On Point Memo

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RESTORING WORKER FREEDOM TO THE NATION'S CAPITAL

A Proposal for Labor Law Reform in the District of Columbia

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During the 1990s, local D.C. radio host and Democratic Party activist Mark Plotkin famously proposed that the District of Columbia offer a license plate bearing the Revolutionary War-era slogan "Taxation Without Representation," reflecting the District's constitutionally-mandated status as a federal enclave subject to the exclusive jurisdiction of Congress, and without congressional representation.[1] Plotkin's suggestion was enacted into law, and can be seen on vehicles bearing District-issued license plates. Yet some suggested that a more appropriate slogan would be "Consumption without Production."

With a population of fewer than 600,000[2] — smaller than every state save Montana — the District of Columbia has developed a labyrinth of labor laws and regulations rivaling the most over-bureaucratized states in the nation, bespeaking a commitment to increased union power over lean and efficient government. This essay proposes four reforms to reform the District's labor laws to break the hold of labor unions and politicians who do their bidding at the expense of taxpayers and entrepreneurs. It also proposes specific legislative solutions.

I. Repeal Public Sector Monopoly Bargaining

Public employee monopoly bargaining—or "collective-bargaining," as it is called by its supporters—has been ensconced in the laws of the District since at least 1973.[3] In its current form,[4] it is consistent with similar statutes in many states. With certain exceptions for

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[1] United States Constitution, Art. I, § 8, cl. 17.

[2] United States Census Bureau, State and County QuickFacts, District of Columbia, http://quickfacts.census.gov/qfd/states/11000.html.

[3] **See** former D.C. CODE ANN. § 1-347.1.

[4] D.C. CODE ANN. § 1-617.01 *et seq.*

management and confidential employees, it purports to protect the right of District employees "[t]o form, join, and assist a labor organization or to refrain from this activity,"[5] and "[t]o engage in collective bargaining concerning terms and conditions of employment ... through a duly designated majority representative."[6]

The first of these rights is consistent with the First Amendment's protection of freedom of association.[7] The second is a statutory creation that gives unique authority and privilege to public employees unions, in the debate over the allocation of scarce public resources. Public sector monopoly bargaining imposes upon public officials the *obligation* to take public employee unions' demands strongly into account when making those decisions. This privilege is unique. Its constitutionality under the Fourteenth Amendment's guarantee of equal protection under the law is dubious, though it is has never been challenged.[8]

Removing the preferred status of government employee unions in decisions over the allocation of scarce public resources would be a fairly simply process, requiring the striking of a few words from the existing statute, and the addition of very brief provisos. Suggested amendments appear in Appendix A.

The most profound advantage of repealing public sector monopoly bargaining may be that it would increase competition in the public sector over the choice of representatives. Public employees would no longer be required to join or subsidize a single representative to have a voice in the workplace, as various representatives would compete for the loyalty of various groups of public employees. Moreover, it would restore public employee unions to their natural status as just another interest group in the public debate, thus removing their ability, owing to

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[5] D.C. CODE ANN. § 1-617.01(b)(1).

[6] D.C. CODE ANN. § 1-617.01(b)(2).

[7] U.S. Const., amend. I; **see** *Pickering v. Board of Education*, 391 U.S. 563, 574-575 (1968) ("The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so"); ***accord*** *Shelton v. Tucker*, 364 U.S. 479 (1960).

[8] This is as compared to a union claim to a constitutional right to engage in monopoly bargaining, which has been rejected by the Supreme Court. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979) (*per curiam*) ("the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it"), ***citing*** *Hanover Township Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456, 461 (7TH CIR. 1972), **quoting** *Indianapolis Education Assn. v. Lewallen*, 72 LRRM (BNA) 2071, 2072 (7TH CIR. 1969) ("'there is no constitutional duty to bargain collectively with an exclusive bargaining agent'").

their monopoly status, to hold public services hostage to their demands.[9] It would also do away with workers requirement to pay compulsory union dues in order to keep their jobs.

II. **Right to Work Law**

It is beyond serious question that "To compel [public-sector] employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."[10] The primary justification for compelling employees to support a collective-bargaining representative has been the "free rider" argument, which maintains that non-union employees who are bound by the terms of the union contract benefit from collective bargaining without paying union dues.[11] Of course, any justification for public-sector forced-unionism would be rendered moot by the repeal of monopoly bargaining, by allowing individual employees to opt out of union contracts if they so chose.[12]

Repeal of private-sector monopoly bargaining privileges would require significant revision of the National Labor Relations Act (NLRA),[13] which is unlikely in light of current political realities. Nevertheless, since 1947, the NLRA leaves states free to pass right to work laws, which protect employees from being required to join a union in order to keep their jobs.[14]

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[9] James Madison, in *Federalist* No. 10, discusses the dangers of "faction," and notes that, since its causes "cannot be removed, ... that relief is only to be sought in the means of controlling its *effects*" (original emphasis).

[10] *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977); ***accord*** *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 301 (1986), **quoting** *Abood*.

[11] *Machinists v. Street*, 367 U.S. 740, 761 (1963); ***accord*** *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 415 (1976); *NLRB v. General Motors*, 373 U.S. 734, 740-41 (1961). Of course, the so-called "free rider" problem is a fraud, and unions lobby for and jealously guard the privilege of exclusive representation which purportedly "burdens" them.

[12] D.C. CODE ANN. § 1-167.07.

[13] 29 U.S.C. § 141 *et seq*.

[14] 29 U.S.C. § 164(b).

This freedom to legislate in this area applies to the District under the District of Columbia Home Rule Act.[15]

The most recent statistics on union membership in the District of Columbia demonstrate that thousands of District employees would benefit from a Right to Work law. In 2010, approximately 30,000 private sector employees in the District (10.5% of the private-sector workforce) were represented by labor unions, but only 26,000 (9.0% of the private-sector workforce) were union members.[16] That means that, in 2010, 4,000 workers (1.5% of private-sector employees in the District) have chosen not to join the labor union representing their bargaining unit—but are still being forced to subsidize their monopoly-bargaining representative.

A Right to Work law for the District would remedy this situation. A legislative proposal is attached as Appendix B.

III. Project Labor Agreements

[15] Public Law 93-198; 87 Stat. 777; D.C. CODE § 1-201 *et seq.* Specifically, D.C. CODE § 1-204 authorizes the District government to legislative with regard "to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution of the United States."

[16] United States Department of Labor, Bureau of Labor Statistics, Union Members Summary, Table 5, Union affiliation of employed wage and salary workers by state, 22 January 2010 (http://www.bls.gov/news.release/union2.t05.htm) (last accessed 7 December 2010).

Project labor agreements (PLAs) are frequently used by governments to award public construction projects to unionized firms contracts. Project labor agreements usually result in cost overruns and higher public infrastructure construction costs for taxpayers. A ban on PLAs would go a long way toward increasing competition in the District government's bidding process for public infrastructure construction projects, and help save taxpayers millions by lowering costs.

The vast majority of contractors and their employees—more than 80 percent—have opted against unionization. However, the NLRA authorizes employers in the construction industry to enter into what are known as "pre-hire" agreements with labor unions, thus subjecting their employees to a union contract **without holding a vote by the employees**.[17]

PLAs require all contractors, whether unionized or not, to submit to union rules in order to work on government-funded construction projects.[18] This is done by including a collective bargaining agreement in a public construction project's bid specifications. PLAs usually require contractors to pay union-level wages, grant union officials monopoly bargaining privileges over all workers, use exclusive union hiring halls, and force workers to pay dues to keep their jobs. Qualified non-union contractors who wish to make lower-cost bids, and employees who wish to work non-union, are locked out of the project. This especially puts a burden on minority contractors, many of which are nonunion.

Perhaps the most egregious recent example of abuse of the PLA process occurred when the District fully funded a baseball stadium when Major League Baseball returned to the District. Nationals Park in Washington, D.C., is a publicly funded baseball stadium. As is the case with most PLAs, proponents of the PLA governing the construction of Nationals Park portrayed their scheme as an even-handed attempt to prevent conflicts between unionized general contractors and union officials before the project begins, and as a way of avoiding strikes or lockouts. In addition, realities in District politics resulted in the imposition of three main goals in the Nationals Park PLAs: (1) that residents of the District perform half of the journeyman hours; (2) that 100% of apprenticeships be awarded to District residents; and (3) that apprentices perform 25% of the total work hours.

However, as documented in one study, the Nationals Park PLA failed miserably in its virtually all of its stated goals. As just one example, only a little more than half of the nearly $400 million in subcontracts which were supposed to have been paid to certified local small and disadvantaged business enterprises actually went to such entities. **Nevertheless**,

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[17] 29 U.S.C. § 158(f).

[18] Such requirements in public contracting are constitutionally permissible after *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993).

politicians and government officials continue to impose project labor agreements to reward the union officials that fund their political campaigns and keep them in power.

Governments at various levels have taken action to stop abusive PLAs, but such actions shift with the political winds. Over the last four administrations, successive presidents have issued executive orders either barring PLAs (George H.W. Bush and George W. Bush) or promoting them (Bill Clinton and Barack Obama). The last ban on PLAs was President George W. Bush's Executive Order 13202, issued in 2001,[19] and rescinded by his successor eight years later.[20] At the state level, Montana enacted similar legislation prohibiting government mandated project labor agreements, and --- as noted by Steven Greenhouse in *The New York Times* --- the popularity of such measures "waxe[s] and wane[s] …, depending on who was in power."[19]

A ban on PLAs would allow the free market to determine whether union contractors are competitive, without government interference, thus saving taxpayers millions and leveling the playing field for all contractors. Moreover, a bar would allow employees the free choice to determine union representatives, if any.

IV. Davis-Bacon

The second significant reform regarding public contracting in the District would be to repeal the application of the Davis-Baron Act of 1931[21] to public works projects in the District.

Imagine if you will a **flag**. Like any **flag**, it's merely **a design** on a **piece of fabric**. Imagine that the justification for **flying that flag** was originally racism. Isn't that enough to taint those who fly the stars and bars of the Confederate battle flag as racists? Now, imagine a law. Like any law, it's merely words on a paper. Imagine that the justification for **passing that law** was originally racism. Isn't that enough to taint those who defend Davis-Bacon as racists?

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[19] Executive Order 13202, 66 Fed.Reg. 11225 (2001), provides that neither the federal government, nor any agency acting with federal assistance, shall require or prohibit construction contractors to sign union agreements as a condition of performing work on government construction projects.

[20] Executive Order 13502.

[21] MT. CODE ANN. § 18-2-425; Greenhouse, Steven, "Taking a Vote on Union Construction," *New York Times*, 14 Oct. 2010, available at http://www.nytimes.com/2010/10/15/business/15construct.html?_r=1&scp=1&sq=%22project%20labor%20agreements%22&st=cse.

[22] 40 U.S.C. § 3141 *et seq.*

The answers to those questions are, of course, the subject for others to address, but there can be little doubt that the Davis-Bacon Act has racist origins, rooted, at least in part, in the desire to freeze out Southern rural blacks migrating to urban areas.[22] Davis-Bacon is the Confederate battle flag of American labor law.

Moreover, prevailing wage restrictions artificially inflate the price of government construction and rehabilitation projects. It hurts unskilled labor/entry-level workers, and creates a legal preference for union labor. According to research by Suffolk University economists, Davis-Bacon has raised the construction wages on federal projects 22% above the market rate. According to Heritage Foundation labor expert James Sherk, repealing Davis-Bacon would save American taxpayers $11.4 billion in 2010 alone, and allow government contractors to hire 160,000 new workers at no additional cost.[24]These requirements written into statute itself,[25] and have been applied by the Obama Administration to pay off union supporters. For example, Davis-Bacon requirements were extended by the American Recovery and Reinvestment of Act of 2009, better known as the Stimulus Bill.[26] According to an all-Agency Memorandum issued by the Department of Labor, Davis-Bacon now applies to all "projects funded directly by or assisted in whole or in part by and through the Federal Government."[27] As a result, construction and rehabilitation projects partially funded by the stimulus bill must obey the costly requirements of Davis-Bacon.

The solution for the District would be to seek congressional repeal of this costly law, at least as applied to the always-tenuous finances of the District. As Sherk has noted:

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[24] James Sherk, "Davis-Bacon Suspension Would Fund 160,000 New Construction Jobs," Heritage Foundation, January 2010, at http://www.heritage.org/research/reports/2010/01/davis-bacon-suspension-would-fund-160000-new-construction-jobs (27 January 2010).

[25] 40 U.S.C. § 3142(a) (emphasis added), provides that it applies to "every contract in excess of $2,000, to which the Federal Government **or the District of Columbia** is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics."

[26] James Sherk, "Davis-Bacon Wage Provisions Depress the Economy," Heritage Foundation, January 2009, at http://www.heritage.org/research/reports/2009/01/davis-bacon-wage-provisions-depress -the-economy (28 January 2009).

[27] John J. McKeon, Deputy Administrator for Enforcement, United States Department of Labor, Employment Standards Administration, Memorandum No. 207 (29 May 2009), page 2, at

Davis-Bacon restrictions ensure that the infrastructure spending — such as that provided for in H.R. 1 — will yield as little economic benefit as possible. The $17 billion is spent paying a premium for work that employees would do at market wages. Without Davis-Bacon inflating costs, construction spending would go farther, funding more projects and creating more jobs. Including Davis-Bacon restrictions in the stimulus bill lines the pockets of some workers at the cost of both fewer jobs and fewer schools and highways built.

Davis-Bacon restrictions are also an inefficient and ineffective way to increase Americans' purchasing power. There is no economic reason to give federal construction workers — but no other workers — inflated wages. If Congress wants to spend $17 billion to increase Americans' purchasing power, it could use that money to give a $110 tax rebate to single filers and a $220 tax rebate to joint filers. Such a rebate would broadly benefit all workers instead of just those who happen to work in construction.
James Sherk, "Davis-Bacon Wage Provisions Depress the Economy"

Repealing Davis-Bacon would allow the public would receive more "bang for its buck" in public construction spending and removing such restrictions would, as one politician famously noted, allow the government more broadly to "spread the wealth around," if spreading the wealth around is truly its goal of those politicians who posture as though it is.

V. Conclusion

Enacting the labor reform program for the District of Columbia outlined above will be a challenge, the rewards would be substantial: greater employee freedom; greater efficiency; and millions of savings for taxpayers. Both public and private sector employees would still be able to choose union representation if they so chose, without having it foisted upon them by votes occurring before — perhaps years or decades before — their hire. Public and private employees alike would not be forced to subsidize an unwanted or unneeded monopoly-bargaining representative.

For too long, the District of Columbia's compulsory unionism *status quo* has burdened District residents, continuously adding more layers of government. This proposal challenges that entrenched order, and seeks to pave a new road toward greater freedom and prosperity.