

## Prevailing Wage Laws

*Greed Disguised as Public Policy*

By David Denholm

*Summary: Most Americans have probably never heard of “prevailing wage” laws, or if they have, think they’re redundant since, by definition, they must mandate a wage that is already “prevailing.” Nothing could be further from the truth: Prevailing wage laws, used by labor unions and by contractors who have union contracts, inflate the cost of construction projects. Time and again the Department of Labor has decided that a union’s wage rate is a local area’s “prevailing wage” even though in 2009 only 14.5 percent of all construction industry workers were union members. But times are changing. Despite union political power many states understand what’s wrong with prevailing wage laws and are repealing them. Will the federal government also see the light?*



In some parts of the U.S. highway engineers are just waiting for a major bridge to collapse. An eight-lane steel bridge did just that in 2007. The bridge carrying interstate highway 35-W across the Mississippi River in Minneapolis collapsed during rush hour killing thirteen people. The American Society of Civil Engineers estimates that America has an “infrastructure deficit” which will require an expenditure of \$2.2 trillion over the next five years. They say that’s what’s needed to keep our highways from deteriorating, to keep bridges from falling down, and to build new schools and keep old ones in good repair.

Some of the work requires new construction, but much of it involves repair and renova-

tion—from pouring concrete to replacing broken glass and fixing leaky roofs—work that ideally could be accomplished by thousands of American small businesses.

But there is one problem: to participate in the bidding process for government-funded construction jobs, small businesses must abide by “prevailing wage” laws. Because these laws mandate a certain level of wage payment they increase the costs of construction, which reduces the funds available for other much-needed construction projects.

Labor unions are dedicated to preserving and extending prevailing wage laws. At heart they are an attempt to legalize dis-

crimination against non-union employers and workers. The laws prevent low bids for construction work by claiming that they undermine local community wage standards. But the wage standards they protect are the

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creation of a labor union cartel. Prevailing wage laws discriminate against workers who are willing to work for less than the artificially high cartel wage that is negotiated between unions and employers - and protected by government.

### **What Are “Prevailing Wages”?**

Prevailing wage laws require that workers on government contracts be paid wages that are said to “prevail” in the community where the work is done. Supporters of these laws argue that this prevents government contractors from undermining local community wage rates by importing workers from outside the area who are willing to work for less pay.

Kansas was the first state to enact a prevailing wage law in 1893. But the best known prevailing wage law is the federal Davis-Bacon Act passed in 1931 during the Great Depression. Thirty-two states have varying types of prevailing wage laws. These state laws may apply to municipalities and other units of local government, or to specific state agencies, or to particular types of construction projects such as highways and bridges.

There is no cost threshold for applying a prevailing wage law to a construction job in union-heavy Illinois, or in Massachusetts, Michigan, Missouri, Nebraska, New York, Texas, Washington and West Virginia. But government-funded construction jobs must

cost at least \$500,000 in Maryland. In three states, Connecticut, Delaware and Ohio, the cost threshold varies for new construction work and for repairs and remodeling. State prevailing wage laws also cover different kinds of projects. Some laws apply to all state-funded construction while others exclude certain projects.

Some states have even applied prevailing wage laws to private sector projects if they receive minimal amounts of financial aid from a government agency. Unions have demanded so-called “project labor agreements” for construction projects that have minimal connection to what might be identified as “public works.” For instance in Lansing, Michigan the building trade unions sought a PLA on a private development where the developer needed to spend heavily on environmental cleanup because the city had offered a tax abatement as an incentive. Fortunately, the City Council rejected the demand.

If prevailing wage laws simply focused on their stated purpose—prohibiting outside government contractors from undercutting local area wage rates—it is likely that they would cause little public controversy. Indeed, the laws would prove unnecessary because workers from out of the area would gravitate to whatever jobs paid the highest wages. But that’s not how prevailing wage laws work.

Before a government agency sets a “prevailing wage” for a particular job it conducts a survey. This invites intervention by powerful special interests who have a strong stake in fixing the outcome. The most powerful of these special interests are the building trade unions and contractor associations whose fortunes are closely tied to unions because they’ve entered into collective bargaining agreements with them. The contractors and the unions know that if they were to bid on government contracts in a free market they would not be able to compete successfully against non-union contractors that pay wage rates that truly prevail in a local community.

Advocates of prevailing wage laws like to say that the Davis-Bacon Act and similar state laws protect the economies of local communities that host public works construction projects and frustrate low-ball bids from unscrupulous contractors who import “mechanics and laborers” willing to accept exploitative low wages. (Mechanic is the old-fashioned term for a skilled trade worker. The phrase “mechanics and laborers” often appears in government agency pamphlets and regulations.)

These are some of the profound misconceptions about prevailing wage laws. The principal defenders of prevailing wage legislation are the special interests who benefit from the anti-competitive character of the laws. They know it’s foolish to be honest about their intentions, and so they choose words that disguise their real intent.

For instance, the Davis-Bacon Act never states that a prevailing wage is the market rate that prevails for comparable work in a local community. Instead, the law makes the open-ended statement that “The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing...” for specific trades in the area where work is to be performed. The Department of Labor conducts surveys—participation in which is voluntary—in order to determine what wages for a particular type of work shall be designated as “prevailing.” Of course union contractors realize that making union scale the “prevailing” wage will protect them from competition by non-union contractors. Workers covered by union contracts, egged on by union officials, are highly motivated to participate in these surveys. After all, if union member wages are the standard or “prevailing wage,” then unionized jobs are protected from competition.

By contrast, prevailing wage laws discourage contractors who pay market wages from bidding on public works construction projects. It’s awkward for a contractor to have to explain to an employee why he or she is making more money one day, working on a

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public works project, than the next day, doing exactly the same work on a private job. Open shop contractors (i.e. contractors who do not require workers to be union members as a condition of their employment) have little incentive to participate in the surveys that set the prevailing wage and they may have good reason to distrust government bureaucrats with their confidential payroll information which might get into the hands of a competitor or a union. In addition, open shop contractors are likely to be burdened by all the record keeping and reporting requirements for complying with a prevailing wage law. The Davis-Bacon Act requires contractors to file weekly reports to the government on the amount of wages paid to each worker. That's why many small firms without teams

of lawyers and accountants choose not to bid on public construction projects rather than invite trouble over compliance issues. With reduced competition, particularly from small business, large unionized firms have an incentive to bid up the cost of public works construction.

**Four Reasons Why Government Attempts to Determine A "Prevailing Wage" Are Harmful and Inaccurate**

1. Using a government-sponsored survey to determine a local community's prevailing wage forces employers to standardize their wage rates. In the non-union construction industry workers in a particular trade are often

paid varying wages even when they work for the same employer. Non-union firms are free to recognize higher skill levels with higher pay and they may choose to acknowledge workers' seniority. But in the unionized construction industry wages are almost always standardized, one-size-fits-all.

2. Then there is the issue of "norming," a survey technique for determining the prevailing wage. Consider what currently happens when the Department of Labor uses a norm rather than an average to survey the prevailing wages of ten carpenters. If two carpenters are union members who earn an identical wage and the other eight are non-union and earn varying wages, the Labor Department sets the union wage as the "norm." Using a weighted average on

the survey would produce an entirely different wage level for deciding what should be called the “prevailing wage.”

The Oregon legislature once ordered the state Bureau of Labor and Industries to conduct a survey of construction wage rates and compare them to previously published “prevailing wage” rates. It found that the published prevailing wage rates were on average 25 percent higher than those actually paid in Oregon communities. Moreover, Oregon law required independent wage surveys, but in practice the state accepted the wage rates set by the Davis-Bacon act.

3. Davis-Bacon prevailing wage rates are not accurate assessments of the real wages paid to workers across this country. As long ago as 1979, the General Accounting Office (GAO) recommended that the law be repealed. Its audit found that the Department of Labor had not even conducted a wage survey in 57 percent of the cases where it set a prevailing wage rate.

Even the Labor Department’s own office of Occupational Employment Statistics (OES) has demonstrated the fallacy of prevailing wages. OES looks at “mean hourly wages.” This figure is derived from data in the Bureau of Labor Statistics’ Current Population Survey (CPS), which is based on 60,000 monthly interviews. CPS data is considered highly accurate. OES state-by-state data is available online just as is the Davis-Bacon determination of the prevailing wage for various occupations. Compare the two data sets and it is clear that the Davis-Bacon “prevailing wage” is way out of line with OES-reported statewide wages that can truly be said to prevail in the states.

There is also the question of fraud. Recently an Oklahoma union official was convicted of filing false reports on a Davis-Bacon wage survey. To drive up the prevailing wage rates determined by the survey he created fictitious workers at fictitious jobs who were paid fictitious rates of pay.

4. It is difficult to estimate the inaccuracy of prevailing wage laws because the

market-based cost of labor on construction projects varies from project to project. Some estimates show that labor costs account for about 30 percent of the cost of new construction. But labor can account for 60 or 70 percent of the cost of projects involving repairs and renovation. Hence it is ridiculous for the federal government to estimate that Davis-Bacon adds a mere 3.7 percent to the cost of labor. The building trade unions contend that prevailing wage laws have little or no impact on increasing construction costs. But it goes against common sense to argue that rules mandating union pay rates in construction projects will not increase the cost of labor.

Union supporters claim the Labor Department designates union wage rates as the “prevailing wage” because union members dominate construction industry employment in big cities. (In labor policy circles this is known as “union density.”) But they are wrong. In 2009 construction industry union density in the New York City metropolitan area was only 27 percent. In San Francisco it was a mere 20 percent. The highest union density was in Chicago where 42 percent of construction workers are union members. In other words, it is false to assert that union wages “prevail” in any part of the country. According to the Bureau of Labor Statistics, in 2009 only 14.5 percent of all construction industry employees were union members.

### **Prevailing Wage Laws: Another Name for Discrimination**

The historical evidence shows that prevailing wage laws have been used to discriminate against minority groups. An Empire Foundation commentary on New York State’s prevailing wage law notes that it was first enacted in 1897 to prevent Irish and Italian immigrants from getting construction jobs. As these and other ethnic groups began to dominate the construction unions, they used prevailing wage laws to block African-Americans from obtaining work on federal construction jobs. Indeed, a major motive behind passage of the 1931 Davis-Bacon Act

was to keep African-Americans out of the building trades. (For more information, see David E. Bernstein, *One Place of Redress: African-Americans, Labor Regulations and the Courts from Reconstruction to the New Deal*, Duke University Press, 2000.) Prevailing wage laws gave unionized contractors the upper hand in bidding on public works projects. That froze out minorities who were unable to obtain union membership.

### **Prevailing Wage Laws Stall Economic Recovery and Hurt National Security**

It may seem excessive to pound so many nails into the prevailing wage coffin. But like Dracula, the noble myth of the prevailing wage keeps rising. We tend to think of wages as pay for work. But wages are also the “price” of labor. It’s considered a scandal when the government pays more for property than a competitively bid price. Why is it considered noble for government to insist on paying more for labor?

Congress’s mammoth economic stimulus bill (a.k.a. the American Recovery and Reinvestment Act of 2009) included federal spending for infrastructure, and these funds are subject to the Davis-Bacon Act. Consider the \$5 billion in federal funding for “weatherization” projects at schools and at homes occupied by the poor and elderly. Although President Obama told the unions that weatherization jobs are covered by Davis-Bacon, he apparently did not understand that the Labor Department is required to determine a prevailing wage for all classifications of weatherization work in all 3,140 counties receiving federal funds.

That’s what the Davis-Bacon Act requires, and it has led to lengthy delays in distributing stimulus funding for this purpose. The Labor Department assures the many non-profit agencies scheduled to do the work that there will be no delays, but the legal and financial consequences of misclassifying a job—and paying less than the prevailing wage—are too great. The upshot: delays have continued for the better part of a year.

Clearly, prevailing wage laws reduce the amount of government funding available for infrastructure projects. City and county governments that need to modernize their water and sewer systems must abide by the laws. So does military base construction, which is covered by the Davis-Bacon Act. The more money that governments must pay to unionized contractors, the less will be available for roads and bridges and schools and our national security.

### **Will the States Lead Us Out of the Prevailing Wage Morass?**

In 1935 Congress lowered from \$5,000 to \$2,000 the threshold at which the Davis-Bacon Act applies to government construction contracts. Congress has never raised the threshold. If the \$5,000 threshold were only adjusted for inflation government-funded construction projects would need to cost at least \$70,000 today. But you can bet the unions would raise a fuss.

But there is cause for hope: 18 states are refusing to mimic the Davis-Bacon Act and have no prevailing wage laws. Nine of the 18 actually repealed their own laws.

After the 2010 elections more states should be ready to repeal their prevailing wage. There are rumblings in Missouri, Michigan, Ohio, Pennsylvania and Wisconsin. Florida led the way. In 1974 it exempted public school construction from prevailing wage requirements and a study found the exemption saved 15 percent in school construction costs. In 1979 Florida became the first state to repeal its prevailing wage law. Alabama and Utah followed in 1981, Arizona in 1984, Colorado, Idaho and New Hampshire in 1985, Kansas in 1987 and Louisiana in 1988. In 1997 Ohio exempted public school construction from its prevailing wage law. (In 2000 Maryland took a step back, extending coverage of its law to public school construction.)

Another indication of the public's rejection of prevailing wage laws is the increasing

number of California cities that have passed ballot referendums to become charter cities. Under California law charter cities are not required to pay prevailing wages on construction projects that are entirely funded by the city. It's no secret that getting out from under the prevailing wage is the primary, if not sole, reason for these referendums. The building trade unions have opposed them vociferously, but they have been approved by comfortable margins.

### **The Decline of Construction Industry Unionism**

Once upon a time state prevailing wage laws probably didn't matter. That's because there was a time when almost all construction jobs were unionized. According to Rutgers professor emeritus Leo Troy, a noted labor union demographer, 87 percent of all construction industry employment was unionized in 1947. But times have changed. Unionized workers in the construction industry fell to 28 percent in 1983 (when modern record keeping began). In 2009 the figure was 14.5 percent.

Union density in the construction industry varies from state to state: the high is 39.8 percent in Illinois; the low of 1.1 percent in North Carolina. On average, construction workers who belong to unions in states with prevailing wage laws (i.e. union density) is 17.8 percent compared to 6.6 percent in states with no law.

Still, it is difficult to calculate how much a state's prevailing wage law affects union power in a state. For example, Iowa is a Right to Work state and has no prevailing wage law. But unions have a high state profile and strong political influence. By contrast, Texas law defers to each contracting unit of government to determine whether there is a prevailing wage and how it is to be enforced. The state has low levels of unionism. In New York, state prevailing wage rates are easy to determine. It is whatever wage is determined by collective bargaining with a union.

### **Conclusion**

Prevailing wage laws are relics of a bygone era that persist because vested interests still preserve their legislative privileges even though they have failed in the marketplace.

But during the last two decades nine states have repealed their prevailing wage laws and more are poised to do so in the future. In 1997 Ohio exempted public school construction from coverage by the state's prevailing wage law because it needed to repair deteriorating public schools. That motive is sure to spur political leaders in other states to take similar action in 2011 and beyond.

*David Denholm is the President of the Public Service Research Foundation.*

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**Terrence Scanlon  
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# LaborNotes

Liberals favor greater governmental oversight in seemingly every aspect of society - except labor unions. That's the only conclusion one can reach in light of the Obama Administration's decision in early December to roll back the Bush-instituted requirements that unions make so-called "strike funds" and other accounts transparent in Form T-1 disclosures.

Incoming Wisconsin Republican Gov.-elect **Scott Walker** has publicly called on the **Wisconsin State Employees Union** to increase their pension contributions by 12 percent in order to help bring the state's gargantuan budget deficit under control. The union heard the call, and has now answered: Fat chance. The new union-approved contract increases pension contributions by a measly 0.2 percent to 0.8 percent, as reported by the *AP*. Gee, thanks.

In Newark, New Jersey's largest city, 167 police officers, comprising 14 percent of the entire force, have been dismissed. The layoffs are a direct result of the local police union rejecting the cash-strapped city's request for a one-time salary deferment and a cap on overtime, which the union "saw as a violation of their contract," according to CBS New York. "These layoffs were entirely avoidable. These layoffs could've been stopped at any moment by the union leadership. We could've cut the layoffs in half or a fraction if the union leadership was willing to do something in partnership with the city," Newark Mayor **Cory Booker** lamented. Booker went on to assure the citizens that they will not be any less safe due to the drop in the number of police patrolling their streets at night - an argument few are buying. Newark resident Emma Montgomery put it best: "The criminals are sitting back, saying, 'Oh boy. I like this. I like this!'" Indeed.

New-majority Republicans in the Maine state government are already on a political collision course with organized labor. State Rep. **Richard Cebra** (R) has instigated legislation aimed at taming Maine's \$4.4 billion unfunded pension liability by "raising workers' contributions by 1 percent for six years and eliminating cost-of-living increases for retirees with pensions of more than \$45,000 annually," as reported by *Maine Today*. Among other controversial Republican proposals: The elimination of the **Labor Committee** in the State Legislature and the introduction of so-called "right-to-work" legislation, which unions (correctly) fear will weaken their power and influence. "This will be a line in the sand -- a major campaign fight for us that we will oppose very aggressively," vowed **Matt Schlobohm**, executive director of the **Maine AFL-CIO**. Bet on it.

How do you know that teachers' unions have grown complacent and corrupt and more interested in teachers' salaries than student achievement? When even liberal politicians turn on them. Take Los Angeles Mayor **Antonio Villaraigosa**, himself a former teachers' union employee, who said recently of the powerful **United Teachers of Los Angeles** (UTLA): "At every step of the way, when Los Angeles was coming together to effect real change in our public schools, UTLA was there to fight against the change and slow the pace of reform." According to the *LA Times*, the mayor in a recent address "declared that education in Los Angeles stands at 'a critical crossroads,' and he assailed United Teachers Los Angeles for resisting change. During the last five years, the mayor said, union leaders have stood as 'one unwavering road block to reform.' He called for change in contentious areas such as tenure, teacher evaluations and seniority — all volatile arenas in which teachers unions have balked at proposals for reform as eroding their rights." Ouch.