

**The Deterrent Effects of Reverse Discrimination Claims
on Federal Rule Compliance:**

The Case of Public Procurement and Contracting

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Samuel L. Myers, Jr.
University of Minnesota

Yuan Gao
University of Missouri-Columbia

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Introduction

Surprisingly little is known about how state agencies that receive federal funds allocate these funds to racial and ethnic minority group members when complying with federal rules and mandates. One federal mandate, promulgated during the Clinton Administration, requires that recipients of federal highway funding set goals for allocating funds to women, minority and disadvantaged business enterprises (DBEs). More than \$7 billion dollars was distributed to DBEs via U.S. Department of Transportation funding in 2009 and 2010 alone. The programs designed to set and implement DBE goals, however, have been challenged by white-male owned business enterprises alleging that these forms of targeted support for women and minorities amount to reverse discrimination.

This paper examines whether reverse discrimination litigation results in reduced compliance with the federal mandates via lower DBE goal settings. Reverse discrimination claims pose a significant implementation challenge to state and local decision makers. On the one hand, agencies may lose federal funds by failure to comply with rules that require them to make efforts to distribute funds equitably to women and minority owned business enterprises. On the other hand, litigation or the threat of litigation may cause rational actors to limit their affirmative action programs. Deterrence theory is the basis for the prediction that greater litigation will reduce goal setting efforts. Alternative theories, such as prospect theory, predict the opposite. Thus, this paper also provides a basis for the testing of deterrence theory and its application to federal rule compliance.

The paper is organized as follows. First, we provide background information on public procurement and contracting and the federal rule mandating DBE goals. Then we discuss the competing theoretical foundations for the model we estimate, which states that the DBE goal is a

function of reverse discrimination litigation. Next, we detail the data used for the model estimation. Finally, we provide an assessment and interpretation of the results relevant to the larger debate about compliance with federal rules.

Background

Billions of dollars are awarded each year by the federal government to state departments of transportation, which use these funds to contract with private construction companies, and to procure such professional services as architectural design, surveying, engineering and technical support. The contracts range from the construction and repair of bridges, highways and tunnels, to the design of information accounting and report systems. In fiscal year (FY) 2012, for instance, the U.S. Department of Transportation (DOT)'s Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA) requested, respectively, \$70.5 billion, \$22.35 billion, and \$18.66 billion to fund construction and professional services for all states¹. These requests have been increasing annually. The three agencies' requests in FY 2012 were approximately 70%, 84% and 20% higher than FY 2010. The sheer magnitude of these requests contrasts with other non-defense spending that has been in decline.

Private construction industries have been historically dominated by white males. The use of public funds for construction projects passively contributes to historic disparities arising in the private market place (Enchautegui et al. 1996). As a result, the U.S. DOT has mandated programs and policies designed to remedy historic or ongoing disparities in the award of contract dollars to women and minority owned business enterprises. One of the most visible and perhaps most controversial areas of federal mandates involves the requirement that recipients of FTA,

¹ <http://www.dot.gov/budget/2012/budgetestimates/fhwa.pdf>;
<http://www.dot.gov/budget/2012/budgetestimates/fta.pdf>; <http://www.dot.gov/budget/2012/budgetestimates/faa.pdf>

FHWA, and FAA funding institute percentage goals specifically for Disadvantaged Business Enterprises (DBEs). These goals are designed to create a level playing field for minority-owned businesses in DOT-assisted public procurement and contracting. The Code of Federal Regulations Title 49 Part 26—“Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs”—requires that state DOTs establish realistic DBE goals annually, and report them to the U.S. DOT for review and approval.

Early affirmative action efforts in federal procurement and contracting date back to 1969, when the Small Business Administration created a special 8(a) program to provide historically disadvantaged firms with opportunities to participate in federal contracts, and to facilitate capacity-building and successful graduation of such firms from the program once self-sufficiency had been developed (Leiter and Leiter 2002).

Congress enacted Public Law 95-507, as an amendment to the Small Business Act and Small Business Investment Act of 1958, which authorized minority set-asides and required all federal agencies to submit annual percentage goals for minority business utilization. Defense contractors, for example, were required to achieve at least 5% minority business participation within 3 years, according to the National Defense Authorization Act. The Public Works Employment Act required that 10% of federal construction grants be reserved for minority-owned enterprises. The Federal Acquisition Streamlining Act encouraged federal agencies to promote race-conscious procurement activities (Colamery 1998).

The U.S. Supreme Court decisions in *Croson v. City of Richmond* (1989) and *Adarand Constructors v. Peña* (1995) found that race-conscious set-asides in government procurement and contracting are generally suspect and must meet a strict scrutiny test, the most stringent level of judicial review. The Clinton Administration, maintaining that “affirmative action in federal

procurement is necessary, and that the federal government has a compelling interest to act on that basis in the award of federal contracts,”² sought to find a middle ground in an effort to salvage such programs. The solution sought was to require that goals established to assist disadvantaged business enterprises be narrowly tailored, flexible, not over-inclusive, and to minimize the burden placed on other firms. The U.S. Department of Justice issued further guidance on applying the *Adarand* decision to government procurement and contracting programs. In the case of the DOT, Federal Rule 49 CFR Part 26 requires recipients to set DBE goals based on the availability of willing, able and qualified women and minority owned firms and to meet the maximum feasible portion of any specified DBE goal through race-neutral means.³

In *City of Richmond v. Croson* (1989), Justice O’Connor commented that “where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”⁴ Federal, state and local agencies will have to be able to demonstrate a compelling interest to justify the installation of a narrowly-tailored program that uses not rigid quota schemes, but statistical evidence and scientific disparity studies to reflect actual need for minority business participation in government-assisted contracting process (Halligan 1991; La Noue 1993; Rice 1993).

Some state transportation agencies, consequently, have sought support for data collection and analyses (Rice 1992), whereas others have failed to conduct adequate and systematic research required to meet the mandate. The Transportation Research Board of the National Academies

² DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,050.

³ 49 Code of Federal Regulations Part 26 “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.”

⁴ 488 U.S. at 509 (1989).

reports that there are wide variations in how states meet their *Croson* requirement of establishing a compelling interest for their race-conscious procurement and contracting programs.⁵ Relatively little is known about the degree to which state agencies comply with 49 CFR Part 26 in general. Some jurisdictions, attempting to comply with the rule but fearing litigation, had responded by eliminating their race-conscious DBE goals and replacing them with race-neutral goals (Myers and Ha 2009).

Deterrence and Compliance

The area of public procurement and contracting remains largely understudied in public policy and administration. One body of existing literature examines historic reasons that justify the use of race-based contracting policies by government agencies. Transformations of urban economic structures (Bates 1984) and persistent racial disparities in financial markets (Munnell et al. 1996; Cavalluzzo and Cavalluzzo 1998; Boston 1999; Fairlie and Meyer 2000; Blanchflower et al. 2003; Fairlie and Robb 2008) make it all the more important for public sector contracting programs to create a level playing field for minority firms (Feagin and Imani 1994). Another group of studies mainly investigate the effectiveness and policy impacts of affirmative action programs in government contracting (Bates 1981; Black 1983; Rice 1991; La Noue 1994; Enchautegui et al. 1996; Myers and Chan 1996; La Noue 2008). Some case studies of DBE programs in the post-*Croson* era, for example, suggest that such narrowly tailoring adjustments may have led to reduced shares of contracting dollars awarded to minority businesses (Bates 2009; Davila et al. 2012).

⁵ National Cooperative Highway Research Program (NCHRP) Report 644: “Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program.” Transportation Research Board of the National Academies.

The deterrence theory holds that when the cost of compliance is deemed lower than that of noncompliance, enforcement and punishment will deter noncompliance. An individual or organization will choose to comply with laws and regulations when the expected benefits of compliance are perceived to exceed the related costs (Becker 1968; Ehrlich 1972; Tittle and Logan 1973; Braithwaite and Makkai 1991; May 2005). This theoretical framework has been used in studies of federal rules and regulations (Braithwaite 1985; Langbein and Kerwin 1985; Scholz and Gray 1997; Hutter 1997; Winter and May 2001; Whitford 2005). In the case of public procurement and contracting, 49 CFR Part 26 does not require that state recipients of DOT funds actually meet their DBE goals. However, failure to submit goals for review as well as failure to make good faith efforts to implement the goals can result in withholding of critical federal dollars required for the completion of important highway, airport or transit projects. There are three main compliance mechanisms: a) referral to the U.S. Department of Justice for possible litigation; b) withholding of federal funds; and c) delay in approval of proposed goals and/or delay in release of federal funds. All of these compliance mechanisms create significant costs to agencies.

The first two mechanisms have rarely been used in the pre-Obama years. The third is rather common, and has the same practical effect as withholding of funds. Projects are delayed. The public inconvenienced. One external factor affecting the rule compliance is legal challenges from white male-owned firms alleging that the DBE goals per se or the goal-setting process contributes to discrimination against non-protected group members. Such challenges typically involve the filing of lawsuits in state or federal courts, or the lengthy, expensive, distracting and protracted pre-trial discovery process intended to induce government agencies to abandon the DBE goals, lower the DBE goals, replace them with race-neutral goals, and/or compensate non-

DBE firms for the harm that they experience from the implementation of DBE goals. Some litigation is pursued based on principle, with the ultimate intention of going forward to the United States Courts of Appeals or the U.S. Supreme Court in an attempt to establish the unconstitutionality of the DBE goals.

Consider the outcome variable G_t , the DBE goal required to be submitted to the U.S. Department of Transportation annually since 2000. This value should be approximately equal to the relative representation of DBEs in the geographic market area, subject to a possible upgrade adjustment that requires evidence of ongoing discrimination against DBEs. The relative representation of DBEs in the market place is the base goal, denoted as $g(t)$. The adjustment to the base goal can be denoted by $\alpha(t)$, so that the submitted goal is:

Equation 1:

$$G_t = g(t) \cdot [1 + \alpha(t)]$$

For example, if minority and women's businesses account for 10% of the relevant market, and if about half of the disparity in contract awards to DBEs versus non-DBEs is due to discrimination, then the resulting G_t submitted should be about 15%. Compliance with the federal rule suggests that the submitted goal is about equal to the base goal plus an adjustment.

The cost of submitting a high goal with a possibly large adjustment, C_1 , may result in costly litigation (L) from aggrieved white male-owned firms on the grounds of reverse discrimination. The cost of submitting an unrealistically low goal or failing to submit one at all, C_2 , may lead to federal sanctions and/or loss of federal funds (F). The expected utility from the goal-setting, therefore, can be given by:

Equation 2:

$$EU(G_t) = U[G_t \geq g(t) \cdot (1+\alpha(t)); C_1(g, \alpha, L)] \cdot p(C_1) + U[G_t < g(t-1) \cdot (1+\alpha(t)); C_2(g, \alpha, F)] \cdot p(C_2)$$

This equation depends on the probabilities of incurring either of these costs as well as the potential sizes of these costs, L and F. For simplicity, we can denote that the social benefits to the state come through setting the goal. The benefits of a goal equal to or greater than the base goal are assumed to be greater than the benefits of a lower goal or goal of zero to the state. Therefore, equilibrium for the risk-neutral decision-maker occurs when the expected net benefit of compliance exceeds the expected net benefit from noncompliance. The probability of compliance depends on the cost of compliance C_1 which comes from the base goal and the adjustment along with possible litigation costs (L), and the probability that these costs are incurred ($p(C_1)$), versus the cost of noncompliance C_2 which comes from the base goal and the adjustment along with possible federal sanctions (F), and the probability that these sanctions will occur ($p(C_2)$). Consequently, increases in certainty and severity of federal sanction are expected to increase compliance, whereas increases in the certainty and severity of legal challenges are expected to reduce compliance. Specifically, the theory suggests that reverse discrimination lawsuits produce expected costs that exceed the expected social benefits of the goals and thus result in a lowered goal. In short, one expects that reverse discrimination litigation will have a deterrent effect on state DOT compliance with federal rule 49 CFR Part 26.

The rational choice model under uncertainty predicts that as the risk of litigation increases, there should be a reduction in the overall goal. Surprisingly, a simple illustration suggests this might not be the case. The 9th Circuit Court of Appeals (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington) ruled in *Western States Paving Co., Inc. v. Washington State Dep't of Trans.* (2005) that the DBE programs were not sufficiently narrowly tailored. The initial reaction in Washington State was the elimination of

race-conscious goals but in subsequent years, many of the states affected by this ruling have increased their overall goals—perhaps to compensate for elimination of the DBE goals.

The rational choice theory assumes, furthermore, that state government administrators face incentive structures and decision mechanisms permitting them to respond like rational decision makers under uncertainty. Complex models building on the work of Herbert Simon, Kanneman and Turvesky, and others in what might be called the behavioral economics literature, suggest inertia, framing effects and other aspects of bounded rationality with alternative predictions of the impacts of litigation on federal rule compliance.

Prospect theory (Kahneman and Tversky, 1979) helps to explain why behavior might differ between increases in losses vs. reductions in gains. Prospect theory posits that agents are more sensitive to increases in losses than changes in their gains. From this perspective, one might expect there to be asymmetric and possibly non-transitive impacts of litigation on goal setting and goal attainment. Put differently, one might expect under prospect theory that reverse discrimination litigation will reduce DBE goals but the absence of reverse discrimination litigation will not increase goals.

But the data from these observations come from FHWA (highway) funding projects by State Departments of Transportation. We hypothesize that the framing of these risks is affected by stakeholder groups. The main stakeholder group for FHWA projects is highway users whose preferences differ from state to state. One can assume, for example, that more liberal states will show greater support for DBE programs and thus result in higher goals set. In the framing perspective and relying on prospect theory, however, reverse discrimination claims will have a smaller impact on goal setting than the larger issue of support for affirmative action in the state.

Data and Measurement

The models we estimate use unique pooled cross-section, time-series data obtained through the Freedom of Information Act (FOIA) request to the U.S. DOT. Upon request, the DOT has provided copies of “Uniform Report of DBE Awards or Commitments and Payments Form,” reported to the DOT’s Office of Civil Rights by each of the fifty state DOTs, between FY 2001 and 2010. We have acquired separate annual reports for FTA and FHWA, two of the three federal agencies within the U.S. DOT. These yearly reports contain the race-neutral and race-conscious portions of DBE procurement and contracting goals proposed by each state transportation agency, as well as the actual percentages of contracting dollars DBE firms have been awarded.⁶ Our final analyses are based on the FHWA reports.⁷ These original data allow us to examine the impact of litigation efforts upon agency DBE goal-setting and attainment.

Dependent Variable

Our dependent variable is the relative DBE goal. All state and local highway administrations receiving above a certain threshold in federal funds are required to establish annual (triennial after FY 2010) DBE goals. The goals are supposed to be set according to a three-step methodology: a) estimation of a base goal; b) adjustments to the base goal; and c) partitioning of the adjusted goal into race-conscious and race-neutral portions. The base goal is determined by the availability of DBEs in the relevant geographic market area. The required filings to the U.S. Department of Transportation provide access to the overall DBE goals and the race-neutral and race-conscious portions of the goals that state agency recipients of FHWA funding formulate each year. A DBE goal of 8% indicates that the state transportation agency plans on allocating 8%

⁶ The forms differ slightly across years. Race-neutral goals were not reported in 2001. In earlier years, entries existed for the partitioning of the DBE attainment by race and gender.

⁷ There are many missing values in the FTA reports. A great number of the fifty states did not properly report DBE goals between 2001 and 2004.

of the coming year's public contracting dollars specifically to firms certified as DBEs. Overall DBE goals submitted by states between 2001 and 2010 range between 3% (Nevada) and 32% (Washington, DC). Naturally, such goals are more likely to be lower in states with fewer DBE firms. In order to examine goal-making primarily as a function of legal challenges, we compute the relative DBE goal as overall goal divided by availability of DBE firms. The availability data comes from women's and minority business enterprise shares reported in the Survey of Business Owners by state.

Independent Variables

Legal Challenges

Our independent variables mainly center on litigation activities. The WestLaw online legal database provides full access to comprehensive lists of lawsuits in which preferential affirmative action programs or policies were involved. For the purpose of this paper where we essentially examine race-based DBE goals and attainment, we have narrowed down the list by selecting cases in which discrimination or reverse discrimination claims made were primarily race-based.⁸ For each case coded, we record information on the race/ethnicity of the plaintiff (white vs. non-white), the outcome of the lawsuit⁹ (dummy variable), whether or not the plaintiff was represented by a non-profit legal foundation (dummy variable), and whether the defendant was a transportation agency in particular (dummy variable), which may have a more direct bearing on DBE-related decision-making. Moreover, we identify the level of judiciary at which the case was decided, as well as case history; namely, whether, and to which level of court, the case was

⁸ The cases that we exclude dealt with issues related to gender, age, disabilities, national origins and other categories to which affirmative action programs typically apply.

⁹ Value of 1 signifies that the affirmative action program in question was invalidated by court. Other outcomes, such as anti-affirmative action claims, being dismissed or rejected are coded as 0.

appealed. Detailed case histories are listed in the Appendix section. We create four dummy variables for state supreme court, federal district courts, federal courts of appeal, and the U.S. Supreme Court to specify at which level of court the lawsuit occurred. We expect the decisions of state supreme courts and federal district courts to have a stronger impact upon state DBE programs relative to Courts of Appeals and the U.S. Supreme Court rulings.¹⁰

We collected and reviewed 69 cases, a total of 104 lawsuits at all levels of courts. Fourteen of these cases were filed against a state department of transportation to specifically challenge existing Disadvantaged Business Enterprises plans. There were 16 lawsuits at the state level. Forty lawsuits were received in federal district courts, 44 in federal courts of appeals. There were eight individual court decisions in which the race-based public programs in question immediately failed the judicial strict scrutiny test, eight decisions in which affirmative action was upheld. More than half of the cases were dismissed or rejected due to lack of standing or evidence, or declared as moot. A majority of the reverse discrimination claims that challenged government-installed affirmative action programs were eventually denied in courts.

For each year for each state and the District of Columbia we coded the following variables:

x1 if there is any lawsuit in prior year(s)

x2 if there is any lawsuit in current year

x3 if there never were no lawsuits in the current year or previous years

x4 lawsuit at federal circuit court of appeals in prior or current year

¹⁰ Our preliminary examination of state DBE reports suggests that a federal circuit court's decision may not significantly influence decision-making of the agencies within the circuit. For example, the 9th Circuit Court of Appeal (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) ruled in *Western States Paving Co., Inc. v. Washington State DOT* (2005) that the DBE programs were not sufficiently narrowly tailored. Nevertheless, the state of Washington made only small reductions in their DBE goals, whereas many other states affected by this same ruling have actually increased their overall goals.

nx1 any white plaintiff in prior years

nx2 any white plaintiff in current year

nx3 never any white plaintiff in current year of previous years

nx4 white plaintiff at federal circuit court of appeals in prior or current year

defendant if the State Transportation agency was a defendant in a reverse discrimination complaint

Political Factors

Our next set of independent variables measure the political party compositions of state legislatures, and the political party affiliation of governors. This partisanship information is obtained from the annual statistical abstracts published by the U.S. Census Bureau. We create dummy variables for Republican- and Democrat-controlled state legislature, and Republican and Democratic governors. We hypothesize that state DBE goal-setting may also be at least partially affected by a state's political climate. There is a well-established literature on the influence of political branches on public policy-making. In particular, studies have shown that compared to Republican-controlled legislatures, legislatures controlled by the Democratic Party are more likely to favor redistributive programs (Erikson 1971; Winters 1976), and more likely to enact racial and gender-related programs (Nice 1982; Dye 1984; Garand 1985; Barrilleaux and Miller 1988; Meier et al. 1996). Therefore, we also propose to test the effect of partisanship on state DBE programs by controlling for the presence of a Democratic governor and legislature.

Public Attitudes

Public attitudes towards race-related policies may also affect a state's general racial policy environment and thus DBE program implementation. Public opinion studies suggest small support for race-conscious policies (Kinder and Sanders 1996). White attitudes towards

affirmative action in public employment, education, and contracting tend to fall between uncertain and negative, and reflect a widespread belief that such programs amount to reverse discrimination (Steeh and Krysan 1996; Alvarez and Brehm 1997; Schuman et al. 1998; Kemmelmeier 2003).

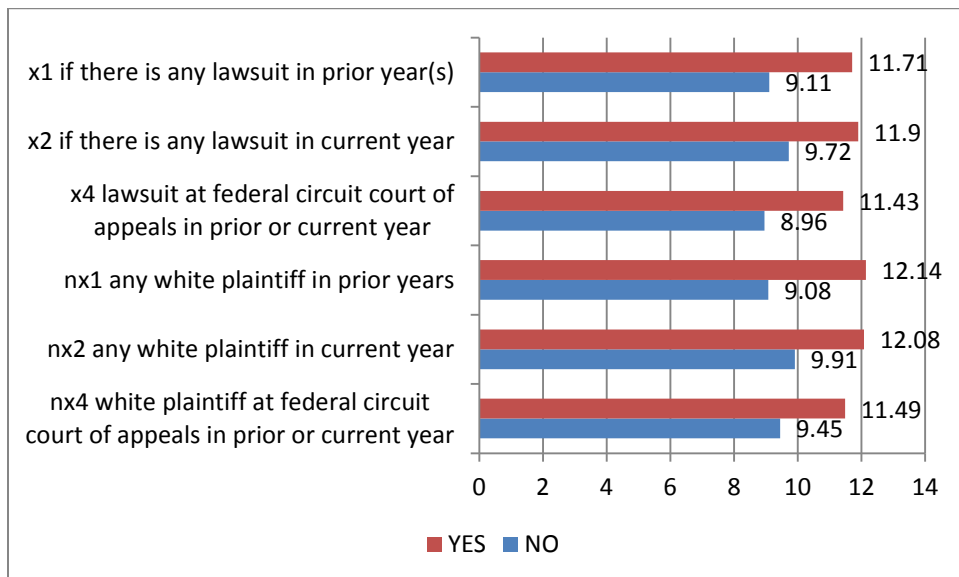
To measure racial attitudes, we use an index of citizen ideology first proposed by Berry et al. (1998). On a scale of 0 to 100, this measure denotes the ideological positions of a state's citizens, and will more or less reflect the degree to which race-related federal policies such as the DBE programs are perceived at the state level. Meanwhile, we also utilize another possible measure of racial attitudes by taking into account the fact that anti-affirmative action ballot initiatives have been introduced at the state level (Hajnal et al. 2002; Kellough 2006). These data are collected from the online ballot measures database through the National Conference of State Legislatures website.¹¹ We create a dummy variable, coded as 1 if the introduced state ballot initiative or referendum aiming to ban affirmative action was successful, and 0 if it had eventually failed. For a list of both successful and failed ballot measures between 2001 and 2010 please go to the Appendix. Under the assumption that state bureaucracy does not intend to deviate dramatically from the preferences of its constituents, we expect to see a decline over the years of state DOTs' overall DBE goals and the particular race-conscious portions, in states with more conservative citizens.

¹¹ <http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx>

Results

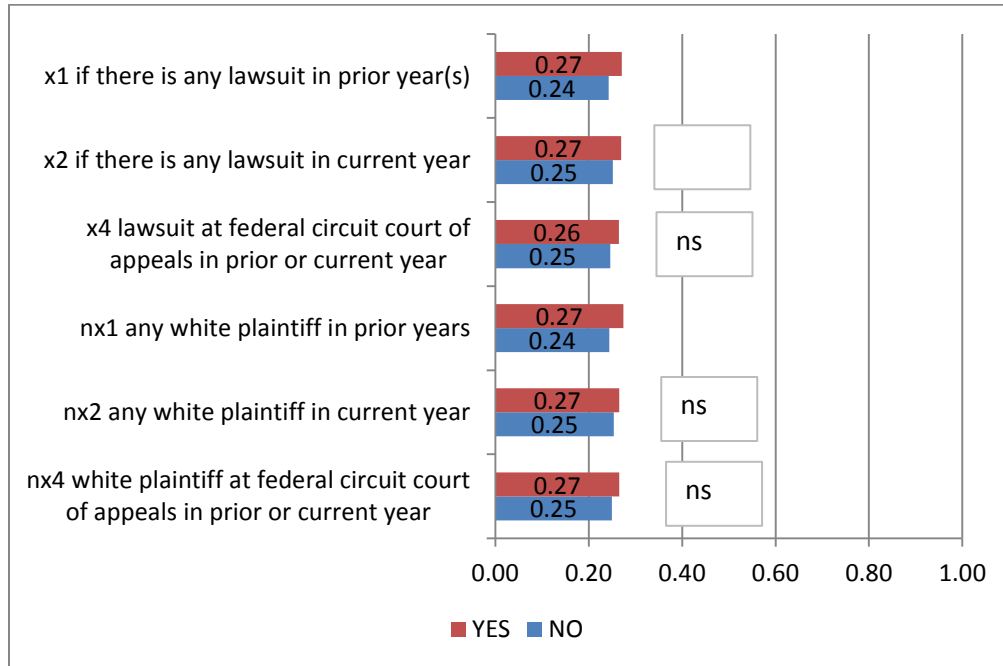
Figure 1 reveals that DBE goals were consistently higher for states and years where there was litigation than otherwise. Whether the litigation variable was defined as litigation in the current year, previous years, in federal courts, or with white plaintiffs, the results are the same: the DBE goal reported by the state DOT was always higher in instances where there was litigation. These effects are all statistically significant.

Figure 1: Differences in DBE Goals by Litigation Type



These results are tempered by the fact that litigation also occurred in states where there were large numbers of minority firms. Thus, when one examines instead Figure 2, which shows the relative DBE goals—the ratio of the goal to the percentage of women or minority firms in the state—the effects are no longer statistically significant. The ratios average from .24 to .25 for states without litigation to .26 to .27 for states with litigation. The differences are statistically significant only when litigation is measured as prior years.

Figure 2: Differences in Relative DBE Goals by Litigation Type



It is not surprising, then, that alternative methods of estimating the coefficients of the litigation variables in a model predicting the natural log of the relative DBE goal that the effects are statistically insignificant for all but previous litigation measures.

Table 1 reports the results of ordinary least squares estimates controlling for circuit court, political representation and the percentage of the DBE goal that is race neutral. The effects are generally positive when there is litigation (or negative when there is no litigation) but statistically significant only in three out of eight models: any litigation in previous years, white plaintiff in previous years, and never a white plaintiff in current or previous years. These results do not support a general deterrence theory predicting *lower* DBE goals when there is litigation.

A Hausman test for endogeneity suggests the weak possibility that current litigation is a function of past or current DBE goals. However, prior litigation cannot be predicted by current DBE goals and thus the argument that the positive coefficients are simply an artifact of

simultaneous equation bias is not supported. To see this further, the second row in Table 1 report the two-stage least squares (2SLS) estimates of the litigation coefficients. Instruments include: ideology, ideology squared, Democratic House of Representatives, Democratic Governor, whether affirmative action program in question was invalidated by court, Federal District 1-8, Federal District 10-11, year 2003-2009. The 2SLS produce estimates that are all negative for current or previous litigation or positive for no litigation. None of the effects, however, are statistically significant, undermining the suggestion that the causal path is from the setting of goals to litigation and not litigation to goal setting.

Table 1

Effects of Reverse Discrimination Litigation on Relative DBE Goals								
(Robust Standard Errors in Parentheses)								
Dependent variable: relative goal ln[(dbe total goal percent)/(mbe+wbe percent)]								
ESTIMATOR	Any lawsuit in prior year(s) ^{1/}	There is any lawsuit in current year ^{2/}	Never any lawsuit in current year of previous years ^{3/}	Lawsuit at federal circuit court of appeals in prior or current year ^{4/}	White plaintiff in prior years ^{5/}	White plaintiff in current year ^{6/}	Never any white plaintiff in current year of previous years ^{7/}	White plaintiff at federal circuit court of appeals in prior or current year ^{8/}
OLS	0.129***	0.0343	-0.0622	0.0318	0.121***	0.0256	-0.0946**	0.0413
Robust Standard Errors	(0.0406)	(0.0424)	(0.0478)	(0.0539)	(0.0417)	(0.0547)	(0.0441)	(0.0440)
N	276	276	276	276	276	276	276	276
2SLS	-0.0858	-0.160	0.0994	-0.0405	-0.0634	-0.357	0.0958	-0.0419
Robust Standard Errors	(0.304)	(0.645)	(0.336)	(0.242)	(0.275)	(1.210)	(0.353)	(0.252)
N	297	297	297	297	297	297	297	297
FGLS	0.0240	-0.0161	-0.0464	-0.0113	0.0426	-0.00215	-0.0750	0.00665
Robust Standard Errors	(0.0367)	(0.0255)	(0.0917)	(0.100)	(0.0366)	(0.0342)	(0.0840)	(0.0812)
N	276	276	276	276	276	276	276	276

OLS: Other controls include: percentage DBE goal that is race neutral, Democratic House of Representatives, Federal District 10, Federal District 6, Federal District 9, Federal District, 8, Federal District 11, Federal District 4, Federal District, 5, Federal District 2.

2SLS: instrumented variable x1, instruments ideology, ideology², Democratic House of Representatives, Democratic Governor, Whether affirmative action program in question was invalidated by court, Federal District 1-8, Federal District 10-11, year 2003-2009.

Pooled FGLS estimator or population average estimator: percentage DBE goal that is neutral, Democratic House of Representatives, Democratic Governor, unsuccessful ballots initiatives/referendums banning race-based affirmative action, citizen ideology, whether the affirmative action program in question was invalidated by court, Federal District 2-11, year 2004-2010.

Table 1 also reports feasible generalized least squares estimates. None of the coefficients on the litigation variables are statistically significant. We cannot conclude, therefore, that litigation has an adverse impact on DBE goal setting.

Prospect theory suggests that the risk of losses should have a larger impact on DBE goals than the absence of losses (e.g., gains). Prospect theory predicts a negative coefficient on the litigation variable that represents losses and a positive coefficient on the litigation variable that predicts gains. The absolute value of the loss coefficient should be larger than the absolute value of the gain coefficient. The problem here, however, is that the OLS estimates are all positive for the loss variable and negative for the gain variable, in direct contradiction to the predictions of the Prospect theory.

Table 2 examines the impacts of law suits against the State Department of Transportation. The difference here is that the effect is a specific deterrent rather than a general deterrent. The estimates obtained using ordinary least squares (OLS) with no covariates, OLS controlling only for ideology, OLS with a full set of covariates, two-stage least squares and feasible generalized least squares (FGLS) all produce the same substantive result: there is not specific deterrent effect of litigation on DBE goal setting.

Table 2

Estimates of Specific Deterrent Effects of Litigation					
		Coef.	Std. Err.	t	P> t
OLS, No Covariates		-0.0025	0.082	-0.03	0.98
OLS, with Ideology		0.0081	0.0817	0.1	0.92
OLS, Full Set of Covariates		-0.0604	0.0463	-1.31	0.19
2SLS		-0.5008	0.6364	-0.79	0.43
FGLS		-0.0286	0.1074	-0.27	0.79

The only statistically significant determinants of the relative DBE goals turn out to be those that are most closely aligned with the framing model. In jurisdictions such as the 11th Circuit Court of Appeals, where the Western Paving case was decided virtually banning race-conscious programs, and the 5th Circuit Court of Appeals, where there is a long standing run of anti-affirmative action cases, the *framing* of the policy of setting DBE goals is more important than whether there are litigants challenging the goals. Another factor that is consistently significant is the ideology variable. DBE goals are set higher in more liberal states.

Conclusions

We find no evidence in this paper supporting the deterrence theory, wherein reverse discrimination claims hinder the setting of race conscious goals and thwart the intent of the federal mandates regarding affirmative action for disadvantaged business enterprises in the state programs receiving federal highway funding. No support is found for specific deterrence, whereby defendants in reverse discrimination litigation reduce their DBE goals, or general deterrence whereby any type of antidiscrimination litigation reduces DBE goals. We also test for the possibility of framing effects and do find limited support for this proposition. We test the prediction of prospect theory and reject the hypothesis that losses have a larger impact than gains on outcomes.

An important qualification of our results is that we do not test for other types of costs and benefits or gains and losses from reverse discrimination litigation. This will require additional data to which we do not have access at this point. Such gains and losses involve the budgets of the state agency and levels of support or opposition from elected officials.

Another qualification is that we have not yet interviewed state agency heads or procurement officials to determine whether other factors could explain the unexpected finding

that DBE goals were higher in states with litigation than in states with no litigation. A plausible explanation is that there is endogeneity in the model suggesting that reverse discrimination claims are more likely to arise in states with high goals.

A final qualification is that the theory suggests *threats of litigation* should also act as deterrents to goal setting. We have yet to collate and assemble court filings and related pre-trial hearings that typically precede the final outcomes of litigation. The typically long and expensive legal processes associated with these threats might encourage agencies being sued to reach settlements. Such settlements would not be located using the data we have assembled on litigation. These threats might affect agencies and counterpart governmental departments in a state from pursuing race-conscious plans. Future analysis will explore these issues.

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Appendix A: Race-Based Affirmative Action Lawsuits by State

STATE	YEAR	CASE	ISSUE	OUTCOME	HISTORY
AL	2006	Robert Rogers v. Michael Haley	Dept. of Corrections reverse discrimination on basis of race	Dismissed	
	2008	Timothy D. Pope v. State of Alabama	Reverse discrimination on basis of race	Dismissed	
AK					
AZ	2005	John Killingsworth v. State Farm Mutual Automobile Insurance Company	Reverse discrimination on basis of race and age	Overruled	2007: Circuit Court
AR	2008	Donna Humphries v. Pulaski County Special School District	Reverse discrimination on basis of race	Overruled	2009: Circuit Court
CA	2001	Ward Connerly v. State Personnel Board	Challenged affirmative action	Partially invalidated affirmative action plan	
	2001	L. Tarango Trucking v. County of Contra Costa	Discrimination on basis of race and gender	Overruled	
	2002	Jaxon Enterprises v. DOT	Challenged DBE plan	Upheld	
	2002	Donald Bruce Crawford v. Huntington Beach Union High School District	Challenged racial balancing for public schools	Invalidated affirmative action plan	
	2004	C&C Construction Inc. v. Sacramento Municipal Utility District	Challenged affirmative action	Invalidated affirmative action plan	
	2007	Coral Construction Inc. v. City and County of San Francisco	Challenged DBE plan	Invalidated DBE plan	2010: State Supreme Court
	2010	Coalition to Defend Affirmative Action v. Arnold Schwarzenegger	Challenged anti-affirmative action initiative	Dismissed	
CO	2003	Concrete Works of	Challenged	upheld	

		Colorado Inc. v. City and County of Denver	affirmative action	affirmative action	
CT	2001	Board of Education of the City of Norwalk v. Commission on Human Rights and Opportunities	Challenged racial discrimination ruling	Overruled	2003: State Supreme Court
	2002	Sheryl Broadnax v. City of New Haven	Fire Dept. discrimination on basis of race	Dismissed	2004: State Supreme Court
	2007	Josephine Smalls Miller v. Praxair Inc.	Discrimination on basis of race	Dismissed	2009: District Court
	2009	Gilbert Cortez v. State of Connecticut DOT	DOT discrimination on basis of race	Overruled	
	2010	Lorraine Gariepy v. State of Connecticut	Reverse discrimination on basis of race	Overruled	
DE					
FL	2003	NAACP v. Florida Board of Regents	Challenged anti-affirmative action laws	Upheld claim	
	2004	Hershell Gill Consulting Engineers Inc. v. Miami-Dade County, Florida	Challenged DBE plan	Invalidated DBE plan	
	2004	Florida A.G.C. Council Inc. v. State of Florida	Challenged DBE plan	Invalidated DBE plan	
GA	2001	Melvin Reid v. Lockheed Martin Aeronautics Co.	Discrimination on basis of race	Dismissed	
HI	2003	John Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate	Reverse discrimination on basis of race	Overruled	2005: Circuit Court (Invalidated affirmative action plan)
IA	2007	Glynn Jones v. Cargill Inc.	Discrimination on basis of race	Overruled	
	2007	Fred Gilbert v. Des Moines Area Community College	Discrimination on basis of race	Overruled	
ID					
IL	2001	Builders Association	Challenged DBE	Invalidated	2003: State

	2003	of Greater Chicago v. County of Cook Jeffrey Horan v. City of Chicago	plan Reverse discrimination on basis of race	DBE plan Dismissed	Supreme Court
	2004	Northern Contracting Inc. v. State of Illinois DOT	Challenged DBE	Upheld DBE plan	2005-2007: Circuit Court
	2006	Carl Qualis v. Steve Cunningham et al.	Discrimination on basis of race	Overruled	
	2006	Bernard Mlynczak v. Samuel W. Bodman (U.S. Dept. of Energy)	Reverse discrimination on basis of race	Overruled	
	2010	Darryl W. Jackson v. Paul Cerpa	DOT discrimination on basis of race	Overruled	
IN	2006	Mary Wallskog v. Indiana Dept. of Correction	Discrimination on basis of race	Overruled	2006: Circuit Court
	2006	Gabe Keri v. Board of Trustees of Purdue University	Discrimination on basis of race	Overruled	
KS	2002	Klaver Construction Inc. v. Kansas DOT & US DOT	Challenged DBE plan	Dismissed	
KY	2004	Gerald Arthur Theisen v. Kentucky State University	Reverse discrimination on basis of race	Upheld claim	
	2004	Glenn E. Bone v. City of Louisville	Reverse discrimination on basis of race	Overruled	
LA	2001	Charles Albright v. City of New Orleans	Reverse discrimination on basis of race	Overruled	2003: Circuit Court
	2008	Terry R. Lewis v. City of Ruston, Louisiana	Discrimination on basis of race	Overruled	
	2008	Harrell Sharkey v. Dixie Electric Membership Corporation	Reverse discrimination on basis of race	Overruled	
ME					
MD	2002	Associated Utility Contractors of Maryland Inc. v. Mayor and City	Challenged DBE plan	Dismissed	

	2005	Council of Baltimore Carmen Thompson v. U.S. Dept. of Housing and Urban Development	Discrimination on basis of race	Overruled	2006: State Supreme Court
MA	2002	Winifred N. Cotter v. Massachusetts Association of Minority Law Enforcement Officers	Reverse discrimination on basis of race	Overruled	
	2006	William Brackett v. Civil Service Commission	Reverse discrimination on basis of race	Upheld affirmative action plan	
MI	2001	David Sharp v. City of Lansing	Reverse discrimination on basis of race	Overruled	
	2002	Crawford v. Dept. of Civil Service	Reverse discrimination on basis of race	Overruled	
	2003	Cindy A. Pilon v. Saginaw Valley State University	Reverse discrimination on basis of race	Overruled	
	2004	Coalition to Defend Affirmative Action v. Board of State Canvassers	Discrimination on basis of race	Upheld claim	
	2006	Coalition to Defend Affirmative Action v. Regents of University of Michigan	Challenged anti- affirmative action initiative	Overruled	2007, 2008: State Supreme Court
MN	2001	Sherbrooke Turf Inc. v. Minnesota DOT	Challenged DBE plan	Overruled	2003: Circuit Court
MS					
MO	2005	Michael Martinez v. City of St. Louis	Reverse discrimination on basis of race	Upheld claim	
	2009	Kansas City Hispanic Association Contractors Enterprise v. City of Kansas City, Missouri	Discrimination on basis of race	Overruled	
MT					
NE	2006	Michael Pritchard v. City of Omaha, Nebraska	Reverse discrimination on basis of race	Invalidated affirmative action plan	

NV					
NH					
NJ	2002	Dr. Andrew C. DeSanto v. Rowan University	Discrimination on basis of race and gender	Overruled	
	2007	Jeanne Klawitter v. City of Trenton, New Jersey	Reverse discrimination on basis of race	Upheld claim	
	2009	Geod Corporation v. New Jersey Transit Corporation	Challenged DBE plan	Upheld DBE plan	2010: Circuit Court
	2010	Vulcan Pioneers of New Jersey v. City of Newark	Discrimination on basis of race	Overruled	
NM					
NY	2005	Jana-Rock Construction Inc. v. New York State Dept. of Economic Development	Discrimination on basis of race	Dismissed	
NC	2003	H. B. Rowe Inc. v. W. Lyndo Tippet et al. (DOT)	Challenged DBE plan	Upheld DBE plan	2007, 2008, 2010: Circuit Court
ND					
OH	2002	Kathryn Ogletree v. Ohio Wesleyan University	Discrimination on basis of race	Overruled	
	2006	Gordon P. Koehler v. Ohio Civil Rights Commission	Reverse discrimination on basis of race	Overruled	
	2007	Regina Russell v. University of Toledo	Discrimination on basis of race	Overruled	2008: Circuit Court
OK	2001	Kornhass Construction Inc., TAO Inc. & Daco Construction Company v. State of Oklahoma, Dept. of Central Services	Challenged affirmative action plan	Invalidated affirmative action plan	
OR	2002	Marilyn A. Robinson v. Spencer Abraham (Dept. of Energy)	Discrimination on basis of race	Overruled	2004: Circuit Court
PA					
RI					
SC					
SD					

TN	2002	West Tennessee Chapter of Associated Builders and Contractors Inc. v. City of Memphis	Challenged DBE plan	Dismissed	2004: District Court
	2006	Walt Ruffin v. Gerald F. Nicely (TN DOT)	DOT discrimination on basis of race	Dismissed	
TX	2001	Rothe Development Corporation v. US DOD & Dept. of Air Force	Challenged DBE plan	Upheld DBE plan	2004, 2007, 2008: Circuit Court
	2007	Johnny B. Crawford v. City of Houston Texas	Discrimination on basis of race	Overruled	
UT					
VT					
VA					
WA	2001	Parents involved in Community Schools v. Seattle School District	Challenged racial balancing in public schools	Upheld affirmative action plan	2003: State Supreme Court; 2005: Circuit Court; 2007: U.S. Supreme Court (invalidated affirmative action plan)
WV					
WI					
WY					
DC	2006	Marilyn Vann v. Dirk Kempthorne (U.S. Dept. of the Interior)	Discrimination on basis of race	Dismissed	2008: Circuit Court
	2007	Dynalantic Corporation v. U.S. DOD	Challenged DBE plan	Dismissed	

Appendix B: State Anti-Affirmative Action Ballot Measures

STATE	YEAR	INITIATIVES & REFERENDA	STATUS
AZ	2010	Prop. 107: Preferential Treatment or Discrimination Prohibition	Pass
CA	2003	Prop.54: Classification by Race, Ethnicity, Color or National Origin	Fail
CO	2008	Amendment 46: Discrimination and Preferential Treatment by Governments	Fail
MI	2006	Prop. 06-2: Proposal to Amend the State Constitution to Ban Affirmative Action Programs	Pass
NE	2008	Initiative 424: Affirmative Action Ban	Pass