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Author(s): [Lowell Gallaway](http://go.galegroup.com/ps/advancedSearch.do?inputFieldName%280%29=AU&prodId=AONE&userGroupName=oran95108&method=doSearch&inputFieldValue%280%29=%22Lowell+Gallaway%22&searchType=AdvancedSearchForm) and [Richard Vedder](http://go.galegroup.com/ps/advancedSearch.do?inputFieldName%280%29=AU&prodId=AONE&userGroupName=oran95108&method=doSearch&inputFieldValue%280%29=%22Richard+Vedder%22&searchType=AdvancedSearchForm)

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A venerable form of legislation on the books since the Great Depression is under legislative and judicial attack. During the past year, Congress has considered repealing or significantly modifying the Davis-Bacon Act, which requires contractors on federally funded contracts to pay "prevailing" (union scale) wages on projects. This congressional initiative follows action by at least nine states to repeal their "little Davis-Bacon" prevailing wage statutes since 1979.

The legislative impetus for repeal relates to costs: by raising wages paid on federally funded contracts, the Davis-Bacon Act increases the cost of government. Advocates of repeal suggest that it would reduce expenditures without reducing the amount of government provided services. For example, a highway contractor could hire a college student for eight dollars an hour to be a traffic flagger instead of using a unionized worker making perhaps twice or more that amount.

What is the judicial challenge to this legislation all about? There is considerable evidence that the Davis-Bacon Act and related legislation (the Walsh-Healey Act of 1936 and the Service Contract Act of 1965) serve to reduce employment and business opportunities for minorities, particularly African-Americans. Indeed, the historical record suggests that this adverse impact on minorities was intended by some of the advocates of the legislation.

In the midst of the Great Depression in 1931, President Herbert Hoover signed what was then called the Bacon-Davis bill, providing "prevailing local wages" on federal construction projects. "Prevailing wages" have been consistently interpreted as meaning the scale paid to unionized workers. Since that time, the Davis-Bacon Act has affected labor market conditions in the construction industry. Emulating the federal government, 31 state governments and the District of Columbia have "little Davis-Bacon" acts that extend the influence that this legislation has on labor markets and the public.

Initially, Davis-Bacon seemed to directly affect a relatively small proportion of construction industry projects. Federally sponsored construction projects in 1929, for example, totaled less than $125 million, only 2 percent of total construction. Yet over time, the use of federal funds on state and local projects extended the scope of Davis-Bacon very considerably, as did the various legislative extensions, including the "little Davis-Bacon" statutes in the various states. As a consequence, by 1993, some 27 percent of all construction in the United States was directly carried out in the public sector; since some private sector construction has governmental financing, over half of all construction now comes under prevailing wage provisions.

At the time the legislation passed Congress, it appeared outwardly to be a relatively non-controversial statute designed to bring "order" to the construction industry. There had been 142 strikes and lockouts in construction in New York state alone in 1929. House debate on the bill lasted but 40 minutes, and, as described by the New York Times, "... the vote against the measure was negligible." The measure had been supported by the Hoover administration, with the secretary of labor arguing that most labor disputes in construction arose from the use of "outside" labor, and that the Davis-Bacon bill would deal with the problem. Although it had some concerns with details, even the Associated General Contractors of America at their January 29, 1931 meeting in San Francisco endorsed the bill in principle.

The intent of the bill was clearly to assure that local construction companies and workers would not be undercut by low wage competition from the outside. Why did it pass in 1931? Largely because the dominant economic thinking at the time was that the worsening business conditions reflected inadequate purchasing power, and that the maintenance of high wages was necessary to stem the decline. At the time of Davis-Bacon's passage, we estimate that the national unemployment rate exceeded 14 percent. Thus, in addition to its other supposed benefits, some members of Congress believed that the pending legislation was an anticyclical depression-fighting device.

Yet a review of the debate on the bill reveals that there was another less admirable motive behind the legislation. The fear over wage cutting in the construction industry was in large part a concern about blacks and foreigners taking jobs from native-born white Americans. The impetus for the bill, at least in part, was a fear of the deleterious effects of labor competition from these groups on native white Americans.

The author of the bill in the House of Representatives, Robert Bacon, was the epitome of elitist Eastern Establishment Republican thinking. He was born in a proper place (Boston), went to the right college (Harvard, for both undergraduate and law degrees), belonged to the right church (Episcopalian), and was a member of the most fashionable clubs (over a dozen, including the Union League Club, the Knickerbocker Club, and the New York Yacht Club). He lived in an upscale area of Long Island that was so solidly Republican that he withstood the GOP electoral massacre of 1932 that ended three generations of Republican dominance of American politics.

A 32nd degree Mason, Bacon championed restricting immigration to the United States since his election to the House in 1922. Moreover, his concern about foreigners had a very distinct racist dimension. In early 1927, he approvingly introduced into the Congressional Record a statement from 34 professors about the nation's new restrictive immigration law that said, in part:

We urge the extension of the quota system to all countries of North and South America ... in which the population is not predominantly of the white race.... We further urge the prompt putting into effect of that provision of the immigration act ... whereby the quotas ... are to be adjusted so as to conform to the officially estimated number of persons now in the country of each national origin.... Only by this method can that large proportion of our population which is descended from the colonists and other early settlers ... have their proper racial representation.... Congress wisely concluded that only by such a system ... could the racial status quo ... be maintained.

The "Davis" of Davis-Bacon was James J. Davis; the Davis-Bacon Act was enacted within weeks of his joining the Senate. Davis did not have Bacon's blue-blood background, being a Welsh immigrant who spent years as the director general of the Loyal Order of Moose. Davis served as secretary of labor under three presidents (Harding, Coolidge and, for a short while, Hoover), championing immigration restriction in general and the racially-tainted national origins system in particular.

Davis and Bacon had been drawn together on the issue of public construction employment as early as 1928, when Davis was secretary of labor. Bacon, perturbed that the government contract for the North Port Veteran's Hospital being built in his Long Island District had been given to an Alabama contractor, had already introduced legislation that would establish hiring preferences for veterans and in-state labor, as opposed to out-of-state labor and aliens. Davis's Commissioner of Labor Statistics, Ethelbert Stewart, wrote a memorandum to Davis, dated March 3, 1928, supporting Bacon's bill. In it, Stewart describes the North Port Hospital incident, which Bacon himself admits spurred him to begin introducing hiring preferences legislation. It is revealing:

Congressman Bacon's case, which we learned was accurate ... 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 box cars, permitting no one to see them; that he employed no local labor whatsoever.

Davis relayed his full endorsement of Stewart's memorandum to Representative Bacon in a March 16, 1928 letter. From the beginning, there were racial overtones to the Davis-Bacon relationship. They were not alone in this regard. An excellent summary of a host of sometimes explicit, and more often implicit, concerns about the racial and ethnic character of the "cheap" labor that Davis-Bacon was designed to exclude is provided by Representative Miles C. Allgood's (D-Ala) during the final debate on the Davis-Bacon legislation: "[I]t is labor of that sort [colored] that is in competition with white labor throughout the country."

The Davis-Bacon Act and Racial Discrimination

All human beings "discriminate" against or for other human beings in some fashion. When a man falls in love with a woman and he thinks that she is a more preferable companion than other women, he "discriminates" in favor of her. Coaches and athletic directors do not let men participate on women's basketball teams. Military leaders do not allow women to fight in combat, believing that such activity is "men's work." Men are prohibited from using restrooms designated for women, and vice versa. Colleges discriminate against students with low grades or test scores in their admission procedures. Fancy restaurants discriminate against patrons who are not well dressed.

Discrimination, then, is a common practice, and some forms of it are generally regarded as acceptable and even desirable. Yet other forms are regarded generally as unacceptable. For several decades, it has been considered immoral or wrong, and even illegal, to make decisions solely on the basis of the color of a person's skin. Having said that, however, some people have a "taste" for racial discrimination, to use University of Chicago economist and Nobel laureate Gary Becker's apt words. Some individuals, other things equal, will prefer to rent to whites rather than to blacks, have their children marry whites rather than nonwhites, or have whites as a neighbor. Of course, the discrimination may be directed against whites as well as in favor of them.

Markets are where most American economic resource allocation decisions are made, and in most respects markets are "color blind." Yet in one respect markets, and, in particular, competition within markets, reduce the ability of individuals to indulge in their taste for discrimination. More precisely, competitive markets make racial discrimination more costly.

Suppose there is a highly competitive market for electricians. There are hundreds of competing employees within a metropolitan area seeking jobs as electricians, and dozens of employers seeking their services in carrying out thousands of jobs, big and small, within the community. Suppose at a wage of $10 a hour, there are 200 qualified electricians willing to work, and also that employers want to hire 200 electricians at that wage. That is what economists would call an "equilibrium" wage, one at which there is no unemployment - every qualified electrician gets a job.

Typically, some of the 200 electricians will be black or members of another minority. Typically also, some of the employers will possess a degree of racial (or gender or ethnic) prejudice. Suppose the owner of XYZ Construction has a strong antipathy for blacks, but gets only a single response to the want ad for electricians, from a highly qualified black. XYZ has a dilemma - it can hire the black, which it does not want to do, or it can readvertise, offering to pay $11 an hour, hoping to induce some white electricians making $10 an hour with competing construction firms to apply. Suppose it does the latter. The firm gets its white electrician, but only at a cost of perhaps two thousand dollars a year. The prejudicial employer loses some bids on jobs because of its comparatively high price for labor, or accepts lower profits on the jobs that are won. Either way, its income is reduced. The market, in effect, punishes employers who are not color blind.

Consider an alterative scenario. Suppose a government agency, say, the U.S. Department of Labor, says that a minimum wage of $20 an hour must be paid to electricians. Suppose at that wage some 250 individuals want a job (some persons who have electrician skills will switch to offering their services as electricians full time if wages were doubled from previous levels). Yet employers only want to hire 150 at the higher wage.

At the $20 wage, there are 100 unemployed electricians (250 minus 150). Some of them are white, others are black. Suppose now the XYZ Construction Co. advertises for an electrician. Instead of the single black applicant, it likely will get dozens of applications, many from white electricians. The prejudicial employer now can choose from qualified black and white applicants and, given its racial prejudice and an inability to pay lower wages than $20, it will hire a white electrician. Governmental interference with wage determination serves to allow the employer to indulge in its taste for discrimination without any incremental cost being imposed on it. Unwittingly and unintentionally, the governmental minimum wage policy promotes racial discrimination. It also increases unemployment generally, but particularly among blacks, raising the ratio of black to white unemployment (assuming significant racial discrimination exists towards blacks).

The example given above is analogous to what the Davis-Bacon Act does. The legislation specifies that "prevailing wages" will be paid on government-financed projects, which, in turn, often means very high union pay scales well above the equilibrium wage necessary to secure a desired number of workers. Often "prevailing wages" might be double the non-union equilibrium wage. That was the case in the era in which Davis-Bacon was enacted. The prevailing wage in different cities, using union scale, varied from $1.00 to $1.75 an hour for bricklayers, at a time when the average wage of a production worker in manufacturing was barely 50 cents, and when non-union construction craft wages averaged about 80 cents. Because of these above equilibrium mandated wages, the Davis-Bacon Act generates unemployment, since it becomes unprofitable to pay some workers the higher government-mandated rate of pay. Moreover, Davis-Bacon promotes overt racially discriminatory practices, to the extent employers have a "taste for discrimination."

Growth in Black Labor in Construction

In the two decades before the passage of the Davis-Bacon Act, there was a significant growth in the number of black employees outside the South in major construction crafts. Looking at seven crafts (carpenters, painters, bricklayers, plasterers, cement finishers, plumbers and electricians), labor economist Herbert Northrup compared observed employment patterns in 38 non-Southern states as well as in the South. The data were for the two decades prior to the enactment of Davis-Bacon, as well as the first decade after enactment.

Starting with the North (38 non-Southern states), black employment in the construction trades rose dramatically in both of the decades before 1930, more in the 1920s than in the wartime era. In the 1920s, the growth in black employment in the seven construction trades averaged an impressive 5.17 percent a year, compared with white employment growth of only 2.08 percent annually. In the 1930s, employment generally declined in the craft trades in the North, but the number of jobs declined more for blacks than for whites, reversing the trend of more employment growth for blacks.

We constructed what we call a black construction employment opportunity index, which is black employment growth in construction as a percent of that for whites. The index had a value of 286 for the 1920s (substantially greater black job growth), then fell sharply to under 87 for the 1930s. Blacks fell as a percentage of workers in the measured trades during the 1930s, contrasted with growth in the 1920s.

In the South, the number of black craftsmen grew very slowly in the 1910-30 era. Since this was an era of substantial black migration to the North, however, it can be surmised that opportunities for southern blacks in the trades may have been better than the statistics indicate. In the 1930s, the trend of employment growth was reversed, and the number of blacks in the trades fell while the number of whites continued to increase significantly.

These statistics suggest that black employment progress in construction was reversed in the 1930s - the decade in which the Davis-Bacon Act took effect. The results are precisely what one would predict from economic theory where there is a significant presence of racial prejudice.

A second approach in measuring the racial impact of Davis-Bacon is to evaluate trends in comparably skilled blue-collar occupations. We calculated an employment opportunity index for black labor for the ten censuses from 1900 to 1990 for four skilled construction crafts: carpenters, plumbers, painters and electricians. Also, an index was computed for construction laborers, unskilled workers who worked in construction but did not have relatively highly paid craft skills.

Two trends are quite apparent from this calculation. Over time, black participation has risen in these construction crafts, so underrepresentation of blacks has declined. Second, however, even in 1990 blacks were underrepresented in all four of the higher paying skilled occupations. In the numerically most important, carpentry, blacks were represented in only about half the proportion that the total (largely white) population was. Indeed, in that craft, the underrepresentation of blacks in 1990 was greater than it was 30 years earlier.

The underrepresentation of blacks in the construction trades is not confined to these four skilled occupations. We calculated a black labor force employment opportunity index for blacks in all "construction crafts" as defined for 1990 from census data; the estimate, 62.3, suggests that blacks were still significantly underrepresented in the construction trades in 1990. The proportion of black workers in construction crafts was 37.7 percent less than that for the general population.

A better insight into the possible effects of Davis-Bacon is obtained when the skilled construction crafts are compared with other blue-collar occupations, several of which require skills that are perhaps similar in magnitude to those required in construction. Six construction craft occupations are compared with six other blue-collar occupations not directly impacted by the Davis-Bacon Act. The six construction craft occupations are the four mentioned above along with brick-layers and stone masons, and plasterers. The six nonconstruction occupations examined are: typesetters, compositors and printing press operators; tool and die makers; cabinetmakers; butchers; cotton mill operatives; and machinists. The first four of these occupations are at least semi-skilled jobs requiring perhaps similar amounts of apprentice training as the construction crafts (indeed, they have similar apprenticeship periods under union contracts.) The last two jobs are factory jobs that on balance probably require lower skill levels.

While blacks were underrepresented in the highly paid construction occupations in 1930 (an employment opportunity index of 31.5), their relative presence in these occupations was more than double what it was in the roughly comparable non-construction blue collar occupations. Since Davis-Bacon, relative black participation in construction crafts has grown. Nonetheless, in 1990 black participation in the construction crafts was still nearly 30 percent below what the black labor force suggests it should have been, with underrepresentation existing in a majority of occupations. With respect to the non-construction jobs, black progress was far more substantial since Davis-Bacon, and indeed by 1990 blacks were significantly overrepresented in these blue collar occupations.

This fits the hypothesis that Davis-Bacon and related prevailing wage legislation has had a detrimental impact on black employment opportunities in construction. Indeed, the underrepresentation in construction induced by Davis-Bacon and related legislation may have artificially increased the labor supply in other blue collar occupations, partially explaining the overrepresentation observed.

The Davis-Bacon Act and the Real World

A suspicious reader might view the historical, theoretical and statistical analysis above as intangible, circumstantial evidence that the Davis-Bacon Act has lowered job opportunities for minorities. Yet the litigation response of blacks in the construction industry supports it. Black contractors have sued the U.S. Department of Labor (Brazier Construction Co. v. Robert Reich), arguing that the law hurts minorities. Nona Brazier, a female black contractor in the State of Washington, has been joined by numerous others. Art Pearson, who began his career as a black electrician in 1956, later starting his own contracting business says:

The Davis-Bacon Act puts me between a rock and a hard place.... I would like to be able to hire workers and pay them different rates, based on how good they are. I would pay some people more than what is currently the prevailing wage rate, and others less, depending on how good they are.... I would also want to have some workers cross over, do some electrician work, some laborer work, some other work.... The Davis-Bacon Act prevents me from doing any of this.

The president of the Bay Area Black Contractors Association, Chris Albert, tells a story about a young high school graduate who begged him for a job working as an electrician on a public housing project. Albert said "I can't hire you because ... I can't afford to hire another trainee," since he had to pay Davis-Bacon wages. The kid returned saying he would work below prevailing wages, saying he wanted to end a life of dealing in drugs. Albert reluctantly said no, and two days later the young man was shot to death.

This points to another problem of Davis-Bacon. Often minority workers lack skills for jobs, simply because they have been denied on-the-job training. Being inexperienced, they are relatively less productive, perhaps performing ten dollars an hour worth of services instead of twenty dollars done by highly experienced workers. Black contractors wanting to hire blacks simply cannot afford to do so, since worker productivity is far below the very high wage minimum set by Davis-Bacon.

Some of the strongest support for repealing Davis-Bacon comes from minority residents in public housing projects, who would like to have maintenance work performed at modest wages by their own residents, a move that would achieve three objectives. First, it would provide them income. Second, it would teach work skills and discipline. Third, it should improve the quality of their housing. A resident of the Abbottsford project in Philadelphia, Dorothy Harrell, notes that "Even though our residents would be happy to perform unskilled and semi-skilled work for $8 or $10 an hour, the Davis-Bacon Act forces the contractors to pay the prevailing wage.... A general laborer's wage right now is $25.65...." Major renovation of the over half-century old facilities is soon to begin, but it is likely that the residents who live there cannot participate in the construction project despite the many advantages of allowing their participation.

Lingering Consequences

The Davis-Bacon Act was designed to protect Northern white construction workers from competition from black workers from other regions. The very high minimum wages imposed under the legislation allowed employers to favor white workers over nonwhites without suffering financial consequences. Unskilled blacks lose opportunities to more skilled whites even when discrimination is not a motive given the high wage payments mandated by the law. Rep. Bacon's desire to maintain a predominantly white construction labor force in the North was furthered by his bill, arguably one of the most racist federal labor laws ever enacted in the United States. Despite a reduction in racially prejudicial conduct by employers over time, blacks continue to be underrepresented in construction employment, more so than in other comparable occupations not subject to the strictures imposed by Davis-Bacon. Davis-Bacon has subsidized behavior that is inconsistent with a color-blind society with equal opportunity for all regardless of race, gender or national origin.

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