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Paving the High Road: Labor Standards and Procurement Policy in the Obama Era

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PANEL ONE

Phillis Payne: Good morning, everyone. I just want to begin by thanking Dean Edley and the other faculty members here for hosting us, and we really appreciate the weather that you provided. It is just unbelievable, and it makes us folks from Washington want to move here. I'd also like to second his remarks in thanking the students from the Journal who have organized and put so much work into this program.

As Dean Edley said, this is a profoundly important issue. My job, as the leadoff panelist, is to set the table for the discussions that are going to occur throughout the rest of the day, and I'm here to talk about the history of our nation's oldest labor standards laws that regulate public procurement, and those are the prevailing wage laws. Even though it's my assignment, I'm not going to be able to cover the entire history in my 15 or 20 allotted minutes here as the history of prevailing wage laws in the United States begins right around the Civil War. Needless to say, we're not going to be able to get through the history in 15 or 20 minutes. So I thought that the best way to structure my time would be to start at our most recent history in

† The full-day symposium was held on April 23, 2010, to address legal protections for the millions of workers whose jobs are funded by federal contracts and federal grant-in-aid programs.
1. Attorney, Connerton & Payne.
2. Presidential Proclamation No. 182 (1869) and Presidential Proclamation No. 1872 (1872); see THE ECONOMICS OF PREVAILING WAGE LAWS (Hamid Azari-Rad et al. eds., 2005).
this area, which is the year 2009, when within weeks of President Obama being sworn into office, the Congress, on February 17th, enacted the American Recovery and Reinvestment Act,\(^3\) known as ARRA to some, or as the “Stimulus” bill, or as the Recovery Act.

President Obama signed this enormous public works bill literally within weeks of taking office. The reason that I start with ARRA, or the Recovery Act, is because it has in it two provisions that establish Davis-Bacon coverage on the public works contracts that are funded under ARRA. I’ve quoted one of those at the bottom on the back of the handout.\(^4\) So I’m going to talk a little bit about ARRA and how its funding mechanisms work on public works contracts.

Through some examples, I hope to be able to paint a tapestry of how our federal and state prevailing wage laws all work together. I think a tapestry really is the best way to describe labor standards laws and prevailing wage laws. Just a caveat, though: when I use the term “labor standards laws,” I am talking about prevailing wage laws. Those are the laws at the federal and at the state level that regulate the minimum wages that have to be paid to workers who are employed under public contracts for construction or services. And at the federal level we’re talking about the Davis-Bacon Act,\(^5\) which regulates public procurements for construction by the federal government, and, on the service side, the Service Contract Act,\(^6\) the analog to the Davis-Bacon Act in the service sector. So that’s what I’m talking about when I use the term “labor standards laws.” Now, for the rest of the day, after this panel, we’re going to have a lot of discussion about other types of regulatory procedures on public works that go beyond the

\(^4\) Pub. L. No. 111-5, § 1606 (“[A]ll laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor . . .”).
\(^5\) 40 U.S.C. § 3141 (2006) (“The advertised specifications for every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works . . . which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics . . . The minimum wages 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 in the locality as determined by the Secretary of Labor . . .”).
\(^6\) 41 U.S.C. § 351 (2006) (“Every contract . . . entered into by the United States or the District of Columbia in excess of $ 2,500 . . . to furnish services in the United States through the use of service employees, shall contain . . . A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary . . . in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm’s-length negotiations.”).
prevailing wage concept. But for my part, I'm talking about prevailing wage laws.

So let's talk a little bit about the Recovery Act. As I say, it was signed into law on February 19th. President Obama had been in office just a matter of weeks. ARRA appropriates about $787 billion. It is big. ARRA is divided up into basically three sections in terms of the allocation of funds. About one-third of the money in ARRA goes to tax relief. About one-third goes to direct entitlements to individual people, such as the COBRA funding and the unemployment payments, and fiscal relief to the states. The final third is where the public works projects are found, and that is composed of money that is going to be directly expended by a federal agency.

In addition to that, there are billions of dollars in grants and loans that federal agencies will give out to the states. It's not possible to say how much of that is actually subject to the ARRA Davis-Bacon provision. But a substantial amount of that is for construction or for services. And whether those contracts are direct federal contracts or whether they are state or municipal procurements funded under ARRA, they will carry Davis-Bacon protections for the workers employed under those contracts.

Now, this illustrates an important concept in the tapestry that I want to talk about. The provision in ARRA that I have put on the back of the handout, section 1606, indicates that federal contracts for construction, which are direct federal contracts or federally assisted, will carry Davis-Bacon protections. For example, let's imagine that HUD decided that it was going to utilize ARRA money to do energy retrofit on its headquarters building. This example is apt because there is a tremendous amount of money in ARRA for energy retrofit work and weatherization. If that agency entered into contracts with private contractors to come in and do that energy retrofit work, that work would be subject to the Davis-Bacon Act. That is a direct federal contract for construction that employs laborers or mechanics. Those laborers or mechanics would have their wages set by prevailing wage determinations issued by the Secretary of Labor, and those prevailing wage determinations would have been put into the bid specs when those contractors were bidding on that contract. So that is a classic federal contract for construction, and Davis-Bacon covers construction, alteration, repair, painting, and decorating. That is the gamut of activities covered by the Davis-Bacon Act.

Now, the provision in ARRA, section 1606, reiterates that direct federal contracts are covered by Davis-Bacon. It would not have been necessary for Congress to put this provision in the law to ensure that the Davis-Bacon Act applied to such contracts. The Davis-Bacon Act, enacted

in 1931 and substantially amended in 1935, applies to direct construction contracts of the federal government and the District of Columbia. So that hypothetical that I just described, the HUD procurement for energy retrofit in its headquarters in Washington, is covered by the Davis-Bacon Act as long as it is above $2,000. So what Congress did when it enacted 1606 was to reiterate that all construction contracts under ARRA are going to be covered by Davis-Bacon. But it did something much broader than that. And that’s where we get into the concept of a Davis-Bacon “Related Act.”

The Davis-Bacon Act covers direct federal construction. By its terms it does not cover federally assisted construction when the procurement is entered into by a state or a municipality or some other entity of government or, indeed, even a private entity that is receiving federal funds. And on the handout, I refer to the Davis-Bacon “Related Acts”. There are approximately sixty of these acts by Congress, which have been enacted from 1931 to 2009. And the provision that is on the back of the handout from ARRA, section 1606, is a Davis-Bacon “Related Act.”

One reason that Davis-Bacon is a complicated area to practice in is that Davis-Bacon itself is a little over two pages long. It’s not a very complicated statute. Even the administration of it is not particularly complicated. But that is just the beginning. We have some 60 other laws that we, as practitioners in this area, have to deal with. And those are the “Related” statutes.

The Related statutes deal with federally funded projects that just cover the gamut of almost any type of construction activity that you can imagine. And what Congress did in ARRA was that when it appropriated money, for instance to fund HUD to fund some sort of state project for an energy retrofit, all of those state projects must carry Davis-Bacon prevailing wage determinations in them, and that is the concept of the “Related Act.” So I think you can see from that part of the tapestry that this concept of prevailing wage protections spreads out through our entire economy, and I think when Dean Edley says these are big ideas, that’s the reason that this is a big idea. Because we’re not just dealing with direct federal contracts. We are dealing with millions and millions of contracts of states and counties and municipalities that receive federal funding. So that is the concept of the Davis-Bacon “Related Acts.”

I wanted to give you the concept, again, by just looking at the Recovery Act, of what some of these “Related Acts” cover and what the “Related Act” provision of ARRA covers. The GAO has just issued a report on the functioning of ARRA, and I brought it along because it has a pretty interesting list of some 40 federal programs that provide for

9. E.g., National Housing Act, 12 U.S.C. 1715c; Federal Aid-Highway Act, 23 U.S.C. 113(a); see 29 CFR 5.1a for a list of statutes extending the Davis-Bacon Act to federally-assisted contracts.
construction that are now newly covered by the Davis-Bacon Act. And the
totality of these programs runs into the billions and billions of dollars. So
I'll just throw a few off. For example, the Department of Commerce
received billions of dollars to improve broadband technology. A lot of that
work is going to be either construction or service-related. Some of this
work, if not much of it, will probably be done directly by the federal
government. But much of it is going to be in the form of grants and loans
from the Department of Commerce to the states and localities to do
broadband improvement. All of that construction work will be covered
by the Davis-Bacon Act through the "Related" Davis-Bacon Act provision in
ARRA, if it goes out into the states and the localities.

Now, this is an opportunity for me to digress and say something about
the Service Contract Act. You'll see in the timeline that I provided that, of
course, the Davis-Bacon Act was enacted in 1931. And it, by the way,
came after states enacted their own prevailing wage laws. So it was not the
first prevailing wage law. There had been, at least eight states that had their
own prevailing wage laws prior to 1931. And, again, jumping to the other
side of the handout, I have an excerpt from the first state prevailing wage
law, and it was in Kansas.\(^\text{10}\) And when you read the text of that law, and
then read the text of the Davis-Bacon Act, and then read the text of the
ARRA-related provision, you'll see that the concepts really have not
changed very much from the 1800's as to how these government contracts
are regulated. It is a pretty simple concept and hasn't changed much from
the 1800's in terms of how it's articulated in the statute.

So back to the Service Contract Act. It was enacted in 1965. What
was happening in 1965? Well, in 1961, when President Kennedy came into
office, he announced the space program. There was a gigantic amount of
service contracting, not just because of the space program, but that was one
of the primary markers that preceded the Service Contract Act. Service
contracting was booming during that period. And a number of members of
Congress were having constituents coming to them, saying these service
contracts are being granted without the Davis-Bacon requirements. People
believed in 1965 that if you had a government contract, that it was going to

\(^{10}\) Eight-Hour Law, Kansas Gen. Stats. §§ 3827–3829 (1891) ("Eight hours shall constitute a
day's work for all laborers, workmen, mechanics, or other persons now employed, or who may haveafter
be employed by or on behalf of the State of Kansas, or by or on behalf of any county, city, township, or
other municipality of said state... provided, that in all such cases, the laborer, workmen, mechanics, or
other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis
of eight hours constituting a day's work: provided further, that not less than the current rate of per diem
wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, and
other persons so employed by or on behalf of the State of Kansas, or any county, city, township, or other
municipality of said state... and laborers, workmen, mechanics, and other persons employed by contractors
or sub-contractors in the execution of any contract or contracts within the State of Kansas, or within any
county, city, township, or other municipality thereof shall be deemed to be employed by or on behalf of
the State of Kansas or of such county, city, township, or other municipality thereof.").
be subject to a prevailing wage law, and that prevailing wage law in 1965 was the Davis-Bacon Act. And so Congressional hearings occurred in the early 60's that disclosed the fact that service contracts, then becoming a very big part of federal procurement, had no prevailing wage protections. In 1965, Congress enacted the Service Contract Act and substantially amended it in 1972. I'll mention those amendments in a moment.

What does the Service Contract do? Well, it's the cousin to the Davis-Bacon Act. It requires that on all federal contracts that are principally for services, that service employees employed under those contracts will be paid the prevailing wage in the locality as determined by the Secretary of Labor. So it is similar to the Davis-Bacon Act, except that it covers service contracts.

Davis-Bacon covers construction, alteration, repair, painting, and decorating. The Service Contract Act covers "services." The list goes on forever as to what constitute services, and the concept has evolved since 1965. Much of the service contracting in 1965 was more traditional. It was food service, janitorial service, and so on. Any time you go into a federal building and you go into the cafeteria, those food service workers are undoubtedly covered by the Service Contract Act. Almost all food service is contracted out in federal buildings. That's a very basic example of what the Service Contract Act covers.

Now, one thing I want to mention about the Service Contract Act that distinguishes it from the Davis-Bacon Act is what happened in 1972. And, as I mentioned earlier, the space program was booming during that time period, and workers on the space program and elsewhere were successfully organizing on service contract sites. And because the federal bidding system, requiring that the low responsible bidder receive the contract, when these workers organized and got collective bargaining agreements, their contractors were bidding against low bidders who were not subject to a collective bargaining agreement. What the Congressional hearings of that day, between '65 and '72, showed is that workers were succeeding in organizing, and they were succeeding in getting collective bargaining agreements. Many of these workers were on the very bottom rung of the economic ladder, but they were succeeding in organizing only to see their contractors, their fair, responsible contractors, losing those service contracts when contracts were rebid. And so Congress found that the fruits of collective bargaining were being deprived from service contract workers, a group that really needed help in our society.

Congress amended the Service Contract Act in 1972. The amendment required that the Secretary of Labor determine the prevailing

11. 29 C.F.R. § 4.130 ("Types of covered service contracts illustrated").
wage at the collectively bargained wage and fringe benefit level when workers have a collective bargaining agreement on a service contract and when that service contract is being rebid. In other words, organized workers were able to keep the fruits of collective bargaining, and those collectively bargained wages became the wage determination for the next round of bidding. And we refer to that as the "successorship," or the "section 4(c) requirement" in the Service Contract Act, and that sets it apart from Davis-Bacon. Davis-Bacon does not have that concept in it.

Returning to the present. Much of the work in ARRA is service work, and when the federal government enters into a federal service contract with ARRA money or any other federal money, it is subject to the Service Contract Act. By the same token, under ARRA, when the federal funds that we've been talking about go out to the states and the localities and all of these 40 programs that are subject to the Davis-Bacon Act, does the Service Contract Act apply to those state or municipal or county service contracts? The answer: no. Why not? There are no service contract-related provisions. The Service Contract Act stops with direct federal service contracts of the federal government or the District of Columbia if the amount is above $2,500. So that is a major difference in the service sector as compared to the construction sector in the world of prevailing wages.

One more thing I want to mention about ARRA. I mentioned that since 1931 we've had some 60 Davis-Bacon "Related Acts" which have applied Davis-Bacon to federally assisted construction. And I mentioned 1606 in ARRA. There is a second provision in ARRA that is extremely significant, because it is the first time that a Davis-Bacon "Related" provision has been applied to a provision in the tax code. The way ARRA is structured, all of the amendments to the Internal Revenue Code are found in Division B of ARRA. Section 1601 of Division B lists five different tax credit bonds that are funded under ARRA. Two relate to energy development. Two relate to school construction. And one is a Build America bond that can be used in recovery zones by states and municipalities to perform construction in low-income recovery zones. These five categories of bonds allow the issuer of the bond, which will be a state or a municipality, to get up to 45 percent of the interest paid on those bonds in some cases. Prior to 2009, there had never been Davis-Bacon related coverage of a tax vehicle like that. Related statutes had covered grants, federal loans, federal loan guaranties, mortgage insurance, revolving loan banks, all sorts of other mechanisms, whereby the federal government gets its funds out to states and municipalities, but never in the form of a

reimbursement or a credit of interest on a creature of the tax code. So section 1601 in ARRA is really ground-breaking in its extension of the Davis-Bacon Act provisions to this new instrument of financing.

I’m sure during the day that we’re going to have conversations about all of these issues, but there are many ways in which federal money goes out into our economy, and I think that not just prevailing wage standards, but other types of labor protection provisions can follow that federal stream of money into the economy. So ARRA is an extremely significant event in the history of the prevailing wage laws for those reasons.

I want to mention quickly two other things that happened during the same time period that the President signed ARRA to underscore how important this topic is to this administration. He signed the Executive Order on, I think, February 6th to allow federal agencies to utilize project labor agreements on federal contracts of $25 million or more. The next week he signed another Executive Order. That is Executive Order 13495, which is the Non-Displacement of Qualified Service Contract Workers. That Executive Order gives unprecedented protections to service contract workers when their employer loses a federal service contract. And federal service contracts, by the way, are rebid almost every year, or an option is exercised every year, so there is a tremendous turnover of federal contractors. When a contractor turns over, some of those workers—using the example of food service workers—may have worked in that federal building for ten years with one contractor after another. That’s where they work. That is their workplace. They have no job protection. And a new contractor comes in. They can all be replaced. It is perfectly legal to replace them. That contractor can bring in an entire new workforce. This Executive Order, for the first time, protects those workers. It gives them job protection. They may not be replaced by the successor contractors so long as there is sufficient work in the contract and so long as they have nothing on their record to show that they’re not qualified for the position. So, again, to emphasize the importance of this topic, I think we only have to look at those three actions that President Obama took in the first weeks of his administration. The biggest public works bill that, I suppose, the nation has ever had and these two very important Executive Orders.

I will just mention one quick thing, and maybe during the question and answer session we can talk about some of the state prevailing and “living” wage requirements. I didn’t get to that part on the outline, but I’ll heed the stop sign and turn the panel over to Lynn. [applause]

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Lynn Rhinehart: Good morning. It’s great to be here with all of you. I want to add my thanks to Dean Edley and Berkeley, to Darin and Liz and Lisa for all the hard work that you’ve put in to organizing this event, and to David Rosenfeld for looping me into this event. I really appreciate the invitation and am happy to be here with you today.

I’m struck by the fact that this history panel is comprised of all women, and the final panel this afternoon about proposals for change is comprised of all men. [laughter] And I don’t quite know what to make of that. I was thinking that perhaps what that says is that any ideas proposed by men are built on the foundations presented by women. [laughter] And I think I’ll just leave it at that.

So here we are on a beautiful spring Friday in Berkeley, sitting in a windowless classroom talking about procurement policy. Some might say what is wrong with us? What is wrong with this picture? But actually, and as Dean Edley said this morning when he opened up this session, we’re here because of the incredible power of procurement and procurement policy, to make real difference in people’s lives. To make a real difference in the behavior of contractors who win federal dollars. The government spends upwards of $600 billion every year buying goods and services. And the decisions it makes about who to give that money to and what policies should apply to the companies that win that federal work have incredible impact across our economy. So that’s why we’re here today, and it’s a very worthwhile topic. I’m really happy that Berkeley convened this session so that we could have this discussion.

So in my time this morning I’m also going to cover a little bit of history, but it’s history of more recent vintage. It’s history and a perspective that’s based on the AFL-CIO’s efforts during the Clinton administration, to try to raise the bar on the labor practices of federal contractors through various executive branch actions. I’m going to describe briefly what they were. I’m going to talk a little bit about what happened to them. It’s a very sad story, so get your Kleenex ready. And then I’m going to spend a couple minutes talking about what the Obama administration is doing in this area so far, and then make a couple of observations about lessons learned from all of that, time permitting. So let’s roll the clock back to the 1990’s and the early days of the Clinton administration.

The story begins, at least in terms of the AFL-CIO’s involvement in these issues, at Avondale Shipyards in New Orleans, New Louisiana. Avondale, as a major federal contractor, raked in millions and millions of dollars from the Navy to build ships for the Navy. At the time—and this is

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17. General Counsel, AFL-CIO.
in the early '90s—the workforce at Avondale Shipyards was not unionized. The wages at the shipyard were substandard. There were terrible health and safety problems at the shipyard. Workers were being killed at a higher rate than at any other shipyard in America. And the workers wanted a union. What did Avondale do? Did it say, "OK?" No. Avondale did what too many employers do when their workers want to organize, and it launched a vicious assault, a vicious anti-union campaign to try to dissuade workers from forming a union. They fired union activists. They committed hundreds of unfair labor practices. Fred Feinstein, who is going to speak this afternoon, prosecuted a number of those unfair labor practices against Avondale as General Counsel of the National Labor Relations Board. Avondale held captive audience meetings with their workers, where they tried to persuade them not to join the union. They had their supervisors put the squeeze on workers one on one to persuade them not to join the union. They used every trick in the book to try to dissuade workers from having a union. But the workers filed a representation petition, and they were able to get to an election, and in 1993 they voted for a union.

So the workers got their union, right? Wrong! Avondale kept fighting. They committed more unfair labor practices. They fired more union activists, discriminated against union supporters, continued to commit OSHA violations. This company had upwards of 500 OSHA violations on its record at that time. And they fought and fought and were able to eventually get the 5th Circuit Court of Appeals in New Orleans to throw out the results of that 1993 election. So the workers lost their union.

Now, while this was all going on, Avondale was continuing to receive millions of dollars in federal contracts and, even more outrageous than that, they were able to bill the federal government and get reimbursed for the costs of holding those captive audience meetings to persuade workers not to join the union, to pay for those supervisors to go put the squeeze on workers, to pay for the anti-union literature that they handed out to workers. They were able to bill the government and use taxpayer dollars to pay for that activity fighting the union. Worse, they were able to bill the government and get reimbursed for their legal fees fighting those unfair labor practice charges brought against them by the National Labor Relations Board. So you had the NLRB, the federal government, funded by our tax dollars paying to prosecute those cases. And taxpayer dollars also paying for Avondale's defense costs. Millions and millions of dollars.

So at the AFL-CIO, we looked at this situation and said, "Hold it. What is wrong here?" [laughs] You can't have a situation where a major lawbreaker like this is going around, violating workers' rights, and being reimbursed by the federal government for many of those costs, and continuing to be able to pull in federal contract dollars. That is just
absolutely the wrong policy. It encourages terrible behavior on the part of companies across the United States.

So we went to the Clinton administration and brought the situation to their attention and said something has to be done. And I start the story with Avondale, and I'm talking a lot about Avondale, and Avondale is an egregious example of bad behavior by a federal contractor, but Avondale is not alone.

When we went to talk to the Clinton administration about the need for reform, we brought to them studies that the General Accounting Office had put together, showing that high numbers of federal contractors had committed unfair labor practices and other labor law violations, that high numbers of federal contractors were committing OSHA violations and putting workers at risk. Upwards of 20 to 30 percent of federal contract dollars were going to companies that had violations of this sort on their record. The AFL-CIO did our own research, and we found that in a two-year period, 10 of the top 100 contractors committed 4500 OSHA violations and over 1100 unfair labor practices.

We felt this was a major problem and we told the Clinton administration that we really felt something needed to be done. Reforms needed to be instituted. And I'm happy to say that the Clinton Administration listened, and they proposed three different reforms.

First, they proposed rules to ban the reimbursement of those costs by federal contractors of trying to persuade their workers whether or not to have a union. So they banned reimbursement of costs for captive audience meetings, supervisor one-on-one's, anti-union literature, anti-union consultants, those sorts of things.

Second, they proposed a rule to say that the government would no longer fund both the prosecution and the defense of cases involving federal contractors—that if the contractor was going to fight the case, and if it lost, it wasn't going to get its legal fees reimbursed by the federal government. To us, this just made no sense. It was a waste of taxpayer money, and frankly it provided an incentive to contractors to string out legal proceedings and fight longer because, hey, why not? At the end of the day, you're going to get your legal fees covered, win or lose. So the Clinton Administration proposed a rule to close that loophole as well.

Thirdly, and most significantly, the Administration proposed rules to try to breathe new life into what were existing requirements that federal contractors be responsible contractors. These requirements had been on the books for decades. For decades, federal law has required that every federal contractor, in order to get a contract, has to be deemed a responsible source. And one aspect of being a responsible source is that you have to have a satisfactory record of business ethics and integrity. We argued to the Clinton administration, and they agreed, that lawbreaking is a piece of your
business ethics and integrity, and that if you’re a chronic lawbreaker, that doesn’t reflect very well on your ethics and integrity. We argued that contracting officers ought to be encouraged to scrutinize and screen contractors upfront before they get contracts, to see whether or not they were chronic lawbreakers or whether or not they had satisfactory ethics and integrity. The Clinton administration proposed a rule to do just that. The proposed rule clarified that a company’s record of lawbreaking was part of their ethics and integrity, and it gave contracting officers authority to disqualify a contractor from a particular contract if they found that the company’s behavior was problematic enough that they didn’t meet the responsible contractor test.

We felt that these were very common sense reforms that addressed very practical and real problems. We did some polling on the question of whether chronic lawbreakers should get taxpayer funded federal contracts, and it polled off the charts. It was one of these sort of “duh” concepts, [laughs].

We felt that these reforms were important for a few reasons. One, we thought these reforms provided a really powerful incentive for companies to clean up their act, to stop breaking the law, to address violations that had occurred. Since companies want these contracts, and if they think they’re not going to get them because of their record of lawbreaking, it’s a powerful incentive for them to clean up their act and protect workers.

Second, we felt strongly that, as a policy matter, the federal government shouldn’t be giving federal contracts paid by taxpayer dollars to chronic lawbreakers. That’s just not good policy, and we felt we needed a firm policy statement to the contrary.

Third, another important rationale for these rules was a fairness rationale—that it’s just not right to have companies that are chronic lawbreakers getting these lucrative federal contracts and beating out other companies that may have better records of law compliance but may not be able to provide as low a bid as the lawbreaking company because the lawbreaking company is able to kind of shave corners on its costs through its lawbreaking. Even that out and giving the law abiding contractors a fairer shake in the process seemed to us to be a very important fairness rationale for these reforms.

And for that reason, the proposed reforms actually enjoyed some support from some in the contractor community. Good contractors with good labor practices—union contractors who had good relationships with unions and good, strong labor practices—actually recognized these reforms as a positive step that would help them. They realized that the proposed reforms would take away the disadvantage that they faced when they went up against some of the lawbreaking contractors. So these contractor groups signed on and supported these reforms, as did a very broad coalition of
labor organizations, civil rights organizations, environmental organizations, consumer groups, and others.

So there we were, with the proposed rules and our excellent coalition supporting them. What happened? Well, as soon as the rules were announced, the business community—the Chamber of Commerce, the National Association of Manufacturers and other groups—went on the attack. They denounced these rules as blacklisting, saying that the rules would deny companies contracts without the benefit of due process. They got Congress all revved up, mostly Republicans in Congress, but some Democrats in Congress, over the reforms, painting them as this radical, unfair change. They got the small business community revved up. They got the contracting officers revved up by raising all sorts of questions and operational concerns, saying every decision they made to disqualify a company was going to be subject to legal attack and legal review, that it was going to be a big headache for the contracting officers. And, frankly, we were somewhat blindsided by the ferocity and intensity of these attacks, and their reaction to what we really thought were quite common sense and modest proposals.

But we pressed on. The Clinton administration pressed on. And final rules along the lines that I described were issued in December of 2000. Now, you’ll remember that there was something else that happened in December of 2000, which was that the Supreme Court issued a decision that essentially gave the presidency to George Bush. And so he came into office a few weeks later, and he immediately froze these rules. He formally repealed them later that year. So these great new rules that we worked so hard on for so many years lasted about a nanosecond. They never really did take effect. We never got to see whether or not the sky would fall, as the business community had predicted. I think the sky probably would not have fallen, given the fact that these reforms were built on reforms that have been in place in many states for years, and, as best as we have been able to tell, the sky hasn’t fallen in those states.

While he was at it, Bush not only repealed the contractor responsibility rules but he also repealed two pro-worker Executive Orders that President Clinton had issued. Phillis mentioned one of them, the worker retention Executive Order for service contract workers. Bush also repealed a Clinton Executive Order on project labor agreements and replaced it with one banning project labor agreements on federal construction. He also took it upon himself to require federal contractors to post a notice in their workplaces, telling workers that they don’t have to join a union. Those were some of the procurement reforms that we saw from the Bush administration.

Let’s roll the clock forward and talk about where we are now. It is a new day. The Obama administration is off to a great start. They’ve
implemented a number of very meaningful reforms that are going to improve conditions for workers under federal contracts.

First of all, and importantly, they’re taking a good, hard look at the scope of work that actually is put out for contracts. The Bush administration increased the amount of federal contracting by a significant degree, and the Obama administration is taking a look at that and asking whether there is work that was contracted out that should really be done by federal employees? Because if you want to talk about raising standards and providing good wages and benefits for workers, having the work done by federal workers who have a union contract, good wages and benefits, and civil service protections is a pretty good way of accomplishing that. The Obama administration is taking a look at that and trying to in-source back to the federal government work that was inappropriately contracted out during the Bush administration. This is something we’re very supportive of.

President Obama has restored the neutrality rules that President Clinton tried to issue, the rules that say federal money is not going to go to contractors trying to influence workers’ decisions about unions. So no more federal reimbursement for captive audience meetings, one-on-one’s, anti-union consultants and the like. President Obama issued an Executive Order in one of his first weeks in office putting back the requirement that no federal money will be used for those purposes, and the regulations implementing that Executive Order are in the process right now and should be finalized soon.

President Obama restored the worker retention Executive Order that Phillis talked about a little bit earlier. He repealed Bush’s Executive Order banning project labor agreements and replaced it with one encouraging the use of project labor agreements. He repealed the Bush Executive Order requiring contractors to post notices telling workers they don’t have to join a union, and he replaced it with an Executive Order requiring federal contractors to post a notice telling workers about their rights under the National Labor Relations Act, that you have the right to join a union and form a union, and actually the federal government is there to protect you in exercising that right. The rules on that notice should be out any day now, and federal contractors will be required to post that notice in their workplaces.

The Obama administration is also expanding databases for contracting officers and requiring them to use these databases in making responsibility determinations. One of the criticisms of the Clinton administration rules was that contracting officers didn’t have the information that they would need to assess a contractor’s record of law compliance. And the Obama administration is working really hard to put those databases together, get that information together, and give contracting officers tools that they can use in doing these responsibility assessments. We are concerned that
they’re still too narrow and they’re also not public. We think these databases ought to be open to the public so that we can all see that information about contractors’ records. And we’re not there yet.

Significantly, the Obama administration has put good, strong, enforcement minded people in charge of key worker protection agencies. That’s going to help all workers: workers under federal contracts, workers under state contracts, and private sector workers who aren’t under contract. It’s a very significant step and quite a contrast from the last administration. And, finally, the Obama administration is supporting passage of the Employee Free Choice Act, which, frankly, would do as much or more than any of the other measures that I’ve just described in making sure that workers have good wages and benefits, because the facts are that workers who organize and have a collective bargaining agreement enjoy better wages, better benefits, better job protection than workers who don’t have a union on the job.

So that’s where we are at this point with the Obama administration. Lots of good progress being made, lots of meaningful reforms that have been put in place. I know that you’re sitting there thinking, OK, that’s all well and good. I’m glad that good things are happening in the Obama administration, but what happened at Avondale? Finish the Avondale story. So, OK, here’s the end of the Avondale story.

It has a happy ending. Avondale got new ownership. Avondale got new management. Avondale adopted a new attitude. They decided that they were going to let their workers decide, without interference from the company, whether or not they wanted to have a union. And in two weeks time, a vast majority of the workers signed up and said, yes, we want a union, and they got their union. The workers now have industry standard wages and benefits. Safety and health has greatly improved. They have a good, strong working relationship between the workers and the company. So this tale that started, oh, so long ago in not such a happy place actually has a pretty happy ending.\footnote{18}

So I’m going to stop there and save the lessons learned. Maybe we can talk about that a little bit in the discussion part. Thank you. [applause]

\textbf{Ann O’Leary:} Thank you so much, Phillis and Lynn. It’s such an honor for me to be on this panel with Phillis and Lynn, who have worked

\footnote{18. Editor’s Note: During the summer of 2010, Northrop Grumman announced plans to consolidate its shipyard operations and to wind down operations at the Avondale shipyard in 2013. \textit{See} W. J. Hennigan, \textit{Northrop Says It May Abandon Shipbuilding}: \textit{The giant military contractor announces plans to close its yard in Avondale, La.}, \textit{L.A. Times}, July 14, 2010, at B2.}

\footnote{19. Executive Director, Berkeley Center on Health, Education \& Family Security and Lecturer-In-Residence, UC Berkeley School of Law.}
on these issues for longer than I have and from whom I learned a tremendous amount when I came to this issue.

First, let me start by thanking tremendously the students who put this together. I’ve been on maternity leave for the last five weeks with our five-week-old son, and these students have really pulled this whole conference together, so I just want to thank particularly Liz Hinckle, Darin Ranahan and Lisa Poplawski for all the work that they’ve done. I also want to thank the Dean for allowing this type of forum to take place at the Law School. I think it’s a rare law school that has these types of robust discussions, not only about the history of our laws, but also about the context of how these laws are applied and lived today and what we need to do to use existing laws to tackle these big ideas that the Dean talked about. I’m also going to talk a little bit about one of the areas on which I focus—gender equity. Gender equity starts in the workplace and in the home, so I’m also very appreciative that my husband’s here holding our baby in the back, and that our employer is allowing this type of flexibility to occur while he’s on the clock. [laughter] So thank you to all of you.

Allow me to contextualize where we are as we come to the end of this panel. Phillis talked about the legislative vehicles that we have to make changes in terms of labor standards, prevailing wages, and benefits, and then Lynn talked about labor standards in terms of the ways we can use executive authorities. And I think one of the things that we oftentimes think about is the difficulty of enacting legislation and how hard it is to make these changes today, and people often say, “Oh, well, we could never do what we did when we passed the Davis-Bacon Act or the Service Contract Act.” In some sense Phillis turned that on its head a little bit and said, well, we might not be able to pass a stand-alone bill, but there’s a lot that we can do through legislative action, being creative about using existing laws, building on those existing laws as we go forward. So that was really eye opening to me and, I think, important to remember as we go forward. And then I think Lynn really told a very different story, which is oftentimes we think, well, if we can’t get it done legislatively, then we certainly can get it done through the executive action. And, yes, that’s true. But, as Lynn pointed out, there’s a lot of whims to the executive action, and obviously we then get thrown into the ebbs and flows of different administrations.

I want to talk about the most enduring Executive Order in the procurement policy, and one that Dean Edley started talking about today, which is Executive Order 11246.20 I want to start by explaining exactly what it does because we have students in the room who are new to these issues. Executive Order 11246 prohibits federal contractors and federally

assisted construction contract and subcontractors who do over $10,000 in government business, which is most of our contracts, from discriminating on the basis of race, color, religion, sex or national origin. It also requires that the government contractors take affirmative action to ensure equal opportunity in all aspects of employment. So this is quite broad. Obviously we know in terms of statutes that we have Title VII prohibiting discrimination, but this also proactively requires affirmative action.

It’s also incredibly powerful, because I think one of the things that people don’t realize is that not only does it prohibit discrimination for those federal employees or private sector employees who are supported by federal contracting dollars, but it also impacts the entire workforce. That means that if you’re an employer and you receive any federal contracting dollars, you can’t discriminate in your workplace against any worker, and you have to have affirmative action plans for your entire workforce, not just those supported by the federal contract. Nearly a quarter of our entire private sector workforce is impacted by this Executive Order. So really it’s quite powerful.

I’m going to talk a little bit about the history, but first let me say how I came to really start thinking a lot about this Executive Order and working on it. It goes back to Dean Edley’s concept of big ideas. At Berkeley CHEFS, we’ve been working on issues related to women in the workforce, and considering the impact of the fact that women now make up half of the workforce in our country, and women, particularly mothers, are major breadwinners in their family. We know that 40 percent of families rely on women as the primary breadwinner, in other words, 4 in 10 families are looking towards women as the primary breadwinner in their families. This change in women’s roles in our workplaces and our families is very powerful. But the other thing that we know that’s happening is that our workplace policies haven’t kept up with this reality, so we still have many workplace policies focusing on the fact that the worker is generally a male and generally going to have somebody at home to take care of family responsibilities.

As I was working on those issues, I started thinking about how do we begin to look at what’s in place to change these policies and in some sense started from the concept that I talked about just now, which is that it’s really hard to get things done legislatively, particularly in this environment where, although we have a Democrat in charge in the White House and we have Democrats in Congress, a lot of the space was being eaten up importantly by health care reform, and we also support that, but also the reality of the economy. So thinking about that issue, and then looking at what vehicles we had in place, I was led to the federal contracting workforce and thinking about, OK, how do we think about nearly a quarter of the workforce? If we
could begin to change policies there, that would have a ripple effect throughout the country. This is something we should look at.

Of course, I started with Executive Order 11246. Often when we think of anti-discrimination laws we don’t think about them in the same kind of box as we think about basic labor standards. Today what we’re here talking about is how we use procurement policy to improve basic labor standards, to improve living wages, to improve benefits. I’d like to suggest that we really should be thinking about Executive Order 11246 as a central tool to improving basic labor standards, and I’m going to talk about that.

One of the things that we have seen that has been effective about 11246 is, as Dean Edley suggested, it really has changed the way we conceive of the workforce. We certainly have fuller workforce participation. We have greater appreciation of not only diversity in the workforce for equity principles, but also diversity in the workforce in terms of the bottom line and what it means for businesses to really have the profits that they want.

But what I think is interesting about 11246 is that it really could be seen not only as this equity tool, but also as a tool to increase labor standards because of the affirmative action requirements. Under the affirmative action requirements, federal contractors have to put into place action-oriented programs to meet their affirmative action goals. They have to make a good faith effort to expand employment opportunities. It seems to me that good labor practices can and should be central to these efforts, to the action-oriented programs, to the good faith efforts, that we really need to conceive them. Instead of thinking of affirmative action merely as the numbers, of reaching the numbers goals, I think it’s important to think about how do you get to those numbers, and how do you support a workplace policy that, in fact, puts in place policies that will help women, in particular, meet the affirmative action goals. But before I do that I want to look at the other thing I think we need to think about in terms of 11246 in the context we’re talking about today: what are the lessons we can learn from 11246? Both how can we use it as a tool to build upon, when you’re thinking about high road contracting proposals, and what are the weaknesses of 11246? I think certainly one of them is the one that Lynn mentioned, which is that, although 11246 has been enduring, it certainly has had this ebb and flow to it in terms of its enforcement. I want to start with that point first, and then I’m going to come back to the issue of how we might use it today.

Let me go way back. I won’t go back to the Civil War, as Phillis did, but I will go back to World War II. I think it’s important to understand how this Executive Order came about. Leading up to World War II, President Roosevelt signed the first Executive Order, 8802, which made the government’s first commitment to encourage full workforce participation
by prohibiting discrimination in the defense contracting workforce, which was at that time only based on discrimination on race, color and national origin. In some sense, this wasn’t about a driving force of equity in the workplace; it was really about the reality that, if we were going to support our allies and begin to prepare for the potential entry into World War of the United States, that we had to have a full workforce in place to do that. And it wasn’t going to be beneficial to our country to only be employing white workers in the defense industry. And so President Roosevelt used it as a way of saying in order to have this full workforce participation, we’re not going to have discrimination in our defense contracting companies with regard to race, color, and national origin. It was a really important first step.

And one of the things that’s important to understand about it, though, is that it was limited to the defense industry. So it wasn’t all federal contracts. And the other really important issue is that it included no enforcement mechanism to ensure that the defense contractors were actually abiding by this prohibition. It also didn’t include a prohibition against sex discrimination, which I’ll come back to.

Over time this Executive Order has been expanded. President Eisenhower in 1953 expanded it to cover the entire federal contracting workforce, but it wasn’t until President Kennedy came on the scene that he expanded what was then called Executive Order 10925, which provided that the government had the authority to impose sanctions for violating the prohibition against discrimination. So not until Kennedy came on board did they actually have any teeth to this Executive Order and say, in fact, if you’re violating this order, there are going to be sanctions in place. This was also the first time that the concept of affirmative action came into the Executive Order. Not only do you have to not discriminate, but you have to have some affirmative action in terms of providing equal opportunity. President Johnson amended this order and expanded upon it, increasing the affirmative action piece, and that’s where we resulted in 11246 in 1965.

Again, importantly, women were not part of the picture of these early Executive Orders, and I want to say just a little bit about that, which relates to some of the points I’ll make today. At that time there was a robust conversation going on in the country, as we all know, about the proper place of women. President Kennedy had put forth the first Commission on the Status of Women, and there was a very heated discussion about whether or not the commission should recommend that a prohibition against sex discrimination should be added to the Executive Order. And the commission actually came down against it. They said that one, they were concerned that it would disrupt the family responsibilities of women to put

in place this prohibition against sex discrimination in the workplace, but also they weren't sure that they should require employers to accommodate women's family responsibilities by having to share in any of the costs of family responsibilities with women. It was a very different time, and there was a very different sense of what it meant in terms of encouraging workforce participation. Not until after Title VII passed and then several years later, not until 1967, did this Executive Order get amended to include sex discrimination.

I think the lesson learned in terms of the history of this Executive Order is that it really started in a more narrow sense, and was built upon and expanded not only in terms of the protections that it covered, but also in terms of the tools it was used to be able to ensure that the protections in place really had teeth and legs to them.

Going back to what Lynn was saying, this Executive Order has endured, but what has happened to it over time? It's really been an interesting history, and it's also really flowed with the different administrations. This is to say that it was in 1965, when the Executive Order was really getting off the ground, that the Office of Federal Contract Compliance was established at the Department of Labor. We're going to hear from Pat Shiu at lunch today, who’s the current head of that office. At that time it wasn’t a centralized unit. What happened was that the contract compliance officers in all the different federal agencies were required to ensure that this Executive Order would be complied with as they worked. There wasn’t a centralized effort to assure non-discrimination. It was within all the agencies. What that meant was that there was a varying level of enforcement going on. Some departments were doing a very good job. The Department of Defense was doing a better job than others of ensuring that discrimination wasn’t happening, but it really was very challenging.

When President Carter came on board in 1978, he stopped the decentralization and centralized it, and put all of the enforcement into this office at the Department of Labor, to ensure that there was consistency across the federal procurement policies in terms of discrimination. This is important because one of the things it did is it brought everyone together, but it also meant that there was a huge workforce that was dismantled. At that time there were 1700 individuals who were just compliance officers under the Office of Federal Contract Compliance. Let me just compare that to today. At the end of the Bush administration, there were 580 compliance officers. So we went from 1700 to 580. There's been a little bit of an increase, really thanks to the Recovery Act, where we now have 780 compliance officers, but nowhere near what we had in the Carter administration.

What happened between 1978 and today? Obviously there was the Reagan administration and the two Bush administrations. In the Reagan
administration there was a very serious effort to rescind the Executive Order. It didn’t come to pass, but what did come to pass is that there was a broad assault on enforcement, so there was very lax enforcement going on in the Reagan administration. A little bit more enforcement happened under the first Bush presidency, but it was much more of a focus on voluntary compliance. When the Clinton administration came on board, they had a lot of work to do. It was years and years of backlogs of complaints that had been filed that needed to be addressed. And then, as Dean Edley knows all too well, there was the assault on affirmative action and the need to think about how to increase those efforts. Throughout this time period there has been a differing assault on using Executive Order 11246 as an enforcement tool.

What this last Bush administration did was quite clever, which is to say that in some sense, if you look at the face of what happened, you could say it was great work. They were ensuring that compliance was happening on systematic discrimination. They were bringing charges. But if you then dig a little deeper, you see that 95 percent of what they were doing was really quite limited. They were focusing on systemic discrimination, but really only on the issue of hiring. It wasn’t on the issue of termination. It wasn’t on the issue of promotion. It wasn’t looking broadly at not only race-based discrimination, but also sex discrimination, and not just sex discrimination, but if you think about pregnancy discrimination or care-giving discrimination, none of that was being done. So the executive order was really enforced in a very narrow sense.

Now we come to the Obama administration, and I won’t spoil Pat Shiu’s talk. I’ll let her tell you what she’s doing. But I think one of the things that is really interesting is thinking about how this executive order can be used again today.

People often ask whether or not Executive Order 11246 has been an effective tool. I think if you look at it in terms of when it has actually been robustly enforced, you see that it has been an effective tool. Some of the early studies, there were studies from 1974 to 1980, for example, when both the end of the Nixon administration and the Ford administration, and then the Carter administration, were enforcing this Executive Order. There are studies to show that the impact in terms of women’s employment was really quite dramatic. In federally contracted employers, women’s employment rose by 15 percent, whereas in the comparable private sector it only rose by 2 percent. So it really was quite dramatic.

What oftentimes happens, and when the assault on affirmative action happened in the ’90s, people said, “Oh, well, this isn’t effective. It’s not really doing anything.” Well, yes, it’s true that these studies from the 1980’s did not show very much effectiveness. Well, map that onto the fact that it wasn’t being enforced very rigorously, and you get an indication of
why that might be true. I think it will be important today not only to ensure that we are looking at how you use this Executive Order, but we're also mapping its effectiveness so that we can continue on with this.

I don’t have very many minutes left, but I want to say a few words about going back to the original point that I made, which is that how do you think about using this tool today? I think one of the things that’s so critical is that even with the more limited set of compliance officers, that this is still an incredibly powerful tool, in that it can be used very broadly. And I’ll go back to the area that I focus on, which is sex discrimination in women in employment, and I’ll say that I think a couple things have really changed since this Executive Order first came about. One is that in the 1960’s, when we were talking about federal contracting, we were very largely focused on contractors who were manufacturers. Obviously this changed, and some of that recognition of the change happened with the Service Contract Act. Today a very large percentage of our federal contractor dollars go to service-oriented industries. We also know that many of those service oriented industries are dominated by women. Today, we have a need to really think about how we’re using this tool to aid women in the workforce. Particularly, as I said, when our workplace policies still very much do not favor any workers with caregiving responsibilities—responsibilities which disproportionately fall upon women workers. We don’t have paid family leave. Many of our employers are not covered by the Family and Medical Leave Act. It only covers half of our workforce. We don’t have paid sick days. There are many, many policies that we don’t have in place that really could aid working caregivers.

One of the things that I think we should think about with regards to Executive Order 11246 is how to use the existing Executive Order so that it prohibits sex discrimination, which also encompasses pregnancy discrimination and caregiver discrimination. One of the things that I found interesting as I began exploring this topic is that you look at what’s in place that hasn’t been enforced. For example, under pregnancy discrimination, it requires that any worker who is pregnant gets a reasonable period of leave time and gets reinstated after that reasonable period of leave time. Even if you’re not protected by the Family Medical Leave Act, you should still be able to get a reasonable period of time of leave. This certainly seems to me a basic labor standard that we should assure is being enforced through this existing Executive Order. The same can be said of caregiving benefits, ensuring that at least workers with caregiving responsibilities are getting access to the same benefits as other workers. Again, some pretty basic labor standards that can be enforced through this existing Executive Order. I think we should go further and really look at affirmative action and provide some guidance and help to employers to understand how they might use good faith efforts and action oriented programs to provide policies like workplace flexibility that do help women not only get hired,
but get retained, get promoted. This is the type of creativity that we could use today to make sure that this Executive Order is very robustly used.

I want to make sure there's time for questions. I'm just going to leave it with one other thought, which is that, in addition to thinking about how we'd use the existing Executive Order, we also need to think about how we use it as a framework for any new proposals. You're going to hear a lot today about these high road contracting proposals that many in this room have been working on. We should think about this in terms of the vehicle, what's worked, what's not worked. We have incredibly robust, and some employers will say burdensome, but I think important compliance efforts out there. How do you build on those? How do you ensure that when compliance is happening, that we're looking at this Executive Order and potentially any new Executive Order, how do you think about the enforcement mechanisms that we have in place, everything from technical assistance to eventual debarment if we don't get there? How do you think about things like the fact that under Executive Order 11246, you have to have, you can do some preconditioning, which is for contracts that are very large, $10 million or more, you can look at whether or not they're violating any of these Executive Orders before you grant the contract? There's a lot that we can learn from the fact that this Executive Order has been around for quite some time, and as we go forward and think about using these policies, let's make sure that we learn the lessons from the past and don't make the same mistakes.

I want to turn it over to Liz to direct us in the questions. Thank you so much. [applause]

Q&A [not transcribed]

PANEL TWO

Darin Ranahan: My name's Darin Ranahan. I'm a co-editor in chief of the Berkeley Journal of Employment and Labor Law. Thank you all for being here with us today. This second panel is going to give a broad-brush overview of various procurement policies used at the state and local level and sort of to segue into the proposals at the federal level, to see how some of these things may or may not work at the federal level. So with us we have, first, to my left, Paul Sonn, the Legal Co-director of the National Employment Law Project, then to his left Tseeye Gebreselassie, a staff attorney at the National Employment Law Project. To her left, Julian Gross, the Director of the Community Benefits Law Center. To his left, Ken Jacobs, the Chair of the UC Berkeley Labor Center, and to his left Donna Levitt, the Division Manager of the San Francisco Office of Labor Standards Enforcement. So without further ado I'll turn it over to Paul.
Paul Sonn: I want to reiterate thanks for the *Journal of Employment and Labor Law* and Ann O’Leary and Dean Edley for helping bring folks together for this really useful discussion.

I’m Paul Sonn with the National Employment Law Project. We’re a policy and advocacy organization that works on expanding opportunity for America’s workers in the 21st century economy, and we’re perhaps best known for our work on the unemployment insurance system, but we also, more relevant today, do a lot of work on living wage and minimum wage policy at the federal, state, and local levels. And I’ll be drawing on that experience in these remarks.

I’m going to provide an overview of the experience at the state and local level, but really chiefly local, with living wage policies in the United States over the past 10 or 15 years, and lessons that they may offer for federal policy. In some kind of disclosure, much of the policy work and models that we’re reviewing we’ve actually been engaged with many of those campaigns in helping develop and implement the policies in many cases. And, to give a little overview, I think that these experiences point towards a variety of lessons for federal policy reform. Specifically I think that they suggest three areas where federal spending might well be leveraged to improve job quality.

The first is, most broadly, general procurement, which is the chief topic being addressed at the conference today. The second is a related category of subsidized jobs, the federally subsidized caregiver jobs, which are a really important sector of the economy that is not technically procurement, but is one of the most significant areas where the federal government today is subsidizing low wage employment. And then the third area, and this touches back to some of Phillis Payne’s remarks, is federally subsidized economic development policy, which chiefly takes the form of grant-in-aid programs that flow down through the states, and where our current labor standard system is not very robust outside of the construction sector. I think the state and local living wage experience offer precedents for reform in all of these areas. And finally I think the experience around messaging, organizing, and sort of political mobilization that’s revealed from the state and local experiences with living wage, I think, are instructive for how we can build the political base for pushing for this sort of reform at the federal level.

I’ll start with a very brief overview of the living wage movement, and maybe briefly define what a living wage law or policy is. Typically, it’s a local ordinance that establishes a higher minimum wage for a category of publicly subsidized private sector workers, most commonly businesses that

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22. Legal Co-Director, National Employment Law Project.
do business or contract with the local government, but in some cases businesses that receive tax breaks or subsidies of some sort.

By and large the wage standards established, as one of the earlier panelists mentioned, are calculated through some formula based on the poverty threshold. Generally, they're in the $10-14 an hour range. Typically they require a supplement of some sort if employers don't receive employer-provided health benefits. And very commonly they require some forms of paid time off, vacation days or sick days for the employers covered by the policies.

And this is a policy movement that really launched in the mid-1990's. It was part of the post welfare reform refocusing on work and on the low wage labor market as the chief vehicle for supporting low-income families. And in many ways it was aimed at responding to the growth of low wage employment as our economy continued its 30-plus year shift from a manufacturing base to a service industry base and the accompanying erosion in wage standards that's been part of that.

A large part of this policy model was the focus on publicly subsidized jobs. It's really the latest version of the labor standards that historically the federal government has attached to its spending and contracting programs. It really is the principle that when the government spends money to create jobs, it ought to lead by example, and that employers who are electing to seek taxpayer funded benefits can fairly and appropriately be asked to meet certain quality standards in return.

So this movement began by some measure in Baltimore in 1994, which passed the first of these local living wage laws for businesses that contracted with the city. And then these ordinances were replicated very quickly across the United States, so that within the next ten years there were more than 150 of them. Later, in 2007, Maryland adopted a similar policy for state contracting. But they really became a very common feature of the local policy landscape, and it's only a slight exaggeration to say in really bluish or purplish states most major cities adopted them, and actually in many of the red states there were campaigns for them. In some cases more conservative state legislatures banned such policies, for example in states such as Texas. But really they became a very robust movement for about 10 or 15 years.

In broad, stylized terms, there are really three categories of publicly subsidized jobs that these policies covered. And the first and most basic were jobs created by employers that contracted with local governments. And these were businesses that were contracting to provide the outsourced services that local governments need to run, so the janitors and security guards that might clean the city hall, or the workers that might maintain public parks, or often there were recycling programs run by municipalities
that were staffed by outsourced contract workers. Laundry workers are another segment where there’s extensive privatization.

And the general experience with these policies has been that they’ve raised wages for a relatively smallish segment of the workforce, because the labor force employed by local contractors in any municipal labor market is actually relatively quite small. There’s been a lot of helpful evidence—I think Ken Jacobs will go into some of the research, much of which his shop has really spearheaded, showing that they’ve been beneficial in stabilizing the workforces that provide this outsourced municipal work, often reducing worker turnover and improving service quality.

And the cost impact, by and large, has been really quite modest. And the general understanding for why this is (1) that the prevailing market wages for many of these jobs were somewhat below the mandated living wage, but not so much below, and (2) that not 100 percent of the cost of these higher wages ended up being passed back to the government. Some portion of it was absorbed by employers, and some portion was offset by some efficiency and productivity gains. So by and large there’s probably some modest cost impact, but it’s really been quite small.

So this segment of the living wage movement, these living wage ordinances for local procurement, are really analogs to the Executive Order proposal that will be discussed in greater detail in the afternoon panel, which would propose establishing a living wage incentive system for employers that contract with the federal government.

The second broad category of local living wage policies that sort of extends beyond what’s being proposed currently in this high road Executive Order are the local living wage policies that apply to caregiver jobs. And this has been one of the areas where, I think, local living wage policies have had perhaps the greatest impact in very, very substantially changing labor standards. The jobs covered have been chiefly home health care worker jobs and in some cases childcare worker jobs. These are some of the lowest paying jobs in the economy and also some of the fastest growing occupations. I think two of the top three or four fast growing occupations are home care jobs. These are a factor of the aging population. And as for home care, a huge segment of the workforce is effectively government-subsidized through the Medicaid program. It’s the vehicle by which the bulk of low and middle-income Americans receive long-term care.

In many states, the way our local governments come in is in some states, or a number of them, local cities and counties play a role in administering the Medicaid home care program. Local governments contract with private providers of various sorts to provide this care to elderly and disabled local residents. And these were a category of locally subsidized jobs that paid very, very low wages, typically a dollar more than the minimum wage, and typically did not offer health benefits.
Local living wage policies were extended to them, but the places where this was done most extensively were in California and in New York State. And in California this occurred in conjunction with the policy reform involved with organizing public authorities to organize previously independent contractor home care workers under an employer of record system, so that they could unionize for the first time. So the combination of establishment of these public authorities and then the application of living wage policies to some of these public authorities, because they were part of the municipal government system, resulted in very, very substantial wage gains from the workers who were making in the 7's or 8 dollars an hour, jumping to 10 or 12 dollars an hour. I can't remember the precise figure in California. There were similar gains in New York. There's really, unfortunately, been a very substantial erosion in this with the California budget crisis and with the Medicaid budgets in crisis all across the country. But it's been a very positive model to tackle the problem of poverty wages in this key sector.

The way living wage laws function in this sector is actually complicated because while these jobs are contracted by local governments, the financing for them is actually not controlled by the local governments; it's by and large controlled by the state governments under the Medicaid program. So these local living wage policies played more of a catalyst role as sort of a policy conversation with the state governments. But they really did help play a key role in translating into policy gains. So they are a second area where the living wage model has been used successfully by municipalities and one that is very ripe for federal replication.

The third broad category is around economic development programs. These are programs where local governments attempt to attract or retain employment in their localities by typically providing Tax Increment Financing ("TIF") benefits, tax breaks, sometimes direct grants, sometimes providing infrastructure improvements for employers proposing to relocate there. And, as with contracting, it's an area where local government spending is creating poverty jobs, not so much in the construction jobs or sometimes the white collar jobs that may be created, but through the service jobs, the retail jobs, the hotel jobs that typically are created in local developments.

Many living wage laws nominally apply to economic development programs, but because of a variety of loopholes and limitations, in practice the impact hasn't been that substantial. However, in more recent years we've seen a movement to extend living wage standards to these local economic development projects, first through the community benefits agreements, where on a project by project basis activists in local governments have negotiated fair wage standards, living wages and prevailing wages for development projects, and Julian Gross is one of the
national leaders on that. And then more recently, localities in the past few years have started to institutionalize these standards with living wage and prevailing wage standards for their economic development programs. Los Angeles has done this. Pittsburgh has passed a sweeping measure. There are proposals now, despite the recession, in New York and in Chicago to do so. So this is another area of success where the living wage model’s been used successfully by localities and one that, I think, is really appropriate for replication at the federal level.

It would work differently at the federal level because the federal government is not directly involved in subsidizing local economic development the way localities are. As Phillis explained, instead it’s typically the federal government through grant-in-aid programs and tax credit programs, grants, subsidies to state and local governments that, in turn, finance economic development and jobs. So one way that this model could be replicated at the federal government is by establishing fair wage standards and having them flow down to the state and local grant-in-aid programs that the federal government extends to state and local governments. And, as Phillis noted, for decades construction prevailing wage standards have flowed down with federal grant-in-aid monies, but for non-construction jobs, for low wage service jobs, there are no standards. So it’s a really significant gap in our federal labor standards system and one where the experiences of state and local governments with living wage laws are instructive.

I think one of the most useful lessons of the living wage movement and this local living wage activism has been on a sort of political and messaging level. This movement has been one of the most successful and robust policy reform movements that the progressives have had for the last 10 or 15 years. It’s really swept the country. It’s had very broad popular and populist appeal. You know, the notion that the government should be leveraging federal spending to create good jobs. The opposition typically has had to, you know, fall back to the position that living wage sounds attractive but it’s not workable for X, Y, or Z reasons. But it really has been something that has worked for progressives. And, I think, fast forwarding to where we are now with this proposed Executive Order this Executive Order should really be a wildly popular thing. It’s the government trying to ensure that when the government invests taxpayer funding, we create good jobs. And I think partly because there has not been a broad-based grassroots campaign yet of the sort that there should be, there’s been very confused messaging in the media. Some of the opponents are trying to characterize it as some sort of favor for organized labor, despite the fact that the overall majority of workers who would be affected by it are non-union, low wage service workers. And I think we really need to recapture the framing and the sort of policy conversation around this proposal, both to win it, but and because there are a whole lot more things
along these lines that we need the federal government to be doing, and it by rights should be as popular as cracking down on Wall Street excess. It’s something that’s not just smart policy and the right thing to do, but it should be really popular with the public. And we need to learn from our experience with the living wage movement to make that happen.

So I’ll break off here and look forward to questions and answers later. Thanks very much. [applause]

Tsedeye Gebreselassie:²³ Hi. My name is Tsedeye. I’m a staff attorney at the National Employment Law Project, and I am going to talk briefly about some of the state and local contracting policies beyond living wage that have been adopted over the last 15-20 years, and talk about some of the goals, which have obviously been to improve job standards for low wage workers. But beyond that, some of the goals for the state and local contracting process as a whole, which is to deliver tangible benefits to governments when they spend taxpayer dollars, and these are some benefits that include better quality services, increasing the number of good companies that bid on projects, and using agency resources in an efficient and targeted manner. So I wanted to bring up some of those after I survey some of the other policies that are out there because I think they’re important benefits for the federal government to consider when it thinks about how to reform its federal procurement process.

Paul talked about the living wage laws. I just wanted to focus on a couple of other laws. Many are surveyed in the report that’s out at the front table. But I just wanted to kind of highlight a few.

There’s a broad category of laws. As Lynn had referred to earlier today, of the responsible contracting or responsible bidder laws on the state and local levels, many focused on the construction industry but basically wanted to avoid contracting with repeat and significant lawbreakers that waste taxpayer money. And they take different forms. One of the variants is laws that require bidders to prequalify before they’re allowed to bid on a government contract. So that means that the government will do a front-end responsibility review before bidders are even allowed to bid. So they’ll look at their past performance history and see how they’ve done on previous projects, previous contracts, to see if they’ve actually completed them on time and on budget. But, beyond that, they’ll look at their legal compliance history, so they’ll see, has this contractor actually paid the prevailing wages that it’s required to pay under state and federal law? Has it followed other workplace laws in the past? And, based on their assessment, they’ll see, okay, is this a business that we want to be able to bid on our government work?
Kind of in that category are some really interesting laws that Phillis and others have been working on that try to address the problem of misclassification of workers. Misclassification is where unscrupulous employers will misclassify their workers as independent contractors rather than employees. And so when they do this, they get two things. One is that they get to avoid a lot of payroll taxes, so they don’t have to pay unemployment insurance, Social Security, Workers Compensation, things like that. They also get to escape liability under basic workplace protections like minimum wage when they say that their workers aren’t employees. So there are a variety of responsible contractor laws that prohibit contractors from doing this, and if it’s found that they have done this after they’ve gotten a project, then there are a variety of remedies that can include disbarring them from ever competing for a project again.

So those are some of the responsible contracting policies, and there are many, many more of them out there. In terms of wage standards, Paul discussed living wage for service workers. Earlier, Phillis talked about prevailing wages for construction workers. Recently, there’s also been on the state and local level prevailing wage laws that are actually being extended to service jobs, the rationale being that when the government contracts, they shouldn’t drive down at least what the market already pays. And so these laws, prevailing wage laws for service employees, are often targeted in industries and cities where the prevailing wage law would be higher than the living wage law. For example, in areas of the country and in occupations where there might be so much union density that the union wage is essentially the prevailing wage. So we’ve seen prevailing wage laws like this in New Jersey, Connecticut, Pennsylvania, and New York City for building service workers. And I’m sure that there are more out there.

Another interesting way that governments have tried to raise workplace standards for workers on contracted through something called best value contracting, which is—the theory behind this type of contracting is, rather than having the job standard be a mandate, have it be a plus factor in the contractor selection process. And the rationale here is that best value doesn’t necessarily mean the contractor that submits the lowest bid. There are lots of other non-cost factors that are relevant in determining which company offers the best value to the government.

An interesting example that I thought would be helpful to talk about is the City of El Paso, Texas. They have a contracting system where, for service contracts, a company can get up to 100 points when it submits a bid. And up to 10 of those points are awarded if the company provides health care to its employees. So it’s not a mandate, but it’s a plus factor if you provide health care to your employees. The price of the bid still accounts for the majority of the points, but when I spoke to procurement officials
down there, they said that there had been several times where a company submitting the lowest bid actually got edged out by a company that submitted a slightly higher bid, but that provided better health care to its workers. So it’s proven to be a great way to incentivize employers to provide health insurance and other benefits to their workers.

There are many, many more but I know there are other really awesome people that are going to speak, so I just wanted to flag quickly that all of these state and local contracting policies are basically getting at the same thing, that yes, it’s important to raise job standards for workers, and that’s probably what we all care about the most. But there also are concrete benefits to the government with high road contracting.

So on the prequalification laws, the agencies that I’ve spoken to uniformly say that it saves them time and money on the back end when they do a front end responsibility screening because then they don’t have to spend time trying to kick bad contractors off of projects when the contractor builds a school a building and the roof falls down, or something like that, which was actually a real-life scenario.

On misclassification, a huge amount of state and federal tax revenue is lost when companies misclassify their workers and evade payroll taxes. And in terms of services, Ken will talk about all of the great research that he’s done. But, in short, workers that get paid better do a better job, and there’s less turnover and greater productivity. This is what governments seem to care about the most. There’s greater competition for these contracts when you have high road contracting policies. Paul referenced the State of Maryland, which passed a living wage law back in 2007 for their state contracts. They did an assessment of the law a year later, and they found that the average number of bidders increased by 30 percent, which was amazing. And they interviewed some of the bidders, and they said, yeah, we never bid before, but we’re bidding now because now we know we’re not going to be competing with a low road contractor. And the same thing can be said of prequalification laws, especially on these big construction projects. It takes a lot of time and money and effort to put together a bid, to submit it, and why would you do that if you know that you’re going to compete with somebody who will always be able to rig the bidding process by misclassifying or by doing many other lawbreaking things. And so why go to that trouble? So what you end up with, if you don’t have that type of rigorous prescreening process, is you have a bunch of low road contractors competing with each other, and the end result is something that’s bad for the taxpayers and obviously bad for the workers.

So just to wrap up, I think that these are really concrete benefits that the federal government should think about when assessing how to reform the federal contracting process. The focus can’t just be on the cheapest bid, as everybody’s been talking about. It has to consider some of these
concrete benefits for taxpayers. I mean we hope and we know that they care about workers, but if they want to be thinking just about the benefits to the government, then there are a lot of them. [applause]

Julian Gross: Hi. I want to join the chorus of thanks to everybody for the Journal for putting all this together. It’s great to see all these colleagues that sometimes I only see on the phone, and a lot of great minds in this room, so I’m really interested in hearing about all this stuff, and a nice excuse to be back into the classroom where I took Contracts Law like 18 years ago. [laughter] And sort of cower in front of Mel Eisenberg’s towering intellect. I also learned about the dormant commerce clause and other really boring aspects—that was foreshadowing, because you’re going to learn more about the dormant commerce clause in about 7 minutes. [laughers] So 15 minutes is a lot of stuff I want to get through. So I’m going to skip this slide. If you want to know about my organization, come and talk to me and I’ll hand you a boring brochure. [laughter]

Going on to the next one. What I’m going to be talking about is mostly local efforts around labor standards and other policy goals on publicly supported construction projects. The most obvious thing we’re talking about is public works, but one thing that people don’t usually think of is labor procurement, projects that are public-private partnerships, like redevelopment projects. There are a great number of ways that the public subsidizes land use development, that is, large private developers building neighborhoods. Tax credits are one of them. Building infrastructure at great expense to the public to support private development is another one. So there’s been a lot of efforts—Paul mentioned community benefits agreements—that community and labor have had to engage with the land use planning process and to weigh in on a range of policy issues when the government is supporting these big private projects that have incredible ramifications for the neighborhoods, obviously a huge leverage factor for the public dollars and the private dollars involved, and major public hooks into these projects that generate huge numbers of jobs, particularly construction jobs.

So there are a lot of policies, and there has been a lot of policy focus on how you define subsidy for those projects. So some of the different things I’ve mentioned, there’s questions about that. One thing to note: even though this is the land use area, all these subsidies take the governmental involvement outside the realm of straight land use regulation. So we’re still talking about procurement to some degree, or some sort of voluntary contractual relationship between the private parties, or a chain of

contractual relationships. We’re not talking about the local government using its police powers just to regulate. That’s a different conference, and we could talk about takings and all that stuff, but you don’t have to worry about that stuff here because it’s all contractual basically.

So one other thing on the interest of these projects. I’m going to be talking about how it can work in construction, but this also would have equal validity when you’re talking about service contracts and targeted hiring in those areas and labor standards in those areas as well.

I should note Paul’s right that the federal government is usually not involved in these big projects. There is one hook, though, that the federal government has into a lot of local projects, and that’s the HUD §108 loan guarantees, which a lot of local projects do receive, and that has always been interpreted by HUD as triggering its §3 requirements. §3 is a targeted hiring and local contracting requirement that is intermittently enforced, but is pretty good on the books in certain ways, and ripe for regulatory reform by this new administration.

So I wanted to mention some of the challenges of dealing with this industry going back to publicly-funded construction. Huge amounts of money are at stake, so everybody’s very interested in anything that’s going to shift around these dollars. There is a history of corruption in the industry, which leads to it being heavily regulated in a lot of ways. There’s also a history of contention among the many parties involved, probably due to the amounts of money, and it’s a super complex industry as well.

It’s so complex that it gets its own slide. [laughter] Just on complexity. A lot of these factors might be obvious, but really when you’re doing policy in this area, all these things come into play at some point. There’s multiple tiers of contractors. That leads, sticking with construction, to a very long chain. Even if it’s a public works project, you have the funding entity, which is hiring the contractor. Maybe they received money from the state, which received money from the federal government. The contracts and grant agreements flow down that way before the contractor’s even hired. Then a prime is hired. Then that prime is hiring subs. Then those subs are hiring second-tier subs, etc. And because this is all contractual, not regulatory, any policy objectives that any entity has along the way have to flow down that long chain of contracts. This leads to serious challenges, legally and practically, when it comes to enforcement, and requires a lot of effort on the drafting of language about how these things are going to flow down or who’s actually responsible at different stages for doing what.

So there’s the multiple tiers of contractors. There are many different types of bidding processes. Even if you don’t get into the ones that people think advance labor standards, like prequalification and best value. But
there's just a lot of different processes involved in how these contracts are awarded.

There are various practices in the union and non-union segments of the industry in terms of who gets hired and how benefits work. And even just within the union side there are various trades. They've all got different hiring halls. They all have different rules for how people get referred out to the jobs. They may all have different apprenticeship programs. And those programs have different rules about how people get into those programs and how people progress through those programs and get referred out to jobs there. So on a really big public construction project, there may be 30 or 40 trades involved, each of which has different rules, each of which has its own contractual relationships with its contractors that are going to work on the job, and all those training programs involved too. So this is a very complex web of relevant contractual relationships and real world practices.

Certain aspects of this industry are heavily regulated. Obviously the contract awards in the bidding process, because of the history of corruption and the huge amounts of money at stake, are heavily regulated. Apprenticeships are also heavily regulated. There are many different systems. There's an overarching federal law that regulates admissions and progress through apprenticeship programs. And then many states have set up their own systems and are allowed to regulate it on a state by state basis.

The overarching point of the regulation of apprenticeship programs is to address the history of discrimination over the decades in admission to and progress through them. So that's the thrust of the regulations. But they put very clear limits on how people can get into those programs, which have to be dealt with if you're trying to change that and target those slots.

Then you've got multiple policy goals here regarding contracting with MBE and WBE issues, also small and local businesses. The various hiring goals, some of which we'll talk about, goals of how you want people trained to make sure they're being tracked into middle class construction careers, and QA for quality assurance because at the end of the day in construction, you are building something that has to work and has to not be crazily expensive. And there's a lot of litigation in this area. So that's why this is such a challenge.

The goal that a lot of very effective coalitions of advocates have settled on is an overarching high road construction approach, or a construction careers approach when you're talking about workers. The various goals of that approach are job quality, measures that ensure that workers enjoy decent wages and benefits, are well trained, healthy and safe on the job, and the job and the training involved in the job is advancing a pathway into middle class construction careers. That last point is really what accounts for the huge amount of effort and interest in advocacy communities and poverty-fighting communities in this industry, because it's one of the few
paths to a truly middle class career for someone without a college degree, and as much as anti-poverty advocates like to bash the building trades, the building trades are the path that leads to that middle class career for the most part in this industry.

Targeted hiring is the other part that's very obvious here. Measures to try to ensure that disadvantaged and underrepresented populations can be part of this program. So people are probably pretty familiar with the long history of controversy between community advocates and building trades unions about access and who's getting hired, because these jobs are so valuable and because they're publicly supported.

Quality assurance—again, that's to make sure that the construction work is performed at high standards and at a reasonable cost to the taxpayer.

So the approaches that advance these goals could probably take up a multi-day conference. I guess they regularly do take up multi-day conferences. But we're going to try to do it all in what's left of my 15 minutes here.

So first, the job quality measures that are commonly advocated for—there's been a lot of talk already about prevailing wage requirements, federal, state, and even local entities—Phillis mentioned little Davis-Bacon acts in many states. Local governments can also require prevailing wages. A typical situation—well, I guess it's not that typical, but when it happens, a local entity says when we subsidize a project or when we run a public works project over this size, all the contracts will have to comply with the state prevailing wage law. Then the requirements are different for each job classification, and a key factor that I'm not sure has been mentioned today yet is that the apprentices that are in these certified apprenticeship programs are allowed to get a lower wage than the journeyman worker level. But if you're an employer, probably a non-union employer, that doesn't hire people out of these certified apprenticeship programs, you have to pay all your workers at the higher level, no matter how junior they are. So that's a factor.

Tsedeye covered responsible contracting policies as well as prequalification. You know, those would sort of look at the same things, sort of a backwards looking assessment of the performance of the contractor. Prequalification is just something that you can't really argue with, but it's probably burdensome enough on the government to do it and you're only going to do it on really large projects.

Tsedeye also covered best value contracting, which is very appealing in concept. One very challenging aspect that some of our local advocates have found is that you still have to have the right people with the values that the program was set up for doing the assessing of the different contractors, because it is more burdensome, or more involved I should say, to assess the
job quality benefits of different contractors coming in, and it's not just “Here's your requirements, what's the lowest bid?” It's a whole new sort of thing that contracting entities have to do, and it may not be something that the normal contract compliance officer thinks of as the main part of their job or their policy goal. So it's involved a lot of pressure and monitoring of the award system even after you have this new, arguably better, system in place.

Many people argue for apprenticeship utilization requirements. That really is only meaningful if you mean that employers are required to use certified apprenticeship programs, the ones that are registered and certified by the state or the federal government. There are a couple different ways to write this. You could look at just labor management programs, but you can have non-union programs too in it, so I guess there's legal issues and certainly political issues about how you frame that apprenticeship utilization requirement. But the important thing to remember in the real world is that about 95 percent of the good programs that actually graduate people and put people into career tracks are the union programs. So that's just how it is.

Project labor agreements (“PLA’s”) are—certainly from the building trades perspective and probably from the job quality perspective—the holy grail of the job quality measures. Non-union contractors can work on projects that have a PLA. But everyone agrees that it makes it harder, of course. They may have to change the way they do some things. Many of the things that have to change are things that we want them to change, like paying their workers a better wage. But it can be a politically testy area, for sure. So project labor agreements are also called project stabilization agreements. The essential thing the unions are offering the public entity there is that there aren't going to be any strikes in the project, no labor disruption, and the project then has to work under the terms of the relevant trades' collective bargaining agreements. So you could be a non-union contractor and do all that stuff and pay good benefits and wages, and everybody's happy except for you.

There are a bunch of legal issues that can come up with this. The main legal challenge to this kind of agreement would be NLRA preemption, and the Boston Harbor case made clear that in the context of a public work there's a market participant exception, a proprietary interest exception to the preemption doctrine. That comes up in a lot of areas of law and I think is getting more and more important with this increased focus on putting standards on public money.

There are a couple of other issues that could come up about whether you can do PLA's through a broad policy, or whether you have to weigh the

need for it on a project-by-project basis, so that’s going to need some development too.

One thing about PLA’s is that they are very important potentially in facilitating the targeted hiring outcomes that we’re going to talk about. When they do that, we call them community workforce agreements. That’s a term of art that is being developed. But potentially, for some reasons that I’m going to talk about, PLA’s can also impede targeted hiring to a certain degree.

All right. So targeted hiring, equitable access. Who are the targeted populations? That’s obviously your first consideration. Minority and women participation are a widely shared policy goal. There are legal issues there, of course. Federal constitutional issues, state constitutional issues in a lot of places. Low income individuals are often targeted. That’s a well-established, clearly legitimate governmental policy goal, and HUD §3, as I mentioned, establishes that to some degree on HUD funded projects or HUD subsidized projects. Another one that is also reflected in HUD §3 is residents of low income or high unemployment areas. That is a geographically-based preference, the idea being that the government has a strong policy interest in addressing geographically concentrated poverty. That’s the stated purpose behind a lot of the redevelopment projects.

There are, unfortunately, some legal issues that come up there. One is the dormant commerce clause, which everybody remembers, of course. Right? Remember, the commerce clause says the federal government can regulate interstate commerce. The dormant commerce clause is the idea that individual states and their subdivisions can’t interfere with interstate commerce. So the theory is that, with a geographic preference, you are making it harder for people to come from out of state and work on this construction site.

That theory that you’re making it harder also underlies the privileges and immunities clause, which is relevant in this area. The dormant clause has a market participant exception, so in the same circumstances you could have a PLA, or probably the same circumstances. If you’re spending public money, you don’t have to worry about dormant commerce clause. At this point, there’s no market exception in the case law for the privileges and immunities clause, but the barrier is not an absolute. And when you’re trying to advance a clearly legitimate policy goal, like revitalizing a low income urban neighborhood with high unemployment, I think you’d have a really good shot at fighting off a privileges and immunities challenge, and there are a lot of factors on how you could structure a program to make it most likely to do that.

Unfortunately, most government entities that do local hiring just say anyone in the jurisdiction gets the benefit of this preference, and that is disfavored. It doesn’t reflect any legitimate policy goal and looks much
more like you're balkanizing the economy, which is the point of these legal prohibitions in the first place.

There are a couple of other ways to target. You might look at individuals with barriers to employment, like previous criminal convictions or they're coming off welfare, individuals new to the trade, like new apprentices, or graduates of designated training programs that are good training programs.

All right. Then you've got a bunch of nuts and bolts about what the targeting mechanism is. I'm not going to go through these in detail, because they're boring and because I'm almost out of time.

Here is what is really the challenging thing. This is the overriding legal and practical problem that to me is the reason that the country is littered with local hiring policies or targeted hiring policies that are not enforced. It's the conflict between the targeted hiring measures that I skipped over back here, where the contractors have to take workers from certain places, or try to look for particular workers to staff the job, either finding them themselves or finding them from a designated training program, and they potentially have consequences if they don't do that. It's the conflict between that obligation that could be placed on a contractor and the collective bargaining agreement that a union contractor has with its building trade, where every aspect of how that contractor staffs the job is negotiated out in this contract that pre-exists the contract that the contractor wants to sign with the public entity. Few of these agreements allow for targeted hiring. Sometimes there's a little flexibility. This is very different than the permanent job setting, where none of the union agreements say anything about who gets hired in the first place usually.

This puts the contractors in a very tough position, because it means if they want to work on a job, they need to sign a contract that is in conflict with another contract they have. Public entities are also in a tough position because it means that if they want to be serious about enforcing this, they can't have union contractors on the job if the union contractors are going to be held to the terms of their collective bargaining agreements. And obviously you don't want to, and in many places probably can't, build these very big, complicated public projects without union contractors.

So the new, or newish approach that kind of cuts this knot and gets everything dealt with in one place and advances all of these policy goals is what we are calling community workforce agreements. That's just a PLA that included targeted hiring provisions. This advances all the goals of job quality and targeted hiring and quality assurance, because for all the same reasons PLA's have a high road level of contractor, you have better trained workers. Most importantly, it solves the legal problem of conflicting agreements, because the PLA, or community workforce agreement, by its own terms will override the terms of the collective bargaining agreements,
and all the unions that sign it and their contractors agree that for this job this is how hiring is going to be done. It also solves the political problem of community vs. labor. I guess solves might be an overstatement, but it’s a tool that offers something to the community jobs advocates and the building trades, which is the big conflict that bedevils this area and always has. It solves the contractors’ problem because they’re not signing conflicting agreements. It solves the public entity’s problem. It’s all very wonderful.

There are some really good examples now. They’ve been doing this in Los Angeles on a project-by-project basis for a while and are hitting some really great local hire numbers. Under this PLA rubric, the redevelopment agency passed a policy saying on almost all subsidized projects and projects on agency on land, they’re all going to be under a master community workforce agreement. And this essential political bargain of increased density and better provisions that help build density in the unionized segment of the construction industry, combined with better and real targeted hiring measures, was reflected at the national level too, in the broad coalition that supported the targeted hiring and PLA provision in the House version of the climate change bill. There, you had a range of anti-poverty advocates, some of the organizations here, and the National Building Trades Council all in support of a unified proposal that did all these different things. That actually got in the House side of the climate change bill. And in the magical world where we get a Senate side of the climate change bill it may become law.

Obviously there’s limitations here. One thing that this approach has not yet dealt with is how to deal with these small contractors, the MBE’s and WBE’s, many of whom don’t like working on project labor agreements, and many of whom are politically powerful in cities and aren’t shy about voicing that opinion. I think we all need to do some work on ways to make sure that all contractors can participate on these projects and have the support they need in reforming whatever they need to reform to do that.

Obviously this approach is only feasible where PLA’s are a possibility, legally, practically, and politically. And this is still a new strategy, so there are a bunch of projects that have gone on that have used this approach, but the result is still preliminary and it’s different in every city. And because it is a new strategy, these agreements are hard to negotiate.

PWF’s page on construction career opportunities, which you can get to from a big button on the home page, has just an immense amount of information about all of these different strategies, and a lot of examples, a lot of text you can read if you’re a type who likes to read policies that are really long. And then the AFL-CIO’s building trades departments of the National Building Trades Council just put out a guide to community workforce agreements that has a huge amount of information about all the places this has been used, and the results, and links to the actual text of
these things. And you can always get in touch with us at the Community Benefits Law Center. [applause]

Ken Jacobs: So, again, I want to start by thanking Liz and Darin for organizing this. And, as I’ve been sitting here, looking around the room and seeing all the faces of people who have done some of the most creative work in the country in developing these kinds of policies, we have the basis for an incredibly rich conversation here today. And recognizing that if I say anything that’s a mistake, there’s a lot of people in the room who will know it. [laughter]

The main rationales for labor standards proposals are, of course, the improvement of workers’ welfare and improving quality and timeliness of service. The two major objections that come out are that they raise costs to the public and result in reduced employment, “hurting” the very people they’re meant to protect. I was asked to talk about some of the empirical research that sheds light on these questions, and so I’m going to talk about some of the research on productivity, on cost and employment from labor standards laws, and then specifically draw on two case studies. One is a case study we did a number of years ago looking at the San Francisco International Airport quality standards program, which I’ll describe in a minute, and a proposed federal standard for school cafeteria workers. It is a new proposal, and this is the first public discussion, so I’ll be very interested also in hearing peoples’ feedback.

So in terms of the San Francisco quality standards program, it was established by the Airport Commission in early 2000. At the time, the airport was concerned about high turnover among employees in safety and security systems, that many people working multiple jobs. The Director of the Airport, John Martin, would say he’d find people asleep between jobs in the stairways, and there was real concern about what that meant for safety and security. To further complicate it, most of the low wage jobs were concentrated in airline service contracts, so we’re talking about baggage handlers, airport screeners, airport cleaners, etc. This was before the TSA went into effect. And these jobs were all contracted by the airlines, and the airport had no direct relationship with these firms.

Originally the conversation was around the ways living wage laws traditionally work, as conditions on contracts or leases. The airline has a contract with the airport, so you can make it a condition, then you can do subcontracts, covering anybody else who’s going to be hired on the premises. But some of these existing leases were quite long, so if that mechanism was used, it would be many years before the requirement actually went into effect for many of the workers.

26. Chair, UC Berkeley Labor Center.
And so what the airport did was to create a 30-day, month by month, renewable permit that any firm must have to operate at the airport. The first step was to say we're going to create a relationship with the airline contractors at the airport. They have to have these 30-day renewable permits. And then they put conditions on those permits, and said in order to have a permit and operate at the airport, if you affect safety and security in any way, then you need to meet certain conditions, which included wage standards, training standards, and other standards.

It started out in April, 2000, $9.00 an hour, $10.25 without benefits, and then went up after that. It's now at $12.33 with benefits and $13.58 without.

In terms of the impact on workers, a little less than 10,000 workers at SFO received pay increases after the policy was implemented. Importantly, that went beyond those who were directly required—and I think this gets into some of this conversation about, well, you can only reach a certain set of workers. So what happened was the retail establishments at the airport looked around and said, our workers are going to jump to these other jobs. We'd better match these rates if we want to hold onto our workers. So you had a wage push that went well beyond those firms that were immediately included.

Interestingly, in San Francisco most of the firms chose to provide health benefits. This wasn't true in LAX, and there's been some conversation about what the difference was between those two.

The cost of the pay increase was a little less than $43 million a year, which works out to about $1.42 per airline passenger if it had been fully passed on.

So what happened? The first thing that happened was turnover fell dramatically, an average of 34 percentage points. The greatest reduction was security screeners, where turnover fell from 95 percent to 19 percent over a 15-month period. Most of the people in the firms we were interviewing were the HR people, and for them this was huge. We had people saying they were now spending less staff time on the San Francisco International Airport than they were on Oakland across the Bay, which was a fraction of the size, because of the decrease in turnover.

Both employers and employees reported serious improvements in effort and performance. Employees reported more skills were required. They were putting more effort into the job. The pace of work had increased. Workers reported more stress on the job. Some of the typical comments were: “Before I didn’t worry about this job. If I wanted to leave, take off, I knew I’d always be hired back.” Before, they had trouble finding workers. I could skate. Now I’ve got to take my job more seriously.”

Now, you can evaluate whether or not that’s good, but it definitely changed peoples’ behavior, which gets into an important point. The general
supply and demand theory of labor treats labor as if it's like a widget. So you say, OK, supply and demand—if the cost goes up, then employers will hire fewer workers, because workers are just like any other product. Well, the reality is that the productivity of the worker changes based on how they're treated and what the job conditions are.

Employers reported very similar points, so it wasn't just what we were hearing from employees. Again, employee morale went up. Work performance improved. Service quality improved. Disciplinary issues went down, and grievance issues went down. And, of course, customer service improved.

So all of these findings about what happens to job and service quality match research on other labor standards policies. There's been a lot of great work done around prevailing wage. Because you have different prevailing wage laws in different states, and a number of states repealed their prevailing wage laws, it creates a set of natural experiments. What happens when prevailing wage has been repealed or has been added? And then you also have some school districts having prevailing wage laws and others not. So, again, you've got a lot of natural experiments to look at the impacts in this area. And repeal of prevailing wage laws are associated with an increase in cost overruns, shortage of skilled workers, decline in apprenticeship rates, and increase in injury rates. So, again, the measures around quality and performance, I think, are pretty robust across a number of these laws.

Another area where there's good evidence is in in-home supportive services, where higher wages lead to workers staying longer times with their consumers, which is associated with lower hospitalization rates and the ability of consumers to remain out of nursing homes for long periods of time. And in both the construction case and the home care case, there's a clear association as well with costs. And so the prevailing wage studies that are based on these natural experiments generally found prevailing wage has no or very small impact on the contracting or on the construction costs, and in home care it's highly suggestive of some cost savings by reducing people going into nursing homes.

So I want to turn now to—in thinking about some these cost aspects—a case going forward. SEIU asked us to do some work analyzing a proposal they have on school food service workers. The connection here is school cafeterias receive money from the federal government to pay for school lunches for lower income families. There are about 420,000 school food workers in K-12, increasingly contracted out. About 50,000 are now hired by contractors like Sodexho, Compass, and Aramark.

The proposal that SEIU developed was to put labor standards in the Child Nutrition Reauthorization Act. Part of that would be to, as Phillis raised earlier, look at an expansion of the Service Contract Act, where you
have federally related funding. They would: phase in the Service Contract Act for wage and benefit standards; mandate paid sick leave for school food service workers, which, on the face of it, makes a lot of sense; establish adequate training standards to ensure workers have skills they need; and require contracting transparency because it’s currently hard to know what’s going on in terms of outsourcing.

We were looking to measure the cost impacts in two ways. We studied nine states where the data was available and where there’s a high occurrence of contracting out. We profiled workers based on income demographics and family characteristics, and then measured the impact of the wage standards on turnover and on public costs. Just in terms of the public costs side of this, the question is often framed: if wages are raised, will it save money? Usually if you’re thinking internally within the firm, it won’t. Right? If raising wages would have saved money, most—if we assume employers are rational, and I know sometimes that’s a strong assumption—already would have done so. But often there are costs that are not directly within the firm itself and that are transferred onto society. One of those places is the use of public safety net programs. If the low bidder gets the low bid by paying low wages, and then those workers are relying on Food Stamps or Medicaid or other public safety net programs, the federal government is paying and state governments are paying anyway, but they’re just paying through another avenue. And so one of the things we’re looking at is measuring to what degree this plays out in this sector.

So, first, who are these workers? Not surprisingly, most are women. Median age is 47. Most are married and have children at home. The vast majority have a high school degree or less. They are twice as likely as the general working population to be below the poverty line or below twice the federal poverty line. The median wage is a little over $10 an hour. Median annual income from the job: $10,700.27 So these are part-time jobs, don’t go year-round, and pay very low wages. And I think the poverty statistics belie the assumption that they’re just married to somebody that is making more. It’s clear that this is a low income as well as low wage workforce.

If you look at the distribution of wages, there is heavy dependence on public safety net programs, not surprisingly. About 36 percent are on one public safety net program or another, compared to a little over 20 percent for the general working population in those states. Heaviest earned income tax credits, and then the health care programs and Food Stamps. So the average benefits per worker is about $1700 a year.

27. The analysis of school cafeteria workers and the impact of applying the Service Contract Act presented here were preliminary results. For an updated analysis see Ken Jacobs and Dave Graham-Squire, "Labor Standards for School Cafeteria Workers, Turnover and Public Program Utilization" in this volume.
If their wages were moved in line with Service Contract Act, it would increase wages by $3.62 an hour and increase earning by about $4500 a year, a very significant increase for that workforce.

In calculating the savings from this, we looked at two aspects. One is savings from reduced turnover. And here, for low wage workers, for every dollar increase we expect about a 5 to 7 percent decrease in turnover. So that translates, in this case, to a decrease of about 18 to 25 percent in turnover. Average replacement cost for a low wage worker is about 25 percent of annual salary. So that gives us a savings in the nine hundred to twelve hundred dollar range from decreased turnover. Savings in public programs would be, on average, $450. Between a little less than a third and 38 percent of the employer cost increases would be saved in one of these two avenues.

Now it's important to note that we only looked at a small fraction of the larger safety net programs. There are a number of safety net programs, including childcare, which is sizable, that we did not have the data to include in this analysis. We don’t take into account the new health care law, which will increase subsidies for lower income families. But I think this helps make a strong point that when we’re thinking about all of these federal procurement policies, how do you internalize those external costs? This represents, in terms of the public safety net programs, a key set of costs that should be internalized into the bidding process. And then, again, as we’re seen with turnover, there will be other savings as well from productivity increases.

Just a last quick point with one minute left on the employment impacts. Bill Lester, who’s sitting in the middle here, along with other colleagues at the Institute for Research on Labor and Employment, has been doing really phenomenal work analyzing the employment impacts of various labor standards policies. People should look at that work. Most of you are familiar with the Card and Krueger study, looking at the border between Pennsylvania and New Jersey, when you had a minimum wage increase in New Jersey, and what happened in the fast food restaurant industry. Bill and colleagues did a Card and Krueger on steroids, and took every single county in the United States where there has ever been a different minimum wage across the border, and did a similar analysis and came to very similar results, finding no measurable impact on employment. So this is important research to look at.

And I will leave it there. [applause]

Donna Levitt: First of all, thank you very much for giving me the opportunity to speak before you and being open-minded enough to invite a

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couple of non-lawyers. I’m going to speak about what it’s like to enforce some of the country’s most progressive labor laws. And Ken sort of set the table for me when he shared his study about the effects of the QSP program at the airport. I’ll speak about the San Francisco Office of Labor Standards Enforcement, the laws that we enforce, some of the on-the-ground experiences we’ve had, and some lessons learned that may be useful to inform this discussion about federal labor standards reform.

In the late ‘90s, a coalition of labor and community groups in San Francisco mobilized to wage a battle for living wage, and the first success was the question of the Quality Standards Program that Ken spoke about at the airport. Soon after that, the success spread city-wide with the enactment of our living wage laws, which are called the Minimum Compensation Ordinance ("MCO") and Health Care Accountability Ordinance ("HCAO"). Those laws have different formats. QSP at the airport, as Ken said, was a law that follows what’s a common national model, where there’s a wage that’s required with benefits, and then a higher wage that’s required without benefits.

MCO and HCAO, however, are two separate laws that apply on personal service contracts and leases at the airport and the port. At the airport the leases that are not behind security are covered now by MCO and HCAO.

The MCO wage is currently $11.54 an hour and includes paid time off and unpaid time off provisions. It’s been amended since its first enactment to be indexed to the Consumer Price Index. The HCAO, which I said is separate from the wage requirement, is a play or pay ordinance that requires contractors to either provide an insurance plan to their workers that meets the minimum standards set by the Department of Public Health, or pay $2.50 an hour to the City. It’s also been amended to index that in lieu of the cost of healthcare.

A note of interest is that the airport is phasing out the QSP program currently in favor of MCO and HCAO to provide consistency, but also because those employers who were not providing benefits and who were paying the higher wage, workers weren’t using that higher wage to buy insurance, and it wasn’t meeting the intent of the City to incentivize, to do everything possible to encourage employers to provide insurance.

At the same time that this battle for living wages in our city was being waged, the building trades unions were very frustrated with the lack of prevailing wage enforcement. And in 2000, the Office of Labor Standards Enforcement was created to enforce prevailing wage on construction contracts. That was our only duty. We now not only enforce prevailing wage...
wage, living wage, we have a sweat-free contracting ordinance that currently covers garments, linens, and uniforms that are purchased by the City. And of note, ours is the only sweat-free contracting ordinance that doesn’t require the City to take the low bid. In the bidding process bidders are evaluated for their sweat-free compliance. This mostly means the degree to which they disclose factory locations in their supply chain. And so there’s a point system established, taking that into consideration.

We also have prevailing wage laws, which I learned after listening to Phillis—we have our own little service contract act. Not only prevailing wage in public works construction contracts, but the City of San Francisco adopts a wages and benefits in various collective bargaining agreements a prevailing wage for janitorial work, for movers, for parking lot attendants, for the hauling of sludge, and for stage hands who work on City property.

Influenced by and built on the success of our contract laws, that same, or a similar labor and community coalition mobilized subsequent to that and took to the ballot both a city-wide minimum wage ordinance and a paid sick leave ordinance. So San Francisco is now one of three cities in the country with its own minimum wage. It’s $9.79 per hour. And the first in the country to require that all workers who work in San Francisco are entitled to paid sick leave. We had hoped that that would be spreading faster than it has [laughs].

Many of you know that we also have a health care security ordinance, the only employer spending mandate for health care. All employers with 20 or more employees must spend a certain amount per hour on their employees’ health care. This is currently being challenged, and the Supreme Court’s deciding whether to hear the case. But we’re enforcing it for the last two years. And, to tie things, our office has integrated enforcement of all these laws in our efforts. One thing of interest in the discussion about prevailing wage is, whereas everywhere else in the country a construction contractor on a public works job can choose to pay the fringe benefit package in cash rather than provide benefits, in San Francisco you actually have to provide health care benefits if you’re working on public works and you have more than 20 employees anywhere, not just on that job.

So some lessons learned is I was struck in Ann’s talk about how long it took to get enforcement language in anti-discrimination laws in what ended up to be 11246. And that’s really what we’ve found, is that enforcement is too often an afterthought. We’ve got great laws, but each time there have been challenges, and I think we’ve had well thought out enforcement plans in those laws but no consistent funding for enforcement. We originally had four investigators doing living wage compliance review, but we now have one because we’ve had to redirect all of those staffing resources to enforce the minimum wage ordinance. We have one person city-wide enforcing our great health care security ordinance, and we just redirected staff from
prevailing wage to health care because it’s a continual challenge to staff the work.

As Kim Bobo pointed out in her book on wage theft, like DOL, we’re short on resources and long on responsibilities. And we, like other enforcement agencies, are having to do more with less in a very challenging budget climate.

One thing that can help is technology. We now require that all public works contractors submit their weekly certified payroll records through a web-based system that automatically checks for underpayments by classification. But the most popular web-based system that does this is not the one we use, but it’s found to be attractive by many jurisdictions because, before the employer hits the “Send” button, it tells them what underpayments they are about to report. [laughter] Well, we want to know what the employer really paid [laughs].

So with technology, you have to be aware of shortcuts and remember that nothing takes the place of getting out of the office and actually getting on the job site to talk to workers and observe the work that they’re doing.

Some of the keys to our success have been—the biggest one is our staff. We are multilingual, culturally competent. Some of us are construction workers. Some of us were union or community organizers. Workers—we deal with some of the city’s most vulnerable, low wage workers, and they take a great risk when they cooperate with our office, and we work hard to earn their trust. We have strong collaborative relationships with community-based organizations. For the last two years we’ve actually had a contract with a collaboration of CBO’s to do education and outreach to low-wage immigrant workers about San Francisco’s labor laws. We have good relationships with the local labor movement and with other government agencies. And we do consistent messaging that we enforce the law regardless of immigration status. It’s on the back of our investigators’ business cards. It’s on our handouts. It’s emphasized on radio shows and presentations that we do.

I thought I’d give you a couple of examples of investigations that we’ve done recently. A painting contractor came to our attention from an investigator in another City department, a painting contractor who had done public works in the Bay Area for over 20 years. He talked to a worker who said, “I’m only getting $17.00 an hour, and I heard that I’m supposed to get more.” Yes, they had been reporting to the City that they paid over $45.00 an hour. And through a long campaign, where the two original workers left the country to go home to Mexico because they were fearful, we ended up with affidavits from ten workers. We worked with San Francisco Unified

School District, whose labor compliance person, Lynn Robertson, is here. We subpoenaed the real pay stub detail that showed in black and white they were getting $12 to $20 an hour. We subpoenaed the real bank records that showed cancelled checks that were completely different than the ones that had been turned in to us. And the contractor had to pay back wages, penalties, and is now debarred from doing work at either the School District or the City.

There’s a lot of talk lately about proactive enforcement, the challenges of trying to respond to complaints and do any proactive, targeted enforcement, and I thought I’d give an example. The Teamsters Union came to us and said that Hertz at the airport had shuttle drivers who weren’t getting any health benefits, and they thought it was a violation of the HCAO, which it was. And it was on Hertz’s insistence that we audited all of the car rental agencies at the airport. We found every one of them in violation. [laughter] Which resulted in $1.2 million in fees to the Department of Public Health, $95,000 to the employees, and $45,000 in penalties to the City. All employees are now offered health insurance, and there’s a much more level playing field for those contractors.

In summary, it’s OLSE’s experience that strong labor standards and strong enforcement go hand in hand, or must go hand in hand, and are good for workers who get higher wages—increasing their spending power, that they pump back into the local economy—are a benefit to the contracting community, creating a fair bidding environment, and are good for the city, encouraging high quality work and less reliance on public health care and other government assistance programs. And thank you very much. [applause]

**LUNCHTIME REMARKS**

**Patricia Shiu:** Thank you. Thank you all very much. It’s really great to be back in California and Boalt, where I studied for the bar. I should have remembered where the bathroom was, but I didn’t. It’s been a long time. Anyway, thank you very much. I want to thank the symposium directors for inviting me to speak to today, and Ann O’Leary, for her comments about the current work and direction of the OFCCP. With the change of leadership, it is really important that we have meetings like this, so that we can come together to identify and discuss the critical employment issues of our day.

My message is really twofold, and I’ll say my two key things first because two of my dear colleagues are sitting in the back and they’ve got to go. It is a new day at the Department of Labor, and it is a new day at the

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32. Director, Office of Federal Contract Compliance Programs.
OFCCP. And my other key sentence usually comes a little later, but you’re going to hear it now: “It is a privilege and not a right to be a federal contractor.” Oh, yes—try to get that meaning across to federal contractors who have had a pass for the past eight years, and you see looks of shock and awe.

First, let me explain a little bit about what the OFCCP does. Many of you may already know. I really didn’t when I was approached about this job. We administer and enforce three laws that require equal employment opportunity and affirmative action by federal contractors and subcontractors. The Executive Order 11246, which prohibits discrimination on the basis of race, sex, religion, national origin, and color, §503 of the Rehab Act, which prohibits discrimination against persons with disabilities, and VEVRAA, which is the Vietnam Era Veterans Readjustment and Assistance Act, which prohibits discrimination against protected vets.

To place this within a historical context, the Executive Order was signed by President Lyndon Johnson in 1965, so we are celebrating this year our 45th anniversary. It was intended to prohibit discrimination in hiring and in all employment decisions. It applies to all non-exempt government contractors and subcontractors and federally assisted construction contracts and subcontracts in excess of $10,000. For those contractors and subcontractors that have a contract of $50,000 or more and 50 or more employees, they are required to develop a written affirmative action plan. And they are required to set forth specific and action-oriented efforts with respect to hiring and recruitment.

So what exactly does the OFCCP do? Essentially we do three sorts of things. We do enforcement. We do regulatory work. And we do technical assistance. We offer technical assistance to federal contractors and subcontractors to help them understand the regulatory requirements and review process. We conduct compliance evaluations and complaint investigations of federal contractors’ and subcontractors’ personnel policies and procedures. We have conciliated cases from contractors and subcontractors who are in violation of the law, and we monitor these contractors in fulfilling the terms of their agreements through periodic compliance reports.

We also have attempted to form linkages between contractors and the Department of Labor to assist them in actually finding people with disabilities, protected veterans, women, and ethnic or racial minorities, who

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can actually work on many of these jobs. That seems to be a real issue, that is, connecting federal contractors with workers. We also work closely with the Solicitor of Labor in enforcing cases. The ultimate sanction for violation of either the Executive Order, or any of the laws that we enforce, is debarment, and that is a measure that has not really been used by the Department of Labor, probably, since the late 1970's in the Harris Bank case. But it is the big ticket item, so to speak, in terms of federal contractors. We do seek other forms of relief, most specifically, back pay wages, interest, and reinstatement. We are beginning to, under my leadership, seek other sorts of things, such as policy changes, and the ever-important training and monitoring. Those of you who have litigated with me know those are my three big things when we settle cases.

The OFCCP has very close working relationships with other departmental agencies, such as the Department of Justice and the Equal Employment Opportunity Commission. And I really look forward to working with Jackie Berrien, the new Chair of the EEOC, and with Tom Perez, the Assistant Attorney General for Civil Rights at the Department of Justice. We have had ongoing discussions about our roles vis-à-vis one another, how we intend to speak with one voice for the federal government, and we are working to actually put together a federal civil rights agenda, which is something that hasn't been done among these agencies ever. So that's a really exciting part of my work.

Within the department, the OFCCP has very close working relationships with many of its sister agencies, including the Office of the Solicitor, the Women's Bureau, the Office of Disability Employment Policy, the Veterans' Employment and Training Service, the Wage and Hour Division, OSHA and the Department of Labor's policy office.

Apparently in the Department of Labor, apparently in the government, people didn't work together the way we work together as civil rights agencies and organizations. There was much more of a silo mentality. But now we are going to do things differently, and I think it's good that we are doing so, because we are working together as one team.

We have offices all over the country—six regional offices, in Chicago, San Francisco, Atlanta, New York, Denver, and Dallas; and 42 district offices. And now, with the President increasing our budget by 25 percent, we've gone from 600 employees to nearly 800, from an $80 million budget to $105 million budget. So our budget and our personnel are restored to the pre-2001 cuts. But we still have a lot of work that we are doing to both restore and transform the agency.

We have been focusing our resources, and we will be focusing our resources, on finding and resolving both systemic cases as well as
individual cases. We have adopted a strategy to prioritize enforcement resources by focusing on the worst offenders, those who are persistent and egregious violators. We encourage employers to engage in self-audits of their employment practices. This does not usually happen. And we attempt to maximize and leverage our resources to protect the greatest number of workers from discrimination. And that’s part of working together within our agency and also working with agencies outside the Department of Labor.

The bottom line is that federal dollars cannot be used to discriminate. Approximately 22 percent, and I think that’s a conservative figure, of the entire American workforce is employed by federal contractors. That is almost one in four workers. And the OFCCP oversees the employment rights of these workers. So my job is to bring the full force of the OFCCP and its resources to ensure that federal contractor employees are treated fairly, and to level the playing field for women, racial, religious, and ethnic minorities, protected vets, persons with disabilities, and others who are protected. The Department of Labor is committed to engaging in an ongoing dialogue with you and other stakeholders, to work with you so that Secretary Solis’s vision of good jobs for everyone is a reality for all of us.

To put this all in context, the Department has a very broad mandate and strategy. Let’s start with President Obama’s vision. President Obama’s vision for workers has essentially five key components: first, to expand lifelong training opportunities; second, to improve work and family balance; third, to restore labor standards, including workplace safety; fourth, to help protect middle class and working family incomes; and, finally, to protect retirement security.

President Obama holds the OFCPP and me and the rest of its administration to the highest ethical standards in order to create an open government that’s marked by transparency. It is that transparency and participation and collaboration which are really the three hallmarks of his administration. And it’s in that spirit that I come to you today to share our vision. Secretary Solis, I just have to tell you, just on a personal note—she is a wonderful, wonderful person. It is such a privilege and honor to work with somebody who has such a keen understanding of the plight of workers in America, who understands from her own personal perspective, as someone who comes from a large family, who had to work her way through school, she really understands the whole, the breadth of everything. So it really is a pleasure and an honor for me to work with her.

But her overarching priorities are really as follows: to reinvest and restructure workforce development; to build effective career ladders for at-

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risk youth and underserved populations; to develop an unemployment insurance system that provides workers with income support and job training opportunities that they are really going to need, so that if they lose a job they don't permanently fall out of the middle class; to support high growth industries by training the workers they need to promote green collar jobs, to expand retirement savings; to assure that workers get the wages they have earned, working in safe, healthy, and fair workplaces; and to assure that the door to opportunity is open to every American, regardless of gender, race, color, religion, national origin, veteran status, disability or other protected status.

So, we have these goals, but a word about these goals is in order. This administration, perhaps like none other in history, is significantly focused on measurable outcomes and measurable success. That is, we are measured not on the number of audits we conduct, not on the number of investigations, but on the effectiveness of those audits and the outcomes of those audits. So, in terms of results, this means more jobs, more good jobs that move people into the middle class, secure jobs, green jobs, jobs at safe and healthy workplaces, jobs where workers are actually paid their wages and overtime, jobs that help at-risk youth, and, finally, jobs that really are open to every American.

The OFCCP has four major goals: increasing workers' incomes and narrowing wage and income inequality; breaking down barriers to fair and diverse workplaces so that every worker's contribution is respected; helping workers who are in low wage jobs, or who are out of the labor market find a path into the middle class; and providing workers with a voice in the workplace.

Under my leadership, the OFCCP is examining how it conducts its audits, how it evaluates cases and how it can improve and update its protocols for conducting investigations and audits. The previous administration focused almost exclusively on blue collar systemic cases. There was little, if any, enforcement and monitoring of affirmative action plans. All of that will change. The OFCCP is committed to all dimensions of its mandate, including enforcement of individual cases as well as systemic cases, because viable and effective affirmative action plans are a critical component to the federal contractor workplace. They are a necessary tool to examine equal employment opportunities within the workplace, to identify potential discrimination before they become legal challenges, and to level the playing field for those to whom opportunity has been denied.

As I said, being a federal contractor is a privilege and not a right. And I really do mean that. With that privilege comes serious responsibilities, such as accurate record keeping, persistent and effective recruitment. Federal contractors should be prepared, when they enter into these
agreements, to have the tools, such as policies and procedures and protocols in place, tools necessary to comply with the conditions of their contracts. As I travel all around the country I tell my federal contractor stakeholders: “You have an accountant, don’t you, when you pay your taxes? This is as important—complying with the EEO is as important as doing the job in a good way.” And I tell them that we’re going to be watching.

One poor fellow—I think he was the 70th one who moaned to me that the record keeping requirements were burdensome. Well, this was like the 70th time, and I had just had it. And I said, “No, not really. Once you sign on the dotted line and you get this lucrative contract, you have agreed to provide records. Records are the life blood of the Department of Labor. That’s how we measure whether you’re living up to your end of the bargain.” After I chewed that poor guy out, I felt a little bad about it, but I didn’t get any more questions about record keeping. But that is the tone that I hear when I go around the country, “Affirmative action plans? Record keeping? Just give me the contract.”

The OFCCP also has a very ambitious regulatory agenda. We are examining §503 of the Rehabilitation Act, VEVRAA and the Affirmative Action regulations for construction contractors. And I welcome your input on all of these items. As I said, I am engaged in a series of web casts and town hall meetings across the country to hear from stakeholders with their ideas on how the regulations at OFCCP can be improved. This is somewhat of a new strategy. Generally what happens with agencies is they just issue a notice of proposed rule making, and then there are comments. But because the OFCCP has not engaged in much community nor worker-based outreach in a very long time, I thought it would be good to hear what people had to say about these issues, so that we could incorporate suggestions before we actually put pen to paper.

So we had many, many meetings with stakeholders, and many of them had really wonderful ideas, not only on what we ought to be thinking about with respect to the regulations, but also with respect to ways we can improve OFCCP that don’t even require regulatory changes. Of course, everybody will have the opportunity to submit written comments once the regs are published. And we do, of course, welcome your comments on those as well. In particular, we are really looking to strengthen the affirmative action provisions of the three laws we enforce, so that they become meaningful and enforceable.

As the Director of the OFCCP, I think it’s important for you to understand what I value about the importance of work to an individual and

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41. 48 C.F.R. §§ 52.222.23-.27 (1999).
to the fabric of society. I have a deep and abiding belief in the importance of good jobs for an individual’s sense of self-worth and integrity and financial independence. I understand the issues that face the most impoverished in our society and the working poor and their families. And I realize the extraordinary toll that unemployment has taken on our communities. And we are here—the Department of Labor is here—to create jobs. And it has created thousands and thousands of jobs with much of that ARRA money and other money all across the country. While there are many pieces to the dilemma that our society faces today, including affordable health care, which the President and the administration worked tirelessly, creating jobs is one of the most important priorities. Jobs. Good jobs. Green jobs. Well-paying jobs. Secure jobs. Jobs with benefits. And we can start now by making sure that there are jobs for everyone and not just for a few of us. We really have a unique opportunity. It is a historic moment, to realize the mission of the OFCCP, and I look forward to working closely with all of you in our quest to bring a renewed commitment to workers and their families. Thank you. [Applause]

PANEL THREE

David Madland: 42 Thank you all, and, like all the other panelists, I really do want to thank our hosts for having us and doing all the work for pulling this together because I really do think this is an interesting and important panel, and it’s a topic that doesn’t get the attention it deserves. So, thank you all for having me.

In my presentation, I want to make four main points. I’m going to talk about the scope of the problem, how much workers are harmed by the current system of federal procurements. I’m going to talk about the impact this has on taxpayers. Then I’ll talk a little bit about the success of previous efforts at reforming contracting, and last I’m going to talk about the outlines of our proposal that we’ve been pushing, which we call the High Road Contracting Proposal, 43 and which we’ve been pushing for as an executive order at the federal level.

Some of the points I’m going to make, a few of our previous panelists have touched on. So I won’t go into any of the details that previous panelists have covered. I won’t bore you with the same details, but I might repeat some of the points because I think it’s an important setting of the context that builds towards this federal initiative that we’ve been working on.

42. Director of the American Worker Project at the Center for American Progress Action Fund.
So, first, what’s the problem? How big is it? What do we know? Well, actually Patricia Shiu was just talking about how the data is really bad. In terms of enforcing Executive Order 11246, she was explaining how bad the data was. But really it’s a systematic problem in federal contracting. We don’t even know how many workers are contracting for the federal government. The government doesn’t know, it doesn’t keep data, and it certainly doesn’t release data for people like me to figure it out. So there’s a lot we don’t know. But of the data we do have, a lot points in the same direction: that there’s a pretty widespread problem.

So, for example, estimates from the Economic Policy Institute, which is a Washington, DC think-tank, indicate that about 20 percent of all federally contracted workers earn poverty level wages, and often don’t receive benefits. That means 1 in 5 workers on a federal contract don’t earn enough to keep a family of four out of poverty. But other scholars looking at this issue actually find significantly higher problem. Paul Light, who’s a professor at NYU, looks at service contracts, so just one segment of federal contracting. He estimates that 80 percent of service contractors earn poor wages.

Then, we also have some evidence from several military apparel contractors, and they found workers earning $5.50, basically the minimum wage from a couple years ago. They also found about 50 to 80 percent of the workers at the factories receive no health benefits, and none had a retirement plan.

The other kind of evidence we have that this is a problem comes from data published under the existing prevailing wage laws, Davis-Bacon, Service Contract Act, and Walsh-Healey. As Phillis mentioned earlier, these laws require publication of the prevailing wages. You can go on to the website, WDOL, and you can see what they are, and in many cases they’re really quite low, especially under Walsh-Healey, for good manufacturers, and that’s the minimum wage. For Service Contract Act and Davis-Bacon, you’re also supposed to get an additional benefit for the

prevailing health benefits, but with some frequency that benefit is worth zero dollars—that is, the prevailing benefit is nothing. So, we have evidence that there’s a pretty significant, widespread problem with low wages and benefits.

We also have evidence from the U.S. Government Accountability Office that workers are working in poor quality work environments, where the basic laws aren’t even being upheld. Unfortunately, they haven’t done very recent surveys, but when they’ve looked, they’ve found significant problems. So, for example, in 2004, they looked at Service Contract Act violations, when workers complained about Service Contract Act violations. They found that in more than 80 percent of the cases there were violations, and they found more than 20,000 individual violations where employers were, indeed, failing to pay minimum wages or benefits. They’ve also looked at NLRA violations, OSHA violations, and found the same thing: widespread violations. For OSHA violations, they looked at 260 federal contractors with 5,000 violations, and there they found that these are significant, serious kinds of violations. To give an example, 80—almost 90 percent—of OSHA violations were the kind that would put workers at serious risk of death, and in the vast majority of those cases the companies knew and knowingly violated the law. They did not just happen to have an accident.

The Brennan Center, a New York research organization, looked at prevailing wage laws there, and found that employers have almost no chance of being caught violating the law. So we have significant evidence that low wages and law violations are pretty common.

This is obviously bad for the workers, and I won’t belabor that point. But this harms taxpayers in several ways, and several of the panelists have pointed this out. As Ken Jacobs talked about, there are hidden costs, in the form of public subsidies through Medicaid, Food Stamps, etc., which taxpayers pick up. This also puts higher road companies at a competitive disadvantage, since, in effect, taxpayers are subsidizing their competitors.

Then there’s also a fair amount of research that shows that when companies cut corners with workplace laws or break those laws, they tend to cut corners with the product they provide the taxpayers. So basically, you break the law, you give a low quality product. As early as the 1980’s, HUD did research on this, and they found, quote, “a direct correlation between labor law violations and poor quality construction.” New York’s Fiscal Policy Institute found that contractors with workplace violations were more than five times as likely to have low performance ratings as those with no workplace violations.

The Project on Government Oversight, which is a DC good government organization that focuses heavily on contracting, maintains a list of the most wasteful contracting companies they find. They have the top 50 list, and about 70 percent of those companies have significant labor law violations.

And you might have heard some thing in the news more recently about U.S. embassies in Afghanistan. There are serious allegations about the quality of security that contractors are providing there, and the evidence that has been uncovered suggests that the poor security is in part because of the poor quality of jobs there. And I quote from some of the reports there. They’ve found: serious understaffing, bullying by management, petty corruption, abusive work conditions that threaten the security of the compound.

So, there are clear links that low-road contracting harms the taxpayers. The trick is that the executive branch has a fair amount of authority to distribute contracts, but one of the limits is that you have to promote economy and efficiency in contracting. There’s pretty wide latitude to what that means, but you need to show that you’re going to get better quality, lower cost goods. So, it’s key that we have this sort of significant base that shows that treating your workers poorly and paying them low wages imposes costs on government, and that fixing it can lead to more efficiency in contracting.

Now I’m going to talk a little bit about how some of the fixes that state and local governments and the federal government have attempted have proven effective. And Ann O’Leary mentioned Executive Order 11246 in her talk at the beginning, but I want to emphasize this point. The key thing is that these reforms can have a broad impact: not just on contracted workers, but across an entire workforce. Up to a quarter of the workforce works for companies that contract with the federal government. So you can get at a quarter of the workforce, plus any ripple effects. You really can significantly help structure the economy through contracting.

So, was Executive Order 11246 effective? Yes. The minority and female employment increased in compliant contractors much faster than in non-contractor establishments, 12 percent faster for black females, 3 percent faster for white females, 4 percent faster for black males, 8 percent faster for other minority males.

And Tsedeye talked a lot about the state and local examples of success. There are now hundreds of cities and one state with living wage laws, as well as responsible contractor initiatives across a number of states, and numerous prevailing wage laws. So these all provide models that we could think about adapting at the federal level.

I'm going to talk a little bit about the initiative that many of us in this room, but also many who aren't in this room, are pushing. First I'm going to talk about the wide group of us who are working on this issue. Along with the Center for American Progress and the National Employment Law Project and some labor unions, there are dozens of women's groups, particularly the National Partnership for Women and Families. There are also many good government groups, like the Project on Government Oversight. So there's a big base that sees the positive impacts these reforms could have.

What we're pushing for has two key elements. The first element is to limit the number of contracts that are awarded to companies that repeatedly violate the law. The second element is to use the contracting process to raise standards, to promote companies that already do pay higher wages and benefits to give them a leg up in the process.

Now, these two elements, setting the floor and then providing the incentives for companies to go up closer to the ceiling, they work in tandem, and neither one by itself is quite enough. You certainly want a floor, but minimum standards, well, they're just minimums. We want to find a way for companies to go above that floor. And as Pat was talking about in the last talk, the enforcement is crucial. How you enforce these standards is very important. One of the key ways we think about doing that is through some sort of centralized office, like Pat's office, that has experience in enforcing these kinds of orders.

So, the rest of my time I'm going to focus really on the first element: how you set the minimum bar for legal compliance. And then Fred, who's going to talk after me, is going to talk a little bit more about the details of the second element.

So how do you set the standard? As Lynn was highlighting in her presentation, this idea that you shouldn't be awarding contracts to companies that are persistent violators of the law, shouldn't be that controversial. But, unfortunately, it was. But it's not really new. It's something that's basically on the books already. You just have to do several steps to make it work. So, as Lynn was describing, the government is only supposed to contract with companies that have, quote, "a satisfactory record of integrity and business ethics." So, the first thing you have to do to set the bar that I'm talking about is clarify what that means, and that means persistent law violators don't get new contracts. And that's what the Clinton Contractor Responsibility Initiative did, or attempted to do, but was overturned before it really came into being. But that's not enough.

56. Id.
After you’ve clarified that there’s some level of standard that you’re going to look at for persistent law violations, you still need to do several other things. You need to have better data about companies’ past violations. You need to have good analysis of those violations, so you know when companies are really outliers. And, lastly, you need to have the public involved, and give the public access so they can shine some sunlight onto whether companies really are complying.

How you get better data about companies’ past violations? The 2009 Defense Authorization Bill requires the creation of a database to collect—in one place—contractors’ violations of the law. And the Obama administration just issued regulations trying to bring this database into being. This is a huge step forward. Huge. But, unfortunately, there are major problems with the database that make it woefully incomplete and inadequate for the task of judging whether a company is complying with the law or not. And I can highlight just a few of them, but I’m happy to go into more details if people really want to go there.

Just to give one of the problems, the dollar threshold for whether fines in the workplace even get reported in this database is $100,000. Lots of times, as you know, wage and hour violations aren’t going to rise to that level, so have no record in the database. Other problems I’ll just tick off real quick. Right now it’s all self-reporting. Companies decide what to report. Even though the government already collects similar information in many other places, such as with OSHA and wage and hour. You’d think they could populate it with that information, but that’s not the way it’s set up right now.

So, we need to actually get all legal violations in one database, so it’s in one useful place. Before, the data was in all sorts of other places, and it was far too much work for anyone to go through every existing government database to find this information. Then, once we get all the information there, you need to analyze it. Because you can imagine that all this is just noise. A company may have a hundred service contract violations. What does that mean? How do I interpret that? And right now the way the law is set up, the people who are supposed to interpret that are the contracting officers. These are the people who are making the decision on whether company X or company Y should be getting the contract. But they are not experts in all these bodies of law. So you need to provide a system where someone is providing analysis to these contracting officers, or even making the decision themselves. And we think you could either have the regulatory agency, or an enforcement agency, doing the analysis and saying, “No, this company’s really an outlier. They repeatedly violate the law, and most

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companies are able to comply with it." Or, you could have a centralized office doing that.

And the last element that I think we need in order to have real reform is for the public to have some ability to see what’s going on in the system. The fact that the database is not public at all is sort of silly because most of the information that’s in there is already public in plenty of other places.

As I said, there’s a big group of folks pushing for an executive order. There’s been a fair amount of press accounts in the past month or so, in the New York Times, the Wall Street Journal, the contracting trade press, indicating that the Obama administration is very seriously considering a proposal along the lines of what I’ve described to you. So, that’s heartening. But the administration has not commented publicly in any of these stories, so it’s a little bit hard to tell. They’re based on undisclosed leaks, I guess.

The strongest evidence we have that the administration is very seriously considering this proposal is from the Middle Class Task Force, which is a White House office, an inter-agency office that’s compiled of the Cabinet officials from labor, treasury, and so forth. About a month, a month and a half, maybe two months ago, they issued a report where they explained the kinds of initiatives they are going to push for in the next year to help support the middle class. And one of the proposals they discussed was a contracting reform very similar to what I’ve described here, with the two elements, and they said, quote, “We hope to do something along these lines soon.” Now, who knows exactly what soon means and what might be in it, but I guess what I want to convey is that these ideas are under very serious consideration and seem to have some probability of being enacted.

Thank you. [applause]

Fred Feinstein: I'm going to describe a little bit about the second piece of this proposal, which as David has described as the "plus factor," sometimes called the best value aspect of procurement policy. I should start by saying that you’ve heard this morning the basis of the genesis of this proposal. It comes out of the rich experience from states across the country over the last 10 or 15 years. The states really have been the laboratories here. All the concepts and ideas that we’ve been thinking about and considering come from that experience. And in fashioning the proposal to the administration, we’ve tried to rely heavily on that experience.

So what is the proposal? As has been said, once you get through the door and become an eligible contractor because you’re found to be

59. Senior Fellow, University of Maryland School of Public Policy. Former General Counsel of the National Labor Relations Board and Staff Director of the Labor-Management Relations Subcommittee of the US House of Representatives.
responsible, you’re in the source selection part of the process. This is terminology that we’ve learned over the course of developing these proposals. The first part is the responsibility factor. Are you a responsible contractor? This is the threshold to be eligible to even bid for the contract. Once you’ve met that criteria, or once you are deemed to be a responsible contractor, you’re in the source selection process. This is the process to determine which of the responsible contractors gets the contract. And, as Phillis and others have suggested, historically this was basically a low bid process... the lowest bidder gets the contract. And for all the reasons we’ve been hearing about today, that’s problematic.

The critical problem is that the taxpayer doesn’t get good value if low cost is the sole basis to award contracts. Anybody can just say, “I’m going to do this for less than anybody else,” but that process ignores numerous other factors—quality, experience, practices, and so forth. Nobody in the private sector, for example, would contract on that basis. And awareness of this problem is increasingly reflected in policies adopted by the states, and also on the federal level. I’m going to talk a little about some of the other things that have already begun to develop on the federal level, to inform the source selection so that the government is getting quality, getting value for the contract dollar. Changing low-bid contracting, of course, has the advantages that we’ve already been hearing about, of promoting better labor standards. And there are other values at work here. But that certainly is one of the central values that we’re talking about.

The second part of this proposal, that focuses on the source selection—who gets the contracts—basically gives credit for good employment practices. You get positive value for good employment standards. One way we’ve referred to it is that the prospective bidders on contracts get a score based on the quality of their employment practices, which is one part of what goes into the determination of the source selection.

So, what are the factors that we have suggested would be good employment policies? Let me describe the outlines of the proposal. You get credit for your employment practices up to a ceiling. We have proposed that good practices up to this level get positive credit. There is a ceiling because you have to protect against inflated bids. It can’t be that the more you pay, the better your score with no limit. You can’t just keep getting more and more credit. So, we’ve tried to establish a certain level, that is a good labor standard up to which you get positive value. So that’s one idea.

Another key concept, relevant to a lot of this conversation, is the importance of the ripple effect. We’re not just talking about what the prospective bidder is offering to pay or is committing to pay on the federal contract. To develop this employment score, we evaluate what that bidder pays its entire workforce, across the board—not just the contract workforce, but all of its workers. Some bidders on contracts are basically just federal
contractors, but many are not. Many have a portion of their business in federal contracts, but also a broader non-federal contract workforce. So in determining this employment score, you look at the entire range of employment benefits across the workforce of the bidder.

The proposal that we are urging is that this scoring process should apply to all federal contracts, all procurement. We have also discussed the possibility of making it less than that, and I'll come back to that idea later.

Another key concept is the very important enforcement conversation we've been having, and the problems of enforcement that have occurred on the state and local level. We've tried to address that. The proposal has various aspects to assure it's a proposal that will work, and will be enforceable. In other words, that the federal procurement workforce will actually be able to implement this. The notion is that enforcement should be a fairly mechanistic process. It doesn't require a lot of interpretation. And it doesn't require an already overburdened procurement workforce, the actual contract officers, to have to do anything more than they currently do.

As Lynn described, part of the pushback against the Clinton proposals came from the contracting community who said, "We can't do this. We can't figure out what this employment practice is and what that is. We can't do this evaluation. We can barely do what we're required to do now. You put this on us, and it's just not going to happen."

We've suggested the bidder simply has to fill out a form, about their employment practices, and they turn this over to a centralized entity, like the OFCCP, that simply takes this information and develops a score. So based on certain specific factors, they say, "Your employment score is 22, 85, 36, whatever." And this number is then passed along to the contracting officer. Currently, source selection decisions are made by evaluating each contractor and giving them a score. The new employment standards score would simply be mechanically placed into this process and given a weight, which could be 10 percent or 15 percent or 20 percent. All that the contracting officer has to do is add in another number when calculating the score. The contracting officer doesn't have to develop the employment practices number; that number is developed some place else in the centralized office.

We've also suggested that, like other federal programs, there be people in the agencies other than the contracting officers with the responsibility to oversee the implementation of this proposal. They would make sure that the number is getting communicated to the contracting officer, and that it's being properly applied. Someone would be responsible in each agency to make sure the program is being implemented. So it's the centralized authority that develops the number, and then someone in the agencies carries through on it.
It’s also important, as David has suggested, that there be mechanisms for stakeholder input, in both the determination of the responsibility factor and in its implementation. This is needed to make sure that implementation is happening in an appropriate way: that community groups, labor unions, and others have a means of communicating and suggesting how the program is working, how it isn’t working, when it’s being applied effectively and when it isn’t.

So what are the measures that form the basis of the employment standards score? There are lots of possibilities. We’ve suggested four. The first is wages, what the employer pays. This is an extrapolation of the living wage concept that we’ve heard a lot about today and is really one of the big success stories at the state and local level. We have suggested the Lower Living Standard Income Level, LLSIL, which is a number that the Department of Labor develops that approximates a living wage. An employer gets credit for wages up to that ceiling. The bidder that pays the minimum wage gets less credit than the bidder that pays something up to the living wage level.

The second measure is health care. A little bit harder to define than wages, and now we have health care reform to consider. Perhaps the new health care legislation makes it a little easier, or a little harder, I don’t know. But some measure of a minimum health coverage.

A third element is leave policies. Here we’ve suggested that perhaps the standard should be what the federal workforce gets for leave. The federal workforce has a generous leave program compared to the rest of the workforce. Another way to go here is closer to the average leave policy across the workforce.

And, finally, the fourth measure is pension coverage. Again, the measure would probably be a percentage of compensation. You can tie it to the average workforce coverage, or other possibilities, but the number developed would a percentage of compensation.

We also have talked about the possibility of applying the responsibility factors on the source selection side as well. By that, I mean that responsibility is a threshold to get in the door, but can also guide selection between eligible contractors. To simplify this, suppose that if you have 20 violations, you’re not eligible to bid on federal contracts. If you have 20, you’re out. But if you have 19, you’re in. Applying a responsibility factor to source selection might mean that the person with 19 violations doesn’t get as many points as the person with no violations. That’s something that has been discussed—that it’s possible to look at these responsibility factors twice—once you’ve met the minimum, the better your record is could also influence the source selection criteria.

Returning to enforcement, I want to re-emphasize that this is critical. As everyone has suggested, particularly Ann this morning, looking at
11246, history suggests the overriding importance of developing a system that actually gets enforced. The key elements of the enforcement mechanisms that we've suggested are that the contracting officer doesn't have to do anything other than to insert a number, that the number is developed in a centralized office like the OFCCP, and that someone in the agency oversees how it's being implemented.

Regarding the question about which federal contracts should be covered by such a policy, we've suggested that it should be all contracts. But given the experience that Lynn described during the Clinton administration, given the political pushback, and given issues of administration, it's obviously a possibility that something less than across-the-board coverage will be considered.

Over the course of time we've looked at this issue, there have been different ideas about how to implement these ideas, and I'll just suggest some of the obvious ones. You could make the proposal apply to certain kinds of contracts, to certain industries, to contracts that employ lower paid workers, so that there is a cutoff based on the typical wage compensation levels and other kinds of compensation levels in that industry. You could do it by agency—only contracts out of specific agency would be covered. I mention this because we have considered different possibilities to address some of the concerns that have been raised about cost. In an industry like high tech for example it's possible that labor standards aren't the problem and to make them go through this process perhaps isn't as efficient as figuring out other industries to prioritize. Our proposal is that it applies to all contracts, and we think we fashioned it in such a way that it should be doable across the board.

Let me talk just a few minutes about some of the arguments that we have put forward in support of this, and I know I'm repeating a lot of what people have said today and what David has just said. The key argument is quality and cost. You get better quality when you promote good contracting and good contracting policies. Good employment practices are directly related to contract performance, so this is a process that will lead to better performance. It also helps avoid hidden costs. We've done a lot of work on trying to quantify those costs. When workers are paid low wages, the government picks up the tab for significant social services costs, so we have been trying to quantify those hidden costs in a system that promotes low wage contractors.

The other point that we've tried to make is that this approach to contracting is consistent with developments in the policy arena in federal contracting over the last many years. Both CAP and NELP have developed reports which look at a wide range of non-cost factors that inform federal

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contracting decisions, including programs for veterans’ preferences, programs for small business preferences, minority contracting, and 11246.61 There’s the hub zones program which gives preference to contractors who come out of low income communities and serve such communities.

Some of the federal policies that look at non-cost factors are statutorily based, but some are based on executive orders or are regulatory-based. And they are based on some of the rationales that we’ve been talking about: that these policies get better value, as well as serve broader policy goals. So we are not talking about something that’s brand new, that’s never been considered before. It’s grounded in federal procurement policy and in policies that have been growing in the states over the course of the last many years.

Let me conclude with this point. One of the things we’ve had in mind as we’ve been developing and thinking about procurement reform is all of the reasons this makes sense apply not only to procurement policy, but also to the expenditure of other federal dollars—such as grant programs, or other assistance programs. Procurement might be the place to start, but once we see advancement in procurement policy, these ideas can be extended to the wide range of government spending programs. The rationale is the same. Thank you. [applause]

George Faraday:62 Thanks. It’s a real pleasure to be here again in Berkeley. I always feel jealous of anyone who lives in this area. We saved the legal issues, despite our location, for last, but we can’t postpone them any further. Scott and I divided our labor in terms of good news and bad news, and Scott was kind enough to give me the good news to deliver, which is that the President has considerable power to set standards for labor conditions, terms and conditions of employment, regarding federal contractors, but has very limited power to influence the labor relations of federal contractors. So, I’m going to talk about the first part of that.

The President’s authority to issue the kind of order that we’re looking for emanates from his powers under the Federal Property and Administrative Services Act of 1949,63 which I’m going to call the Procurement Act. And the overarching goal of that act is to provide for an economic and efficient system of procurement, and it specifically empowers the President to prescribe policies and directives that he considers necessary to carry out the act. In other words, policies and directives that promote economy and efficiency.

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The two key cases defining the scope of this authority are *Contractors Association of East Pennsylvania v. Shultz*\(^{64}\) from 1971, in the Third Circuit and *AFL-CIO v. Kahn*,\(^{65}\) DC Circuit, 1979. So actually the background on the *Contractors Association* case is kind of interesting, albeit slightly squalid. *Contractors Association* heard a challenge to the so-called Philadelphia Plan, which was an order issued by the Department of Labor pursuant to Executive Order 11246,\(^{66}\) which for the first time gave bite to the affirmative action aspect of 11246 in relation to construction. It set numerical goals for minority employment in certain construction trades in the Philadelphia area. So not only did the construction contractors protest, the building trades joined them. It had an immediate impact on their existing membership at the time. And the court upheld the order, and it almost in passing said that it was OK because there was a decent argument that removing barriers to the employment of minorities would expand the pool of available labor to the federal government. I think, without mentioning economy and efficiency, that essentially suggests that it was seeing the Order as promoting economy and efficiency. And it's worth pointing out that, if we imagine what the Chamber of Commerce would say if they were briefing this today, they would say that this is going to drive small business out of federal contracting, that it will raise costs, labor costs and compliance costs and so forth. Those arguments might even have some merit, but the court essentially was not interested. It said that the court accepts the President's argument that this is good for economy and efficiency because it expands the labor pool.\(^{67}\)

Then in 1979 the *AFL-CIO v. Kahn* case\(^{68}\), which Dean Edley referred to, considered a President Carter executive order\(^{69}\) which required federal contractors to abide by otherwise voluntary wage and price guidelines in order to be eligible for federal contracts. And the DC Circuit in that case set out the test that's since been used in these kinds of cases, asking whether there was "a sufficiently close nexus" between the policy and economy and efficiency in procurement. Which sounds like a somewhat demanding test, but in its application it has not been applied in a demanding fashion.\(^{70}\)

The court specifically acknowledged the possibility that in certain circumstances, the federal government would have to reject a low bid in order to comply with the Order, because if the low bidder didn't comply with their wage and price obligations, they'd be out of contention. But the

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68. *AFL-CIO*, 618 F.2d 784.
70. *AFL-CIO*, 618 F.2d at 793.
court accepted the President's argument that in the long term the restraint of inflation will likely have the effect of restraining federal procurement costs. So, again, a somewhat speculative argument was accepted.

Those are the two key cases, but subsequent cases have reiterated the degree of deference accorded to the President's judgment. The next one we get to is Chamber of Commerce v. Reich, which Scott will probably be talking about also in relation to an NLRA preemption claim, but I'm just going to talking about the Procurement Act issue. That case considered an order banning contractors who used permanent strike replacements in any of their work, federal or not. And the court observed that the President may consider factors that are, quote, "directed beyond the immediate quality and price of the goods and services purchased." In general, but not when it comes to labor relations issues.

Then another DC Circuit case, which is perhaps the boldest assertion of Presidential discretion, is UAW Labor Employment and Training Corporation v. Chao. This considered a challenge to the last President's executive order requiring federal contractors to post a notice, which I think has been mentioned, saying that workers do not have to join a union and do not have to pay dues for political purposes even if they are in a union. And so the court quotes, I believe in full, the rationale advanced for the order. I'm going to, if you'll humor me, read out the entire rationale at length. "When workers are better informed of their rights, including their rights under the federal labor laws, their productivity is enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." That's it, actually. So, as the court acknowledges, the link between the policy and economy and efficiency may seem attenuated, especially since unions already have to tell you that you don't have to join a union, etc., etc., indeed, one can with a straight face advance an argument claiming opposite effects or no effects at all. But that's OK, because it's a lenient standard, and we're not going to second-guess the President's judgment.

The most recent case on this issue is a Federal District Court decision from the Southern District of Maryland, considering the validity of the requirement (first from Bush and now from Obama) that federal contractors use the E-Verify system to verify the employment authorization of their workers. Again, not just the workers on their federal contracts; all their employees. And again, the court approved the government's argument. The government argued that, "Contractors that adopt rigorous employment

71. Id. at 792-93.
73. UAW Labor Emp't & Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. 2003).
eligibility confirmation practices are much less likely to face immigration enforcement actions because they are less likely to employ unauthorized workers and, therefore, they’re generally more effective and dependable sources.”

It’s perhaps a slightly better argument than the Beck notice argument, but it’s still pretty thin, considering the low level of immigration enforcement to date and the high levels of cost savings that generally follow from using unauthorized labor.

The court was also explicit in stating that the President doesn’t need to present any evidence of these assertions, so long as the argument is, quote, “reasonable and rational.” This seems to resemble the rational basis test in constitutional cases, or perhaps even something below rational basis—minimal rationality, something like that.

So I think we can distill several principles from these cases. First, when courts consider economy and efficiency and, indeed, when the Procurement Act discusses them, quality is relevant as well as price. So you can pursue economy and efficiency by improving quality of performance, or by reducing price, or by a mixture of both. But just because a policy hasn’t put down price doesn’t make it not economical and efficient.

Then, as you’ve seen, courts will defer to the President’s judgment as to what promotes economy and efficiency. And so far we haven’t really seen the limits of that deference. And the courts will do so even if there are strong counter-arguments, which have not been empirically rebutted or even answered.

So implicitly in this, and this is something which I think Ken referred to in a slightly different context, the courts will defer to the President’s judgment of economy and efficiency even if an orthodox conservative economist would say, “Well, if this is so great, why wouldn’t firms already be doing it?” Take, for instance, the Beck rights order. If it’s true that informing workers of their rights improves their productivity, then this is presumably an effect that would be felt at the firm level. So, presumably all rational employers would be doing a great job of informing employees of all their rights, including their right not to join a union. So the President is effectively intervening where the private marketplace hasn’t seen fit in general to intervene.

The President can also consider the long-term economy and efficiency impacts of a policy as well as the immediate impact, and those might in some circumstances be in tension with one another. And I think you can see this in the rationale for the affirmative action and wage-price orders. Presumably much of the benefit of the affirmative action orders, and

75. *Id.* at 737.
76. *Id.* at 738.
historically I think this has been borne out, is felt over the long term, with the greater entry of minorities into the workforce.

These decisions have upheld policies that considered labor-related interventions in relation to the whole workforce of the contractor and not just the workers on the federal contract. I think this, again, is linked to the fact that long-term benefits can be considered: because the government is such a large purchaser of goods and services, its purchases have a systemic effect on the economy as a whole, from which the federal government can, in turn, benefit.

And finally, and this is more speculative, these cases certainly leave open the possibility that the President can legitimately consider the impact of procurement on non-procurement policy goals. In other words, the President isn’t obligated to conduct procurement in a way that defeats the administration’s non-procurement goals. I’ll give you an example of two executive orders that, although they haven’t been challenged in court, seem to reflect that principle. My favorite is Executive Order 12072,77 President Carter’s order on urban development that requires federal agencies, in their real property purchasing and leasing decisions, to give first consideration to properties in cities. And the interesting thing about this Order is that it says nothing about economy and efficiency. It just says this will promote the historical and cultural and social vitality of our cities. It’s just a good idea. And very recently, President Obama’s Order 1351478 on environmental leadership, which, among other things, calls for federal agencies to leverage their acquisitions to foster environmentally sustainable products and services, which seems very analogous to what we are calling for in the labor context. The cases [that I’ve discussed] don’t resolve the question, but they do clearly show that it’s at least OK for the President to consider social policy goals along with procurement goals, which is why we’re able to have this conversation in public today.

So I think that we’ve actually heard a fair amount about how the high road order is consistent with these, let’s say, doctrinal principles, but I want to end on a cautionary note. Setting aside the underlying legal principles, if you look at the cases I just outlined, there seem to be two common themes in terms of the result. One is that, at least on the Procurement Act79 claims, the President always wins. The second one is that whichever side labor backs has always lost. That’s including E-Verify, when labor was on the other side. So if we’re fortunate and the President issues the kind of order that we’re looking for, these principles are going to come into direct conflict. So we’ll see how the DC Circuit adapts. Thanks. [applause]

Scott Kronland: §80 Thanks. I want to say a few words today about an issue that I’ve sometimes had to litigate, and that’s the extent to which the National Labor Relations Act§81 is actually an obstacle to doing good things, including having high road contracting policies. But I’m not going to rain on your parade because actually I think the law is very good with respect to what’s being talked about today, in terms of high road contracting policies, including the proposal that Fred and David laid out.

By way of background, the NLRA itself says absolutely nothing about preempting state and local laws, and it says nothing about preempting Presidential Executive Orders. But the courts have interpreted the NLRA to preempt enactments that interfere with what the court believes that Congress was trying to accomplish in the NLRA, and the courts have also applied the same preemption analysis to Presidential Executive Orders that they’ve applied to state and local government actions. Thus, the Clinton striker replacement Executive Order§82 that you just heard about was struck down by the DC Circuit not because it was beyond the President’s virtually limitless authority under the Procurement Act, but because the DC Circuit concluded that it was precluded by the National Labor Relations Act§83 because, in the DC Circuit’s view, it interfered with employers’ use of an economic weapon during labor disputes.

I have a handout listing about 30 relevant cases which is available outside if you didn’t get it now, and which you don’t have to read if you’re not an NLRA preemption wonk, because I’m going to summarize it all for you in a few sentences. As I read the NLRA preemption cases, they fall into two categories, and one category there’s very good news about, and that’s about substantive minimum labor standards requirements, protections that apply to individual workers without regard to union status and have nothing to do with labor relations, things like the minimum wages anti-discrimination requirements.

The Supreme Court has been very clear that there’s no tension between minimum substantive labor standards and the National Labor Relations Act, and that’s true whether the government adopts them as part of its police power or the government adopts them as part of its contracting authority. The key case is Metropolitan Life Insurance v. Massachusetts,§84 in which the Supreme Court recognized that part of Congress’s purposes, and indeed the main purpose, of the NLRA was to raise labor standards for workers, and the NLRA sought to accomplish that by equalizing bargaining power

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80. Partner, Altshuler Berzon, LLP.
by protecting workers’ right to organize and by requiring employers to bargain in good faith with the workers’ chosen representative. And the Supreme Court found that there was no tension between what Congress wanted to accomplish and the NLRA, and typical substantive minimum labor standards that simply established a floor. The floor just provides the background against which collective bargaining takes place.

The following year, the Supreme Court followed up in a case called *Fort Halifax v. Coyne*, and held that there was no tension with the NLRA when the minimum labor standard requirement permitted the union, through collective bargaining, to agree to something different. In fact, the Court said that it lessens the tension with the National Labor Relations Act if the union has the authority, through collective bargaining, to agree to something different. There’s no conflict between collective bargaining and the standard, and it would be perverse to hold that the National Labor Relations Act, which was designed to improve the status of workers, actually prevented states, local governments, Presidential Executive Orders, from raising labor standards to protect workers.

All that being said, there is one recent court decision that actually finds that a minimum labor standard requirement was so narrow and so specific that it interfered with workers’ right to collective bargaining. That’s the recent decision in the Seventh Circuit by Judge Manion in a case called *520 South Michigan Avenue*. It’s cited in the handout. This case dealt with a law that applied only to breaks for hotel room attendants in Cook County, Illinois. The decision makes no sense as a matter of doctrine. It simply seems to illustrate the fact that if a court thinks that you went too far, the court will find a way to strike it down.

I’ve always been concerned, for instance, about someone going too far with minimum labor standards and adopting, say, the one-hour day, but providing that, through collective bargaining, you could agree to have workers work eight hours a day. A court would find a way to strike that down. But apart from that, the law is very good with respect to minimum labor standards, and this is a very fruitful avenue for progress by the government, I think, in helping a very large group of workers.

Now I want to talk about where the law is not so good, where it’s more mixed, and where we don’t have as much guidance. And that’s with contracting policies that deal with matters that the NLRA does regulate: the process by which workers organize and the use of economic weapons during labor disputes. The cases in this area are not as clear as to what’s permitted. The courts are very clear that when the government acts as a regulator, it cannot regulate labor relations for private sector workers.

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covered by the NLRA, so states and localities can't have their own labor relations policies for private sector workers covered by the NLRA. On the other hand, the cases are also clear that when the government acts as a proprietor, imposing requirements through its contracting authority, its actions aren't subject to NLRA preemption. It's free, like a private business, to impose whatever requirements it wants on its contractors.

Where the case law is not clear, however, is on the distinction between when the government is acting as a proprietor and when the government is acting as a regulator. The Supreme Court has decided three NLRA preemption cases on this issue. The first of these issues was Wisconsin Department of Industrial Relations v. Gould, where the Court struck down a Wisconsin law that debarred contractors who were recidivist NLRA violators from doing business with the state. In that case the Court said Wisconsin was acting as a regulator because the state conceded the purpose of the law was to enforce the NLRA. The state made no argument that the law was related to the state's own procurement needs of getting high quality contractors or getting jobs done. The state essentially conceded that it had a policy goal in mind in its contracting requirements, and, therefore, it was engaged in impermissible regulation.

The next case in the series was the so-called Boston Harbor case, in which the Supreme Court said that a Massachusetts agency was acting as a proprietor when it required all of the contractors on a big construction project to enter into a labor agreement as a condition of working on the job. And the Court said that such labor agreements on big construction projects are common in the construction industry. Private developers use them. And the state was just interested in setting a contracting policy for a single project in order to get the job done on time and on budget, and had no interest in setting labor policy. It was simply doing what a private developer would do on similar big projects.

And the third and most recent case was Chamber of Commerce v. Brown, decided in 2008, where the Court struck down a California law that barred employers that received state grants and participated in state programs, like contractors in California's Medicaid program, from using state funds to assist or deter union organizing. And the Court said California was indisputably acting as a regulator because the state conceded that it was trying to effectuate labor policy, that it wasn't trying to ensure the efficient use of state funds, but it had a policy goal. It didn't want the money spent for a purpose that the state said, in the statute itself, that it didn't like.

So we have three cases on the issue, but they really represent the extremes. In *Gould* and *Chamber v. Brown*, the state conceded it wasn't trying to have efficient procurement policy; it was trying to effectuate labor policy. In *Boston Harbor*, the court said that the Massachusetts agency had no labor policy goals in mind. It was acting just like a private business and doing things a private business actually does do.

But we don't have any cases in the middle from the Supreme Court, perhaps cases where the government action has, like most government actions, more than one purpose. You could have a government that wants to promote economy and efficiency, but that also cares about labor policy. We don't have that case in the Supreme Court. And what we do have are a whole bunch of lower court cases, deciding various challenges based on this regulatory-proprietor distinction, without coming to a clear test for how to decide when the government is a regulator and when it is a proprietor.

The best we can glean from the cases is that there are factors the court looks at. For instance, if the government has a policy that applies on an across-the-board basis, it's more likely to be deemed a regulator than if contracting authorities can adopt policies geared to particular projects. That's why the DC Circuit in the *Reich* case, dealing with the Clinton strike replacement Executive Order, said that was regulation. There was a policy that applied across the board, so that's the government as regulator. I think it was the next year, or not that long after that, in the *Allbaugh* case, the DC Circuit dealt with President Bush's Executive Order banning the use of project labor agreements on all government contracts. It's across-the-board basis, but the court allowed it.

So sometimes it's OK for the government to have a consistent policy on an across-the-board basis. It's still a proprietor because these are the government's projects, and we didn't really mean what we said in *Reich* with respect to President Clinton's Executive Order. Not that long after that, the DC Circuit got the *UAW v. Chao* case, involving the Executive Order about posting Beck rights, and the court said of course the President was acting as a regulator. When the government acts on an across-the-board basis, that's regulation. So, while the bulk of the cases seem to lead to the conclusion that when the government acts on an across-the-board basis, it's more likely to be deemed a regulator, the cases are not uniform.

The second factor that the courts look at is whether the requirement applies beyond the particular project in question. Does it affect labor relations on other jobs? Or is it solely geared to the government contract at issue? If the government is imposing requirements that apply more broadly

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90. See Reich, 74 F.3d 1322.
92. See Reich, 74 F.3d. 1322.
93. UAW Labor Emp't & Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. 2003).
than the government contract itself, the government is likely to be deemed a regulator. If the requirements apply only to the contractor’s work on the government’s project, it’s more likely to be a proprietor. But again, the law isn’t entirely clear. What about the case of the government that considers a contractor’s record on other projects in deciding whether the contractor is a responsible contractor for the government’s contract. It’s certainly something a normal proprietor would consider, if you have a contractor that has a terrible record on other jobs. On the other hand, it’s conduct outside the government’s project. So we don’t know how that case would come out.

And the third factor that the court seems to look at is what is the fit between the requirement the government has imposed and the government’s interests as proprietor, meaning the government’s interest if it was just a profit-maximizing business that cared nothing about labor policy. What is the fit between what the government imposed and what the government claims it’s trying to accomplish? Unlike the situation of the President’s procurement authority, where the courts have been very willing to defer to whatever the President says is the rationale, the courts here have actually looked, in various degrees of scrutiny, as to whether this just a pretext, or whether the requirements actually fit. But, again, the cases are not uniform.

There’s a case called Sage Hospitality,94 which upheld the City of Pittsburgh’s requirement that contractors on a hotel development project adhere to a labor peace requirement. In a decision by then Judge Chertoff, before he was Homeland Security Secretary, the Third Circuit upheld the requirement, saying that the requirement’s just geared to the particular development project. The City has a proprietary interest in the project because it was going to be getting revenue if the hotel project was successful. Hence, the City was acting as a proprietor, and it doesn’t matter if other private businesses have imposed similar requirements, and we’re not going to conduct this objective inquiry into motive. The requirement seems to be co-extensive with the project, and we’re going to defer to the City’s judgment that it’s acting as a proprietor.

On the other hand, we have the Metropolitan Milwaukee case,95 a Seventh Circuit case, that struck down Milwaukee County’s requirement that service contractors enter into labor peace agreements to protect against disruption of the service contracts. And that was a decision by Judge Posner, who reasoned that, in his view, no private business would require its contractors to enter into labor peace requirements. That’s stupid. Private businesses would rather there be non-union contractors because that saves money, and in his view that was not the real subjective motivation of

Milwaukee County. They wanted to help unions. Judge Posner also said that that case involved a requirement that would have impinged on the contractors' labor relations outside the particular contracts with Milwaukee. But, in any event, that requirement was struck down on the theory that the government was acting as regulator rather than proprietor, even though it was a requirement that applied only to the County's own service contractors and was ostensibly designed only to prevent disruption of the service contracts for which the County was paying, and not to accomplish a labor policy goal.

So, the bottom line is when it comes to contracting requirements that don't deal with substantive minimum labor standards, but do touch in some way on labor relations requirements, we're left with a mixed bag, where if the locality is unabashedly pursuing a labor policy goal, it's regulating, and it's going to be struck down. On the other hand, if the locality or the state or even the Executive Order is pursuing a procurement goal, we get into the question of whether a court will think that the government is acting as a proprietor or not, and the court's going to be looking at a test that has not yet crystallized.