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CASE COMMENTARY

IMPLIED PRIVATE RIGHT OF ACTION
UNDER THE DAVIS-BACON ACT:
CLOSING SOME LOOPHOLES IN
ADMINISTRATIVE ENFORCEMENT—
McDaniel v. University of Chicago and
Coutu v. Universities Research Association, Inc.

Laurie E. Leader*
Kenneth A. Jenero**

The Davis-Bacon Act\(^1\) is a relatively unknown piece of legislation. Although the Act is an old one by American labor law standards and is, in fact, the first federal law enacted to regulate the wages of non-government employees,\(^2\) it has received little attention in the legal literature. By its terms, the Act is misleadingly simple. It requires payment of prevailing wages, as determined by the Secretary of Labor, to laborers and mechanics engaged in the construction, alteration, and/or repair of public works of the United States.\(^3\)

Despite the Act’s obscurity and facial simplicity, it has a significant impact on our nation’s economy. The Act not only regulates employee wages of the largest customer of the construction industry,\(^4\) but its administration by means of prevailing wage determinations has a widespread effect upon labor negotiations throughout that industry.\(^5\) The task encompassed by administration and enforcement of the Act is, therefore, an onerous one.

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2. Elisburg, Wage Protection Under the Davis-Bacon Act, 28 LAB. L.J. 323, 323 (1977) [hereinafter cited as Elisburg].


4. The federal government is clearly the largest single customer of the construction industry, accounting for an estimated $30 billion in new construction during 1975. A.J. Thieblot, Jr., The Davis-Bacon Act 207 (1975) [hereinafter cited as Thieblot].

5. In addition to spreading union wage rates to the non-union sector, the Davis-Bacon Act disperses urban wage rates throughout non-urban areas. Thieblot, supra note 4, at 160. For a more detailed discussion of the effects of the Davis-Bacon Act on industry, see the 1974 survey results of contractors. Id. at 156-66. Thus, the Act generally standardizes construction wage
Two recent Seventh Circuit cases have further expanded the Act's overall impact and scope of application. In McDaniel v. University of Chicago,\(^6\) and Coutu v. Universities Research Association, Inc.,\(^7\) the Seventh Circuit recognized a private right of action in government laborers and mechanics to enforce payment of prevailing wage rates guaranteed to them by the Davis-Bacon Act. Moreover, the Coutu court held that the absence of Davis-Bacon Act stipulations requiring payment of prevailing wages in the construction contract between the government and the prime contractor would not automatically free the contractual parties from any Davis-Bacon obligations, and that laborers and mechanics could enforce such obligations if they performed Davis-Bacon work pursuant to the subject government contract.\(^8\)

This Commentary reviews the legislative and case history of the Davis-Bacon Act as it developed prior to the McDaniel and Coutu decisions. The two decisions effected changes in the scope and application of the Davis-Bacon Act worthy of discussion.

**Statutory History of the Davis-Bacon Act**

*The Original Davis-Bacon Act*

The Davis-Bacon Act, like most early federal labor laws, was preceded by state statutes.\(^9\) Following the earliest of these state laws, congressional hearings on maintaining local labor standards in construction work were held beginning in 1898.\(^10\) In a House report accompanying a bill of March 4, 1927, which provided that wages to be paid by private contractors on federal construction must comply with the local standards of wages and working conditions, the Committee members noted "that the least that the Federal scales at union rates. It further influences the market organization of construction labor through the work classifications specified by the Secretary of Labor in the Davis-Bacon determinations. \(\text{Id. at 146-48.}\) Whether the Act also strengthens unionization has been the subject of dispute. It is submitted that, to the extent that administrative mechanisms are effective in standardizing wages at union rates, the Davis-Bacon Act minimizes the preference of government contractors to hire nonunion labor. Examination of those mechanisms reveals that, more often than not, the Act is less than vigorously enforced. \(\text{See notes 49-73 and accompanying text infra.}\) The advent of industrial unionism further diminished the statute's impact on unionization because jurisdictional disputes then emerged among the building trade unions and industrial unions concerning questions of coverage under the Act. Price, A Review of the Application of the Davis-Bacon Act, 14 LAB. L.J. 614, 618-19 (1963) [hereinafter cited as Price].

\(6\) 548 F.2d 689 (7th Cir. 1977), cert. denied, 434 U.S. 1033 (1978).

\(7\) 595 F.2d 396 (7th Cir. 1979), cert. granted, 100 S. Ct. 1310 (1980).

\(8\) \(\text{Id. at 398-400.}\)


\(10\) Price, supra note 5, at 614.
Government should do is maintain an equally satisfactory standard (comparable to that established by state legislation) for federal construction work in that state.\textsuperscript{11} No legislation resulted from those hearings until 1931.

The real impetus for government regulation of wages for public and private employees in public construction was the economic and social conditions of the 1930's.\textsuperscript{12} During the Depression, the national conscience was aroused by the effect of widespread unemployment on the wages of workers. While the competition for limited markets forced employers to cut labor costs,\textsuperscript{13} the scarcity of work created an oversupply of labor that resulted in low wage rates.\textsuperscript{14} The absence of job opportunities further increased public reliance upon federal construction as a source of employment at a time when the federal government was required to award its contracts to the lowest bidder.\textsuperscript{15} This requirement prevented representatives of federal contracting agencies from dictating that successful bidders pay their employees wages comparable to those paid for similar labor in private industry in the vicinity of the government projects under construction. Some successful bidders took advantage of the government contracting agencies' impotence by "selfishly import\[ing\] labor from distant localities and . . . exploit\[ing\] this labor at wages far below local wage rates."\textsuperscript{16} Local workmen were affected by their inability to compete with the migratory labor, and qualified local contractors found it impossible to compete with outside contractors who based their estimates for labor costs upon the low wages paid to imported laborers.\textsuperscript{17}

The Davis-Bacon Act was designed to curtail such unscrupulous practices among government contractors during a decade in which public works were on an upswing and economists and politicians were particularly wary of depressed labor markets.\textsuperscript{18} The Act also was designed to prohibit wage differ-

\textsuperscript{12} See generally 74 CONG. REC. 6504-21 (1931). Besides the Davis-Bacon Act, two other legislative measures were designed to arrest the depression: (1) the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (terminated by Exec. Order No. 7252, as reprinted in 15 U.S.C. § 701 (1976)); which establishes codes of fair competition for both prices and wages; and (2) the Walsh-Healy Act, 40 U.S.C. § 35-45 (1976), which sets forth labor standards for government supply contracts. Shortly after enactment, the National Industrial Recovery Act was declared unconstitutional in A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). For a general overview of these statutes, see Donahue, The Davis-Bacon Act and the Walsh-Healy Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions, 29 L. & CONTEMP. PROB. 488 (1964).
\textsuperscript{13} S. REP. No. 1445, 71st Cong., 3d Sess. 2 (1931).
\textsuperscript{14} Id.; H.R. REP. No. 2453, 71st Cong., 3d Sess. 2 (1931).
\textsuperscript{15} Thieblot, supra note 4, at 7.
\textsuperscript{16} S. REP. No. 1445, 71st Cong., 3d Sess. 2 (1931).
\textsuperscript{17} See Brozen, The Law that Boomeranged, 62 NATION'S BUS. 70 (1974).
\textsuperscript{18} Elsburg, supra note 2, at 323-24; Price, supra note 5, at 616. But see Thieblot, supra note 4, at 8-10. The author questions whether the depression and the fear of itinerant contractors and laborers were, rather than the true reasons for enactment of the Davis-Bacon Act, rationalizations to promote its passage. In support of this theory, Dr. Thieblot notes the following: (1) the philosophy of the bill preceded the depression itself and the massive government
entials from becoming a major competitive advantage in bidding on government construction contracts, and it thereby insured that the economic power of the government as an employer would not contribute to a further demoralization of local labor markets.\textsuperscript{19} To accomplish these goals, the Act required government contractors to pay their laborers and mechanics the prevailing private industry wage rates.\textsuperscript{20}

The compulsory nature of the Act's prevailing wage rate provision was emphasized throughout the 1931 congressional debates on the Davis-Bacon bills.\textsuperscript{21} In fact, that provision emerged as the most controversial aspect of the Act because it was vehemently argued that the prevailing wage provision infringed upon the inherent freedom of contract between contractors and laborers.\textsuperscript{22}

Because the Act mandated that under all covered contracts the contractor pay the prevailing wage rate, the only variable was the exact rate to be paid. Should a dispute arise concerning the applicable wage rate, the contracting officer first would attempt to adjust the rate in accordance with the character of the work performed and the locality in which it was performed.\textsuperscript{23} To the

projects undertaken to stimulate the depressed economy by several years; (2) the Act was likely a union-oriented measure, because it would significantly protect unions from nonunion wage competition in an era of increased unionism, despite constitutional prohibitions against specification of union labor in federal construction contracts; (3) the fear of itinerant laborers and contractors was overstated from a statistical standpoint and, most probably, was colored by racial bigotry; and (4) the contention that the Act was prompted by the Depression and problems of bootleg labor was refuted by the fact that Congress declined to adopt the bill as special legislation during the emergency of the Depression. \textit{Id.}


\textsuperscript{20} Act of March 3, 1931, ch. 411, § 1, 46 Stat. 1494 (current version at 40 U.S.C. § 276a (1976)). The original Act provided, in pertinent part:

That every contract in excess of $5,000 in amount, to which the United States or the District Court of Columbia is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration, and/or repair of any public buildings of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, shall contain a provision to the effect that the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State in which the public buildings are located, or in the District of Columbia if the buildings are located there . . . .

\textit{Id.} (emphasis added).

\textsuperscript{21} \textit{Id.} at 6509 (remarks of Rep. Blanton).

\textsuperscript{22} \textit{Id.} at 6509 (remarks of Rep. Blanton).

\textsuperscript{23} Act of March 3, 1931, ch. 411, § 1, 46 Stat. 1494 (current version at 40 U.S.C. §§ 276a-276a-5 (1976)) provides that:

\textit{In case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract . . . .}

This crisis orientation toward administration of the Act created a virtual vacuum of enforcement. Further problems arose from the lack of definition of "prevailing wage" under the original Act. The current method for computation of prevailing wage rates appears at 29 C.F.R. §§ 1.1-.17 (1979).
extent that the contracting officer could not resolve the dispute, the matter
was referred to the Secretary of Labor for a conclusive determination.24

The 1935 and 1964 Amendments to the
Davis-Bacon Act

The original Davis-Bacon Act had several serious shortcomings. The Act
not only failed to inform laborers of the rights it afforded them, but was
devoid of effective mechanisms for the administration and enforcement of
those rights.25 The enforcement problem was compounded by the absence
of definitions of key terms within the statute. Because the Secretary of Labor
was without authority to prevent wage conflicts through a predetermination
of prevailing wage rates, government contractors had no power to prevent
wage disputes from arising. The Secretary was only authorized to determine
such rates following a conflict, and this often meant that a contractor would
be forced to pay wages at a higher rate than those upon which the initial bid
was based.26

Accordingly, in 1935 Congress amended the Davis-Bacon Act in an
attempt to correct many of the readily apparent deficiencies of the original
legislation.27 The 1935 amendment strengthened the Act in five significant
aspects. First, the amount involved in a construction contract subject to the
Act was lowered from five thousand dollars to two thousand dollars, and the
lower amount is contained in the present version of the Act.28 Second, the
prevailing wage provision was expanded to require the unconditional pay-
ment of wages at least once each week, without subsequent rebates or de-
ductions.29 Such wage payments were mandated “regardless of any contrac-
tual relationship which may be alleged to exist between the contractor or

276a-276a-5 (1976)).
25. The Secretary of Labor was curtailed from effective administration of the original Act in
two significant respects: (1) his or her role emerged as one of conciliation rather than indepen-
dent enforcement due to the Act’s provision for postdetermination of prevailing wage rates; and
(2) even assuming the Secretary’s desire to curtail Davis-Bacon violations, the Act was without
sanctions to impose against derelict government contractors. Id.
276a(a) (1976)).
28. Id. By decreasing the dollar threshold for application of the Act to $2,000, Congress
extended coverage to most federal construction while retaining a floor below which the rela-
tively slight effect on wage stabilization would not warrant administration. The propriety of the
still-existing $2,000 floor, in light of skyrocketing construction costs since 1935, has been aptly
questioned by a number of federal procurement agencies. The Department of the Interior, the
General Services Administration, and the Department of Housing, among others, argue that
this is no longer the point below which administration would have a de minimus effect upon
wage stabilization and, accordingly, advocate raising the threshold amount at varying levels from
$10,000 to $100,000. Thiebloth, supra note 4, at 78.
§ 276a(a) (1976)).
subcontractor and such laborers and mechanics.”

Third, the contractor was required to post applicable wage scales at the worksite to inform laborers of the wage protections afforded to them by the Act. Fourth, to enable government contractors more accurately to approximate labor costs before submitting construction bids, the Secretary of Labor’s role under the 1935 amendment was expanded to one of predetermination, rather than postdetermination, of prevailing wage rates. Finally, aggrieved workers were afforded the same right of action against the contractor and the sureties as was previously available to persons furnishing labor and materials pursuant to the government contract.

The other significant amendment was enacted in 1964 in response to the changing pattern of wage payments. By this time, wages were no longer the sole significant component of a worker’s income; fringe benefits had become a large portion of the compensation received by the worker. Yet, under the Act, the labor force of a local community could continue to lose government contracts to competitors who were able to underbid them by denying their workers fringe benefits. To close this loophole and encourage employers to provide these benefits, Congress enacted the 1964 amendment to the Davis-Bacon Act. Specifically, that amendment redefined the term “wages” as used in the Act to include fringe benefits voluntarily assumed by the contractor on behalf of his or her employees.

30. Id. Prior to 1935, laborers could, and often did, release government contractors from Davis-Bacon obligations by private agreement. Both the 1935 amendment and subsequent judicial decision rendered such practices violative of the Act. See United States ex rel. Johnson v. Morley Constr. Co., 98 F.2d 781 (2d Cir. 1938).


33. Act of August 30, 1935, ch. 825, § 3, 49 Stat. 1012 (current version at 40 U.S.C. § 276a-1 (1976)). If the funds withheld by the Comptroller General under the terms of the contract prove to be insufficient to reimburse laborers and mechanics for the failure to pay the prevailing wages, such laborers and mechanics are given the same right of action against the contractor and the sureties as has been conferred upon persons furnishing labor and materials. Id. Therefore, laborers and mechanics can sue for the amount, or the balance thereof, unpaid at the time of initiation of the suit. See 40 U.S.C. § 270b (1976).

34. Act of July 2, 1964, Pub. L. No. 88-348, 78 Stat. 238-40 (current version at 40 U.S.C. § 276a(b) (1976)). This amendment defined the terms “wages,” “scale of wages,” “wage rates,” “minimum wages,” and “prevailing wages” as used in the Davis-Bacon Act to include:
ADMINISTRATION AND ENFORCEMENT OF THE
DAVIS-BACON ACT

As previously stated, the administration and enforcement of the Davis-Bacon Act are onerous tasks. This fact is due, in large part, to the bifurcated delegation of these duties articulated in Reorganization Plan No. 14 and implemented by the Office of the Secretary of Labor under the Code of Federal Regulations.

Pursuant to the Reorganization Act of 1949, President Truman established Reorganization Plan No. 14 as a means to coordinate the administration of labor standards under the Davis-Bacon Act and several other statutes regulating federal construction and public works. Under the Plan, administration efforts were delegated to the Secretary of Labor, while responsibility for actual enforcement of the Act resided with the federal contracting agencies. The purpose of the Plan was to not only centralize administration, but also to provide uniformity of enforcement from agency to agency.

(1) the basic hourly rate of pay; and
(2) the amount of—
   (A) the rate of contribution irrevocably made by a contractor or subcontractor to a
       trustee or to a third person pursuant to a fund, plan, or program; and
   (B) the rate of costs to the contractor or subcontractor which may be reasonably
       anticipated in providing benefits to laborers and mechanics pursuant to an enforceable
       commitment to carry out a financially responsible plan or program which was
       communicated in writing to the laborers and mechanics affected, for medical and
       hospital care, pensions on retirement or death, compensation for injuries or illness
       resulting from occupational activity, or insurance to provide any of the foregoing,
       for unemployment benefits, life insurance, disability and sickness insurance, or
       accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship
       or other similar programs, or for other bona fide fringe benefits, but only where the
       contractor or subcontractor is not required by other Federal, State, or local law to
       provide any of such benefits . . . .
Pursuant to the Plan, the Secretary of Labor promulgated regulations under the Code of Federal Regulations to coordinate its administration and enforcement of applicable labor standards provisions. The regulations originally governed twenty-nine specific acts that conferred upon the Secretary of Labor responsibilities similar to those bestowed upon him or her by Reorganization Plan No. 14. By 1978 the number of regulated acts had increased to fifty-eight. Leading labor authorities, however, have criticized the regulations for not providing the degree of uniformity and effectiveness needed to enforce labor standards equitably.

How the Enforcement Mechanism Works

The advertised specifications for every contract subject to the Davis-Bacon Act must include a wage determination by the Secretary of Labor. As a government project approaches the bidding stage, the federal contracting agency responsible for the project makes an initial determination of whether the Act covers the work to be performed under the subject contract. If the contemplated work is deemed to be covered by the Act, the federal contracting agency through its contracting officer must secure appropriate prevailing wage rates for the project. The applicable wage determination is then incorporated into the contract, thereby becoming a contractual obligation of the successful bidder. It is the further responsibility of the federal agency to ascertain whether the required stipulation to pay prevailing wage rates has been inserted in a covered government contract.

45. 29 C.F.R. §§ 5.0 -.17 (1979).
46. 29 C.F.R. § 5.1 (1964).
47. 29 C.F.R. § 5.17 (1979).
48. See generally Price, supra note 5; Wolk, Mr. Davis-Mr. Bacon-But Who Is The Enforcer?, 15 LAB. L.J. 323 (1964) [hereinafter cited as Wolk].
50. See Thieblot, supra note 4, at 31.
51. There are two methods by which the contracting officer may secure appropriate wage determinations. First, in geographical areas in which wage scales are well-settled and numerous government contracts are awarded annually, the Secretary of Labor may publish area or general wage determinations. 29 C.F.R. § 1.5(b) (1979). Such determinations appear in the Federal Register on a weekly basis and provide the usual method for obtaining prevailing wage schedules. Alternatively, if general determinations are unavailable for the contemplated work in the locality in which the government project is situated, the contracting officer must request a project determination from the Secretary of Labor. Id. § 1.5(a). Project determinations are applicable only to the particular project under review and remain effective for a maximum of 120 calendar days from the date of issuance. Id. § 1.7(a)(1). By contrast, area or general determinations remain in effect until withdrawn or superceded, although they are required to be updated through timely publication. Id. § 1.7(a)(2).
52. 29 C.F.R. § 5.5(a), 6(a)(1) (1979). Every government contract subject to the Davis-Bacon Act must contain the following clause:

All mechanics and laborers employed or working upon the site of work . . . will be paid unconditionally and not less than once a week . . . at wage rates not less than
the propriety of particular wage determinations may be referred to the Secretary of Labor for authoritative ruling, with appellate jurisdiction conferred in the Wage Appeals Board. Such administrative rulings, however, are not subject to judicial review.

To assure continual compliance with labor standards enunciated by the Davis-Bacon Act, the federal agency is empowered to examine submitted payrolls and ledgers of government contractors and to conduct investigations of their employment practices. Although the Secretary of Labor is authorized to conduct independent investigations as deemed necessary to effectuate the purposes of the Act, the bulk of this administrative chore is clearly borne by the contracting agency.

When it is found that any laborer or mechanic employed by a contractor directly on the worksite covered by the Davis-Bacon Act has been paid less than the determined prevailing wage, the government may terminate the subject contract and proceed with the work at the expense of the violating contractor. In addition, upon recommendation of either the contracting agency or the Department of Labor, the Comptroller General may debar for a period of three years a contractor who has disregarded its obligations to employees or subcontractors.

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those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof . . . .

*Id.* § 5.5(a).

See also 41 C.F.R. §§ 1.16, 5.11 (1979) (setting forth approved forms for Davis-Bacon stipulations to pay prevailing wage rates under contracts funded through the Department of Energy).


55. 29 C.F.R. § 5.6(a)(2) (1979).

56. *Id.* § 5.6(a)(3).

57. *Id.* § 5.11.


60. 40 U.S.C. 276a-2(a) (1976). See 29 C.F.R. § 5.6(b)(1) (1979). This section provides that whenever any contractor or subcontractor is found to be in aggravated or willful violation of labor standards provisions or statutes, other than the Davis-Bacon Act, such contractor or subcontractor shall be debarred for a period not to exceed three years. For a list of the statutes subject to this provision, see 29 C.F.R. § 5.1 (1979).
Statutory Protection to Covered Laborers and Mechanics

While the foregoing illustrates the sanctions that may be imposed upon government contractors who violate the Davis-Bacon Act, it does little to demonstrate how laborers and mechanics employed by such contractors may recover wages to which they are entitled under the Act. Essentially, the Act provides for two avenues by which workmen can obtain unlawfully withheld back wages.

The first avenue to recovery is contained within the statute itself. Failure to pay prevailing wages under a covered government contract may result in the withholding from the violating contractor of so much accrued payments as is considered necessary by the contracting officer to reimburse workers for the difference between prevailing wages required by the contract and the wages actually received. The Comptroller General is authorized to disburse such sums to laborers and mechanics with wage claims. In the event that the accrued payments withheld are insufficient to satisfy all wage claims, and a Miller Act payment bond has been posted on a particular construction project, laborers and mechanics may obtain additional monies for wage claims by suit on the Miller Act bond. This approach is thus a corollary to the first stated remedy, because the withholding of accrued payments is a condition precedent to the recovery of unpaid wages.

The second avenue of relief to covered workmen is contained within the applicable regulations promulgated by the Secretary of Labor. Where violations of the Davis-Bacon Act are found to be unwilled, the federal contracting agency head may request that restitution be made to laborers and mechanics for unpaid wages, or to plans, funds, or programs established on

62. Id. § 276a-2(a). It should be noted that these provisions confer upon the workmen no right to dictate that the United States withhold accrued payments for their wages. Rather, these provisions merely provide aggrieved laborers and mechanics with a remedy if such sums have been withheld. Veader v. Bay State Dredging & Contracting Co., 79 F. Supp. 837, 839 (D. Mass. 1948).
63. The Miller Act, 40 U.S.C. §§ 270a-270d (1976), is the federal construction bond statute that parallels the Davis-Bacon Act. It generally requires that prime contractors on federal construction projects exceeding $2,000 in costs furnish payment and performance bonds to the satisfaction of the contracting officer "for the protection of all persons supplying labor and material in the prosecution of the [contemplated] work." Id. § 270a. In contrast to the mandatory character of the Davis-Bacon Act, however, the Miller Act may be waived for certain types of construction projects. For an overview of enforcement mechanisms under the Miller Act, see Wallick & Stafford, The Miller Act: Enforcement of the Payment Bond, 29 L. & CONTEMP. PROB. 514 (1964).
64. 40 U.S.C. § 276a-2(b) (1976). The Miller Act provides that:

Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished . . . and who has not been paid in full therefore [within a specified period] shall have the right to sue on such payment bond . . . .

Id. § 270b(a) (1976).
65. 29 C.F.R. § 5.10(a) (1979).
their behalf for any type of fringe benefit prescribed in the applicable wage determination.66

While the withholding of funds is not a prerequisite to restitutional recovery under the regulations, both statutory remedies by which an aggrieved workman may obtain the mandated wage rates lie within the discretion of the federal contracting agency. Unless the contracting agency exercises this discretion, the workman is precluded from recovering unpaid wages under the statute. The workman would have no right to demand that funds be withheld or that a Miller Bond be obtained from the contractor.67 Inherent problems emerge from this enforcement scheme. The contracting agency, concerned with minimizing its own costs on a federal construction project, is not the most likely participant to safeguard the rights of covered laborers and mechanics, because the requirement to pay prevailing wage rates increases those costs. Nevertheless, that agency is charged with the primary responsibility for enforcement of the Act in terms of incorporating wage stipulations into a covered contract,68 investigating government contractors to assure day-to-day compliance with the Act,69 and protecting laborers and mechanics by insuring their receipt of prevailing wage rates.70 This apparent conflict of interest has been accurately depicted by one author as a situation in which "the 'home team' not only plays its own baseball game, but umpires as well."71

Consequently, more often than not, laborers and mechanics employed by government contractors are left with no assurance that they will receive the wage rates to which they are statutorily entitled. Pursuant to the statute and applicable regulations, they are at the mercy of the adversely interested federal contracting agency to secure their wages. The fact that the Secretary of Labor is to oversee the administration of the Davis-Bacon Act is of no import because the Secretary is dependent upon the contracting agency to furnish investigatory information with regard to compliance with the Act.72

Accordingly, until 1975 aggrieved workmen could not independently enforce the rights purportedly guaranteed to them by the Act. In that year, in the landmark case of McDaniel v. University of Chicago (McDaniel I),73 the Seventh Circuit Court of Appeals held that an implied private right of action existed under the Act to allow those workmen to vindicate their wage claims in court.

66. Id.
67. See notes 62-63 supra.
68. 29 C.F.R. § 5.6(a)(1) (1979).
69. Id. § 5.6(a)(2).
71. Wolk, supra note 48, at 326.
72. 29 C.F.R. § 5.6(b)(2) (1979).
73. 512 F.2d 583 (7th Cir. 1975), vacated and remanded, 423 U.S. 810 (1976), aff'd, 548 F.2d 689 (7th Cir. 1977), cert. denied, 434 U.S. 1033 (1978).
McDaniel v. University of Chicago and the Private Right of Action Implied from the Davis-Bacon Act

McDaniel v. University of Chicago\footnote{Id.} involved a dispute arising out of a government contract for the design, construction, and operation of the Argonne National Laboratory located in DuPage County, Illinois. By its terms, the contract contemplated the performance of construction work that exceeded $2,000 in costs. The defendant contractor and the contracting agency\footnote{The contracting agency in both the \textit{McDaniel} and \textit{Coutu} decisions was the Atomic Energy Commission (AEC) and its successor agencies, the Energy Research and Development Administration and the current Department of Energy.} agreed, however, that such work would be performed by employees of subcontractors, thereby contractually excluding the workmen of the defendant contractor from Davis-Bacon Act coverage.\footnote{The government contracts in \textit{McDaniel} and \textit{Coutu} contained a clause providing that all Davis-Bacon work would be performed by subcontractors and their employees, and not by employees of the defendant-contractor. \textit{See} notes 106 & 112 and accompanying text infra. The insertion of such clauses in AEC contracts is commonplace. \textit{See Price, supra} note 5, at 631. The clauses have been attacked because of their sweeping language, and the \textit{Coutu} decision tested the legality of such clauses.} The plaintiff, Louis McDaniel, Jr., a laborer who constructed experimental units at the defendant's Argonne facility, filed a lawsuit on behalf of himself and others similarly situated to recover unpaid prevailing wages. He contended that, notwithstanding the contractual exclusion of defendant's employees from Davis-Bacon coverage, he and others performed construction work pursuant to the subject contract and were entitled to be paid at the predetermined wage rates.

The two federal claims in \textit{McDaniel} alleged violations of the Davis-Bacon Act: the first theorized an action against the government contractor for unpaid minimum wages under the Davis-Bacon Act; the second complained of a breach of the subject contract allegedly executed in contravention of the Act. The district court, holding that the Davis-Bacon Act did not confer a right of action against the contractor under the circumstances of the case, dismissed the complaint.\footnote{\textit{See} 512 F.2d at 585 (where the court of appeals discussed the unpublished opinion of the district court).} The Seventh Circuit reversed, holding that a private right of action could be implied from the Act.\footnote{\textit{Id.} at 586-88. The plaintiff alleged that jurisdiction for the implied private right of action was predicated upon the commerce clause, and 28 U.S.C. § 1337 (1976), which provides that district courts shall have original jurisdiction of any civil action arising under any Act of Congress that regulates commerce, 512 F.2d at 587. The \textit{McDaniel} court analogized the minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976), to those of the Davis-Bacon Act and concluded that the commerce clause constituted a "significant constitutional basis underlying the Davis-Bacon Act's validity." 512 F.2d at 587 & n.4. The commerce clause basis for the Fair Labor Standards Act was first pronounced in United States v. Darby, 312 U.S. 100, 117-24 (1941).}
The facts of *McDaniel* allowed and even compelled that holding. In *McDaniel*, the plaintiff workmen were prima facie covered by the Act because the case involved a government construction contract in excess of $2,000. Nevertheless, the contracting agency not only failed to require the payment of prevailing wages to them, but also neglected to safeguard the express statutory remedies by which the plaintiff laborers could challenge the underpayment of wages.\(^79\) Accrued payments were not withheld from the contractor for the future satisfaction of wage claims, nor was a Miller Act bond furnished by the contractor.\(^80\) Characterizing the *McDaniel* facts as illustrative of a situation in which the express statutory remedies for payment of prevailing wages "have proved ineffective," the court stated that an implied private right of action was necessary to fulfill Congress' purpose to insure payment of prevailing wages to covered laborers and mechanics.\(^81\)

Absent a recognition of a private right of action under the Act to check the enforcement abuses by the contracting agency, the rights of the plaintiff laborers and mechanics would go unprotected, and the Act would be emasculated by the very structure designed to effectuate its purposes.

On writ of certiorari, the Supreme Court neither affirmed nor reversed the appellate decision, but merely vacated and remanded the case to the Seventh Circuit with instructions that the decision be reconsidered in light of two recent cases,\(^82\) *Securities Investor Protection Corp. v. Barbour*\(^83\) and *Cort v. Ash*.\(^84\) In *Barbour* and *Ash* the Supreme Court refused to imply a private right of action from the applicable federal statutes.\(^85\) The Seventh Circuit, however, affirmed its earlier decision and found an implied action (*McDaniel II*),\(^86\) a position to which the Supreme Court subsequently deferred.\(^87\)

Ironically, the *McDaniel II* court employed the Supreme Court's reasoning in *Ash* to support its finding of an implied private right of action under the Davis-Bacon Act. The court specifically analyzed the *McDaniel* facts in the context of the four factors pronounced in *Ash* as relevant in determining

\(^79\). See notes 61-64 and accompanying text *supra*.
\(^80\). 512 F.2d at 585. Furthermore, the court noted that the Miller Act itself does not provide a federal cause of action for failure to furnish a bond. *Id.* at n.1 (citing Harry T. Ortlip Co. v. Alvey Ferguson Co., 223 F. Supp. 893, 894 (E.D. Pa. 1963)).
\(^81\).*Id.* at 587.
\(^84\). 422 U.S. 66 (1975). In *Ash*, the Supreme Court denied implication of a private right of action under a criminal statute, 18 U.S.C. § 610 (1976), to complainant citizens or stockholders who sought to enjoin alleged violations of that statute. *Id.* at 82-84.
\(^85\). See notes 83-84 *supra*.
\(^86\). 548 F.2d 689 (7th Cir. 1977).
whether a private right of action is implicit in a federal statute. Those factors are: (1) whether the statute creates a federal right in favor of the plaintiff; (2) whether the applicable legislative history evidences an intention, either express or implied, to create or deny the proposed remedy; (3) whether the implied remedy is consistent with the underlying purposes of the statutory scheme; and (4) whether the proposed cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a statutory cause of action predicated solely upon federal law. The McDaniel II court applied this four-step analysis to conclude that there was a private right of action under the Davis-Bacon Act.

The court had little difficulty in finding that the Davis-Bacon Act created a federal right in favor of aggrieved laborers and mechanics. It found a basis for this right on the face of the statute itself, which emphasizes that the Act was designed to insure the payment of prevailing wages to laborers and mechanics. Consequently, these workmen were found to be the principal beneficiaries of the statute as well as the third-party beneficiaries of the contract that statutorily mandates the payment of those wages to them.

The court resolved the question of whether Congress intended to grant or deny a private right of action by examining the legislative history of the Davis-Bacon Act and its companion statutes—the Miller Act and the Portal-to-Portal Pay Act. Construction of the Davis-Bacon Act in light of these statutes revealed a congressional recognition of the laborers’ right of action. The court also held that the implied private right of action was

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88. Cort v. Ash, 422 U.S. at 78.
89. 548 F.2d at 693. The court also found that the legislative history of the Davis-Bacon Act, as well as subsequent congressional comment on the Act, indicated that the fundamental purpose of the Act was to guarantee payment of prevailing wages to laborers and mechanics.
90. Id. The court emphasized, however, that workmen are not the exclusive beneficiaries of the Act. "[The fact] that local contractors and communities may benefit from the Act does not mean that it was not primarily directed toward the laborers and mechanics." Id.
92. 29 U.S.C. §§ 251-262 (1976). The Portal-to-Portal Pay Act immunized employers against a proliferation of windfall wage and overtime claims that threatened "the solvency of numerous employers and the stability of the industrial structure generally." Northwestern-Hanna Fuel Co. v. McComb, 166 F.2d 932, 939 (8th Cir. 1948). These wage claims resulted from Supreme Court decisions concerning the Fair Labor Standards Act. Under this Act, employers were immunized against employees’ overtime wage claims unless such claims were based on an express contract provision, a collective bargaining agreement, or a custom of the employer. See Note, Constitutionality of the Portal-to-Portal Act, 47 COLUM. L. REV. 1010, 1012 (1947).
93. 548 F.2d at 694. The court found an intention to create an implied private right of action by comparing the limitations periods contained in the Miller Act and the Portal-to-Portal Pay Act. The latter Act encompassed a limitations period of two years applicable to actions brought under the Davis-Bacon Act, whereas the limitations period under the former Act was one year. The court interpreted this distinction as congressional recognition "that laborers are able to sue at least as third party beneficiaries of the contract required by [the Davis-Bacon Act] in state court or in federal court if there were proper jurisdiction." Id.
consistent with the underlying purposes of the Davis-Bacon Act. Though the Act itself contemplated some private remedies, the court found that these remedies were ineffective in accomplishing the congressional purpose. Therefore, an implied private right of action was deemed necessary to effectuate the purpose of the Act.

Finally, the fact that the nature of the implied action is contractual and, thus, one traditionally relegated to state law, did not impede the *McDaniel II* court's determination that aggrieved laborers and mechanics should be afforded a federal remedy. Because Congress had expressed a federal policy to pay covered workmen prevailing wage rates, a corresponding federal remedy was required to insure uniform and consistent enforcement of that policy. Thus, based upon *Barbour* and *Ash*, the *McDaniel II* court again guaranteed to aggrieved laborers and mechanics the right to proceed in federal court to obtain prevailing wages guaranteed to them by the Davis-Bacon Act.

It is important to note, however, what the *McDaniel* court did not do. The court did not directly address the contracting agency's failure to incorporate the required Davis-Bacon stipulation to pay prevailing wages in the government contract. The legal consequence of an agreement between the defendant contractor and the contracting agency to exclude their employees from Davis-Bacon coverage remained to be determined by the Seventh Circuit in the companion case of *Coutu v. Universities Research Association, Inc.*

*Coutu v. Universities Research Association and the Requirement to Stipulate to the Inclusion of Prevailing Wage Rates in a Government Construction Contract*

*Coutu v. Universities Research Association, Inc.* found its origins in the *McDaniel I* decision, which first recognized an implied private right of action under the Davis-Bacon Act. Strikingly similar on their facts, both cases involved government contracts for the design, construction, and operation of nuclear accelerator laboratories, and a failure by the contracting agency to perceive the Davis-Bacon implications of those contracts. Consequently, in both cases, the required statutory stipulation to pay prevailing wage rates was absent from the subject contract.

94. Laborers and mechanics are given a right of action against the contractor and its sureties if accrued payments withheld under the contract are insufficient to reimburse them for wages to which they are entitled. 40 U.S.C. § 276a-2(b) (1976). Laborers are also given a private right of action to sue on a Miller bond. 40 U.S.C. § 270b (1976). See notes 63-64 and accompanying text supra.

95. 548 F.2d at 694.

96. *Id.* at 695.

97. 595 F.2d 396 (7th Cir. 1979), cert. granted, 100 S.Ct. 1310 (1980).

98. *Id.*
It was not surprising that the defendant in *Coutu* argued for dismissal of the complaint on the ground that the absence of a wage rate stipulation rendered the contract outside the scope of the Davis-Bacon Act. The district court, however, dismissed only Count I of the complaint, which improperly relied upon the existence of a stipulation to support breach of contract allegations. In so ruling, the district court implicitly accepted the proposition that other contractual clauses could reveal that the agreement was one for Davis-Bacon work and was, therefore, subject to the Act.

Following the dismissal of Count I, the *Coutu* case was transferred within the District Court for the Northern District of Illinois. The defendant then filed a motion for summary judgment, again contending that because the contract did not contain a prevailing wage stipulation, it could not be covered by the Act. In contrast to the initial district court decision dismissing Count I of the complaint, the subsequent district court decision characterized the mandatory stipulation as prerequisite to Davis-Bacon Act coverage. Accordingly, summary judgment was granted for the defendant. This created, to say the least, confusion as to the legal effect of a failure to include the required wage rate stipulation in a government construction contract.

The Seventh Circuit accepted, to a limited extent, the latter reasoning: if the contract was not within the scope of the Davis-Bacon Act, plaintiffs were not entitled to recover. The appellate court, however, refused to analyze the coverage issue solely on the basis of whether the contract contained an explicit prevailing wage stipulation. Instead, it posited that there may be other evidence that the contract is one for Davis-Bacon Act work, in which case, the required stipulation would be incorporated into the contract by operation of law. Concluding that the mandatory stipulation had been so incorporated into the subject contract, the court reversed the grant of summary judgment.

99. 595 F.2d at 398. Although *McDaniel* also involved a contract without a stipulation to pay prevailing wage rates, the defense of absence of such stipulation was not raised in the pre-*Coutu* stages of the *McDaniel* litigation. Nevertheless, the *Coutu* defendant used the absence of the wage rate stipulation as the basis for its defense against alleged Davis-Bacon violations. Following the *Coutu* district court's favorable response to this argument the *McDaniel* defendants raised this issue in a motion for summary judgment. The motion ultimately was denied because the *Coutu* appellate decision, reversing the district court's decision, was published before the *McDaniel* court could render a favorable decision on this issue.

100. *Id.* at 397.

101. *See id.* at 398. Here the Seventh Circuit analyzed the unreported memorandum of the District Court for the Northern District of Illinois (McGarr, J.). This analysis was the basis for the court's holding that, despite the absence of a standard prevailing wage provision, the *Coutu* contract was subject to the Davis-Bacon Act. *Id.* at 400.

102. *Id.* at 397.

103. *Id.* at 398.

104. *Id.*

105. *Id.* at 402.
Specifcally, the court focused upon two sources to find "other evidence" that the contract was one for Davis-Bacon Act work. First, it looked to the specific clause in the government contract that the defendant had contended expressly excluded its employees from coverage under the Act. That clause provided that the contract did not contemplate that employees of the Association would do work subject to the Davis-Bacon Act. The contract further provided that any statutorily covered work would be performed by subcontractors. Second, the court relied upon the contracting agency's letter to the president of the defendant stating that the quoted exclusionary clause had been incorporated into the contract with the understanding that if conditions arose which made it necessary for employees of the defendant to perform covered work, the contract would be modified to include the Act's labor and wage provisions.

While the foregoing evidence did not answer the ultimate question of who was actually performing Davis-Bacon Act work at the project site, the court found it sufficient to demonstrate that such work was contemplated by and might even be required under the subject contract. If, as alleged in the complaint, the defendant's own employees performed construction, alteration, and/or repair work within the meaning of the Act, they would be entitled to the prevailing wages for similar work in the locality in which that work was performed. To the extent that those employees were covered by the Act, the defendant had placed itself in the position of a subcontractor with the attendant obligations set forth in the exclusionary clause of the government contract. The court deemed superfluous the expressed administra-

106. The contract provided:

This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontractors which shall be subject to the written approval of the Commission and shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

Id. at 398, quoting article XXXIII of the contract.

107. Id.

108. Id. at 399. See Brief for Appellant at 12, Coutu v. Universities Research Association, Inc., 595 F.2d 396 (7th Cir. 1979). The letter stated in pertinent part:

This provision with respect to the Davis-Bacon Act has been discussed between representatives of the AEC and the Association, and has been included with the following understanding:

(a) If presently unforeseen conditions arise which make it necessary in the best interests of timely and efficient completion of the accelerator that work be performed by the Association with its own employees which AEC determines is subject to the Davis-Bacon Act, the contract will be modified as appropriate to incorporate the provisions relative to labor and wages required by law.

Id. at 12. See also 41 C.F.R. § 9-18.701-52(b)(1) (1979) (requiring modification of a government contract not originally contemplating Davis-Bacon work if such work is actually performed at the project site).


110. Id. at 399.
tive intention to modify the contract if Davis-Bacon Act work was performed by the defendant's employees. No such amendment was required because "under McDaniel I the contract was already so modified by operation of law ...." 111

This reading of the court's prior McDaniel decision probably came as a surprise to the defendant, which had consistently argued that the private right of action afforded to the McDaniel plaintiffs was predicated upon a contractual commitment to pay prevailing wage rates. The McDaniel and Coutu tandem, however, was not distinguishable on that basis. The court correctly noted that despite the absence of Davis-Bacon stipulations and the existence of an exclusionary clause virtually identical to the one in the McDaniel contract, 112 the contract at issue in Coutu was subject to the provisions of the Act. 113

Indeed, a contrary holding in Coutu would have emasculated the Act's guarantee of prevailing wages. The workmen's independent statutory right had been implied from the purpose and intent of the Act, rather than from the contract between the government and the contractor. It would be anomalous to allow the contractor to shield itself from liability simply by disregarding the clear mandate of the Act and failing to include the required wage stipulations in its contracts. If the workmen's right could be so easily defeated, it would not be difficult to envision every contractor doing Davis-Bacon work seeking to avoid inclusion of the stipulations. Nor, as previously stated, would it be unusual for the contracting agency to permit such avoidance of statutory requirements. 114

In reading the mandatory wage stipulation into the government contract, the Coutu court asserted that it was "following precedents established as early as 1827 and applied consistently thereafter." 115 The mandatory

111. Id.
112. Compare the Coutu exclusionary clause, note 106 supra, with the following clause in the McDaniel contract between the defendant University of Chicago and the contracting agency:

26.5 Davis-Bacon and Other Labor Provisions for Construction Subcontractors

The University and the Commission have agreed upon a procedure under which the Commission will determine when work to be undertaken at the Laboratory facilities is covered by the Davis-Bacon Act. When it is determined that the Davis-Bacon Act does cover a particular work project, the University shall procure by subcontract the covered work. Any subcontract entered into under this section shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work. When requested by the Commission, any such subcontract shall be submitted for Commission approval.

595 F.2d at 399 n.7.

113. See 595 F.2d at 399, quoting the first McDaniel decision, 512 F.2d at 584, as follows: "There is no question but that this government contract was subject to the Davis-Bacon Act." It should be noted, however, that while the McDaniel I court summarily concluded that the government contract was within the scope of the Act, the basis for that conclusion was never enunciated.

114. See text accompanying note 68 supra.

115. 595 F.2d at 400. The precedents to which the court referred are generally embodied within the "Christian Doctrine." G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct.
character and protective purpose of the Davis-Bacon Act further mandated the conclusion that the Act was not merely addressed to the legal form

Cl.), motion for reh. and reargument denied, 320 F.2d 345 (Ct. Cl.), cert. denied, 357 U.S. 954 (1963), reh. denied, 376 U.S. 929 (1964). Simply stated, the doctrine provides that when a contract clause is required by statute or procurement regulation to be included in a government contract, that clause is deemed incorporated as a matter of law into the contract. See generally C. DEES & G. GINSBERG, CONTRACT INTERPRETATIONS AND DEFECTIVE SPECIFICATIONS 1-4 (1975). The following cases illustrate varied applications of this principle: Hartford Accident & Indemnity Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352 (1934) (a bond contract is subject to the statutes in force at the date of the contract even if these are not included in the written document); Antoni v. Greenlow, 107 U.S. 769 (1883) (laws applicable and in force at the time a bond was purchased enter into and form a part of the bond contract itself); Von Hoffman v. City of Quincy, 71 U.S. 535 (1867) (power of taxation given to a municipality is a contract that cannot be withdrawn until the contract is satisfied); Ogden v. Saunders, 25 U.S. (12 Wheat.) 212 (1827) (the municipal law of the state, whether written or unwritten, forms a part of every contract unless the parties agree otherwise); United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459 (5th Cir. 1977) (where applicable regulations require inclusion of a clause in every contract, it is incorporated even if not agreed to by the parties); Compagnie Generale Transatlantique v. American Tobacco Co., 31 F.2d 663 (2d Cir. 1929) (a lawful statute in force at the time an import trade contract was made in France becomes part of the contract); City of Tullahoma v. Coffee County, 204 F. Supp. 794 (E.D. Tenn. 1962) (a statute—Tennessee Valley Authority Act—that relates to the subject matter of a contract and exists at the time of execution, becomes a part of such contract).

It should be noted, however, that prior to the McDaniel and Coutu decisions, there was some support for the proposition that the conditions imposed by the Davis-Bacon Act were effective only when, as expressly directed, they were included in the advertised specifications. The Comptroller General stated:

Nor . . . can we see how an omission of minimum wage representations and stipulations, even assuming that they should have been included, could be cured retroactively . . . . Where the conditions have not been included, whether properly or improperly, it is clear that the act does not of itself become binding upon a contractor . . . . While we might agree that the public policy manifest in the provisions of the Davis-Bacon Act warrants cancellation and readvertisement, if feasible, of work awarded without clearly applicable conditions, no corrective action would appear possible where, due to substantial completion of the work or other practical considerations, it is not reasonable to cancel and readvertise.


116. See 40 U.S.C. § 276a(a) (1976). The Davis-Bacon Act requirement that every contract involving construction in excess of $2,000 on government projects shall contain the required minimum wage stipulation cannot be construed as anything but mandatory. See Association of Am. R.R. v. Castle, 562 F.2d 1310 (D.C. Cir. 1977). In Castle, the court stated: "The word 'shall' is the language of command in a statute, and there is no doubt that the Congress has commanded [what the statute requires]." Id. at 1312. See also 75 CONG. REC. 6504-21 (1931) (discussion of the compulsory nature of the Act's prevailing wage provision).

The regulations issued by the Secretary of Labor pursuant to 40 U.S.C. § 276c (1976) complement the requirement of the Act by dictating a like incorporation of applicable regulations, including those dealing with the standard contract clauses that stipulate compliance with the Act's minimum wage obligations. See id. § 276; 29 C.F.R. § 3.11 (1979).

117. In its two McDaniel decisions, the Seventh Circuit traced the history of the Davis-Bacon Act and emphasized the highly remedial purpose of the Act. See, e.g., 512 F.2d at 587. Prior to the McDaniel decisions, both the Supreme Court and Congress had pronounced clearly that the statute was enacted for the benefit of construction workers. See United States v. Binghampton Constr. Co., 347 U.S. 171, 176-78 (1954); S. REP. NO. 963, 88th Cong., 2d Sess. 2 (1963).
of a construction contract, but rather to the substantive right of workmen to receive prevailing wages pursuant to that contract. Thus, the court concluded, the defendant contractor was compelled by law to pay the predetermined wage rates to covered workmen, regardless of the absence in the subject contract of an express provision to do so.

The Coutu court, however, did not go so far as to reject contract content as the test for determining applicability of the Davis-Bacon Act. The court indicated that other evidence may be necessary to show that the contract was one for covered work.\footnote{595 F.2d at 398.} Nevertheless, because the contract clause and contemporaneous letter purported to renounce the application of the Act to work performed by the defendant's employees, it would appear that only a minimal threshold showing of "other evidence" is required. Stated another way, the court broadly construed the scope of the Davis-Bacon Act. If it could be demonstrated that a government contract was one for construction, alteration, and/or repair work and in excess of $2,000 in costs, the contract would be deemed subject to the Act. Laborers and mechanics would then be permitted to prove that the work they performed under it was in-fact Davis-Bacon Act work. In essence, the character of the laborer's work would be determinative of statutory coverage and the corresponding obligation of the contractor to pay prevailing wage rates.\footnote{Determining applicability of the Davis-Bacon Act by means of the character of actual work performed at the project site, rather than by the contracting agency's classification of contemplated work, is implicitly accepted within the Department of Energy regulations that set forth criteria for statutory application to projects involving operational and maintenance activities. The pertinent regulation provides:

The classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are classifiable as outside of Davis-Bacon coverage, since it may be necessary to separate out work which should be classified as covered. Therefore, heads of procuring activities shall establish and maintain controls for the careful scrutiny of proposed work assignments under such a contract to assure that:

(1) Contractors whose contracts do not contemplate the performance of covered work with the contractor's own forces are neither asked nor authorized to perform work within the scope of the Davis-Bacon Act. If the actual work assignments do involve covered work, the contract should be modified to include applicable provisions of the Davis-Bacon Act.

41 C.F.R. § 9-18.701-52(b)(1) (1979) (emphasis added).}
agency. The Coutu court merely reiterated that decision in express language.\textsuperscript{120}


Do the \textit{McDaniel} and \textit{Coutu} decisions compel a plaintiff to exhaust his or her administrative remedies if such remedies are, in fact, available? In a 1948 case in which the Comptroller General withheld from a contractor sums deemed necessary to pay employees the prevailing wage, the court held that the aggrieved laborers could not bring an action against the United States for the amounts withheld unless they could assert, as a condition precedent, a demand upon the Comptroller General and a refusal to pay.\textsuperscript{121} The court stated that "as a minimum preliminary condition to resort to the courts, the claimant must assert his compliance with the terms prescribed by Congress, else the courts cannot assume to take jurisdiction."\textsuperscript{122}

More recently, in \textit{United States v. Capelletti Brothers, Inc.},\textsuperscript{123} plaintiff, relying on the \textit{McDaniel} decisions, brought an action against a government contractor to recover sums allegedly due under the prevailing wage provisions of the Davis-Bacon Act. The court limited \textit{McDaniel} to its specific facts and held that plaintiff did not have a cause of action under the Act.\textsuperscript{124} The \textit{McDaniel} court, it was stated, "specifically focused on cases where the express remedies provided by the Act were ineffective or nonexistent, holding that in such cases, the Court should provide an alternative remedy, if possible."\textsuperscript{125} In contrast to \textit{McDaniel}, a Miller Act bond had been posted by the contractor in \textit{Capelletti}, and the Secretary of Labor was investigating alleged statutory violations and the possibility of withholding accrued payments from the contractor to reimburse complaining laborers and mechanics. Under such circumstances, the court found that the plaintiff laborer was adequately protected by the express statutory remedies and, accordingly, deemed the implication of a private right of action unnecessary.\textsuperscript{126} The court further held that the complaint was fatally deficient to

\textsuperscript{120} 595 F.2d at 400-01. The court emphasized that while the express statutory remedies and corresponding regulations "presumably facilitate contractor compliance, they do not assure a remedy to employees." \textit{Id.} at 401. Nowhere do the regulations authorize the Secretary of Labor to order a contractor to pay more for Davis-Bacon work already completed. Thus, deference to administrative regulations and the coverage determination of the contracting agency would be inappropriate if, as plaintiffs alleged, Davis-Bacon work was actually performed by employees of the Coutu defendant.


\textsuperscript{122} 79 F. Supp. at 839-40.


\textsuperscript{124} \textit{Id.} at 68.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.}
sustain a private right of action because the plaintiff had failed to allege "either that no payments were or would be withheld by the government, or alternatively, that any such monies withheld would be inadequate to reimburse the laborers." 127

It should be noted that Capelletti pre-dates Coutu. Its holding, therefore, is limited in precedential value by the Coutu court's emphatic rejection of an exhaustion-of-administrative-remedies requirement under the Davis-Bacon Act. The procedural thrust of the Capelletti decision is also suspect, because neither the McDaniel nor Coutu plaintiffs were required to plead compliance with or absence of effective administrative avenues in order to obtain access to the judicial forum. Ironically, however, the Coutu decision offers some support for the Capelletti "alternative remedy" rationale:

If defendant or our own research had uncovered administrative regulations affording plaintiff and his class relief in this situation, we might require recourse to that remedy before permitting this lawsuit to proceed. The Davis-Bacon Act itself does not contain a provision requiring exhaustion of administrative remedies in this kind of case. 128

Furthermore, because the driving force behind McDaniel and Coutu was the desire to make effective the congressional purpose of insuring the payment of prevailing wages to laborers and mechanics on all government contracts, it would seem reasonable for a court to exercise restraint and limit aggrieved laborers to their administrative remedies where such remedies adequately fulfill the Act's purpose. This is particularly true in light of the judiciary's desire to avoid unnecessary invasions into the jurisdictional sphere of the executive branch of government.

In any event, such a narrow reading of the McDaniel and Coutu tandem would in no way detract from their significance. By closing a loophole in the overall enforcement scheme under the Davis-Bacon Act, the decisions should have a prophylactic effect upon attempts by either the contractor or the contracting governmental agency to subvert the clear mandate of the Act. These decisions will have the further effect of insuring that the circuitous nature of the administration and enforcement of the Davis-Bacon Act, with its attendant lack of checks and balances, will not work to the detriment of the very laborers and mechanics whom the Act is designed to protect.

The McDaniel and Coutu decisions, in their judicial determination of coverage questions under the Davis-Bacon Act, infringed upon areas traditionally relegated to administrative law. A final question thus emerges as to the propriety of judicial determination of whether a government contract is covered by the Act. The Coutu defendant had argued against judicial review

128. 595 F.2d at 400. See also Coutu v. Universities Research Ass'n, Inc., No. 75 C 1129 (N.D. Ill. Oct. 8, 1975). There, Judge McGarr stated that "[t]he Court need not determine whether exhaustion of these remedies is a condition precedent to a cause of action on defendant's contractual commitments unless it be shown that such remedies do, in fact, exist." Id.
of the contracting agency’s determination of “noncoverage” and the corresponding lack of Davis-Bacon stipulations in the subject contract. Citing considerable authority for the proposition that prevailing wage determinations were nonreviewable, the defendant maintained that analogously coverage determinations were outside the scope of judicial decision.129

Although not directly addressing the proposed analogy, the Coutu court implicitly distinguished between wage determinations and coverage determinations.130 This distinction appears warranted upon examination of the nature of the questions and the expertise required for such determinations. Prevailing wage determinations involve the compilation and analysis of often complex wage data and the mathematical computation of wage rates.131 Clearly such work is more appropriately within the province and expertise of the executive branch of government. By contrast, coverage determinations require construction of the underlying statute and practical application of that statute, tasks falling within the expertise and constitutional jurisdiction of the federal courts.132

For purposes of the analysis of coverage questions, the legislative intent behind the Act emerges as all-important. Because the bureaucratic entanglements of administration had already proved ineffective in providing adequate remedies, the McDaniel and Coutu courts utilized this analytical tool to achieve a result that would best effectuate the Act’s purposes in the protection of covered workmen. The fact that the contracting agency had arrived at a contrary conclusion concerning coverage is irrelevant to the propriety of judicial review. Absent a clear legislative mandate against such review, the courts were obliged to hear the questions before them. In so

129. Brief for Appellee at 14-16. For cases that have held prevailing wage determinations of the Secretary of Labor to be non-reviewable, see note 54 supra.

130. See 595 F.2d at 401. The court stated:

The cases cited by defendant for the proposition that the administrative remedies are adequate involved contracts which did contain Davis-Bacon Act stipulations. The dispute in those cases focused on the proper classification of work or the determination of wage rates. These and other cases involving the finality of the Secretary of Labor’s decisions regarding wage rates and job classifications are not germane to the central question in this case, which is whether the required wage rate stipulations are incorporated into the contract as a matter of law. That is not a question on which deference to agency expertise is appropriate.

Id.

131. For an overview of the two methods for obtaining prevailing wage schedules—general or area determinations and project determinations—see note 44 supra. In both cases, the Department of Labor depends largely on voluntary submission of wage rate data, such as statements showing wage rates on other projects in the locality, signed collective bargaining agreements, wage rates determined for public construction by state and local officials pursuant to prevailing wage legislation, information furnished by federal and state agencies, and other pertinent information proffered by contractors and contractor’s associations, labor organizations, and other interested parties. See 29 C.F.R. § 1.3 (1979).

ruling, the fact that an agency blatantly ignores the purpose of the controlling statute merits reversal of the administrative decision. There can be no rational basis in law to support upholding that decision because it is more important for a government agency to abide by the law than it is for a private individual.133

CONCLUSION

An implied private cause of action now exists under the Davis-Bacon Act for the benefit of laborers and mechanics who are not paid the prevailing wage for work covered by the provisions of that Act. The existence of this private right of action does not depend solely upon the presence of the requisite Davis-Bacon stipulations in the relevant government contract. There may be other evidence that the contract is one for Davis-Bacon Act work, in which case the required stipulations are incorporated into the contract by operation of law.

Although McDaniel and Coutu have opened the courthouse door to the aggrieved laborers, these laborers still have a substantial task ahead of them in proving that the work actually performed was construction, alteration, and/or repair within the meaning of the Act. Yet, in merely providing a judicial forum to these and future plaintiffs, the Seventh Circuit has taken a significant step by supplementing the existing administrative enforcement mechanisms and establishing the judiciary as an independent check upon arbitrary administrative action.

Of course, the impact of the McDaniel and Coutu tandem depends upon what the future portends for the Davis-Bacon Act itself. A number of government officials and labor authorities have recently advocated repeal of the Act.134 Nevertheless, many others have argued the continued need for the

133. See International Union of Operating Eng’rs, Local 627 v. Arthurs, 355 F. Supp. 7 (W.D. Okla. 1973), aff’d, 480 F.2d 603 (10th Cir. 1973). The court stated:

It is far more important for a government agency to follow the laws passed by Congress and to show obedience to the judicial process than it would be in the case of a private individual. In the first place, the agency is part of the legal system that can survive only through obedience to the law. Furthermore, what an agency does affects the lives of many people. If an agency is allowed to flout the law, the people affected will soon lose confidence in that agency or perhaps, justifiably, in the total legal system.

Id. at 13.

134. Essentially two arguments are asserted in support of repeal of the Davis-Bacon Act. First, it is submitted that the Act has outlived its usefulness. Those adhering to this school of thought characterize the Act as no more than a legislative attempt to arrest the depression conditions of the 1930’s, and suggest that “the union and the working man in general are now in a much better position to bargain for and obtain wages in a community which are commensurate with the cost of living.” Improved Technology and Removal of Prevailing Wage Requirements in Federally Assisted Housing: Hearing Before the Subcom. on Housing and Urban Affairs of the S. Comm. on Banking, Housing, and Urban Affairs, 92d Cong., 2d Sess. 168-69 (1972) (statement of Stanley Waranch, President, National Ass’n of Home Builders). Secondly, it is con
Act in light of the current high rate of unemployment, resulting in the availability of excess manpower in many areas of the country. The Seventh Circuit decisions should, by providing a judicial forum in which the rights guaranteed by the Davis-Bacon Act may be vindicated, serve to curtail some of the criticism aimed at the often lackadaisical enforcement of the Act.

As a parallel to the increased judicial concern for the rights of laborers and mechanics, the Department of Labor has expressed an intention to act aggressively to enforce wage determinations by monitoring contracting agency enforcement activities and by directly enforcing an agency's contracts when it fails or refuses to do so itself.

This combined judicial and executive effort should secure a long and healthy future for the Davis-Bacon Act. These two branches of government, however, have gone as far as possible in their firm commitment to the Act. Legislative action in the form of amendment of the Act now is required to clarify administrative procedures and to insure consistent and uniform enforcement. Some suggested modifications include the establishment of: (1) mandatory protection devices, such as the required posting of payment bonds before the commencement of work on federal construction projects; (2) external checks on the administrative activities of the contracting agencies; and (3) an express grant of judicial review of enforcement actions and of initial coverage determinations particularly. With these amendments, the continued viability of the Act and its protection of local labor markets should be realized.


The basic purpose of the Act is no less valid today then it was 31 years ago when first enacted. To eliminate this Act, would, on Federal and federally assisted construction, place laborers and mechanics in the jungle of fierce competition that is the industry. Labor would again become a barter item in the bidding to get work.

In many areas of this country, with excess manpower available, the end result with respect to wages and earnings would be all too apparent.

136. See Elisburg, supra note 2, at 328.

137. United States v. Capelletti Bros., Inc., 448 F. Supp. 66 (S.D. Fla. 1978), discussed at notes 123-128 and accompanying text supra, was affirmed as this Case Commentary went to press, 621 F.2d 1309 (5th Cir. 1980).