

NO SUCH THING AS A FREE LUNCH: HURRICANE KATRINA AND THE DAVIS-BACON ACT

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I. INTRODUCTION

There's no such thing as a free lunch. However, despite the near ubiquitous applicability of this statement, politicians seem to think they can provide exceptions to the rule. They "sell" policies that, they claim, confer a plethora of benefits on the American public with little or no associated costs. How can politicians buck the rationale behind this maxim? The truth is that they can't.

Politicians often advocate policies that shift costs from one group to another. This muddies the water that is economic reality in an attempt to gain public support for their (and their constituents') policies and goals. For instance, a policy may be touted as spurring redevelopment and economic growth after a natural disaster while costing taxpayers nothing, when in fact the very real costs of the policy are borne by a small group of people and/or shifted to a later date. Such policies are often temporary, as they are quick-fix solutions to current problems that cannot, or will not, be addressed by more direct means. This is what happened after Hurricane Katrina. While the implemented policy was not in effect for very long, data from the New Orleans region and economic forecasting illustrate its inequitable nature.

Hurricane Katrina slammed into the Gulf Coast states of Alabama, Florida, Louisiana and Mississippi on August 29, 2005,¹ killing over 1300

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people.² Millions of others were impacted as Katrina spread across some 90,000 square miles, displaced approximately 770,000 people, destroyed or made uninhabitable an estimated 300,000 homes and created close to 118 million cubic yards of debris.³ To put these numbers in perspective: Katrina impacted an area larger than the size of Great Britain, displaced more Americans than had been displaced since the Dust Bowl migrations of the 1930s, destroyed eleven times the number of homes as Hurricane Andrew and created six times more debris than Andrew.⁴ It was the costliest storm in history, with damages estimated at \$75 billion.⁵

Politicians are struggling to determine how best to avoid, or at least mitigate, devastation from future natural phenomena,⁶ but disasters similar to Katrina will almost certainly strike again, with attempts to repair the resulting damage sure to follow.⁷ President George W. Bush declared that repairing the damage “in the Gulf Coast region will be one of the largest reconstruction efforts the world has ever seen.”⁸ The scope of reconstruction was evidenced by Congress’s approval of \$62 billion for disaster relief a mere three weeks after Katrina hit.⁹ This set a new record for the amount of federal money given for domestic disaster relief¹⁰ and more than tripled the amount given for disaster relief after the September

1. See Scott Gold & Ellen Barry, *Katrina Slams Into Gulf Coast*, L.A. TIMES, Aug. 30, 2005, at A1.

2. See H. COMM. ON HOMELAND SEC., 109TH CONG., REDIRECTING FEMA TOWARD SUCCESS: A REPORT AND LEGISLATIVE SOLUTION 28 (2006) [hereinafter REDIRECTING FEMA], available at <http://hsc-democrats.house.gov/SiteDocuments/20061006093318-77981.pdf>.

3. *Hurricane Preparedness: Hearing Before the H. Comm. on Transp. & Infrastructure*, 109th Cong. (2006) (statement of Michael Chertoff, Sec’y, Dep’t of Homeland Sec.) [hereinafter *Hurricane Preparedness*], available at 2006 WLNR 2646384 (Congressional Testimony via FDCH, Feb. 15, 2006).

4. *Id.*

5. See REDIRECTING FEMA, *supra* note 2, at 28.

6. See, e.g., *id.*; *Hurricane Preparedness*, *supra* note 3.

7. See Ron Hutcheson & Erika Bolstad, *Repair Mission in Gulf*, PHILA. INQUIRER, Sept. 16, 2005, at A01. But note that many have called for abandoning inhabited regions prone to recurring flooding and therefore not repairing certain areas affected by Katrina. See, e.g., Steven Hayward, *Katrina and the Environment*, AEI ONLINE, Sept. 23, 2005, at 4, http://www.aei.org/publications/pubID.23244/pub_detail.asp (citing environmental reasons for limiting reconstruction of New Orleans); Jack Shafer, *Don’t Refloat: The Case Against Rebuilding the Sunken City of New Orleans*, SLATE, Sept. 7, 2005, <http://www.slate.com/id/2125810/> (citing social and economic reasons).

8. Hutcheson & Bolstad, *supra* note 7, at A01.

9. See *id.*

10. Jonathan Weisman & Amy Goldstein, *Bush Requests \$51.8 Billion More for Relief*, WASH. POST, Sept. 8, 2005, at A1.

11 terrorist attacks.¹¹ While the sum approved for Katrina relief may seem extraordinary, one must remember that during this time the Federal Emergency Management Agency (FEMA) saw its *daily* ‘burn rate’ of expenditures skyrocket from \$500 million to \$2 billion, mainly due to construction contracts for temporary housing.¹²

In response to these soaring costs, President Bush suspended the Davis-Bacon Act (DBA) on September 8, 2005,¹³ mirroring the response of his father, President George H.W. Bush, to Hurricane Andrew in 1992.¹⁴ The DBA applies to “every contract in excess of \$2,000, to which the Federal Government . . . is a party, for construction, alteration or repair, including painting and decorating, of public buildings and public works”; it requires that these contracts contain a provision stating the minimum wage owed to mechanics and laborers.¹⁵

President Bush cited to the minimum wage rates imposed by the DBA as “increas[ing] the cost to the Federal Government of providing Federal assistance” to the Katrina-affected areas, particularly given the “unprecedented property damage.”¹⁶ Due to the magnitude of Federal assistance needed, President Bush suspended the minimum wage law in order to provide “greater assistance to these devastated communities and [to] permit the employment of thousands of additional individuals.”¹⁷ The DBA was suspended “until otherwise provided” in 154 counties affected by

11. See U.S. GEN. ACCOUNTING OFFICE, SEPTEMBER 11: OVERVIEW OF FEDERAL DISASTER ASSISTANCE TO THE NEW YORK CITY AREA 3 (2003) (Report No. GAO-04-72), available at <http://www.gao.gov/new.items/d0472.pdf> (estimating \$20 billion in aid for the New York City area).

12. Weisman & Goldstein, *supra* note 10, at A01. But see Press Briefing, Josh Bolten, Dir. Office of Mgmt. & Budget (Sept. 7, 2005), http://www.whitehouse.gov/OMB/pubpress/2005/press_sheet_90705.pdf (noting that the high burn rate was due to very large one-time expenses).

13. Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005). The substantive law of the Davis-Bacon Act, which was previously codified under 40 U.S.C. §§ 276 et seq., is currently codified under 40 U.S.C. §§ 3141-48; these sections will be referred to collectively as the Davis-Bacon Act throughout this Note. See 40 U.S.C. § 3141 (Supp. 2002). Note also that this Proclamation suspended the provisions of other “related acts” which incorporate the Davis-Bacon prevailing wage provision. See *id.*; see also JOHN R. LUCKEY & JON O. SHIMABUKURO, CONG. RESEARCH SERV., PREVAILING WAGE REQUIREMENTS AND THE EMERGENCY SUSPENSION OF THE DAVIS-BACON ACT 2-3 (2006) (C.R.S. No. RL33276), available at http://www.opencrs.com/rpts/RL33276_20060216.pdf. For ease of discussion, these “related acts” will be assumed to be substantially incorporated in the Davis-Bacon Act.

14. See Proclamation No. 6491, 57 Fed. Reg. 47,553 (Oct. 14, 1992); discussion *infra* Part II.A.3.

15. 40 U.S.C. § 3142(a) (Supp. 2002).

16. Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005).

17. *Id.* Note that many states have instituted laws similar to the Act, known as “little Davis-Bacon” acts, but that these laws are unlikely to affect the analysis due to the federal government’s position as a price-setter for labor. For more on this, see discussion *infra* Parts III, IV.

Hurricane Katrina throughout the states of Alabama, Florida, Louisiana and Mississippi.¹⁸

Approximately two months later, President Bush revoked the suspension of the DBA “as to all contracts for which bids are opened or negotiations concluded on or after November 8, 2005.”¹⁹ This was likely due to direct pressure from labor leaders and members of Congress—every House Democrat and thirty-seven House Republicans went on record to oppose the suspension.²⁰ Because President Bush “reinstated” the DBA amid this pressure, an analysis of the suspension may seem moot. It is not. Two of the three most recent presidents have suspended the DBA for disaster relief,²¹ and given the likely recurrence of such disasters,²² another suspension of the DBA is probable in the near future.

To determine if a future suspension of the DBA is a “proper” response, it is helpful to start with this question: Should the DBA have been suspended after Hurricane Katrina? Many responses will invariably be tied to individuals’ feelings about minimum wage laws in general.²³ This Note attempts to show that, regardless of how one feels about minimum wage laws generally (i.e., regardless of how one feels about retaining the DBA over the long run), a limited suspension of the DBA may adversely affect the communities it purportedly benefits. In addition, communities surrounding the area in which the Act is suspended may also be adversely affected.

To properly discuss this assertion, it is necessary to understand both the DBA and basic economic concepts. This is the work of Parts II and III of this Note, respectively. Part IV analyzes the Act’s suspension in the Katrina-affected regions using the economic framework set out in Part III. It looks at the problems posed by both the geographic and temporal suspension of the DBA. Finally, Part V concludes that a *limited* suspension of the Act, as well as of other worker protections, will likely affect

18. Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005).

19. Proclamation No. 7959, 70 Fed. Reg. 67,899 (Nov. 3, 2005).

20. Edwin Chen, *Prevailing-Wage Curb for Storm Work Ends*, L.A. TIMES, Oct. 27, 2005, at A19.

21. See Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005); Proclamation No. 6491, 57 Fed. Reg. 47,553 (Oct. 14, 1992).

22. See, e.g., Aaron C. Davis, *Governor Blasts Bush Cabinet*, SAN JOSE MERCURY NEWS, Apr. 21, 2006, at B5, available at 2006 WLNR 6678171 (“We are one big storm or one big earthquake away from a major disaster just like Katrina.” (quoting Gov. Schwarzenegger)); James Gill, Editorial, *When the Big One Hits Utah*, TIMES-PICAYUNE (New Orleans), Mar. 19, 2006, at B7, available at 2006 WLNR 4559078 (noting that there is a 33% chance that a major earthquake will hit Utah—“between 1,100 and 1,900 people would perish and damage would run to \$28 billion”).

23. See discussion *infra* Parts II.B, IV.

adversely those it is intended to help. It notes that other means may achieve a better overall result, and it calls for a more restrictive use of DBA-suspension policy.

II. DAVIS-BACON ACT: THE LAW AND ITS PURPOSE

The DBA, originally promulgated in 1931, is now codified under 40 U.S.C. §§ 3141-48.²⁴ It has been the subject of much litigation and does not lack interpretive precedent.²⁵ While the Act's two purposes—protecting local wage standards and giving local labor and contractors a fair opportunity to bid for federal government contracts—have been fleshed out in the case law, it has been roundly criticized on both social and economic grounds.²⁶

A. THE LAW

As noted above, the DBA applies to federal contracts exceeding two thousand dollars that are entered into for the purpose of “construction, alteration or repair, including painting and decorating, of public buildings and public works.”²⁷ It thus requires all government contractors to pay employees on contracts covered by the Act a wage *at least as high* as the prevailing wage in a particular geographic area.²⁸ While the Act broadly applies to both contractors and their subcontractors,²⁹ its application is limited to “mechanics and laborers employed directly on the site of the work.”³⁰ Further, the “work” covered by the DBA is “construction, alteration or repair,” and therefore demolition contracts are not subject to the Act's prevailing wage requirements.³¹ The test for determining whether the Act applies, however, is not the nature of the specific work, e.g., construction, alteration, repair or demolition, but rather the nature of the contract itself, i.e., whether the contract essentially or substantially

24. See 40 U.S.C. § 3141(1) (Supp. 2002).

25. See generally 40 U.S.C.A. §§ 3141-48; 64 AM. JUR. 2D *Public Works & Contracts* §§ 222, 223 (2001 & Supp. 2006); 51B C.J.S. *Labor Relations* §§ 1290, 1291 (2003).

26. See discussion *infra* Parts II.A, II.B.

27. 40 U.S.C. § 3142(a) (Supp. 2002).

28. *Bldg. & Constr. Trades Dep't AFL-CIO v. U.S. Dep't of Labor Wage Appeals Bd.*, 932 F.2d 985, 986-97 (D.C. Cir. 1991). Note that this is not necessarily the union wage, although it may be if the union wage prevails in the community.

29. *O.G. Sansome Co. v. Dep't of Transp.*, 55 Cal. App. 3d 434, 441-45 (Ct. App. 1976).

30. 40 U.S.C. § 3142(c)(1) (Supp. 2002). *But see Bldg. & Constr. Trades Dep't*, 932 F.2d at 987 (noting that “site of work” includes the permanent location of the structure after work is completed *and also* nearby property used during construction that can reasonably be said to be a part of the “site”).

31. 38 Op. Att'y Gen. 229, 233 (1935).

contemplates performance of the work described as construction, alteration or repair.³²

1. Prevailing Wage Mandate

Contracts governed by the DBA must contain a provision stating the minimum wage for mechanics and laborers.³³ This minimum wage “shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed.”³⁴

This prevailing wage must be paid to employees on all construction projects governed by the Act in money or in contributions to bona fide employee benefit plans.³⁵ Further, the prevailing wage rate must be determined with reference to an objective standard of predominance or currency in a given locality; thus, it is permissible to define the prevailing wage in terms of the lowest rate if that rate reflects the most frequently occurring wage.³⁶ If no single wage is predominant, it is permissible to use an average.³⁷

Determinations of the prevailing wage rate are made by the Secretary of Labor and, if such determinations are made in compliance with the Act, they are not subject to judicial review.³⁸ The applicable wage rates are those that the Secretary of Labor has determined at, or before, the time of the contract’s execution.³⁹ But the DBA does not require payment of a higher wage if the Secretary later determines such a rate prevails; nor, however, is it a warranty that a contractor will pay only the wage determined by the Secretary.⁴⁰

32. 40 Comp. Gen. 565, 565 (1961).

33. 40 U.S.C. § 3142(c) (Supp. 2002).

34. 40 U.S.C. § 3142(b) (Supp. 2002). The prevailing wage rates are published on the website for the Department of Labor, organized by state and county. See <http://www.gpo.gov/davisbacon> (last visited Nov. 21, 2006).

35. 40 U.S.C. § 3142(d) (Supp. 2002); *In re Schimmels*, 85 F.3d 416, 419 n.2 (9th Cir. 1996).

36. 5 Op. Off. Legal Counsel 174, 174 (1981).

37. *Id.*

38. See *Univs. Research Ass’n v. Coutu*, 450 U.S. 754, 761 n.10 (1981); *Tenn. Roadbuilders Ass’n v. Marshall*, 446 F. Supp. 399, 402 (M.D. Tenn. 1977).

39. *Bushman Constr. Co. v. United States*, 164 F. Supp. 239, 240 (Ct. Cl. 1958).

40. See *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 177-78 (1954).

2. Enforcement Provisions

In addition to these wage requirements, the DBA contains two enforcement provisions which clearly demonstrate its purpose to benefit *employees* engaged in the construction of public buildings and public works.⁴¹

First, the DBA gives the federal government authority to terminate “the contractor’s right to proceed with the work” if it determines that covered employees have been, or are being, paid a wage rate less than the applicable prevailing wage.⁴² If the federal government exercises this authority, it “may have the work completed, by contract or otherwise, and the contractor and the contractor’s sureties shall be liable” for any excess costs incurred.⁴³

Second, the DBA requires that the federal government “pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due.”⁴⁴ This hefty government stick, intended to protect employees, has even greater force due to the deference courts give it: the withholding is deemed proper so long as the government’s contracting officer has a reasonable belief that withholding payment from the contractor will protect the employees’ interests.⁴⁵ If the accrued payments withheld are insufficient to cover the wages due, the Act grants the aggrieved mechanics and laborers “the same right to bring a civil action and intervene against the contractor and the contractor’s sureties as is conferred by law on persons furnishing labor or materials.”⁴⁶ In such causes of action, it is not a defense that the employees either agreed to accept payments less than those required by the Act or made voluntary refunds to the contractor.⁴⁷ The provision providing for the payment of wages to laborers, as well as the provision authorizing the federal

41. See discussion *infra* Part II.B.1.

42. 40 U.S.C. § 3143 (Supp. 2002).

43. *Id.*

44. 40 U.S.C. § 3144(a)(1) (Supp. 2002).

45. See *Copeland v. Veneman*, 350 F.3d 1230, 1234 (Fed Cir. 2003) (distinguishing the standard of review applied to other government withholdings, which must be properly computed).

46. 40 U.S.C. § 3144(a)(2) (Supp. 2002).

47. *Id.* Most courts hold that this language, however, only provides employees with a narrow cause of action to allege that the federal government withheld insufficient payments from the contractor and was therefore unable to reimburse employees pursuant to the Act. See, e.g., *Weber v. Heat Control Co.*, 579 F. Supp. 346, 348 (D.C.N.J. 1982), *aff’d*, 728 F.2d 599 (3d Cir. 1984). Thus, it does not grant a private cause of action to employees seeking back wages from a contractor. *Id.*; *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 85 (9th Cir. 2003); see also 64 AM. JUR. 2d *Public Works & Contracts* § 222 (2001 & Supp. 2006) (cautioning readers about the limited cause of action).

government to terminate contracts, advances the purpose of protecting local wage standards.⁴⁸

3. Presidential Suspension

“The President may suspend the provisions of [the DBA] during a national emergency.”⁴⁹ However, the term “national emergency” is not defined in the Act, and its definition is therefore subject to the discretion of the president.⁵⁰

Explicit suspension⁵¹ of the Act has been invoked three times prior to President Bush’s 2005 suspension.⁵² First, President Franklin Roosevelt suspended the Act in 1934 for approximately one month, apparently for convenience in administering New Deal legislation.⁵³ There is little history on this suspension, as it was hardly noticed by the public.⁵⁴ The second suspension occurred in 1971 under President Nixon, in an apparent attempt to reign in inflationary pressures on construction industry wage rates.⁵⁵ The suspension lasted just over thirty days, at which point the president moved on to other means of resolving the problem.⁵⁶ Both the Nixon and Roosevelt suspensions were very short in duration, and neither Administration formally defined what constituted a “national emergency” under the Act.⁵⁷ This lack of precedent set the stage for the third suspension in 1992 by President George H.W. Bush.⁵⁸ Unlike prior

48. See discussion *infra* Part II.B.1.

49. 40 U.S.C. § 3147 (Supp. 2002).

50. See 40 U.S.C. §§ 3141-48 (Supp. 2002).

51. The act may have been suspended from 1941 to 1947 in the wake of World War II; it was not explicitly suspended in 1941 when President Roosevelt declared an unlimited national emergency, but it was explicitly reinstated by Joint Resolution terminating the national emergency. See LUCKEY & SHIMABUKURO, *supra* note 13, at 2 n.8 (citing Proclamation No. 2487 on May 29, 1941, and Joint Resolution on July 25, 1947). However, given the wartime exigencies and the fact that suspension was not explicit, there is likely little utility in furthering this avenue of discussion.

52. See H.R. REP. NO. 109-258, at 3 (2005), available at 2005 WL 2850838. For a detailed discussion of these suspensions, see WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., THE DAVIS-BACON ACT: SUSPENSION (2005) (C.R.S. No. RL33100), available at http://www.opencrs.com/rpts/RL33100_20050926.pdf.

53. See *id.*; see also Proclamation No. 2088, 48 Stat. 1745 (June 5, 1934).

54. See WHITTAKER, *supra* note 52, at 4.

55. See *id.* at 7; see also Proclamation No. 4031, 36 Fed. Reg. 3,457 (Feb. 25, 1971) (finding, *inter alia*, that there were inflationary wage pressures due to collective bargaining, increased unemployment and work stoppages in the construction industry, which “affected collective bargaining in other industries, thus contributing to inflation in the overall economy”).

56. See WHITTAKER, *supra* note 52, at 7-12. Nixon’s suspension of the Act may have merely been leverage to force labor and management to come to a more “responsible wage/price policy.” See *id.*

57. See *id.*

58. See *id.* at 13; see also Proclamation No. 6491, 57 Fed. Reg. 47,553 (Oct. 14, 1992).

suspensions, the 1992 suspension was a response to tangible events—Hurricanes Andrew and Iniki—and was only instituted over limited geographic areas in Florida, Louisiana and Hawai‘i.⁵⁹ It came days before the 1992 presidential election, however, and the Act was ultimately “reinstated” by President Clinton just five months later.⁶⁰

The three suspensions preceding President Bush’s 2005 suspension were very short in duration, and no serious attempts were made to monitor their impacts.⁶¹ Without studies of the suspensions’ effects, the door has remained open for proponents and critics of the Act to make their respective arguments.⁶² To understand these arguments, it is first necessary to understand the purpose of the DBA.

B. ITS PURPOSE

The DBA was promulgated in 1931, when federal construction projects were on the rise in an attempt to spur economic recovery from the Great Depression.⁶³ Given the nature of federal construction contracts, where the lowest bidder is awarded the construction project, contractors routinely attempted to undercut competitors and increase profits by hiring cheap labor.⁶⁴ Contractors’ continued use of cheap labor led to a downward spiral in wage rates, which was seen as “subverting the recovery process.”⁶⁵ The DBA was passed in 1931 to prevent the lowering of wage rates and to give “local” workers a chance to compete for government contracts.⁶⁶ The current embodiment of the Act does not depart far from its underpinnings, with many recent cases reinforcing the two purposes of the law.⁶⁷

1. The Two Purposes of the DBA

The most important purpose of the DBA advanced in recent case law is the protection of local wage standards.⁶⁸ In the words of Representative

59. See Proclamation No. 6491, 57 Fed. Reg. 47,553 (Oct. 14, 1992).

60. Proclamation No. 6534, 58 Fed. Reg. 13,189 (Mar. 6, 1993).

61. See WHITTAKER, *supra* note 52, at 19.

62. *Id.*

63. See WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., DAVIS-BACON SUSPENSION AND ITS LEGISLATIVE AFTERMATH 1-2 (2005) (C.R.S. No. RL33149), available at http://openncs.cdt.org/rpts/RL33149_20051114.pdf.

64. See *id.*

65. *Id.*

66. See *id.*

67. See discussion *infra* Part II.B.1.

68. See *Univ. Research Ass’n v. Coutu*, 450 U.S. 754, 773 (1981).

Bacon (R-NY), after whom the Act was named, wage protection is needed to prevent “certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg, labor, [from] going around throughout the country ‘picking’ off a contract here and a contract there.”⁶⁹ Specifically, the Act “protect[s] local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.”⁷⁰ This protection is accomplished by setting a price floor for wages (determined by the Secretary of Labor) on government construction projects.⁷¹ A price floor protects employees from substandard earnings⁷² and expresses the “public policy that payment of low wages shall not give a contractor an advantage in bidding [for] or securing a public contract.”⁷³ Thus, the Act is not for the benefit of contractors, but rather for the benefit of employees.⁷⁴

The second purpose of the Act, derived from the aforementioned wage protection, is “to give local labor and the local contractors a fair opportunity to participate” in federal construction projects.⁷⁵ Representative Bacon put forth this fairness argument, stating that “it is a fair proposition where the Government is building these post offices and public buildings throughout the country that the local contractor and local labor may have a ‘fair break’ in getting the contract.”⁷⁶ This rationale has been endorsed by recent courts.⁷⁷ The Act therefore attempts to “promote the hiring of local labor rather than cheap labor from distant sources”⁷⁸ in order to protect local craftsmen that are “denied work by those contractors who recruit[] labor from distant cheap labor areas.”⁷⁹ According to a Senate Report in 1964, the DBA was found to be generally effective in protecting local wage standards and giving local labor and contractors a fair opportunity to secure government construction contracts.⁸⁰

69. *See id.* at 774.

70. *Id.* (citing H. COMM. ON EDUC. & LABOR, 87TH CONG., LEGIS. HISTORY OF THE DAVIS-BACON ACT I (Comm. Print 1962)).

71. *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 176-77 (1954).

72. *Id.*

73. *See R.D. Anderson Constr. Co. v. City of Topeka*, 612 P.2d 595, 602 (Kan. 1980).

74. *Binghamton*, 347 U.S. at 176-77.

75. *See id.*

76. *See Univs. Research Ass’n v. Coutu*, 450 U.S. 754, 774 n.25 (1981) (citing 74 CONG. REC. 6510 (1931)).

77. *See, e.g., id.; Binghamton*, 347 U.S. at 176-77.

78. *N. Ga. Bldg. & Constr. Trades Council v. Goldschmidt*, 621 F.2d 697, 702 (5th Cir. 1980); *see also Int’l Union of Operating Eng’rs, Local 627 v. Arthurs*, 355 F. Supp. 7, 8 (W.D. Okla. 1973).

79. S. Rep. No. 88-963 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2339, 2340.

80. *See id.*

2. Criticisms of the Act

The DBA has been criticized for having adverse social consequences that are harmful to minority laborers.⁸¹ Many critics have argued that the purpose of the Act was not only to protect local labor while maintaining quality in the construction industry, but also to advance a social policy protecting White union workers from the competition of cheaper African American labor.⁸² David Bernstein, who has written extensively on the DBA as a barrier to African Americans,⁸³ argues that Congress passed the Act with a discriminatory intent and that the Act continues to serve its discriminatory purpose.⁸⁴ He notes that in the early twentieth century, prior to the Act's promulgation, most construction unions excluded African Americans while other unions "relegated them to second-class segregated locals."⁸⁵ As African American workers migrated north, the unions' discrimination impeded these workers' procurement of higher-paying skilled labor positions; this discrimination forced a disproportionate number of African Americans to remain in unskilled positions or forced skilled African American workers "to accept lower-paying non-union employment."⁸⁶ After the Act was adopted,⁸⁷ African Americans were

81. See, e.g., Timothy J. Pendolino, *The Davis-Bacon and Service Contract Acts: Laws Whose Time Has Passed?*, 147 MIL. L. REV. 218, 253-55 (1995).

82. See, e.g., Davidson M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541, 1548 (2002) (analyzing the adverse effect on African American workers of pro-union legislation); Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. ILL. U. L. REV. 457, 466-68 (2004) (analyzing the adverse effect on African American workers of occupational licensing laws and consumer protection laws as discriminatory monopolies).

83. See, e.g., David E. Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. 276 (1994) [hereinafter Bernstein, *Vestige*]; David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993) [hereinafter Bernstein, *Roots*]; DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (2001) [hereinafter BERNSTEIN, *ONLY ONE PLACE OF REDRESS*].

84. See Bernstein, *Vestige*, *supra* note 83, at 276; see also Robert A. Levy, *An Equal Protection Analysis of the Davis-Bacon Act*, 1995 DET. C. L. MICH. ST. U. L. REV. 973 (1995).

85. Bernstein, *Vestige*, *supra* note 83, at 277.

86. See *id.* at 280. Bernstein provides examples of this discrimination. He notes that African Americans constituted approximately 4.8% of New York City's population, but comprised only 2.5% of the city's skilled construction workforce compared to 7.3% of the unskilled workforce. *Id.* Similarly in Chicago, African Americans constituted 7% of the population, but comprised only 3.5% of the skilled workforce compared to 13.2% of the unskilled workforce. *Id.*

87. Bernstein argues that the Act was intended to protect White union workers, noting that Rep. Bacon introduced the "prevailing wage" legislation after an Alabama contractor won a construction bid in his New York congressional district and brought in African American laborers to work on the project. *Id.* at 281-82. Further, Bernstein provides as evidence testimony from various legislative hearings on the Act which reference the "problems" African American labor posed to local wage rates. For a detailed discussion, see *id.* at 281-87.

unable to exercise the one advantage they had in the labor market—“their willingness to work for less money than whites.”⁸⁸ Consequently, many African American laborers were prevented from working on federal construction projects or, if they did work on such projects, were forced to work for cheaper pay as non-union unskilled labor.⁸⁹ Bernstein concludes that the effects of the DBA are still being felt and urges its elimination so that “[African American] workers will find it easier to get construction jobs, and one of the remaining racist stains on American law will be erased.”⁹⁰

In addition to social criticism of the DBA, other critics find fault with the Act on economic grounds. These critics claim that the DBA, because it is a minimum wage law, creates inefficiency and therefore does not maximize welfare.⁹¹ Many of these critics believe that minimum wage laws are generally inefficient because they redistribute wealth that would otherwise be allocated efficiently under a free market.⁹² They claim that such laws are not Pareto efficient—in other words, such laws are not welfare-maximizing because, “[w]hile some [people] would be better off, it can be shown that their gains [overall] would be smaller than the losses of those who lost their jobs.”⁹³ In addition to the welfare loss accompanying the redistribution imposed by minimum wage laws, further welfare loss may result if various groups expend resources in order to prevent or effect

88. *Id.* at 288. This harm to African American workers was due to the effect of the law in conjunction with union discrimination. *See supra* notes 85-86 and accompanying text. It is important to keep in mind, however, that the law itself is facially race-neutral and applies to all workers wishing to undercut the prevailing wage. For more on this, see discussion *infra* Part IV.A.

89. *See* Bernstein, *Vestige*, *supra* note 83, at 288-89. Note that many African Americans were able to work on the construction of army camps in the South during World War II, due to the comparative dearth of White workers. *See id.* at 290.

90. *Id.* at 296-97; *see also* S. REP. NO. 104-80, at 14 (1995), available at 1995 WL 296975 (noting that the National Association of Minority Contractors and the National League of Cities argued for repeal of the Davis-Bacon Act due its negative effect on minority workers). Despite this criticism, however, the NAACP and other civil rights groups support the Davis-Bacon Act. Bernstein, *Vestige*, *supra* note 83, at 296-97.

91. *See, e.g.*, Sarah Dunn, John M. Quigley & Larry A. Rosenthal, *The Effects of Prevailing Wage Requirements on the Cost of Low-Income Housing*, 59 INDUS. & LAB. REL. REV. 141, 142-43 (2005) (noting conclusion of Robert S. Goldfarb and John F. Morrall III, *The Davis-Bacon Act: An Appraisal of Recent Studies*, 34 INDUS. & LAB. REL. REV. 191 (1981), that “the legislation could hardly be attractive on efficiency grounds”).

92. *See generally, e.g.*, S. W. POLACHEK & W. S. SIEBERT, *THE ECONOMICS OF EARNINGS* 6-8 (1993) (equating minimum wage laws to robbery).

93. *Id.* at 6-7. Note that this reasoning follows from basic microeconomic theory regarding supply and demand in the labor market: as the price of labor increases, the demand for laborers will decrease, and therefore the minimum wage will prevent the employment of some people who would otherwise be employed. For more on this, see discussion *infra* Part III.

changes to a minimum wage policy.⁹⁴ For example, firms may spend both money and time lobbying Congress to eliminate a minimum wage rate while civil rights groups spend money and time lobbying Congress to maintain the rate, thereby causing groups on both sides of the debate to waste resources that would otherwise be used more efficiently.⁹⁵ Thus, the overall welfare loss includes two components: 1) the loss of jobs resulting from increased labor costs, which outweighs the higher wages earned by those still employed, and 2) the resources wasted in setting the wage rate, usually in the form of time and money spent on lobbying.⁹⁶

Many economic arguments go further than general criticism of minimum wage laws and attack the DBA on specific grounds. Some argue that the safeguard provided by the Act—preventing contractors from obtaining government bids at the expense of laborers—is not necessary in today’s economy.⁹⁷ This is because the unemployment rate is significantly lower now than during the Great Depression, and therefore contractors will not have access to laborers willing to undercut the market rate. Thus, contractors have a “strong incentive to bid the project using market-level wages.”⁹⁸ Should unemployment rates grow, this argument continues, there will be “little impact on wages in the industry because [the federal government] only controls five percent of the construction dollars.”⁹⁹ This low percentage is important because during the Great Depression the federal government had a monopsony on construction labor, i.e., it was the only buyer of construction labor and could therefore purchase it at below-market prices; this is what ultimately necessitated prevailing wage safeguards such as the Act.¹⁰⁰ However, critics claim that the Act is no longer needed now that no monopsony exists: the federal government is but one of many purchasers of construction labor.¹⁰¹ Therefore, mandating

94. POLACHEK & SIEBERT, *supra* note 92, at 8.

95. *Id.*

96. *See id.*; *see also* discussion *infra* Part III.

97. *See* Christine Tracey, Comment, *An Argument for the Repeal of the Davis-Bacon Act*, 5 J. SMALL & EMERGING BUS. L. 285, 294-95 (2001).

98. *Id.* at 295.

99. *Id.*; *see also id.* at 287 & nn.18-19 (citing data compiled by the U.S. Census Bureau). This Comment notes, however, that a majority of highway construction and almost half of all heavy construction are publicly funded, with the federal government responsible for roughly 10-15% of such construction. *Id.* at 297.

100. *To Save Money and Create Jobs the Davis-Bacon Act Should Be Repealed: Hearing on S. 141 Before the Comm. on Labor and Human Res.*, 104th Cong. 89 (1995) [hereinafter *Davis-Bacon Hearings*] (statement of A.J. Thieblot, Economist), available at 1995 WL 60908 (F.D.C.H.).

101. *Id.*

compliance with the Act “applies a cure (of awesome expense and complexity) to a problem that simply does not exist.”¹⁰²

The awesome expense to which most critics cite is the increased cost of construction projects to the federal government, and thus to taxpayers.¹⁰³ The U.S. Chamber of Commerce believes that the DBA inflates the cost of construction projects by as much as fifteen percent, costing taxpayers roughly \$1 billion annually; this is in addition to the estimated \$100 million spent annually on government administrative costs and \$190 million spent annually by private construction companies to comply with the Act’s regulatory paperwork requirements.¹⁰⁴ Many critics further contend that increased construction costs result in less overall construction (i.e., the additional \$1 billion per year that is spent on inflated construction wages could instead be used for additional public works), and thus fewer public resources.¹⁰⁵

Regardless of which arguments one might agree with, it is clear that debate over the DBA is multi-faceted and on-going, with criticisms of, and justifications for, the Act covering such issues as fairness to union contractors,¹⁰⁶ overall construction quality,¹⁰⁷ the effect of increased wages on local demand for goods and services,¹⁰⁸ worker training programs¹⁰⁹ and the safety benefits derived from having experienced workers on construction sites.¹¹⁰ Much of the debate regarding the Act “has tended to reflect ideological positions: some, generally conservative, in opposition; some, mostly trade unionists and contractors operating with union crews, in support.”¹¹¹ This Note, however, does not attempt to address the lengthy

102. *Id.*

103. *See* Tracey, *supra* note 97, at 308 (noting that “the federal government would save \$9.6 billion in discretionary spending over the next ten years if Davis-Bacon were repealed”); *see also* Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005) (stating that the Act’s wage rates “increase the cost to the Federal Government”).

104. U.S. Chamber of Commerce, Davis-Bacon Act, <http://www.uschamber.com/issues/index/labor/davisbacon.htm> (last visited Nov. 21, 2006); *see also* CONG. BUDGET OFFICE, MODIFYING THE DAVIS-BACON ACT: IMPLICATIONS FOR THE LABOR MARKET AND THE FEDERAL BUDGET 22 (1983) (estimating that the Act raises costs by 3.7%—equivalent to an additional \$1 billion in federal construction outlays for fiscal year 1982), *available at* <http://www.cbo.gov/ftpdocs/50xx/doc5030/doc12-Entire.pdf>.

105. *See, e.g.*, Dunn, Quigley & Rosenthal, *supra* note 91, at 154 (contending that cost increases “due to prevailing wage regulation surely lead to reductions in the number of newly constructed low-income housing units produced”).

106. *See Davis-Bacon Hearings, supra* note 100, at 89.

107. *See id.*

108. *See id.*

109. *See id.*; Tracey, *supra* note 97, at 304-05.

110. *See* Tracey, *supra* note 97, at 305-06.

111. WHITTAKER, *supra* note 63, at 2.

and complicated policy debate of whether or not the Act should be the law, but rather a much narrower issue—whether or not limited suspension of the DBA due to a “national emergency” is a sound policy decision. To better understand arguments for and against such a decision, as well as to better understand the positions of proponents and critics of the Act generally, it is necessary to understand some basic economic concepts.

III. ECONOMICS 101

Economic theory is a tool. As one noteworthy scholar puts it, “[e]conomic analysis can illuminate, reveal as coherent, and in places improve” the law, and it is therefore useful to see economics “as a tool for understanding and reforming social practices, rather than as a formal system of daunting mathematical complexity.”¹¹² To that end, this Note will focus on using basic economic principles to better understand the ramifications of a limited suspension of the DBA.

The use of *basic* economic principles may, at first blush, seem limiting and uninformative. Economic principles are the result of economists “abstract[ing] from the vast complexities of the real world . . . to develop rather simple models that capture the ‘essentials.’”¹¹³ But this does not detract from the utility of such basic principles.¹¹⁴ Economic models have improved over time and are useful even if not completely accurate.¹¹⁵ The utility of models, in fact, is a result of their basic nature. A model that requires too many inputs and provides too many outputs prohibits any practical application and is rendered useless. For instance, imagine the difficulty in utilizing a weather forecast that provided predicted temperature, barometric pressure, humidity, wind speed and wind direction for every minute of the following day. Recognizing that economics is a

112. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* xix (4th ed. 1992).

113. WALTER NICHOLSON, *MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS* 3 (7th ed.1998).

114. *See id.* Consider, for example, weather forecasting—although forecasting models are vastly simple compared to real-world atmospheric conditions, the models are still helpful to most people. *See, e.g.,* Weather.com, <http://www.weather.com>. Weather models have improved over time such that, according to an Earth Observatory study, weather forecasting “in the 5-day range is as accurate as it was in the 3-day range 20 years ago”; this includes a 20 to 30% improvement in accuracy for the seven years prior to the year 2000 study. David Herring, *Second Guessing Mother Nature: Forecasting the Surprise Snow of January 2000*, EARTH OBSERVATORY, 2000, <http://earthobservatory.nasa.gov/Study/Blizzard/printall.php>. This trend of increased accuracy will likely continue as “meteorologists fine-tune their models,” so that in five to ten years “forecasters will be able to accurately predict the weather 10 days, perhaps even 14 days, ahead of time.” *Id.*

115. *See* NICHOLSON, *supra* note 113, at 3-4.

powerful, yet incomplete tool, allows one to put a model's results into perspective.

A. SUPPLY AND DEMAND

Most, if not all, economic models start with the two axiomatic assumptions that economic actors are both rational and wealth-maximizing—e.g., persons maximize their utility, firms maximize their revenue and minimize their costs, and government regulators maximize public welfare.¹¹⁶ While some models dispense with rational behavior as a first approximation, and wealth-maximization altogether,¹¹⁷ both assumptions are still useful because “the analytical concepts usually associated with such behavior are retained” in many of these models.¹¹⁸

From the basic assumptions of rationality and wealth-maximization, the next logical question is: How, exactly, does an economic actor value goods in order to wealth-maximize? In modern economies, the simple answer is usually the price (in money) paid for the good. But is price always indicative of value?

Adam Smith, generally regarded as the founder of modern economic theory,¹¹⁹ addressed this question of value in his seminal work, *An Inquiry into the Nature and Causes of the Wealth of Nations*.¹²⁰ Smith differentiated between “value in use” and “value in exchange” in an attempt to resolve the following problem:

The things which have the greatest value in use have frequently little or no value in exchange; and on the contrary, those which have the greatest value in exchange have frequently little or no value in use. Nothing is more useful than water: but it will purchase scarce any thing; any thing can be had in exchange for it. A diamond, on the contrary, has scarce any value in use; but a very great quantity of other goods may frequently be had in exchange for it.¹²¹

116. *See id.* at 7.

117. *See, e.g.*, ARMEN A. ALCHIAN, *Uncertainty, Evolution, and Economic Theory*, in *ECONOMIC FORCES AT WORK* 1, 1 (1977).

118. *See id.*

119. *See, e.g.*, NICHOLSON, *supra* note 113, at 9.

120. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 24-32 (Edwin Cannan ed., Random House 1994) (1776).

121. *Id.* at 31-32. Note that John Law addressed the same problem nearly seventy years earlier and arguably resolved it with a supply and demand theory of value, which is not far off from Alfred Marshall's highly regarded resolution. *See* JOHN LAW, *MONEY AND TRADE CONSIDERED: WITH A PROPOSAL FOR SUPPLYING THE NATION WITH MONEY* 4-5 (Augusts M. Kelley Publishers 1966) (1705).

This became known as the famous water-diamond paradox.¹²² Smith concluded that the price of a good was equal to its value in exchange, which was dependent on the cost of production—here, the cost of labor.¹²³ However, philosophers and economists debated Smith’s theory regarding “value in use” and “value in exchange,” noting gaps the theory failed to adequately address.¹²⁴ Ultimately, Smith and his contemporaries could not satisfactorily resolve the paradox because they relied solely on a labor theory of value.¹²⁵

Roughly a century after *The Wealth of Nations* was published, several economists proposed a theory of value that did not rely solely on labor.¹²⁶ Instead, they explained, a particular good’s value in exchange is not determined by its total utility, but rather by the utility of the last unit consumed.¹²⁷ Value, therefore, is determined by a good’s marginal utility, i.e., the utility derived from an additional unit of that good.¹²⁸ Alfred Marshall’s lucid explanation of marginal value in *Principles of Economics* “showed that demand and supply *simultaneously* operate to determine price.”¹²⁹ The general law of demand put forth by Marshall is thus: “The greater the amount to be sold, the smaller must be the price at which it is offered in order that it may find purchasers; or, in other words, the amount demanded increases with a fall in price, and diminishes with a rise in price.”¹³⁰ Similarly, the supply price of a good is “the price required to call forth the exertion necessary for producing any given amount” of that good, where the price, or cost, of supplying a good increases with each additional unit built.¹³¹

This relationship is shown graphically by the famous Marshallian cross in Figure 1.¹³² The upward slope of the supply curve reflects increasing marginal costs, while the downward slope of the demand curve reflects decreasing marginal value.¹³³ The point at which the supply and demand curves intersect represents the equilibrium point in a free market—

122. See, e.g., NICHOLSON, *supra* note 113, at 9.

123. See SMITH, *supra* note 120, at 33.

124. See NICHOLSON, *supra* note 113, at 9-10.

125. See *id.*

126. *Id.* at 10.

127. *Id.*

128. *Id.* at 11.

129. *Id.*; see also ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS: AN INTRODUCTORY VOLUME* (8th ed., MacMillan & Co. 1964) (1890).

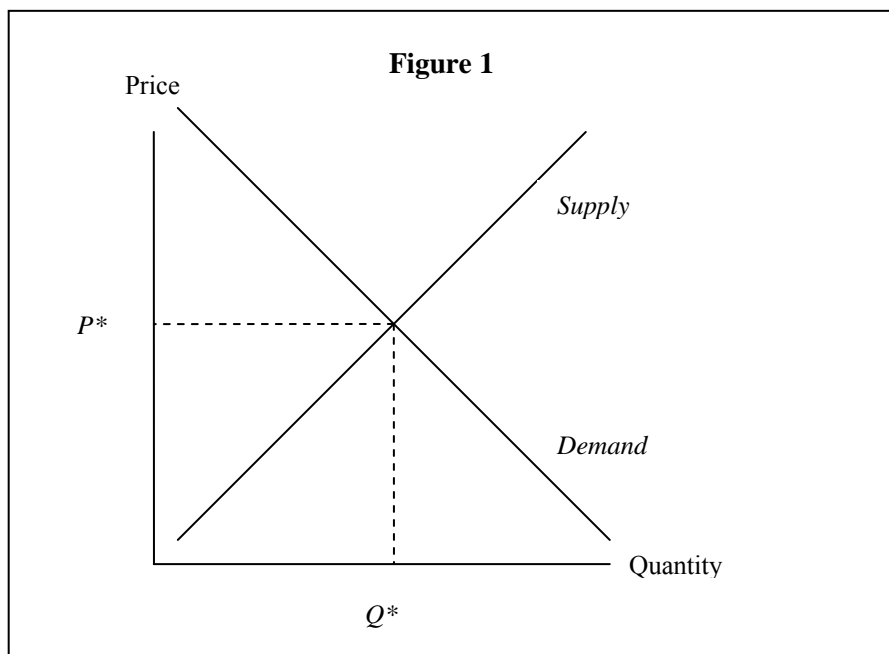
130. MARSHALL, *supra* note 129, at 84.

131. See *id.* at 118.

132. See NICHOLSON, *supra* note 113, at 11-12.

133. *Id.* at 11.

here, consumers of the good (represented by the demand curve) and suppliers of the good (represented by the supply curve) are satisfied, in aggregate, when consuming and producing the equilibrium quantity (Q^*) at the equilibrium price (P^*).¹³⁴



This relationship may be more easily understood if applied to a tangible example. Water, for instance, is necessary to life, but most people do not place a high value on one more cup of it because it is so abundant—it is relatively easy to get an additional cup of water. If, however, a dehydrated person was wandering through the desert with no water in sight, that person would likely place a high value on the additional cup of water and would thus be willing to pay a high price. In this situation, water's marginal value is inflated due to the person's inability to easily obtain one more cup of it. Now consider a situation where a family desires one million gallons of water for their super-sized swimming pool. Here, they may not *value* the water highly (because it will be used solely for amusement purposes), but the *cost* of supplying the one-millionth gallon will be exorbitant—it will become more costly for a supplier to find and transport the water. Thus, in this situation, the marginal cost of supplying

134. *Id.*

the last gallon of water is extremely high and the supplier will only do so for a high price. From these examples, one can understand how Marshall's supply and demand synthesis resolves the water-diamond paradox: water is cheap because it generally has both a low marginal value and a low marginal cost, whereas a diamond is expensive because it has a high marginal value (a diamond is, after all, a girl's best friend)¹³⁵ and a high marginal cost (diamonds must be found, mined, cut and transported before they come to market).¹³⁶

In addition to solving the water-diamond paradox, Marshall's supply and demand synthesis can help explain the effect that changing circumstances will have in a particular market. Recall that the equilibrium price and quantity occur where the supply and demand curves intersect—this represents the point at which the marginal value or benefit (MB) of one additional unit of a good equals the marginal cost (MC) of supplying that additional unit, which can be represented by the simple equation $MB = MC = P^*$.¹³⁷ However, the equilibrium price (and therefore quantity) may change due to changing circumstances that result in movements along, or shifts to, both the supply and demand curves.¹³⁸

Movement along a demand curve usually occurs when there is a change in the price of a good and, *ceteris paribus*, the consumer adjusts consumption along his or her demand curve to account for that change.¹³⁹ This is shown in Figure 2, where the price of the good falls from P^* to P' , resulting in an increase in quantity demanded by the consumer, from Q^* to Q^D .¹⁴⁰ Note, however, that the producer will not supply as much of the good because the price that he or she can charge for a good may not cover the marginal increase in supply costs; the producer will thus supply only the quantity Q^S .¹⁴¹ Assuming a free market, however, the supply and demand will return to some equilibrium price and quantity over the long run.¹⁴²

135. See, e.g., MARILYN MONROE, DIAMONDS ARE A GIRL'S BEST FRIEND (MGM Records 1953).

136. NICHOLSON, *supra* note 113, at 11-12; see also MARSHALL, *supra* note 129. Note that in modern times, the high marginal cost of diamonds has more to do with the monopolistic restriction of supply rather than the natural scarcity of diamonds. See, e.g., *The Diamond Cartel: The Cartel Isn't For Ever*, ECONOMIST, July 17, 2004, at 60, available at 2004 WLNR 6553035.

137. See *supra* fig.1; see also POSNER, *supra* note 112, at 9.

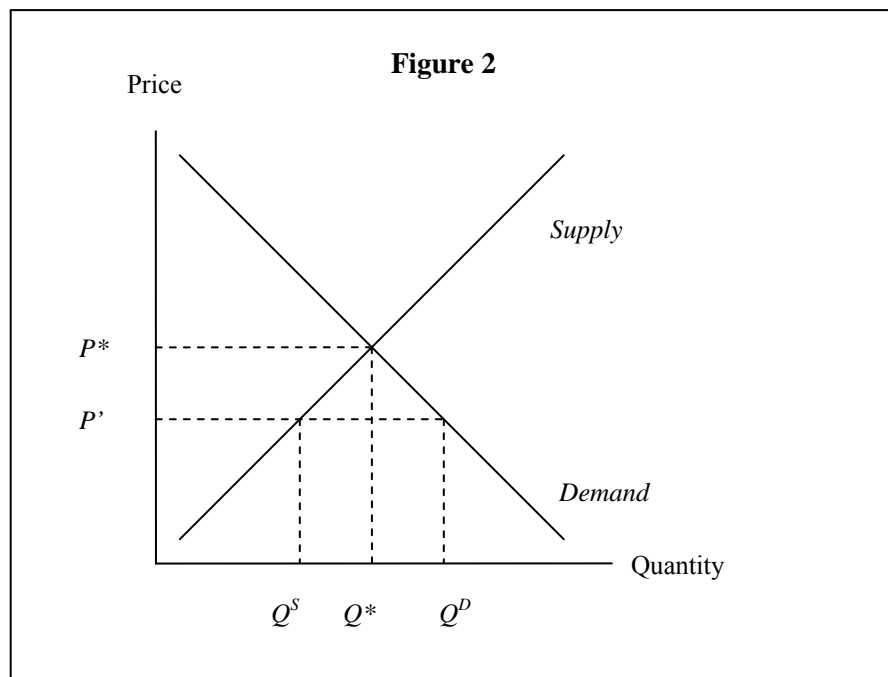
138. See POSNER, *supra* note 112, at 8-9.

139. See NICHOLSON, *supra* note 113, at 125-57.

140. See *infra* fig.2.

141. See *id.*

142. See POSNER, *supra* note 112, at 10-12.



Changing circumstances, however, often lead to two different effects—a substitution effect and an income effect—which shift the entire demand curve.¹⁴³ The substitution effect occurs when the price of a good changes relative to that of a substitute good (e.g., the price of pizza rises relative to that of hamburgers, both of which are demanded as food).¹⁴⁴ If the price of a substitute rises, and assuming consumers' income remains unchanged, consumers will purchase more of the relatively cheaper product, resulting in a rightward shift of the demand curve for that product (e.g., consumers will now demand more hamburgers than before at every price point because it is now cheaper to consume hamburgers relative to pizza).¹⁴⁵ Similarly, the income effect occurs when consumers' incomes increase, which results in more purchasing power for a good, thereby increasing demand for that good.¹⁴⁶

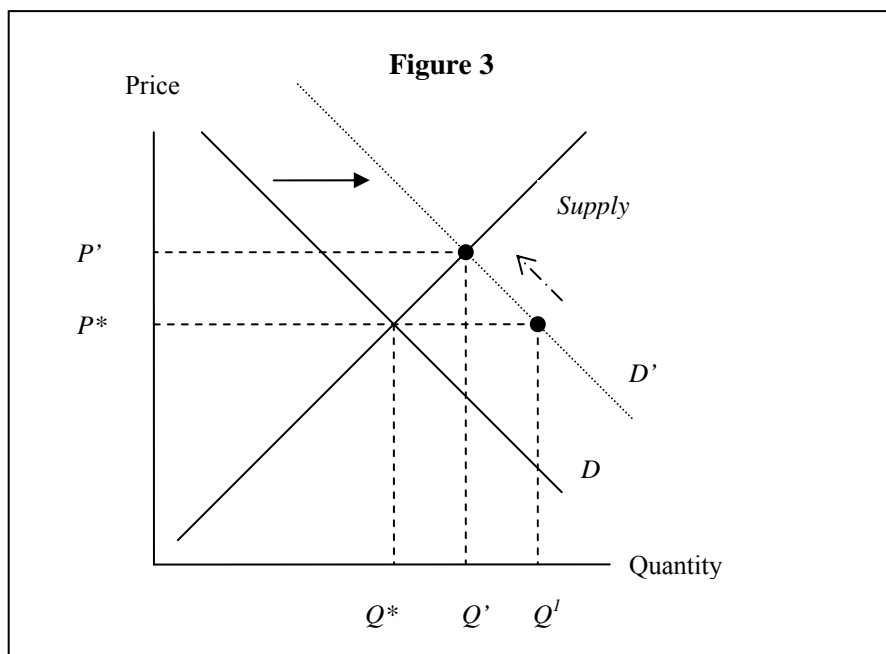
143. See NICHOLSON, *supra* note 113, at 125-57. The demand curve may also shift if consumers' preferences change. See *id.*

144. See *id.*

145. See *id.*

146. See *id.* This analysis applies for normal goods. For a discussion on inferior goods and Giffen goods, see Uriel Spiegel, *The Case of a "Giffen Good,"* 25 J. ECON. EDUC. 137 (1994), available at <http://www.jstor.org/browse/00220485/AP040076> (follow "The Case of a 'Giffen Good'" hyperlink under "Economic Instruction").

Both the income and substitution effects can act together to shift the demand curve.¹⁴⁷ Thus, an increase (decrease) in the price of a substitute or an increase (decrease) in overall income, or both,¹⁴⁸ will shift the demand curve to the right (left), as shown in Figure 3.¹⁴⁹ This rightward shift, from D to D' , represents an increase in demand, which is shown graphically as a change in the quantity demanded from Q^* to Q' , assuming a constant P^* . Over time, however, producers will charge a higher price for the good, resulting in a new equilibrium price and quantity at P' and Q' , respectively.



Similar to the demand curve, the supply curve may also shift due to changing circumstances.¹⁵⁰ Shifts in the supply of a good can occur due to changes in the price of inputs—the resources used to produce the good.¹⁵¹

147. See NICHOLSON, *supra* note 113, at 125-57.

148. See *id.* For instance, if the price of a good decreases and the price of substitute goods remains constant, the consumer now has more overall spending power—the consumer will purchase the relatively cheaper good which will result in relatively more overall income.

149. See *id.* For more on circumstances affecting consumers' demand and budget constraints, see Eugen E. Slutsky, *On the Theory of the Budget of the Consumer*, in READINGS IN PRICE THEORY 27 (George J. Stigler & Kenneth E. Boulding eds., 1st ed. 1952).

150. See NICHOLSON, *supra* note 113, at 363-91.

151. *Id.* at 408.

Thus, a price increase in an input (e.g., cheese) which is used to produce a particular good (e.g., pizza) will raise the total cost of producing that good and consequently the marginal cost of producing additional goods; this is because the cost of each additional unit will be affected by the higher input price.¹⁵² This higher marginal cost will result in a decrease in supply, represented by a leftward shift of the supply curve in Figure 4.¹⁵³ This leftward shift from S to S' , rather than mere movement along the existing curve, results because producers will supply less of the good at every price.¹⁵⁴ Thus, if price remains constant at P^* , producers will only supply quantity Q' ; however, the price of the good will likely rise over time, resulting in a new equilibrium price and quantity at P' and Q' , respectively.

Two other important factors that can shift the supply curve are changes in the number of firms producing a good and changes in technology.¹⁵⁵ The effect of changing the number of producers is fairly intuitive. For example, if one-half of all producers in a toothpick market left to make drink umbrellas, the supply of toothpicks would drop sharply, which is represented in Figure 4 by a leftward shift of the supply curve (S to S'). Over time, the remaining producers will ramp-up toothpick production to meet the demand and, absent re-entry of toothpick producers, settle at a new equilibrium price and quantity (P' and Q').¹⁵⁶ Changes in technology can also affect supply, although usually increasing overall supply, which would be represented by a rightward shift of the curve. This is because technological changes usually make production more efficient, i.e., less costly.¹⁵⁷

152. See *id.* at 334-38. For a more detailed explanation of cost functions and their mathematical rationales, see *id.* at 287-396.

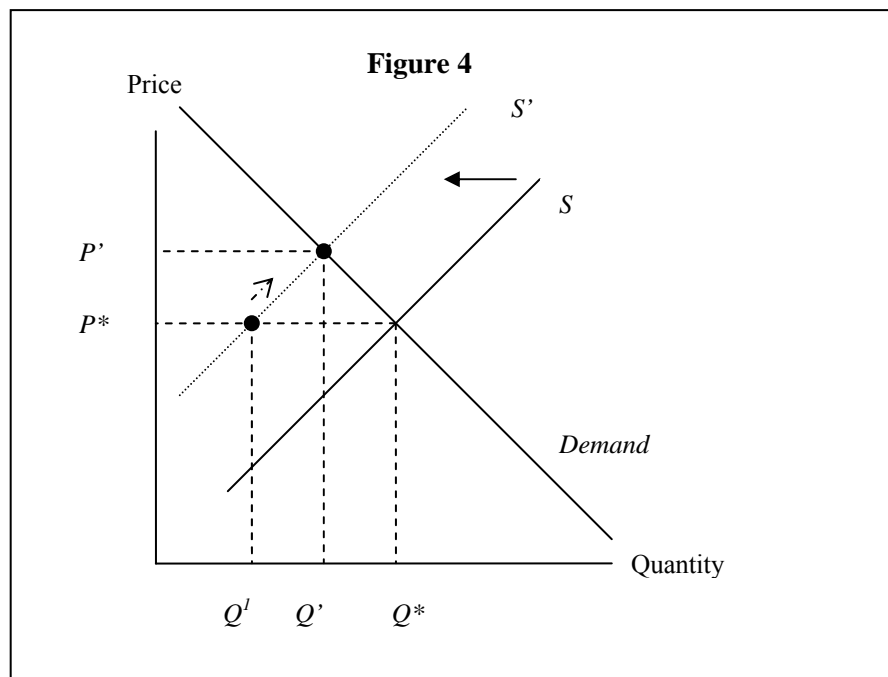
153. See *id.* at 334-38.

154. See *id.*

155. See *id.* at 408.

156. See *infra* fig.4.

157. See NICHOLSON, *supra* note 113, at 343-45. However, technological changes that make production more costly, like government-mandated emission control devices on automobiles, will increase the total and marginal cost function, decreasing overall supply.



While nowhere near an exhaustive account of supply and demand,¹⁵⁸ these basic concepts will assist in understanding the economics related to firms and their two main input factors—labor and capital.¹⁵⁹ The concepts regarding firms and their inputs will do most of the work in determining the economic effect of a limited suspension of the DBA.

B. THE FIRM, LABOR AND CAPITAL

A firm that is both rational and wealth-maximizing will generally constrain itself such that total revenue is greater than total cost—this is economic profit.¹⁶⁰ Thus, to maximize its profit, a firm will be motivated to revenue-maximize and cost-minimize, both of which will affect how a firm makes input factor decisions.¹⁶¹ Labor (L) and capital (K) are the two

158. See, e.g., PRODUCTION ECONOMICS: A DUAL APPROACH TO THEORY AND APPLICATIONS (Melvyn Fuss & Daniel McFadden eds., 1978); Slutsky, *supra* note 149.

159. See, e.g., NICHOLSON, *supra* note 113, at 635-718; MARSHALL, *supra* note 129, at 115-268.

160. See NICHOLSON, *supra* note 113, at 635. Firms, as well as consumers, often spend more in one period than they earn in that period, relying on inter-temporal smoothing over several periods to yield a net-positive or break-even sum. See *id.* at 692-714. Note also that “economic profit” is generally broader in scope than the “nominal” or “cash” profit with which most businesses are concerned, although the distinction is not of great concern in this discussion.

161. See *id.* at 635.

input factors used most often in basic economic models of firms.¹⁶² Ultimately, a firm's goal is to retain additional units of each input factor (*L* or *K*) up to the point that the extra revenue generated by that factor equals the extra cost of obtaining that additional unit of input.¹⁶³

To help conceptualize how a firm might make such break-even decisions regarding input factors, economists look to an input's *marginal revenue product* (MRP)—the marginal revenue (MR) derived from a firm's output (i.e., the additional revenue from one unit of a good) multiplied by the marginal product (MP) of each additional input (i.e., the additional quantity of goods produced by the input).¹⁶⁴ For example, a drink umbrella company can sell drink umbrellas for a penny each (MR), and each drink umbrella worker can make 800 drink umbrellas per hour (MP); here, a worker's MRP equals \$8 per hour. Therefore, the firm will only hire an additional worker, or hire the same worker for an additional hour, if the cost of the labor (usually represented by the worker's wage) is equal to or less than \$8 per hour.¹⁶⁵ If, for instance, the firm pays one worker \$7 per hour, and if it is subject to an overtime compensation law requiring one and one-half (1.5) times compensation after the eighth hour worked per day, the firm will not "hire" the worker for the ninth hour because cost of that worker to the firm (\$10.50) exceeds the benefit, or MRP (\$8).

The cost to the firm of an additional input is the *marginal expense* (ME) of the input.¹⁶⁶ In the prior example, the ME for the eighth hour of labor is \$7, while the ME for the ninth hour is \$10.50. Assuming that the firm cannot exercise market power over the labor supply, the firm will be a price-taker, and the ME of labor will equal the market wage.¹⁶⁷ A profit-maximizing firm, therefore, will pay a worker the market wage if that wage is less than or equal to the worker's contribution to the firm (i.e., each worker's MRP).¹⁶⁸

The same firm will pay for capital such that the cost of capital is less than or equal to the capital's contribution to the firm.¹⁶⁹ For example,

162. See, e.g., *id.* at 635-718; MARSHALL, *supra* note 129, at 115-268.

163. NICHOLSON, *supra* note 113, at 635-36.

164. See *id.* This approach recognizes that each additional unit of input creates revenue only through the additional output produced by that input, see *id.*, and although it has been criticized "on the basis that 'firms do not think like that,' . . . it matters little what firms *think* they do." POLACHEK & SIEBERT, *supra* note 92, at 9 (emphasis added).

165. This example is very basic, yet illustrative.

166. See NICHOLSON, *supra* note 113, at 636-37.

167. See *id.*

168. See POLACHEK & SIEBERT, *supra* note 92, at 8.

169. See NICHOLSON, *supra* note 113, at 636-37.

suppose that the drink umbrella company can rent screwdrivers for its workers, which allows the workers to produce 900 drink umbrellas (instead of 800) per hour. Because the MRP for the screwdrivers is only \$1 per hour ($100 * \0.01), the firm will only “hire” the screwdrivers if they can be rented for less than or equal to \$1 per hour.¹⁷⁰

Both labor (e.g., workers) and capital (e.g., screwdrivers) are used by a firm to produce its goods, and a firm can sometimes substitute one for the other.¹⁷¹ This substitution effect is similar to that which occurred for consumers’ demand of two goods, but here the firm is demanding inputs.¹⁷² If the market wage drops, thereby decreasing the relative cost of labor to capital, a firm may hire more workers and reduce expenditures on capital.¹⁷³ This substitution of labor for capital will decrease costs.¹⁷⁴ For example, imagine that the drink umbrella firm has seven workers earning \$7 per hour (ME of L), and all workers use screwdrivers costing \$1 per hour (ME of K). Recall that each worker produces 800 units per hour, or 900 units per hour with a screwdriver, and each unit is sold for one penny. If a firm utilizes both labor and capital, one hour of production will cost the firm \$49 in labor (7 workers * \$7) plus \$7 in capital (7 screwdrivers * \$1), for a total cost of \$56. The firm will produce 6300 units (900 units * 7 workers with screwdrivers) for a gross revenue of \$63 and a net profit of \$7 ($\$63 - \56). If the market wage drops to \$6 per hour, then total costs become \$49 (\$42 for workers + \$7 for screwdrivers) and revenue remains unchanged at \$63, leaving a net profit of \$14. But due to the firm’s motivation to cost-minimize, it will substitute workers for screwdrivers. To maintain output at 6300 units and thus gross revenue at \$63, the firm need only hire a part-time worker employed for $\frac{7}{8}$ of an hour to replace the 7 screwdrivers—thus, labor costs are now \$47.25 ($7\frac{7}{8}$ workers * \$6) while gross revenue remains unchanged. The net profit of the firm is \$15.75 ($\$63 - \47.25) after this substitution, which is better than the net profit of \$14 that the firm made when it used both workers and screwdrivers. A firm

170. This is a very simple example intended for the reader unfamiliar with the economic concept of paying for capital. In more sophisticated models, the cost of capital usually depends on the opportunity cost of the capital’s particular use, often using analyses such as discounted present value and return on investment. For a more detailed discussion on this, see SHANNON P. PRATT, *COST OF CAPITAL: ESTIMATION AND APPLICATIONS* (2d ed. 2002). Note also that to “hire” capital is to “rent” it, and the latter term will be used throughout this discussion.

171. See NICHOLSON, *supra* note 113, at 640.

172. See *id.* Note that the degree of substitution will depend on the elasticity of the substitutes with respect to the firm’s production function. See *id.* at 289-362; see also PRODUCTION ECONOMICS, *supra* note 158, at 287-309.

173. See NICHOLSON, *supra* note 113, at 640-43.

174. See *id.*

will therefore substitute labor for capital (e.g., workers for screwdrivers), minimizing cost and increasing profit.¹⁷⁵

As with the consumer model, there is more to the story than the substitution effect—there is also an output effect.¹⁷⁶ Because of the drop in market wage (input cost), the firm can produce more units at every wage rate; it will thus demand more input units in order to maximize revenue.¹⁷⁷ To continue with the prior example, the firm can hire the “ $7/8$ ” part-time worker on a full-time basis. This will result in total labor costs of \$48 (8 workers * \$6), but it will also result in an increase in gross revenue to \$64 (8 workers * \$8), for a net profit of \$16. Here, the additional labor does not substitute capital, but because the price of labor decreases, the firm can hire more labor and thereby increase output (and thus gross revenue). A decrease in the price of an input can therefore result in both a substitution effect and an output effect.¹⁷⁸

However, the output effect may not be as strong as this model indicates due to the increased quantity of goods supplied.¹⁷⁹ If the wage decrease applies to all firms in an industry, all firms will experience a substitution and output effect, and thus all firms will increase production.¹⁸⁰ This increased production will increase the total market supply of the good (rightward shift in the supply curve), resulting in a lower market price for the good and thus lower revenue.¹⁸¹

Just as changes in demand for a firm’s output can affect the market price of that output, changes in demand for a firm’s input can similarly affect the input price.¹⁸² The easiest way to examine the effect a firm might have on the input market is to examine a *monopsony*,¹⁸³ where there is a single purchaser of a given input (just as a monopoly is a single seller of a given output).¹⁸⁴ Monopsonies are effective when there is a finite

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.* The drink umbrella model illustrates the powerful principle of relative costs; it is, however, fairly basic and does not take into account such variables as transactions costs, information costs, etc. For more on this and the theory of the firm generally, see, for example, ALCHIAN, *supra* note 117, at 15-123 (Part I: Information, Uncertainty, and the Allocation of Resources) and RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988).

179. *See* NICHOLSON, *supra* note 113, at 642.

180. *See id.*

181. *See id.* This, of course, assumes non-inferior inputs and a downward sloping demand curve for the good. *See* discussion *supra* Part III.A.

182. *See* NICHOLSON, *supra* note 113, at 652.

183. *Id.*

184. *See id.*

supply of a desired input such that the marginal cost of obtaining additional input units increases (i.e., the supply curve for the input is upward sloping).¹⁸⁵ A monopsonist faces a higher ME for the input because the price increase of each additional unit applies to that marginal unit and all prior units purchased.¹⁸⁶ Here, the monopsonist will purchase less of the input than would be purchased in a competitive market and at a lower price than the competitive price; if the input is labor, “wages will be systematically below MRP.”¹⁸⁷ In the labor market, monopsony power can arise whenever workers are immobile—for example, “illegal immigrant workers, who are afraid to move between jobs for fear of being arrested.”¹⁸⁸

The firm’s demand for inputs, whether or not a monopsony exists, does not act alone in setting an input’s price, but rather in conjunction with the supply of that input (in these models, either capital or labor).¹⁸⁹ The supply of capital does little work in this Note’s analysis because it is assumed that suspension of the DBA, a labor law, has little or no bearing on capital markets.¹⁹⁰

Focusing on the labor supply, the axiomatic assumption for most basic models is that an individual laborer can allocate his or her time in two mutually exclusive ways—labor or leisure.¹⁹¹ The exact manner in which a laborer allocates time depends highly on the wage rate: as the wage rate increases, there will be both a substitution and income effect on the laborer’s allocation of time.¹⁹² The substitution effect results from the laborer (who is assumed to be both rational and wealth-maximizing) increasing the number of hours worked and thus increasing the supply of labor.¹⁹³ The laborer is substituting labor for leisure because the latter is now relatively more costly.¹⁹⁴ That is, the cost of leisure is the wage that could have been earned had the laborer been working, which has now

185. POSNER, *supra* note 112, at 314-15. They are also only effective if the monopsonist cannot price discriminate. *See id.*

186. *Id.*

187. POLACHEK & SIEBERT, *supra* note 92, at 10.

188. *Id.*

189. *See* discussion *supra* Part III.A.

190. *See* discussion *infra* Part IV. Note, however, that drastic changes to the labor market, natural disasters and an influx of government money all may affect the supply of capital. Modeling these effects is outside the scope of this Note, but for more on this, see PRATT, *supra* note 170; THOMAS SARGENT, *MACROECONOMIC THEORY* (2d ed. 1987).

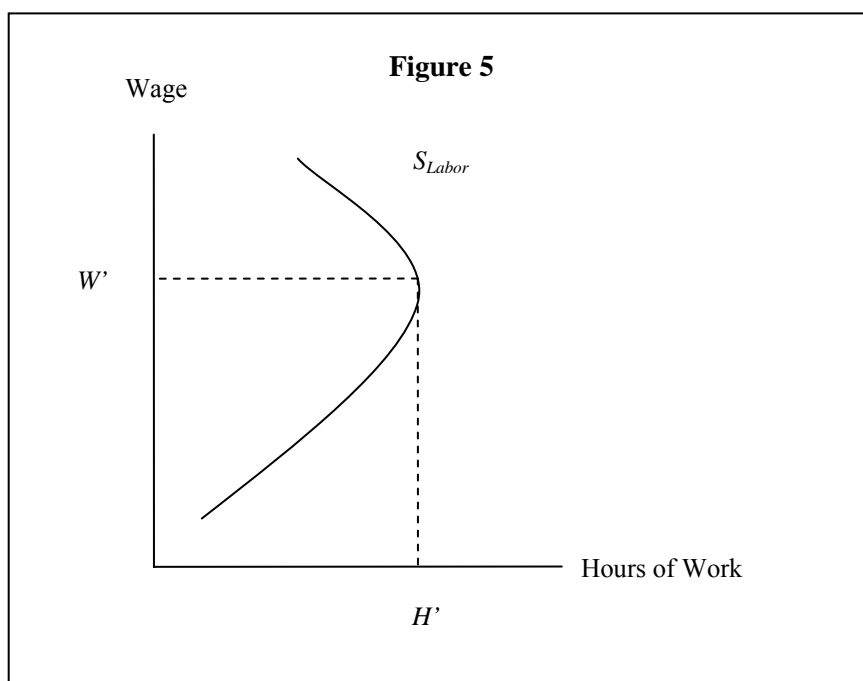
191. *See, e.g.*, NICHOLSON, *supra* note 113, at 666. Note that leisure refers here to any time not spent working. *Id.*

192. *See id.* at 668-70.

193. *See id.*

194. *See id.*

increased due to the higher rate.¹⁹⁵ But because the laborer has increased purchasing power due to the higher wage, the laborer will tend to buy more leisure—this is the income effect.¹⁹⁶ This relationship means that at a certain wage the income effect will likely overpower the substitution effect, and additional increases to the wage rate will lower the supply of hours worked, as shown in Figure 5.¹⁹⁷ The market supply of labor, however, is the aggregate of all individual laborers supply curves in a particular market.¹⁹⁸ Due to varying preferences regarding the consumption of leisure by individual laborers, and because it is assumed that non-laborers can enter the labor market if they desire, the market supply curve of labor is often upward sloping.¹⁹⁹



195. *See id.*

196. *Id.*

197. *See* POLACHEK & SIEBERT, *supra* note 92, at 98-101. This is referred to as a “backward-bending” supply curve, which results from an individual’s preference to consume leisure. *See id.*; *infra* fig.5.

198. NICHOLSON, *supra* note 113, at 677-78.

199. *See id.* at 677-86.

These basic principles regarding labor supply and firms, as well as the basic principles in Part III.A, *supra*, do not create the most detailed models. But that does not invalidate either the principles or the models.²⁰⁰ Rather, it is what gives the principles and models their predictive utility: “A theory that sought faithfully to reproduce the complexity of the empirical world in its assumptions would not be a theory—an explanation—but a description.”²⁰¹

IV. ANALYSIS OF THE DAVIS-BACON ACT’S LIMITED SUSPENSION

Determining the effect of the DBA’s limited suspension is not moot. Hurricanes and other disasters are inevitable.²⁰² Two hurricanes in the last fifteen years have caused two presidents to issue limited suspensions of the DBA.²⁰³ Given these factors, it is likely that the Act will again be suspended, especially in light of the statute’s ambiguity regarding the term “national emergency.”²⁰⁴ It is therefore useful to determine whether a limited suspension of the DBA benefits the affected communities after a natural or man-made disaster.

The analysis in this section first evaluates whether the Act continues to have a discriminatory effect.²⁰⁵ It then analyzes the ability of the federal government, through its contractors, to exercise monopsony power in the labor market.²⁰⁶ Finally, it addresses the biggest threat to lower-wage workers—the *limited* nature of the suspension.²⁰⁷ This threat will be analyzed by looking first at issues regarding the geographic limitation and then at issues regarding the temporal limitation.

200. See POSNER, *supra* note 112, at 16-17.

201. *Id.*

202. See sources cited *supra* note 22; see also Ralph Vartabedian, *Experts Fault Repairs to New Orleans Levees*, L.A. TIMES, Mar. 8, 2006, at A14 (noting UC Berkeley experts’ analysis that repairs are flawed).

203. Admittedly, the father-son relationship of these two presidents may have some bearing on the similarity of their responses; the more likely reason, however, is the similarity in their political persuasions. See discussion *supra* Parts I, II.B.

204. See 40 U.S.C. § 3147 (Supp. 2002); see also discussion *supra* notes 49-62 and accompanying text.

205. See discussion *infra* Part IV.A.

206. See discussion *infra* Parts IV.B.

207. See discussion *infra* Parts IV.C, IV.D.

A. RACIST SOCIAL POLICY?

As discussed in Part II.B.2, *supra*, critics of the Act argue that it was passed with a racist intent,²⁰⁸ and they call for its elimination so that “one of the remaining racist stains on American law will be erased.”²⁰⁹

However, the intent of particular legislators in enacting a law is not a determinant of the law’s utility. For example, a facially race-neutral law is reviewed under strict scrutiny only if there is both a discriminatory purpose (intent) and a discriminatory impact.²¹⁰ Of these two factors, however, the latter is most important.²¹¹ That is, strict scrutiny may be applied absent an explicit discriminatory purpose—an overwhelming discriminatory impact alone may be enough.²¹² Consider also Title VII of the Civil Rights Act of 1964, which grants employees a cause of action if an employer’s workplace practice has a disparate impact on a protected class regardless of whether the practice was intended to have such an impact.²¹³ Both examples illustrate that the purpose of a law or practice is not always dispositive of an issue,²¹⁴ and thus whether the DBA was rooted in racism may be of limited current significance. More important is whether the Act continues to have a discriminatory impact.

Critics contend that the Act does have a discriminatory impact because it continues to severely limit the ability of African Americans to work on Davis-Bacon projects.²¹⁵ Bernstein argues that this is due to the discriminatory practices of unions, which he contends are able to secure a high proportion of Davis-Bacon projects.²¹⁶

According to a 2005 U.S. Department of Labor press release, however, “[African American] workers were more likely to be union members than were White, Asian or Hispanic workers.”²¹⁷ The press release noted that 16.5% of African American wage and salary workers

208. Bernstein, *supra* note 84, at 276.

209. *Id.* at 296-97; *see also* sources cited *supra* note 90.

210. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

211. *See Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

212. *See id.* at 342.

213. *See* 42 U.S.C. § 2000e-2(k) (2000).

214. As a practical matter, a law with no discriminatory impact will withstand judicial scrutiny regardless of its purpose because it will be nearly impossible to plead any damage.

215. *See supra* notes 86-90 and accompanying text.

216. *See id.*

217. Press Release, U.S. Dep’t of Labor, Union Members in 2005 (Jan. 20, 2006), *available at* <http://www.bls.gov/news.release/pdf/union2.pdf>. Note that Bernstein reiterated his argument in a recent article supporting the president’s decision. *See* David Bernstein, *Bush ‘The Emancipator’?*, HUMAN EVENTS ONLINE, Oct. 13, 2005, <http://www.humaneventsonline.com/article.php?id=9645>.

were either union members or represented by a union, compared to 13.4% of Whites and 11.5% of Hispanics.²¹⁸ In addition, only 13.8% of all construction workers were union members or represented by unions in 2005, compared to a 25.1% unionization rate in the transportation and utilities industry and a 14.4% rate in the information industry (which includes telecommunications, motion pictures and sound recording, and non-internet publishing and broadcasting).²¹⁹ These numbers suggest that unions no longer discriminate as they once did and that unionized construction may not be as prevalent in our society as previously thought.

In addition, not all DBA projects are secured by unionized labor, and data from the recent census suggest that minority workers are proportionately represented in the construction industry.²²⁰ According to the 2000 census data, approximately 3.8% of employed African Americans work in the construction industry, compared to roughly 7.2% of Whites and 9.8% of Hispanics.²²¹ Compared to the national average of 6.8%, African Americans are under-represented in the industry, but Hispanics are over-represented.²²² Together, these two minority groups are employed in the construction industry at a rate of 6.8%, equal to the national average.²²³ These data suggest that maintaining higher wage rates in the construction industry would benefit minority workers and Whites almost equally. However, the result of this analysis becomes more pronounced when using data from the Gulf Coast region. For Alabama, Florida, Louisiana and Mississippi, the approximate average rates of representation in the construction industry are as follows: 5.3% of African Americans, 8.6% of Whites and 11.7% of Hispanics.²²⁴ The two minority groups combined work in the construction industry at a rate of 8.5%, only one-tenth of a percent lower than Whites.²²⁵ Moreover, approximately 59% of all

218. See U.S. Dep't of Labor, *supra* note 217, at tbl.1.

219. *Id.* at tbl.3.

220. See U.S. CENSUS BUREAU, PROFILE OF SELECTED ECONOMIC CHARACTERISTICS: 2000 (United States) tbl.DP-3 (2000), http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF3_U_DP3&-geo_id=01000US&-ds_name=DEC_2000_SF3_U&-lang=en&-format=&-CONTEXT=qt (last visited Nov. 21, 2006).

221. See *id.* But consider that African Americans are over-represented in other areas. For instance, nearly 80% of NBA players and 65% of NFL players are African American, but they only represent 13% of the U.S. population. See generally JON ENTINE & EARL SMITH, TABOO: WHY BLACK ATHLETES DOMINATE SPORTS AND WHY WE'RE AFRAID TO TALK ABOUT IT 19 (1999).

222. See U.S. CENSUS BUREAU, *supra* note 220.

223. See *id.*

224. See *id.*

225. See *id.*

construction workers in the city of New Orleans were African American as of the 2000 census.²²⁶

The DBA therefore may not have the same discriminatory effect that it used to, given that unions seem to be weaning their discriminatory practices and that overall minority representation in the construction industry is roughly on par with Whites. While the Act may be a “vestige of Jim Crow,” ironically, it may now be in a position to help the predominantly minority construction workers in New Orleans.²²⁷

B. MONOPSONY POWER

Critics of the Act contend that the safeguard provided by the Act is no longer necessary because the government does not exercise monopsony power in the construction industry.²²⁸ But it can.²²⁹ While it may be true that the federal government does not always exercise this power, generally accounting for only five percent of all construction dollars,²³⁰ it could potentially do so. For instance, the federal government allotted \$110 billion for the Katrina relief effort,²³¹ which amounts to roughly one-fifth of the total money spent on *all United States* construction in 2004.²³² While not all money was spent on construction, \$34 billion of the initial \$62 billion was earmarked solely for temporary housing and “mission

226. *See id.*

227. The demographic of the city may differ markedly now compared to 2000. For more on this shift and the relationship between African American and Hispanic workers, see discussion *infra* Part IV.C.2. In addition, the discussion in this section focused on laborers, but critics have argued that the Davis-Bacon Act also prevents minority contractors from obtaining federal construction projects. *See, e.g.,* Bernstein, *supra* note 84, at 294-95. Whether or not this is generally true, it appears that the Act’s suspension did not help local minority contractors. *See* Griff Witte et al., *Gulf Firms Losing Cleanup Contracts*, WASH. POST, Oct. 4, 2006, at D1 (noting that 90% of contracts went to outside firms); *Minority Firms Say They’re Getting Raw Deal*, CHI. SUN TIMES, Oct. 5, 2006, at 36 (noting that 1.5% of federal contracts have been awarded to minority-owned businesses, less than the 5% normally required).

228. *See supra* notes 97-102 and accompanying text.

229. *See, e.g.,* Joby Warrick, *Workers’ Pay Diluted in Katrina Cleanup: ‘Trickle-Down Contracting’ Keeps the Costs High, Watchdog Groups and Others Say*, HOUS. CHRON., Mar. 20, 2006, at A8; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, AGENCY MANAGEMENT OF CONTRACTORS RESPONDING TO HURRICANES KATRINA AND RITA (Report No. GAO-06-461R), *available at* <http://www.gao.gov/new.items/d06461r.pdf>.

230. Tracey, *supra* note 97, at 294-95; *see also supra* notes 97-102 and accompanying text.

231. Department of Homeland Security, *Hurricane Katrina: What Government Is Doing*, www.dhs.gov/katrina (last visited Nov. 21, 2006); *see also* Liz Sidoti, *House Bill Gives Bush \$92B for Wars, Storm Cleanup*, CINCINNATI POST, Mar. 16, 2006, at A11 (noting that total spending related to Katrina totaled \$100 billion).

232. ROBERT A. MURRAY, MCGRAW-HILL CONSTR., HURRICANE KATRINA: IMPLICATIONS FOR THE CONSTRUCTION INDUSTRY (2005), <http://www.construction.com/AboutUs/20050909pr.asp>.

assignments,” such as debris removal.²³³ This equals almost *five times* the amount of money spent on *total* construction in the impacted areas during 2004 and does not include construction expenditures for other public works such as roads and bridges.²³⁴ Given this exorbitant spending, it seems reasonable to conclude that the federal government became the single largest purchaser of construction inputs—most importantly, labor—in the Katrina-affected areas, and thus approximated a monopsony.²³⁵

By controlling the immense amount of construction money flowing into the region, the federal government, through its contractors, could exercise monopsonistic power over the labor market.²³⁶ And while it seems that contractors must compete in the labor market (i.e., one government contractor must compete with another government contractor to attract labor, thereby raising wage rates to a competitive level), they may not have to compete if the money is initially allocated to a small number of contractors.²³⁷ For example, four companies were awarded contracts after Katrina for the removal of sixty-two million cubic yards of debris, each company receiving approximately \$28–\$30 per cubic yard removed.²³⁸ The companies then hired subcontractors, who in turn hired more subcontractors, who finally hired the employee that actually removed the debris at \$6–\$10 per cubic yard.²³⁹ Although contractor payment rates and bids are not public knowledge, it is reasonable to assume that the contractors put downward pressure on the wage rate so that it fell below the expected, bid-upon rate.²⁴⁰ They were thereby able to increase their profits at the expense of workers by exerting monopsony power,²⁴¹ with the difference between a job’s actual price and a contractor’s payment ranging “from 40 percent to as high as 1700 percent.”²⁴²

The fact that contractors exercised this power even after the suspension was terminated only emphasizes the need for maintaining

233. *Id.*

234. *See id.*

235. *See supra* notes 231-34 and accompanying text; *see also* discussion *supra* Part III.

236. *See* discussion *supra* Part III.

237. *See* discussion *supra* Part III.

238. Warrick, *supra* note 229.

239. *Id.*

240. *Id.*; *see also* POLACHEK & SIEBERT, *supra* note 92, at 10.

241. Note that when such power is exercised by a group, rather than by one entity, it is called “oligopsony power”; here, however, the term “monopsony” is retained because the group approximated a single purchaser—the federal government. And in any event, the subtle economic distinction between exercising oligopsony power versus monopsony power does not change the fact that *some* anticompetitive effect results.

242. *See* Warrick, *supra* note 229.

worker protections following a disaster. The government may not normally exercise monopsony power, but because it has the ability to do so, safeguards such as the DBA should remain in place.

C. EFFECT OF GEOGRAPHIC LIMITATION

Some economists compare minimum wage laws to robbery because both decrease overall welfare.²⁴³ As mentioned in Part II.B.2, *supra*, the decrease results from two factors—wage redistribution lowers overall welfare (similar to theft) and lobbying resources could be used more productively elsewhere (similar to security expenditures).²⁴⁴ But in a situation where the DBA is suspended due to a natural disaster, do these welfare arguments make sense?

1. Welfare Lost to Lobbying

It is unlikely that suspending a minimum wage law for a limited duration will prevent the loss of welfare that is incurred by various groups' lobbying activities. As an initial matter, lobbying is "pricey, but it's the cost of doing business in the federal environment."²⁴⁵ In fact, the business of lobbying is more prosperous than many other business sectors in America, with the number of registered lobbyists more than doubling since 2000.²⁴⁶ Lobbying is expensive and is here to stay. Therefore, it is easy to imagine an equilibrium point of lobbying expenditures with respect to a minimum wage law by both contractors²⁴⁷ and workers,²⁴⁸ where contractors lobby to reduce the minimum wage and workers lobby to increase it, with little change in the degree of their lobbying efforts over time.²⁴⁹ However, if the minimum wage is reduced to zero, contractors will likely stop or reduce their lobbying efforts, resulting in an overall welfare gain. But this wage change will likely result in workers increasing their lobbying efforts to effectuate a return to the original minimum wage

243. See POLACHEK & SIEBERT, *supra* note 92, at 8; discussion *supra* notes 91-96 and accompanying text.

244. See POLACHEK & SIEBERT, *supra* note 92, at 8.

245. Jeffrey H. Birnbaum, *The Road to Riches Is Called K Street: Lobbying Firms Hire More, Pay More, Charge More to Influence Government*, WASH. POST, June 22, 2005, at A1 (quoting Robert L. Garner, President, American Ambulance Association).

246. *Id.*

247. Individually or through association.

248. Individually or through association.

249. Note also that increased expenditures by one party likely result in increased expenditures by the other, with the proportion of expenditures remaining stable over time.

(at least), and this may offset the welfare gains accrued by contractors.²⁵⁰ For example, following the 2005 suspension of the DBA, “a number of pieces of legislation were introduced that would deal in various ways with that action.”²⁵¹ Preparation of these proposals took time and money, and there is little doubt that much of the proposed legislation was at the behest of lobbying parties.²⁵² While many of these proposals sought to overturn the suspension, some sought to extend it.²⁵³ Overall, there may have been more lobbying after the suspension than before it, and the resultant net welfare change is unclear.

Note also that limited suspension of the DBA likely affects lobbying activities only within the area subject to suspension—the “Suspension Area.” It is unlikely to affect lobbying activities by contractors or workers outside the Suspension Area. However, if a limited suspension does affect lobbying activities outside the Suspension Area, it would likely result in *increased*, not decreased, lobbying. Indeed, Representative Jeff Miller (R-FL) and twenty-seven other House Republicans sent a letter to President Bush on October 28, 2005, imploring him to follow the precedent he set after Katrina by suspending the DBA in areas of Florida affected by Hurricane Wilma.²⁵⁴ Increased lobbying such as this results in lower overall welfare because resources (e.g., time and money) are being siphoned off from other more productive uses.²⁵⁵ Therefore, a limited suspension likely affects lobbying activities outside the Suspension Area in one of two ways: it has no effect, or it results in increased lobbying and thereby lowers overall welfare. Given this impact, the welfare-maximization argument regarding lobbying activities is probably a non-starter when discussing a limited suspension of the DBA.

2. Welfare Lost to Redistribution

The welfare loss caused by wealth redistribution is the primary concern of critics of minimum wage laws.²⁵⁶ A minimum wage is a price

250. Because it is not clear how groups will respond, it is possible that workers will increase lobbying so much that there is overall more lobbying after the suspension than before it.

251. See WHITTAKER, *supra* note 63, at 3.

252. See Birnbaum, *supra* note 245.

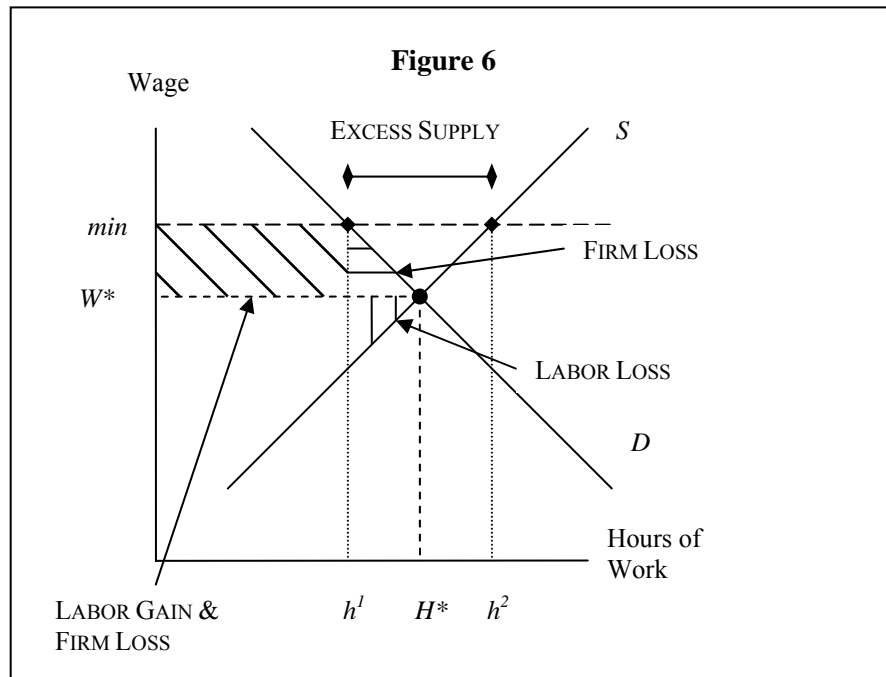
253. See WHITTAKER, *supra* note 63, at 3-4. This included such proposals as the Flake Bill, H.R. 3684; the Miller Bill, H.R. 3763; the Pallone Bill, H.R. 3834; the Kennedy Bill, S. 1749; and the Boxer Bill, S. 1763. *Id.* at 4-6.

254. Letter from Representative Jeff Miller et al. to President George W. Bush (Oct. 28, 2005), available at <http://www.house.gov/pence/rsc/doc/Miller-Davis-Bacon.pdf>.

255. See discussion *supra* Part II.B.2.

256. See *supra* notes 91-96 and accompanying text.

floor.²⁵⁷ Therefore, if the market wage rate is higher than the minimum wage rate, the minimum wage will have no effect on the allocation of resources.²⁵⁸ If, however, the minimum wage is set above the market wage rate (W^*), as in Figure 6, the welfare gain will not compensate for the welfare loss.²⁵⁹ Critics therefore argue that a minimum wage can never increase overall welfare, and will only leave unchanged or, more likely, decrease total welfare.²⁶⁰ But given Katrina-like circumstances, what is the best way to “maximize” welfare?



257. *Id.*

258. See discussion *infra* Part IV.C.1 & fig.7; see also discussion *supra* Part III.

259. See POLACHEK & SIEBERT, *supra* note 92, at 6-8; *infra* fig.6; discussion *supra* Part III.A. But see DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1997) (suggesting that increases in the minimum wage lead to increased pay without job losses). Note that the elasticity of demand for labor will affect the degree to which the loss outweighs the gain. See NICHOLSON, *supra* note 113, at 663-64; POLACHEK & SIEBERT, *supra* note 92, at 6-8.

260. See POLACHEK & SIEBERT, *supra* note 92, at 6-9; discussion *supra* notes 91-96 and accompanying text.

a. Empowerment zones

Most problems associated with suspension of the DBA derive from its geographic limitation to the Suspension Area. The price of labor within the Suspension Area may be relatively cheap compared to the price of labor outside it.²⁶¹ This cheaper production input will induce contractors to enter the Suspension Area, bringing with them capital and a demand for labor, which will hopefully revitalize the community.²⁶² Because a similar rationale is used to justify empowerment zones,²⁶³ they are helpful in this analysis.

Governed by Internal Revenue Code sections 1391–97D²⁶⁴ empowerment zones are intended to revitalize distressed communities through tax incentives.²⁶⁵ The tax incentives decrease the amount of money owed to the federal government by businesses, and thus lower the cost of capital within the zone compared to the cost of capital outside the zone.²⁶⁶ The cheaper capital, like the cheaper labor within the Suspension Area, should “stimulate business creation and expansion” within the zone.²⁶⁷ That is, businesses will substitute one geographic location for another.²⁶⁸ As businesses enter the empowerment zone and bring with them capital, their demand for production inputs, including labor, will increase.²⁶⁹ In addition, businesses already in the zone will likely increase output (the output effect) as they take advantage of the cheaper capital.²⁷⁰ The empowerment zone should therefore attract businesses and expand the overall economy within it, creating more jobs and reducing

261. See discussion *supra* Part III.B.

262. See Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005) (stating that DBA suspension will allow for greater federal assistance to devastated communities and increase employment levels, i.e., revitalize communities).

263. See Jennifer Forbes, Note, *Using Economic Development Programs as a Tool for Urban Revitalization: A Comparison of Empowerment Zones and New Market Tax Credits*, 2006 U. ILL. L. REV. 177, 177-78 (2006).

264. I.R.C. §§ 1391-97D (2000).

265. Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 296-97 (1999).

266. See I.R.C. §§ 1391-97D (2000); see also discussion *supra* Part III. For example, a business that might normally have an annual after-tax profit of \$100 will now have an after-tax profit of \$110. Thus, capital investors (business owners) will now earn a higher rate of return on capital within the zone (here, an increase of 10%), making it more costly for them to invest outside the zone. See discussion *supra* Part III.

267. See McFarlane, *supra* note 265, at 296-97; see also discussion *supra* Part III.

268. See McFarlane, *supra* note 265, at 296-97; see also discussion *supra* Part III.

269. See Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, 53 WASH. U. J. URB. & CONTEMP. L. 143, 153-54 (1998); see also discussion *supra* Part III.

270. See discussion *supra* Part III.B.

unemployment.²⁷¹ An interim report in 2001 concluded that employment did increase within empowerment zones, but did not attribute that growth to the zones' empowered status.²⁷² And while some zones continue to suffer economically, other zones have experienced positive economic growth and increased employment.²⁷³

Generally, proponents of empowerment zones argue that fixing inner-city woes through a market-based approach is most efficient and increases overall wealth.²⁷⁴ They contend that the gains of this increase are had by all.²⁷⁵ However, empowerment zones have been criticized on a number of grounds,²⁷⁶ with two criticisms most applicable to this discussion addressing wealth allocation and gentrification.²⁷⁷

First, critics argue that market-based approaches are "apt to produce jobs that pay low wages, do not provide health care benefits, and provide no opportunity for training and upward mobility."²⁷⁸ Further, they say that limiting the market-based approach to a specific area may not increase the welfare of local residents because "new jobs may not go to local residents."²⁷⁹ Therefore, wealth *allocation* is more important than wealth maximization, as it ensures that social policies actually benefit those for whom the policies are intended.²⁸⁰

Second, critics note that even if intended beneficiaries actually benefit from the empowerment zone in the form of higher employment rates, they

271. See Hyman, *supra* note 269, at 153-54; see also I.R.C. §§ 1391-97D (2000).

272. SCOTT HEBERT ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., INTERIM ASSESSMENT OF THE EMPOWERMENT ZONES AND ENTERPRISE COMMUNITIES (EZ/EC) PROGRAM: A PROGRESS REPORT ch.9, at 9-5 (2001), http://www.huduser.org/publications/pdf/ezec_report.pdf; see also Forbes, *supra* note 263, at 185-86.

273. See Forbes, *supra* note 263, at 185-86.

274. See, e.g., Scott L. Cummings, *Between Markets and Politics: A Response to Porter's Competitive Advantage Thesis*, 82 OR. L. REV. 901, 916 (2003); see also discussion *supra* Part III.

275. See Cummings, *supra* note 274, at 915-18.

276. See, e.g., Hyman, *supra* note 269, at 160-63 (criticizing the law's bias toward creating "traditional line" black businesses that are small-scale and labor-intensive and its likelihood to create jobs only in the secondary industrial sector); Forbes, *supra* note 263, at 193-200 (criticizing the law's focus on economic expansion rather than the underlying causes of urban decay, its lack of residential involvement and its potential for adverse gentrification effects).

277. See Cummings, *supra* note 274, at 915-18. For more background on this, see Michael E. Porter, *The Competitive Advantage*, 73 HARV. BUS. REV. 55 (1995).

278. Cummings, *supra* note 274, at 916.

279. Helen F. Ladd, *Spatially Targeted Economic Development Strategies: Do They Work?*, 1 CITYSCAPE 193, 202 (1994), available at <http://www.huduser.org/Periodicals/CITYSCPE/VOL1NUM1/ch10.pdf>.

280. See Cummings, *supra* note 274, at 917.

still may not be better off due to threats posed by gentrification.²⁸¹ Gentrification occurs as capital flows into the zone in the form of businesses, and these businesses purchase land and raise real property prices.²⁸² This will in turn raise rental prices, making it more expensive for local residents to continue living in the affected community.²⁸³ The historical effect of gentrification has therefore been “to displace and reconcentrate low-income communities in other undesirable parts of the city.”²⁸⁴ Ultimately, critics argue that empowerment zones are ineffective because they simply “relocate firms to the zones from nearby locations” without effectively “generating new jobs or improving the welfare of disadvantaged zone residents.”²⁸⁵

Like empowerment zones, a Suspension Area has the benefit of lower-cost production inputs (here, labor) in order to revitalize distressed communities through construction and job creation.²⁸⁶ However, also like empowerment zones, a Suspension Area suffers from problems of wealth allocation and gentrification.

b. Wealth allocation problems

The purpose of the DBA’s suspension was to assist the devastated communities and “permit the employment of thousands of individuals”; that is, to spur construction of homes and businesses in the community and create jobs.²⁸⁷ It was thus intended to increase overall welfare by allowing the market to “correct” to the equilibrium wage and hours of labor, P^* and H^* . Recall, however, that welfare is lost only if a price floor is set above the market wage, as in Figure 6.²⁸⁸ If a price floor is set below the market wage, there will be no effect on the wage rate.²⁸⁹ Therefore, suspending the Act will only increase overall welfare if the prevailing wage mandated is *more than* the market wage.

281. See *id.*; MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 13, available at <http://www.brookings.edu/es/urban/gentrification/gentrification.pdf> (2001).

282. See Ladd, *supra* note 279, at 202. This occurs due to the law of supply and demand, and is more pronounced because the total supply of land is fixed; it is one of the few goods that has a vertical supply curve. See discussion *supra* Part III.

283. See Ladd, *supra* note 279, at 202. Note that residents who are real property owners will gain a windfall from these higher prices, and therefore empirical data must support any conclusion one reaches regarding the effect of gentrification on a given community. *Id.*

284. Cummings, *supra* note 274, at 917.

285. Ladd, *supra* note 279, at 208.

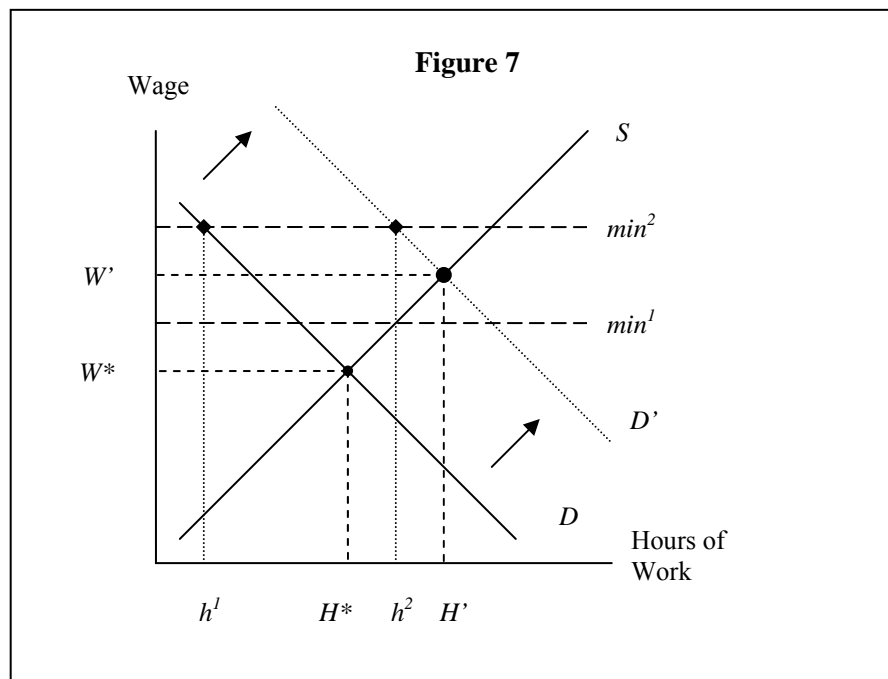
286. See Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005).

287. *Id.*

288. See discussion *supra* Part III; *supra* fig.6.

289. See *infra* fig.7.

Immediately following Katrina, however, the prevailing wage was *less than* the market wage in the Suspension Area, and therefore suspending the Act had no major effect on the market allocation of labor in the short run.²⁹⁰ According to a contractor working in New Orleans in November of 2005, the prevailing wage set by the DBA “guarantees wages at levels lower than the market is now paying workers.”²⁹¹ And while short-run circumstances after a disaster may not mirror those in post-Katrina New Orleans, it seems safe to assume that the more important issue is determining the long-term effects (greater than five to six months) of suspending the DBA.



Because the 2005 DBA suspension was too brief for measurement of more long-term effects (and the same is true of all prior suspensions),²⁹² this analysis must look to economic models and other data to forecast the long-run effects posed by a longer suspension period.

290. See *Construction Workers Become Hot Property*, NEWORLEANS CITY BUSINESS.COM, Nov. 14, 2005, <http://www.neworleanscitybusiness.com/viewFeature.cfm?recID=123>.

291. *Id.* (citing Jim Lewis, Executive Vice President, Landis Constr. Co.).

292. See discussion *supra* Part II.A.3 (the longest prior suspension lasted just five months).

Due to changing circumstances in the long run, the market-based approach in the Suspension Area may not adequately protect the lower-wage workers domestic to the region (mostly African Americans and Hispanics).²⁹³ For the month of February 2006, the nation added 243,000 jobs led by gains in the construction industry.²⁹⁴ Part of the reason for this increase was that “rebuilding efforts in the areas affected by Hurricane Katrina [were] ramping up, driving particularly strong employment gains there.”²⁹⁵ Indeed, Louisiana posted the highest employment gains in the nation in January of 2006.²⁹⁶ As rebuilding efforts increased, the demand for construction labor increased as well (represented graphically in Figure 7 by a rightward shift in the demand curve, resulting in an increase from h^1 to h^2).²⁹⁷ Using the economic model, it is apparent that as the demand curve shifts rightward, and assuming the supply of labor remains constant, the wage rate will tend to increase.²⁹⁸ Because the DBA sets a price floor on wages, the increased demand will either leave the wage rate unchanged (because the price floor is above the market wage), or it will increase the wage rate.²⁹⁹ This means that workers’ welfare will either remain the same or be better off with a price floor (e.g., DBA protections).

Suspending the DBA may adversely affect workers, however, if the supply of labor increases along with the labor demand. This is what has happened in the Suspension Area, with contractors having access to abundant cheap labor—migrant labor.³⁰⁰ According to one source, the immigrant population of the Gulf Coast prior to Katrina was estimated at 100,000, and this was boosted to 230,000 after the disaster.³⁰¹ This equals roughly a doubling of the immigrant labor force in a six-month period, with

293. See U.S. CENSUS BUREAU, INCOME IN 1999 BY SELECTED HOUSEHOLD, FAMILY, AND INDIVIDUAL CHARACTERISTICS: 2000 (New Orleans) tbl.QT-P33 (2000), http://factfinder.census.gov/servlet/QTTable?_bm=y&-context=qt&-reg=DEC_2000_SF4_U_QTP33:001|002|004|400&-qr_name=DEC_2000_SF4_U_QTP33&-ds_name=DEC_2000_SF4_U&-CONTEXT=qt&-tree_id=404&-all_geo_types=N&-geo_id=40000US62677&-search_results=40000US62677&-format=&-_lang=en (last visited Nov. 22, 2006) (in New Orleans, African American families earned \$25,668 compared to \$52,797 for White families and \$36,782 for Hispanic families).

294. Neil Irwin, *US Gains 243,000 Jobs in February: Report Provides Evidence of Healthy Economic Growth*, BOSTON GLOBE, Mar. 11, 2006, at B5.

295. See *id.*

296. *Id.*

297. See *supra* fig.7.

298. See discussion *supra* Part III.

299. See *supra* fig.7.

300. See Hernán Rozemberg, *The Changing Face of the Gulf Coast Workforce*, SAN ANTONIO EXPRESS-NEWS, Mar. 19, 2006, at 01A, available at 2006 WLNR 4623400.

301. *Id.*

many of these laborers competing for reconstruction jobs.³⁰² One recent study found that “[a]bout half of the construction workers (three quarters [sic] among undocumented workers) came to New Orleans six months ago or less.”³⁰³ Whether this growth represented a new influx of immigrant labor or merely a siphoning-off of existing immigrant labor from other areas,³⁰⁴ one thing remains certain—there is an abundant supply of cheap labor that is not domestic to the Gulf Coast states.³⁰⁵

An increased supply of relatively cheap labor over the long run puts downward pressure on the wage rate.³⁰⁶ For example, prior to Katrina the prevailing wage for a residential carpenter³⁰⁷ was \$11.78 per hour in New Orleans and \$7.13 per hour in Gulfport, Mississippi.³⁰⁸ Over a longer-term DBA suspension, wages could fall drastically and possibly drop to the federal minimum of \$5.15 per hour.³⁰⁹ This is because as more labor continues to move into the area over the long run, the supply of labor will continue to increase and result in a lower wage rate.³¹⁰ This effect is likely exacerbated by the fact that much of the incoming labor is willing to

302. *See id.*

303. LAUREL E. FLETCHER ET AL., UNIV. OF CAL., BERKELEY & TULANE UNIV., REBUILDING AFTER KATRINA: A POPULATION-BASED STUDY OF LABOR AND HUMAN RIGHTS IN NEW ORLEANS 13 (2006), available at <http://www.hrcberkeley.org> (follow “Rebuilding After Katrina” hyperlink).

304. *See, e.g.*, Victor Landa, *Immigration: Labor Real Issue, Not Guarding Borders*, MYRTLE BEACH SUN NEWS (S.C.), Dec. 18, 2005, at D5, available at 2005 WLNR 20422557 (noting farmers’ concerns as labor shifts from the fields to construction sites); FLETCHER ET AL., *supra* note 303, at 14 (noting that “[m]ost of the undocumented workers who came to New Orleans within the last six months were already residing in the United States”).

305. *See* Rozemberg, *supra* note 300. Note also that laborers domestic to the United States, but not to the New Orleans region, likely moved into the region after the hurricane and further added to the supply of labor. These laborers, however, are not as easily exploited by contractors and therefore are less likely to be used as a means of transferring wealth from laborers to contractors. *See* discussion *infra* notes 314-26 and accompanying text. And while this influx may harm laborers domestic to the region, it would be difficult to prevent or limit citizen laborers’ (and documented workers’) immigration to New Orleans. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489 (1999) (holding that the right to travel includes equal treatment of new state citizens and existing state citizens).

306. *See* discussion *supra* Part III.

307. *See* discussion *supra* Part III.

308. *See* H.R. REP. NO. 109-258, at 11 (2005), available at 2005 WL 2850838. The fact that prices for such jobs differ across locales does not make the model moot. For instance, many states have different minimum wage rates. *See* U.S. Dep’t of Labor, Minimum Wage Laws in the States – April 3, 2006, <http://www.dol.gov/esa/minwage/america.htm> (last visited Nov. 22, 2006). But these rates are known and are fairly static; thus, rational actors can account for these differences when wealth-maximizing. The problem occurs when there is an unexpected change in price. For more on this, see RATIONAL EXPECTATIONS AND ECONOMIC PRACTICE (Robert E. Lucas, Jr. & Thomas J. Sargent eds., 1981) and discussion *supra* Part IV.B.

309. *See* U.S. Dep’t of Labor, *supra* note 308.

310. *See* Bruce Egler, *Population up 35% in December to January: But New Orleans Remains Far from Its Pre-Katrina Number*, TIMES-PICAYUNE (New Orleans), Mar. 8, 2006, at B1, available at 2006 WLNR 3892435; *see also* discussion *supra* Part III.

undercut the “market” rate.³¹¹ According to one account, this is what has happened in sectors not subject to DBA safeguards—day laborers could earn approximately \$200 to \$300 per day about one month after Katrina, but as of October 2006, the pay dropped to \$200 to \$300 *per week*.³¹² Such drastic wage decreases would similarly affect the public construction sector during a long-term suspension of the DBA because firms are rational economic actors, and they will pay lower wages in an attempt to minimize costs.³¹³

This cost-minimization would mean that workers domestic to the region and in need of aid would be worse off after the disaster, *not including the effect of the disaster itself*. They would likely earn a lower wage than prior to the disaster, decreasing their overall welfare.³¹⁴ Evidence that lower wages follow a labor influx can be seen in the market for day laborers in post-Katrina New Orleans, mentioned above, which is a private sector market and thus not subject to the DBA and other administrative safeguards.³¹⁵ In addition to facing lower wages over a prolonged suspension, some local workers may have difficulty obtaining employment because so many jobs have been secured by workers not domestic to the region.³¹⁶ For example, a recent lawsuit has been filed against a prominent New Orleans hotel claiming that the hotelier improperly hired foreign workers rather than hiring the “black folk who worked at his hotels pre-Katrina.”³¹⁷ This same shift to cheaper labor would likely occur in the public construction sector should the DBA be suspended for a longer term. Ultimately, it seems unfair that private sector workers currently endure a welfare decrease and domestic construction workers would suffer the same decrease given long-term DBA suspension, especially when one considers the purpose of federal aid and relief policies—to help persons adversely affected by a natural or man-made disaster.³¹⁸

311. See Rozemberg, *supra* note 300.

312. See Mark Waller, *In the Wake of Katrina, Thousands of Spanish-Speaking People Are Migrating to New Orleans, Drawn by the Dream of a Better Life*, TIMES-PICAYUNE (New Orleans), Oct. 8, 2006, at A1, available at 2006 WLNR 17423649.

313. See discussion *supra* Part III.

314. And while many workers may no longer be in the area, lower wages are unlikely to induce them to return and revitalize the community. See Egger, *supra* note 310.

315. Waller, *supra* note 312.

316. See Rozemberg, *supra* note 300.

317. Gwen Filosa, *Foreign Workers Sue N.O. Hotel Chain: They Say It Failed to Meet Pay Promises*, TIMES-PICAYUNE (New Orleans), Aug. 17, 2006, at B1, available at 2006 WLNR 14239635.

318. See discussion *supra* Part I.

An additional problem of long-term suspension is that the exploitation of newly-hired immigrant workers by profit-seeking firms will be more pronounced, particularly if workers are undocumented.³¹⁹ Undocumented workers are relatively immobile (e.g., less movement between jobs for fear of arrest or deportation),³²⁰ and thus employers of these workers are generally able to exert monopsony power,³²¹ compounding the monopsony effect discussed in Part IV.B, *supra*. Data from post-Katrina New Orleans support this, as one recent study found that “[t]hirty-four percent of undocumented workers report that they receive less than they expected when paid, compared to [sixteen] percent for documented workers.”³²² And while documented workers earn \$16.50 per hour on average, undocumented workers earn just \$10 per hour.³²³

Even documented workers, however, can be subject to an employer’s monopsony power. The aforementioned foreign workers who were brought into the United States to work for the New Orleans hotel could work only for that employer.³²⁴ The hotelier was therefore able to exercise its monopsony power and “ha[d] not made good on promises of pay and reimbursement for travel expenses.”³²⁵ Therefore, while foreign laborers unaffected by the storm may have seen welfare gains at the expense of domestic laborers, profit-maximizing contractors may have ultimately captured some of the “new” laborers’ welfare gains through exploitation. As evidenced by the private sector in New Orleans, persistent lower wages and exploitation are likely after a disaster, and long-term suspension of the DBA will likely result in a welfare exchange from domestic workers to immigrant workers to contractors.

However, it is doubtful that contractors need this welfare gain at domestic workers’ expense or need to be “protected” from the increased cost of labor. Recall that one goal of suspending the DBA is reconstruction, accomplished by inducing firms into the Suspension Area.³²⁶ But given the amount of money entering the market after a disaster, primarily in the form of federal aid,³²⁷ contractors are already

319. See Justin Pritchard, *Immigrants Often Unpaid for Katrina Work*, ORLANDO SENTINEL, Nov. 6, 2005, at A4, available at 2005 WLNR 23747150.

320. See POLACHEK & SIEBERT, *supra* note 92, at 7.

321. See *supra* note 188 and accompanying text.

322. FLETCHER ET AL., *supra* note 303, at 2.

323. *Id.*

324. Filosa, *supra* note 317.

325. *Id.*

326. See Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005).

327. See Sidoti, *supra* note 231 (noting that total spending related to Katrina totaled \$100 billion).

better off than they were prior to the disaster.³²⁸ The increased construction demand by the federal government shifts the demand curve to the right, which increases the price contractors can charge and thus the revenue they generate.³²⁹ Therefore, contractors earn higher revenue by meeting the increased government demand, which in turn satisfies the goal of rebuilding the Suspension Area.³³⁰ Further, data from New Orleans indicate that contractors were doing quite well even after the suspension ended—consider the 40% to 1700% markup on wasteful and expensive projects that lined the pockets of many contractors.³³¹ Reduction of construction costs, therefore, may be more easily obtained through added oversight of contractors,³³² rather than decreased wages for workers. In turn, this should maximize overall welfare.

c. Gentrification problems

The typical gentrification pressure posed by an influx of capital and faced by low-wage workers may be more acute after a disaster. In the case of Katrina, the hurricane destroyed 300,000 homes, thereby decreasing the supply of houses in the housing market.³³³ While the demand for houses decreased in the short run due to the fleeing population, it then increased over the longer term as people returned to the area.³³⁴ Returning to the Suspension Area before reconstruction was complete put increased pressure on housing prices—on March 6, 2006, the Department of Housing and Urban Development (HUD) noted that New Orleans was impacted “by a combination of damage that made over half of the inventory uninhabitable and a massive increase in demand for the remaining units.”³³⁵ Updating its January 2006 determinations, HUD noted that rents had increased by twenty-five to thirty percent; to account for this, it increased New Orleans Fair Market Rent (FMR) figures by thirty-five percent.³³⁶ Thus, the Orleans parish FMR in FY 2005³³⁷ for a one-

328. See discussion *supra* Part III.B. This is obviously a generalization, and there may be particular contractors that are not better off. *In general*, however, this statement is likely true. See *infra* text accompanying notes 330-32.

329. See fig.6.

330. See discussion *supra* Part III.B.

331. See Warrick, *supra* note 229.

332. See Warrick, *supra* note 229 (noting that the Government Accountability Office “said inadequate oversight had cost taxpayers tens of millions of dollars”).

333. See discussion *supra* Part I.

334. See discussion *supra* Part III.

335. HUD Final Fair Market Rents for FY 2006 (revised), 71 Fed. Reg. 11,286 (Mar. 6, 2006) [hereinafter HUD].

336. *Id.*

bedroom apartment was set at \$578, and the FMR then jumped to an astounding \$803 in FY 2006.³³⁸ This rental pressure occurred in the region absent continued suspension of the DBA. It therefore does not include the additional gentrification pressure posed by long-term DBA suspension, which would be created as businesses enter the region to take advantage of cheap production inputs (labor), thereby raising real property prices and rental prices.³³⁹ The gentrification effect of long-term DBA suspension ultimately heighten the gentrification effect posed by the disaster itself,³⁴⁰ which adversely affects low-income renters—predominately African Americans and Hispanics.³⁴¹

In addition to the pronounced gentrification and lower wages suggested by the data, a long-term DBA suspension may force low-wage earners outside of the Suspension Area to its penumbra. These displaced individuals will drastically impact the penumbra communities. After Katrina, for example, HUD noted that the “Baton Rouge rental inventory [only] had some damage, but the influx of New Orleans evacuees had a far greater impact and virtually eliminated vacancies.”³⁴² This resulted in a fifteen to twenty percent increase in rental rates from January to March of 2006.³⁴³ Again, this occurred without long-term DBA suspension; if in place, suspension would likely exacerbate this trend due to gentrification in

337. This Note assumes that the FY 2005 data approximates pre-Katrina rents; note, however, that a closer approximation of pre-Katrina rents is somewhere between FY 2004 and FY 2005, as the latter includes four months of post-Katrina data.

338. Greater New Orleans Cmty. Data Ctr., Metro New Orleans Fair Market Rent History, http://www.gnocdc.org/reports/fair_market_rents.html (last visited Nov. 22, 2006) (citing data from the Dept. of Housing and Urban Dev. that was effective as of Oct. 1, 2006).

339. See discussion *supra* Part IV.C.2.a.

340. This assumes that the disaster destroyed a significant amount of habitable property. This seems reasonable, however, given that DBA suspension has been invoked recently only in such circumstances.

341. See U.S. CENSUS BUREAU, PROFILE OF SELECTED HOUSING CHARACTERISTICS: 2000 (United States & New Orleans) tbl.DP-4 (2000), http://factfinder.census.gov/servlet/QTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF4_U_DP4&-reg=DEC_2000_SF4_U_DP4:001|002|004|400&-ds_name=DEC_2000_SF4_U&-CONTEXT=qt&-tree_id=404&-redoLog=false&-all_geo_types=N&-geo_id=01000US&-geo_id=40000US62677&-search_results=40000US62677&-format=&-lang=en. As of 2000 in New Orleans, Whites occupied 75,618 rental units, comprising 34% of all units occupied by Whites; African American occupied 85,337 rental units, comprising 57% of all units occupied by African Americans; and Hispanics occupied 9,080 rental units, comprising 52% of all units occupied by Hispanics. See *id.* In addition, Whites paid a median gross rent of \$570, African Americans paid \$462, and Hispanics paid \$541. *Id.* However, gross rent represented thirty-five percent or more of household income for 28.5% of Whites, 37.8% of African Americans, and 31.9% of Hispanics. *Id.* These general trends hold true across the United States. See *id.*

342. HUD, *supra* note 335.

343. See *id.*

the Suspension Area. In addition to increased rents, people domestic to the penumbra region may have to support the newcomers directly (e.g., government welfare) or indirectly (e.g., theft). In Houston, for instance, schools were flooded with 5800 additional kids as of March 2006, costing the school district an additional \$130,000 *per day*.³⁴⁴ There was also an influx of thousands of uninsured people after Katrina, which greatly taxed Houston's health-care system.³⁴⁵ And crime in Houston rose in the six months after the hurricane, with 33 of the 189 murders involving Katrina evacuees.³⁴⁶ Prolonged suspension of the DBA would only exacerbate the gentrification effects that a disaster itself imposes, adversely affecting both the Suspension Area communities and the penumbra communities.

D. EFFECT OF TEMPORAL LIMITATION

Unforeseen events—natural disasters or temporary legislation—change people's expectations and thus affect their actions.³⁴⁷ And because people and firms are rational economic actors, unforeseen events such as temporary legislation create added incentive to maximize utility over time periods, instead of merely maximizing utility within a single time period.³⁴⁸ Firms thus attempt to revenue-maximize or cost-minimize by forecasting what will next occur, i.e., they will change their actions in the current period in order to maximize profits across more than one period.³⁴⁹

While there is a dearth of empirical data on this subject with respect to DBA suspensions, one can use economic models to predict how a temporary suspension will change the actions of contractors. As an initial matter, it seems safe to assume that contractors will perceive the temporally limited nature of the suspension, thus recognizing that the DBA will later be "reinstated" and therefore increase labor costs.³⁵⁰ In order to maximize profits, contractors will likely increase labor demand in the current

344. See Arian Campos-Flores, *Katrina's Latest Damage*, NEWSWEEK, Mar. 13, 2006, at 27. Other cities, such as Dallas and Baton Rouge, have also reported similar problems, but to a lesser degree. See *id.*

345. *Id.* Houston health officials also noted that infection rates for sexually transmitted diseases were increasing, speculating that this was due to the high rates found in New Orleans. *Id.*

346. *Id.*

347. See Thomas J. Sargent, *Rational Expectations*, <http://www.econlib.org/library/enc/RationalExpectations.html> (last visited Nov. 22, 2006); see also RATIONAL EXPECTATIONS AND ECONOMIC PRACTICE, *supra* note 308.

348. See Sargent, *supra* note 348; see also Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1060-61 (2006) (analyzing legislators' delegation of review over future periods).

349. See Sargent, *supra* note 348.

350. See discussion *supra* Part III.B; see also *supra* figs. 6 & 7.

period—the “Suspension Period”—to compensate for their eventual decrease in labor demand in later periods (when labor is relatively more expensive).³⁵¹

Contractors’ efforts to minimize costs over time periods, however, amount to a transfer of wealth from workers to contractors. In order to cost-minimize, a contractor essentially substitutes labor now, which is cheaper, for labor later, which is more expensive.³⁵² An example best illustrates how this substitution amounts to a transfer of wealth from worker to contractor. Consider a contractor engaged in the construction of a small building, where the building requires side-paneling that must be painted and which equals one hundred total hours of labor.³⁵³ Here, this task would be covered under the DBA as work done by a residential carpenter, mandating a wage of \$11.78 per hour in New Orleans; therefore, the contractor’s total labor cost (and the worker’s total wage earned) equals \$1,178 absent DBA suspension.³⁵⁴ After a suspension, assume that the price of labor drops³⁵⁵ to \$5.15 per hour, the federal minimum wage rate.³⁵⁶ If 50 hours of work occur during the Suspension Period, the contractor will pay, and the laborer will earn, \$257.50 ($\$5.15 * 50$ hours). To complete the job, the remaining 50 hours of labor must be paid at the higher rate, resulting in labor earnings of \$589; thus, total worker earnings on this project are \$846.50, versus the \$1,178 that would have been earned absent the DBA’s suspension. The contractor is therefore better off at the expense of the laborer.

But this is not the whole story—the prior example assumes that the contractor will continue with the project at a “normal” completion rate after the suspension, i.e., he will not wealth-maximize across periods. The contractor, however, is a rational economic actor and will likely recognize that labor is now cheap but will later become more expensive.³⁵⁷ Consequently, the contractor will increase the rate of demand for labor now (substitution effect), resulting in an increase in overall output (output effect).³⁵⁸ If possible, the contractor will attempt to complete the entire job

351. See NICHOLSON, *supra* note 113, at 692-700.

352. See discussion *supra* Part III.B.

353. Assume that the marginal revenue product (MRP) is constant—i.e., one hour of labor yields an MRP of one percent of the revenue generated from painting the fence. Therefore, the firm is only attempting to minimize the cost of inputs. See discussion *infra* Part III.B.

354. See H.R. REP. NO. 109-258, at 11 (2005), available at 2005 WL 2850838.

355. As mentioned above, if the market price of labor exceeds the price floor mandated by the DBA, suspension of the DBA will have little, if any, effect. See discussion *supra* Part IV.C.2.

356. U.S. Dep’t of Labor, *supra* note 308. The example is extreme but better illustrates the effect.

357. See discussion *supra* Part III.

358. See *id.*

during the Suspension Period, thereby incurring labor costs of only \$515. The worker will therefore earn less due to the drop in wage rate (\$1,178 to \$846.50) and due to “temporal profiteering” by the contractor (\$846.50 to \$515). In sum, a temporary suspension of the DBA gives contractors an incentive to engage in temporal profiteering, whereby workers are exploited across periods.³⁵⁹

V. CONCLUSION

While the economic models used in this analysis are basic, the models combined with post-Katrina data seem to yield one conclusion: A limited suspension of the Davis-Bacon Act after a disaster, natural or otherwise, will not benefit the communities for which it is intended. There are powerful arguments both for and against such legislation over the longer term; however, these arguments tend to lose their force when dealing with a suspension that is limited both geographically and temporally. The limited suspension will be a boon to contractors because it will lower the costs associated with DBA projects. This windfall will probably come at the expense of low-wage laborers who are severely affected by the disaster precipitating the Act’s suspension. In addition, these laborers will face wage pressure from cheap migrant labor; but this migrant labor is likely to be exploited by profiteering firms, resulting in a transfer of wealth back to contractors. Ultimately, a DBA suspension is unlikely to accomplish what it sets out to do—revitalize communities. In fact, communities which are comprised of low-wage laborers, many of which are minority communities, may be worse off after such a policy is implemented, even when not accounting for the disaster’s debilitating effects.

There are, of course, alternative policies. A tax credit is one possible approach,³⁶⁰ however, it may be subject to the same problems suffered by empowerment zones because it employs the same market-based approach of lowering input costs.³⁶¹ Thus, there may continue to be downward pressure on wage rates and upward pressure on housing prices, both of

359. This effect is unlikely to be as pronounced as the model suggests because it is difficult to capture these rents in construction; that is, it may be difficult to shift construction work from a later period to the current period. Note also that because suspension may affect a contract regardless of when construction is completed, *see* discussion *supra* Part I, contractors may need to make labor substitutions between projects, rather than within one project, to engage in this temporal profiteering.

360. *See, e.g.*, Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, 119 Stat. 2577 (amending the Internal Revenue Code to provide tax benefits for areas affected by Hurricanes Rita and Wilma). Note that this solution lowers the price of capital, rather than labor, thus mitigating the adverse effect on low-wage workers.

361. *See* discussion *supra* Part IV.C.2.a.

which will likely lower the welfare of many local lower-wage workers.³⁶² A better approach may be to grant federal relief aid, as was done after Katrina, while increasing oversight, which will reduce waste and contractor profiteering. This is because it is not clear that additional incentives must be given to contractors to bring them into the region—as federal money flows in, contractors will follow.³⁶³ In addition, the domestic population may not return to the area as quickly as expected, thus negating the need for a rush of construction and redevelopment.³⁶⁴ Therefore, welfare may be maximized with less overall construction and retention of the DBA; contractors that enter the region are still better off because they would not have entered the market otherwise³⁶⁵ and laborers earn at least their pre-disaster wage. Welfare loss in the form of unemployment, a result of the wage floor, can likely be mitigated through other means.³⁶⁶

Suspending the DBA as a means of revitalizing communities after a disaster is an inequitable quick-fix solution. The overall benefits of such a policy are likely outweighed by the hidden costs, which are disproportionately borne by low-wage, predominately minority, workers. At the same time, contractors get a windfall they do not need or deserve. Efforts should therefore be made to reign in existing precedent regarding what constitutes a “national emergency” in the DBA context, as it appears that the president currently has too much discretion in that field. Ultimately, it seems that the maxim holds true—there’s no such thing as a free lunch. But if you know the right people, someone else may be paying for it.

362. See discussion *supra* Part IV.C.2.

363. See *id.*

364. See discussion *supra* Part IV.C.2.c.

365. This follows from basic economic principles. Contractors are assumed to be rational economic actors, and they therefore will engage in an activity only if it makes them better off than had they not engaged in the activity. While students of economics will note that things are rarely this simple, due to such things as transaction costs, the basic concept still has force. Contractors who move into the new market and discover that they were better off prior to moving will return to the market in which they were better off. See discussion *supra* Part III.

366. For instance, unemployment welfare loss may be offset by using federal aid or private donations. See *supra* fig.6; see also The Ctr. on Philanthropy at Ind. Univ., Gulf Coast Hurricane Relief Donations, http://www.philanthropy.iupui.edu/nr-Hurricane_Katrina.html (last visited Nov. 22, 2006). However, it is not clear that federal aid or billions of dollars in private donations would *fully* cover this welfare loss.