invalid six major congressional

acts intended to stimulate economic recovery from the Great Depression, including the National Recovery Act of 1933 ("NIRA"), perhaps the broadest of all the New Deal statutes. Under the NIRA, the President had the power to establish maximum hours of work, minimum wages, and any and all other conditions of employment in any industry that was engaging in unfair practices--in short, the NIRA gave the President virtually unlimited powers to establish wage and hour control over the economy. In A.L.A. Poultry Corp. v. United States—the famous "sick chicken" case—the Supreme Court struck down the NIRA, holding that Section 3 of the Act constituted an unconstitutional delegation of power to the President. [1/]

It was in this context that the Davis-Bacon Act was passed in 1931, based on the power of the Federal Government to use its contracting power to regulate the labor standards practices of its contractors. As such, the Act represented a further conceptual leap in the law relating to an individual's freedom of contract, and although it did not set a minimum wage, it did establish the principle that the Federal Government could determine the wages to be paid by private companies seeking to do business with the Federal Government.

Nevertheless, the perceived constitutional limit on congressional power to regulate local matters, including labor standards, discouraged consideration of applying Davis-Bacon prevailing wage requirements to federally-assisted construction projects. However, that perception began to change dramatically after 1936, when the Supreme Court in United States v. Butler, [2/] while accepting the traditional view that the Federal Government has only such powers as have been expressly conferred by the Constitution, adopted the position originally advocated by Alexander Hamilton that the power to lay and collect taxes for the general welfare contained in Article I, Section 8, cl. 1, of the U.S. Constitution, known as the "General Welfare Clause," is a grant of authority separate and distinct and, therefore, not limited by the direct grants of legislative power found elsewhere in the Constitution.

The Butler case affirmed the power of Congress to use the General Welfare Clause to promote the general well being of the country in the context of legislation that provides federal assistance to states, local governmental entities and private parties. The Butler case did not, however, address the issue of whether Congress could impose federal standards on State and local governments as a condition of receiving federal financial assistance without running afoul of constitutionally protected state sovereignty.

But it didn't take long for the Court to reach that issue in Steward Machine Co. v. Davis [3/] in 1937. The Court held that federal statutes that offer financial assistance subject to acceptance of federal standards do not invade state sovereignty, because the

---

[1/] U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935).

[2/] 297 U.S. 1, 80 L. Ed. 477, 56 S. Ct. 312 (1936).

[3/] 301 U.S. 548, 81 L. Ed. 1279, 57 S. Ct. 883 (1937).

statute simply extends an option that the State is free to accept or reject. Following Steward Machine, the Supreme Court has repeatedly affirmed that conditional federal assistance does not invade state sovereignty as long as participation is optional and the recipient is free to withdraw.

Thus, in the space of six years between 1931 and 1937, the perceived constitutional limitation on the inclusion of social and economic requirements in federal legislation that provides financial assistance to State and local recipients had been breached, but it did not evaporate all at once. Consequently, Congress incorporated a Davis-Bacon provision in the National Housing Act of 1934, as amended in 1939. The National Housing Act of 1934 created the original Federal Housing Administration and provided federal insurance of financial institutions against loss on advances for modernization and repair loans; for insurance of mortgages on small homes and on low-cost rental housing projects held by federal or state instrumentalities or private limited dividend corporations. [4/] The 1934 Act did not include a Davis-Bacon prevailing wage provision. During the course of considering amendment of the Act in 1937, Senator Henry Cabot Lodge of Massachusetts proposed an amendment that would have applied a Davis-Bacon requirement to all housing construction assisted by federally insured mortgages, including single-family dwellings. After extensive debate in which President Roosevelt and a majority of the Democrats opposed the Lodge amendment, because it would apply to privately owned homes as well as multi-family rental projects, it was defeated in 1937. Subsequently, however, a Davis-Bacon prevailing wage provision applicable to federally insured mortgages for multi-family low-income rental housing was adopted without much debate in 1939. [5/]

The Davis-Bacon prevailing wage requirements incorporated in the National Housing Act in 1939 have been applied repeatedly, without exception, to additional federally insured housing programs that involved construction, repair and/or alteration of other types of multi-family housing projects which have been created over the years. [6/]

Incorporation of Davis-Bacon provisions into the National Housing Act of 1934 and subsequent housing legislation that provide federal assistance for multifamily housing construction is significant for two reasons. First, it illustrates how the development of the General Welfare Clause as an independent source of federal authority to regulate local matters affected application of the Davis-Bacon prevailing wage principle to federally assisted construction projects.[7] Second, and perhaps more

---

[4/] Act of June 27, 1934, ch. 847, 48 Stat. 1246.

[5/] Act of June 3, 1939, ch. 175, §14, 53 Stat. 807.

[6/] See Historical and Statutory Notes under 42 U.S.C.A. §1715 c.

[7/] Some critics have argued that application of a Davis-Bacon prevailing wage requirement in States that have chosen not to enact their own prevailing wage law is an "unfunded mandate" that should not be imposed on them. To begin with, an "unfounded mandate" is a requirement imposed on States and local governments by the Federal

importantly, it also demonstrates that the form in which federal assistance is provided is not determinative of whether the Davis-Bacon prevailing wage principle can be applied to new federally assisted construction programs like affordable housing. In fact, research indicates that, while a majority of federally-assisted construction programs created by Congress over the last 50-60 years have relied on grants-in-aid as the means of providing federal assistance, nevertheless, Congress has created programs that provide many other kinds of assistance to state and local governments as well as private parties in the form of mortgage insurance, loans, and guarantees of loans, notes, bonds and other financial obligations.

THE NEED FOR CONTINUED APPLICATION OF DAVIS-BACON REQUIREMENTS

Davis-Bacon prevailing wage protection for American workers on federally funded and assisted construction projects is as important today as it was in 1931. Individuals and advocacy groups who insist that labor market forces alone should be allowed to determine wage levels on federally-assisted construction projects are neither as concerned about worker rights as they frequently claim nor as unmindful of the potential for worker exploitation as they would have us believe. The United States of America long ago rejected the notion of an unregulated economy as our chosen method of achieving both economic growth and social justice. Therefore, there is a compelling need to preserve the rather limited protections of the Davis-Bacon and Related Acts for laborers and mechanics who have no greater expectation of reward than being able to bring home a fair wage for a hard and often dangerous job in building America's future.

The building and construction industry is one of the last great blue collar industries. At a time when so many industrial jobs have disappeared overseas, the building and construction industry provides millions of non-exportable jobs and valuable skill training to many Americans. [8/]

Government with providing any federal financial assistance to offset the cost of implementing the federal requirement. Application of Davis-Bacon requirements is not an "unfounded mandate," because as explained above, receipt of federal financial assistance is expressly conditioned on compliance with these requirements, as well as other socially desirable mandates. However, potential recipients are free to decline of such federal assistance and thereby avoid compliance with the federal mandates that accompany the assistance. In fact, that quid pro quo arrangement is what makes it constitutionally acceptable.

[8/] According to the "Employment and Earnings" Current Population Survey published jointly by the Bureau of Labor Statistics and the Bureau of the Census in January 2001, the median income of all workers over the age of 16 in the United States in 2000 was $ 576 per week or $ 29,952 per year. According to the same source, the median income of all workers employed in the "construction trades, except supervisors in the United States in 2000 was exactly the same, i.e., $ 576 per week or $ 29,952 per year.

As already discussed above, the exercise of federal spending authority to promote the public health, safety, and welfare is a long established and constitutionally sanctioned process. In the case of Davis-Bacon prevailing wage protection, the federal power of the purse is exercised not only to promote the public health, safety and welfare, but also to safeguard taxpayers from the predatory practices of unscrupulous contractors and the unwitting damage caused by unskilled workers. The infusion of federal funding or other assistance is deliberately offered as a conditioned benefit that obligates contractors, subcontractors and local jurisdictions alike to accommodate national social goals. Thus, federal assistance obligates recipients to adhere to many statutory mandates including prevailing wages, equal employment opportunity and fair housing. If these conditions are too onerous, as some individuals and advocacy groups maintain, entrepreneurs and local governmental entities are always free to forego federal assistance and proceed according to the dictates of their conscience and their purse.

THE PRINCIPAL ARGUMENTS AGAINST APPLICATION OF DAVIS-BACON REQUIREMENTS TO CONSTRUCTION OF FEDERALLY ASSISTED AFFORDABLE HOUSING

1. Davis-Bacon Prevailing Wage Requirements Raise the Cost of Housing Construction.

Critics of Davis-Bacon prevailing wage requirements, including those who advocate elimination of application of such requirements to federally-assisted affordable housing construction, argue that the Federal Government should use its bargaining power to cut local wage rates. In fact, they contend that local wage rates could be reduced by as much as 50%, and that such a race to the bottom could cut affordable housing construction costs substantially. Nonetheless, claims of the added cost associated with Davis-Bacon prevailing wage requirements and of cost savings from repeal of those requirements are not adequately supported by empirical evidence.

Some critics maintain that the impact of prevailing wages on construction costs is attributable to the difference between the "prevailing wage rate" that is mandated by Davis-Bacon requirements and the "market wage rate," which they claim is the "real" wage rate paid on local construction projects that are not subject to Davis-Bacon requirements. Yet wage differences have a moderate effect on total construction costs. Labor costs are less than 1/3 of total construction costs and actually may be falling.[9/]

[9/] In 1972, for instance, in an analysis of school construction costs, John Olsen found that onsite wages and salaries, excluding fringe benefits, were 28.2% of total costs. (Monthly Labor Review, 1979, at 40). According to the Census of Construction, labor costs, including fringe benefits, on all types of construction were 30% of total costs in 1977 and had fallen to 26% by 1987.

Another factor that undermines estimates of the impact of Davis-Bacon prevailing wage requirements on overall construction costs is an implicit assumption that when wages and fringe benefits fall, labor productivity remains the same. However, several recent studies indicate that prevailing wages may attract workers with more experience and training who are more productive than less experienced, less skilled lower paid workers, and that this increased productivity may result in completion of construction projects in fewer hours thereby offsetting their higher hourly wage rates. Additionally, higher wage rates may lead contractors to substitute capital or other devices for labor, thereby mitigating the impact of higher wages on total construction costs. [10/]

Consequently, a drop in wages of 50% with no change in productivity or the type of equipment used or the amount of training provided, would yield no more than a 15% savings in the cost of construction. If wages fell 25%, the cost of construction would fall by 7.5%. Moreover, the hypothetical cost savings from lower wages and benefits would be undermined if productivity fell off and/or the cost of maintaining poorly constructed facilities increased on account of the work performed by less experienced, less skilled, less trained employees. [11/]

These factors, alone or in combination, make the assumptions underlying the analysis of construction cost savings based on wage differences inappropriate and cast doubt on estimates of cost savings from repeal of Davis-Bacon prevailing wage requirements. An alternative approach is simply to examine total construction costs directly and compare costs in the presence and absence of prevailing wage requirements controlling for project differences.

Few studies have attempted to estimate the impact of prevailing wage requirements on the actual total construction costs of projects. In 1983, a study entitled "The Effect of the Davis-Bacon Act on Construction Costs in Rural Areas," by Martha N. Fraundorf, a professor of labor economics at Oregon State University. The Fraundorf study found that federal construction projects covered by Davis-Bacon prevailing wage requirements were 23% more expensive than private construction projects. In fact, the Fraundorf study concluded that the impact of Davis-Bacon prevailing wage requirements could be as high as 30%. More recently, Professor Mark J. Prus of the State University of New York in Courtland, N.Y. prepared a paper for the County Council of Prince George's County, Maryland that used a regression model patterned after Professor Fraundorf's 1983 study to analyze total construction costs and prevailing wage requirements in the United States and in British Columbia, Canada.

Professor Prus found that while public projects were significantly more expensive than similar private projects, this was true in both States that have prevailing wage laws

---

10/ Prus, Mark J., "Prevailing Wage Laws and School Construction Costs," Prepared for the Prince George's County Council, Maryland, (Jan. 1999) ("Prus"), at 1-3.

11/ Philips, Peter, "Kentucky's Prevailing Wage Law," (Oct. 1999) ("Philips") at 50.

and in States that do not. Consequently, he concluded that the higher costs of public projects could not be attributed to application of prevailing wage requirements. In fact, he concluded that the estimated effect of prevailing wage requirements, controlling for other factors including differences in the type of ownership, was not statistically different from zero. [12/]

Hence, claims that Davis-Bacon prevailing wage requirements cause higher construction costs and less federally-assisted construction are based on hypothetical assumptions that lack much, if any, basis in fact and have been substantially rebutted by more recent scholarly analysis. In any event, projected cost savings from repeal of Davis-Bacon prevailing wage requirements are grossly inflated and illusory. On the other hand, the negative impact of such action on a portion of the very group of wage earners that an affordable housing program is intended to serve would more than offset any anticipated cost savings.

2. Davis-Bacon Prevailing Wage Requirements Purposely or Inadvertently Exclude Minorities from Public Construction Work.

a. *The Davis-Bacon Act is a "Jim Crow Law."*

Until the mid-1970's, debate over prevailing wage laws in construction was limited to its effect on project costs, taxpayer expenses, the benefits of collective bargaining and apprenticeship training. In 1975 Professor Armond Thieblot introduced a new argument, that the Davis Bacon Act was, at least in part, motivated by racial bigotry. Professor Thieblot noted that the issue of race was mentioned explicitly only once during the House debate on Davis Bacon by a Southern Congressman, but he asserted that thinly veiled allusions to race could be found in other speeches including those of Congressman Bacon. [13/]

In recent years, Professor Thieblot's assertion has been refined and advanced by some Washington think tanks, notably the CATO Foundation and the Institute for Justice. [14/] Their basic argument is that Davis-Bacon prevailing wage requirements discriminate against African-American workers because the higher wages required to be paid on public projects incline contractors to pass over lesser skilled workers, such as African-Americans. These think tanks also allege that such discrimination was not an unintended by product of the law, but reflected the purpose of the supporters of the Davis-Bacon Act. This interpretation of prevailing wage laws in general, and the Davis

---

[12/] Prus at 3-5.

[13/] Armond Thieblot, The Davis Bacon Act, Industrial Research Unit, Report No. 10, Wharton School, University of Pennsylvania, Philadelphia, 1975, at 9.

[14/] Institute for Justice lawyers presented arguments on behalf of plaintiffs in seeking the constitutional overturning of the Davis Bacon Act as a racially discriminatory law. Brazier Construction Co., Inc. v. Reich, Civil Action No. 93-2318 WBB (D. D.C.).

Bacon Act in particular, has received favorable attention from the media and some in Congress. [15/] But these claims are not based on a careful review of the legislative history of prevailing wage laws or analysis of the effects of prevailing wage laws on minority employment.

Arguments that the Davis-Bacon Act was originally a Jim Crow law designed to keep African-Americans out of the construction industry are not supported by factual evidence. Nor do these arguments square with what we know about those who supported the early federal and state prevailing wage laws. The first federal labor standards law was passed in 1868 by the same Republican Congress that enacted the 13th, 14th and 15th Amendments to the Constitution—the legal bases for federal enforcement of equal rights in this country. The first state prevailing wage statute enacted by Kansas in 1898 was declared constitutional by the U.S. Supreme Court in Atkin v. Kansas, [16/] written by Justice John Marshall Harlan—the leading judicial critic of Jim Crow laws in his day. The Davis-Bacon Act was vigorously supported by New York Republican Congressman Fiorello LaGuardia who subsequently, as mayor of New York, played a strong supportive role in integrating Major League Baseball by bringing Jackie Robinson to the Brooklyn Dodgers. [17/]

Notwithstanding, David Bernstein argued in a paper published in 1993 that racist comments found in the Congressional debate over the Davis-Bacon Act in 1931 and prior prevailing wage legislative proposals in 1930 and 1927 prove the Davis-Bacon Act was motivated by racial animus.[18/] Professor Peter Philips of the University of Utah discussed Mr. Bernstein's arguments in "Kentucky's Prevailing Wage Law," a paper he prepared in October 1999. According to Professor Philips, Mr. Bernstein's interpretation of the Congressional record concerning the Davis-Bacon Act divides into two parts--a limited number of statements that directly referred to race and a larger number of statements that he believes are coded references to race. Mr. Bernstein states:

> The comments of various congressmen reveal the racial animus that motivated the sponsors and supported of the bill. In 1930, Representative John J. Cochran of Missouri stated that he had "received numerous

---

[15/] Scott Alan Hodge, "Davis Bacon: Racist Then, Racist Now," guest editorial by Heritage Foundation analyst in The Wall Street Journal, June 25, 1990, at A14; George Will, "It Is Time to Repeal the Davis-bacon Act," syndicated column in many papers, February 5, 1995; Tony Brown, Black Lies, White Lies: the Truth According to Tony Brown, William Morrow and Co., Inc., New York, 1995, at 304-310.

[16/] 191 U.S. 207, 24 S. Ct. 124, 48 L. Ed. 148.

[17/] See Philips at 38.

[18/] David Bernstein, "The Davis-Bacon Act: Let's Bring Jim Crow to an End," Cato Briefing Paper, No. 17, Cato Institute, 1000 Massachusetts Avenue, N.W., Washington, D.C., January 18, 1993 ("Bernstein").

> complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South." [Alabama] 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." Other congressmen were more circumspect in their references to black labor. They railed against 'cheap labor,' 'cheap imported labor,' men 'lured from distant places to work on this new hospital' 'transient labor,' and 'unattached migratory workmen.' While the congressmen were not referring exclusively to black labor, it is quite clear that despite their 'thinly veiled' references, they had black labor primarily in mind.

Bernstein at 3.

In fact, according to Professor Philips' analysis of the Congressional record, direct reference to race in the debate over Davis-Bacon was rare. Of the 31 Senators and Representatives who spoke in favor of the Davis-Bacon Act in 1931, Alabama Representative Allgood was the only one to have explicitly mentioned the issue of race.[19/] Furthermore, only one of the thirteen witnesses who spoke at Senate and House hearings in that year mentioned the issue of race. [20/] This kind of evidence hardly supports the argument that enactment of the Davis-Bacon Act was motivated by racial bias.

Instead, advocates of this line of reasoning rely primarily on the view that proponents of the Act hid their animus with racial code words for African-Americans when they complained of cheap, itinerant, foreign, non-local labor undercutting local labor standards. [21/]

One weakness with the code word hypothesis is that racial and ethnic discrimination was widely accepted at the time and people, including political representatives, were unlikely to use code words when speaking openly of the 'problem' was so acceptable.[22/] Another weakness is that these same adjectives were explicitly applied to white Europeans in the debate over New York State prevailing wage law.[23/] According to Professor Philips, a racial animus interpretation of prevailing wage laws would require that these initiatives and their code words were used primarily or solely

---

19/ Philips at 35.

20/ Id.

21/ Id.

22/ Id. at 36.

23/ Id.

when the references to "cheap labor" were synonymous with references to African-Americans. They were not. [24]/

Professor Philips noted a third shortcoming of the code word hypothesis as applied to Davis-Bacon is that, according to the 1930 U.S. Census of Population, Construction, most cheap, itinerant labor coming into high wage states in the North was not from the South and, even among itinerant southern construction labor coming north, most were white, because even when a southern general contractor came north with a work crew, that crew was likely to be composed of both white and African-American workers. At that time, construction occupations were racially segregated in the South. [25]/ Therefore, a crew that required craftsmen from a variety of construction occupations, would necessarily include workers of both races. Thus, the general contractor would likely bring black laborers and hod carriers and perhaps brick masons. [26]/ But the same contractor would probably bring white carpenters. Consequently, inasmuch as according to the 1930 Census of Population, Occupations, a majority of construction workers in every southern State were white, it follows that if a southern contractor came north with an integrated crew at the proportions typical of the racial composition of the southern construction labor force, then the majority of southern workers coming north would be white. [27]/

b. ***Davis-Bacon Requirements Have a Disparate Impact on African-American Construction Workers.***

In any event, whatever the intent of the supporters of the Davis-Bacon Act and other prevailing wage laws, critics argue that these laws nevertheless act to exclude African-American workers from the building and construction industry. Critics of the Davis-Bacon Act suggest that African-American workers are disadvantaged both by the higher wages required by prevailing wage laws and by the lack of low wage entry occupations other than apprentice. These critics claim that higher wage rates make less skilled and less productive employees unattractive to contractors because the wage level cannot be adjusted to conform to the productivity of such employees. They assert that contractors will prefer higher skilled workers, workers who are overwhelmingly white due to hiring and training practices, and will avoid hiring the lower skilled African-American workers. In addition, they claim that the only type of employee who can be paid at less than the journeyman rates under current administrative practice is an apprentice, and that the lack of alternative lower wage positions, such as "helpers," precludes less skilled workers from being hired onto jobs where they could develop the skills needed to qualify as a journeyman. This restriction on access to the industry for

---

[24]/ Id.

[25]/ Id.

[26]/ Id.

[27]/ Id. at 37.

lower skilled workers, they say, excludes African-Americans in particular. Both arguments are based on the premise that African-Americans in the building and construction industry have lesser skills than other workers in the industry.

Specifically, Professors Richard Vedder and David Gallaway argue in Cracked Foundation: Repealing the Davis-Bacon Act, Center for the Study of American Business, Policy Study Number 127, November, 1995, that:

> Representative Bacon was partly successful in his efforts to maintain a predominantly white labor force in construction. Despite a reduction in racially prejudicial conduct by employers over time, blacks continue to be under-represented in construction employment, more so than in other comparable occupations not subject to the strictures imposed by Davis-Bacon. While minimum wage laws such as Davis-Bacon increase unemployment for all groups and raise costs of production, the negative impact of this legislation has fallen disproportionately on individuals subject to discrimination.

Id. at 23.

However, research by Professor Philips disputes the conclusions reached by Vedder and Galloway. Professor Philips states in “Kentucky’s Prevailing Wage Law,” that "[o]ur research finds no relationship between prevailing wage statutes and the racial composition of the construction labor force.” [28/] Professor Philips then concludes:

> Our empirical research moves away from discussion of intent to one of measurable consequences. Utilizing a conventional data source and a procedure incorporating a state and individual error component, we find a moderate negative simple correlation between state prevailing wage laws and minority employment in blue-collar construction. This correlation is, however, the product of the lack of such laws in the South, the region with the largest proportion of African Americans in its labor force. Once adjusted, the association between prevailing wage laws and minority employment disappears.
>
> The debate surrounding the Davis Bacon Act will continue on other grounds. How the Act effects the cost of public construction, the quality of work done, the amount of training that takes place in construction, the extent to which the law promotes labor standards and encourages collective bargaining, all these issues remain and will be addressed in subsequent chapters. However, the proposition that the Davis Bacon Act was primarily or substantially intended to restrict African American access to federal construction work is not supported by the historical record, and the idea that the Davis Bacon Act currently restricts minority access to

[28/] Id. at 42.

construction work is not consistent with current racial patterns of employment. [29/]

Here again, the contention by anti-Davis-Bacon advocates that the purpose and intent of the Davis-Bacon Act, as well as its effect, is to discriminate against minorities in general and African-Americans in particular is unsupported by the true facts. There is no doubt, however, that historically minorities were systematically excluded from employment in the building and construction industry, albeit not on account of the Davis-Bacon Act.

During the 1950s and 1960s minority groups fought hard to break down discriminatory barriers to employment opportunities in the industry. One of their principle objectives was to integrate apprenticeship programs in the building and construction industry and insure that such programs undertake affirmative action to recruit and retain qualified minority apprentices who would eventually become skilled journey level mechanics in the various building and construction crafts. In order to accomplish this goal, apprenticeship programs have been closely monitored over the last three decades to ensure their compliance with affirmative action and equal employment opportunity requirements.

Notwithstanding, there is no statutory or regulatory requirement in State or federal law that compels construction employers to sponsor or even participate in apprenticeship programs that are subject to affirmative action and equal employment opportunity requirements. That is, employers can generally avoid these requirements simply by declining to participate in State or federally approved apprenticeship programs. However, there is a price to pay for failing to participate in State or federally regulated apprenticeship programs, because most State prevailing laws and/or their implementing regulations provide an exception to the requirement that contractors on public works projects must pay prevailing wages to their employees that permits a contractor to pay a lower wage to workers participating in approved apprenticeship programs. [30/] Similarly, under the Davis-Bacon Act, the Secretary of Labor promulgated regulations many years ago which provide that laborers and mechanics classified as “apprentices” or “trainees” can only be paid less than the prevailing wage rate on a Davis-Bacon project if he or she is enrolled in a bona fide apprenticeship program registered with BAT, or a State Apprenticeship Agency recognized by the BAT. [31/] This regulation creates a powerful incentive for contractors to participate and invest in formal apprenticeship programs in return for an exemption from the requirement to pay their apprentices the otherwise applicable Davis-Bacon prevailing wage rate. Consequently,

---

[29/] Id. at 46.

[30/] See e.g., California Prevailing Wage Law, Cal. Lab. Code Ann. § 1771 (West 1989).

[31/] 29 U.S.C. § 5.5(a)(4) (2000).

Davis-Bacon contractors are not obliged to employ apprentices, but if they do, the apprentice wage is only permitted for those apprentices enrolled in approved programs.

It should not be a surprise, with this understanding of the relationship between Davis-Bacon prevailing wage requirements and contractor sponsorship and participation in apprenticeship programs, that Professor Philips reported in his 1999 paper entitled "Kentucky's Prevailing Wage Law" that, according to the latest data from the U.S. Department of Labor's Bureau of Apprenticeship and Training (BAT) for the years 1987 to 1989, a far higher portion of apprentices in registered apprenticeship programs operated in States that have prevailing wage laws are minorities than in programs in States that do not have a prevailing wage law. After reviewing this data, Professor Philips concluded that "minorities have a much more difficult time getting into apprenticeship programs where prevailing wage regulations are absent." [32/] Hence, contrary to the contentions of some, Davis-Bacon prevailing wage requirements actually help to promote participation and retention of African-Americans in apprenticeship programs that provide the surest means of achieving admission into the building and construction industry by creating a financial incentive for contractors to sponsor and participate in approved apprenticeship programs that are subject to State and federal affirmative action and equal employment opportunity requirements.

Any public policy that undermines formal apprenticeship training could have catastrophic effects on minority employment in the building and construction industry. Accordingly, the potential detrimental impact on formal apprenticeship training programs of repealing the Davis-Bacon Act, or even contracting its application to federally-assisted construction at this time is particularly acute because, according to a paper prepared by the Construction Labor Research Council entitled "Craft Labor Supply Outlook 2000 - 2010" (hereafter "CLRC Paper"), a large influx of new entrants into the building and construction industry will be needed to replace an increasing number of older workers who will be leaving the industry and meet the needs created by the anticipated growth in the industry over the same period.

The paper explains that the dominant demographic characteristic of the 2000 to 2010 period will be the significant growth in the number of people in the general population between the ages of 55 and 64 years of age due to the "baby boomer population bubble" that will be reaching this age group. [33/]This is the age group in which most retirements occur. At the same time the number of people reaching their later working years rapidly expands, the primary source of new entrants into the labor force, those ages 18 to 24, will increase only modestly. [34/]

[32/] Philips at 74.

[33/] CLRC Paper at 6.

[34/] Id. at 7.

According to the CLRC Paper, this phenomenon will adversely impact the building and construction industry compared to other industries because its workforce tends to be younger than the general workforce, and it loses workers at an earlier age than the rest of the workforce. [35/] As a result, the aging population will impact the building and construction industry sooner than other segments of the economy. *Id.* The CLRC Paper estimates that the industry will require at least 75,000 new workers annually just to replace those retiring, as well as 25,000 new entrants per year to meet the demand created by expansion in the industry. [36/]

This data clearly indicates that there will be a substantial increase in the demand for new entrants into the building and construction industry in the coming years. [37/] It is counterintuitive to advocate repeal of Davis-Bacon prevailing wage requirements that provide the sole and exclusive incentive for construction employers to sponsor and participate in formal apprenticeship programs at a time when these programs offer the best opportunity for minorities and women to penetrate the building and construction industry in greater numbers than ever before with the training and skills that can enable them to command an income sufficient not only to support their families, but also to purchase homes and provide a better future for their children. That is the "American Dream."

Clearly, non-application of Davis-Bacon prevailing wage requirements to federally assisted construction would be inconsistent with this public policy objective.

CONCLUSION

For all the foregoing reasons, proposals to eliminate application of Davis-Bacon prevailing wage requirements to federally assisted construction should be rejected. Instead, Congress should continue to include Davis-Bacon prevailing wage requirements in legislation that creates new federally assisted construction programs that use innovative techniques that leverage limited federal resources to achieve maximum public benefit.

35/ Id. at 9.

36/ Id. at 15-16.

37/ Id. at 17.