SOMETHING'S EXCLUSIONARY NOT KOSHER RULE ABOUT DAVIS-BACON.

By David Bernstein

When USS-Posco Industries decided to renovate its steel plant in Contra Costa County, California, in 1987, it did what any rational business would do: It hired the company that submitted the lowest bid, a joint venture whose main partner was BE&K Construction of Birmingham, Alabama.

BE&K's bid was $400 million, $50 million lower than that of its closest competitor. Because of the massive size of the project, workers were brought in from all over the country. Although BE&K was giving work to hundreds of people, the local building unions resented the nonunion contractor. With the help of the AFL-CIO, the local unions launched a huge public-relations campaign against the project. They alleged, first of all, that the deaths of two workers on the project were due to the use of untrained, nonunion laborers. (The company replied that the union's charge was based on pure speculation.)

More important, the unions played on local resentment of the poor, often unskilled laborers who had traveled across the country to work on the project. These workers brought their families, causing temporary strains in the local social-services system. They also created unsightly conditions: Some of them lived in their cars until they could find more permanent quarters, while others set up house in trailers and cheap hotels. "It was kind of like *The Grapes of Wrath* of the construction industry," one union official told *The New York Times*.

Building on resentment of the transient workers, the unions convinced the county Board of Supervisors to pass a law requiring all contractors working on large private building projects to pay the "prevailing wage"—otherwise known as the union wage. This law takes away any economic incentive for local companies to use nonunion labor and discourages the use of unskilled workers, who are not recognized in union pay scales. Similar laws have since been passed in several other jurisdictions in Northern California, and they may be imitated elsewhere.

The origins of the Contra Costa County law are startlingly similar to the origins of the granddaddy of all prevailing-wage laws, the Davis-Bacon Act. Davis-Bacon, which was passed in 1931, requires that all federal contractors with contracts of over $2,000 pay their workers the prevailing wage.

The bill that eventually became Davis-Bacon was originally submitted to Congress in 1927 by Rep. Robert Bacon of Long Island, New York. Bacon's action was spurred by a construction project in his district. An out-of-state, nonunion contractor (coincidentally, also from Alabama) had won a bid to build a Veteran's Bureau hospital. According to Bacon, the workers "were herded onto this job, they were housed in shacks, they were paid a very low wage," all of which caused "the neighboring community [to be] very upset."

One added factor that might have upset Bacon was that all of the workers were black. In response to goading by a fellow congressman, Bacon denied any antiblack animus, declaring that his position would be the same "if you should bring in a lot of Mexican laborers or if you brought in any nonunion laborers from any other State." (Blacks and Mexicans were not allowed into most construction unions.)

Bacon submitted various versions of his bill over several congressional terms, each time failing to win passage. But as the Depression lingered, the federal government launched a massive public-works project that soon accounted for half of all American construction. Members of Congress began to see Davis-Bacon as a way to protect local, white construction workers from the competition of job-hungry blacks, who suffered the most in the terrible economic situation.

The racist intent of the statute is clear from public remarks made by individual members. Rep. John J. Cochran of Missouri, supporting Davis-Bacon, said: "I have received numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South." Rep. Clayton Allgood, in the course of floor debate on the Davis-Bacon bill, added that the measure would discourage the use of black labor, which was "in competition with white labor throughout the country."

Other members were more circumspect in their references to black labor. They railed against "cheap labor," "cheap, imported labor," men "lured from distant places to work on this new hospital," "transient labor," and "unattached migratory workmen." But American Federation of Labor President William Green, testifying on the Davis-Bacon bill before the Senate Committee on Manufactures, made clear that a major goal was the elimination of "colored labor."

Because of Davis-Bacon, almost all federal construction jobs went to whites. Discrimination was rampant throughout the construction industry—on the part of both labor unions and management. In such a labor market, the only advantage blacks had was their willingness to work for less money than whites. By setting a minimum wage, Davis-Bacon prohibited black workers from exercising that advantage. Instead, a white contractor had the choice of hiring either white or black laborers for the same price. Given white workers' general hostility to black coworkers and the white contractors' own discriminatory preferences, the contractors generally chose to hire exclusively white labor.

As of the late 1950s, union discrimination limited blacks in the construction industry almost entirely to unskilled jobs. For example, in 1950, only 1 percent of the electricians and 3.2 percent of the carpenters in the United States were black. And as late as 1961, blacks were still barred from the unions of the electrical workers, operating engineers, plumbers, plasterers, and sheet-metal workers, among others. In one shocking incident, because the local union refused membership to nonwhites, blacks weren't allowed to work on construction of the Rayburn Office Building for the House of Representatives.

To make matters even worse, the only unskilled workers that Davis-Bacon regulations recognized were those in government-approved union apprentice programs. Blacks were very occasionally allowed into labor unions of unskilled workers but almost never into union-sponsored apprenticeship programs. In 1950, blacks represented from 0.6 percent to 4.1 percent of apprentices in various skilled trades.

Davis-Bacon's restrictions on unskilled workers not only limited the employment opportunities of unskilled blacks but also kept them from acquiring skills. 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. As of 1940, blacks composed 19 percent of the 435,000 unskilled "construction laborers" in the country and 45 percent of the 87,060 in the South. Thanks to Davis-Bacon, these workers were excluded from federal building projects.

Even federal efforts to ensure compliance with the 1964 Civil Rights Act did not shield blacks from Davis-Bacon's discriminatory effects. A 1968 Equal Employment Opportunity Commission study found that "the pattern of minority employment is better for each minority group among employers who do not do 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."

By 1970, almost all blacks working in construction were still filling low-paying, unskilled jobs. Yet, because of Davis-Bacon, federal contractors were still forbidden to pay workers wages suitable for unskilled labor. Even as the Labor Depart-

BEFORE 1964, MOST CONSTRUCTION UNIONS BARRED BLACKS. DAVIS-BACON SUPPORTERS SAID THEY WANTED THE LAW TO LIMIT "COLORED LABOR."

ment was launching its Philadelphia Plan and other affirmative-action schemes to encourage the use of skilled minority workers in federal construction projects, its Davis-Bacon rules were effectively keeping the vast majority of unskilled black workers out of such projects, where they could have learned skills on the job.

The Labor Department continued to recognize unskilled workers only when they participated in government-approved apprenticeship programs. Otherwise, they had to be considered, for pay purposes, journeymen of the trade to which they were apprenticed. An employee's daily pay had to be based on the wage for the highest level of skill at which he did any work at all. So if a laborer hammered one nail, he automatically became a carpenter and had to be paid as such. Given those pay requirements, contractors would, of course, hire a skilled construction worker—almost always white—instead of an unskilled helper—often black.

Contractors who have tried to help black workers break into the construction industry have found Davis-Bacon a huge obstacle. Ralph Jones is the president of a company that manages housing projects for the Department of Housing and Urban Development. Last year, his company took over a pair of very dilapidated public housing buildings in black Tulsa, Oklahoma. Jones wanted to hire unemployed residents at $5.00 an hour to help rip out everything that needed to be ripped out before he could bring in skilled craftsmen to fix things up. But he found that he would have to pay them $14 an hour because of Davis-Bacon, and that was the end of that.

Elzie Higgibottom, a successful builder of federally subsidized low-income housing in Chicago, is deeply committed to helping build the economic base of Chicago's poor neighborhoods. But, under Davis-Bacon, Higgibottom complained to *The Washington Monthly*, "I've got to start out a guy at $16 an hour to find out if he knows how to dig a hole. I can't do that." So much for giving the unemployed a chance.

Studies by the U.S. comptroller general, the American Enterprise Institute, and economists Walter Williams and William Keyes, among others, have confirmed what Jones and Higgibottom already know from experience: Repealing Davis-Bacon would increase black participation in the construction industry. But the NAACP and other major civil rights groups, allied with unions on many issues, support Davis-Bacon and put their faith in civil-rights laws and the good will of unions.

Yet, even assuming that craft unions have changed their discriminatory ways, it will take decades for black membership to match the black share of the working population. U.S. Census data from 1980 show that blacks were significantly underrepresented in many construction crafts. Let us make the heroic—and obviously incorrect—assumption that in 1975 all craft unions not only stopped discriminating against blacks but adopted hiring quotas that reflected the percentage of blacks in the work force. Because unions follow strict seniority rules, blacks would have to wait for the retirement of all white workers employed prior to 1975 before they could achieve equal status in the unions. In other words, they'd have to wait until about 2025.

Meanwhile, blacks are still disproportionately represented as unskilled laborers in the construction industry; they are almost twice as likely as whites to hold such positions. Partly in response to this situation, the Labor Department adopted new regulations in 1982 to let Davis-Bacon contractors use unskilled helpers. After much litigation with the construction unions, and some modifications, the new rules went into effect on February 4, 1991. They promised unskilled blacks a greater opportunity to break into the construction industry.

But that wasn't the end of the story. In late March, the unions convinced a majority of the House and Senate to sneak into an emergency appropriations bill a provision prohibiting the Labor Department from spending money to put the new regulations into effect. The leading Democratic sponsors of the Civil Rights Act of 1991, showing more commitment to their union supporters than to the principle of equal economic opportunity, all voted to sustain the provision against a challenge by Sen. Don Nickles (R-Okla.). President Bush, unfortunately, signed the amended appropriations bill in April.

If the new regulations are ever implemented, they will be a boon to black and other minority workers. The rules do not go far enough, however. First, they restrict the use of helpers to areas where their use "prevails," a legally mandated but harmful qualification. Heavily unionized cities where the use of helpers doesn't "prevail" are home to millions of unskilled minority youths who will continue to be frozen out of Davis-Bacon projects.

Second, the new rules set a maximum ratio of two helpers to every three journeymen employed by a contractor. In nonunion construction, about one-third of all workers are typically helpers. But the ratio varies with the project. In small-scale construction, where highly skilled labor isn't critical, the ratio must sometimes rise above the maximum 2 to 3. So the new rule (if upheld and implemented) will still at times prove a barrier. Public housing residents who are managing their own buildings, for instance, will still find it difficult to hire unskilled or semiskilled tenants to renovate their buildings.

Indeed, while the NAACP continues to support Davis-Bacon, community activists in poor areas find the law a primary

obstacle to achieving their two main goals—increasing employment and improving housing. Mary Nelson, head of Bethel New Life, a Chicago organization that rehabilitates low-income housing, told Stephen Chapman of the *Chicago Tribune* that her organization's task would be "a thousand times easier without Davis-Bacon."

And Marshall England, a Bronx activist who encourages local black youths to become entrepreneurs, finds his housing ideas utterly thwarted by the law. England would like to see local people "homestead" dilapidated buildings that have been abandoned and are now owned by New York City. He envisions a "sweat equity" program in which young residents of the area would repair the buildings and eventually own homes in them.

But despite the billions wasted by HUD on housing projects that become uninhabitable before they are completed, and despite hundreds of millions of dollars spent by the city and the state on providing housing for New York's indigents, England cannot get any federal, state, or local funds for his project unless he pays the union wages required by Davis-Bacon and its state and local equivalents. England calls Davis-Bacon "the biggest inhibitor to good housing in poor areas."

What is really needed is a legal challenge to Davis-Bacon that will wipe the law off the books once and for all. The best hope for such a challenge is an antidiscrimination suit based on the statute's intent. In the 1977 case *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court recognized that a statute may have a discriminatory purpose that is neither "express nor appear[s] on the face of the statute." In that same case, the Court said that, "where there is proof that a discriminatory purpose has been a motivating factor," it will strictly scrutinize the law, a process few laws survive. Given the manifold evidence that Davis-Bacon was passed with discriminatory intent, the *Arlington Heights* test should be satisfied easily.

One problem with such a challenge is that the law was passed 60 years ago, making it difficult to impute discriminatory intent to today's Congress. But the law has not been substantially modified since 1935, and it still has a discriminatory impact. As a Heartland Institute study concludes, "Under the currently applicable doctrines of the Supreme Court, Davis-Bacon is unconstitutional."

Another way to launch a legal attack on Davis-Bacon is to argue that repealing the law would be a race-neutral way to encourage minority participation in government construction contracts. Ralph C. Thomas III, executive director of the National Association of Minority Contractors, says Davis-Bacon hurts minority contractors in several ways. Most minority-owned construction businesses are small and nonunion, so their manpower structures don't follow Davis-Bacon requirements, which are based on union structures. They also cannot afford the staff that would be required to meet Davis-Bacon's cumbersome record-keeping rules.

Race-conscious construction set-asides—the usual way of making room for minorities on government projects—have been among the most controversial issues to come before the Supreme Court. In various decisions, both upholding and striking down such set-asides, the Court has said repeatedly that race-neutral remedies are constitutionally preferable to race-conscious remedies. Most recently, the Court made this point in the 1989 case *City of Richmond v. Croson*. The U.S. Court of Appeals for the Ninth Circuit, in an opinion written by Judge Alex Kozinski, has gone even further, holding that race-neutral remedies must be tried before race-conscious remedies are resorted to.

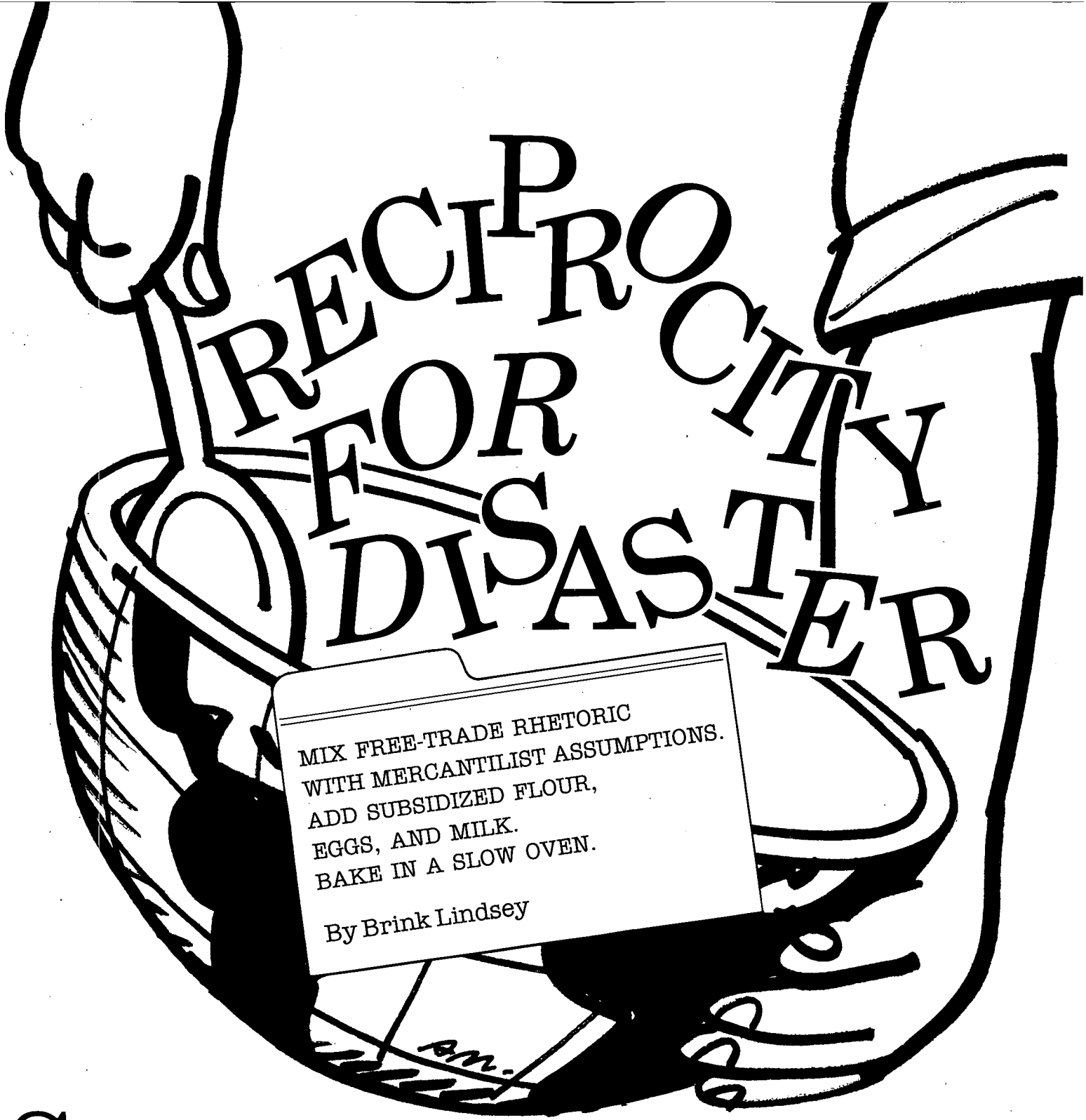
CONTRACTORS WHO TRY TO HELP BLACK WORKERS BREAK INTO THE CONSTRUCTION INDUSTRY FIND THAT DAVIS-BACON IS A HUGE OBSTACLE.

Based on Kozinski's version of the "least restrictive means" test, Congress must try eliminating Davis-Bacon as a race-neutral way to promote minority contracts. Only if repealing Davis-Bacon fails to improve the lot of black contractors can Congress adopt a set-aside program. An attack on Davis-Bacon could come from a white plaintiff challenging construction set-asides. Or a black plaintiff could argue that as long as the set-aside law stands, all racially neutral remedies must also be in place to minimize the need for quotas and the stigma they impose.

If Davis-Bacon is overturned, however, about 30 states and many localities will retain prevailing-wage laws, even though those laws have the same pernicious effects on minority workers and businesses as Davis-Bacon. Some of those laws could, of course, be subject to the same legal challenges as Davis-Bacon. Even without such a challenge, these statutes are becoming rarer. Constrained by tight budgets and lobbied by the fast-growing nonunion construction sector and local minority activists, a dozen states have repealed their prevailing-wage laws. The decline of construction unions' economic and political power explains their desperate bid to extend prevailing-wage laws to private construction in jurisdictions where unions still have clout. Legal challenges have been filed everywhere such legislation has passed.

In the long run, whatever the outcome of the court challenges, few places are likely to extend prevailing-wage requirements to the private sector. While these laws help unionized construction workers, they ultimately drive away businesses that employ other local residents. Meanwhile, the existence of such rules is a testament to the continued willingness of unions to play on prejudices against minorities and the poor in order to benefit their members. ■

David Bernstein is a recent graduate of Yale Law School.



ARTHUR MATSON

Supporters of free trade in this country spent the last decade on the defensive. The large merchandise trade deficit, as well as Japanese gains at the expense of highly visible U.S. industries, gave rise to intense pressure for new protectionist measures. Under these adverse conditions, advocates of open markets adopted a policy of tactical retreat, making measured concessions in the hopes of staving off a rout.

Now, however, free-traders are on the offensive with two major initiatives: 1) multilateral talks to liberalize global trade under the Uruguay Round of General Agreement on Tariffs and Trade (GATT) negotiations; and 2) a proposed North American free-trade agreement involving the United States, Canada, and Mexico. Though these are separate and distinct sets of negotiations, their fates became linked in the recent congressional battle over extending fast-track authority.

Fast-track authority allows the president to negotiate trade agreements that are then subject to an up-or-down vote in Congress (no congressional amendments to the agreement are allowed). Fast track is essential if these negotiations are to proceed, since no country will