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PREVAILING WAGE LEGISLATION AND THE CONTINUING SIGNIFICANCE OF RACE

David E. Bernstein[†]

Research on how twentieth-century government regulation of economic activity contributed to the oppression of African Americans has traditionally focused on Jim Crow legislation in the American South. More recently, scholars have documented the ways that other types of government regulation, ranging from federal and state labor laws¹ to federal housing and mortgage policies,² have harmed African Americans.³ The contribution of federal, state, and local regulation to racial inequality received significant mainstream attention thanks to the publication of Ta-Nehisi Coates' much discussed-essay, *The Case for Reparations*.⁴ It is therefore a propitious time to examine the largely unknown discriminatory origins and effects of prevailing wage legislation.

Since the early twentieth century, labor unions have lobbied federal and state governments to enact and enforce laws requiring government contractors to pay "prevailing wages" to employees on public works projects. These laws, currently active at the federal level and in approximately thirty states,⁵ typically in practice require that contractors pay according to the local union wage scale. The laws also require employers to adhere to union work rules.⁶ The combination of these rules

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1. See, e.g., DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001); PAUL D. MORENO, BLACKS AND ORGANIZED LABOR: A NEW HISTORY (2008); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987).

2. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA. L. REV. 1351 (1995).

3. See generally IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005); DESMOND KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT (1995).

4. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>.

5. *Dollar Threshold Amount for Contract Coverage Under State Prevailing Wage Laws*, DEP'T OF LAB. WAGE AND HOUR DIVISION, <https://www.dol.gov/whd/state/dollar.htm> (last visited Jan. 1, 2017).

6. See ARMAND J. THIEBLOT, JR., PREVAILING WAGE LEGISLATION: THE DAVIS-BACON ACT, STATE "LITTLE DAVIS-BACON" ACTS, AND THE SERVICE CONTRACT ACT (1986) [hereinafter THIEBLOT, PREVAILING WAGE LEGISLATION]. In some jurisdictions, the law is skewed to make the "prevailing wage" equivalent to a hypothetical, higher union wage, rather than to follow what union workers actually get from private contracts. See ARMAND THIEBLOT, THE CASE AGAINST THE DAVIS-BACON ACT: 54 REASONS FOR REPEAL (2013) [hereinafter THIEBLOT, THE CASE AGAINST THE DAVIS-BACON ACT] (contending that instead of reflecting local

makes it extremely difficult for nonunion contractors to compete for public works contracts.⁷

Meanwhile, construction unions have been among the most persistently exclusionary institutions in American society.⁸ Not surprisingly, in many cases the history of prevailing wage legislation has been intertwined with the history of racial discrimination. Economists and others argue that prevailing wage legislation continues to have discriminatory effects on minorities today. Union advocates, not surprisingly, deny that prevailing wage laws have discriminatory effects. More surprisingly, they deny that the granddaddy of modern prevailing wage legislation, the federal Davis-Bacon Act of 1931, had discriminatory intent.⁹

Part I of this Article discusses the discriminatory history of the most significant of all prevailing wage laws, the Davis-Bacon Act. As discussed below, Davis-Bacon was passed with the explicit intent of excluding African American workers from federal construction projects, and its discriminatory effects continued for decades.

Part II of this Article discusses the controversy over whether prevailing wage legislation continues to have discriminatory effects. The section begins with a discussion of the empirical literature on the effects of prevailing wage discrimination on minority employment. The section next presents evidence that construction unions continue to discriminate against members of minority groups, albeit much more subtly than in the past. The section concludes by recounting allegations that prevailing wage legislation serves to exclude minority contractors from obtaining government contracts.

wages, prevailing wage laws inflate them); E.J. MCMAHON & KENT GARDNER, PREVAILING WASTE: NEW YORK'S COSTLY PUBLIC WORKS PAY MANDATE (2017), <https://www.empirecenter.org/publications/prevailing-waste>.

7. "Davis-Bacon mandates inflated wage rates . . . and creates rigid job classifications and procedures which, though standard operating procedure for unions, are anathema to small non-unionized firms." *Removing Barriers to Opportunity: A Constitutional Challenge to the Davis-Bacon Act*, INST. FOR JUST., <http://ij.org/case/brazier-construction-co-inc-v-reich/#backgrounder> (last visited Apr. 6, 2018).

8. See, e.g., Charles S. Johnson, *Negro Workers and the Unions*, SURVEY (Apr. 15, 1928), at 113–14. The article reveals that as of 1927, "Practically none" of the members of the electricians' union were African American, the sheet metal workers' union had no African Americans among its 25,000 members, the plasterers' unions had only 100 African American members among its 30,000 members, despite the presence of 6,000 African Americans in the trade, the plumbers and steam fitters had "a long history" of successfully maneuvering to avoid admitting African American members, and the carpenters had 340,000 members, among whom only 592 were African American.

9. See, e.g., PETER PHILIPS, THOUGHTLESS THINK TANKS: FACTOID SCHOLARSHIP AND SOUND BITE THINKING ABOUT THE HISTORY AND INTENT OF PREVAILING WAGE LAWS 7 (2001). It should be noted that Philips writes, in reference to me, "An extensive literature search does not show that Bernstein ever wrote on this topic before or after" a briefing paper I wrote about the Davis-Bacon Act published by the Cato Institute in January 1993. In fact, between then and when Philips' paper was published, I wrote the following papers that discussed prevailing wage legislation in detail: *The Shameful, Wasteful History of New York's Prevailing Wage Law*, 7 GEO. MASON U. CIV. RTS. L.J. 1 (1997); *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. 276 (1994); EMPIRE FOUND. FOR PUB. POLICY RESEARCH, IT'S TIME TO REFORM NEW YORK'S PREVAILING WAGE LAW, (1993); and *Roots of the 'Underclass': The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993). So much for Philips' "extensive literature search." In fairness, Philips does acknowledge that state public works legislation, including prevailing wage laws, was used to exclude Chinese workers in the West, African American workers in Louisiana, and foreign workers in New York.

I. THE DAVIS-BACON ACT OF 1931

The Davis-Bacon Act¹⁰ is a federal prevailing wage law that applies to any construction project that receives federal funding. Excluding competitors, especially nonwhite and immigrant competitors, from public works projects was an early goal of construction unions. A Louisiana statute limited employment on public works to those who had paid their poll tax.¹¹ Early Oregon and California statutes banned the use of Chinese laborers on public works projects,¹² and a New York statute banned the use of aliens generally.¹³ Courts invalidated each of the laws as violations of liberty of contract and/or equal protection guarantees.¹⁴

By the mid-1920s, New York was one of several states to require contractors on public-works projects to pay their employees the “prevailing wage.” The prevailing wage was generally set at least as high as union wages to prevent union workers from being undercut by their competitors, including African Americans excluded from the unions. The law, however, only applied to state, not federal, contractors.

In 1927, Algernon Blair, a contractor from Alabama, received a federal contract to build a Veteran’s Bureau hospital in Long Island, New York. The contractor employed primarily itinerant African American workers from the South. Representative Robert Bacon of Long Island complained on the floor of the House of Representative that these workers “were paid a very low wage . . . that meant that the labor conditions in that part of New York State where this hospital was to be built were entirely upset.”¹⁵ Congressman William Upshaw of Georgia, apparently aware that the workers in question were African Americans, responded, “You will not think that a southern man is more than human if he smiles over the fact of your reaction to that real problem you are confronted with in any community with a superabundance or large aggregation of negro labor.”¹⁶ Bacon responded that “the same thing would be true if you should bring in a lot of Mexican laborers or if you brought in any nonunion laborers from any other State.”¹⁷

In 1928, the House held hearings on Bacon’s “Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Give Certain

10. Davis-Bacon Act, Pub. L. No. 71-798, ch. 411, 46 Stat. 1494 (1931), codified as amended at 40 U.S.C. §§ 3141–3148 (2012).

11. *See Employment of Labor on Federal Construction Work: Hearings on H.R. 7995 and H.R.9232 Before the H. Comm. on Labor*, 71st Cong. 15 (1930).

12. *Ex Parte Kuback*, 85 Cal. 274 (1890); *Baker v. Portland*, 2 F. Cas. 472 (C.C. D. Ore. 1879). The Los Angeles City Council also passed a similarly discriminatory public works statute in the late 19th Century. GRACE H. STIMSON, *RISE OF THE LABOR MOVEMENT IN LOS ANGELES* 100 (1955).

13. N.Y. LAWS OF 1870, ch. 385, *amended by* N.Y. LAWS OF 1894, ch. 622.

14. *Kuback*, 85 Cal. 274; *Baker*, 2 F. Cas. 472; *People v. Warren*, 34 N.Y.S. 942 (Sup. Ct. 1895).

15. *Hours of Labor and Wages on Public Works: Hearing on H.R. 17069 Before the H. Comm. on Labor*, 69th Cong. 2 (1927).

16. *Id.* at 3.

17. *Id.* at 4.

Preferences in the Employment of Labor.”¹⁸ Secretary of Labor James J. Davis, who later became the Senate co-sponsor of the Davis-Bacon Act, sent the committee a letter supporting the bill. He recounted that a contractor from the South brought an “entire outfit of negro laborers from the South” into Bacon's district, treated them badly, and “employed no local labor whatsoever.”¹⁹ William J. Spencer, Secretary of the Building Trades Department of the American Federation of Labor told the committee:

There are complaints from all hospitals of the Veteran's Bureau against the condition of employment on these jobs. That is true whether the job is in the State of Washington, Oregon, Oklahoma, or Florida. The same complaints come in. They are due to the fact that a contractor from Alabama may go to North Port and take a crew of negro workers and house them on the site of construction within a stockade and feed them and keep his organization intact thereby and work that job contrary to the existing practices in the city of New York.²⁰

At hearings in March 1930 on two new bills to regulate labor on federal construction projects, Representative William Henry Sproul complained that at St. Elizabeth's Hospital the contractor paid bricklayers less than the local prevailing wage.²¹ Representative John J. Cochran later explained that southern contractors were “employing low-paid colored mechanics” at St. Elizabeth's.²² When the Senate held hearings in 1931 on the bill that was destined to become the Davis-Bacon Act, American Federation of Labor president William Green testified that “[c]olored labor is being brought in to demoralize wage rates” on federally-funded construction work in Kingsport, Tennessee.²³ T.A. Lane, of the Bricklayers' Union, told the Senators that the Algernon Blair company was getting federal contracts and using imported “cheap labor.”²⁴ In the House, Congressman Miles Allgood of Alabama remarked that Algernon Blair, a home state contractor, “has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country.”²⁵

18. See *Preferences in the Employment of Labor on Federal Construction Works: Hearings on H.R. 11141 Before the H. Comm. on Labor*, 70th Cong. (1928). The bill would have required federal contractors to give preference to residents of the state where the work is performed who are veterans, non-veteran residents, American citizens, and aliens, in that order.

19. *Id.* at 5.

20. *Id.* at 17.

21. *Employment of Labor on Federal Construction Work: Hearings on H.R. 7995 and H.R. 9232 Before the H. Comm. on Labor*, 71st Cong. 18 (1930).

22. *Id.* at 26–27.

23. *Wages of Laborers and Mechanics on Public Buildings: Hearings on S. 5904 Before the S. Comm. on Manufactures*, 71st Cong. 10 (1931).

24. *Id.* at 15–16.

25. *Id.* at 513.

The Davis-Bacon Act became law soon thereafter.²⁶ A year later, a union official complained to the House Committee on Labor that non-enforcement of the Act allowed a contractor to hire a mixed crew of white and African American workers:

Mr. Summers, a steel erector, violated the law by paying only \$12 a week and board to ironworkers, and he rented a shack in which he had white men and negroes sleep together. In that instance I complained to District of Columbia officials about the violation of the wage law, without result.²⁷

Davis-Bacon was not solely motivated by racial animus. The construction unions wanted to reserve federal contracting jobs for their members, regardless of the race of their nonunion competitors. Nevertheless, given the racially exclusionary policies of labor unions, and the fact that several Congressmen and committee witnesses specifically complained about the use of black workers by Algernon Blair and other federal contractors, racial animus was clearly a significant factor motivating the passage of Davis-Bacon.

As intended, the Act eventually reserved jobs on federal construction contracts primarily for white union men. The discriminatory effects of Davis-Bacon were built into the structure of the law, and were destined to persist so long as discriminatory union policies persisted. For example, many construction jobs for federal projects were filled via union “hiring halls,” from which black workers were excluded.²⁸ Davis-Bacon substantially contributed to a decline in African American participation in the construction industry.²⁹

Because of construction unions’ refusal to significantly modify longstanding policies restricting or even prohibiting membership by non-whites, even the 1964 Civil Rights Act did not substantially ameliorate Davis-Bacon’s discriminatory effects.³⁰ The Nixon Administration’s Department of Labor concluded that repealing Davis-Bacon would be an efficient means of increasing minority employment on

26. In 1964, the definition of “wages” was expanded to include benefits including health insurance, retirement, disability, unemployment, vacation pay, and apprenticeship program costs. Pub. L. No. 88-349, 78 Stat. 238 (1964).

27. *Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts: Hearings on S. 3847 and H.R. 11865 Before the H. Comm. on Labor*, 72nd Cong. 190 (1932) (statement of Dan M. Gayton, International Association of Bridge, Structural & Ornamental Iron Workers). In 1935, Congress responded to complaints about the difficulties of enforcing the Act’s prevailing wage requirement by establishing a lower coverage threshold, requiring that the Department of Labor pre-determine the prevailing wage rate, and extending the law’s coverage. WILLIAM G. WHITTAKER, CONG. RES. SERV. 94-908, DAVIS-BACON: THE ACT AND THE LITERATURE (2007).

28. Herman D. Bloch, *Craft Unions and the Negro in Historical Perspective*, 43 J. NEGRO HIST. 10, 24 (1958).

29. Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, 19 POL. & SOC’Y 291, 301 (1991), available at <http://journals.sagepub.com/doi/abs/10.1177/003232929101900302>.

30. A 1968 Equal Employment Opportunity Commission study found that “the pattern of minority employment is better for each minority group among employers who do not contract work for the government [and are therefore not subject to Davis-Bacon] than it is among prime contractors who have agreed to nondiscrimination clauses in their contracts with the federal government” who were subject to Davis-Bacon. HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 389 n* (1977).

public works projects.³¹ To avoid unduly offending the union voters Nixon was wooing, however, the Department instead decided to launch affirmative-action “city plans” to encourage the use of skilled minority workers in federal construction projects.³² These plans, however, were a mixed success at best. A series of studies conducted in the 1970s and ‘80s concluded that Davis-Bacon continued to have discriminatory effects on African-American workers.³³

While debate over Davis-Bacon and its potential lingering discriminatory effects continues, occasionally Davis-Bacon advocates will support the Act for explicitly discriminatory reasons. In the wake of Hurricane Katrina in 2005, President George W. Bush used his statutory authority to suspend the Act in the area affected by the hurricane to facilitate cleanup and reconstruction.³⁴ Pro-union critics expressed outrage, with many explicitly arguing that enforcing the Act was necessary to prevent itinerant immigrant workers from obtaining jobs on Katrina-related projects.³⁵ Under political pressure, Bush eventually repealed the suspension.³⁶

II. DOES STATE PREVAILING WAGE LEGISLATION HARM MINORITIES?

As Davis-Bacon wreaked havoc on minority employment in the construction industry, states passed and enforced their own prevailing wage laws, generally modeled on Davis-Bacon. These laws have also been the subject of allegations that

31. PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, *THE NEW COLOR LINE* 102 (1995).

32. Herbert Hill, *The AFL-CIO and the Black Worker: Twenty-Five Years After the Merger*, 10 J. INTERGROUP RELATIONS 5, 20 (1982).

33. THIEBLOT, *PREVAILING WAGE LEGISLATION*, *supra* note 6, at 157; THE COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS HRD-79-18: THE DAVIS-BACON ACT SHOULD BE REPEALED 32 (1979); JOHN P. GOULD & GEORGE BITTLINGMAYER, *THE ECONOMICS OF THE DAVIS-BACON ACT: AN ANALYSIS OF PREVAILING WAGE LAWS* 62 (1980); William A. Keyes, *The Minimum Wage and the Davis-Bacon Act: Employment Effects on Minorities and Youth*, 3 J. LAB. RES. 398, 407 (1982). See generally Robert A. Levy, *An Equal Protection Analysis of the Davis-Bacon Act*, 1995 DET. C. L. REV. 973 (1995).

34. Proclamation 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005); see also JOHN R. LUCKEY & JON O. SHIMABUKURO, CONG. RES. SERV. RS22265, *PREVAILING WAGE REQUIREMENTS AND THE EMERGENCY SUSPENSION OF THE DAVIS-BACON ACT* (2005).

35. See Roberto Lovato, *Using Illegal Labor to Clean Up After Katrina: Gulf Coast Slaves*, SPIEGEL ONLINE (Nov. 15, 2005), <http://www.spiegel.de/international/0,1518,385044,00.html>. Senator Mary Landrieu wrote to the Secretary of the Department of Homeland Security, “While my state experiences unemployment rates not seen since the Great Depression, it is unconscionable that illegal workers would be brought into Louisiana, aggravating our employment crisis and depressing earnings for our workers.” JUDITH BROWNE-DIANIS ET AL., *AND INJUSTICE FOR ALL: WORKERS’ LIVES IN THE RECONSTRUCTION OF NEW ORLEANS* 12 (2006). The Democratic Senate Policy Committee complained, “[I]nstead of providing jobs to displaced local workers, contractors have hired out-of-state migrant workers willing to accept minimal compensation.” DEMOCRATIC POLICY COMM., BUSH ADMIN., *CONGRESSIONAL REPUBLICANS MISMANAGE HURRICANE RECOVERY* (2005). Congressman Steven LaTourette argued, “There are thousands of skilled Gulf Coast workers who should be working to rebuild their communities, and . . . companies are passing them by and hiring cheap unskilled illegal workers to beef up their bottom line.” Press Release, October 26, 2005, from the website of Representative Steven LaTourette (Oct. 26, 2005). For the claim that inhibiting immigrants from obtaining jobs on Katrina projects prevented their “exploitation,” see Haley E. Olam & Erin S. Stamper, Note, *The Suspension of the Davis Bacon Act and the Exploitation of Migrant Workers in the Wake of Hurricane Katrina*, 24 HOFSTRA LAB. & EMP. L.J. 145, 146 (2006); see also D. Aaron Lacy, *The Aftermath of Katrina: Race, Undocumented Workers, and the Color of Money*, 13 TEX. WESLEYAN L. REV. 497 (2007) (discussing competition between African Americans and undocumented immigrants for Katrina-related jobs).

36. Griff Witte, *Prevailing Wages to be Paid Again on Gulf Coast*, WASH. POST (Oct. 27, 2005), at A10.

they have discriminatory effects on African American and other minority workers. This section begins with a discussion of the controversy in the economics literature over whether empirical evidence demonstrates that state prevailing wage legislation reduces minority employment. Next, it discusses evidence of continuing discrimination by construction labor unions. This section concludes with a brief discussion of allegations that prevailing wage legislation harms minority contractors, which in turn limits the utilization of minority workers.

A. Economic Literature on the Effects of Prevailing Wage Legislation on Minorities

At one time, state prevailing wage laws were nearly ubiquitous, but many states repealed their laws starting in the 1980s. By January 2017, thirty states still had prevailing wage legislation.³⁷ The repeals provided researchers with a data set they could use to explore the impact of prevailing wage legislation on minority employment.

The results of this research have been mixed. Some articles conclude that such legislation harms minority workers, while others (almost all by researchers associated with the University of Utah) conclude that such legislation is essentially neutral. No academic articles appear to argue that prevailing wage legislation disproportionately benefits minority workers.

Daniel Kessler and Lawrence Katz analyzed Current Population Survey data and Census data and found that the relative wages of construction workers decline slightly after the repeal of a state prevailing wage law.³⁸ However, “the small overall impact of law repeal masks substantial differences in outcomes for different groups of construction employees. Repeal is associated with a sizable reduction in the union wage premium and an appreciable narrowing of the black/non-black wage differential for construction workers.”³⁹ The authors note that repealing prevailing wage legislation also raises the wages African American construction workers get relative to other African American workers, which implies that repeal of prevailing wage laws may benefit African American construction workers.⁴⁰

Economist Armand Thieblot, a long-time critic of prevailing wage legislation, found based on 1990 census data “a strongly inverse correlation . . . between black employment and strength of prevailing wage law.”⁴¹ Thieblot found that while African American employment in construction is generally below black employment in other sectors, African American employment in construction is closer to average in states with no prevailing wage law, lower in states that have prevailing wage laws, and progressively lower in states with progressively stronger prevailing wage laws.⁴²

37. DEP’T OF LAB., *supra* note 5.

38. Daniel P. Kessler & Lawrence F. Katz, *Prevailing Wage Laws and Construction Labor Markets*, 54 INDUS. & LAB. REL. REV. 259 (2001).

39. *Id.*

40. *Id.* at 273.

41. A. J. Thieblot, *Prevailing Wage Laws and Black Employment in the Construction Industry*, 20 J. LAB. RES. 155 (1999).

42. *Id.*

In other words, the stronger a state prevailing wage law, the weaker African American employment in the construction industry.

Economists Hamid Azari-rad and Peter Philips (an outspoken supporter of prevailing wage laws) of the University of Utah responded to Thieblot's article by arguing that the 1970 Census data shows that African American construction workers happened to be relatively abundant in states that had prevailing wage laws at the time, and would later repeal their prevailing wage laws.⁴³ According to Azari-rad and Philips, if one only looked at the 1990 data, one might think that the relative abundance of African American construction workers in certain states was due to the absence of a prevailing wage law.⁴⁴ In fact, however, that abundance also existed when prevailing wage legislation was in effect.⁴⁵ This suggests that studies like Thieblot's that simply compare prevailing wage states to non-prevailing wage states, without considering whether these states have other relevant labor market differences, are not good evidence of either the strength, or even existence, of a causal relationship between prevailing wage legislation and black unemployment.⁴⁶

Thieblot asserted that Azari-rad and Philips reached their conclusion by cherry-picking data, accomplished by excluding eight southern states from their data.⁴⁷ Thieblot pointed out that those eight states contain 97.6% of the African Americans who work in construction in states without prevailing wage laws, and almost half of all African American construction workers.⁴⁸ Thieblot acknowledged that some non-prevailing wage law states had relatively high African American employment in construction even when those states had prevailing wage laws.⁴⁹ He argued, however, that this is just a proxy for the level of labor unionism. States with relatively high levels of African American employment in construction also tended to have weaker unions, which is why it was easier to repeal prevailing wage legislation in those states.⁵⁰ But the weakness of unions also meant that when the prevailing wage laws were repealed, African Americans were in an especially good position to benefit.⁵¹

Another University of Utah economist concluded in 2003 that there are significant differences in apprenticeship rates in the construction industry for minorities among states that have strong prevailing wage laws, weak prevailing wage laws, and no such laws, but there is no consistent pattern. Hence, the data does not

43. Hamid Azari-rad & Peter Philips, *Race and Prevailing Wage Laws in the Construction Industry: Comment on Thieblot*, 24 J. LAB. RES. 161 (2003).

44. *Id.* at 162.

45. *Id.*

46. *Id.*

47. A.J. Thieblot, *Race and Prevailing Wage Laws in the Construction Industry: Reply to Azari-Rad and Philips*, 24 J. LAB. RES. 169, 171 (2003).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

lend itself to any obvious interpretation.⁵² The author concludes that there is no evidence that prevailing wage laws stifle minority participation in apprenticeships.⁵³

Two years later, economist Dale Belman published a book chapter acknowledging that there is a negative correlation between state prevailing wage legislation and minority employment.⁵⁴ However, Belman claims that this correlation disappears if one controls for the racial composition of the states' non-construction labor force.⁵⁵ More generally, he claims that studies suggesting the prevailing wage laws limit minority employment are derived from naive models that do not adequately account for relevant factors beyond those laws.⁵⁶

Also in 2005, Mark Price, a student of Professor Philips, completed a Ph.D. dissertation on state prevailing wage laws.⁵⁷ Based on data collected in the Current Population Survey between 1977 and 2002, Price found no evidence that African American construction workers received an increase in hourly wages or benefits coverage as a result of the repeal of prevailing wage laws.⁵⁸ However, such repeals did lead to a decline in unionization among less-skilled construction workers.⁵⁹ Because African American construction workers are disproportionately less-skilled, repeal of prevailing wage laws led to a disproportionate decline in African American membership in construction unions.⁶⁰

An analysis undertaken by economist Elizabeth Roistacher and others on behalf of the Citizens Housing & Planning Council in New York City found that extending a prevailing wage mandate to low-income housing projects would have a strongly adverse impact on the largely minority labor force that had been engaged in that work.⁶¹ The researchers found that there is continuing—albeit subtle—discrimination in favor of white construction workers in New York unions that benefit from prevailing wage legislation, and that the imposition of prevailing wage requirements is a large hindrance to minority-owned firms.⁶² “Few such firms,” they wrote, “have the back-office capacity to comply with the complex reporting and oversight requirements of prevailing wages.”⁶³ Consequently, they concluded, if

52. Cihan Bilginsoy, *Wage Regulation and Training: The Impact of State Prevailing Wage Laws on Apprenticeship* (Univ. of Utah Dep't of Econ., Working Paper No. 2003-08, 2003), https://www.researchgate.net/publication/23696701_Wage_Regulation_and_Training_The_Impact_of_State_Prevailing_Wage_Laws_on_Apprenticeship.

53. *Id.* at 20.

54. Dale Belman, *Prevailing Wage Laws, Unions, and Minority Employment in Construction: A Historical and Empirical Analysis*, in *THE ECONOMICS OF PREVAILING WAGE LAWS* 101, 102 (Hamid Azari-Rad et al. eds., 2005).

55. *Id.*

56. *Id.*

57. Mark Price, *State Prevailing Wage Laws and Construction Labor Markets* (Dec. 2005) (unpublished Ph.D. dissertation, University of Utah) (on file with the Department of Economics, University of Utah).

58. *Id.* at v.

59. *Id.*

60. *Id.*

61. ELIZABETH A. ROISTACHER ET AL., *PREVAILING WISDOM: THE POTENTIAL IMPACT OF PREVAILING WAGES ON AFFORDABLE HOUSING 2* (2008), <http://chpcny.org/wp-content/uploads/2011/02/Prevailing-Wisdom-web-version1.pdf>.

62. *Id.* at 13.

63. *Id.* at 15.

New York were to mandate the payment of prevailing wages on low-income housing projects, many African American and Latino workers who currently are employed on such projects would lose their jobs.⁶⁴

A recent article on prevailing wage legislation and minority employment expressed skepticism about the validity and persuasiveness of the empirical research of the effect of prevailing wage legislation on minority employment, whichever side of the debate it comes from.⁶⁵ The author argued that the “use of statistics in evaluating the construction industry is difficult, particularly if the analysis does not distinguish between the individual trade disciplines.”⁶⁶ He suggested that “[a]n accurate statistical analysis regarding whether minorities and women have fair access to construction opportunities must be done on a trade-by-trade basis in each county or market being studied during the same time frame,” and that, “[a] good way to survey participation of minorities on Davis-Bacon-funded projects is to compare demographic information derived from payroll reports with area demographic data.”⁶⁷ However, economists studying the issue have yet to undertake such a study.⁶⁸

Most recently, a University of Montana master’s thesis, comparing employment data from states that repealed their prevailing wage legislation with data from states that did not, concluded that repealing a prevailing wage law is associated with an across-the-board increase in employment.⁶⁹ One subgroup of workers, Hispanics, benefits significantly more than average from repeal.⁷⁰

B. Do Labor Unions Still Discriminate Against Minority Workers?

Defenders of prevailing wage legislation might argue that whatever discriminatory effects prevailing wage laws may have had in the past were a product of historical patterns of discrimination in labor unions that no longer exist. Unions not only do not exclude members of minority groups any more, under public and government pressure they often undertake affirmative action policies seeking to place members of minority groups in apprenticeships and ultimately in full-time union jobs.

Past research, however, suggests that affirmative action policies in cities like New York ultimately did little to provide long-term union employment for minority construction workers. The problems ranged from union intransigence regarding discrimination to unions’ declining share of the construction labor market, which left little room for new workers in a system dominated by hiring preferences based on

64. *Id.* at 18.

65. Dominic Ozanne, *Who Promised Fair? Improving the Construction Industry Part II*, 63 LAB. L. J. 55, 56 (2012).

66. *Id.*

67. *Id.*

68. *Id.*

69. Portia Anne Conant, *Employment Effects of Prevailing Wage Laws* 52 (Apr. 2016) (unpublished Master’s Thesis, Montana State University) (on file with author).

70. *Id.*

seniority.⁷¹ Ironically, the availability of a pool of nonunion minority workers to contractors in the 1970s and beyond due to union discrimination strengthened the hand of nonunion employers and helped cause the significant decline in the percentage of construction workers represented by unions.⁷²

Surprisingly, an extensive literature search found no broad academic study of discrimination in construction unions since Waldinger and Bailey's 1991 study of the persistence of racial discrimination in New York unions.⁷³ There are occasional anecdotal reports of discrimination in the academic literature. For example, the authors of a chapter of a book about race and migration in New York reported that "many Jamaican men report strong barriers to joining white-dominated skilled trades and construction unions and racial discrimination in finding jobs as contractors."⁷⁴

Beyond the academic literature, one finds occasional anecdotal reports of persistent discrimination in labor unions, especially in the New York City area.⁷⁵ For example, one activist claims that while New York construction unions have become somewhat more racially integrated in the last twenty years, the Carpenters and Laborer unions, which represent relatively low-paid workers, have the bulk of

71. Waldinger & Bailey, *supra* note 29; see also N.Y.C COMM'N ON HUMAN RIGHTS, BUILDING BARRIERS: DISCRIMINATION IN NEW YORK CITY'S CONSTRUCTION TRADES (1993), available at http://www.talkinghistory.org/sisters/images/building_barriers.pdf.

72. Jeff Grabelsky & Mark Erlich, *Recent Innovations in the Building Trades, in WHICH DIRECTION FOR ORGANIZED LABOR? ESSAYS ON ORGANIZING, OUTREACH, AND INTERNAL TRANSFORMATIONS* 167, 172 (Bruce Nissen, ed. 1999); see also Nancy A. Banks, *The Last Bastion of Discrimination: The New York City Building Trades and the Struggle over Affirmative Action, 1961-1976* at 376 (2006) (unpublished Ph.D. dissertation, Columbia University) (on file with author) ("Indeed, there is a very real connection between the building trades' restrictive hiring practices and the transformation of the construction industry over the last three decades. In that time, an increasing number of minority workers, unable to break into the building trades, have had little choice but to take jobs with non-union contractors at substantially lower wages.").

73. Waldinger & Bailey, *supra* note 29.

74. Philip Kasinitz & Milton Vickerman, *Ethnic Niches and Racial Traps: Jamaicans in the New York Regional Economy, in MIGRATION, TRANSNATIONALIZATION, AND RACE IN A CHANGING NEW YORK* 191, 203 (Hector R. Cordero-Guzman et al., eds. 2001).

75. See generally Richard Berman, *NY Construction Unions Make It Hard for Minorities to Move up*, N.Y. POST (Dec. 22, 2015), <http://nypost.com/2015/12/22/ny-construction-unions-make-it-hard-for-minorities-to-move-up>.

Philadelphia also seems to have more than its fair share of problems with discriminatory building trade unions. See, e.g., Solomon Jones, *Building Trade Unions and Rebuild—a Slippery Slope*, PHILA. INQUIRER (June 27, 2017), http://www.philly.com/philly/columnists/solomon_jones/building-trade-unions-and-rebuild-a-slippery-slope-20170627.html; Matthew Rothstein, *Racism, Discrimination Complaints Mount against Local Construction Union*, BISNOW PHILA. (July 26, 2017), <https://www.bisnow.com/philadelphia/news/construction-development/racism-discrimination-builders-union-local-542-77015>; Hayden Mitman, *Fixing Philly: Bringing More Minorities into Trade Unions*, METRO (July 5, 2017), available at <https://www.metro.us/news/local-news/philadelphia/fixing-philly-bringing-more-minorities-trade-unions>.

I suspect that New York and Philadelphia get disproportionate attention because they are two of the few cities that still have a large union presence in the construction industry. Nationwide, less than fourteen percent of construction workers are unionized. BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY (2018), <https://www.bls.gov/news.release/union2.nr0.htm>. By contrast, over one-quarter of construction workers in New York City are union members. Bob Hennelly, *Unions, Construction Companies are Playing the Blame Game over Worker Deaths in NYC*, CITY & ST. N.Y. (Aug. 29, 2016), <https://www.cityandstateny.com/articles/politics/new-york-city/unions,-construction-companies-are-playing-blame-game-over-worker-deaths-in-nyc.html> Moreover, union contractors seem to dominate lucrative public construction contract work.

minority workers, while unions of more skilled workers are still overwhelmingly white.⁷⁶ When asked to point to progress in ending discrimination, union leaders and politicians often point to apprenticeship programs run by the unions and geared toward minority workers.⁷⁷ However, few of these apprentices ever get steady union work.⁷⁸ Meanwhile, “the workforce on the non union side is overwhelmingly minority . . . mostly Latino, with sizable numbers of Black, Chinese, and South Asian workers as well.”⁷⁹

Litigation against discriminatory labor unions has also persisted. Charles Brown, an African American certified welder, received a settlement in 1991 against the Ironworkers as the result of a settlement of a race discrimination lawsuit filed by the EEOC against Ironworkers Local 580. The court found that the union violated a 1978 court order banning discriminatory job referrals. The court also found the union guilty of retaliatory harassment.⁸⁰

Brown received a \$40,000 damages award, but his ordeal was not yet over. Despite seeking work at the union’s hiring hall three or four times a week, he received only about two months’ worth of work referrals over nine years, while enduring threats and blacklistings.⁸¹ He therefore sued the union for violating the consent decree.⁸²

Angel Vasquez, another plaintiff in the lawsuit who is of Hispanic descent, also reported that he almost never got chosen for work when he went to the hiring hall.

76. GREGORY BUTLER, *DISUNITED BROTHERHOODS: RACE, RACKETEERING AND THE FALL OF THE NEW YORK CONSTRUCTION UNIONS* 9 (2006).

77. *E.g.*, Press Release, City of New York, Mayor Bloomberg, Congressman Rangel, Comptroller Thompson, Building and Construction Trade Council President Malloy and Non-traditional Employment for Women Board Chair Hayes Announce 10 Initiatives of Mayor’s Commission on Construction Opportunity (Oct. 5, 2005), <http://www1.nyc.gov/office-of-the-mayor/news/383-05/mayor-bloomberg-congressman-rangel-comptroller-thompson-building-construction-trade-council> (announcing that “the unions in the City’s Building and Construction Trades Council are making an unprecedented commitment to reserve over 40% of the slots in their apprenticeship programs by the year 2010 for veterans, women, high school graduates, and economically disadvantaged New Yorkers.”).

78. BUTLER, *supra* note 76, at 13–15; *see also NYC Construction Union Leadership: Male, Pale, and Stale*, LABORPAINS (Sept. 28, 2015), <http://laborpains.org/2015/09/28/nyc-construction-union-leadership-male-pale-and-stale/> (noting that unionized African American workers hold jobs that pay about 20% less than jobs held by whites).

79. BUTLER, *supra* note 76, at 19.

Women also complain of discrimination by construction unions. For example, one female construction worker described her union’s attitude towards workplace discrimination as follows: “I would go to jobs and the Business Agents were, to put it quite bluntly, very hostile. And the more persistent I was, the more they made it clear that they were not going to do too much to help me and that it didn’t matter what the laws were. It didn’t matter if the jobs were supposed to have women on them. The contractors are not responsible to the union hall. And the officers in the union are not responsible directly to the members. This is what happens in practice.” Jane Latour, *Live! From New York: Women Construction Workers in Their Own Words*, 42 LAB. HIST. 179, 185 (2001). *See also* Kris Paap, *How Good Men of the Union Justify Inequality: Dilemmas of Race and Labor in the Building Trades*, 33 LAB. STUD. J. 371, 376 (2008) (documenting underrepresentation of blacks and women in the construction trades and the role of labor unions in preserving discriminatory status quo); David Crary, *Few Women in Construction; Recruiting Efforts Rise*, USA TODAY (Sept. 1, 2014), <https://www.usatoday.com/story/money/business/2014/09/01/few-women-in-construction-recruiting-efforts-rise/14870787/> (noting allegations of widespread hostility to and harassment of women construction workers).

80. Jack Newfield, *2 Brave Men Battle Racist Union*, N.Y. POST (July 26, 1998).

81. *Id.*

82. *Id.*

Despite regularly showing up at the hiring hall, most of his work was from referrals from friends, not the union. Brown and Vasquez's attorney, Ramon Jiminez, filed a motion with the court overseeing the earlier Equal Employment Opportunity Commission ("EEOC") settlement arguing that his clients should be recognized as third-party beneficiaries of the settlement agreement, and asking for an order finding Local 580 in civil contempt for violating the court's orders that accompanied the settlement. The plaintiffs at the same time filed a new Title VII lawsuit for race discrimination. The EEOC meanwhile commenced an investigation into Local 80's compliance with the applicable court orders.⁸³

For unclear procedural reasons, the action eventually shifted to an EEOC claim that local 580 violated the 1991 consent decree by discriminating against minority workers in Westchester County and New York City with regard to job referrals and by failing to adhere to the apprentice-to-journeyperson ratio required by the consent decree. The parties settled the latter claim when Local 580 agreed to a settlement worth \$4.5 million, which would, among other things, increase the Local's budget for its Apprentice Training Facility.⁸⁴

With regard to referrals, the EEOC claimed that there was a substantial disparity between the opportunities given to minority workers and white workers. In 2007, the EEOC reached a settlement with Local 580 in which the latter agreed to pay the EEOC \$800,000 and provide "substantial remedial relief" to settle the case.⁸⁵ The case was not fully settled, however. The EEOC refused to drop its lawsuit until the local showed substantial progress for several years in abandoning discriminatory practices.⁸⁶

Meanwhile, each of the individual plaintiffs represented by Jiminez was offered a settlement in 2003 based on formula agreed upon by the union and the EEOC. Each of the plaintiffs accepted the settlement except for Brown, who found the offer of \$42,000 inadequate and instead chose to continue the litigation without an attorney, requesting a contempt award of over six million dollars.⁸⁷ After much additional procedural wrangling, in 2011 a magistrate judge recommended that the court award Brown the original \$42,000.⁸⁸ It was so ordered by Judge Lewis Kaplan, and the

83. Equal Emp't Opportunity Comm'n v. Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers, Local 580, 139 F. Supp. 2d 512, 518 (S.D.N.Y. 2001).

84. Press Release, Equal Employment Opportunity Commission, EEOC Obtains a \$4.5 Million Settlement with Local 580 Ornamental Ironworkers (July 31, 2003), <http://www.eeoc.gov/eeoc/newsroom/release/7-31-03b.cfm>.

85. Press Release, Equal Employment Opportunity Commission, Local 580, Ornamental Ironworkers to Pay \$800,000 to Partially Settle Contempt Action by EEOC (May 8, 2007), <http://www.eeoc.gov/eeoc/newsroom/release/5-8-07.cfm>.

86. *Id.*

87. Equal Emp't Opportunity Comm'n v. Int'l Ass'n Bridge Structural and Ornamental Ironworkers Local 580, No. 71 Civ. 2877 (S.D.N.Y. Aug. 18, 2008), available at <https://casetext.com/case/eeoc-v-international-association-of-bridge-structural>.

88. Equal Employment Opportunity Comm'n v. Int'l Ass'n of Bridge Structural and Ornamental Ironworkers Local 580, 2011 WL 1219261 (S.D.N.Y. Mar. 11, 2011).

litigation ended.⁸⁹ However, EEOC monitoring of Local 580's compliance with its obligations under its various settlement agreements continues to this day.⁹⁰

The Sheet Metal Workers have also continued to find themselves defending the union in court from claims of discrimination. The EEOC first sued Local 28 for race discrimination in the early 1970s and has been in on-and-off litigation with the union over its violations of the resulting court orders ever since, resulting in a series of contempt orders against the local.⁹¹ In 2004, the Hispanic Society brought an action as plaintiff-intervenors on behalf of itself and a certified class of all black and Hispanic persons who are or were at any time since 1984 members, either as journeypersons or apprentices, of Local 28 and who are or were “underemployed” as compared to their white counterparts.⁹²

The plaintiffs claimed that statistical analysis of the 1991 to 2003 period showed that statistically significant work hours disparities between white and nonwhite workers persisted, alleged that the disparities were attributable to race, and alleged that Local 28 failed to make diligent efforts to remedy these disparities.⁹³ The court ruled in favor of the plaintiffs, concluding:

Local 28's lack of engagement in rectifying discriminatory practices has had a severe detrimental effect not only on its nonwhite union members but also on the union as a whole. Local 28 has endured years of litigation, with all the attendant costs both to its financial resources and its reputation. For this, the union has only itself to blame. Perpetual resistance and foot-dragging on the union's part will not cow the court from using the full range of powers at its disposal to ensure that Local 28 fulfills its court-ordered responsibilities. Sadly, the union continues to evade its obligations and the court has no choice but to hold Local 28 in civil contempt, once again.⁹⁴

In January 2008, a federal judge approved a \$6.2 million settlement.⁹⁵ “This lawsuit has lasted 37 years because for a very long time the union’s old guard resisted change and would not bring itself into compliance with the court order,” remarked Jyotin Hamid, a partner with Debevoise & Plimpton, which represented the black and Hispanic workers in the case.⁹⁶ The EEOC continues to monitor Local 28 for compliance with the settlement, and the union was the defendant in a lawsuit by a contractor for failing to meet its obligations under the apprenticeship provisions of

89. Equal Emp't Opportunity Comm'n v. Int'l Ass'n of Bridge Structural and Ornamental Ironworkers Local 580, 2011 WL 1236592 (S.D.N.Y. Mar. 29, 2011).

90. See Equal Emp't Opportunity Comm'n v. Local 368, 2015 WL 749133 (S.D.N.Y. Feb. 19, 2015).

91. Equal Emp't Opportunity Comm'n v. Local 638, 2005 WL 823915 (S.D.N.Y. Apr. 8, 2005).

92. *Id.*

93. *Id.*

94. *Id.*

95. Steven Greenhouse, *Settlement in Bias Suit that Stalled for 37 Years*, N.Y. TIMES (Jan. 16, 2008), <http://www.nytimes.com/2008/01/16/nyregion/16union.html>. One of the relevant orders, dealing with back pay claim from 1984 to 1991, can be found at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1119&context=condec>.

96. *Id.*

the settlement as recently as 2012.⁹⁷ A special master continues to monitor the compliance of several other union locals with various anti-discrimination orders and settlements extending back decades.⁹⁸

Lawrence Mishel of the pro-union Economic Policy Institute contends that despite reports of persistent discrimination, African Americans are a higher percentage of unionized construction workers in New York City than of non-union workers.⁹⁹ Mishel, however, simply presents his conclusions, and there is no easy way to check whether his analysis is consistent with the underlying data.

Nor is there any way to tell what extent the data reflects actual improved conditions for black workers on the ground.¹⁰⁰ For example, some African Americans have reported that they are members of a building trades union, but rarely get work through the union.¹⁰¹ Finally, as Mishel acknowledges, Hispanics and other minorities (primarily Asian Americans) are vastly better represented in the nonunion sector of New York's construction industry than in the union sector. Over 75% of nonunion construction workers are members of minority groups, compared to 55% of unionized construction workers.¹⁰²

C. Prevailing Wage Law's Effect on Minority Contractors

Regardless of whether prevailing wage legislation harms minority workers, minority contractors allege that such legislation has discriminatory effects on them. As noted previously, Roistacher and colleagues found that minority contractors find it extremely difficult to compete for government contracts because of massive paperwork and other expensive requirements.¹⁰³

Harry Alford, president and CEO of the National Black Chamber of Commerce, has stated that approximately 98% of construction companies owned by African Americans and Hispanics are nonunion and are frozen out by project labor agreements that implicitly require union labor.¹⁰⁴ The same dynamic would apply to

97. Equal Emp't Opportunity Comm'n v. Local 638, 2012 WL 3594245 (S.D.N.Y. Aug. 10, 2012). The court denied defendant's motion to dismiss, and it's unclear what became of the lawsuit thereafter.

98. Equal Emp't Opportunity Comm'n v. Local 368, 2015 WL 749133 (S.D.N.Y. Feb. 19, 2015) (approving a fee increase for the special master in question).

99. LAWRENCE MISHEL, DIVERSITY IN THE NEW YORK CITY UNION AND NONUNION CONSTRUCTION SECTORS (2017), <http://www.epi.org/publication/diversity-in-the-nyc-construction-union-and-nonunion-sectors/>.

100. Cf. Eric Durkin, *EXCLUSIVE: NAACP Claims Building Trades Council Misleads New Yorkers About Diversity in Construction Unions*, N.Y. DAILY NEWS (Oct. 22, 2015), <http://www.nydailynews.com/new-york/exclusive-naACP-rips-diversity-nyc-construction-unions-article-1.2415475>.

101. See BUTLER, *supra* note 76, at 62–90.

102. See MISHEL, *supra* note 99.

103. ROISTACHER ET AL., *supra* note 61, at 15.

104. Press Release, Couch White, LLP, The National Black Chamber of Commerce and Its New York Affiliates Submit Amicus Brief Objecting to Racially Discriminatory Effects of Union-Only Project Labor Management (July 10, 2013), available at https://kingcounty.gov/~media/depts/executive-services/children-family-justice-center/documents/EOEP/Doc_1203_NBCC_Amicus_-_PLA_Discriminatory_201307.ashx?la=en.

prevailing wage legislation that favors union contractors.¹⁰⁵ Alford also quoted Anthony Robinson, President of the Minority Business Enterprise Legal Defense and Education Fund, who testified in the House of Representatives that “the construction trade labor unions have been, and remain, a serious obstacle to the participation of minority contractors and workers in the construction industry.”¹⁰⁶

CONCLUSION

Historically, prevailing wage legislation has been a disaster for minority construction workers. Such laws bias the labor market in favor of labor unions, and construction labor unions have been among the most vociferously exclusionary entities in the United States. Persistent discrimination lawsuits, combined with anecdotal reports of discrimination, suggest that significant discrimination continues to exist in construction unions. Given that prevailing wage laws tend to operate to exclude nonunion labor in favor of union labor, this works to the detriment of minority workers who are subject to union discrimination.

Regardless of intentional discrimination, prevailing wage laws give an advantage to union contractors and labor unions, while people of color are much better represented in the nonunion sector of the industry. The seniority system favors older white male workers who received their jobs when discrimination was still rampant over younger, more ethnically diverse construction workers.

The economic literature on the effects of prevailing wage laws is divided between those who conclude that prevailing wage laws exclude minority workers and those who believe that such exclusion is unproven. There do not appear to be any articles addressing in any detail the effect of prevailing wage laws on minority-owned contracting companies, but given that they are overwhelmingly nonunion, such laws almost certainly serve to disproportionately exclude such companies. If so, this would contribute to the discriminatory effects of prevailing wage laws on minority workers.

105. Brief for The Nat'l Black Chamber of Com., Inc. et al. as Amicus Curiae Supporting Appellants, *Lancaster Dev., Inc. v. McDonald*, 112 A.D.3d 1260 (N.Y. App. Div. 2013) (No. 4745-12) [hereinafter Amicus Brief]. The defendants were granted a motion to dismiss because the court found that the plaintiffs had failed to establish “standing.” *Lancaster Dev., Inc. v. McDonald*, 112 A.D.3d 1260 (N.Y. App. Div. 2013).

106. Amicus Brief, *supra* note 105, at 3.