

THE DAVIS-BACON ACT: VESTIGE OF JIM CROW

David Bernstein*

I. INTRODUCTION

In a 1987 speech to the Business Law Section of the American Bar Association, then-Equal Employment Opportunity Chairman Clarence Thomas argued that “legislative initiatives such as . . . [the] Davis-Bacon [Act] provided barriers against black Americans entering the labor force.” During the confirmation process, Senators Kennedy,¹ Metzenbaum,² and Simon,³ all strong supporters of civil rights legislation, attacked Thomas for his hostile statements about Davis-Bacon. But as this Article will show, Justice Thomas’ assessment of the Davis-Bacon Act was correct.

The Davis-Bacon Act,⁴ though a relatively obscure and unknown law, has had a tremendous negative impact on Black construction workers for decades. Initially passed by Congress in 1931, the Act requires that contractors with federal building contracts whose values exceed \$2,000 pay their workers the “prevailing wage,” as determined by the Secretary of Labor.

One of the goals of Davis-Bacon supporters was to prevent Blacks from working on federal construction projects. The law in large part accomplished this goal, and continues to serve that goal to some degree today, while also inhibiting minority business enterprises from competing for federal contracts.

Part I of this Article will review the evidence that Congress passed Davis-Bacon with discriminatory intent. Part II will document the historical and continuing discriminatory effects of Davis-Bacon. The Article concludes with the hope that Davis-Bacon, a vestige of Jim Crow lawmaking, will be declared unconstitutional.

II. EVIDENCE OF DISCRIMINATORY INTENT

A. *Discrimination Against Blacks by Construction Unions*

In the immediate post-Civil War period, an estimated 100,000 out of the 120,000 skilled construction craftsmen in the South were Black. After the Civil War, White workers began to displace Black building craftsmen

* Clerk, Judge David A. Nelson, Sixth Circuit U.S. Court of Appeals; J.D., Yale Law School 1991. The author, while a law student at Yale, co-authored the amicus brief of the Landmark Legal Foundation Center for Civil Rights in Building and Constr. Trades Dept., AFL-CIO v. Dole 90-5345 (D.C. Cir., argued Oct. 31, 1991), which is currently pending.

1. Remarks by Senator Kennedy During Floor Debate Regarding Nomination of Clarence Thomas to the Supreme Court, Federal Information Systems, Oct. 4, 1991.

2. Senate Judiciary Committee Hearings on the Nomination of Clarence Thomas to the United States Supreme Court, Federal Information Systems, Sept. 13, 1991.

3. 137 Cong. Rec. 14452 (1991).

4. 40 U.S.C. § 276(a)-(c) (1988).

until, by 1890, Whites made up a majority of skilled construction workers.⁵ New skills were needed as technology changed, and the combination of discriminatory labor laws,⁶ discrimination in vocational schooling,⁷ discriminatory union policies,⁸ and violence⁹ froze Blacks out of skilled positions. These elements were intertwined; unions not only discriminated in membership, but lobbied for Jim Crow laws and inferior technical education for Blacks. In addition, union members led violent attacks against Black workers.

The position of Black construction workers declined further in the early twentieth century. Although the construction industry expanded, the proportion of Blacks in the skilled work force steadily fell. For example, in 1890 Blacks constituted about twenty-five percent of the South's carpenters.¹⁰ By 1910, the percentage dropped to fifteen.¹¹ This decline was attributable to all of the factors noted above, but especially to labor union policies.

By the early 20th century, construction craft unions affiliated with the American Federation of Labor ("AFL") were among the most powerful unions in the United States. Most construction unions excluded Blacks completely, while carpenters and bricklayers, faced with large numbers of potential Black competitors, relegated them to second-class segregated locals.¹² Licensing laws, passed at the behest of unions, were applied discriminatorily to prevent Blacks from gaining more than token representation as plumbers and electricians.¹³ Because of the discrimination and hostility faced by Black workers in the AFL, many Black leaders, including Marcus Garvey¹⁴ and Dean Kelly Miller¹⁵ of Howard University, urged Blacks to reject unionism entirely.¹⁶ Many Blacks voluntarily gave up membership in

5. S. STERLING D. SPERO & ABRAM L. HARRIS, *THE BLACK WORKER: THE NEGRO AND THE LABOR UNIONS* 16 (1931).

6. H. NORTHRUP, *ORGANIZED LABOR AND THE NEGRO*, xb-xc (1946) (Kraus reprint ed. 1971); Gatewood, *The Black Artisan in the U.S., 1890-1930*, 5 REV. BLACK POL. ECON. 19, 25 (1974); Charles S. Johnson, *The New Frontier of Negro Labor*, OPPORTUNITY, June, 1932, at 168, 169-70.

7. Gatewood, *supra* note 6, at 38.

8. P. PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: THE POLICIES AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR, 1900-1909* 240 (1981).

9. Gatewood, *supra* note 6, at 32.

10. Marc W. Kruman, *Quotas for Blacks: The Public Works Administration and the Black Construction Worker*, LABOR HIST., Winter 1975, at 37, 38.

11. HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 14 (1977).

12. For statistical details see Charles S. Johnson, *Negro Workers and the Unions*, THE SURVEY, Apr. 15, 1928, at 113, 114.

13. W.E.B. DU BOIS, *THE NEGRO ARTISAN* 94-95 (1902); HILL, *supra* note 12, at 22; NORTHRUP, *supra* note 6, at 26; SPERO & HARRIS, *supra* note 5, at 478-81; Ray Marshall, *The Negro in Southern Unions*, in *THE NEGRO AND THE AMERICAN LABOR MOVEMENT* 128, 145 (J. Jacobson ed., 1968); DAVID H. GERBER, *BLACK OHIO AND THE COLOR LINE: 1860-1915*, at 303 (1976).

14. *Quoted in* SPERO & HARRIS, *supra* note 5, at 135-36.

15. Dean Kelly Miller, *The Negro as a Workingman*, AM. MERCURY, Nov. 1925, at 313.

16. Even W.E.B. Du Bois, who was generally sympathetic to socialism and unions, wrote "[I]nstead of taking the part of the Negro and helping him toward physical and economic freedom, the American labor movement from the beginning has tried to achieve freedom at the expense of the Negro." W.E.B. Du Bois, *The Denial of Economic Justice to Negroes*, THE NEW LEADER, Feb. 9, 1929, at 43-46. Du Bois was particularly bitter because, unlike his rival, Booker T. Washington, he had been a long-time advocate of the union cause in the hope that they would eventually change their racist policies. FONER, *supra* note 8, at 238-39, 244-46, 247.

segregated Jim Crow unions in order to take jobs at sub-union wages in the building trades.¹⁷ Others were forced to work for lower wages because the unions controlling their occupation would not let them in at all.

The decision of many Blacks to underbid white union labor, rather than face discriminatory treatment in Jim Crow unions, had a salutary effect on their employment prospects. By 1926, a survey could locate but fourteen local unions of Black carpenters as compared with an estimated thirty-nine in 1912,¹⁸ and the figure dropped again by 1929. The 340,000 member carpenters' union had only about 600 Black members.¹⁹ Yet despite continuous large scale migration to the North by Blacks in general and by craft workers in particular,²⁰ by 1930, the percentage of Black carpenters in the South had reached 17 percent, up from 15 percent in 1910.²¹

Blacks also retained their antebellum strength²² in the trowel trades — bricklaying, plastering, and cement finishing — composing, for example, 61 percent of the South's bricklayers and 44 percent of the plasterers and cement finishers.²³ Blacks were numerous enough in those fields to create their own informal training programs and to allow their employers to withstand labor boycotts by White unionists seeking revenge for the "crime" of hiring Black labor.²⁴ Blacks so dominated these fields that White unionists sometimes felt compelled to offer them equal status.²⁵

Despite the exclusion of Blacks from craft unions, in 1930 the construction industry provided southern Blacks with more jobs than any industry except agriculture and domestic service.²⁶ Because the effects of union and educational discrimination were hardly felt in unskilled construction work,²⁷ Blacks performed most of that work. In at least six southern cities Blacks composed more than eighty percent of the unskilled construction force.²⁸

B. *The Growth of Legislation Regulating Labor on Public Works*

Beginning in the immediate post-Civil War period, building trade unions lobbied for legislation that would help them monopolize labor in the growing market of state and local public works. Much of this labor was explicitly discriminatory in nature. An early California statute banned the

17. NORTHROP, *supra* note 6, at 28; *see also id.* at 339-40 (Black bricklayers respond to discrimination in local by forming an independent association working at less than union scale).

18. Johnson, *supra* note 12.

19. *Id.* at 114.

20. NORTHROP, *supra* note 6, at 21.

21. Kruman, *supra* note 10, at 38.

22. NORTHROP, *supra* note 6, at xc.

23. Kruman, *supra* note 10, at 38.

24. Marshall, *supra* note 13, at 145.

25. NORTHROP, *supra* note 6, at 7, 44. However, Northrup exaggerates the extent to which trowel trade unions actually granted Blacks equal status. The Plasterers Union, for example, had fewer than 100 Black members out of 30,000 union members. Johnson, *supra* note 12, at 114.

26. Kruman, *supra* note 10, at 38.

27. Johnson, *supra* note 12, at 114.

28. Kruman, *supra* note 10, at 38-39.

use of Chinese laborers on public works projects,²⁹ and an early New York statute banned the use of aliens generally.³⁰ Such legislation began to spread nationwide around the turn of the century, with state legislatures acquiescing to union demands to ban the employment of aliens³¹ and citizens of other states.³² The latter type of statute particularly harmed the stream of laborers, both Black and White, who migrated from the South in search of employment opportunities.

Other statutes regulating labor on public works projects were not explicitly discriminatory, but had discriminatory effects. The most restrictive of those statutes required that public works contractors use only union labor. More common were statutes requiring that contractors pay the "prevailing wage" to workers, which generally meant the union wage. Such statutes froze out laborers who could only gain employment by undercutting the union wage, either because they were unskilled,³³ because the unions discriminated against them (as in the case of aliens), or for both reasons. The laws generally did not exist in the South, and their relatively minor effects on Blacks were more incidental than purposeful.³⁴

In 1903, the Supreme Court ruled that regulation of labor on public works did not violate the Fourteenth Amendment.³⁵ State courts nevertheless invalidated public works labor statutes on various state constitutional

29. *Ex Parte Kuback*, 85 Cal. 274 (1890). The Los Angeles City Council passed a similarly discriminatory statute around the same time. GRACE H. STIMSON, *RISE OF THE LABOR MOVEMENT IN LOS ANGELES* 100 (1955).

30. New York Laws of 1870, ch. 385, amended by New York Laws of 1894, ch. 622.

31. See *City of Chicago v. Hulbert*, 68 N.E. 786, 205 Ill. 346 (1903); *People v. Coler*, 166 N.Y. 1, 59 N.E. 716 (1901); *People v. Warren*, 34 N.Y. Supp. 942, 13 Misc. 615 (Sup. Ct. 1895) (all discussing laws banning employment of aliens). The Supreme Court upheld discrimination against aliens on the public works projects in *Heim v. McCall*, 239 U.S. 175 (1915) and *Crane v. New York*, 239 U.S. 195 (1915). See generally Thomas R. Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916).

32. See *People v. Coler*, 166 N.Y. 1, 59 N.E. 716 (1901).

33. Cf. *People v. Coler*, 166 N.Y. 1, 59 N.E. 716 (1901), in which the New York State Court of Appeals struck down a prevailing wage law:

Such a law may indeed benefit for a time the favored few who possess the largest capacity to earn the largest wages, and in this view it may be said that it provides only for the survival of the fittest. But the effect of the law must be that those who are too young or too old, or for any reason less competent than their neighbors, must be deprived of all opportunity to secure employment on all public works in their respective callings, and so the tendency of such legislation is to check individual exertion and to suppress industrial freedom.

Coler, 166 N.Y. at 16-17, 59 N.E. at 721. Justice Landes, concurring, added:

"To enact that no less than the prevailing rate of wages shall be paid by such contractor is an indirect method of excluding from his employment those who can earn something, but not so much, since he will not hire those who cannot do the work of an able-bodied man."

Id. at 24 (Landes, J., concurring). But see *Campbell v. City of New York*, 244 N.Y. 317, 329, 155 N.E. 628, 631 (1927) (Cardozo, J.) (prevailing wage law prevents the "merciless exploitation of the indigent or the idle.")

34. In Southern cities, local officials would simply prohibit Blacks from working on large-scale projects. The city engineer in Houston, for example, told contractors in 1928 that only white men would be allowed to work on the building in which the National Democratic Convention was to be held. NATIONAL CONFERENCE OF SOCIAL WORK, *THE NEGRO INDUSTRIALIST* 460 (1928).

35. *Atkins v. Kansas*, 191 U.S. 207 (1903).

grounds.³⁶ By the late 1920s, only a few states had valid prevailing wage laws on the books.

By the 1920s, the demographics of union discrimination changed. During and after World War I, foreign immigration to the United States slowed and aliens ceased to pose a serious threat to union dominance of the construction industry. A new "threat" soon arose in the form of Black migrants from the South. Black labor was in high demand in the North, particularly in industries prone to strikes.³⁷ The AFL was not, to say the least, happy with this development.

In one infamous racial incident in 1917, riots against Blacks broke out in East St. Louis, Illinois,³⁸ leading to the deaths of thirty-nine Blacks.³⁹ The major provocateur of the riots was Edward F. Mason, Secretary of the East St. Louis AFL Central Trades & Labor Union.⁴⁰ He called on union members to march on city hall to demand a halt to "the importation" of Southern Blacks, and the deportation of those who had already arrived.⁴¹ "The immigration of the Southern Negro into our city," Mason stated, was a "growing menace."⁴² Samuel Gompers, President of the AFL, defended the rioters on the grounds that the capitalists of East St. Louis had been "luring colored men into that city to supplant white labor."⁴³

Despite the AFL's agitation in East St. Louis and other cities, Black workers continued to move northward. By 1930, they composed a proportion of the northern urban construction worker force that approximated the Black proportion of the total northern urban population.⁴⁴ As in the South, Blacks managed to acquire a disproportionate share of unskilled construction jobs, while lack of skills and discriminatory union practices forced Blacks to accept lower-paying non-union employment in order to maintain a diminished presence in skilled construction work. For example, while Blacks made up about 4.8 percent of New York City's total population, they constituted about 2.5 percent of the city's skilled construction workers and 7.3 percent of the unskilled.⁴⁵ In Chicago, Blacks composed 7 percent of the total population, 3.5 percent of the skilled workers, and 13.2 percent of the unskilled.⁴⁶ 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 sug-

36. *E.g.*, *Holden v. City of Alton*, 179 Ill. 318, 53 N.E. 556 (1899); *Fiske v. People*, 188 Ill. 206, 58 N.E. 985 (1900); *Street v. Varney Electrical Supply*, 160 Ind. 338, 66 N.E. 895 (1903); *Miller v. City of Des Moines*, 143 Iowa 409, 122 N.W. 226 (1909); *Lewis v. Board of Educ.*, 139 Mich. 306, 102 N.W. 756 (1905); *Wright v. Hoctor*, 95 Neb. 342, 145 N.W. 704 (1914).

37. SPERO & HARRIS, *supra* note 5, at 149-50.

38. Herbert Hill, *Labor Unions and the Negro*, COMMENTARY, Dec. 1959, at 479.

39. August Meier & Elliot Rudwick, *Attitudes of Negro Leaders Toward the American Labor Movement from the Civil War to World War I*, in *THE NEGRO AND THE AMERICAN LABOR MOVEMENT* 27, 47 (J. Jacobson ed. 1968).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 482. The NAACP sent W.E.B. Du Bois to determine the causes of the riots. Du Bois charged "This program [was] engineered by Gompers and his Trade Unions." MEIER & RUDWICK, *supra* note 40, at 47.

44. Kruman, *supra* note 10, at 39.

45. *Id.*

46. *Id.*

gests that the foothold was a tenuous one."⁴⁷ The Davis-Bacon Act was soon to further weaken that foothold.

C. *The Origins of the Davis-Bacon Act*

Many construction unions continued to exclude Blacks at the time Davis-Bacon was passed. In 1928, a survey of construction unions revealed the following:

- "Practically none" of the members of the electricians' union were Black
- the sheet metal workers' union had no Blacks among its 25,000 members
- the plasterers' unions had only 100 Black members among its 30,000 members, despite the presence of 6,000 Blacks in the trade
- the plumbers and steam fitters had "a long history of successfully maneuvering to avoid Negro membership"
- the carpenters had 340,000 members, among whom only 592 were Black⁴⁸

Small wonder, then, that even small-scale migration by Black workers to union strongholds in the Northeast and Midwest was quite upsetting to the labor movement. As a contemporary source noted: "Negroes outside the South are a small factor in the building trades, yet they have been able to depress the market here and there, in Chicago, Pittsburgh, Cleveland, and elsewhere, to an extent sufficient to cause bitter complaint from the white unions which commonly bar them from membership . . . [T]heir numbers, though small, were sufficient to create an oversupply of certain types of building labor and to depress established standards, even though no attempt was made to undercut prevailing rates."⁴⁹

Competition between Black workers and exclusionary unions set the backdrop for the Davis-Bacon Act.⁵⁰ New York was one of the few states to retain a prevailing wage law in the 1920s. The law could protect White union construction workers from Black competition on state public works, but not on federal projects.

Enter Representative Robert Bacon of Long Island, New York. In 1927, a contractor from Alabama won a bid to build a Veteran's Bureau hospital in Bacon's congressional district. The contractor brought a crew of Black laborers from the South to work on the project. In response, Bacon introduced House Bill 1709, "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."⁵¹

47. *Id.*

48. Johnson, *supra* note 12, at 114.

49. STERLING D. SPERO & ABRAM L. HARRIS, *THE BLACK WORKER: THE NEGRO AND THE LABOR MOVEMENT* 178 (1931) (emphasis added); *see also* ABRAHAM EPSTEIN, *THE NEGRO MIGRANT IN PITTSBURGH* 41 (reprint ed. 1969) (Blacks believed that unions opposed making them members because they feared doing so would "flood the city with skilled Southern Negroes").

50. At this time, cities such as Jacksonville and Tampa, Florida, were passing ordinances prohibiting Black contractors from working in White neighborhoods. NATIONAL CONFERENCE OF SOCIAL WORK, *supra* note 34, at 460.

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

According to Bacon, the workers brought into his district “were herded onto this job, they were housed in shacks, they were paid a very low wage, and the work proceeded. Of course, that meant that the labor conditions in that part of New York State where this hospital was to be built were entirely upset. It meant that the neighboring community was very upset.”⁵²

In response to Representative Bacon’s complaints, Congressman William Upshaw of Georgia 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.”⁵³ At least publicly, Bacon denied any specific animus against Blacks. He responded: “I just merely mention that fact because that was true in this particular case, but the same thing would be true if you should bring in a lot of Mexican laborers or if you brought in any nonunion laborer from any other state.”⁵⁴ But Upshaw’s comment is revealing, because although Bacon had never stated that the workers from Alabama were Black, Upshaw clearly understood the racist subtext of Bacon’s complaint.

1. 1928 Hearings

Hearings held the following year on another of Bacon’s bills, House Bill 11141, “A Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Give Certain Preferences in the Employment of Labor,”⁵⁵ give further insight into the racial animus that led to the passage of Davis-Bacon. Bacon submitted a letter to the Committee on Labor from James J. Davis, who was then the Secretary of Labor, and later became a Senator and Davis-Bacon co-sponsor. The letter stated that Secretary Davis was asked his opinion on the bill, and was “enclosing herewith a copy of a memorandum submitted to me by the Commission of the Bureau of Labor Statistics in connection with this very bill and which I entirely indorse [sic].”⁵⁶

52. *Id.* In order to see the racist implications of Representative Bacon’s comments, compare them with the statements of Mr. Victor Olander, Secretary of the Illinois State Federation of Labor, explaining the causes of the 1917 East St. Louis race riots in which dozens of Blacks were killed:

The railroads developed “a general propaganda in East St. Louis to bring them (Negroes) there and dump them there, and to let them run wild in the city without any place to sleep or live after they were through with them. At the time of the riot, every shed and shack in that town was filled.”

Testimony before the Chicago Commission on Race Relations, Aug. 16, 1920, pp. 8-9, *quoted in SPERO & HARRIS, supra* note 6, at 162. The riots started largely because union officials stirred up hatred of Black newcomers. While it is undoubtedly true that living and working conditions for the Blacks employed in Bacon’s district were far from ideal, that situation was due largely to the exclusionary practices of unions and others which Bacon’s bill would only encourage.

53. *Id.* at 3.

54. *Id.* at 4.

55. The bill would have required federal contractors to give preference to residents of the state where the work is performed, with priority given to veterans, non-veteran residents, American citizens, and aliens, in that order.

56. *Preferences in the Employment of Labor on Federal Construction Works: Hearings on H.R. 11141 Before the Comm. on Labor, 70th Cong., 1st Sess. 4-5 (1928)*, (emphasis added).

The memorandum, from Ethelbert Stewart, Commissioner of Labor Statistics, stated that "Congressman Bacon's case, which we learned was accurate in detail was this: 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*, housed them in barracks and boxcars, permitting no one to see them; that he employed no local labor."⁵⁷ Stewart added that the practice of bringing workers from the South adds "confusion to the question of workmen's compensation, as these gangs of southern negro labor carried around from State to State originate for the most part in Southern States which have no workmen's compensation law In addition to this, there is nothing to prevent the contractor having this class of labor from throwing an injured worker out of his gang upon the charity of the city or State of New York, since he is under no obligation to take care of or return the negro workmen to his home."⁵⁸

Testimony by union representatives supporting the bill reveals that there was a definite racial element to their support of the bill. William J. Spencer, Secretary of the buildings trades department of the American Federation of Labor testified: "There are complaints from all hospitals of the Veteran's Bureau against the condition of employment on these jobs. That is true whether the job is in the States of Washington, Oregon, Oklahoma, or Florida. The same complaints come in. They are due to the fact that a contractor from Alabama may go to North Port and take a crew of *negro* workers and house them on the site of construction within a stockade and feed them and keep his organization intact thereby and work that job contrary to the existing practices in the city of New York."⁵⁹

Emil Preiss, business manager of Local No. 3, International Brotherhood of Electrical Workers, New York City, who was from Bacon's district, stated that "[t]here are thousands of skilled mechanics in [Long Island] today who are unable to obtain employment on [the Veteran's hospital], owing to the fact that poorly paid labor is imported and being housed somewhat like cattle on the job and that labor is living under conditions that an American workman could not countenance."⁶⁰ Preiss added that "the class of mechanics they are using out there today is an undesirable element of people. They are mixing with that community, but the community is refusing to house these people who can not be housed on the jobs."⁶¹

Another telling moment in the hearings came during the testimony of James G. Higgins, general organizer of the United Association of Journeymen Plumbers and Steamfitters of the United States and Canada in Chicago. Congressman Harry Rowbottom of Indiana asked Mr. Higgins, "Is it not a fact that most of this labor that is imported into the various States of the North and West are nonunion labor." Mr. Higgins replied, "That is true."⁶² This colloquy takes on particular significance given Spero and

57. *Id.*

58. *Id.*

59. *Id.* at 17 (emphasis added).

60. *Id.* at 21. This testimony also appears in the March 1930 hearings discussed below.

61. *Id.* at 22-23. This testimony also appears in the March 1930 hearings discussed below.

62. *Id.* at 14. This testimony also appears in the March 1930 hearings discussed below.

Harris's observation that Blacks migrating from the South at this time depressed wage rates in various cities, including Mr. Higgins' Chicago.⁶³

2. 1930 Hearings

In March 1930, the House Committee on Labor held hearings on House Bill 7995, "A Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Give Certain Preferences in the Employment of Labor," and House Bill 9232, "A Bill to Regulate the Rates of Wages to Be Paid to Laborers and Mechanics employed by Contractors and Subcontractors on Public Works of the United States and of the District of Columbia." Rep. Bacon submitted the former bill, and Rep. Sproul of Illinois the latter. The Sproul bill required that federal contractors and subcontractors pay the prevailing wage; it was the first bill to do so.

Representative Bacon stated during the hearings on his bill that he was in favor of requiring contractors to pay the prevailing wage, but believed that such a provision would be unconstitutional because it is too vague.⁶⁴ He also reiterated that he was led to introduce the bill because of the incident in which the contractor from Alabama built the hospital in his district. Bacon pointed out that "[t]his contractor picked up Government work all over the United States simply because they [sic] could make a low bid by bringing in cheap labor from Alabama"⁶⁵

Another interesting aspect of Bacon's testimony is that it refutes the claim, made by union supporters of Davis-Bacon then and now, that Davis-Bacon legislation is necessary to ensure good quality work by favoring skilled union workers. Or, at least, this reasoning was not a motivating factor in the passage of Davis-Bacon. Rep. Charles Easterly of Pennsylvania, referring to the contractor that built the veteran's hospital in Bacon's district, asked Bacon, "Is this Alabama concern that you have reference to, a good concern?" Bacon responded, "Yes, they do good work; at least I am so informed."⁶⁶

Later in his testimony, Rep. Bacon submitted a letter he had sent to a fellow Congressman. In this letter, Bacon argued that his bill was "aimed, and the purpose of the bill is directed against, a monopoly of the benefits of labor by a special few, namely, those gangs of imported workmen, under the strict control of a contractor, who moves them from one part of the country to the other in chasing Federal construction work."⁶⁷

Later in the March 1930 hearing, Rep. Sproul discussed his reasons for introducing the prevailing wage bill. He stated that "[i]t is manifestly unfair that a contractor who pays the prevailing rate of wages in the locality in which the Government's work is done, and who bases his bid for the work upon the prevailing wage scales, should be underbid by a contractor whose intent is, if he is awarded the contract, to import labor at a much lower

63. See SPERO & HARRIS, *supra* note 5.

64. *Employment of Labor on Federal Construction Work: Hearings on H.R. 7995 and H.R. 9232 Before the Comm. on Labor, 71st Cong., 2d Sess. 5 (1930).*

65. *Id.* at 6.

66. *Id.* at 6.

67. *Id.* at 8.

scale of wages . . . What follows? He imports labor to which he pays less than the prevailing wage."⁶⁸

Rep. Sproul himself made no explicit references to Blacks. However, of the four examples he gave of situations that his bill will prevent, one definitely involved Black workers and the other probably did. (The other two may have as well, but there is no direct evidence.) Sproul complained that at St. Elizabeth's Hospital the contractor paid bricklayers only \$8 a day, compared to a prevailing wage of \$13 a day.⁶⁹ Later in the hearing, Rep. John J. Cochran reported that he had "received numerous complaints in recent months about southern contractors employing low-paid *colored* mechanics getting the work and bringing the employees from the South. Just recently there was trouble at St. Elizabeth's Hospital."⁷⁰

Another example presented by Rep. Sproul was a contract for brickwork in Quantico, Virginia. According to Sproul, "Men were brought from other sections, with railroad tickets in some instances furnished."⁷¹ Anyone with a passing knowledge of Black labor history knows that southern Blacks were often attracted to work projects by labor agents who gave them train passage. Poor Black sharecroppers could not afford the fare otherwise. After the Supreme Court upheld laws restricting labor agents in *Williams v. Fears*,⁷² southern states and localities made a cottage industry of passings laws restricting labor agents from recruiting Black workers.⁷³

3. 1931 Hearings

In January 1931, the House Committee on Labor held hearings on House Bill 16619, a bill that was submitted by Rep. Bacon and was to become the Davis-Bacon Act.⁷⁴ Rep. Richard Welch of California, the chairman of the committee, stated that he did not expect the hearings to go on long, given that "hearings were had in full on what were known as the Sproul and the Bacon bills last session, and I know that each and every member of the committee is thoroughly familiar with the question involved and the bill now under consideration."⁷⁵ Rep. Bacon argued that the bill would prevent federal contractors from importing "cheap, bootleg labor" into a federal construction site and would remove the temptation to import "cheap, bootleg, itinerant labor."⁷⁶

The Senate hearings on Davis-Bacon in February 1931, were rather short. American Federation of Labor president, William Green, testified at the hearings. Green noted that "[c]olored labor is being brought in to de-

68. *Id.* at 18.

69. *Id.*

70. *Id.* at 26-27 (emphasis added).

71. *Id.*

72. 178 U.S. 270 (1900).

73. See Leo Alilunas, *Statutory Means of Impeding Emigration of the Negro*, 22 J. NEGRO HIST. 148 (1937); Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161 (1984).

74. *Regulation of Hours Paid to Employees by Contractors Awarded Government Building Contracts: Hearings on H.R. 16619 Before the Comm. on Labor*, 71st Cong., 3d Sess. (1931).

75. *Id.* at 12.

76. *Id.* at 20.

moralize wage rates" in a federal post office job in Kingsport, Tennessee.⁷⁷ T. A. Lane, of the Bricklayers' Union, also remarked upon the Kingsport case, noting that "wage reduction is taking place in Tennessee right today."⁷⁸ Lane added that "cheap labor" was being imported from North Carolina to work on a post office in Alexandria, and that the Blair Company (which had built the building with Black workers in Bacon's district) had, within the last six weeks, acquired the contracts for the office in Spartanburg, S.C., the post office at Kosciusko, the Memphis veterans' building, and the post office at Streator, Ill.⁷⁹

4. 1931 Congressional Record Debate

The debate in the Senate over the Davis-Bacon bill, as recorded in the Congressional Record, was only a page long, and contained no direct or indirect references to Blacks. The House, however, was a different matter. Direct or possible references to Black construction workers included the following:

Mr. LaGuardia — "A contractor from Alabama was awarded the contract for the Northport Hospital, a Veterans' Bureau hospital. I saw with my own eyes the labor that he imported there from the South and the conditions under which they were working. These unfortunate men were huddled in shacks living under most wretched conditions and being paid wages far below the standard. These unfortunate men were being exploited by the contract. Local skilled and unskilled labor were not employed. The workmanship of the cheap imported labor was of course very inferior."⁸⁰

Mr. Bacon — "The unscrupulous contractor who hitherto came in with cheap, bootleg labor must now come in and pay the prevailing rate of wages in the community where the building is to be built . . ."⁸¹

Mr. Bacon — "Members of Congress have been flooded with protests from all over the country that certain Federal contractors on current jobs are bringing into local communities outside labor, cheap labor, bootleg labor. . ."⁸²

Mr. Cochran — "What would be the result if cheap labor was brought into my city? It would be resented, and trouble would result."⁸³

Mr. Allgood — "Reference has been made to a contractor from Alabama who went to New York with bootleg labor. That is a fact. That contractor has *cheap colored labor* that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country. This bill has merit, and with the extensive building program now being entered into, it is very important that we enact this measure."⁸⁴

77. *Wages of Laborers and Mechanics on Public Buildings: Hearing on S. 5904 Before the Committee on Manufactures, 71st Cong., 3d Sess. 10 (1931).*

78. *Id.* at 15.

79. *Id.* at 16.

80. 74 CONG. REC. at 6510.

81. *Id.*

82. *Id.* at 6511.

83. *Id.* at 6512.

84. *Id.* at 6513 (emphasis added).

Mr. Granfield — “This legislation will compel the contractors to pay the prevailing wage scale in the vicinity of the building projects and will prevent the importation of labor from distant points at wages far below the prevailing rates.”⁸⁵

Mr. Granfield — “We do not want to witness in my district the scandalous spectacle that occurred in Lawrence when bootleg labor was imported into that city. . . .”⁸⁶

Mr. Kopp — criticizes “cheap wage rates paid to imported workmen”⁸⁷

Mr. McCormack — “Its passage will meet the approval of everyone except the contractors who, in the past, have been using imported labor, which is invariably cheap labor. The passage of this bill removes from a contractor the incentive or motive to import cheap labor from one section of the country to another.”⁸⁸

Mr. Fitzgerald — “I am for it because of the bitter experience of my home city, Dayton, Ohio, in the erection of the new Hospital at the Central Branch of the Soldiers Home. . . . Men were lured from distant places to work on this hospital. . . . Not only did the labor organizations protest, but . . . the officers of the community chest, who could foresee at the termination of this work, these people from miles away stranded as derelicts of the community for our already outraged people to support.”⁸⁹

Mr. Condon — “Much harm and injustice have already been done by greedy and unprincipled contractors who have taken advantage of their freedom from such restraint as here proposed to exploit the desperate unemployed by transporting laborers and tradesmen to distant points in order to employ them at starvation wages.”⁹⁰

Mr. Zihlman — “In so many cases successful bidders have selfishly imported labor from distant localities and have exploited this labor at wages far below local wage rates. Many of the local contractors of the District of Columbia have felt this unfair and unhealthy competition. Local artisans and mechanics, many of whom are family men, owning their own homes and whose standards of living have long been adjusted to local wage scales, can not hope to compete with this migratory labor. A number of contracts here in the District of Columbia have been awarded to a firm who have [sic] imported labor and established a wage scale which the local laborers and mechanics can not meet.”⁹¹

Mr. Glover — “This bill is very important for the protection of labor in my State, the great State of Arkansas If foreign or transient labor was imported to take the place of the laborers and mechanics who will be employed and should be employed to build these buildings, it would be very hurtful to local labor.”⁹²

85. *Id.*

86. *Id.* at 6515.

87. *Id.* at 6515.

88. *Id.* at 6516.

89. *Id.* at 6517-18.

90. *Id.* at 6519.

91. *Id.* at 6520.

92. *Id.* at 6518-19.

III. DISCRIMINATORY EFFECTS

A. *Depression Era*

The Davis-Bacon Act, which passed on March 3, 1931⁹³, had negative effects on Black workers almost immediately. The federal government was about to embark on an ambitious public works program in order to create jobs in the depths of the Depression. The program would soon account for half of all money spent on construction work.⁹⁴ Because of Davis-Bacon, a disproportionate share of these federal construction jobs went to whites.

The Act set wages on federal construction jobs based on the "prevailing wage."⁹⁵ The only recourse Blacks had in a labor market dominated by exclusionary unions was their willingness to work for less money than whites. The Act prohibited Black workers from exercising that advantage by setting a universal wage.

Moreover, the Act hurt Blacks by encouraging contractors to hire union labor. In 1935, Congress amended Davis-Bacon to reduce the minimum contract amount covered to \$2,000, and to provide for predetermination of wages by the Department of Labor.⁹⁶ In response, Department of Labor promulgated regulations for Davis-Bacon that remained largely unchanged until 1983.⁹⁷ Under those regulations, in any area in which construction labor was at least thirty percent unionized, wages had to be paid at union scale. According to Davis-Bacon expert Armand Thieblot, Jr., this rule guaranteed that almost all Davis-Bacon wages would be set according to union wages.⁹⁸ Because the union wage rule meant that there was no economic benefit to hiring nonunion labor, it made economic sense for contractors to hire the generally more highly skilled unionized workers. Moreover, because they had to pay the same wages regardless of who they hired, contractors working on large-scale federal construction found it most efficient to recruit construction workers directly through discriminatory AFL union locals.⁹⁹ Skilled Black workers in the South were displaced because of Davis-Bacon wage requirements.¹⁰⁰

Contractors also faced political pressure to hire only white, union labor: if a contractor did not hire union labor, well-organized union locals had the power to pressure the Department of Labor to "investigate" that contractor's labor practices, a costly diversion even for a law-abiding contractor.¹⁰¹ Local government pressure to encourage contractors to hire union labor was exerted as well.¹⁰²

93. Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931).

94. Armand J. THIEBLOT, *THE DAVIS BACON ACT* 11 (1975).

95. Davis Bacon Act, *supra* note 93.

96. Pub. L. No. 403 74th Cong.

97. Armand J. Thieblot, Jr., *Prevailing Wage Laws of the States*, GOV'T UNION REV., Fall 1983, at 3, 23. The Secretary of Labor established a structure for selecting a rate from those collected by a survey of the existing work force. This method was the Secretary's own creation, and a regulatory, rather than statutory, provision. ARMAND J. THIEBLOT, JR., *PREVAILING WAGE LEGISLATION* 40-43 (1986). It remained informal until it was codified in 1952. Procedures for Predetermination of Wage Rates, 29 C.F.R. §§ 1.1-1.9 (1985).

98. Thieblot, *supra* note 97, at 37-39.

99. ROBERT C. WEAVER, *NEGRO LABOR: A NATIONAL PROBLEM* 10 (1948).

100. *Id.* at 10.

101. *Id.*

102. *Id.* at 12.

For those reasons, the vast majority of Davis-Bacon contractors opted for union labor. Because the craft unions had few or no Black members, those contractors rarely hired Blacks. To compound matters, already-weak segregated AFL local unions, which could have been the source of unionized construction jobs for Blacks, had been among the first victims of the economic downturn; many of them had simply ceased to exist.¹⁰³ Ironically, considering that Davis-Bacon was supposedly passed to protect local workers, unions insisted that employers bring in union labor from distant cities rather than hire local nonunion Blacks.

In perhaps the most devastating long-term blow to Black construction workers, Davis-Bacon Act regulations promulgated by the Department of Labor failed to recognize categories of unskilled workers in training for skilled positions other than union apprentices, even in the rare instances when such categories were sanctioned by local craft union rules. Unions rarely allowed Blacks into their apprenticeship programs. While Blacks could sometimes get unskilled work as laborers, such jobs paid high, union-dictated wages, leading to the severe underutilization of laborers on Davis-Bacon projects. Moreover, laborers received no training, and were forbidden to use tools in any way. Davis-Bacon regulations thus not only limited the employment opportunities of unskilled Blacks, but prevented them from acquiring skills as well. Because of discrimination in union and public vocational school training programs, the only way Blacks could become skilled workers was to accept unskilled employment and learn on the job.¹⁰⁴ As of 1940, Blacks composed 19 percent of the 435,000 unskilled "construction laborers" in the country and 45 percent of the 87,060 "construction laborers" in the South.¹⁰⁵ As a result of Davis-Bacon, these workers were, at best, permanently relegated to unskilled jobs on Davis-Bacon projects.

B. *World War II*

As federal government involvement in construction grew through New Deal public works projects, craft union discrimination continued. As of 1940, five unions — the Electricians, the Plumbers and Steamfitters, the Bridge and Structural Iron Workers, the Granite Cutters, and the Flint Glass Workers — excluded Blacks by tacit agreement.¹⁰⁶

The national carpenters' and painters' unions did not have rules providing for the exclusion or segregation of Black workers, but there was a great deal of discrimination against Blacks among the locals of both of those unions. The central organizations of those unions did not openly sanction this discrimination, but it was always tacitly condoned.¹⁰⁷ Of the non-trowel trades construction unions, only the Bricklayers' Union made any attempt to enforce racial equality in the constituent bodies, but those

103. NORTHRUP, *supra* note 6, at 29.

104. *Id.* at 38.

105. *Id.* at 46.

106. 2 Gunner MYRDAL, AN AMERICAN DILEMMA 1298 n.7 (1943).

107. *Id.* at 1299 n.7.

attempts were sporadic and not very vigorous, and much discrimination continued.¹⁰⁸

Union policies resulted in continued discrimination in government contract work in the war industries,¹⁰⁹ which, particularly in the South, generally either excluded Blacks entirely or confined them to unskilled work.¹¹⁰ To make matters worse, in 1941, Davis-Bacon was extended to cover contracts awarded by means other than competitive bidding; many contracts awarded immediately preceding U.S. entry into World War II were negotiated on a non-competitive, cost-plus basis.¹¹¹ Moreover, at the start of World War II, federal agencies began signing "stabilization agreements," i.e., agreements preserving the status quo with unions.¹¹² These agreements were first effected in the construction industry and gave a closed shop to the Building Construction Trades Department of the AFL.¹¹³ The stabilization pacts often resulted in the disqualification of Black skilled and semi-skilled workers from defense construction.¹¹⁴

Fortunately for Blacks, due to necessity they were not completely excluded from defense construction. Many army camps were built in the South, and there simply were not enough white workers to fill the available jobs, particularly since the residential type of construction involved was a specialty of Black carpenters.¹¹⁵ The federal government was, therefore, sometimes able to pressure unions to relent and allow Blacks into their carpentry unions, or at least to form new segregated locals.¹¹⁶ In many other cases, however, Blacks were excluded from major construction projects, and in some cities were banned from defense construction work altogether by union policies.¹¹⁷

The standardization of wages and further unionization brought about by Davis-Bacon during the War threatened the future of southern Black carpenters. Their ability to maintain their control over small-scale construction jobs was attributable to their acceptance of a wage differential, which placed their rate below the white nonunion rate, and considerably below the union scale.¹¹⁸ The Carpenters' Union had previously not been well-organized in this relatively unlucrative area. The bonanza brought on by federal wartime construction and high Davis-Bacon wages, however, changed their attitudes. The Carpenters' Union began to organize in residential construction, threatening the jobs of Black carpenters in the post-war period when labor shortages would disappear.¹¹⁹

108. *Id.*

109. See generally WEAVER, *supra* note 99, at 16-40.

110. NORTHROP, *supra* note 6, at 21.

111. Amendment, P.L. Nos. 22, 241 (H.R. 3325, 5312), 77th Cong. 1st sess. (1941).

112. WEAVER, *supra* note 99, at 35; John Payton, *Redressing the Exclusion of and Discrimination Against Black Workers in the Skilled Construction Trades: The Approach of the Washington Lawyers' Committee for Civil Rights Under Law*, 27 How. L.J. 1397, 1403-04 (1984).

113. WEAVER, *supra* note 99, at 35.

114. *Id.* at 35-36.

115. *Id.* at 18-19.

116. *Id.* at 28-32.

117. *Id.* at 35.

118. NORTHROP, *supra* note 6, at 34.

119. *Id.* at 34.

In response to complaints of discrimination in public works projects during World War II, the federal government set up 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.¹²⁰

C. *Post World War II*

By 1950, Blacks constituted only a small percentage of skilled building trades workers, primarily because of Davis-Bacon and other institutionalized forms of union-sponsored discrimination. For example, only one percent of the electricians and 3.24 percent of the carpenters in the United States were Black in 1950.¹²¹ The figures on Black participation in apprenticeship programs were even more bleak.¹²² Black apprentices ranged from .6 percent to 4.1 percent of apprentices in various skilled trades.¹²³ Because of union discrimination, by the late 1950s, Blacks in the construction industry were limited almost entirely to unskilled jobs.¹²⁴

President Eisenhower tried to alleviate discrimination against Black workers in federal public works by establishing the President's Committee on Government Contracts (PCGC).¹²⁵ However, the PCGC did not have jurisdiction over labor unions.¹²⁶ This rendered it almost totally ineffective, because unions, not employers, were the major source of discrimination against Black construction workers.¹²⁷ As of January 1, 1959, complaints of discrimination were pending with the (helpless) PCGC against many of America's leading international unions.¹²⁸ As of 1961, Blacks were still barred from the unions of the electrical workers, operating engineers, plumbers, plasterers, and sheet metal workers, among others.¹²⁹ In one shocking incident, because the local union refused membership to non-whites, Blacks were prevented from working on the construction of the Rayburn House of Representatives office building.¹³⁰

President Kennedy's Committee on Equal Opportunity (PCEO), appointed in March 1961, took a more direct approach to unions. President Kennedy's executive order gave the PCEO power to require contractors to submit compliance reports giving information concerning the racial prac-

120. See generally LOUIS RUCHAMES, *RACE, JOBS, & POLITICS: THE STORY OF THE FEPC* (1953).

121. FONER, *supra* note 8, at 238.

122. *Id.*

123. Marshall, *supra* note 13, at 171 (Table A-6).

124. Herman D. Block, *Craft Unions and the Negro in Historical Perspective*, 43 J. NEGRO HIST. 10, 24 (1958).

125. Marshall, *supra* note 13, at 219.

126. *Id.* at 220.

127. *Id.* at 222; see also Julius Jacobson, *Union Conservatism: A Barrier to Racial Equality*, in *THE NEGRO AND THE AMERICAN LABOR MOVEMENT* 1, 17 (J. Jacobson ed. 1968) ("No one doubts that employers discriminate. Nevertheless, it is no less that in innumerable cases it is the unions that, in effect, do the hiring and the discriminating while individual employers are often prepared to hire Negroes. That is the way it works in many of the building craft unions.")

128. Hill, *supra* note 38, at 586.

129. Herbert Hill, *Racism Within Organized Labor: A Report of Five Years of the AFL-CIO, 1955-1960*, 30 J. NEGRO EDUC. 109, 113 (1961).

130. Hill, *supra* note 38, at 486.

tices of unions dealt with by these contractors.¹³¹ Still, the effects on discrimination were not great because of union intransigence.

Throughout this period, craft unions pleaded innocent to charges of discrimination. Their lack of Black members, they claimed, was due to the fact that there was a shortage of skilled Black labor. They neglected to mention that this shortage was created by the unions themselves, who used government money for apprenticeship programs but excluded Blacks from those programs.¹³² Meanwhile, in the mid-to-late 1960s, 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).¹³³

Even federal efforts to insure compliance with the 1964 Civil Rights Act did not completely shield Blacks from the discriminatory effects of Davis-Bacon. 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," and thus were subject to Davis-Bacon.¹³⁴

According to Department of Labor Statistics, because of union exclusionary policies as late as 1970, almost all Blacks in construction were still in low-paying unskilled jobs.¹³⁵ Yet, because of Davis-Bacon, federal contractors were still not allowed to pay workers at wage rates suitable for unskilled labor.¹³⁶ 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."¹³⁷

Thus, at the same time that the Department of Labor was launching its "Philadelphia Plan" and other city affirmative action "plans" in order to encourage the use of skilled minority workers in federal construction projects,¹³⁸ its Davis-Bacon rules were effectively keeping the vast majority of unskilled Black workers out of such projects, where they could have

131. Marshall, *supra* note 13, at 226.

132. See *id.* at 123 (Table 6-1) (discrimination in New York); Herbert Hill, *Racial Discrimination in the Nation's Apprenticeship Training Programs*, PHYLON, Fall 1962, at 215; ADVISORY COMMITTEES TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORTS ON APPRENTICESHIPS (1964) (discrimination in California, Connecticut, Washington, D.C., Florida, Maryland, New Jersey, New York, Tennessee & Wisconsin); Hill, *supra* note 129, at 116; Irving Kovarsky, *Apprenticeship Training Programs and Racial Discrimination*, 50 IOWA L.J. 755 (1965); George Strauss & Sidney Ingerman, *Public Policy and Discrimination in Apprenticeship*, 16 HASTINGS L.J. 285 (1965).

133. Herbert Hill, *Black Labor and Affirmative Action: An Historical Perspective*, in THE QUESTION OF DISCRIMINATION 190, 238, 258 n.181 (S. Shulman & W. Darity eds., 1989).

134. Quoted in HILL, *supra* note 11, at 389.

135. Payton, *supra* note 112, at 1411.

136. ARMAND J. THIEBLOT, PREVAILING WAGE LEGISLATION 59 (1986).

137. Department of Labor, Field Operations Handbook entry no. 15611 (Nov. 26, 1969), quoted in Thieblot, *supra* note 94, at 23.

138. Herbert Hill, *The AFL-CIO and the Black Worker: Twenty-Five Years After the Merger*, 10 J. INTERGROUP RELATIONS 5, 20 (1982); Payton, *supra* note 112, at 1407. The Philadelphia

gained employment and learned skills on the job.¹³⁹ The legal system was finally reacting to the reality of discrimination by craft unions. Indeed, the earliest decisions of the Second,¹⁴⁰ Fifth,¹⁴¹ Sixth,¹⁴² Seventh,¹⁴³ and Ninth Circuits¹⁴⁴ upholding quotas all involved discrimination by the craft unions that benefited from Davis-Bacon. Yet, there was no serious political or legal challenge to Davis-Bacon at this time.

The Department of Labor continued to recognize unskilled 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. If they were not formally participating in this type of program, they had to be considered, for pay purposes, journeymen of the trade to which they were apprenticed.¹⁴⁵ Indeed, an employee had to be paid for the day at the highest level at which he did any work at all. So, if a laborer hammered in one nail, for example, he automatically became a carpenter and had to be paid as such.¹⁴⁶ In the interest of efficiency, contractors would hire a skilled construction worker, almost always white, instead of an unskilled helper, often Black, because he had to pay them the same rate.

A 1974 survey of 1,402 contractors, both union and open-shop firms, revealed that Davis-Bacon did indeed lead to decreased minority employment possibilities.¹⁴⁷ On a weighted strength of ten, the contractors disagreed at a strength level of eight that "[m]inority employment possibilities are improved by the Davis-Bacon Act."¹⁴⁸

A report issued by the Comptroller General of the United States in 1979 agreed 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 ununionized sector of the construction industry."¹⁴⁹

A 1980 report of the American Enterprise Institute added that Davis-Bacon is harmful to minority workers because so few positions are available on Davis-Bacon covered work under the categories of helper, learner,

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).

139. RICHARD L. ROWAN & LESTER RUBIN, *OPENING THE SKILLED CONSTRUCTION TRADES TO BLACKS* 94 (1972). Davis-Bacon rules also worked against Black workers at this time because they prevented nonunion contractors from obtaining federal contracts. According to one contemporary study, unlike union contractors, who were hampered by discriminatory unions, non-union contractors "hire[] those who come in to apply, regardless of race." *Id.* at 93.

140. *United States v. Lathers Local 46*, 471 F.2d 408 (2d Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

141. *International Ass'n Heat & Frost Insulators Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969).

142. *United States v. International Bhd. Elec. Workers Local 212*, 472 F.2d 634 (6th Cir. 1973).

143. *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir. 1972).

144. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

145. Thieblot, *supra* note 94, at 23.

146. *Id.* at 46.

147. THIEBLOT, *supra* note 136, at 157.

148. *Id.* at 159.

149. 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).

or trainee.¹⁵⁰ The report pointed out that very few union journeymen are minority group members, and it is in the other nonjourneyman categories that most would begin their construction careers.¹⁵¹ The report added that union apprenticeship programs, even if they don't discriminate, severely limit the number of people who may enroll and impose arbitrary educational requirements, thus freezing out the most disadvantaged workers.¹⁵² Abolishing Davis-Bacon would allow more participation by nonunion firms in construction, thus advancing the employment practices of minority workers.¹⁵³

Furthermore, former NAACP General Counsel Herbert Hill notes that even when the numbers of Black union apprentices increases because of government pressure, many of those apprentices never become journeymen.¹⁵⁴ Hill concluded that, as of 1982, "the pattern of racial exclusion in the building trades [] remained intact."¹⁵⁵ An economist writing in 1982 added that the low percentage of skilled Black construction workers "is due primarily to Davis-Bacon."¹⁵⁶

Even if discrimination in craft unions were to cease, Blacks would still be better off without Davis-Bacon and its favoritism to union labor. Contrary to the CRS study, the most recent study of Davis-Bacon asserts that "[o]ne would much more likely find minorities among the helpers and trainees of non-union firms than in the registered apprenticeship programs."¹⁵⁷ Recent statistics also show that minorities compose a larger percentage of the nonunion construction labor force than of the union labor force.¹⁵⁸ Open shop firms not only hire more minorities, they hire them for better positions. As one study concluded, "open shop firms employed a higher proportion of minority workers as craftsmen."¹⁵⁹

Moreover, more than 90% of minority contractors are nonunion, and they tend to hire many minority workers.¹⁶⁰ As their market share increases, they will undoubtedly hire a significant proportion of minorities in construction. Ralph C. Thomas III, former Executive Director of the National Association of Minority Contractors, which represents over 60,000

150. JOHN P. GOULD & GEORGE BILLINGMAYER, *THE ECONOMICS OF THE DAVIS-BACON ACT* 62 (1980).

151. *Id.*

152. *Id.*

153. *Id.*

154. Hill, *supra* note 138, at 8.

155. *Id.*

156. William A. Keyes, *The Minimum Wage and the Davis-Bacon Act: Employment Effects on Minorities and Youth*, 3 J. LAB. RES. 398, 407 (1982); see also Morgan O. Reynolds, *Power and Privilege: Labor Unions in America* 137 (1984); Kenneth A. Kovach, *Should the Davis-Bacon Act Be Repealed?*, BUS. HORIZONS, Sept.-Oct. 1983, at 33.

157. THIEBLOT, *supra* note 137, at 128.

158. *Id.*

159. *Id.*

160. Personal interview with Dominick Ozanne, President of National Association of Minority Contractors. Ozanne's figure of 90%+ is an estimate. Hard statistics of the percentage of unionized minority contractors are hard to come by. One study, however, shows that as of 1970, 16 percent of Black contractors and 6 percent of Mexican-American contractors in Atlanta were unionized, and, in that same year, there were no unionized Black contractors in Houston. Robert W. Glover, *Minority Construction Contractors*, in *EMPLOYMENT OF BLACKS IN THE SOUTH* 157, 163 (R. Marshall & V. Christian eds., 1978).

minority contractors,¹⁶¹ believes that the key to solving the problem of underrepresentation of minorities in the building trades is through on-the-job training in nonunion, minority-owned construction firms.¹⁶² According to Thomas, however, Davis-Bacon prevents minority contractors from successfully training workers.¹⁶³ 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."¹⁶⁴

D. *Recent Reforms*

Fortunately for Black construction workers, recent changes in Davis-Bacon regulations have made it easier for open shop firms to compete for contracts covered by Davis-Bacon. In 1982, the Department of Labor redefined "prevailing wages" from the old thirty percent rule to a new fifty percent rule.¹⁶⁵ The fifty percent rule, combined with the fact that far fewer construction workers are unionized today than several decades ago,¹⁶⁶ means that Davis-Bacon wage rates will be set according to union rates only in a few large, highly unionized cities. Even so, in many large cities ununionized minority workers and contractors will continue to be frozen out of Davis-Bacon projects. In addition, the reform fails to reduce the paperwork requirements which prevent 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.¹⁶⁷ The construction unions challenged this new regulation on the grounds that it violated the Department's mandate to establish prevailing wages.¹⁶⁸ The courts agreed,¹⁶⁹ and the Department was forced to rewrite the regulation.

The new rule, which went into effect on Feb. 4, 1991,¹⁷⁰ defines a helper as "a semiskilled worker who works under the direction of, and as-

161. Oversight Hearings on the Davis-Bacon Act: *Hearings Before the Subcommittee on Labor Standards of the House Comm. on Educ. and Labor*, 99th Cong., 2d Sess. 422-27 (1986) (testimony of National Ass'n of Minority Contractors).

162. *Id.* at 2-3.

163. *Id.*

164. *Id.* at 3.

165. 29 C.F.R. § 21 1.2(a) (July 1, 1989 ed.). This rule was challenged, but upheld in *Building and Constr. Trades Dept., AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983).

166. In 1970, only 30 percent of the United States' 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. Patrick Barry, *Congress's Deconstruction Theory*, WASH. MONTHLY, Jan. 1990, at 10, 15-16.

167. 29 C.F.R. § 5.2 (m).

168. *See, e.g., Building and Constr. Trades Dept., AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983).

169. *Id.*

170. 55 Fed. Reg. 50,148. The rule was upheld in *Building and Constr. Trades Dept., AFL-CIO v. Dole*, No. 82-1631 (HHG) (D.D.C. Sept. 24, 1990). An appeal is currently pending in the

sists journeymen."¹⁷¹ This new rule will be a boon to Black workers,¹⁷² who are best represented in the construction industry in the unskilled categories.¹⁷³ The rule does not go far enough, however. Most important, 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.¹⁷⁴

IV. 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. Such state and local legislation has not been a major concern of this paper, however, it should be noted that these laws have discriminatory effects similar to Davis-Bacon.¹⁷⁵ Considering that much state prevailing wage legislation was passed initially around the same time as Davis-Bacon, it may often have had similarly discriminatory origins.¹⁷⁶

Despite the pernicious effects of Davis-Bacon on Blacks, and its blatantly discriminatory origins, civil rights activists have generally ignored the law. Only one of the many histories of Black workers mentions the law, and then only once, and not by name.¹⁷⁷ No lawsuits have been filed by civil rights groups against the law; in fact, the NAACP, among other civil rights groups, actually supports the law,¹⁷⁸ perhaps because of its close

D.C. Circuit, case no. 90-5345. There have also been continued legislative efforts to repeal the rule.

171. 29 C.F.R. 5.2(n)(4).

172. Expressing a contrary opinion in a case filed by the AFL-CIO Building and Construction Trades Department against implementation of the new helper rules, John Dunlop, a professor at Harvard and former Secretary of Labor, filed an affidavit denying that allowing the use of helpers on Davis-Bacon projects will enhance work opportunities for women and minorities. Building and Construction Trade 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*, 55 FED. CONTRACTS REP. (BNA) 72 (1991).

173. R. Vender & L. Gallaway, Racial Dimensions of the Davis-Bacon Act, Table 3 (unpublished, undated manuscript, on file with author).

174. In nonunion construction, almost one-third of all workers are typically helpers. THIEBLOT, *supra* note 137, at 58-59.

175. Ohio, for example, has one of the most pro-union prevailing rate laws. A repeal effort on behalf of minority workers was mounted in late 1979. Thieblot, *Prevailing Wage Laws of the States*, GOV'T UNION REV., Fall 1983, at 53. In 1985, The Governor of Louisiana vetoed a measure that would have repealed the State's prevailing wage law on the grounds that the law was "the only process by which [Mexicans and other aliens working in local construction] can be identified and remedial actions taken by administrative enforcement." *Prevailing Wage Repeal Fails in Louisiana*, 31 Construction Lab. Rep. (BNA), at 485-86 (July 3, 1985). For a study of the discriminatory effects of the Wisconsin prevailing wage law, see William J. Hunter, *Discriminatory Effects of Wisconsin's Prevailing Wage Laws*, HEARTLAND POLICY STUDY No. 24 (Dec. 2, 1988).

176. For a study of the discriminatory origins and impact of New York's prevailing wage law, see David E. Bernstein, *It's Time to Reform New York's Prevailing Wage Law* (Empire Foundation for Policy Research 1993). For a study of the Wisconsin prevailing wage law, see William J. Hunter, *Discriminatory Effects of Wisconsin's Prevailing Wage Laws*, HEARTLAND POLICY STUDY No. 24 (Dec. 2, 1988).

177. WEAVER, *supra* note 99, at 10.

178. According to Congressman Ronald Dellums, another Davis-Bacon supporter, the NAACP, the Mexican-American Unity Council, the National Women's Political Caucus, and the

political alliance with organized labor. Grass-roots activists, in contrast, generally oppose Davis-Bacon and its state and local equivalents because they reduce employment opportunities.¹⁷⁹

Hopefully, once the story of Davis-Bacon circulates in legal circles, the current situation will be corrected, and Davis-Bacon will be successfully challenged in court, or repealed legislatively. 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 one of the remaining racist stains on American law will be erased.

Navajo Tribal Council have all endorsed Davis-Bacon. 136 Cong. Rec. 2355 (1990) (remarks of Rep. Dellums). The latter group's support is particularly ironic, given that Davis-Bacon has particularly harsh effects on Native Americans. See Keyes, *supra* note 157, at 405.

179. See, e.g., *The Bronx Gets a Flea Market*, ISSUES & VIEWS, Fall 1990, at 2 (detailing opposition of local activist to Davis-Bacon Act).