

Thoughtless Think Tanks

Factoid Scholarship and Sound Bite Thinking
About the History and Intent of Prevailing Wage
Laws

By

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Origin of the Factoid—Prevailing wage Laws Are Remnant Jim Crow Laws

A Think Tank Factoid Is Created

Scholarship discovers facts. But we are living in the world of think tank scholarship. Too often, think tank scholars do not see their jobs as discovering facts. They see their job as creating factoids. Factoids are not facts. But they are treated like facts. They are presented as facts. They are packaged in sound bites. They are promulgated to and by a credulous media. And in the hands of unscrupulous editorialists and lobbyists, they are better than facts. They are factoids, a modern, easy-to-swallow substitute for the truth. In the world of think tank research on prevailing wage regulations, the classic factoid of the 1990s is this:

The original 'prevailing wage' law was dreamed up by a Long Island congressman who was shocked to learn local construction firms had been underbid for the contract to build a veterans hospital in his district by an out-of-state contractor. The contractor then proceeded to cut costs by bringing in black workers from the South, who were willing to work for less. The ensuing congressional oratory left no room for doubt that the new law, requiring any contractor on a federal construction project to pay the same high wages as the local white firms were paying, was specifically intended to block the importation of black labor.

Las Vegas Review Journal, March 30, 1997¹

The federal law was intended to protect the high wages of union construction workers—predominately white Northerners—at the expense of Southern black, non-union workers. One congressman who supported Davis-Bacon actually made reference to the "problem" of "cheap colored labor" on the floor of the U.S. House.

Mark Fischer, Mackinac Center for Public Policy, September, 1999²

The *Las Vegas Review Journal* did not create this factoid. Nor did Mark Fischer. They bought it, hook-line-and-sinker, second-hand, from a think tank in Washington. This is a story about factoids, and the facts they cover up. Where did this factoid come from? How did it spread? What are the facts it covered up?

Like Zeus springing full-grown from the forehead of Chronos, in a modern act of parthenogenesis, the myth of prevailing wage laws being Jim Crow laws sprung full-blown from the head of one Scott Alan Hodge in a 1990 editorial in the *Wall Street Journal*. The charge that prevailing wage laws, in general, and the federal Davis-Bacon Act in particular were primarily and substantially racist laws was new. As Hodge put it in 1990:

So far, debate on Davis-Bacon has focused primarily on its costs, the estimated \$1.5 billion it costs U.S. taxpayers to pay union scale when qualified workers are available at lower rates.

¹ "Time to get rid of the 'prevailing wage' law," *Las Vegas Review Journal* March 30, 1997, Sec. E. p. 2.

² Mark Fischer, "Michigan's Prevailing Wage Act: Will Common Sense Prevail?" <http://www.mackinac.org/article.asp?ID=2461>.

But that complaint avoids the real evil of Davis-Bacon: discrimination against black Americans.³

Hodge's editorial deserves extended consideration because it is the source. There is no scholarship taking this position prior to Hodge's editorial that asserts this thesis.⁴

In 1990, Hodge and other critics of prevailing wage laws had a problem. Between 1979 and 1988, nine states had repealed their state prevailing wage laws. But these states were the low apples on the tree. They were in the South or the Mountain West or New Hampshire. In short, the states that had repealed were, from a political perspective, the states most likely to repeal this regulation. Most of the nine were adjacent to the nine states that had never adopted this type of law. In 1988, advocates of prevailing wage law repeal reached for the top of the tree. They sponsored a ballot initiative in Massachusetts to repeal that state's law. This was a serious test for the political forces for repeal. Massachusetts was an early state to adopt these regulations, and it had a strong labor movement. Going head to head with the electorate as judge, the effort to repeal Massachusetts prevailing wage law failed.⁵

Furthermore, the Massachusetts campaign created an intellectual crisis for advocates for repeal. As repeal became a political issue, the respected research organization located in Massachusetts, Data Resources (a division of McGraw-Hill, Inc.) analyzed the effects of a potential state repeal. The Regional Information Group of Data Resources concluded that there were no solid prospective taxpayer savings from repeal and that the only clear outcome of repeal would be lower wages for Massachusetts' construction workers. The concluding paragraph of the report summarized their analysis:

While it does appear that some nominal tax savings can be attained by repealing the prevailing wage law, the 0.6% reduction in taxes indicated in the Most Likely scenarios would take place at the cost of increased instability in the construction labor market; fiercer competition for work from out-of-state contractors and workers, to the detriment of Massachusetts residents; and a lower standard of living for Massachusetts workers and their families. These costs would be incurred even in the event that the tax savings are less than indicated by the quantitative analysis, as increased contractor profits and decreased labor productivity would keep total cost reductions well below the amount indicated by the apparent savings in unit labor costs, while possible increases in state unemployment compensation and other social service expenditures would further offset the apparent initial savings. The only clear result of repealing the Massachusetts prevailing wage law would be lower wages for certain Massachusetts residents.⁶

So the campaign to repeal prevailing wage legislation was regrouping in 1990. If the cost argument was losing traction, another argument had to be found. That argument became the

³ Scott Alan Hodge, "Davis-Bacon: Racists Then, Racist Now," *Wall Street Journal*, June 25, 1990, p. A14. Hodge does not cite the source for his claim that Davis-Bacon costs the taxpayer \$1.5 billion. In any case, \$1.5 billion is a small percentage (around 1%-2%) of overall expenditures regulated by Davis-Bacon.

⁴ In 1975, Armond Thieblot, a vigorous critic of prevailing wage laws, in a book of 239 pages, devoted only one paragraph to the issue of race. In it he stated: "Behind the fear of itinerant workers may have been some feelings colored by racial bigotry. This issue is mentioned explicitly only once during the House debate, but the allusions to it in other speeches—including Congressman Bacon's—are thinly veiled. . . . As for "itinerant contractors, it should be noted that all contractors are mobile to some degree, moving about to find work. Much opposition to "outsiders" is expressed in all business fields by those who desire to monopolize local work. Armond Thieblot, Jr., *The Davis-Bacon Act*, University of Pennsylvania, The Wharton School, Industrial Research Unit, Labor Relations and Public Policy Series, Report No. 10, p. 9.

⁵ Mark Erlich, *Labor at the Ballot Box : the Massachusetts Prevailing Wage Campaign of 1988*, Philadelphia : Temple University Press, 1990. The only other repeal though the ballot box ever tried was in Oregon in 1994. It failed.

⁶ Donald Walls, Douglas Poutasse and Karen Devol, "The Impact of the Repeal of the Massachusetts Prevailing Wage Law," Data Resources (McGraw-Hill, Inc.), Regional Information Group, Lexington, Massachusetts, August, 1988.

assertion that prevailing wage laws were left-over Jim Crow laws. One of the many ironies in this tactical move is the fact that when advocates of repeal were lobbying Southern legislatures in Alabama, Louisiana and Florida in the 1979-88 period, the Jim Crow argument was not used. As we will see, Davis-Bacon passed almost unanimously in both the House and Senate in 1931. In all the debate around Davis-Bacon (1931) and predecessor bills going back to 1927, the only smoking guns of racist legislative intent that Hodge and others could find came from three people--two southern congressmen and one border-state congressman (Alabama, Georgia and Missouri). Northern congressmen such as the namesakes of the law, Senator John Davis (PA) and Robert Bacon (NY), and Northern supporters of Davis-Bacon such as Fiorello LaGuardia (NY), never once raised the race issue. Whatever smoking guns of Jim Crow intent came from voices from the South. Yet critics of prevailing wage laws never raised the race issue when seeking repeals in Southern states in the 1980s. From the perspective of prevailing wage critics, these laws were only labeled Jim Crow laws when the effort to repeal these laws left the South, the historical heart of Jim Crow legislation.

So the entire Jim Crow argument was omitted from repeal campaigns in Alabama, Louisiana and Florida. But even when the Jim Crow argument was raised in 1990, it was necessary to leave much unsaid to make the argument work. Hodge argued in his 1990 *Wall Street Journal* editorial:

The original Davis-Bacon Act was drafted in 1927 by New York Rep. Robert Bacon after an Alabama contractor won the bid to build a federal hospital in Bacon's district.⁷ As Bacon reported at the first hearing on this bill, "The bid ... was let to a firm from Alabama who brought some thousand non-union laborers from Alabama into Long Island, N.Y. into my congressional district." What he meant, of course is that many of the workers were black—and willing to work for less than local building tradesmen.

Bacon's complaints brought a knowing smile from Georgia Rep. William Upshaw, who commented: "You will not think that a Southern man is more than human if he smiles over the fact of your reaction to the real problem you are confronted with in any community with a superabundance or large aggregation of Negro labor."

Hodge does not report Bacon's response to Upshaw which was:

...the contractor has also brought in skilled nonunion labor from the South to do this work, some of them negroes and some of them white, but all of them are being paid very much less than the wage scale prevailing in New York State...⁸

For Bacon, the issue was not race. The issue was that both black and white workers from Alabama were being paid very much less than the wage scale prevailing in New York. Hodge and those who would repeat his argument try to characterize the Alabama contractor's labor force as entirely or primarily black. But this was not true. Hodge and his followers do not tell us that in the 1920s and 1930s, two-thirds of all Alabama construction workers were white. A typical Alabama general contractor of the time would have a white crew of carpenters, and a black crew of laborers.

⁷ In fact, the 1927 bill was not a prevailing wage regulation. Rather it was a regulation giving preference in employment on public works in a state to citizens of that state. This is an important distinction. Critics of prevailing wage laws claim that they intend to keep minorities off public construction by requiring high wages that exclude low-skilled workers. The argument asserts that minorities are low-skilled and therefore are excluded from public construction. But Bacon's original proposal would have allowed any New York citizen to work on public construction at any wage rate. Thus, it would not have excluded the many blacks that had migrated to New York during the great migration of the World War One-1920s period. Critics bring Upshaw's 1927 remark into the Davis-Bacon debate simply because there is a scarcity of smoking guns in the 1931 debate, itself.

⁸ Sixty-Ninth Congress, Second Session, House of Representatives, Hearings Before the Committee on Labor, H.R. 17069, Washington, GPO, 1927, pp. 2-4.

But more on these facts later. We need to first understand the myth. Hodge went on to quote a second Southern congressman who supported the passage of the Davis-Bacon Act in 1931:

Four years later [in 1931] during the floor debate on the bill, Alabama Rep. Miles Allgood echoed Upshaw's sentiments: "That contractor has cheap colored labor....and it is labor of that sort that is in competition with white labor....This bill has merit...It is very important that we enact this measure."

Hodge does not tell us that the Davis-Bacon Act passed the Republican House in 1931 by voice vote with only one Democratic Texas congressman arguing against the Act. Nor does he quote Northern voices such as that of New York Congressman Fiorello LaGuardia who spoke in favor of the Act. LaGuardia, in contrast to the Southern Democrats Hodge does quote, was a Republican as were both Representative Bacon and Senator Davis. He was from New York City near Bacon's Long Island district. And LaGuardia was personally familiar with the incident Bacon had mentioned. LaGuardia characterized the incident as follows:

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 contractor. Local skilled and unskilled labor were not employed. The workmanship of the cheap imported labor was of course very inferior....all that this bill does, gentlemen, is to protect the Government, as well as the workers, in carrying out the policy of paying decent American wages to workers on Government contracts. [Applause.]⁹

Factoids are foreign to nuances. Myths require simplicity. The simple factoid that Davis-Bacon was a Jim Crow law cannot admit an awareness of Davis-Bacon supporters such as LaGuardia. It is too confusing. LaGuardia, for his time, was a progressive on race issues and supportive of African-American concerns. Harlem was part of his congressional district.¹⁰ His prominent support for the Davis-Bacon Act, and the lack of racial references in his testimony do not square with the myth Hodge was trying to create. So LaGuardia is forgotten in the history Hodge writes on the editorial pages of the *Wall Street Journal*.

Who is Scott Alan Hodge? What are his credentials as an historian? It turns out that Hodge was the Grover M. Hermann Fellow in Federal Budgetary Affairs at the Heritage Institute. According to the Heritage Institute web page, "Hodge has authored over 60 Heritage Foundation studies on a wide range of issues, including the federal budget and spending policy, tax policy, "reinventing government," privatization, and closing federal agencies. He holds a B.A. from the University of Illinois at Chicago."¹¹ Hodge has recently become a Senior Fellow for Tax and Budget Policy at

9 U.S., Seventy-First Congress, Third Session, *Congressional Record-House*, February 28, 1931, p. 6510. The "[Applause]" is in the Congressional Record itself rather than an addition by this author.

10 Greenberg comments: "LaGuardia prided himself on championing the underdog. He steadfastly defended the rights of ethnic groups to receive the full range of opportunities America had to offer. While less consistent on racial issues (his [subsequent] anti-Japanese sentiment is startlingly out of character in this regard), [as mayor] he did support the equal access of African-Americans to municipal benefits. Unlike earlier administrations, LaGuardia enforced strong civil service protections against racial discrimination. Because private industry had no such standards, the city government became the largest employer of white-collar African-Americans in the New Deal period." Quoted in Greenberg, Cheryl Lynn, "Or does It Explode?" *Black Harlem in the Great Depression*, New York, Oxford University Press, 1991, p. 85.

¹¹ <http://www.heritage.org/staff/hodge.htm>

Citizens for a Sound Economy Foundation.¹² Hodge was not then, nor has he become an historian of any note.¹³ Yet his historical take on the Davis-Bacon Act has become a widely accepted and repeated factoid in the media. The *Las Vegas Review Journal* and Mark Fischer of the Mackinac Center were neither the first nor the last to trumpet Mr. Hodge's viewpoint. For example, in 1994, the *Atlanta Journal and Constitution* wrote:

U.S. REP. ROBERT BACON of New York was outraged. An Alabama contractor had won the bid to build a federal hospital in his district and minority workers were being used on the project. Rep. Miles Allgood of Alabama expressed regret for the "bootleg labor" coming from his state: "That contractor has cheap colored labor . . . and it is labor of that sort that is in competition with white labor. . . . This bill has merit . . . it is very important we enact this measure."

And so the Davis-Bacon Act of 1931 was made law. Its purpose was to squeeze out free-market workers, more often than not African-Americans, by mandating that the local prevailing wage - typically the union scale rate - be paid for work on public projects. The protectionist law worked splendidly. Davis-Bacon's effectiveness at keeping African-Americans from working on public projects was so impressive that states and cities enacted their own versions of the law. Georgia did not. Atlanta did in 1947.¹⁴

The Journal Constitution does not explain why legislation whose purpose was Jim Crow exclusion of minorities from construction met such resistance in the South in the 1930s. While Northern and Western States were passing state prevailing wage laws, Georgia, South Carolina, North Carolina, Virginia, and Mississippi all declined to do so. How did the *Atlanta Journal Constitution* become so sure of itself, and so blind to its own local Jim Crow history? Why did the *Journal Constitution* rely so heavily on the historical understanding of a non-historian with a B.A. writing for a Washington think tank? The answer is a common one. Repeat something often enough, and it becomes a factoid. In this case, conservative Washington think tanks played pass-the-baton with the Jim Crow thesis. What the Heritage Foundation asserted, the Cato Institute repeated. The Institute for Justice reasserted and the *Wall Street Journal* republished. Factoids became facts that irresponsible editorialists then promulgated to the public.

The Factoid Baton Gets Passed from One Think Tank to Another

In January of 1993, David Bernstein of the Cato Institute writes a briefing paper in which he revisits and repeats Hodge's thesis. In so doing, he adds the only additional smoking gun quote from congressmen on the question of Davis-bacon and race:

The comments of various congressmen reveal the racial animus that motivated the sponsors and supporters of the bill [the Davis-Bacon Act]. In 1930, Representative John J. Cochran of

¹² http://135.145.55.74/csefhome/bioscsef.htm#Scott_Hodge. Mr. Hodge's bona fides as presented by the Citizens for a Sound Economy Foundation describe his work subsequent to his 1990 Wall Street Journal article. "Prior to joining CSE Foundation, Mr. Hodge spent ten years at The Heritage Foundation, including eight years as the Senior Budget Analyst. While there, he edited three books on balancing the budget and streamlining the federal government and authored over 60 studies on government spending and fiscal policy. Mr. Hodge also has extensive media experience. He has conducted over 400 radio and television interviews including appearances on the "NBC Nightly News with Tom Brokaw," the "CBS Evening News with Dan Rather," CNN, Fox News, and C-SPAN. He has also authored dozens of editorials and opinion pieces for publications such as The Wall Street Journal, The Washington Post, USA Today, the New York Post, and The Washington Times."

¹³ It may be asked what this author's bona fides are in history. Peter Philips has published in the *Journal of Economic History*, *Historical Methods*, and *Business History Review*. His fields of specialty are labor economics and economic history. He regularly teaches American Economic History.

¹⁴ *The Atlanta Journal and Constitution*, June 28, 1994, SECTION: EDITORIAL; Section A; Page 8.

Missouri stated that he had “received numerous complaints in recent months about Southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South.” [Alabama] Representative Clayton Allgood, supporting Davis-Bacon on the floor of the House, complained of “cheap colored labor” that “is in competition with white labor throughout the country.”

Neither Cochran nor Allgood were sponsors of Davis-Bacon. They were not even from the majority party. Of all those who spoke on Davis-Bacon in 1931. They are the only ones to mention the issue of race. David Bernstein was a recent law school graduate,¹⁵ and he realizes that the Jim Crow thesis could not be sustained by these two passing remarks. So Bernstein emphasized a second thesis. He said that the real sponsors of the bill were indeed racist, but they spoke in code words. Rather than say “colored” labor, they said “cheap” labor. Rather than say “Negro” labor, they said “itinerant” labor. Bernstein states:

Other congressmen were more circumspect in their references to African-American labor. They railed against ‘cheap labor,’ ‘cheap imported labor,’ men ‘lured from distant places to work on this new hospital,’ ‘transient labor,’ and ‘unattached migratory workmen.’ While the congressmen were not referring exclusively to African-American labor, it is quite clear that despite their ‘thinly veiled’ references, they had African-American labor primarily in mind.¹⁶

Bernstein does not explain why proponents of Davis-Bacon felt compelled to speak in code in 1931. In a period in which Jim Crow institutions were widespread in the South and blacks were excluded from baseball, the national pastime, Bernstein does not explain why all the supporters of Davis-Bacon except two felt a need to completely hide their intentions in code words or why two congressmen felt no such compulsion. Bernstein does not consider the alternative hypothesis, that the congressmen actually meant what they said when they “railed” against cheap labor, cheap imported labor and so on.

An extensive literature search does not show that Bernstein ever wrote on this topic before or after his one briefing paper. Nevertheless, Bernstein’s views are quickly taken up by the press. His briefing paper was published on January 18, 1993. By February 27, he had an editorial in the *Cleveland Plain Dealer* repeating the assertion of Hodge under the headline “DAVIS-BACON IS A JIM CROW LABOR LAW”:

Appalled that blacks from the South were working on a federal project in his district, Rep. Robert Bacon of Long Island submitted a bill that was the antecedent of the Davis-Bacon Act.¹⁷

By July of 1993, Bernstein had a three-page spread in *USA Today (Magazine)*.¹⁸

The Factoid Becomes a Lawsuit—the Institute for Justice and Nona Brazier

On January 12, 1994, the Jim Crow thesis is repeated again in the *Wall Street Journal* in an editorial by one Nona Brazier. Under the headline “Stop Law that Hurts My Minority Business,” Brazier writes:

¹⁵ He was described in the Briefing paper as follows: “David Bernstein, a recent graduate of the Yale Law School, and clerk on the U.S. Court of Appeals for the Sixth Circuit, practices law with the Washington, D.C., law firm of Crowell and Moring.”

¹⁶ Bernstein, “The Davis-Bacon Act: Let’s Bring Jim Crow to an End,” Cato Briefing Paper, No. 17, Cato Institute, 1000 Massachusetts Avenue, N.W., Washington, D.C., January 18, 1993, p. 3.

¹⁷ David Bernstein, *Cleveland Plain Dealer*, “February 27, 1993 Saturday, SECTION: EDITORIALS & FORUM; Pg. B7.

¹⁸ *USA Today (Magazine)*, Vol. 122, No. 2578, July, 1993.

The Davis-Bacon Act was passed in 1931 when migrant black workers competed with white union labor for scarce jobs. At the urging of unions, like the American Federation of Labor, Congress neutralized black labor competition by requiring that "prevailing wages" be paid on all federal projects. In practice, "prevailing wages" meant union wages. Well-capitalized companies could afford union wages, but their unions usually kept blacks out. Black businesses --which were often less well capitalized -- could not afford to pay those prohibitive rates on labor.¹⁹

Brazier was identified by the *Wall Street Journal* as simply the co-owner of Brazier Construction. Brazier went on to argue that prevailing wage laws prevented her from offering employment opportunities to minorities:

A few weeks ago, a local minister approached me asking if my company could hire 10 gang members who wanted to escape the violence of the streets and learn a worthwhile trade. They were tired of living with bull's eyes on their backs. They needed jobs.

I had none to offer. The construction company my husband and I created to help rebuild Seattle and Tacoma, and provide jobs to the very kids I had just turned away, is now dormant. What is even more disheartening, however, is that our company did not withdraw from the market because of mismanagement or a general downturn in the construction industry.

Like many minority-owned construction firms, Brazier Construction no longer offers job opportunities because of artificially high labor costs that result from racist federal legislation enacted more than 60 years ago. This legislation is fulfilling its original, explicit intent: to keep black firms from competing for and winning federal construction projects.

What the *Wall Street Journal* did not say was that Brazier was, at the time, the Republican chair of King County (Seattle). Nor did the *Wall Street Journal* point out that Brazier had been approached by yet another Washington think tank—The Institute for Justice—to serve as chief plaintiff in a federal law suit to have the Davis-Bacon Act declared unconstitutional based on the Hodge thesis.²⁰ The lawsuit filed two months before on November 9, 1993 was to be called *Brazier, et al v Reich, Secretary of Labor*.²¹ Brazier asked the court to enjoin the act's enforcement by the Labor Department on the grounds that it violated the equal-protection and other guarantees of the Fourteenth and Fifteenth Amendments.²²

The Nameplate for a Jim Crow Lawsuit--Who Was Nona Brazier

Nona Brazier's company started with one garbage truck in 1984. It quickly became a garbage collection and recycling business which by 1991 accounted for almost one-third of all Seattle's garbage collection and one-tenth of its recyclable materials collection.²³ In 1993, her garbage and recycling company employed 40 workers, the majority African Americans and all but three previously unemployed. She paid these workers up to \$16 per hour with medical, dental and some

¹⁹ Nona Brazier, "Stop Law that Hurts My Minority Business," *Wall Street Journal*; New York; Jan 12, 1994, p. A10.

²⁰ Julie Cohen, "Minority Entrepreneurs Wage War on Wage Law," *New Jersey Law Journal*, December 13, 1993, p. 13.

²¹ Bernstein indicated in his Plain Dealer in February 1993 editorial that he was aware that there were plans afoot to file this suit.

²² I first became aware of this lawsuit in November of 1995, when the U.S. Justice Department asked me to serve as an expert on the economic and legal history of prevailing wage laws, in general, and the Davis-Bacon Act, in particular.

²³ Daryl Strickland, "South Business Snapshot," *Seattle Times*, September 11, 1991, p. E9.

pension benefits.²⁴ However, one year later, Brazier's company was "dormant". Her business was fighting bankruptcy, she asserted, because prevailing wages prevented her from hiring unskilled minority workers at lower wages.

Brazier's complaint was not that prevailing wage laws prevented her from hiring African Americans and other minority workers, because under prevailing wage regulations, she had indeed hired primarily African Americans. What she wanted to do was to pay these workers less and perhaps hire additional unskilled minority workers (such as the gang members mentioned in her *Wall Street Journal* editorial).

In addition to opposing prevailing wage regulations, Brazier opposed affirmative action policies and other traditional civil rights initiatives.

"The civil-rights movement never made sense to me," she says. "Why would you want to go to the counter for lunch where the man who fixed the meal had on a Klan robe the night before?" Eat someplace else. Better yet, start your own restaurant....

"The idea of black people running around as whimpering little victims, unable to function in commerce and the social structure is an aberration to me."²⁵

Among other civil rights programs opposed by Nona Brazier, she publicly opposed minority set-asides on public works. Indeed, during a failed attempt to attain the Republican nomination for governor in 1996, Brazier called affirmative action oriented public contracts "the colored drinking fountain of 1996."²⁶ However, this public position directly contradicted her own business behavior. Brazier's garbage collection company was built on and grew rapidly because of minority set-aside contracts in garbage collection and recycling.

Starting with one garbage truck in 1982, Brazier applied for and received a Washington state certification as a minority-owned business in 1984. Based on this certification, by 1991, her business had grown to 18 trucks and 35 employees earning \$2.3 million from government minority set-aside contracts in Seattle and Fort Lewis and only \$60,000 from private-sector work. During this period of prosperity, Brazier and family bought a 34-foot sail boat, 10 acres of land and a gated home in an affluent, white suburb.

But also in 1991, according to a National Labor Relations Board ruling, Brazier's company illegally fired three of her employees for union organizing. By 1993, Brazier was failing to make payroll. Her company owed federal, state and local governments about one-half million dollars in unpaid taxes and workers compensation premiums. And the company pension fund was short a disputed amount of money ranging somewhere between \$21,000 and \$350,000.

Her company in trouble and dormant by 1994, Brazier argued two things at once. First, she argued that prevailing wage laws were racist, preventing her from hiring minority workers and paying them lower than prevailing wages. Second, she argued that minority set-asides of both public contracts and publicly available capital loans were appropriate because minority owned businesses "have historically discriminated against and deprived of numerous business opportunities. She argued that Seattle's minority set-asides for public contracts "recognize the difficulties and disadvantages experienced by minority members of the community seeking to start and maintain viable, competitive business operations."²⁷

²⁴ Sherry Tripling, "Peeling Back the Labels—Through their Republican Affiliations, Two African Americans Defy Pigeonholing—Nona Brazier: On the Fast Track," *The Seattle Times*, January 17, 1993, Scene Section, p. k1.

²⁵ Jerry Large, "Politics as usual? Not if Nona Brazier has a Say," *Seattle Times*, August 7, 1995, p. A1.

²⁶ Barbara A. Serrano and David Postman, "Brazier, Businesses Owe \$500,000 for Workers Comp, Taxes—Though a Critic of Affirmative Action, Candidate Sought Race-Based Contracts," *Seattle Times*, July 18, 1996, p. A1.

²⁷ *Ibid.* Serrano and Postman are the sources for both this paragraph and the preceding two paragraphs.

Nona Brazier was not able to make a go of it in the garbage collection business. According to her, she would have been successful if she had not been forced to pay prevailing wages. Such a deregulation would not have increased minority employment in her business, but it would have allowed her to pay these workers less. But her business did require continued regulation of bidding. Brazier's company was only competing against other women and minority owned businesses for public projects set aside for certified minority and women owned businesses. Because Brazier's company was competing in the public sector against other minority owned businesses who also had to pay prevailing wages, it is not clear whether her business would have survived had the minority contractors she competed against been released from paying prevailing wages as well. The only clear outcome of releasing Nona Brazier from prevailing wage regulations would have been to lower the wages and benefits of her workers, the majority of whom were African Americans.

Critics of prevailing wage regulations have attempted to portray the original federal regulation as racist. They tell a mythical story of an Alabama contractor who brought low-paid workers into N.Y. Representative Bacon's district. They assert without proof that these workers were primarily or entirely black. They assert without proof that Representative Bacon wanted these workers taken out of competition because they were black. They offer as an alternative story the case of Nona Brazier—a black contractor that has allegedly been run out of business because of prevailing wage regulations. They ignore the fact that under prevailing wage regulations, the majority of her workers were African American. They ignore the fact that without prevailing wage regulations, Brazier intended to cut these workers wages, pensions and health insurance. They ignore the fact that Brazier's business was built up under the shelter of minority set-aside regulations. And they offer her up as the nameplate on an effort to have the Davis-Bacon Act repealed as a Jim Crow law. As a paradigm for the Jim Crow thesis, the Nona Brazier case presents a contradictory and even hypocritical example of the argument that prevailing wage regulations are bad for minorities.

The Factoid Treated Like a Fact—Repeated in Many Editorials

Despite the light-weight scholarship standing behind the Jim Crow assertion and the seeming hypocrisy of Nona Brazier, editorials in the *Wall Street Journal*, a 3-page spread in *USA Today* (Magazine), and a filed federal lawsuit gave sufficient *gravitas* to the Jim Crow assertion for it to spread. Bob Dole, in the run-up to his 1996 presidential campaign, adopted the argument in a 1995 *Wall Street Journal* editorial.²⁸ George Will adopted the argument in a nationally syndicated editorial just prior to congressional hearings on the Davis Bacon Act in 1995.²⁹ He repeated the

²⁸ “we should immediately repeal the discriminatory Davis Bacon Act, which was passed in the 1930s with the explicit aim of keeping low-wage blacks out of the labor market for government construction contracts.” Bob Dole and J.C. Watts, Jr., “A New Civil Rights Agenda,” *Wall Street Journal*, July 27, 1995, p. A10.

²⁹ “Why was Davis-Bacon enacted? Because in 1931, the second year of the Depression, the federal government was engaged in pump-priming spending on construction, and blacks were competing successfully for jobs that whites wanted. Four years earlier, Rep. Robert Bacon, a Long Island Republican, had been distressed because the low bidder to build a veterans' hospital in his district was an Alabama contractor using black labor. When the Depression made federal construction money hugely important, and the law bearing Bacon's name was enacted, Rep. William Upshaw, a Georgia Democrat, was amused, saying to his Northern colleagues that he hoped they would not think ill of a Southerner “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.” Such labor was willing to work for lower wages than whites could get as members of unions, most of which excluded blacks. The Davis-Bacon congressional debate was replete with references to “itinerant labor” or “cheap bootleg labor” or “labor lured from distant places” for “competition with white labor throughout the country.”

now widely circulated Southern congressman Upshaw quote. But it is unlikely that Will read the testimony himself. While not a legal scholar, Will prides himself on his knowledge of baseball history. Had he read the Congressional debate on Davis-Bacon, he could not have overlooked Fiorello LaGuardia's support of the Act. In baseball history, LaGuardia is known for his support and assistance to the Brooklyn Dodgers in bringing Jackie Robinson to the team and thereby integrating major league baseball.³⁰ Ignoring these facts, the assertion that Davis-Bacon was a Jim Crow law is repeated by the Greensboro, North Carolina, *News and Record* in 1996. "The law was enacted in 1931 explicitly to keep Southern blacks out of government construction jobs in Northern cities, and it is the last significant surviving regulatory relic of the Jim Crow era."³¹ In 1997, a new think tank expert, William Maze of the Mackinac Institute in the *Detroit News* repeats the now familiar assertion.³² The Jim Crow thesis has been repeated so often, it is worthwhile to carefully, and in detail, go through the real history of this legislation.

The True History and Intent of Prevailing Wage Laws

The *Las Vegas Review Journal* cited at the beginning of this essay got its factoid patently wrong when it asserted: "The original 'prevailing wage' law was dreamed up by a Long Island congressman". In fact, the first U.S. prevailing wage law was passed by the Republican Congress of 1868—the same 40th Congress that passed the Fifteenth Amendment, one of the Constitutional principles used by the Institute for Justice as a legal bases to claim that prevailing wage laws are

George Will, "Davis-Bacon And the Wages of Racism," *The Washington Post*, February 05, 1995, Sunday, Final Edition, pp. c7. Will indicated that he was aware of the *Brazier v. Reich* suit that had been filed a year earlier. This editorial was syndicated across the country under various headlines. See, for instance, "It's Time to Repeal the Davis-Bacon Act," the *Desseret News*, February 5, 1995, p. v8.

³⁰ See, for instance, Jules Tygiel and John Thorn, Jackie Robinson's Signing: The Real Story,

http://www.totalbaseball.com/leagues/other/black/jr_real.html.

³¹"Jim Crow Needs No Survivors," Greensboro, North Carolina, *News and Record*, July 23, 1996, EDITORIAL, p. A7

³² "The federal law was intended to protect the high wages of union construction workers --predominantly white and from the North -- at the expense of black, nonunion workers from the South. Citing congressional remarks on Davis-Bacon at the time of its passage, the Sixth Circuit Court in its recent decision stated that the prevailing wage law was intended "to combat the practice of certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, (who) have been going around throughout the country 'picking' off a contract here and a contract there." "Itinerant, cheap, bootleg labor" were 1930s code words for black and immigrant workers. Davis-Bacon's co-sponsor, Rep. Robert Bacon, actually referred to the problem of "cheap colored labor," and Congressman William Upshaw said during House hearings on Davis-Bacon that "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."

"Wage Law Return Makes Mockery of Fair Play," by William J. Maze, labor research assistant with the Mackinac Center for Public Policy, *Detroit News*, August 10, 1997, Opinion, p. B7. The argument gets repeated a month later by another Mackinac writer, Robert P. Hunter in "Union Racial Discrimination is Alive and Well," a posting on the Center's website. <http://www.mackinac.org/article.asp?ID=325>. Interestingly, prior to 1997, the Mackinac, while critical of prevailing wage regulations, was silent on the Jim Crow thesis. See for instance, in 1991, Brian G. Barnier, "Prevailing Wage Act Harms the Poor," criticized Michigan for subsidizing high paid labor while slashing welfare spending. This critique of prevailing wage law focusing on issues of the poor entirely omitted the Jim Crow thesis. <http://www.mackinac.org/article.asp?ID=198>

The Mackinac Center for Public Policy keeps the myth alive today. See Mark Fischer writes cited above. These Mackinac Center position papers on prevailing wage regulations are short—usually one page. They are not typically original works of scholarship. In the case of the Jim Crow thesis, they are entirely derivative, relying on the scholarship or lack thereof found elsewhere. Nonetheless, these position papers on the web and in op-ed pieces play a crucial role in factoid diffusion. What use is a myth if it is not sincerely repeated? The Mackinac pieces are nothing if not sincerely repetitive.

unconstitutional. We are now at a point where we should do a serious investigation of the original intent of these laws. We begin our investigation at the beginning by looking at the Congressional debate surrounding this first prevailing wage law.

Competition in post Civil-War construction labor markets segmented along racial lines. African-Americans outside the South tended to compete with immigrant labor for unskilled work and tended to be excluded from the skilled trades.³³ White unions in construction reinforced this pattern of racially segmented competition.³⁴ These same construction unions were also important supporters of the National Eight Hour Day Law of 1868. Because this law not only restricted the hours of work on public construction projects to eight hours, but also required that contractors pay their workers the standard daily wage for construction workers in the area based on ten hour day, this law became the country's first prevailing wage law.³⁵ Given that unions supporting this law also engaged in racially exclusionary membership practices, did Congress intend this law to be a barrier against African-American employment on public works? The answer is no.

The Congressional debate surrounding the National Eight Hour Day Law in 1868 was fought over class and not racial lines. For instance, the Abolitionist Republican Senator Wilson from Massachusetts argued in favor of the Eight Hour Law by explicitly favoring the rights of labor over capital:

In this matter of manual labor I look only to the rights and interests of labor. In this country and in this age...capital needs no champion;...whatever tends to dignify manual labor or to lighten its burdens, to increase its rewards or enlarge its knowledge should receive our support.³⁶

Opponents of the Eight Hour Law felt the market should be allowed to regulate the terms of employment and that the law violated the freedom of individuals to make contracts as they pleased. For instance, Abolitionist Maine Republican Senator Fessenden in opposing the law argued:

Let men make contracts as they please; let this matter be regulated by the great regulator, demand and supply; and so long as it continues to be, those who are smart, capable, and intelligent, who make themselves skilled workmen, will receive the rewards of their labor, and those who have less capacity and less industry will not be on a level with them, but will receive an adequate reward for their labor [op. cit.]

Evaluating this debate historian David Montgomery concluded that the National Eight Hour Law was passed primarily with the support of Radical Republicans, the same political group that pushed

³³ Only 14 African-American masons and bricklayers were reported working in New York City in 1870. African-Americans in construction tended to be construction laborers. A African-American newspaper reported: "The [black] longshoremen and common laborers [in New York City] are outnumbered by foreign competition; but as a general thing, their services as good honest laborers are preferred, and to a certain extent when business is brisk, get their share of employment." The Elevator, March 18, 1870, Vol. V, No. 50, p. 4, col. 1.

³⁴ For instance, in 1869, the National Labor Convention of Colored Men complained: "the exclusion of colored men and apprentices from the right to labor in any department of industry or workshops in any of the States and Territories of the Unties States by what is known as "Trades Unions" is an insult to God and an injury to us." The [Washington] Evening Star, Wednesday, December 8, 1869 Vol. 34 No. 5224, p. 4 Col. 4.

³⁵ This law met with bureaucratic resistance requiring President Grant to issue orders in 1869 and 1872 insisting that its provisions be enforced. After 1874, the law fell into disuse when the Supreme Court held that its provisions did not apply to the employees of government contractors.

³⁶ Senate Debates, The Congressional Globe, June 24, 1868, 40th Congress, 2nd session, pp. 3424-3429.

the passage of the 13th, 14th and 15th Amendments to the Constitution.³⁷ There is no evidence in the Congressional debates that the first prevailing wage law in the United States intended to limit the labor market options of racial or ethnic minorities.³⁸

Early State Prevailing Wage Laws

Nor can the first three state prevailing wage laws, Kansas in 1891, New York in 1894 and Oklahoma in 1908, be construed as racially motivated laws. The Kansas and Oklahoma laws were similar to the National Eight Hour Law in mandating eight hours as the legal work day on public construction, and requiring that contractors pay the common daily wage. Both intended that the shortening of the work day from 12 or 10 hours to 8 which not result in a corresponding reduction in the daily wage. In summarizing the purpose of the Kansas Act, the Kansas Supreme Court identified the purpose of the law as one of limiting “the hours of toil of laborers, workmen, mechanics and other persons in like employment to eight hours, without reduction in compensation for the day's service.”³⁹ The Oklahoma law, which was patterned after the Kansas act, had a wider purpose of improving the wages and hours not only on public works but in related labor markets.

The eight hour law has been of inestimable value to the laboring men of this state....The common laborer, who was heretofore employed ten and twelve hours per day, is now, under the provisions of this bill, allowed to work but eight hours....The law has not only affected the laborers and those who are dependent upon this class of work for a living, but it has gone further, and in many localities has gradually forced railroad companies, private contractors [i.e. private construction] and people of that class to pay a high rate of wages for unskilled labor.⁴⁰

In neither case does the historic record mention issues of race.

Discussion of racial motivation is also absent from U.S. Supreme Court Justice John Marshall Harlan's review of the Kansas law. The eminent dissenter in *Plessey vs. Ferguson* (1890),

³⁷ David Montgomery, *Beyond Equality, Labor and the Radical Republicans*, 1862-1872, Alfred A. Knopf, New York, 1967, Chapter 8. The 14th Amendment guaranteeing equal protection under the regardless of race was proposed by the 39th Congress and the 15th Amendment guaranteeing the right to vote was proposed by the 40th Congress. The National Eight-Hour Day Law was a law of the 40th Congress.

³⁸ In California in the mid-1860s, labor unions had two main legislative goals—the exclusion of Chinese immigrants and the eight-hour day. California Republican U.S. Senator John Conness distanced himself from Chinese exclusion but led the fight for the National Eight Hour law. Montgomery, *Ibid.* p. 315.

³⁹ In re Ashby, Kansas Supreme Court decision, December 10, 1898, *The Pacific Reporter*, 1899, Vol. 55, p. 338..

⁴⁰ Chas. L Daugherty, Labor Commissioner, Oklahoma Department of Labor, *Third Annual Report*, Oklahoma City, OK, 1910, p. 327. Similar to Kansas, the historical record for Oklahoma is replete with hours and wage regulatory issues but includes no mentions of issues of race. The primary concern in both states with using public works hours and wage policies to set and improve local labor standards. A typical enforcement case in Oklahoma as reported by the Labor Commissioner follows:

“[Anadarko. May 10. 1908] We were advised that the O'Neill Construction Company had cut the wages on public works at Anadarko from twenty-five cents to seventeen and one-half cents per hour....[C]ontract was taken with the understanding that twenty-five cents per hour should be paid. The work was not progressing as rapidly as necessary to keep the cost within the estimate, hence the contractors tried to take advantage of the situation by reducing pay. After thoroughly discussing the matter before the [city] council and contractor, the wages were restored to twenty-five cents.” (p. 320)

Second Annual Report Oklahoma Labor Commissioner, Chas. L Daugherty, Oklahoma City, OK, August 7, 1909.

Harlan's review of the plausible rationales for the Kansas law does not mention racial exclusion:⁴¹

It may be that the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship.⁴²

Harlan affirmed the law as a legitimate direction from the state to its agents including state contractors and their employees. Further, arguing that the law's "constitutionality was beyond all question" he found:

Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant or to his employee the *equal protection* [author's emphasis] of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the state or of its municipal subdivisions, and alike to all employed to perform labor on such work.⁴³

The New York Law: The First Modern Prevailing Wage Statute

The New York law presents somewhat different facts both in being closer to the current prevailing wage laws in construction and in explicitly excluding the use of low wage labor from public construction. New York's 1870 eight-hour law for government workers and public works contractors was amended in 1894 to require that these workers receive not less than the prevailing rate of wages in the respective trades or callings in which such mechanics, workingmen or laborers are employed in said locality. And in all such employment, none but citizens of the United States shall be employed...⁴⁴

A primary concern of New York's prevailing wage law was the consequences of cheap, itinerant, foreign and non-local labor on local labor standards.⁴⁵ Unions complained of "birds of passage"

⁴¹ This case established the legality of racial segregation based on the principle of separate but equal public accommodations and services.

⁴² *Atkin v. Kansas*, U.S. Reports, Oct. 1903, Vol. 191 pp. 207-224.

⁴³ *Ibid.* p. 224.

⁴⁴ Groat, George Gorham, *The Eight Hour and Prevailing Rate Movement in New York State*, Political Science Quarterly, Vol. 21, No. 3. (Sep., 1906), pp. 416.

⁴⁵ The link between cheap foreign labor and cheap domestic labor from other regions of the country was made by a writer from the New York City Bricklayers and Masons' International Union Local No. 47:

"The only difficulty the bricklayers have is the influx of members of their craft from other States and countries to this city which is almost impossible to overcome."

-New York, Bureau of Statistics of Labor, Thirteenth Annual Report, p. 387.

George D. Gaillard of New York District Council of the United Brotherhood of Carpenters similarly stated:

"I think there should be something done about foreigners coming here in the spring and working during the summer and then again returning to Europe in the fall. They come over here and work for less money than the native American, thus depriving him of work."

-Thirteenth Annual Report, p. 388.

from England, Canada, Sweden and Denmark, often described as itinerant, spending little and remitting most earnings back home.⁴⁶ Local labor standards were also threatened by low wage domestic labor.⁴⁷ The citizenship clause of the New York law explicitly acted to exclude foreign labor. The prevailing wage provisions reduced the incentive for contractors on public projects to import labor from low wage labor markets. As such, it can, as can modern prevailing wage laws, be typified as excluding low wage labor from the public construction market.

Was the prevailing wage component of the New York law intended to exclude racial minorities? To some degree this question is moot because the foreign and domestic construction workers who threatened labor standards in New York in the 1890s were white. For instance a writer for the New York City Bricklayers and Masons International Union No. 34 noted in 1899:

For some years what we term 'birds of passage' came over from Europe in the spring, worked here until fall, and then returned to the old country, but on account of the hard times they haven't been coming over lately. We are now affected by the flood of Westerners, and there is an overplus of bricklayers in the city...⁴⁸

Equally important, more direct means of excluding racial minorities were available had this been the purpose of the New York law.

Public Works Laws with the Explicit or Implicit Acts Purpose of Racial Exclusion

Both Western and Southern states acted to exclude particular races from employment on public works projects. The Western states, primarily concerned with the large number of Asian laborers, acted to exclude Asians from such employment *per se*. Such direct approaches were unavailable to states which desired to exclude African-Americans because of the protections provided by the equal protection clause of the constitution. Making employment condition on the payment of poll taxes was adopted as the means to exclude 'undesired' minorities. Neither used exclusion of non-citizens or imposition of a prevailing wage as a means to exclude their undesired group.

Several states excluded Chinese from public works employment in the time which prevailing wage regulations were being developed. Chinese came to California at the beginning of the Gold Rush. Cheap labor on the West coast was often seen as identical to Chinese labor and from the beginning they encountered racial hostility:⁴⁹

"The feeling is strong against permitting the thousands [of Chinese] flocking our shores to share the wealth of our mines untaxed, or without contribution to the support of the government and the property of the State.... In short, there is a strong feeling--prejudice it may be--existing in California against all Chinese, and they are nicknamed, cuffed about, and treated very unceremoniously by every other class." (*Alta California* May 4, 1852)⁵⁰

⁴⁶For example, Edward F. O'Brien, the Secretary of the Bricklayers and Masons' International Union No. 32 said: ...when business in our trade is brisk, the crowd of masons that come here to work from England is awful. They work during the summer here, live poorly, bank all they get, fill our positions and take all they earn back to England, to come again next summer. (p. 387)

⁴⁷ Mervyn Pratt of the United Tin and Sheet Iron Workers' Association of New York City emphasized that: There should be some law which would prevent foreign contractors--I mean contractors from other States--from coming here and taking contracts, as it brings on many troubles. The wages in other places than New York city are certain to be lower than here and they only want the wages and work the hours of the places from which they came.

-Thirteenth *Annual Report*, p. 535.

⁴⁸ 16th *Annual Report* of the New York Bureau of Labor Statistics for 1898, Albany 1899, p. 1042.

⁴⁹ Brown, Martin and Peter Philips, "Competition, Racism and Hiring Practices Among Early California Manufacturers," *Industrial and Labor Relations Review*, October, 1986 pp. 61-74.

⁵⁰ Quoted in Ira B. Cross, *A History of the labor Movement in California*, University of California Press, Berkeley, 1935, p. 316, fn 12.

In the 1881 floor debate over the AFL's stance towards a prospective Chinese Exclusion Act, Charles Burgman from San Francisco, representing the Assembly of the Pacific Coast Trades and Labor Unions presented a resolution stating:

...the presence of Chinese and their competition with free white labor, is one of the greatest evils with which any country can be afflicted; therefore be it RESOLVED, That we use our best efforts to get rid of this monstrous evil (which threatens, unless checked, to extend to other parts of the Union) by....[the] passage of laws entirely prohibiting the immigration of Chinese into the United States.⁵¹

Unions that opposed Chinese immigration claimed that Chinese immigrants came as indentured slaves rather than free wage labor. They claimed that Chinese could not and would not assimilate the way European immigrants would.

A representative statement of this position is embedded in the preamble of the 1887 Nevada law that prohibited the employment of Chinese on public construction:

Whereas, all Chinese who come to this coast arrive here under contract to labor for a term of years, and all are bound by such contract, not only by the superstitions of their peculiar religions, but by leaving their blood relations...as hostages in China for the fulfillment of their part of the contract; and whereas such slave labor and involuntary servitude is opposed to the genius of our institutions, opposed to the prevailing spirit of the age, as well as humanity and Christianity, and degrades the dignity of labor....Therefore,

SECTION 4764. The immigration to this state of all slaves and other people bound by contract to involuntary servitude for a term of years, is hereby prohibited. [and]

SECTION 4947. From and after the passage of this act, no Chinaman or Mongolian shall be employed, directly or indirectly, in any capacity, on any public works, or in or about any buildings or institutions or grounds, under the control of this State.⁵²

On its face, this is essentially and substantially a racist law for the simple reason that Section 4947 restricts a people, regardless of whether or not they are bound or indentured. In some cases then subtle means of exclusion were not needed de jure or de facto. The omission of such exclusions from the New York law suggests a lack of racial intent.

⁵¹ Federation of the Organized Trades and Labor Unions of the United States and Canada, 1881, "Declaration of Principles" in Proceedings of the American Federation of Labor, 1881 to 1888, Reprinted 1905 p. 3. This organization changed its name to the American Federation of Labor in 1886.

⁵² U.S. Commissioner of Labor, Second Report, pp. 65, 305-6, and 409. The 1885 California law prohibiting Chinese employment on public construction contained a similar rationale as well as provisions legalizing the ghettoizing of Chinese resident in California.

The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the State, and the legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this State, and all the contracts for coolie labor shall be void....The legislature shall delegate all necessary power to the incorporated cities and towns of this State for the removal of Chinese without the limits of such cities and towns, or for their location within prescribed portions of those limits...

U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 148, "Labor Laws of the United States," Part I, Washington, GPO, 1914, p. 261.

Citizenship Requirements for Public Works Jobs, in General, Were Not Targeting Chinese

By 1894, four Northern and Western states (New York, Illinois, Idaho and Wyoming) had passed laws preferring or restricting employment on public works to citizens or those who had declared their intention to become citizens either of the U.S. or the particular state.⁵³ Of the four states that had citizenship requirements by 1894, the two were Western states had some Chinese immigrants and had experienced anti-Chinese agitation.⁵⁴ The Chinese Exclusion Act of 1882 prohibited Chinese from becoming U.S. citizens. The Chinese were caught in a catch-22. They could not declare their intention to become citizens. Therefore, they were automatically excluded from public works jobs. But does this mean that these regulations were primarily or substantially racist legislation targeted at Chinese?

In New York and Illinois the answer is clearly no simply because the percent of foreign born who were Chinese was negligible. In Idaho, however, in 1890, 12 percent of all foreigners were Chinese. In Wyoming, Chinese composed 3 percent of all foreigners.⁵⁵ However, if these Idaho and Wyoming laws were racially motivated, what accounts for the subterfuge? Chinese could be explicitly excluded legally, and there was no need to inconvenience the vast majority of foreign born to get at the Chinese if that was the intent. The parsimonious explanation is that these laws can be taken at face value. They were intended to limit the public employment prospects of non-citizens who were unwilling to become citizens in favor of citizens and would-be citizens. Thus, we can clearly distinguish between the California, Nevada and Oregon laws that had Chinese exclusively in mind and the Idaho and Wyoming laws which included Chinese in their restrictions but did not have Chinese primarily in mind. The fact that the New York and Illinois regulations were not considering Chinese at all supports the notion that citizenship requirements for public works employment were not Jim Crow laws.

Louisiana's Citizenship Requirement Was Implicitly Targeted at African-Americans

The issue of exclusion is somewhat more complex where the excluded group are citizens, as the equal protection clause limits their direct exclusion. Louisiana passed a law in 1899 that gave preference in employment on public works in New Orleans to residents of that city. This law initially did not have a racial target. However, in 1908, that law was extended to all public construction in Louisiana giving employment preference to the citizens of the state over others. In this extended law a proviso was added that preference would not be given to Louisiana citizens who had not fully paid their poll taxes in the last two years. No racial group was explicitly targeted by this law, but African-American citizens in Louisiana were much less likely to have paid their poll taxes. Poll tax collections systematically fell short of their potential revenues. Little effort at increasing collections was made. Poll taxes outside the South had fallen into disuse by the beginning of the twentieth

⁵³ U.S. Commissioner of Labor, Second Special Report, "Labor Laws of the Various States, Territories and the District of Columbia," Carroll D. Wright, Commissioner, Washington, GPO, 1892, pp. 119, 134, 525.

⁵⁴ Alexander Saxton, The Indispensable Enemy: Labor and the Anti-Chinese Movement in California, University of California Press, 1971, pp. 202-211.

⁵⁵ U.S. Department of the Interior, Census Office, Compendium of the Eleventh Census, 1890, Part I., "Population," Washington, GPO 1892, pp. 468 and 470.

century.⁵⁶ Thus, most analysts today agree that the poll tax underlying purpose was revealed by its disproportionate impact on African-Americans. Its true general purpose was to keep African-Americans from voting and probably its specific purpose in being added to the Louisiana employment-preference bill was to prefer white Louisiana workers on public construction. California and Nevada could explicitly exclude Chinese because legally, as non-citizens, they were not protected from discrimination. African-Americans, as citizens, could claim equal protection. Thus, poll taxes proved a useful expedient in an effort to restrict public work jobs for whites in Louisiana.

Was the Davis Bacon Act of 1931 Primarily Motivated by Racial Animus?

The New York case in the 1890s is of interest in part because it was a New York congressman, Robert Bacon, who was a prime mover for the passage of the Davis-Bacon Act (1931), the current federal prevailing wage law. Proponents of the Jim Crow thesis never quote Bacon directly. Indeed they do not quote any Republicans making any explicit racial comment associated with the Davis-Bacon legislative history.

In fact, direct reference to race by anyone in the debate over Davis-Bacon was rare. Of the 31 Senators and Representatives who spoke in favor of the Davis-Bacon Act in 1931, Alabama Representative Allgood is the only one to have explicitly mentioned the issue of race. Furthermore, only one of the thirteen witnesses who spoke at Senate and House hearings in that year mentioned the issue of race. To beef up the Jim Crow thesis, advocates reach back to 1927 for an additional quote from Upshaw, again, a Southern Democrat. Thus, the view that Congressional debate demonstrates that the Davis-Bacon Act was motivated by racial animus relies primarily on the view that proponents of the Act hid their animus with racial code words. In this view, when

⁵⁶ The poll tax is one of the oldest taxes in the United States and throughout the colonial period, it was the major source of government revenue. While some states outlawed the poll tax during the Revolutionary era, roughly half the states retained poll taxes into the Twentieth Century. The origins of the poll tax were not generally racist in intent, but in Southern states during the time of slavery, poll taxes were clearly racially discriminatory. For example, in Mississippi prior to 1865 a higher poll tax was charged to free males of color compared to white males. After the Civil War, this discriminatory pricing scheme was dropped, but as an observer in 1900 noted:

No concealment need be made of the fact that the poll tax is used in Mississippi as a means of disqualifying the negro in national elections and controlling his vote in local elections. That the poll tax is more important in the state as an adjunct of suffrage than as a source of revenue is revealed by the fact that in 1897 out of a capitation of \$529,694, only \$250,057 was collected

In contrast to Mississippi and elsewhere in the South where the poll tax was bent to a racial regulation of voting, such a pattern was not clear outside the South. Several Northern states had outlawed the tax and others such as Wisconsin did not enforce the tax. Not all poll taxes entailed voting rights. At least one municipality in Kansas in 1898 had a "poll" tax or head tax requiring that all males between the ages of 21 and 45 either pay \$3 each or work for two ten hour days on public construction. The Kansas Supreme Court held that this violated the Kansas eight hour law. The court argued it was a violation of the law for a

...man who, either from necessity or choice, works out his own tax...[to be] forced to do four hours more service to discharge his tax than the man employed by the city to render two days service for three dollars.

Given that minorities may have been more likely to work out their tax rather than pay it, this interpretation of the law protected minorities along with other less-wealthy males.

Richard T. Ely, et al, Outlines in Economics, New York, 1920, p. 734; Charles Hillman Brough, "Taxation in Mississippi", and Elbert J. Benton, "Taxation in Kansas", in J.H. Hollander, ed., Studies in State Taxation, Johns Hopkins University Studies in Historical and Political Science, Series XVIII, No. 1, Baltimore, 1900, pp. 165 and 213; Kansas Supreme Court, In re Ashby, 1898, The Pacific Reporter, Vol. 55, 1899, p. 338..

proponents of the Davis-Bacon Act complained of cheap, itinerant, foreign, non-local labor undercutting local labor standards, these proponents were using these adjectives as code words for African-Americans.

A major problem with the code word thesis is that racial and ethnic discrimination was accepted among white politicians in the 1920s and 1930s. Casting doubt on the notion that phrases such as “cheap labor” in 1930 was primarily referring to” African-American labor” is the fact that these phrases were explicitly used to refer to white labor in the case of New York in the 1890s. One might argue that in the North, cheap imported African-American labor in the 1920s had replaced the cheap imported white labor of the 1890s. Even if this were the case, the parallel Northern opposition to cheap labor of either race would suggest the opposition was motivated by the issue of cheapness rather than race.

But it is not the case that cheap African-American imported construction labor had replaced cheap white imported labor by the 1920s . Most low wage itinerant labor coming into high wage states in the North in 1929 was not from the South and, even among itinerant Southern construction labor, not African-American. Table 1 shows the proportion of all construction activity in each of ten, high wage Northern states accounted for by contractors either from seven North-West-central states or eight Southern states. As a group, contractors from the North-West-Central states accounted for 8% of the construction activity in these ten high wage states in 1929 while contractors from the Southern states accounted for 1% of the construction activity in these 10 Northern states. The pattern of activity is partly determined by regional proximity. Illinois which is close to the Northwestern states has the highest involvement of contractors from North-West-central states. Pennsylvania which is closest to the South has the highest Southern contractor involvement. Massachusetts, Connecticut and Rhode Island had little involvement from contractors of either the South or the West. Ohio and New York, states equally distant from the South and the plains states had significantly greater involvement from plains state contractors compared to Southern contractors.⁵⁷

• Table 1: The Role of Out-of-State Contractors in Local construction Activity in 10 Northern States, 1929

	Income	North West Central	8 Southern	All Out of Region
NY	\$2,254	7%	0%	28%
IL	\$2,113	29%	1%	66%
NJ	\$2,036	1%	1%	8%
MI	\$1,921	12%	1%	55%
MA	\$1,874	1%	0%	16%
CN	\$1,842	0%	0%	2%
OH	\$1,786	15%	3%	61%
RI	\$1,774	0%	0%	7%
PA	\$1,755	1%	5%	50%
IN	\$1,581	10%	2%	35%
10 States		8%	1%	32%

Source: 1930 U.S. Census of Population, Construction

⁵⁷ The two regional groupings, eight Southern states and seven plains states, had similarly sized construction industries at the time. The labor force in the Southern states earned on average around \$1,200 per year and were roughly 20% African-American. The plains states workers earned roughly \$1,450 per year and few were African-American. Workers in the Northern states selected earned around \$1,800 per year and employed few African-Americans.

Furthermore, when a Southern general contractor came North with a work crew, the crew would be composed of white and African-American workers. Construction occupations were racially segregated in the South. A Southern crew requiring the craftsmen from a variety of construction occupations would include workers of both races. Thus, the Southern general contractor would bring African-American laborers and hod carriers and perhaps brick masons. But the same contractor would probably bring white carpenters. If the Southern firm was a mechanical subcontractor, it might bring African-American laborers, but it was likely to bring white plumbers, gas fitters and sheet metal workers. If a Southern contractor came North with an integrated crew at the proportions typical of the racial composition of the Southern construction labor force, Table II shows that the majority of Southern workers coming North would have been white.

A Southern contractors going North might however not look like the typical Southern construction firm. The traveling contractor was probably larger and might have a disproportionately African-American labor force. One of the two Southern contractors working outside the South that were explicitly mentioned in the Davis-Bacon congressional record was the Virginia Engineering Company. The name of the company suggests that it was from Virginia, and it might have been either a general or a mechanical contractor. (The word "engineering" is often used by mechanical contractors.) In 1910, the last year for which we have firm-level data for Virginia, 125 mechanical contractors together employed 557 white plumbers, fitters and sheet metal workers, 77 white laborers and 270 African-American laborers. The largest Virginia mechanical contractor employed 30 white plumbers and fitters, 8 white sheet metal workers and 5 African-American laborers. Thus, if the Virginia Engineering Company was a mechanical contractor working outside the South but bringing with it Virginian workers, it was likely to have been a firm employing primarily white workers.

• Table 2: Black Construction Workers as a Percent of All Construction Workers in Southern States, 1930

State	African American as Percent of All Construction Workers
South Carolina	39%
Georgia	31%
Mississippi	30%
Louisiana	28%
Alabama	25%
North Carolina	24%
Florida	17%
Virginia	15%

Source: 1930 Census of Population, Occupations

General contractors in Virginia in 1910 employed a variety of trades including in order of importance--carpenters, laborers, bricklayers, helpers, plasterers, painters, stone masons and plumbers. As a group, these general contractors employed 23% African-American workers. Table III compares the five largest general contractors with the average general contractor. On average, the five largest contractors employed 214 construction workers compared to the 22 workers employed by the average contractor. Again, on average, the five largest firms employed 29% African-Americans compared to 23% for all firms. But this disguises a wide variation. Two of the five largest general contractors employed more than 64% African-American workers while the other three employed 21% or fewer African-American workers. While two of the five largest general contractors employed relatively few African-Americans and were relatively high wage firms, the largest general contractor in Virginia employed only 13% African-Americans and was a very low-wage firm. In short, if large general contractors traveled from Virginia, they might have left with disproportionately African-American labor forces, or they might not. In either case, they would have traveled with at least 36% white workers. The vast majority of African-Americans were employed as construction laborers in these five large firms. Some were hired as bricklayers, painters, plasterers and lathers. However, none hire African-Americans as carpenters, plumbers or stone masons. Segregation prevented general contractors from integrating these occupations, ironically forcing traveling general contractors to use integrated crews. Table IV shows that there were too few African-American carpenters to staff the work crews of traveling contractors in Virginia in the 1920s. In occupations such as hod carriers and laborers, where African-Americans were the majority, African-American-white wages were similar. Thus, firms which did not employ disproportionate numbers of African-Americans such as numbers 1, 2 and 5 shown in Table 3 could compete with firms such as numbers 2 and 3.

• Table 3: Five Largest General Contractors Compared to the Average General Contractor in Virginia, 1910

	Firm 1	Firm 2	Firm 3	Firm 4	Firm 5	Weighted Average of 5 Largest General Contractors	Weighted Average All 224 General Contractors
Average Wage	\$1.35	\$1.78	\$2.08	\$2.45	\$2.87	\$1.95	\$2.29
Average White Wage	\$1.38	\$3.07	\$3.04	\$2.75	\$3.10	\$2.05	\$2.52
Average Black Wage	\$1.16	\$1.25	\$1.53	\$1.37	\$1.81	\$1.41	\$1.52
Percent Black of All Workers	13%	71%	64%	21%	18%	29%	23%
Percent Black of All Laborers	15%	100%	95%	53%	27%	55%	60%
Total Construction Workers	351	154	275	159	131	214	22

In sum, there is no statistical reason to conclude that companies such as the Virginia Engineering Company were necessarily traveling with majority African-American work crews. And there is nothing in the historical record that says they did. The code-word hypothesis requires that when proponents of Davis-Bacon Act spoke of cheap labor or Southern labor they meant African-American labor and when they referred to Southern contractors they meant the employers of African-American labor. The statistical picture of the Southern construction labor force of the time describes integrated work crews typically segregated by occupation. While some larger contractors had disproportionately African-American work forces, other large contractors did not. Even contractors employing disproportionate numbers of African-American unskilled labor had to employ typical numbers of whites in the skilled trades, especially in carpentry and the mechanical trades.

• Table 4: Average Wage by Occupation and Race, Virginia Construction Workers 1919 to 1928

Occupation	Race	Avg. Wage	Wage Gap	%Black
Carpenters	White	\$5.78	67%	3%
	Black	\$3.89		
Apprentices	White	\$3.37	84%	10%
	Black	\$2.85		
Bricklayers	White	\$9.44	87%	17%
	Black	\$8.26		
Helpers	White	\$3.59	88%	29%
	Black	\$3.17		
Plasterers	White	\$8.35	93%	32%
	Black	\$7.80		
Cement Masons	White	\$6.29	78%	37%
	Black	\$4.89		
Lathers	White	\$5.65	94%	45%
	Black	\$5.30		
Hod Carriers	White	\$4.28	95%	68%
	Black	\$4.08		
Laborers	White	\$3.25	97%	69%
	Black	\$3.15		

The Paradigmatic Example:

As mentioned above, proponents of the Jim Crow interpretation of the Davis-Bacon Act rely strongly on the story of an Alabama contractor coming into Representative Robert Bacon's Long Island district around 1926 to build a veterans hospital. This Jim Crow view assumes that this contractor brought a primarily African-American labor force with him. Bernstein argues this was a coded complaint against the employment of African-American workers in Bacon's district.⁵⁸ Bernstein relies on a memorandum written by U.S. Commissioner of Labor Ethelbert Stewart in 1928 that characterized the Alabama contractor's crew as primarily or essentially African-American.⁵⁹ However, as pointed out earlier, in hearings for a predecessor bill, Rep. Bacon indicated that the Alabama contractor had brought an integrated crew and that the issue was not race, in any case, but rather the undercutting of local labor standards.⁶⁰

⁵⁸ Bernstein, op. cit., p. 3.

⁵⁹ Stewart wrote:

[the Alabama contractor] 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. (Quoted in Bernstein, p. 4)

⁶⁰ Sixty-Ninth Congress, Second Session, House of Representatives, Hearings Before the Committee on Labor, H.R. 17069, Washington, GPO, 1927, pp. 2-4. Repeating Bacon's statement:

...the contractor has also brought in skilled nonunion labor from the South to do this work, some of them negroes and some of them white, but all of them are being paid very much less than the wage scale prevailing in New York State

If this contractor hired no local labor to build a veterans hospital, then the skilled labor would very likely have been white Southerners. Table II shows that in 1929, only 25% of the Alabama construction labor force was African-American. In any case, Bacon explicitly stated that the issue was not whether the outside labor was African-American but rather whether the outside labor undercut local union wages and working conditions. When Georgia congressperson Upshaw suggested that the problem was created by the presence of African-American labor, Bacon responded:

the same thing would be true if you should bring in a lot of Mexican laborers or if you brought in any nonunion laborers from any state.⁶¹

This response is consistent with the debate around the New York state prevailing wage law thirty years before that sought to reduce the employment prospects of European whites and cheaper labor from Western states.

We now revisit Representative Fiorello LaGuardia presentation to the House in 1931.⁶² Given LaGuardia reputation as a progressive on race issues and supportive of African-American concerns, his prominent support for the bill, and the lack of racial references in his testimony suggests that the race was not an issue in his support of the Davis-Bacon Act. The Jim Crow factoid has been constructed not from the statements of either Robert Bacon or Republican Senator from Pennsylvania, John Davis, the sponsors for whom the Act was named. It has not been constructed from the statement of close allies such as fellow New York Republican Fiorello LaGuardia. It has been constructed from the statement of Southern Democrats. And those statements are few in number and in proportion to those who spoke in favor of the Act.

Although a small number of racial references can be found in the Davis-Bacon debate, the principle issue of the debate is the protection of labor standards.⁶³ The Davis-Bacon Act was supported by Southern politicians who also favored racial segregation. But it was also supported by progressive politicians such as LaGuardia who had liberal positions regarding race. The Act was supported by construction unions many of which at the time were Jim Crow institutions, themselves. But these same unions supported a variety of legislation in the 1930s such as workers compensation and factory inspections, Social Security and the Fair Labor Standards Act. that are not, by dent of labor union support alone, considered racist laws. No, the Jim Crow thesis cannot stand on a handful of quotes from Southerners outside the party and the region from which this law emerged. Nor can it stand on tarring the Act with the fact that construction unions at the time often practiced racially exclusionary membership policies. Labor unions were not alone in their racism. Business, religious organizations and higher education, among others, share in this guilt. What law of the time cannot be connected in some fashion with the racism of the time? The

⁶¹ Ibid.

⁶² 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 contractor. Local skilled and unskilled labor were not employed. The workmanship of the cheap imported labor was of course very inferior....all that this bill does, gentlemen, is to protect the Government, as well as the workers, in carrying out the policy of paying decent American wages to workers on Government contracts. [Applause.]

U.S., Seventy-First Congress, Third Session, *Congressional Record*-House, February 28, 1931, p. 6510.

⁶³ The New York Times characterized the Davis-bacon House debate as follows: The Davis-Bacon maximum wage scale bill, provides that the maximum wage scale prevalent in any community where public works are undertaken under Federal contract, be paid to all laborers and mechanics....While the [voice] vote against the measure was negligible, the fight on it was bitter during the forty minutes of debate. Representative Blanton, Democrat, Texas, staged a virtual one-man opposition, declaring that the bill would do away with the right of free contract, and furthermore represented a further surrender to organized labor. *New York Times*, Sunday, March 1, 1931, p. 6, col. 2.

code word argument founders on the very fact that the America of the 1920s and 1930s was comfortable with its own racism. Why use code words to hide your central racist intent when such intentions were common and accepted?

Conclusion.

This is not a story about Jim Crow laws. It is a story about factoid production. Critics of prevailing wage regulations were stymied by the failure to win repeals at the ballot box. The 1988 ballot initiative failure in Massachusetts followed by a similar failure at the ballot box in Oregon in 1994 called for a new strategy. Critics were concerned that their claims of substantial taxpayer savings from repeal were beginning to appear false. In any case, prevailing wage regulations had already been swept out of the South in the 1980s with repeals in Alabama, Florida and Louisiana. A new argument was needed that might work in the rest of the country. The Jim Crow factoid was invented to serve this purpose.

The Jim Crow factoid was never based on scholarly research. The argument has never been published in respected academic or scholarly outlets. No qualified economic, legal or labor historian has ever asserted that prevailing wage laws were essentially or fundamentally Jim Crow legislation. This is because the major premises of this argument are false.

Davis-Bacon (1931) was not the original prevailing wage law. The first national prevailing wage law was in 1868. The first state law (Kansas) was in 1891. There is not a scintilla of evidence that either of these laws or the half dozen other state laws passed before Davis-bacon were Jim Crow laws. Furthermore both England (1890) and Canada (1900) passed similar laws without any tradition of slavery or Jim Crow. And finally, of the nine states which never passed prevailing wage laws, five were in the South (Virginia, North Carolina, South Caroline, Georgia and Mississippi). If prevailing wage laws were Jim Crow laws, why were they least common in the heart of Jim Crow country?

The sponsors of Davis-Bacon did not proclaim any racial intentions in their arguments favoring the law. Indeed, Republican sponsor Robert Bacon explicitly rejected such arguments when they were proffered by non-sponsoring Southern Democrats.

The vast majority of supporting arguments for the law involved maintaining labor standards not excluding black workers. So the Jim Crow thesis must and does assert that the sponsors, while not mentioning race, were nonetheless talking in code about their racist intentions. But why in 1931 would legislators feel the need to talk in code? And why if code words were necessary for almost everyone, did three congressmen feel no need to talk in code about their racist outlook? A simpler explanation is that no one was talking in code, and three Democratic supporters of the law—one from Georgia, one from Alabama and one from Missouri—were true blue segregationists who personally saw the law through that racist lens. It is unfair and inaccurate to tar Northern Republicans Fiorello LaGuardia, Robert Bacon and others with the statements of Southern Democrats.

This essay has shown a woeful willingness of credulous or unscrupulous editorialists to spread factoids as facts. It has shown that slipshod scholarship at think tanks has replaced careful research as the resource relied upon by opinion makers. The real story here is not one of an archaic Jim Crow law somehow left on the books. The real story here is on of the debasement of political discourse through the spread of factoids by thoughtless think tanks.

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