JUDICIAL IMPACT ON BUREAUCRATIC DECISION-MAKING: THE CASE OF PUBLIC PROCUREMENT AND CONTRACTING

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Chapter 1: Introduction

Affirmative action programs have been part of an international endeavor to redress discrimination against historically oppressed groups by taking into account factors such as race, ethnicity, national origin, etc. when providing employment, business and educational opportunities in the public sector. With the passage of the Civil Rights Act in 1964, there was increasing recognition of the importance of government-enforced anti-discrimination efforts in bridging gaps in labor, housing and other markets (Thurow 1969; Graham 1990). Race-based affirmative action policies began to be officially installed in three spheres—public universities admissions process, public employers' hiring and promotion procedures, and public procurement and contracting activities. Since the 1970s, affirmative action initiatives have started to undergo setbacks, as legal arguments on the grounds of reverse discrimination were made against mechanistic application of race-based quotas. A series of judicial opinions in these decades mark the shift from a race-conscious focus to an emphasis on race-neutrality[1]. Public institutions, subject to judicial review, are expected to develop narrowly-tailored programs accordingly (Myers 2011). The central research question that this research project examines is whether and how much the bureaucracy responds to the judiciary. In particular, this project explores

[1] *Regents of the University of California v. Bakke* (1978); *Gratz v. Bollinger* (2003); *Grutter v. Bollinger* (2003); *Wygant v. Jackson Board of Education* (1986); *Ricci v. DeStefano* (2009); *Croson v. City of Richmond* (1989); *Adarand Constructors v. Pena* (1995)

whether variations in affirmative action programs in public procurement and contracting across time and U.S. states are explained by the shifting legal environment.

1.1 Contribution to Literature

1.11 Affirmative Action

Firstly, this thesis contributes to the current literature on affirmative action by drawing insight from race-based government procurement and contracting programs, a largely understudied area of affirmative action in political science and public administration. Existing scholarship already points to abundant evidence revealing that affirmative action efforts in public employment and education have contributed to increased access to opportunities for disadvantaged groups, and have led to significant and meaningful redistribution of benefits in many markets (Reskin 1998; Holzer and Neumark 2000).

Public contracting, aside from public employment and education, serves as another potentially powerful tool for combating discrimination and facilitating minority development (Enchautegui et al. 1996). The U.S. federal government procures hundreds of billions of dollars worth of goods and services each year. Federal spending on contracting has exceeded the funds spent on federal employment since the 1990s. Total procurement and contracting dollars in the public sector constitute over 10% of the U.S. Gross National Product.

The federal government has long recognized the need to provide a level playing field to businesses owned by historically disadvantaged groups. Since the 1960s, a major

category of government-initiated affirmative action efforts has been assistance with minority and women-owned firms in securing prime and sub procurement contracts, offering technical and managerial trainings, and providing loans and equity capital (Dale 2002). The primary objective of such efforts is to reduce historically discriminatory barriers, increase participation of small minority businesses in government procurement and contracts, and nurture the growth of these firms.

1.12 Judicial Impact on Bureaucratic Behavior

Secondly, this study seeks to contribute to literature on agency discretion by examining particularly the impact of judicial review on bureaucratic behavior at both state and national level. In particular, the first empirical chapter assesses the impact of federal court activities on federal affirmative action programs in public contracting. The second empirical chapter focuses on the impact of state- and circuit-level courts on state agency decision-making regarding affirmative action in public contracting.

At the federal level, a series of landmark Supreme Court decisions since the 1970s mark the shift of affirmative action jurisprudence from being race-conscious to being color-blind (see Chapter 4.2 for detailed review of these cases). Research on affirmative action has shown the adjustment of pre-existing preferential policies in public employment and education as a result of the shifting legal requirements (Davis and West 1984; Rose 2005; Long and Tienda 2008). The federal empirical chapter will allow us to gain insight into the impact of the new legal standards on federal affirmative action programs in public contracting.

Meanwhile, a focus on state implementation and courts is needed in the literature. Previous research on federal courts suggests limited impact on agency behavior, unless facilitated by several factors such as the clarity and enforceability of judicial decisions, costs and incentives associated with agency response to courts, and the political and economic environment in which the court decisions are issued (Spriggs 1997; Canon and Johnson 1999; Rosenberg 2008). Fewer studies examined the impact of decisions from all levels of state and federal courts on bureaucratic decision-making. Recent years have seen Caucasian-owned construction companies, after losing contract awards to minority firms, challenging the state affirmative action plans in court for violation of the Equal Protection Clause of the Fourteenth Amendment[2]. Do these legal challenges and unfavorable judicial decisions have a significant deterrent effect upon the setting of race-based procurement and contracting goals and actual award amounts at state agencies? To what extent do lower courts and judicial review matter in state-level bureaucratic decision-making?

Bureaucratic processes in a federalist two-party political system can result in considerable variation in the way an affirmative action program is carried out across different state agencies, and leads to unbalanced distribution of resources, benefits, and opportunities (Davis 1971; Bryner 1987; Hasenfeld 1987). The state empirical chapter specifically focuses on the Department of Transportation (DOT)'s racially preferential Disadvantaged Business Enterprise (DBE) program at the state-level. The fifty states are granted great authority by the federal DOT in the design and implementation of their own

[2] E.g. *Western States Paving Co. v. Washington State Department of Transportation* (2005); *Northern Contracting, Inc. v. Illinois* (2006)

affirmative action plans (Eddy 1998). California and Florida, for example, are among the states with the highest percentages of minority-owned businesses[3]. However, huge discrepancies exist in their 2013 affirmative action contracting plans, as California pursues a goal of awarding at least 25% of contracts to minority firms, whereas Florida has entirely eliminated any race-based objectives[4]. How much of this stark variation in affirmative action decision-making, then, can be explained by different legal, political and economic environments?

In this project, I collect federal- and state-level anti-affirmative action litigation data that will help address these questions. This thesis begins in Chapter 2 with an introduction to the open-systems theory as the overarching theoretical framework in the study of bureaucratic responsiveness to courts, followed by a review of current scholarship that approach on courts-bureaucracy interaction from rational choice, communications, institutional and other perspectives. Chapter 3 provides a brief history of affirmative action in the U.S., and a summary of current literature examining different aspects of preferential government contracting programs.

Chapter 4 provides an overview of the shifting jurisprudence of affirmative action in the wake of several landmark Supreme Court decisions, lays out the research design and reports findings from the first empirical study, which investigates federal agency annual race-based contract amounts primarily as a function of relevant Supreme Court and lower court rulings. While I did not find sufficient evidence to support the judicial

[3] 2007 Survey of Business Owners, U.S. Census Bureau
[4] "State Department of Transportation Small Business Programs: A Synthesis of Highway Practice" 2013. Washington, DC: Transportation Research Board.

impact hypothesis, results did suggest significant agency responsiveness to the shifting political principals in the executive branch.

Chapter 5 offers a detailed review of the U.S. DOT's race-based Disadvantaged Business Enterprise (DBE) program, which is one of the most comprehensive affirmative action programs in government contracting, and is also the subject of the second empirical study. This review serves as background knowledge about the general requirements and operation of the DBE program, as we delve into the examination of its programmatic goals and achievement.

Chapter 6, the second empirical study, focuses exclusively on the impact of state- and circuit-based judicial activities on the fifty state transportation agencies' annual race-conscious DBE goal-setting and percentage of contract dollars for minority-owned firms. The findings demonstrated some evidence of state agency responsiveness to judicial review at state- and circuit-level during the goal-setting process, but not in the achievement of the goals. In the concluding chapter, I discuss how the different theoretical perspectives outlined in Chapter 2 may help us better understand the findings of a general lack of substantive judicial impact in the two empirical chapters.

Chapter 2: Theories of Bureaucratic Discretion and Responsiveness to Courts

In this research project, I am interested in examining the relationship between federal and state government agency discretionary decision-making and the legal, political and economic environment in affirmative action in government contracting. I start by providing normative reasons for why it is important to study bureaucratic discretion in the first place. I then introduce a commonly-used theoretical framework for researching bureaucratic discretion in response to external and/or internal environmental characteristics. Next, I summarize current scholarship on the impact of the judicial branch on the bureaucracy, specifically on the factors that may be facilitating or impeding agency responsiveness to courts.

2.1 Theoretical Framework

With the unprecedented growth of government activities and expansion of government programs, the bureaucracy has been viewed as a "fourth branch" of government, in addition to Congress, the President, and the Judiciary (Meier 1993). Bureaucratic agencies enjoy a great amount of autonomy in regulatory rule-making and administrative decision-making that may have profound impacts on people's everyday lives. These bureaucratic processes, nonetheless, may be susceptible and responsive to influence from multiple sources. Discretionary decision-making, as a result of such

susceptibility and responsiveness, can lead to considerable variation in the way a piece of legislation or a federal rule is implemented across different agencies and different constituencies (see Hill and Hupe 2002 for a review of this literature).

Agency discretion can be a double-edged sword. On the one hand, the exercise of discretion has long been understood as an indispensable feature of modern public administration, and an inevitable consequence of bureaucratic expertise. As Alexander Hamilton articulated in *Pacificus* #1 (1793), "The enumeration ought rather therefore to be considered as intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts of the constitution and to the principles of free government." Laws passed by the legislative branch cannot, in any way, foresee the vast magnitude of all real-time situations and possibilities during the implementation stage. By delegating general policymaking powers and granting ample discretionary authority to government agencies, Congress and the Presidency empower the bureaucracy to rely on scientific expertise in the development of specific regulations and solutions (Huber and Shipan 2002).

In *Going by the Book*, Bardach and Kagan (1983) discuss findings from in-depth interviews with agency decision-makers, which reveal that new legislation often comprise of unreasonable and unfeasible components. Successful implementation of laws and policies entails flexible approaches, rather than mechanistic procedures. Agency discretion in day-to-day operations will bridge the gap between proposed policy visions and viable policy choices. Especially in the case of civil service agencies, such as law

enforcement units and social welfare offices, discretionary decision-making will allow bureaucrats to address the human dimensions of circumstances that are not anticipated in written laws, and to tailor their efforts to specific situations with fairness and effectiveness (Lipsky 1980).

Others, however, view such flexibility and adaptability in bureaucratic behavior as potentially problematic and even abusive, for the main reason that discretion in reaction to external pressure or internal considerations may compromise impartiality and fairness in the implementation process, and give rise to unbalanced distribution of resources and benefits (Davis 1971). Too much leeway and too little guidance for a bureaucracy will necessarily increase the degree of its susceptibility to multiple sources of influence, and may invite officials to "overreach, to discriminate invidiously, to subordinate public interests to private ones…and to tyrannize over the citizenry" (Schuck 1994, p. 155). As Lipsky (1980) demonstrates, agency workers engage in extensive decision-making, on a daily basis, in the delivery of benefits and sanctions to citizens, which may generate a significant impact upon people's lives. Discretion in the way such benefits and costs are allocated, nevertheless, may be reflecting an agency's attempt to accommodate concerns from oversight institutions, or attempt to impose its own preferences and agenda (Yates 1982). It is important to examine variations in agency decision-making, because they can result from deliberate discretion in response to external or internal factors, which would lead to inequitable distribution of benefits and opportunities (Bryner 1987).

Like in public agencies, bureaucrats implementing affirmative action in contracting have discretion. As discussed above, however, public employees must deal with both

external and internal pressures. I use the open-systems theory as an overarching conceptual framework to study variations in affirmative action efforts in public contracting, at state and federal agency level because it takes into account the position of public agencies within a larger system. Systems theory is one of the most fundamental approaches in modern organizational theories, which regards social organizations as living entities aware of both external and internal stimuli. As opposed to closed-systems theory, open-systems theory places the bureaucracy in a highly dynamic, interdependent and complex context characterized by "an expectation of change and uncertainty, internally and externally" (Milakovich and Gordon 2012). It acknowledges and addresses various sources of influence, such as political economy, social environment, agency resources and organizational capacity, in the analysis of bureaucratic behavior (Van Meter and Van Horn 1975; Goggin et al. 1990). As open systems, public agencies are likely to shape their behavior in response to both input from external environment, and output from internal activities (Chisholm 2003; Thompson 2003).

2.2 Impact of Political Principals on Bureaucratic Decision-Making

Before we come to examine the impact of the judicial branch on agency decision-making, there is a well-established body of literature that assesses bureaucratic responsiveness to political principals on legislative committees (Weingast and Moran 1983; Moe 1982, 1985; Shipan 2004), and shifting presidential administrations (Wood 1988, 1990; Hedge and Scicchitano 1994). Research has shown that agency priority-setting and output are at least partially conditioned by the partisan composition of the

legislative and executive branches, especially when it comes to social programs, and policy issues of a redistributive nature (Winters 1976; Barrilleaux and Miller 1988; Hird 1994; Dilger 1998). Scholz and Wood (1999), for example, finds that the IRS shifts audit rates in reaction to changing ideological preferences of the political principals, as Democrats tend to favor equity, while Republicans are more likely to make decisions on efficiency grounds.

Such evidence has been found not only at the national level, but at lower levels of government as well (Erikson 1971; Plotnick and Winters 1990; Keiser 2004; Krause, Lewis and Douglas 2006). Variations in state bureaucratic decision-making are found to have been reflecting the different party compositions of legislatures and governorships among states, suggestive of deliberate agency discretion in response to varying degrees of political control at the state level as well (Barrilleaux and Miller 1988; Ringquist 1993, 1995; Hedge and Scicchitano 1994; Hunter and Waterman 1996; Keiser and Soss 1998).

A vast number of studies shed light on the possible reasons why agencies are prone to be responsive to the legislative and the executive branches. Legislative institutions, for example, may adjust the length and language of statutes to control the amount of autonomy granted to a bureaucracy in the first place (Huber et al. 2001). Federal and state legislatures can also apply ex post measures to push agencies to produce outcomes that the legislators desire. Primarily, agencies are given the financial incentives to exercise discretion in response to preferences of the legislative body, which can be rewards in the form of budget increases, or sanctions in terms of budget cuts and the passage of statutes restricting agency actions. Meanwhile, legislators can keep themselves well-informed on

agency activities through hearings and interest group reports (Weingast 1984; Calvert et al. 1989; Banks and Weingast 1992).

Bureaucratic agencies also have political and institutional reasons to respond to the executive branch as well. For example, through layering, reorganization, reduction of workforces, or addition of appointed staff, presidents are often able to exert significant influence on bureaucratic structures and personnel management (Lewis 2008). Presidential and gubernatorial appointees may be filling up positions within the hierarchy of agency posts from heads to mid-level bureaucrats, who are typically selected not only for their policy expertise, but also for their ability to administer the principals' goals and priorities (Nathan 1983; Moe 1989; Waterman 1989). By staffing the bureaucracy, executive branch officials aim at making the agencies more receptive to their own policy agendas and visions. Other sources of executive influences range from budget proposals to administrative procedures. For example, the Office of Management and Budget (OMB), part of the Executive Office of the President, engages in agenda-setting during the agency budget submission process (Wildavsky 1964). Presidents also have the opportunity to inform agencies of their preferences when signing statements, executive agreements and national security directives (Wood and Waterman 1993; Durant 2009).

In general, political principals in the legislative committees and the executive branch possess various tools to increase bureaucratic responsiveness and exert control over agency decision-making. These measures are employed to ensure agency actions do not deviate from the policy preferences of the principals. Numerous studies show that such mechanisms can effectively influence programmatic decisions and policy outputs at

executive agencies. While we have a well-established body of literature that explain why agencies have the incentives to respond to the legislative and the executive branches, we know less about their interaction with courts, and the degree to which they are likely to adjust decision-making in response to judicial activities. In the next section, I summarize current research regarding judicial impact on bureaucratic behavior from multiple theoretical perspectives.

2.3 Impact of the Judicial Branch on Bureaucratic Decision-Making

2.31 An Overview of the U.S. Court System

Before examining different perspectives of judicial impact on the bureaucracy, it is helpful to first review the basic structures of the U.S. court system, to help us better understand where legal challenges against affirmative action programs typically originate, and how a lower court ruling may be appealed (see Figure 2.31). Studies of bureaucratic discretion need to be placed in the context of a two-tiered federalist system (Marando and Florestano 1990; Schneider and Jacoby 1996). The same should apply to research on judicial impact as well. Decisions by a state agency are subject to both state and federal constitutional review. What is unique about this project is that it aims to examine not only federal agency decision-making as shaped by the federal judiciary, but state administrative decisions under the influence of both federal and state courts.

(Figure 2.31 about here)

The court system is hierarchically divided into trial courts and appellate courts, both at the federal and state level. Trial courts are those with the original jurisdiction where civil or criminal trials take place. At the federal level, there are 92 U.S. district courts, at least one for each state. Bigger and more populated states are likely to have more federal districts. The state of Missouri, for example, hosts two federal district courts, one for the eastern district of Missouri, one for the western district. Each state has its own individual court system as well. Lower courts in a state typically share highly similar original jurisdictions with the federal district courts, as a plaintiff who intends to, for example, challenge a government agency's preference contracting program, can choose to initiate the lawsuit in either a federal-level or a state-level trial court (Friedman 2004).

Higher courts, including 13 U.S. Courts of Appeals, and the U.S. Supreme Court at the federal level, as well as numerous intermediate appeals courts and high courts at the state level, exercise the authority of appellate review of decisions reached at lower courts. Decisions handed down at higher state courts may get further appealed to federal appeals courts, if the cases are federal in nature. When an affirmative action-related lawsuit is originally filed in a state-level trial court, the intermediate and supreme courts within the state have the authority, upon the plaintiff's decision to appeal, to review, uphold, remand, or reverse the lower court decision. If the lawsuit requires judicial review of a federally enforced affirmative action policy, then a state Supreme Court decision can get further appealed to the federal Circuit Court of Appeals that has jurisdictions over this particular state. In contrast, litigations that originate from a federal district court within a state can

travel directly to a federal Circuit Court of Appeals for additional review (Friedman 2004).

2.32 Judicial Impact: Different Theoretical Perspectives

The existing literature offers some insights into why bureaucratic agencies should be expected to respond to the legal environment. Upper and lower levels of the judiciary possess the tool known as judicial review. Courts can review, and even overturn, administrative choices on substantive grounds, namely whether a specific agency decision is fair, and legally permissible under the U.S. Constitution or federal statutes (Mashaw 1983). Against the backdrop of pervasive government regulatory activities and widespread exercise of agency discretion, judicial review serves as a "check on lawlessness, a check on administrative agents making choices based on convenient personal or political preferences without substantial concern for matters of inconvenient principle" (Robinson 1991, p. 181). Agency decision-makers are expected to constrain excessive use of discretion based on political bias or personal preferences, by deferring to the rule of law (Humphries and Songer 1999).

Normative reasons for why bureaucracy should respond to the judicial branch are also partly built upon the argument that courts can be perceived as a political principal, similar to the other two branches, with shifting policy preferences. It has been observed that Supreme Court justices tend to influence public policies by ruling on cases consistent with their individual ideological preferences (Segal and Spaeth 2002). In the meantime, prior studies of judicial federalism suggest that lower courts shall be seen not as mere

followers of Supreme Court reasoning and doctrines, but rather as relatively autonomous entities that perform judicial reviews based on standards sometimes distinct from those adopted by higher courts (Gruhl 1982; Gryski et al. 1986; Songer and Sheehan 1990; Brisbin and Kilwein 1994). While federal circuit courts of appeals may seek opportunities to shirk and impose their own policy preferences in Supreme Court-circuit court interactions (Songer et al. 1994), state courts are found to be even less likely than federal courts to adhere loyally to the high court's points of views, and more likely to engage in independent judicial policy-making (Reid 1988; Woolhandler and Collins 1999). In some states, popular election of judgeships, as opposed to gubernatorial appointments, opens up possibilities for more visible political pressure, which makes lower courts' judicial review much more likely to be a political process (Haas 1982; Kilwein and Brisbin 1997). At least in a theoretical sense, therefore, bureaucratic agencies have strong incentives to take into account judicial impact when making policy decisions.

Judicial impact on the bureaucracy typically can be achieved in two ways. Firstly, courts influence the bureaucracy through the judicial review process. When a public agency's program, policy choice, or administrative decision is challenged by a private party in courts, judicial review will be performed, followed by court decisions, which may uphold the agency's position, require a reform of the program in question, or invalidate an action and impose sanction on the agency. Such judicial opinions, in particular, affect the bureaucracy through two major mechanisms: a) by informing agencies of the legal consequences of certain types of behavior; and b) by penalizing

agencies that fail to comply with court decisions (Elster 1986; North 1990). In turn, agencies are expected to react to judicial decisions in three basic ways: a) by engaging in full and prompt compliance with a decision; b) by being indifferent to the decision; and c) by refusing to comply with the decision based on the belief that it is disruptive of agency routines and overly demanding of agency resources (Canon 2004).

Secondly, agencies predict the possibility and outcome of future judicial review on the basis of the ideological tendency of a court, and preemptively take that into consideration in the present decision-making process. This is based on the assumption that judges issues decisions reflective of their own ideological preferences. Empirical studies do suggest so, especially when the subject of judicial review concern controversial social programs (Crowley 87). An agency's affirmative action program, for example, could face a higher likelihood of unfavorable judicial rulings, if it were to be reviewed by a predominantly conservative court. In anticipation of such a possibility, rational agency decision-makers could limit the scope of their affirmative action program to reduce legal risks. In this way, courts exert ex ante influence upon bureaucratic behavior, by signaling possibility of future judicial review via the ideological makeup of the members of courts.

Empirical studies do offer evidence supporting the judicial impact hypotheses. Existing scholarships on bureaucracy and the courts show that judicial review can affect a government agency's organizational structures, problem definition, program implementation, and administrative doctrines (Knight 1992; Rosenbloom et al. 2010). Literatures suggest high levels of agency compliance with court decisions (Cavanagh and

Sarat 1980; Rebell and Block 1982; Hochschild 1984; Hansen et al. 1995; Spriggs 1997). It may be in the best interest of an agency to fully comply with a judicial mandate, not only because failure to do is likely to lead to costly litigation and judicial sanctions in the future, but also for the reason that noncompliance will jeopardize relationship with the judicial branch, as an agency more or less counts on courts to affirm and champion its programs and policies in the long run (Baum 1981).

In addition, evidence of ex ante judicial impact on bureaucratic behavior has been reported as well. Both state and federal government agencies are found to have shaped decisions partly in response to shifting ideological preferences of the judicial branch (Howard and Nixon 2002; Wohlfarth 2007). In anticipation of future judicial review, agencies may adjust decision-making in the present, in a preemptive attempt to avoid or reduce costs associated with future litigation activities (Mezey 1986; Howard 2001).

Nevertheless, other scholars have identified mediating factors in the way judicial review affects bureaucratic behavior. For example, from a utilitarian perspective, agencies are more likely to respond to the judicial branch when the court decisions do not disrupt the status quo, nor impose excessive costs of compliance. From a communications standpoint, clearly-written judicial opinions with more straightforward directions and less ambiguity can facilitate agency responsiveness to courts. From an organizational point of view, court activities that largely align with the preferences of the other pivotal political players are more likely to bring about changes in agency decision-making. In the next section, I provide a more detailed summary on each of these theoretical arguments.

2.321 Utility Theory

According to this line of reasoning, agency responsiveness to the judicial branch may be conditioned primarily on the court decisions' disruptiveness of the status quo. Under the key assumption that agency decision-makers are rational individuals who seek, for the most part, to pursue their own agenda and to promote their self-interest in an environment with limited resources, these individuals tend to weigh the costs and benefits associated with compliance, before formulating a response to court decisions, decisions that may require the adjustment of sizeable portions of existing procedures and programs, or even the establishment of altogether new rules and policies. Taking actions in accordance with such decisions often entails significant reallocation of an organization's financial and human resources. In addressing these competing concerns, a bureaucracy composed of rational individuals is expected to respond to a court decision by "trying to preserve the status quo to the extent possible while avoiding potential sanctions for not complying and minimizing use of resources" (Johnson 1979b, p. 29).

Responsiveness to courts can be an expensive process. Organizational resources typically have to be expended on understanding and interpretation of legal rulings, evaluation of judicial decisions, information-gathering for the purpose of developing policy alternatives, and weighing policy options (Johnson 1979a). The first step entails interpretation of the court decision, which usually comes from the legal department or top decision-makers within an agency. The way a decision is interpreted may vary depending on the clarity and certainty of the court opinion. The more certain agency officials are about the legal consequence of noncompliance with the court order, the more likely they

are to take the decision seriously. If the decision is perceived by the agency as not adverse, which Johnson (1979b) explains as when "the decision does not conflict with existing policies or goals and does not adversely affect a policy to which the agency is highly committed" (p. 29), the likelihood of agency response should be low.

In the case of public contracting, the issuance of the Supreme Court's *Adarand* decision in 1995 is disruptive of the status quo, in that federal agencies are now expected to narrowly-tailor their affirmative action programs to meet the new strict scrutiny legal standards. When the costs of compliance are perceived by agency decision-makers to likely exceed the benefits, short-term agency responsiveness to courts can be low. The same logic applies to state-level agency-courts interaction. Judicial decisions that order structural changes to an existing affirmative action contracting program on the basis of strict scrutiny standards incur greater costs of compliance, and tend to discourage agency responsiveness. Therefore normatively, the utilitarian perspective would predict a lack of substantial judicial impact on agency contracting decisions in this study.

Interpretation of a judicial decision is typically followed by evaluation of the decision, which primarily requires information-gathering on alternative actions the agency can take, based on the estimated probabilities of enforcement and sanctions. In the event that the agency perceives a court order to require minimal change to the existing program, the scope of a search for alternative courses of action will be limited. The extent of the search process can also be curtailed if the agency's commitment to the existing program exceeds the perceived threats of future lawsuits.

The final step is the formulation of an actual response. Again, the degree of responsiveness to courts has to do with how agency decision-makers perceive the costs and benefits associated with compliance, given the interpretation of the court decision, and the amount of agency resources. This utilitarian approach has been adopted to develop a better understanding of local compliance with school desegregation orders, and the IRS' shifting audit decisions to avoid future litigation (Stover and Brown 1975; Giles and Gatlin 1980; Howard 2001). In this research project, this theoretical perspective can inform us that court activities, especially unfavorable judicial rulings that require changes to be made to an existing affirmative action program, are likely to lower agency responsiveness to courts.

2.322 Communications Theory

Other scholars examine the role of judicial language in agency response to courts. A hierarchically-structured bureaucracy expects clear and consistent objectives and directions in the implementation of public policies (Baum 1981). Judicial opinion-writing, nonetheless, is sometimes conducted in a vague manner, containing less straightforward policy directives, and more legal reasoning (Hume 2009b). It has been observed that judges and justices, similar to members of Congress who exercise deliberate discretion in drafting legislations (Huber and Shipan 2002), may prefer to use ambiguous texts in an attempt to reduce the chances of public resistance and defiance, especially when the opinions being delivered touch on controversial issues, and when members of the judicial

branch are uncertain about the policy consequences (Shapiro 1968; Milner 1971; Staton and Vanberg 2008).

Less clear and explicit opinion language can lead to misunderstanding and imperfect translation of a court decision (Wasby 1970; Baum 1976). There are mainly two specific ways in which opinions matter in terms of judicial impact on bureaucratic behavior. One has to do with the legal grounding a judge chooses to base his decision on, namely whether the administrative action in question is judicially reviewed on procedural or substantive grounds. Whereas a substantive review can invalidate an agency program that is "contrary to constitutional right, power, privilege, or immunity", or "in excess of statutory jurisdiction, authority, or limitations", a procedural review primarily examines whether an administrative decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", "without observance of procedure required by law", or "unsupported by substantial evidence"[5]. When a legal argument is developed on procedural grounds, agencies generally tend to be less obligated and pressured to conduct thorough review of, and make changes to, an existing program in response to the judicial decision (Hume 2009a).

The other mechanism in which opinions matter is through the outcome of the litigation. Compared to straightforward holdings that uphold or strike down an administrative choice, "remand" is another commonly used judicial decision to encourage an agency to present evidence that justifies the validity of its decision. Remand appears to be a more ambiguous decision that does not necessarily require significant agency actions,

[5] Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237, Section 706.

and is oftentimes intended to "obtain information about the agency's rationale in support of its decision", or to serve as "an indirect way for a court to voice its disapproval of the agency's decision" (Rosenbloom et al. 2010, p. 66). More adamant ways of expressing judicial disapprovals include "reprimand", a "writ of mandamus" to grant relief to the plaintiff, or "contempt". An agency is more likely to adjust decision-making in response to courts when judicial opinions employ more explicit languages (Hume 2009a).

Numerous case studies have demonstrated how effective opinion language can enhance judicial impact upon the bureaucracy, or lower its impact or lack thereof. The landmark *Brown v. Board of Education* decisions, for example, contain rather ambiguous phrases such as "good faith", "at the earliest possible date", "with all deliberate speed"[6], which many believe have resulted in the inconsistent and delayed implementation of racial desegregation orders in southern states (Rodgers and Bullock III 1972). In another example, a series of Supreme Court decisions limiting the exercise of government-initiated prayers in public schools were interpreted by local school officials as banning a school from officially sanctioning any religion, and consequently did not lead to a significant decrease in the amount of school prayers conducted (Dolbeare and Hammond 1971). Another ambiguous Supreme Court decision leaves the defendant agency Human Relations Commission uncertain about the legal boundaries of their authority[7] (see Footnote 6 for the agency's internal memo) (Johnson 1979b). In general, analysis of

[6] *Brown v. Board of Education* II, 349 U.S. 294 (1955).

[7] "The Majority expressly does not reach the issue of whether we have the power under our (enabling) act to compel answers to Interrogatories. The Majority did say 'we have serious doubts regarding the Appellant's power to compel answers to Interrogatories in the absence of a proceeding initiated by proper complaint.' This is unfortunate because we have the power to investigate even without the filing of a complaint and we believe we should have the power to use 'discovery' tools at this stage as we wish. However, I don't see that our not having such powers will seriously hamper us." (Johnson 1979b, p. 38)

judicial impact on agency behavior needs to take into account the nature and clarity of opinion language as well.

2.323 Organizational Theory

Some contend that normatively, agency responsiveness to courts should be low due to the inherent institutional limitations of the judiciary, and that the impact of courts tend to be stronger when the judicial decisions align with the policy preferences of the legislative and the executive branches. Compared to the other political branches, as Alexander Hamilton argued in Federalist 78, courts tend to be the "least dangerous branch" that lacks both of the power of the purse and the power of the sword. Above all, the role of courts in effecting policy change is a rather passive one, as they cannot directly intervene unless, say, a private party files a lawsuit and invites judicial review (Riley 1987). A more fundamental reason why courts serve as a weaker institutional constraint on bureaucratic behavior is the non-self-executing nature of judicial decisions (Baum 1976; Johnson and Cannon 1998; Hertogh and Halliday 2004). Courts are not equipped with the constitutional means of carrying out their own decisions. They must rely on agency translations of legal rulings (Scheingold 1974), legitimizing actions of the executive and legislative institutions to enforce their decisions, and ultimately, respect for the law (Rodgers and Bullock III 1972; Baum 1981).

Judicial impact on bureaucratic decision-making may be especially constrained when judicial decisions touch on racial policy or other social issues that may require significant change to a society with sometimes deeply-divided sets of opinions and

distinctive value systems (Gallas 1971; McIntosh 1990; Wahlbeck 1997). In studying implementation of court orders concerning civil rights and women's reproductive rights, Rosenberg (2008) reveals that the Judiciary tends to be most successful when the other political actors have taken the initiative to bring about social change. The author attributes bureaucratic indifference and inactions following landmark judicial decisions primarily to a lack of political leadership, and the absence of "a change of heart by electors" (p. 81). The rate of desegregation following the Supreme Court's *Brown v. Board of Education* (1954) ruling did not dramatically increase until the passage of the 1964 Civil Rights Act, which offered further incentives and disincentives to induce compliance. Due to this inherent institutional constraint of the judicial branch, there may be an identifiable gap between the policy environment envisioned by courts, and the actual solutions developed and implemented by bureaucratic agencies.

2.324 Other Characteristics

Several other aspects can mitigate agency responsiveness to courts as well. These aspects mainly focus on factors outside of the judicial branch. Some scholars of bureaucratic discretion discuss the influence of internal characteristics of an agency upon its decision-making. First and foremost, every agency has developed its own goals, preferences, mission, and commitment to a particular policy area or program, which will be taken into consideration as agency decision-makers interpret and evaluate new judicial requirements (Rourke 1984; Wilson 1989; Wildavsky 1992). Gormley (1989), for example, characterizes internal bureaucratic goals as parochial, budget-maximizing and

incremental. A rational goal-seeking agency tends to weigh the cost of changing the status quo in reaction to a court decision, against its own sets of objectives and preferences (Katzmann 1980). Other internal factors may include an agency's staffing and policy implementation capacity (Sigelman 1976; Keiser and Soss 1998), core institutional cultures and values that individual agencies come to internalize and prioritize (Meier and O'Toole 2006), organizational structures and inertia (Hunter and Waterman 1996; Johnson and Canon 1998). These internal characteristics are likely to play a moderating role in the bureaucracy-courts dynamics.

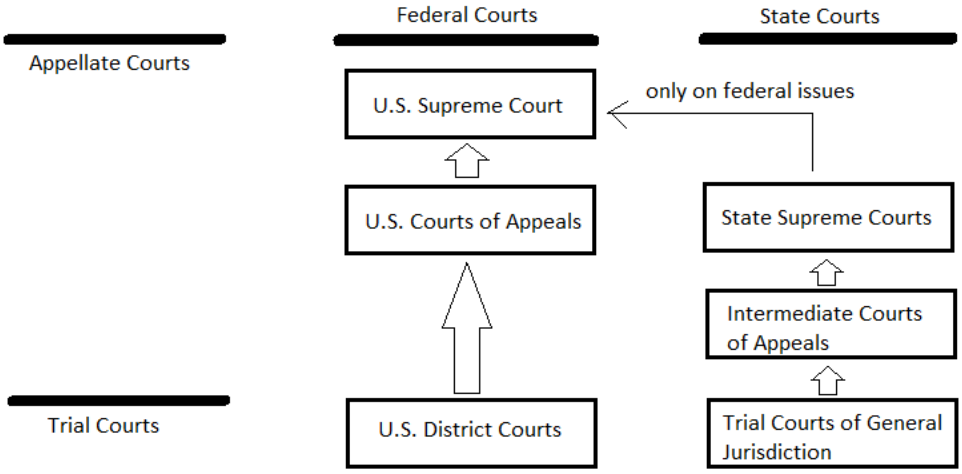
Another source of bureaucratic discretion is the socio-economic environment in which agencies operate. Variations in agency decision-making among states, for example, may be partly explained by a state's economic context (e.g. unemployment rates, per capita income, economic structures, etc.) and characteristics of its social environment (Scholz and Wei 1986; Hedge et al. 1991; Keiser 1999; Davis and Davis 1999).

Specifically, the bureaucracy tends to gauge the task environment in order to assess the needs of the constituents and exercise discretion in policy implementation and service delivery accordingly (Thompson 2003). Economic trends and business compositions are always expected to be taken into account in bureaucratic decision-making, as economic conditions have broad impacts concerning an agency's funding availability, and consequently its ability to carry out programs and implement changes in response to shifting political and legal environments (Dye 1966; Schneider and Jacoby 1996).

Moreover, under the assumption that it is not in the best interest of a bureaucracy to deviate dramatically from the preferences of its constituents, agencies are prone to be

attentive to public opinion and the demographic context as well (Elazar 1984; Wright et al. 1987; Hero 1998; Keiser et al. 2004). Racial attitudes of the geographical communities may affect a public agency's decision-making on race-related policies. Public opinion studies suggest limited support for race-conscious policies (Kinder and Sanders 1996). Attitudes of non-minority populations 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). More conservative locales may demonstrate less support for pro-affirmative action judicial decisions, leading to fewer incentives for an agency to adjust behavior in accordance with court rulings (Johnson and Canon 1998; Canon 2004).

Figure 2.31: Basic Structures of U.S. Judicial System[8]



[8] Source: Canon, Bradley C. and Charles A. Johnson. 1999. *Judicial Policies: Implementation and Impact*. Washington, DC: CQ Press, p.31.

Chapter 3: Literature Review on Minority Businesses and the Role of Affirmative Action in Public Contracting

3.1 A Brief History of Affirmative Action

Affirmative action programs have been part of an international endeavor to "provide increased opportunities for women and ethnic minorities to overcome past patterns of discrimination"[9]. Brazil, Canada, UK, India, Germany, Sweden were among more than a dozen countries in the world that began installing policies and programs in the early 1960s specifically intended to benefit historically underrepresented groups by taking into account an applicant's race/ethnicity, and later on other factors such as gender, national origin, religion, etc., in employment, education, and contracting activities. In the case of the United States, the earliest affirmative action efforts date back to the 1950s when the Warren Court handed down unanimous decisions to end state-sponsored racial segregation in public educational facilities[10]. The federal government first referred to such affirmative race-based actions in the 1960s. Table 3.1 lists some major milestones in the early history of affirmative action in the U.S.

(Table 3.1 about here)

In March 1961, President John F. Kennedy signed Executive Order 10925 requiring federally-funded projects to "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race,

[9] *Academic American Encyclopedia*, 1995, vol. 1, p. 132.
[10] *Brown v. Board of Education*, 347 U.S. 483; *Brown v. Board of Education II*, 349 U.S. 294

creed, color, or national origin"[11]. Executive Order 11246 issued by President Lyndon Johnson established the foundation for affirmative action enforcement in the public sector and the private industry (Andorra 1998). All federal contracts over $50,000 and government employers with 50 or more staff were required to submit written plans that included "annual specific determinations of underrepresentation for each group", and to be "accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured"[12]. The Civil Rights Act of 1964 laid the official statutory framework for affirmative action programs. With growing recognition of the inter-racial gaps in labor and housing markets, and the importance of government-enforced anti-discrimination efforts, race-conscious strategies began to be adopted primarily in three spheres—public universities' admissions processes, public employers' hiring and promotion procedures, and public procurement and contracting activities (Thurow 1969; Graham 1990). Under Title VII of the Civil Rights legislations, public and private employers are required to take affirmative actions to overcome the effects of past discriminatory practices, and increase minority access to education and employment opportunities[13].

The 1970s saw considerable growth and expansion of preferential programs. The Equal Employment Opportunity Commission began introducing numerical goals and timetables that federal agencies were to fully utilize in maximizing employment opportunities for minority groups. The Department of Education also issued federal

[11] http://www.eeoc.gov/eeoc/history/35th/thelaw/eo-10925.html
[12] 5 CFR 720.205(b)
[13] 42 U.S.C. 2000e

guidelines instructing public educational institutions to promote better opportunities for minority students in recruitment and financial aid, and to stress that even "in the absence of past discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin"[14]. In the remainder of this chapter, I will categorize current scholarship on affirmative action in public procurement and contracting into three major areas.

3.2 Historical Basis for Affirmative Action in Public Contracting

Racially preferential public procurement programs, as well as affirmative action policies in general, have stirred lasting controversy across the nation, and have remained the subject of numerous legal challenges in recent decades, despite evidence of gross underrepresentation of minority-owned firms in the delivery of goods and services (see Table 3.2) Opponents of race-based contracting plans oftentimes argue that racial gaps in participation of government projects primarily result from minority firms' lack of capacity to compete in the marketplace, and that deliberate remedial programs bear the risk of over-compensating less competent businesses (LaNoue 1994). Why, then, are race-based government contracting policies still in place? Here are some explanations discussed in the literature.

(Table 3.2 about here)

[14] 34 CFR 100.3(b)

3.21 Transformations of Economic Structures

One body of literature attempts to address these questions in a piecemeal fashion, by examining different historic reasons that serve as justification for the operation of preferential procurement and contracting programs in government agencies. Economists first point to economic transformation of urban America as a starting point for grasping the history of minority enterprise. The U.S. labor market experienced an increase in self-employment after the 1970s. And yet the percentage of business ownerships among the African American community had remained constant (Fairlie and Meyer 2000). The authors considered black migration patterns and racial convergence in educational attainment, and concluded that these major demographic shifts did not remarkably offset the difference between black and white business ownership rates. This historical disparity is partly due to structural transformations in the economy. Technological breakthroughs and vast developments in transportation and production methods have given rise to considerable decentralization of the manufacturing industry, and have dealt a heavy blow to traditional lines of minority employment. The implementation of preferential contracting programs is critical in encouraging minority entrepreneurship and expanding minority business opportunities in the changing economic environment (Bates 1984; James and Clark 1987).

3.22 Financial and Social Barriers

What other historical reasons could have discouraged minority entrepreneurs in the United States from starting up businesses and competing for government projects? In such times of economic transition, minority entrepreneurs have multiple barriers to overcome. Evidence of covert as well as overt racial discrimination has been identified in many markets, which has limited the expansion of minority businesses, and has undermined their competitiveness as bidders on government-funded projects (Enchautegui et al. 1996). Minorities not only tend to have lower human capital endowments compared to non-minority groups, but are also likely to have more limited financial and social capital, which are essential for successful participation in state and federally-assisted contracts. Meanwhile, discriminatory barriers in the public contracting process per se may have further contributed to persisting disparities in contracting dollars awarded to minority and nonminority firms (see Table 3.22).

(Table 3.22 about here)

3.221 Barriers to Formation and Growth of Minority Firms

A key component in the formation and development of businesses is startup capital. Partly as a result of historical discrimination, minority groups had limited access to mainstream educational and employment opportunities. Up to today, huge gaps remain in personal income and home ownership rates. The percentages of African American and Hispanic populations with annual household income less than $15,000 exceed that of white populations by, respectively, 12.1% and 5.1%. While approximately 12.3% of whites live below poverty lines, the percentage figures almost doubled for minority

groups (25.8% among blacks, 25.3% among Latinos) (U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States, 2009). Insufficient personal wealth and income will significantly limit the amount of startup capital essential in the initiation and growth of a business, and will place minority entrepreneurs in an inferior position compared to nonminority males in the first place (Enchautegui et al. 1996).

One with limited startup capital would naturally turn to financial markets for business loans and credits. However, studies have shown that minorities may encounter discriminatory barriers in the bonding and lending process. In one study, scholars examine credit applications, credit denial rates and interest rates across whites, blacks, Asians and Latinos between 1988 and 1989. While no statistically significant differences in application rates are found across different demographic groups, African Americans and Hispanics do face a much higher probability of credit rejection, and more difficulty in obtaining small business loans. The authors suggest that these disparities in the credit markets may have been at least partially the result of prejudicial discrimination (Cavalluzzo and Cavalluzzo 1998). In a specific case study of the Federal Reserve Bank of Boston, loan rejection rate for white applicants is approximately 10%, whereas the percentage number for blacks and Hispanics reaches 28%. Even controlling for individual applicants' personal credit history, loan characteristics and several other factors, African American applicants are still found to have an 8% lower probability of loan approval (Munnell et al. 1996). Blanchflower et al. (2003) uses aggregate data from the National Surveys of Small Business Finances in the 1990s on 3,561 firms, and discovers similar evidence indicative of racial discrimination in the credit market. African-American-

owned companies, in particular, are up to twice as likely as nonminority small business operators to be denied access to credit, after controlling for personal history, measures of creditworthiness of firms, as well as sensitivity to different econometric specifications. Feagin and Imani (1994) document several minority business owners' personal accounts of the obstacles they have struggled against in their individual attempts to obtain loans from banks. Numerous surveys have also captured hundreds of black business operators' bonding and loan application experiences, and the degree to which racial stereotypes and discriminatory barriers in the financial markets limit financing opportunities for minority firms and become an impediment to their future development (Bates et al. 2007).

The formation and growth of minority-owned businesses may be constrained not only by limited access to financial capital, but also by less access to social capital, which is typically acquired through group identifications and associations. In the case of the construction industry, formal and informal business networks play a critical role in the success of a firm (Fratoe 1988). Whereas formal organizations such as labor unions offer bargaining tools and business information to members, construction firms also rely on informal networks for hiring and training opportunities, networks that young minority firms often encounter enormous difficulty breaking into (Waldinger and Bailey 1991). These business networks often provide access to key information on upcoming construction projects, new clients, training practices, etc. Historically, however, minority groups have had to overcome additional barriers to be able to penetrate predominantly white male-owned mainstream networks (Hill 1989). The construction industry for example, as described by U.S. district court judge James Moran,

> "was dominated by a few large firms, large enough to undertake large contracts, and a myriad of smaller firms…Prime contractors had a cadre of subcontractors whom they solicited for bids, subcontractors in whom, because of prior dealings, the primes had confidence would perform to specifications, on time and within budget. Those subcontractors were almost invariably owned and operated by white males" (Moran 2003).

These business networks, which, in a case study of the Chicago-area construction industry, are referred to as "old boy networks" (Bates 2006a), may have limited minority access to social capital, placing minority firms in further disadvantaged competitors in the industry.

In addition to the lack of financial and social capital, minority business owners are likely to have lower human capital, too. Human capital endowments, in this case, can range from educational background to previous work experience. The Survey of Business Owners conducted by the U.S. Census Bureau reveal huge gaps in educational attainment, with a much lower percentage of college degree holders among black and Latino business entrepreneurs, which is likely to translate into disparities in business outcomes (see Table 3.221).

(Table 3.221 about here)

Minorities are also reported to have more limited work and training experience. While studies have identified strong correlation of self-employment rates between different generations in a family (Fairlie 1999; Dunn and Holtz-Eakin 2000), African American men are found to be less likely than whites to have fathers who own businesses, and less likely to follow in their self-employed parents' footsteps and take over family businesses later on (Glazer and Moynihan 1970; Hout and Rosen 2000). Economists Robert Fairlie and Alicia Robb recognize these weaker family ties as part of the reason

why minority-owned businesses tend to be less successful (Fairlie and Robb 2007). In the book "Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States" published the following year, the authors take a closer look at the characteristics of business owners among different racial and ethnic groups. Using census data, they find that black business entrepreneurs have "less work experience in a similar business prior to starting or acquiring their businesses than whites…also less likely to have prior work experience in a managerial capacity than are white business owners" (Fairlie and Robb 2008, p. 106-107). Whereas over 23% of white businesspersons have had the chance to build work experience in a family member's business before venturing into their own, only 12.6% of African American business owners report similar experience. In all, racial differences in human capital endowments may have also contributed to disparities in business formation and development.

3.222 Barriers to Minority Firm Participation in Government Contracts

Government-initiated affirmative action efforts in public procurement and contracting are critical, not only because these programs will generate business opportunities for minority firms and mitigate the negative consequences of multiple barriers to minority business formation and growth, but more importantly, because studies have found evidence of additional barriers to minority participation in the government contracting process itself. Minority contractors have reported not being notified of subcontracts let by non-minority prime contractors, and not having sufficient time to participate in the bidding process (Bentil 1989). In the 1996 Urban Institute report,

Enchautegui et al. identify an array of problems embedded in government contracting programs that may have ended up further limiting minority business participation. For example, some government agencies are unwilling or less capable of breaking large contracts into smaller projects which minority firms are much more likely to bid on. Some local projects are also "customized", containing special restrictions that will lead to the exclusion of minority contractors. In addition to problematic project design, exclusion also occurs in the bid solicitation process, where minority bidders are sometimes offered less complete project information, have failed to receive new project notices online, or have encountered trouble being notified of calls for bids over the phone.

What's more, due to lack of government oversight of subcontracting agreements at state and local levels, minority firms hired as subcontractors have been experiencing late payments or even exclusion from contracts by white-owned prime contractors. As one black contractor describes, "There is nobody who really monitors the program. And that is one of the major problems we have…The way it is set up is not the way it is being run. People do what they want, how they want. There is nobody who monitors to see that things are done the way it's supposed to be done." This is one of the numerous personal accounts documented in Feagin and Imani (1994) which reveals rich evidence of difficulties and barriers minority firms have to constantly struggle with when participating in the government contracting process. Figures 3.2221 and 3.2222 provide a general summary of disparities in public contracting across different demographic groups. These previous literatures can not only deepen our understanding of the historical barriers that may have contributed to such disparities, but also serve as the primary rationale for

continued race-based contracting programs in recent years that are intended to create a level playing field for minority businesses.

(Figures 3.2221 and 3.2222 about here)

3.3 Disparity Studies and Race-Neutral Strategies

While a large body of literature on affirmative action in public contracting delves into evidence of racial disparities and historical justifications for preferential policies, another body of literature focuses on government agency compliance with new legal requirements since the 1980s, and the extent to which such reforms have facilitated race-neutral reconfigurations of existing procurement and contracting programs. Since landmark decisions in *Croson* (1989) and *Adarand* (1995), evidence of historical barriers has been deemed insufficient to justify race-based preferential government procurement programs, as the Supreme Court's jurisprudence of affirmative action shifts from being race-conscious to being race-neutral. In order to survive the strict scrutiny test, federal, state and local agencies will have to bear the burden of implementing a narrowly-tailored program that uses not rigid racial quotas, but scientific disparity studies to reflect actual patterns of minority business underutilization in government-assisted contracting process, and to identify the need for an affirmative action plan to remedy the disparity (Halligan 1991).

The concept of disparity study originates from Justice O'Connor's written opinion in *Croson*,

> "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."

Disparity study encompasses a variety of analyses that rely essentially on quantitative and qualitative measures to document racial gaps in public contracting. It is a central tool used by government agencies to justify the continuation of race-conscious contracting goals. It is also the subject of judicial review in the event white male-owned contractors challenge an agency's minority preference program on the grounds of reverse discrimination (La Noue 1993).

Here to summarize from Rice (1993) and Martin et al. (2007), public agencies are expected to address the following four aspects in a disparity study:

- Is there statistical difference between minority and nonminority business participation in the government procurement and contracting process?
- Controlling for other factors, how much of this disparity may have been resulted from racial discrimination?
- Can any strategies be proposed to remedy the imbalance?
- Are there any race-neutral alternatives the agency can adopt to narrowly target a minority group without creating undue burdens for nonminority groups?

The main focus of the study, nonetheless, is the first part where minority enterprise utilization ratio, otherwise known as disparity index, is calculated. This index measure is derived from dividing relative minority contract awards by minority firm availability. The complete formula is listed in table 3.31.

(Table 3.31 about here)

In determining the possible effects of discrimination on the level of disparity measured, agencies often have to conduct multivariate regression analysis. Those that lack the in-house capacity tend to hire outside experts to take on such tasks as data collection, statistical modeling and producing final disparity study reports that are typically hundreds of pages long, leading to the emergency of an industry of consultants that cost local governments between $60,000 and $800,000" (Rice 1992). Table 3.32 provides some typical components of a comprehensive disparity study.

(Table 3.32 about here)

To best assess racial gaps in public contracting and develop remedial strategies, an ideal disparity study would constitute four major analytical components. First of all, agencies need to compile public procurement and contracting awards records, and conduct a utilization analysis to determine the actual level of minority business participation in government-assisted contracts. Secondly, agencies shall conduct an availability analysis to collect numbers of minority and nonminority businesses in a given geographic area or jurisdiction. In addition, it is also critical that agencies conduct historical analysis, by gathering anecdotal as well as quantitative information, to uncover any evidence of historical barriers, such as entrenched insider business networks and discriminatory practices of credit-lending institutions, which may have impeded minority firm access to government contracting opportunities (Robinson 1990). Last but not least, agencies are encouraged to conduct contemporary analysis, through flexible measures such as survey instruments, to examine minority business contract bidding experiences.

The implementation of these analytical procedures, often immensely data-driven processes, demands considerable input in terms of human and financial resources, which, consequently, tends to discourage government agencies from performing thorough and timely disparity studies. In a report published by the Transportation Research Board of the National Academies[15], for example, it is revealed that only approximately half of the state transportation agencies have conducted, or in the middle of conducting, a disparity study.

Not only are there likely to be delays in the production of these studies, but scholars have also identified methodological problems within the reports that may render the conclusions on racial disparity and discrimination questionable. Since judicial opinions do not specify standardized steps of data collection and measurement, government agencies exercise a great deal of discretion in defining and measuring utilization and availability. In measuring percentage of minority firm utilization in public contracting, for example, some states use the dollar amount of contracts awarded to minority businesses. Others use the amount of dollars actually paid to minority businesses. Whereas the former measure may inflate utilization, as it overlooks the possibility of minority contractors being removed from the project after contract is awarded, the latter measure may deflate utilization, since it does not take into account minority subcontractors who receive payments from white prime contractors (Enchautegui et al. 1996).

[15] 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.

States also have various ways of measuring availability of minority firms. Following the *Croson* and *Adarand* decisions, agencies are encouraged to identify the number of minority-owned firms that have both the willingness and the capacity to participate in government projects, so as to reduce the probability of over-exaggerating racial disparities in the contracting process. Some disparity studies are, therefore, based on vendors or bidders lists that document firms that have attempted to win or have actually won government contracts previously. The underlying problem in this approach is that such restrictive lists are likely to have excluded minority firms that may have failed to obtain contracts precisely because of discriminatory barriers in the past, and thus do not encompass all ready, willing and able minority enterprises in the business community (Enchautegui et al. 1996). More states tend to rely on minority and women business owner survey data conducted by the U.S. Census to estimate the availability of businesses by race and gender. Issues may arise, as well, in using census data to measure availability. For example, the Census Bureau and government procurement programs adopt different criteria in determining minority business ownership status. While a firm owned 50% by an African American is classified as minority-owned in the census data, race-based public contracting programs typically have the ownership threshold at 51%. Another potential problem with using census data is the undercount of Hispanic- and Asian-owned firms prior to 1981, when the racial/ethnic classifications in the early surveys were not as specific. Meanwhile, these survey data may have double-counted minority-owned firms, as multiracial business owners tend to be counted more than once in different racial/ethnic categories (Celec et al. 2000). Using these surveys to measure

availability of minority firms, therefore, may lead to skewed results that will compromise the validity of disparity studies per se (La Noue 1998). In reviewing some major court cases where the race-based public contracting programs fail to survive the strict scrutiny test, Martin et al. (2007) finds that concerns are frequently raised over the specific methodological approaches adopted in the disparity studies, such as inconsistent sources of data collection and measurement, inconsistent definitions of minority and minority firms, over-generalization of the data gathered, and absence of local information (Martin et al. 2007).

Another common concern centers on the proposal in disparity studies of strategies to remedy any racial imbalance. In La Noue and Sullivan (1995), the authors observes the paradox that although a majority of expensive and time-consuming disparity studies have uncovered sufficient evidence of discriminatory barriers to justify the continuation of race-conscious plans, little efforts have been made at the agencies to enforce penalties and sanctions to redress discrimination. A primary reason may be the anonymous nature of discrimination-related data, which tend to be collected from confidential interviews, surveys, public hearings, sworn affidavits, etc. In order to encourage full disclosure while at the same time protecting minority groups from future retaliation, government agencies tend to gather rather general accounts of discriminatory practices, which, in turn, makes it difficult to develop corresponding measures to address existing problems. Meanwhile, the authors call for more serious evaluation of race-neutral strategies adopted in public contracting programs. After reviewing a sample of disparity studies from different states, the scholars suggest that public agencies need to further explore race-neutral alternatives,

such as outreach programs, capital and bonding assistance, and class-based affirmative action efforts, to make sure their preferential plans are narrowly tailored.

Due to the variety of methodologies employed, there have also been inconsistencies in the interpretation of statistical disparities (Suggs 1991; Boyle and Rhodes 1996). What is the relationship between disparity and discrimination? This is a question nearly every public agency grapples with when complying with the disparity study requirement. Statistical evidence of racial disparity in government contracting can be a strong indicator of ongoing discrimination, or a consequence of the limited number of qualified, willing and ready minority firms (Enchautegui et al. 1996). Though some states have attempted to address this question through innovative econometric measures, it is still largely up to legal experts and statisticians to offer individual interpretations.

As the Supreme Court has largely limited the use of race as a factor in government-sponsored contracting by applying the strict scrutiny standard, disparity studies play a crucial role as agencies determine of the size and scope of future race-based contracting plans. This body of literature suggests, nonetheless, that due to time and financial constraints, ambiguity in disparity study procedures, or in some cases lack of expertise in statistical analysis, large variations have been identified in the quality of existing disparity studies, and in the extent to which such studies can contribute to the installation of truly narrowly-tailored programs.

3.4 Effectiveness of Affirmative Action Programs in Public Contracting

While the previous literature on affirmative action in public sector contracting primarily concentrate on review of historical discriminatory patterns, analysis of court decisions and new legal requirements, and discussion of race-neutral alternatives, relatively fewer scholars have examined how effective existing affirmative action programs have been in expanding minority business participation in government-assisted contracts.

Some studies have presented evidence on the direct positive impact of racially preferential programs upon the initiation and continuation of minority business enterprise. As the earlier literature suggest, minority firms often have to overcome multiple barriers before achieving successful business outcomes in the marketplace. Boston (1999)'s case study of Atlanta illustrates that the city's race-based government procurement and contracting program effectively helps black entrepreneurs gain access to dynamically growing industries in the mainstream market, and serves as a remarkable catalyst for the creation and growth of an entire generation of black-owned businesses. More than one third of their annual revenues come from participation in government projects. Partly because of the affirmative public policies that support minority business participation, recent decades have seen substantial growths of African American, Hispanic, Asian American, Native American and Pacific Islander-owned firms. According to the most recent Survey of Business Owners, the number of minority-owned businesses increased by 45.5 percent between 2002 and 2007, to approximately 5.8 million. States such as

California, Florida, Maryland, and New Mexico, are home to minority firms that account for over 30 percent of the states' businesses in total.

Evaluation of the effectiveness of preferential contracting programs needs to be based on the proposed goals and objectives of these programs. Studies have shown that the short-term goal, which is to expand minority business participation in public procurement and contracting, has been achieved with success in many jurisdictions. The adoption of these programs can lead to a sharp increase in the number of willing minority entrepreneurs. In Chicago, for example, nearly 50% of vendors who have indicated interest in selling goods and services to the city government are minority firms (Getzendanner et al. 1990). Between 1980s and 1990s, minority firms went "from a position of being as likely as nonminority firms to sell to government, to one of being more likely to sell to government", and had exceeded nonminority firms in terms of the percentage of revenues generated from sales to government (Bates 2001). Because of the race-based contracting goals in place, minority businesses are able to receive more contract awards than before (Black 1983; Addabbo 1985).

If these programs are evaluated on the basis of their long-term goal, which is to facilitate minority capacity-building and business development in the years to come, some programs may have been more effective than others. Race-based contracting programs are not solely intended to increase general involvement of minority firms without taking into consideration the economic viability of such firms. Even among minority firms that have been successfully awarded government contracts, some may lack the capacity to handle large projects, and consequently are forced to pass contracts to

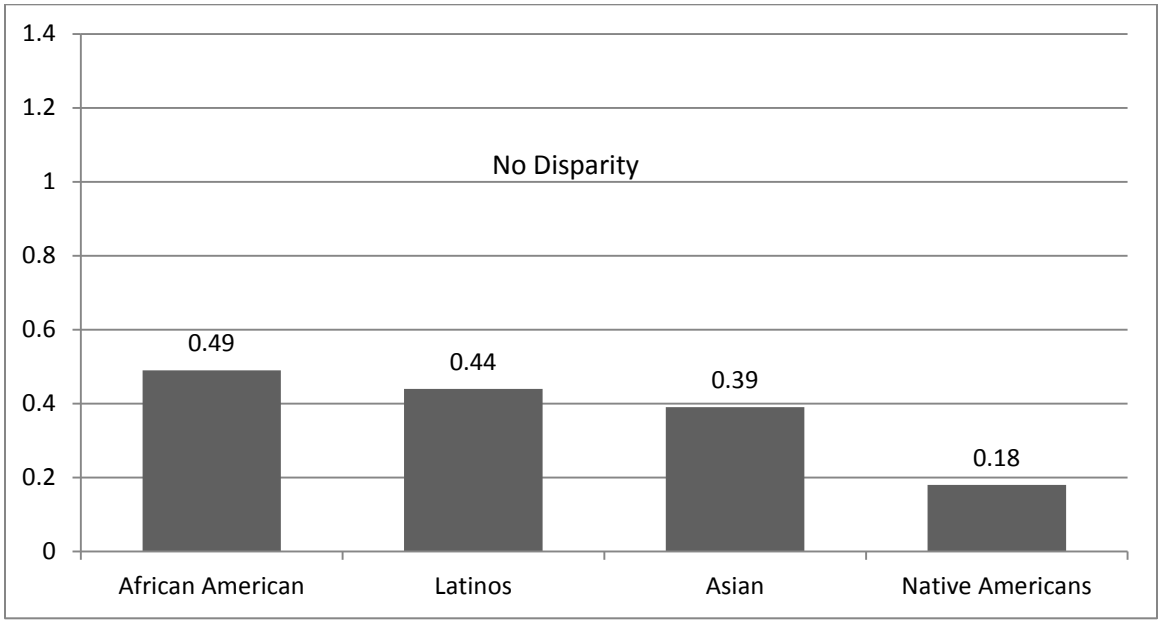
more established non-minority firms, which does not facilitate minority business development in the long run (Bates 1995; Bates and Williams 1995). In a case study of New Jersey's minority preference program, Myers and Chan (1996) discover that while the program has led to a dramatic increase in the number of bids submitted by minority firms, the program does not result in a higher probability of receiving contract awards among minority firms. Chicago's program, nevertheless, has successfully promoted the long-term development of the minority business community, by focusing not exclusively on increasing the sheer number of minority bidders, but, more importantly, on identifying the fundamental barriers that limit minority business opportunities, and improve the economic viability of minority firms through capital and bonding assistance (Bates 2009).

In general, relatively few studies set out to examine the effectiveness of existing preferential procurement programs. However, even less is known about the impact of race-neutral plans on minority business involvement. When agencies adopt largely race-neutral contracting goals, a significantly greater number of small business enterprises that meet certain size and net worth requirements, regardless of race, gender, etc., will be qualified for participating in preferential procurement programs. This has, in the case of New Jersey, led to reduced shares of contracting dollars awarded specifically to firms owned by racial and ethnic minority groups (Davila et al. 2012).

While the studies summarized above have discussed various aspects of affirmative action in public contracting, few studies have systematically examined judicial impact on these programs at both state and federal level, nor state implementation across time and

the fifty states. The following two empirical studies will expand our understandings in these areas.

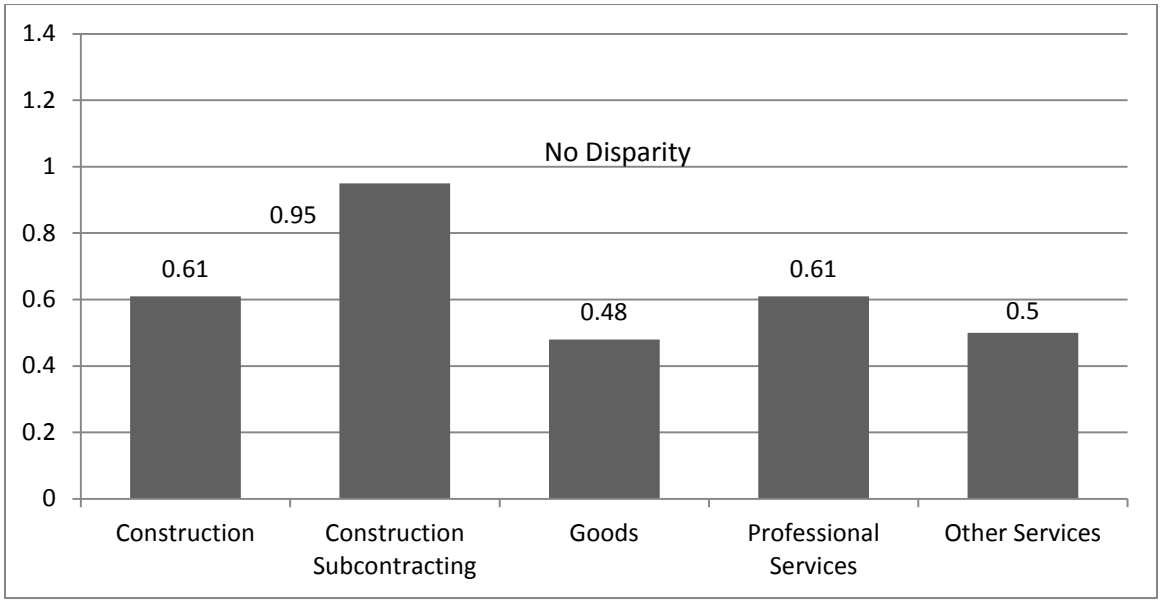
Figure 3.2221: Disparity[16] in Minority Business Contracts



Source: Urban Institute, 1996

[16] Racial disparity is a term often used to describe the gap between the population percentage of a racial/ethnic group, and the percentage of benefits or opportunities granted to this particular group. This gap may not be the result of institutional bias and discrimination. But it can shed some light on the possible challenges minority groups face, and provide the basis for government actions that create more equitable outcomes. Disparity for the African American community in the case of public contracting, for example, is calculated as the percentage of government contracts awarded to black-owned businesses divided by the percentage of blacks in the total population. The closer the ratio gets to 1, the lower the disparity level.

Figure 3.2222: Disparity in Minority Business Contracts by Industry



Source: Urban Institute, 1996

Table 3.1: Early Presidential Efforts in Affirmative Action[17]

Executive Order 10925 by President John F. Kennedy	March 6, 1961
Encouraged affirmative action in employment practices; created the Committee on Equal Employment Opportunity	
Speech by President Lyndon Johnson	June 4, 1965
"This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity--not just legal equity but human ability--not just equality as a right and a theory, but equality as a fact and as a result."	
Executive Order 11246 by President Lyndon Johnson	September 24, 1965
Required all government contractors to take affirmative action in hiring and employment	
The Philadelphia Order and the "Goals and Timetables" Plan by President Richard Nixon	1969
"We would not impose quotas, but would require federal contractors to show affirmative action to meet the goals of increasing minority employment."	

[17] *Columbia Encyclopedia*, 2000.

Table 3.2: Characteristics of Businesses by Race/Ethnicity of Owner

	White	African American	Hispanic	Asian	All Firms
Percent of Population	72.4%	12.6%	16.3%	4.8%	100%
Percent of Total Firms	83.4%	7.1%	8.3%	5.7%	100%
Size of Firm by Number of Paid Employees					
None	10.96%	13.15%	12.88%	11.72%	10.8%
<5 employees	50.91%	55.51%	54.45%	54.45%	50.16%
5-19 employees	28.42%	24.14%	26.12%	27.52%	28.3%
>=20 employees	9.71%	7.19%	6.55%	6.32%	10.74%
Total	100%	100%	100%	100%	100%

Source: 2007 Survey of Business Owners; 2010 U.S. Census

Table 3.22: Barriers faced by Minority Firms

Barriers to the Formation and Growth of Minority Enterprise
Lack of financial capital Lack of social capital Lower human capital endowments Limited access to lucrative nonminority consumer markets
Barriers to Minority Participation in Public Procurement and Contracting Process
Failure of government to break large contracts into smaller ones for minority firms to compete Extensive granting of waivers from minority subcontracting requirements to majority contractors Ineffective screening for false minority fronts Limited notice of contract competitions Majority prime contractors' bid shopping

Source: Enchautegui, Maria E., Michael Fix, Pamela Loprest, Sarah C. von der Lippe, and Douglas Wissoker. 1996. *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* Washington, DC: Urban Institute.

Table 3.221: Human Capital Characteristics of Business Owners by Race/Ethnicity

	All	White	Black	Asian	Hispanic
Educational Attainment					
Less Than High School	5.2%	4.9%	9.4%	8.3%	18.7%
High School/GED	20.6%	20.8%	21.3%	16.6%	23.7%
Some College	17%	17.2%	20.1%	11.8%	16.8%
Bachelor's Degree	26.4%	26.6%	18.5%	29.4%	16.2%
Advanced Degree	18.5%	18.3%	15.8%	24.9%	11.4%
Self-Employment Experience					
Previously Owned a Business	36.7%	37.1%	25.9%	37%	30.8%

Source: 2007 Survey of Business Owners, U.S. Census Bureau, www.census.gov/econ/sbo

Table 3.31: Disparity Index Formula

Utilization = Total contract dollars awarded to minority businesses / Total contract dollars awarded to all businesses
Availability = Total number of minority businesses in the marketplace / total number of businesses in the marketplace
Disparity Index = Utilization / Availablity

Table 3.32: Components of a Disparity Study[18]

Historical discrimination analysis in geographic/jurisdiction area
• Descriptive statistics
Contemporary discrimination analysis in geographic/jurisdiction area
• Descriptive statistics
• Anecdotal evidence
Employment/income analysis in geographic/jurisdiction area by race and gender
Availability analysis of minority firms in market area
Utilization analysis of minority firms in government contracting in jurisdiction
Race-neutral alternatives analysis on minority business development by jurisdiction
Marketplace discrimination analysis in geographic/jurisdiction area
• Price discrimination analysis
• Bonding discrimination analysis
• Bid manipulation analysis
• Financing discrimination analysis
• Attitudinal discrimination analysis
• Financial analysis of minority and nonminority firms
Population growth analysis by race
Comparative growth analysis of local minority firms, to national minority firms and local nonminority firms in business/trade industries

[18] Rice, Mitchell. 1992. "Justifying State and Local Government Set-Aside Programs through Disparity Studies in the Post-Croson Era". *Public Administration Review*, 52 (5): 482-491.

Chapter 4: Federal Agency Decision-Making in Race-Based Procurement and Contracting

My first empirical test primarily examines variation in federal agency preferential procurement and contracting behavior, and the degree of bureaucratic responsiveness to the judicial branch. Many federal agencies have their own Office of Small and Disadvantaged Business Utilization (OSDBU) that develops programs and policies to assist small businesses in general, and small minority firms in particular, in doing business with the federal government. The main purpose of this chapter is to gauge whether, and the extent to which, judicial review and decisions regarding the constitutionality of federal affirmative action programs in public contracting influence agency behavior in the award of contracts to minority contractors. This chapter relies on contracting data at 24 chief federal agencies across 19 years, available through the Federal Procurement Data System. Overall, I do not find compelling evidence of significant and substantial judicial impact on bureaucratic decision-making in contract-awarding to minority enterprises. Political principals in the executive branches are found to have a much stronger impact. Affirmative action contract awards at federal agencies tend to be higher during Democratic presidential administrations.

4.1 Federal Affirmative Action Programs in Public Procurement and Contracting

The passage of civil rights laws in the 1960s laid the statutory framework for affirmative action initiatives and programs throughout the country. In 1978, Congress enacted Public Law 95-507, as an amendment to the Small Business Act, which officially authorized minority set-asides in federal purchases and contracts, and required all federal agencies to submit annual percentage goals for minority business utilization. In particular, every federal agency with procurement and contracting powers was to establish an Office of Small and Disadvantaged Business Utilization (OSDBU) to coordinate affirmative action efforts individually (Eddy 1998). Subsequent legislation proposed specific goals for major government agencies and industries. Defense contractors, for example, were required to achieve at least 5% minority business participation within 3 years, pursuant 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. Universal minority set-aside goals for all federal agencies were introduced in the Business Opportunity Development Reform Act of 1988, which included an annual 20% procurement and contracting goal for small businesses in general, a minimum of 5% for small disadvantaged businesses, and 5% for women-owned firms. Agencies were also encouraged to continue adopting their own goals, in the meantime, in order to maximize opportunities for minority firms to do business with the federal government (Dale 1998).

To be eligible for enrollment in the annual 5% minority set-asides, a firm must be considered as both socially and economically disadvantaged. African Americans, Hispanic Americans, Native Americans (American Indians, Eskimos, Native Hawaiians, etc.), Asian Pacific Americans (origins from Thailand, Malaysia, Indonesia, Singapore, Japan, China, Taiwan, Korea, the Philippines, etc.), and Subcontinent Asian Americans (origins from India, Pakistan, etc.) are among the major racial and ethnic groups classified as "socially disadvantaged". Other traditionally disadvantaged groups, such as women and people with disabilities, may also be able to meet eligibility requirements, if the applicants can demonstrate "clear and convincing evidence" that they have "personally suffered disadvantage of a chronic and substantial nature", due to "long term residence in an environment isolated from the mainstream of American society" that may negatively influence their "entry into the business world" [19]. Whereas economic disadvantage is defined as the case in which "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market". This item is specifically measured by assets and net worth. Applicants whose personal net worth falls below $250,000 may claim economically disadvantaged status[20].

In addition to the nation-wide aspirational goals established by federal statutes, individual agencies have also developed specific set-aside plans for the benefit of

[19] 15 U.S.C. Part 637 (d)
[20] 15 U.S.C. Part 637 (a)

minority groups. One of the most prominent is the special 8(a) program created by the Small Business Administration (SBA), which allows SBA-certified disadvantaged firms to participate in contracts that SBA has obtained from other government agencies. Businesses owned at least 51% by individuals who are able to establish social and economic disadvantages are eligible to be enrolled in the program, and awarded up to $4 million worth of sole-source contracts that involve general services, computer services, engineering services, facility support and research-related activities (Eddy 1998). 8(a) is essentially a business development program intended to facilitate capacity-building of minority business entrepreneurs, and assist their firms in entering the mainstream market. The duration of enrollment in this program is typically nine years. The first four years are a developmental stage in which the SBA helps disadvantaged firms enter into contracts without open competition. This is followed by a five-year transition phase, in which the SBA provides specialized training and financial counseling opportunities, as well as technical, marketing and managerial assistance in gaining access to equity, loans and surplus government property[21]. The SBA also has the mentor-protégé program to forge mentoring relationships in the private sector and foster further growth of minority business owners. Successful graduation from the 8(a) program requires a minority firm's ability to independently compete in the marketplace and secure large shares of contracts from outside sources. To help participants achieve this end goal, SBA officers conduct systematic and periodic reviews and evaluations to monitor and assess progress, until the necessary self-sufficiency has been developed.

[21] http://www.sba.gov/content/about-8a-business-development-program

Other government agencies with procurement and contracting powers have introduced similar plans. The Department of Defense, for example, pursues an annual 5% race-based goal. Its section 2323 program, unlike SBA's 8(a), targets specifically racial and ethnic minorities. Under this program, procurement of goods and services supplied by disadvantaged enterprises is primarily achieved through two measures: a rule-of-two method that authorizes contracting officers to award contracts exclusively to minority firms when at least two potential bidders fall into this category; and a 10% bid preference that adds an additional 10% to non-minority bidders' prices in an open competition. In addition to these affirmative action tools, the DOD also oversees a mentor-protégé program mandated by the National Defense Authorization Act, and has specialists in the Army, Navy, Air Force, and other branches to offer various forms of technical assistance and guidance. In the 1990s, the Department of State stipulated a minimum of 10% of U.S. embassy construction and facility management projects set aside for minority contractors. The Department of Energy enforced a 10% race-based quota as well, pursuant to the Energy Policy Act of 1992. The Environmental Protection Agency appropriated at least 8% of procurement and contracting awards to disadvantaged businesses in wastewater treatment and leaking underground storage tanks projects. The National Aeronautics and Space Agency, similarly, established an exclusive 8% quota to incorporate minority groups in sheltered competition (Eddy 1998).

4.2 Legal Challenges against Affirmative Action in Public Contracting

Regents of the University of California v. Bakke (1978) marks the prelude to a series of constitutional cases challenging affirmative action policies on the grounds of reverse discrimination. The Supreme Court reviewed the University of California School of Medicine's minority set-aside program—16 in every 100 openings reserved for minority students—and declared such inflexible race-based quota impermissible. While the decision itself didn't invalidate affirmative action in general, it started to lay out the legal framework for examining future preferential set-asides programs from a color-blind perspective. Justice Lewis Powell, in delivering the judgment of the Court, argued that there are "serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of particular groups in order to advance the groups' general interest. Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making"[22]. This opinion represents a shifting legal reasoning in courts that starts to treat government-endorsed classifications on the basis of race as generally suspect.

[22] 438 U.S. 265

New standards of judicial review in the area of public procurement and contracting were not officially established until *City of Richmond v. J.A. Croson*, a landmark case that was decided by the Supreme Court in 1989. Richmond, Virginia has been a city with an over 50% minority population. Public hearings in the 1980s, nonetheless, revealed evidence of alarming racial disparities in the amount of prime contract awards. Based on these statistics, the city of Richmond implemented a 30% minority set-aside plan in procurement and contracting in the hope of remedying historical discrimination. According to the new plan, white-owned firms were required to achieve race-based quotas by subcontracting with minority businesses. J.A. Croson was one of the companies trying to fulfill this requirement when bidding on a city government contract on plumbing repairs at the city jail. The minority subcontractor that the Croson company secured made a bid significantly higher than their own. Croson submitted a request for a contract price increase. But the city denied the request and initiated a rebid process for the project. The company challenged the constitutionality of the set-aside ordinance in court. The Fourth Circuit Court of Appeals conducted an intermediate level of judicial review and ruled in favor of Richmond. Croson's subsequent appeal to the Supreme Court was remanded. Upon reconsideration, the Circuit Court decided that the affirmative action plan had violated the Equal Protection Clause of the Fourteenth Amendment, and ruled against the city of Richmond. The city council then appealed the ruling to the higher court.

In a 5-4 decision, the Supreme Court ultimately struck down the city's contracting quota system, arguing that federal efforts in correcting racial imbalances did not

necessarily justify state and local government discretions in the installment of any form of remedial programs as they might see fit. In the plurality opinion, Justice Sandra Day O'Connor emphasized the importance of applying a strict scrutiny standard to race-based contracting plans at municipal and state level.

> "We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classification. We think such a result would be contrary to both the letter and the spirit of a constitutional provision whose central command is equality."[23]

Since *Croson* (1989), state and local affirmative action plans in the awards of purchasing contracts have been subjected to the strict scrutiny test, the most stringent level of judicial review. Mere general statistical evidence is not sufficient to justify deliberate race-conscious classifications imposed by lower levels of government. State governments and city councils must bear the burden of ensuring that their affirmative action plans are narrowly-tailored and further a compelling governmental interest.

This new standard of judicial review was later applied to federal race-based contracting plans in *Adarand Constructors, Inc. v. Pena* (1995). White-owned Adarand Construction Company and minority-owned Gonzales Constructors were competing for a highway subcontract let by Mountain Gravel & Construction Co. in Colorado. Even

[23] *City of Richmond v. J.A. Croson Co*. (1989), 488 U.S. 469

though Adarand submitted the lowest bid, Mountain Gravel eventually selected the SBA-certified Gonzales because of financial incentives offered by the Department of Transportation for doing business with contractors with disadvantaged status. Adarand brought suit in federal court, and upon receiving an unfavorable ruling, appealed the case to the Supreme Court.

Again in a 5-4 split decision, the justices reiterated the necessity of subjecting the inherently suspicious racial and ethnic classifications to a strict scrutiny test, and ruled that the preferential incentives provided by the Department of Transportation failed to pass the test. Similar to the line of reasoning employed in Croson (1989), the majority opinion stated that the historical disadvantages suffered by minority groups should not presumably justify government-enforced differential treatment, that non-narrowly-tailored race-conscious programs themselves would be considered as reversely discriminatory and a violation of the Fourteenth Amendment. As Justice Antonin Scalia put it in a concurring opinion, "The government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[24]

Croson (1989) and *Adarand* (1995) are two landmark Supreme Court decisions that have profound consequences in government contracting program planning. They have laid out the legal parameters for preferential treatment of minority contractors. Government-imposed classifications on the basis of race must survive a strict scrutiny examination to be able to fully establish constitutional validity. One of the two major

[24] *Adarand Constructors, Inc. v. Pena* (1995), 515 U.S. 200

components of a strict scrutiny test is the justification of a compelling government interest. Evidence of past discrimination alone may not suffice to serve as the basis for a future remedial program. To demonstrate a compelling interest, a government agency does not necessarily need to "convince the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on proof", but rather has to present statistically reliable, sound and valid disparity studies to justify the employment of current remedial methods[25].

The second component of a strict scrutiny test is the narrowly tailoring of an affirmative action plan to make sure it's flexible and non-over-inclusive. The municipal preferential plan in *Croson* (1998) failed the strict scrutiny test primarily because the set-asides were intended for several different minority groups, some of which were not present in the local population. The Supreme Court has thus far provided a preliminary list of factors to be examined when reviewing an affirmative action plan:

- More than a mere promotion of racial balancing;
- Based on the number of qualified minorities in the area capable of performing the scope of work identified in the set-aside plan;
- Not over-inclusive by presuming discrimination against certain minorities;
- Complete with race-neutral alternatives to set-aside programs (such as providing managerial and technical assistance to minority entrepreneurs);
- Not based upon numerical quotas or timetables

[25] *Wygant v. Jackson Board of Education* (1986), 476 U.S. 267

Federal and state agencies reacted to the development of these new legal standards in different ways. The Department of Justice published immediate internal directives that called for reevaluation of all race-based federal programs in order to fully comply with *Adarand* (1995)[26]. Some agencies decided to simply put their set-aside programs on hold until further instructed[27]. The Clinton Administration, after reviewing evidence of historic disparities in the private marketplace, maintained 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"[28]. Consequently, the Department of Justice issued further guidance on applying the *Adarand* decision and narrowly-tailoring existing government procurement and contracting programs. Federal agencies with preferential contracting policies, including the Department of Defense, National Aeronautics and Space Administration, General Services Administration, etc., were expected to modify existing procedures by establishing more realistic and race-neutral business participation goals. As a result, some programs, such as the Department of Defense' aforementioned rule-of-two method in the bidder selection process, were suspended. Whereas some programs, such as the Small Business Administration's 8(a) program enforced tighter requirements for minority status certification (Dale 2002). Other programs underwent bigger policy changes. The Department of Commerce, for example, was required by the Justice Department to establish a new program featuring the setting of statistical benchmarks for up to 80 industries. The benchmarks were to be

[26] Memorandum to General Counsels from Walter Dellinger, Assistant Attorney General, June 28, 1995
[27] Memorandum to contractors from the Missouri Highway and Transportation Commission
[28] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,050.

calculated to demonstrate the expected level of minority business participation in the absence of discrimination. If actual participation levels fall below the benchmarks, race-based measures shall be implemented to increase contract awards to minority firms. Alternatively, should actual participation levels already exceed the estimated benchmarks, the department shall rely largely on race-neutral strategies, such as technical assistance and training opportunities, to ensure government contracting activities meet the strict scrutiny standards on a continued basis. The primary purpose of the benchmark requirement, was to "ascertain when the effects of discrimination have been overcome and minority-owned firms can compete equally without the use of race-conscious programs" in general[29].

It is important to have a fundamental understanding of the legal environment and newly-imposed strict scrutiny requirement that applies to racially preferential public contracting programs. These requirements have shaped the constitutional boundaries of government agency affirmative action programs, and have served as the basis for a series of other federal and state level legal cases challenging these programs.

The defendants in such cases are public agencies or local governments that have installed affirmative action programs in public contracting. The plaintiffs in these lawsuits tend to be unsuccessful nonminority bidders, usually Caucasian males, who have lost their bids for federally-assisted contracts to minority-owned firms, even though the bids they have submitted may have been significantly lower, and therefore more competitive, than the ones offered by their minority counterparts. Plaintiffs typically

[29] Response to Comments to DOJ Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25649 (1997)

attribute their failure of being awarded public contracts to the affirmative action program of a government agency who let out the contracts, which, as they argue, has imposed undue burden on them when preference program officials are more incentivized to do business with, or encourage prime contractors to subcontract with, minority-owned firms, in order to meet proposed preferential contracting goals. Overall, such cases typically challenge the constitutionality of an existing state or local agency's plan. In rare cases, a federal affirmative action contracting policy can be called into question and receive judicial review as well (e.g. *Western States Paving Co. v. Washington State DOT*, 2005).

The major legal argument raised by the plaintiffs' side in these cases revolves around the equal protection clause of the 14th Constitutional Amendment, which states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[30]" The plaintiffs typically argue that in awarding a public contract in particular or installing a preference program at large, government agency practices of granting preferential treatment to certain racial/ethnic minority groups at the expense of nonminority demographics, violate the equal protection clause, and therefore seek monetary relief.

Upon the filing of a lawsuit, a state or federal district court, depending on where the plaintiff has chosen to bring suit, will review the preference contracting program in question, and subject it to the strict scrutiny test in accordance with the Supreme Court

[30] Amendment XIV to the United States Constitution, Section 1

jurisprudence of affirmative action programs in general. In order for a preference plan such as the U. S. Department of Transportation's Disadvantaged Business Enterprise program to survive the strict scrutiny test, the defendant agency needs to present evidence of disparity and discrimination to justify the narrow focus and limited extent of their affirmative action plan. That is, the race-conscious component of the plan is reasonably set to remedy effects of prior exclusion, while not over-utilizing a group of contractors solely based on racial classifications (*Croson* 1989; *Adarand* 1995).

4.3 Hypotheses

In recent years, there have been several legal challenges initiated by nonminority bidders, who believe they have been denied equal access to government contracts because of their white male ownership, and challenge the fairness of a government agency's affirmative action plan. Using the Westlaw legal database, I identified 10 legal cases (a total of 16 rulings) where a federal agency's preferential contracting plan received judicial review at state- or federal-level courts. The 10 cases in my dataset include those where affirmative action plans in the DC-based federal government was being directly challenged (e.g. *Dynalantic Corporation v. US DOD* 2007; *Adarand Constructors v. Pena, US DOT* 1995), and those filed against race-based contracting plans at the state-level branch of a federal government agency (e.g. *Sherbrooke Turf Inc. v. Minnesota DOT* 2003; *H.B. Rowe Inc. v. W. Lyndo Tippett, North Carolina DOT* 2007). Upon the filing of a lawsuit, a court conducts judicial review of the preferential program

in question, subjecting it to the strict scrutiny test in line with the Supreme Court jurisprudence since *Croson* (1989) and *Adarand* (1995).

The general hypothesis to be tested in this empirical chapter is how courts impact bureaucratic behavior. Specifically, this chapter investigates whether and to what extent judicial review of preferential federal agency contracting programs affects federal agency decision-making in the award of contracts to minority firms. I hypothesize that a high frequency of judicial review of affirmative action programs in public contracting in general, and a high number of anti-affirmative action rulings in particular, would lead to a lower percentage of federal agency contract dollars awarded to minority businesses.

I argue that these two separate hypotheses are theoretically important in measuring court impact from different angles. The first one measures the frequency of court scrutiny and the second takes into account the amount of court decisions affirming and invalidating affirmative action policies used by agencies. Judicial review of these cases initiated by non-minority contract bidders, as summarized in 4.2, could be a protracted, time-consuming and expensive process. One would expect federal agencies to award fewer contracts to minority businesses in order to reduce the likelihood of future judicial review and save costs. Not only the direction of a specific court decision, but also the general frequency of judicial scrutiny on preferential contracting programs, can signal the possibility of more judicial review, and therefore could deter government agencies from awarding the same level of contract amounts to minority bidders.

4.4 Research Design

The empirical analysis is based on a panel dataset that compiles 24 federal executive agencies' annual contract amounts between 1989 and 2007 to small businesses in general, and small minority businesses in particular. As previously discussed in Chapter 4.1, affirmative action in government contracting at federal agencies have been installed as a sub-spending category in agency-wide contracting programs with small businesses. The unit of analysis is agency by year. The independent variables measure court activities, political institutions, and economic conditions.

4.41 Measurement of Dependent Variable

The dependent variable is the annual percentage of federal agency contract dollars awarded to small minority firms (see Chapter 4.1 for how firms can be categorized as minority-owned), in the total amount of dollars each year awarded to small businesses in general, for the years 1989[31] to 2007. Agency contracting data is collected from the Federal Procurement Data System, a database maintained by the U.S. General Services Administration. All federal contracts with estimated value of $3,000 or above are reported to the system. It has been a primary source for government-wide procurement and contracting data. The database collects information on acquisition amounts, contract dollars by federal agencies and states, and winning bidders. It provides access to yearly

[31] The federal procurement reports are available for years between 1981 and 2007. Prior to 1989, contract awards to firms owned by different racial backgrounds were not published in the reports. Beginning in 1989, data on federal procurement and contracting activities with distinctive types of contractors in each agency have been made available to the public. In addition, reports from 1989 up to 2007 have presented uniform and standardized summaries of expenses on minority versus non-minority businesses, which ensures that the validity of the statistical results would not be compromised due to inconsistent data measurements.

reports detailing information about different categories of agency procurement and contracting spending, including those mandated by legislative initiatives, and those specifically allocated to small minority and non-minority business enterprises.

Information has been collected from 24 federal Chief Financial Officers (CFO) Act agencies (see Appendix I). The federal CFO Act, signed into law in 1990 by President George H. W. Bush, aims to improve financial structures and accountabilities at core executive agencies and departments, where the bulk of federal financial activities, including procurement and contracting, take place. These CFO Act agencies also constitute the 24 participants for the Small Business Administration's annual small disadvantaged business program, which assists and monitors these agencies' preference goal-making and attainment.

Each of the 24 agencies submits total contract dollar amounts to small businesses in general, and small minority firms in particular, at the end of each fiscal year to the Federal Procurement Data System. To calculate the value of the dependent variable in this chapter, I divide an agency's annual total contract dollar amounts to small minority firms by the contract amounts on all small businesses regardless of ownership demographics, then multiplying by 100. As Eddy (1998) summarizes, government-wide public procurement and contracting activities that take race into consideration have been in place since the 1980s. One of the most prominent is the Small Business Administration's preference-based 8 (a) program, authorized by the Small Business Act of 1953 (15 U.S.C. 644) and revised by the Business Opportunity Development Reform

Act of 1988 (P.L. 100-656), which is intended to enhance opportunities for socially and economically disadvantaged groups to do business with government agencies.

In compliance with amendments to the Small Business Act, federal agencies with procurement and contracting power are responsible for establishing an Office of Small and Disadvantaged Business Utilization (OSDBU). In departments such as the Department of Transportation and the Department of Defense, the OSDBU units have rolled out preference policies with racial components similar to the 8 (a) program. Other CFO Act agencies, including the Department of Treasury, Agency for International Development, the Environmental Protection Agency, NASA, have also formulated annual goals for awarding public works to underserved minority populations. Under the Energy Policy Act of 1992 (P.L. 102-486), the Department of Energy was required to reserve at least 10% of its annual prime and sub-contract amounts for disadvantage business concerns. The Omnibus Diplomatic Security and Anti-Terrorism of 1986 (P.L. 99-399) authorized the Department of State to set aside the same percentage in worldwide U.S. embassy construction and maintenance projects. The compilation of contract data from all of these CFO agencies allows us to examine federal affirmative action decisions from the macro-level.

4.42 Measurement of Political Institutions

4.421 Court Activity Intensity

The first independent variable is court activity intensity, which is the annual cumulative count of judicial decisions on cases concerning a federal government

agency's affirmative action programs in public contracting. This measurement is intended to capture the general legal climate for preferential contracting programs in the nation. More frequent judicial reviews of such programs at federal or state courts can signal to federal agency decision-makers a higher litigation risk associated with preferential public contract awards.

Judicial data is collected through keyword search in the Westlaw online legal database. Since data for the dependent variable are available from 1989 and 2007, I use the key phrase "affirmative action" to locate all cases between 1987 and 2007. I included decisions back to 1987 so that I would be able to lag the judicial variables by one and two calendar years. Next, I drop all cases in which the affirmative action plans being challenged are in public university admissions and public employment, and keep only those that are specifically related to the legality of affirmative action efforts in public procurement and contracting. Court decisions regarding, for example, the constitutionality of a police department's race-based hiring procedures, may have rather limited, if any, meaningful impact on a government agency's race-based contracting program decision-making.

After narrowing down to cases concerning preferential contracting programs, I keep only cases in which a federal agency's affirmative action contracting program is sued at either federal or state level courts, and drop those in which the case concerns a state or municipal agency's local preferential contracting program. The reason for this distinction is that under the policy-making framework characterized by federalism, state and local government agencies enjoy a vast amount of autonomy in their affirmative

action program design and operation, independent of federal affirmative action mandates. Therefore in this chapter, I select only cases that are most relevant to federal executive agencies.

This step yields a total of 10 cases that challenge federal agencies' preferential contracting programs on the grounds of equal protection between 1987 and 2007 at all levels of federal courts. In the next step, I obtain detailed histories about each of the 10 cases, as some of them move between lower and appeals courts across years. Westlaw provides graphs detailing the complete case histories, namely in which year, and at which court, a case receives original review and subsequent rulings, and how lower court decisions are appealed to higher courts. *Rothe Development Corporation v. the Department of Defense*, for example, was continually appealed to federal circuit court, remanded back to federal district court, and reviewed again by federal circuit court between 2001 and 2007, leading to multiple distinct judicial decisions arising from the same case. This last step leads to a total count of 16 judicial decisions.

Based on these 16 decisions, I measure general court activity frequency by the annual cumulative count of judicial decisions from courts at both federal and state levels that pertain to federal agencies. First, I count the number of court decisions issued over time. Suppose no court decisions were made in 1989 and 1990 regarding a government agency's affirmative action program in public contracting, the number 0 is entered for years 1989 and 1990 for each of the 24 executive agencies in this dataset. If there were a total of two legal rulings in 1991, then the number 2 is entered for this year for all agencies. I use the annual cumulative count of judicial decisions to capture the lasting

impact and cumulative frequency of court activities on agency behavior. If there were two legal rulings in 1991 from all levels of courts, and another one issued in 1995, the value of this independent variable will be 2 for all federal agencies for years 1991 through 1994, and will be increased to 3 for year 1995.

The discrete count of judicial decisions has often been used as a key indicator for the level of court pressure in empirical analyses of the judicial branch (Coglianese 1996; Howard and Segal 2004; Howard et al. 2006). However, using this measure does not capture the intensity of court attention. If there was at most one court decision reached in the country per year, a dichotomous variable would have sufficed in recording whether or not there was any general activity in the judicial branch each year. However, it is possible that there may be more than one lawsuit being decided at different levels of courts around the same time, which means the simple use of a dummy variable would fall short of measuring the intensity of judicial review upon preferential contracting programs in each year. Consequently, I use the cumulative count.

Doing so recognizes that the issuance of a new court order adds to the frequency of judicial activities, and signals to agency decision-makers a heightened level of court pressure, rather than cancelling out the impact of previous judicial decisions. Meanwhile, I measure lasting judicial impact because court decisions, once given, will remain in effect in the years that follow. Studies of judicial impact often cover long time spans, primarily because court decisions, especially those that touch on sophisticated and controversial policy areas, may require significantly more time to be translated into feasible action plans by the legislative body and the executive branch.

Rosenberg (2008), for example, reveals that bureaucratic responses to landmark Supreme Court rulings regarding issues such as reapportionment of state legislative districts, the right to obtain abortion services, racial desegregation in public facilities, and the legality of same-sex marriage, continue to take place even years following the judicial decisions. In public contracting cases, those that have ruled against a government agency's preferential contracting plan typically order that the agency further conduct disparity studies to narrowly tailor their existing plan. The 2010 U. S. Transportation Research Board report, for example, has shown[32] that disparity studies can be costly and time-consuming, and that it can take executive agencies years to fully react to a court order and finish up the studies. It is therefore reasonable to account for the lasting impact of court decisions on government affirmative action programs over the years.

4.422 Pro-Affirmative Action Court Decisions

The second independent variable in this empirical chapter measures the annual cumulative amount of pro-affirmative action court rulings. There are different types of judicial decisions. Generally speaking, a lawsuit can simply be dismissed due to lack of evidence, or when the plaintiff is deemed as lacking the legal standing to initiate the challenge. In other cases, when a court enters summary judgments for the defendant, it means the plaintiff's legal argument is overruled. By contrast, when the plaintiff's argument is affirmed by court, the defendant party has lost the suit. Alternatively, a

[32] 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, Washington, DC, 2010

higher court can hold that a lower court decision cannot be issued unless additional evidence is presented. In such circumstances, a lawsuit can be decided as remand, as the case gets sent back to the lower court for further review.

Coding for pro-affirmative action rulings is based on a content analysis of the summary judgments in each lawsuit, which can be found in the "holdings" section of each legal brief in Westlaw. Judicial opinions that explicitly uphold a preferential contracting program typically cite evidence of disparity and discrimination sufficient to withstand strict scrutiny, and will be assigned an index score of positive 1. Judicial decisions that order a legal challenge dismissed, usually based on lack of evidence or lack of standing for the plaintiff, are categorized as pro-affirmative action decisions as well, and are assigned the index score of positive 1. Decisions that invalidate a preferential program will be assigned an index score of -1. Meanwhile, non-substantial decisions, such as remand to a lower court for further review, are assigned the value of 0.

This pro-affirmative action variable is the cumulative sum of the total values of all pro- and anti-affirmative action decisions related to government agencies' preferential contracting programs in each year up to that point. For example, if two separate judicial decisions were reached in 1989 that both invalidated the affirmative action plans in question, then the number -2 is entered for all 24 executive agencies in this dataset for the year 1989. If the next decision issued was in 1991, and had upheld an affirmative action plan, then the value of this variable will remain -2 for year 1990, and be increased to -1 (the sum of -2 and 1) for year 1991. Measuring the total amount of pro- or anti-affirmative action rulings in this way will allow us to gauge the extent to which the legal

environment of government agencies is favorable to affirmative action in contracting. Two different models are run, one of which uses a one year lag of this variable and the other a two year lag.

4.423 The *Adarand* Ruling

Last but not least, I include a dummy variable for the landmark Supreme Court ruling in *Adarand* (1995), coded as 1 for years from 1995 through 2007 for all 24 agencies, and 0 for all preceding years. Similar to the other court variables, I lag this variable by one and two years in recognition of the non-immediate nature of judicial impact on bureaucratic decision-making. As mentioned in the introductory chapter, the earlier landmark Supreme Court ruling *Croson* (1989) had established the legal precedent that judicial review of local government-imposed racial classifications in public procurement and contracting should rely on the strict scrutiny test. The *Adarand* ruling in 1995 essentially federalizes the *Croson* decision, and extends the same stringent criteria to federal government agencies. Rational agency officials, who would prefer to avoid litigation and judicial review at all costs, should have the incentives to limit the size of their race-based contract awards in years that followed the *Adarand* ruling. A statistically significant negative correlation would suggest salient and lasting impact of the highest court in federal agency race-based contract decision-making.

4.424 Congress and the Presidency

Next, I include some common indicators to account for the influence of the legislative and executive branches on agency decision-making. Attitudes towards social policies in the United States have gradually split along partisan lines, with Republicans likely to place greater value on efficiency and race-neutral standards, and Democrats more supportive of the concept of equity and social programs of a redistributive nature (Leiter and Leiter 2002; Skrentny 2002). Affirmative action has long been a controversial policy issue that reflects different ideological positions and distinct views on the trade-off between economic efficiency and social equity (Rosenfeld 1991; Bergmann 1996; Seldon et al. 1998). To account for the possibility of agency responsiveness to the policy preferences of political principals (Whitford 2005), I control for the political party affiliation of the Presidency and the ideological tendencies of the legislative branch.

The Presidency variable is coded as 0 for a Democratic administration, 1 for a Republican administration. To measure the ideological preferences of the political principals in Congress, I first collect complete committee members lists for the U. S. House Committee on Small Business and the U. S. Senate Committee on Small Business between 1987 and 2007 (Nelson and Stewart III 2010), both of which are standing committees in Congress that provide oversight on federal agencies' contract-awarding process to small business enterprises, including minority-owned firms. Then, I obtain each individual committee member's DW-NOMINATE ideological score developed and updated by Poole and Rosenthal (2001). Higher scores indicate more conservative committee members. Last, I compute the median ideological scores of both committees

for each year, a common way of measuring the policy preferences and positions of members of Congress at the aggregate level (Whitford 2002; Pacelle et al. 2007). The value of this variable will be the average of the median ideological scores for both committees. The lower the value, the more liberal the overseeing congressional committees tend to be, and the more likely the political principals are to push for an expansion of affirmative action efforts at federal agencies to assist small minority contractors.

4.43 Economic Conditions

Socio-economic factors are commonly incorporated in statistical analysis of agency implementation of public policies as well (Hill and Hupe 2002). Bureaucratic decision-making may be open to economic influences, as the health of the business market, the strength of the labor force, and the distribution of wealth in the constituency reflect the macro task environment in which agency personnel interpret statutes, executive laws, and implement public programs (Dye 1966). Those who carry out social programs of a redistributive nature are particularly prone to be cognizant of economic factors, as agencies assess the degree of program acceptability and potential impact among the public (Plotnick and Winters 1985; Schneider and Jacoby 1996).

In this chapter, I include national unemployment rates, collected annually by the U.S. Bureau of Labor Statistics. I suggest this measure will have an impact on the dependent variable. Studies show mixed relationships between the economic market and social program spending (Kam and Nam 2008). Some argue that high employment rates,

or low unemployment rates, indicate greater competition between firms in the labor market, and can discourage affirmative action efforts which reallocate job opportunities on the basis of race; others suggest that in a healthier economy, race-based efforts tend to be more aggressive in expanding access to employment opportunities to disadvantaged groups.

4.5 Models and Statistical Methods

I conduct pooled linear regression analysis to examine the impact of courts on aggregate federal agency spending in preferential contracting. I create dummy variables for each agency, and cluster the agencies' standard errors by year, to control for the possible influence of one agency's minority contract commitments upon another's in a same year. Granted, a government agency's response to judicial review, interpretation of court decisions, and its translation into changes in decision-making, may take time to formulate. It was not until approximately one year after the *Adarand* ruling was handed down, that the U.S. Department of Justice proposed further directions to federal agencies on possible ways of reforming preferential contracting plans to comply with the legal standards set by the Supreme Court[33]. Furthermore, , it took several months for the attorney general's office at the Department of Defense to issue guidance on narrowly tailoring affirmative action programs[34]. As the unit of analysis in this chapter is an agency

[33] U.S. Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement. Federal Register Volume 61, Issue 101, May 23, 1996.
[34] The Associate Attorney General, Pentagon. Memorandum to General Counsels regarding Post-*Adarand* Guidance on Affirmative Action in Federal Employment. Washington, DC 10330. February 29, 1996. http://eeoa.army.pentagon.mil/web/doc_library/ACF8B0B.TXT

in a given year, I lag the main court variables and the control variables by one and two years, to acknowledge the non-immediate nature of institutional reactions to court actions[35].

Model 1: Percent Contract Dollars for Minority Firms (each fiscal year) = *f* {*Court Activity Intensity (lagged 1 calendar year), Court Rulings (lagged 1 calendar year), Adarand Ruling (lagged 1 calendar year), Other Political Institutions and Economic Conditions (lagged 1 calendar year)*}

Model 2: Percent Contract Dollars for Minority Firms (each fiscal year) = *f* {*Court Activity Intensity (lagged 2 calendar years), Court Rulings (lagged 2 calendar years), Adarand Ruling (lagged 2 calendar years), Other Political Institutions and Economic Conditions (lagged 2 calendar years)*}

4.6 Findings

In summary, the major explanatory variables measure the intensity of court activities in general, and the amount of pro-affirmative action decisions in particular from federal courts. I also take into account the party affiliation of the Presidency, ideological tendencies of the congressional oversight committees, and the national unemployment rates (see Table 4.61 for summary statistics of these variables). Overall, the findings do not suggest any substantial and consistent judicial impact on agency decision-making in the case of public procurement and contracting. Neither the court activity intensity

[35] Data for the dependent variable--federal agencies' contract amounts--are collected by fiscal years, whereas data for the independent and control variables--court decisions, unemployment rates, etc.--are collected by calendar years. If the dependent variable measures contracting activities in fiscal year 2006, which covers the period of October 2005 through September 2006, then model one uses independent and control variables with data from calendar 2005, model two with data from calendar year 2004. Creating lags this way ensures that court and political economy data in a given calendar year (January 2005 to December 2005, for example) don't end up predicting agency contracting decisions in the same fiscal year (October 2004 to September 2005).

variable nor the pro-affirmative action rulings variable achieves statistical significance in the one-year lag and two-year lag models (see Tables 4.62 and 4.63).

Among the other political and economic variables, the presidency variable appears to be a much stronger predictor of federal agency contracting decisions. This variable is positively significant in both models, consistent with one's expectation. The results suggest that federal agencies tend to award more contracts to minority firms during a Democratic presidency. The Congress ideology and national unemployment rate variables are not statistically significant.

(Tables 4.62 and 4.63 about here)

4.7 Conclusion and Implications

This empirical study examines bureaucratic decision-making in response to external environment. Specifically, this chapter investigates whether, and the degree to which, federal agency annual contract award amounts to minority firms fluctuate with changing legal requirements and political leadership in a consistent and systematic way. My primary hypothesis is that federal executive agencies' affirmative action dollar commitments would decrease in response to the issuance of the landmark *Adarand* (1995) decision by the Supreme Court, as well as other federal-level judicial decisions that invalidated a federal agency's preferential procurement and contracting plan. This is under the assumption that litigations and the protracted judicial review process are costly and time-consuming, and risk-averse agency decision-makers tend to interpret these judicial activities as rational basis for lowering spending in affirmative action programs.

Overall, I did not find, however, convincing evidence of salient federal agency responsiveness to courts. Neither the intensity of judicial review in general, nor the amount of pro-/anti-affirmative action rulings in particular, appears to have any significant and substantive impact on annual federal agency's affirmative action contract awards. Nonetheless, the empirical results do suggest a high level of bureaucratic responsiveness to the changing political principals in the presidency. During a Republican presidential administration, federal agencies' contract award amounts tend to be lower than during Democratic ones.

These findings have important implications for the study of judicial impact. The results suggest a lack of substantial impact of the judicial branch on the bureaucracy, either one or two years after court activities occur. Contrary to one's expectation, the findings are consistent with the argument that federal agencies do not change their behavior in response to judicial review of a federal agency's affirmative action program in public contracting. No statistically significant relationship exists between court decisions that ruled against an agency on the grounds of non-narrowly-tailored affirmative action plans and race-based affirmative action program spending. This provides additional supporting evidence for the constrained court view (see literature review in chapter 4) that the non-self-executing nature of the judicial branch makes it the "least dangerous branch" (Alexander Hamilton's Federalist Papers #78). The strict scrutiny threshold installed by the Supreme Court had established the new legal framework for federal affirmative action programs, and had provided the constitutional basis for legal challenges against federal race-based contracting programs. Nevertheless,

it is left to the discretion of agency decision-makers in the interpretation of new judicial policies, the assessment of the legal permissibility of their pre-existing program, and the scope of programmatic reform to comply with the new legal requirements based on cost-benefit considerations.

In addition, these findings also have implications for the study of bureaucratic discretion. Despite the lack of judicial impact, the results do suggest a significantly higher level of agency responsiveness to the changing political principals in the executive branch, consistent with the principal-agent theoretical expectations. In the face of judicial mandates, federal agencies are likely to have more incentives to adjust programmatic decisions in alignment with the policy preferences and priorities of their political principals.

While this chapter provides an opportunity to test the impact of macro-political and economic climate on federal agency behavior, research at the state level will shed more light on the interaction between courts and the bureaucracy. In the next two chapters, I conduct a more in-depth study of the U.S. DOT's affirmative action program in public contracting, and undertake a closer examination of variation in affirmative action decision-making across states as a function of different legal and socio-political environments.

Table 4.61: Descriptive Statistics

Variable	Mean	Std. Deviation	Range
Percent Contract Dollars For Minority Firms	37.85	16.97	[0, 100]
Court Activity Intensity (1-year lag)	3.89	3.44	[0, 12]
Court Activity Intensity (2-year lag)	3.26	2.96	[0, 12]
Court Rulings (1-year lag)	1.26	0.79	[0, 3]
Court Rulings (2-year lag)	1.16	0.81	[0,3]
Unemployment Rates (1-year lag)	5.47	0.90	[4, 7.5]
Unemployment Rates (2-year lag)	5.56	0.89	[4, 7.5]
Presidency (1-year lag)	0.42	0.49	[0, 1]
Presidency (2-year lag)	0.42	0.49	[0, 1]
Congress Ideology (1-year lag)	0.06	0.14	[-0.13, 0.29]
Congress Ideology (2-year lag)	0.04	0.14	[-0.13, 0.29]

Table 4.62: Judicial Impact on Percent Contract Dollars for Minority Firms (Federal, 1-Year Lag)

Variable	Coefficient	Robust Standard Error	T-Score
Judicial Branch			
Court Activity Intensity	0.30	0.28	1.09
Court Rulings	-1.71	1.26	-1.36
Adarand	-0.34	1.93	-0.17
Other Environmental Characteristics			
Unemployment Rates	1.64	1.47	1.12
Presidency	-6.09	1.44	-4.23***
Congress Ideology	-11.53	11.25	-1.02
Constant	25.08	9.77	2.57**
N	436		
R-Square	0.47		

*p<0.1, **p<0.05, ***p<0.01

Table 4.63: Judicial Impact on Percent Contract Dollars for Minority Firms (Federal, 2-Year Lag)

Variable	Coefficient	Robust Standard Error	T-Score
Judicial Branch			
Court Activity Intensity	-0.20	0.48	-0.42
Court Rulings	-0.15	1.68	-0.09
Adarand	-1.77	2.52	-0.7
Other Environmental Characteristics			
Unemployment Rates	0.64	1.71	0.37
Presidency	-4.32	1.70	-2.55**
Congress Ideology	-4.43	12.82	-0.35
Constant	31.23	9.40	3.32***
N	436		
R-Square	0.46		

*p<0.1, **p<0.05, ***p<0.01

Chapter 5: Disadvantaged Business Enterprise Program Overview

One of the most comprehensive affirmative action programs in public procurement and contracting is the Disadvantaged Business Enterprise (DBE) program operated by the U. S. Department of Transportation. It is essentially an affirmative action program which requires the setting of an annual percentage goal at state transportation agencies for allocating a certain portion of their procurement and contract dollars specifically to disadvantaged businesses[36]. Firms owned by traditional minority groups, including Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, are presumed to have suffered historical disadvantages in business formation, development, and participation in public works, and are eligible for enrollment in a state DOT's DBE program.[37] Firms owned by members of these groups are, therefore, eligible to receive preferential treatment in the contract-bidding process.

The program applies to all state and local transportation agency recipients of federal DOT funding. The three major modal administrations--Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA)--co-administer DBE programs across the fifty states.

[36] For example, an 8% DBE goal set by the Missouri DOT in 2010, means that the state agency plans on allocating 8% of this year's public procurement and contracting dollars to disadvantaged businesses.
[37] Code of Federal Regulations Title 49 Part 26—"Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Program", Subpart D--Certification Standards

The DBE program was first authorized by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), which required a minimum of 10% of DOT contract awards be set aside exclusively for socially and economically disadvantaged firms. In 1991, the program received reauthorization by the Intermodal Surface Transportation Efficiency Act (Public Law 102-240) (Eddy 1998). The most recent reauthorization came through the Moving Ahead for Progress in the 21st Century Act (Public Law 112-141).

5.1 State DBE Goal-Setting

General guidance and procedures for the adoption and implementation of a state DBE program are provided in the 49 Code of Federal Regulations (CFR) Part 26--Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs. Subpart C "Goals, Good Faith Efforts, and Counting" (part 26.41) of this federal regulation introduces a 10% aspirational DBE goal at the national level, namely that no less than 10% of federal DOT contract dollars are expected to be expended on doing business with DBE firms. This aspirational goal serves as a general reference to individual states' DBE goal-setting. State agencies are not necessarily obligated to set this exact goal for DBE participation.

What 49 CFR Part 26 does legally mandate is that racial contracting quotas and set-asides be discarded in state affirmative action program planning. States are required to follow two crucial steps for developing a truly reasonable and feasible DBE program goal. In step one, state transportation officials are encouraged to gauge the actual relative

availability of DBE firms that are ready, willing, and fully equipped with the capability of performing the types of government contracts that exist. This availability number should be acquired by dividing the number of ready, willing and able DBE firms by the total number of all ready, willing, able firms (both DBE firms and non-DBE firms). For example, if there are 44 DBE firms in heavy construction, 14 DBE firms in trucking (a total of 58 DBE firms), and there are altogether 300 firms in heavy construction, 150 firms in trucking (a total of 450), then step one should be calculated as 58 divided by 450, which is 12.8%[38]. This percentage number will be the base goal as a state sets its DBE goal. States are encouraged to obtain these numbers from reliable data sources such as DBE directories and census data. The U.S. DOT does caution that while census gives access to overall numbers of DBE firms, it does not necessarily distinguish those that are truly ready, willing and able to perform DOT-assisted contracts. Therefore, states should look to directories, bidders list, vendor databases to better estimate the actual relative availability of DBEs on the market. Moreover, the market where states draw DBE availability data does not have to coincide with the geographic area. The market area shall be understood as where a state's major contracting dollars are expended. Last but not least, the U.S. DOT forbids state agencies from using past DBE participation percentage numbers as the relative availability figure. If a state had given 20% of contract awards to DBE firms last year, the state should still follow the aforementioned

[38] States are suggested to use weighting to make the base figure more accurate. For example, if 80% of a state's contracting dollars are typically on spent on trucking, and the remaining 20% on heavy construction, then the calculation of the relative availability figure should be weighted by the same percentages.

calculation procedure to measure DBE availability for the next year, even if the base goal ends up much lower than previous participation rates.

In step two, states are expected to take into account a variety of factors, and make adjustments to the base goal so that it is as accurate as possible. The U.S. DOT has suggested two possible adjustment methods. One is averaging the base figure with the median of past DBE participation levels, namely the percentage of contracting awards given to DBE firms in previous years. For example, if a state had achieved DBE participation rates of 10%, 30% and 40% in the last three years, the state should average the baseline DBE goal for the current year with the median 30%. In case the median rate is highly similar to the newly proposed goal, there may be less necessity to adjust the goal at large. Nevertheless, agencies should always consider making an adjustment based on historical statistics regardless of whether or not such an adjustment would decrease or increase the baseline goal.

The other way of adjustment is essentially evidence-based. States are encouraged to conduct disparity studies and uncover evidence of past discrimination, so as to ensure the final DBE goal is both sufficiently remedial and not overly inclusive. Disparity study is a loosely defined term that generally encompasses any type of investigative efforts for identifying evidence of discrimination in contracting. States enjoy a great amount of discretion in determining the specific form of disparity studies. Agencies with the in-house expertise may collect DBE history data and perform statistical regression analyses to measure levels of racial disparity in public contracting in the local market area. Those that lack the analytical capacity are free to hire outside consultants to carry out the same

tasks. Alternatively, agency officials may choose to interview minority entrepreneurs and local labor organizations to collect anecdotal evidence of past or current discrimination. The federal DOT does not prescribe uniform guidelines for conducting statistics- or anecdotes-based disparity study, but does offer suggestions on organizations that state DOTs can consult with that are more likely to have the resources, information and/or expertise. Transportation agencies may seek help from "federal, state or local offices responsible for enforcing civil rights laws; state or local offices responsible for minority or women's affairs; state or local offices dealing with business affairs, commerce or small businesses; state or local offices dealing with the oversight of banks and other credit institutions (e.g. state treasurer's office); state or local labor offices, local labor organizations; institutions of higher education within the state; state's Office of the Attorney General (for information about lawsuits related to contracting or obtaining credit or bonding)"[39]. Nevertheless, there is no specific rule for disparity studies under the 49 CFR Part 26. States are not legally obligated to conduct this type of research in the goal-setting process. Should states decide to adjust the baseline goal in response to newly uncovered evidence of past discrimination, the federal DOT requests the submission of descriptions detailing a "clear and rational relationship between the evidence and the adjustment".[40]

In addition to an overall DBE goal, state agencies are also required to split the goal into race-conscious and race-neutral portions (see Figure 5.1), and encouraged to

[39] http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise
[40] Ibid.

maximize the race-neutral portion of the goals and award as many contracts to small disadvantaged businesses regardless of the racial/ethnic characteristics of the business owners. This policy change is in compliance with the color-blind jurisprudence of *Croson* (1989) and *Adarand* (1995), to ensure that government-sponsored remedial contracting plans are narrowly-tailored enough to survive the strict scrutiny judicial review.

(Figure 5.1 about here)

Race-neutral methods include breaking up large projects into smaller parts to increase participation of both racial minority and nonminority contractors, and supportive services such as mentor-protégé programs and technical assistance to DBE firms. In general, awarding contracts is not necessarily the only way of creating a level playing field for DBEs. States can foster the growth of DBEs through providing bonding and credit, and other race-neutral means as well. While federal rule 49 CFR Part 26 offers general guidelines for calculating the DBE goal split, it does not prescribe uniform procedures to follow. State agencies are, therefore, delegated a great amount of discretion in deciding the size and scope of the race-conscious portion.

State agencies are encouraged to look into their own DBE program history and devise reasonable ways of calculating the split. For example, if in the previous year the Alabama DOT had proposed a 10% DBE contracting goal, and ended up achieving 18% DBE participation, then the additional 8% may be projected as the race-neutral portion of next year's goal. Primarily, the amount of the DBE goal that a state has exceeded in the past means this difference could have been achieved through entirely race-neutral means.

5.2 State DBE Contract Dollars

Actual contracting dollars awarded to meet overall, race-conscious and race-neutral portions of annual DBE goals are also submitted by states to the federal DOT at the end of each fiscal year (see Figure 5.2). Federal rule specifies that state transportation agencies will not be penalized for failing to meet their proposed DBE goals. However, penalty and sanctions will ensue, if the state does not have an approved DBE program or DBE goal, or has failed to administer its DBE program in good faith.

(Figure 5.2 about here)

As the U.S. DOT reviews state DBE plans, DOT officers will look for documents demonstrating that a state has made adequate good faith efforts to implement the DBE program, and has taken all necessary steps to achieve the DBE goal, regardless of whether or not the proposed goal has been attained eventually. 49 CFR Part 26 approves the following list of actions accepted as good faith efforts[41]:

- Soliciting the interest of all certified DBE firms that are capable of performing the work of the contract, through all reasonable and available means (attending pre-bid meetings, advertising, sending written notices, etc.);
- Selecting portions of the work to be performed by DBEs in order to increase the chances of achieving the proposed DBE goal. Where appropriate,

[41] 49 CFR Part 26 Appendix A "Guidance Concerning Good Faith Efforts" Section IV

breaking out contract work into economically feasible portions to expand DBE participation;

- Providing interested DBEs with adequate information about contracting plans, requirements, specifications and assisting firms in responding to the solicitation;
- Not rejecting DBEs without providing specific explanations for their lack of qualifications or capabilities. Rejection cannot be based upon the contractor's standing within an industry, his/her political affiliation, or his/her union employee status;
- Providing assistance to interested DBEs in obtaining bonding, credit or insurance;
- Providing assistance to interested DBEs in acquiring equipment or supplies;
- Taking advantage of available resources at federal, state or local minority and women business assistance offices and community organizations in recruitment and placement of DBEs.

As mentioned above, penalties apply when states fail to have an approved DBE program, DBE goal, or fail to demonstrate good faith efforts. Consequences of agency noncompliance include suspension or termination of federal DOT funding, or refusal to approve state DOT projects and grants. Nonetheless, a noncompliant agency shall be exempt from sanctions if a federal court has ordered the agency's DBE plan unconstitutional. Individuals can also file written complaints of agency noncompliance, within 180 days of the alleged violation, to the federal transportation agency's Office of

Civil Rights. The federal agency will initiate an investigation, perform paperwork and on-site compliance reviews, and assist in conciliation between the agency and individual complainant.

5.3 DBE Certification

Companies need to be officially certified as DBE firms in order to enroll and participate in a preferential DBE contracting program. To qualify as DBE, a small business has to be "at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals", and one "whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it"[42]. Individuals, U.S. citizens or permanent residents, who are presumed to have a socially and economically disadvantaged status include black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, subcontinent Asian Americans, and women.

To determine under what circumstances an individual may claim disadvantaged status, state DBE officers typically refer to 49 CFR Part 26 for guidance. Federal rule specifies that social disadvantage applies to those "who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities". In individual cases, socially disadvantaged status may also be established in terms of one's gender, abilities,

[42] 49 CFR Part 26 Subpart A "General"

long-term residence in isolated social environment, etc. Socially disadvantaged persons will also likely encounter additional barriers when entering into or advancing in the business world, due to any or all the following circumstances[43]:

- "denial of equal access to institutions of higher educational and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education";
- "unequal treatment in hiring, promotions and other aspects of professional advancement, retaliatory or discriminatory behavior by an employer or labor union";
- "unequal access to credit or capital, acquisition of credit or capital, unequal treatment in opportunities for government contracts, exclusions from business or professional organizations"

Economically disadvantaged persons are defined as "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities"[44]. DBE officials will need to examine a small business owner's financial condition, such as personal net worth, income history, market value of personal assets, to determine DBE eligibility. Overall, states are encouraged to make case-by-case judgment on individual applications. Those who meet the criteria will be certified as a DBE firm, and be able to enjoy the benefits of DBE

[43] 49 CFR Part 26 Appendix E "Individual Determinations of Social and Economic Disadvantage"
[44] Ibid.

programs. In the event that an owner is denied certification, the person has the right to appeal to the U.S. DOT for review of the lower DOT's decision.

5.4 DBE Supportive Services

One of the key principles in 49 CFR Part 26, partly as a response to the development of strict scrutiny judicial standards, is that instead of relying on rigid racial quotas, public procurement and contracting officials in state DOTs should devise innovative ways of increasing DBE participation, and maximize the achievement of DBE goals through flexible race-neutral means. Agencies can meet this requirement by splitting large contracts into smaller, more accessible projects for small businesses in general, offering more assistance to small firms in obtaining bonding and other financing options, providing technical training and other educational opportunities to further develop the capacity of DBE firms, keeping lines of communication open to ensure prime contractors have access to full lists of able and ready DBE bidders, and installing DBE supportive services to facilitate DBEs' long-term business development and management. States must consider taking any or all of these steps to ensure their remedial DBE programs do not result in overconcentration of DBEs in certain lines of work, while placing unduly burden on nonminority businesses.

A major component of race-neutral measures is auxiliary services that are installed by federal and state DOTs to support growth of DBE firms and successful graduation from the DBE program once their self-sufficiency is achieved and has exceeded the overall size and annual gross receipts cap. This service is oftentimes referred to as DBE

Business Development Program (BDP), which typically consists of two phases—a development stage and a transitional stage. While the first phase is primarily designed to help DBEs identify deficiencies, strengthen managerial skills and technical capacity, the second phase is implemented to help these firms overcome their social and economic disadvantage, develop independence, self-sufficiency and competitiveness outside of the DBE program. Duration of the BDP program is determined by individual states. But participating DBEs are required, no later than six months after enrolling in BDP, to submit comprehensive business plans for state DOT officials' review. The business plans shall include information such as an assessment of the DBE firm's strengths and weaknesses, market potential, business prospects, short-term and long-term objectives and goals, as well as the estimated amount of contract awards needed to achieve the proposed goals. When a DOT agency make decisions regarding when a DBE firm is ready to graduate, the following factors should be taken into account:

- "Profitability;
- Sales, including improved ratio of non-traditional contracts to traditional-type contracts;
- Net worth, financial ratios, working capital, capitalization, access to credit and capital;
- Ability to obtain bonding;
- A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category;

- Good management capacity and capability"[45]

The BDP program is one of the many efforts transportation agencies currently make, in response to court decisions in *Croson* (1989) and *Adarand* (1995), to achieve DBE goals through race-neutral means, and narrowly-tailor existing DBE programs. The following table summarizes examples of how DOT agency rules and regulations now reflect the narrow-tailoring requirements and the burden upon DOTs to justify the constitutionality of their DBE programs[46].

With the background knowledge on the structure and implementation of the U.S. DOT's preferential DBE program, we now have a better idea of the critical decision-making process that state transportation agency officials typically undergo in creating a more equitable playing field for minority contractors. In the next chapter, I conduct empirical analysis to measure the impact of courts on state DOT decision-making in regards to their DBE programs.

[45] 49 CFR Part 26 Appendix C "DBE Business Development Program Guidelines" section K
[46] http://www.dot.gov/osdbu/disadvantaged-business-enterprise/the-new-dot-dbe-rule-is-narrowly-tailored-meeting-the-adarand-test

Figure 5.1: DBE Goal and Breakdown

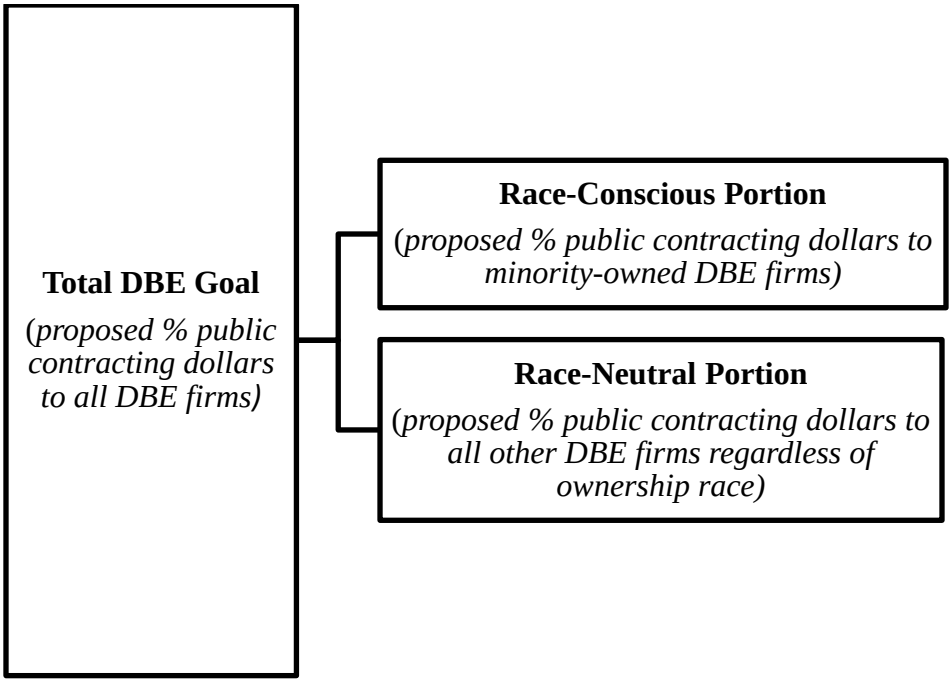
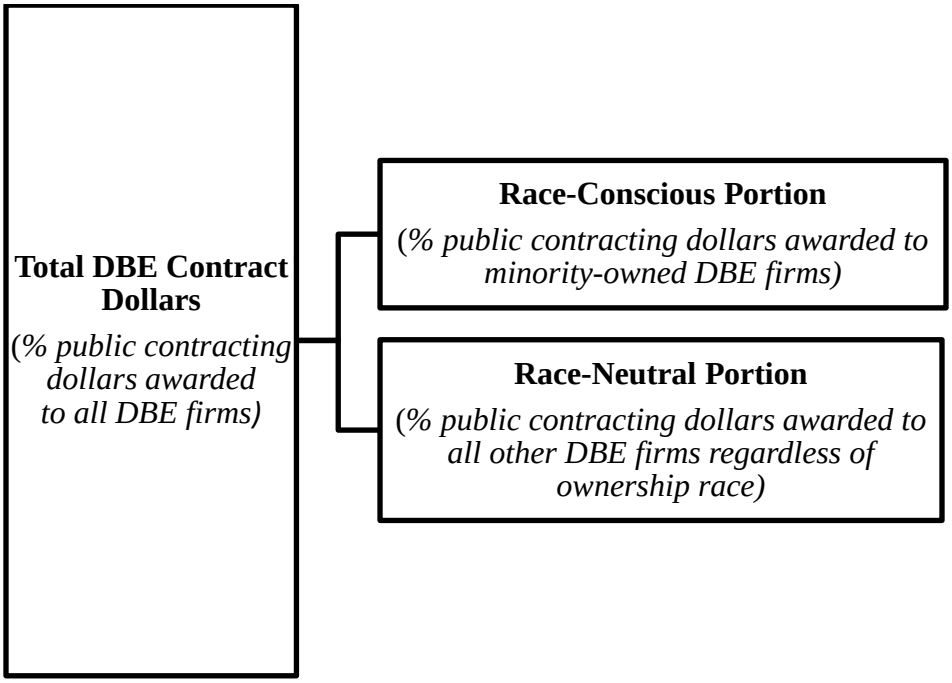


Figure 5.2: DBE Contract Dollars and Breakdown



Chapter 6: State Agency Decision-Making in Race-Based Procurement and Contracting

The second empirical chapter focuses exclusively on the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) program in each state. The primary purpose of the DBE program[47] is to make U.S. DOT-assisted highway, airport and transit projects available to minority contractors. Specific objectives include but are not limited to[48]:

- To reduce discriminatory barriers to the participation of disadvantaged firms in federally-assisted contracts;
- To create a level playing field on which minority and nonminority firms can compete fairly for DOT-assisted contracts;
- To ensure nondiscrimination and fairness in the award and administration of transportation-related projects;

[47] A DBE program installed at state-level typically comprises of the following components: policy statement; general requirements; administrative requirements; goals, good faith efforts, and counting; certification standards; certification procedures; compliance and enforcement. In addition, state transportation agencies need to keep supplementary records such as organizational chart, DBE directory, monitoring and enforcement mechanisms, overall goal calculation steps, breakout of estimated race-conscious and race-neutral participation, evidence for demonstration of good faith efforts, certification application forms, procedures for removal of DBE firm eligibility, etc., for future review by the federal DOT.

[48] 49 CFR Part 26 Subpart A "General"

- To facilitate the development of disadvantaged businesses so they can become more competitive bidders after successful graduation from the DBE program

The main objective of this chapter, is to assess whether, and the degree to which, constitutional reviews that ultimately invalidate an affirmative action program in government contracting have a deterrent effect upon a state DOT's DBE program goal-setting and actual contract awards. This chapter draws evidence from an original dataset obtained via Freedom of Information Act requests, which include annual DBE goals and contract award amounts from 2003 to 2007 at transportation agencies in the 50 states plus Washington DC. Overall, I find some supporting evidence of bureaucratic responsiveness to court activities in DBE goal-setting. However, the contract awards model suggests a lack of significant impact of the judicial branch in the actual contract award amounts at state agencies.

6.1 Hypotheses

My primary hypotheses center on the impact of state- and circuit-based courts on state transportation agencies' contracting decisions. Similar to the federal empirical chapter, judicial impact is measured in two separate ways, the cumulative frequency of judicial review on preferential contracting programs across years by state ('Court Activity Intensity' variable), and the cumulative amount of pro- and anti-affirmative action rulings by state across years ('Court Rulings' variable). There is great variation in

the size and scope of the affirmative action goals and race-based contract award amounts across state transportation agencies. To what extent can these variations be explained by the different legal environment and other political, economic characteristics among states?

What is unique about this empirical chapter is that, firstly, I examine both DBE goal setting and actual contract dollars. As discussed in the previous chapter, in compliance with federal rule 49 CFR Part 26, each state transportation agency sets annual contracting goals with minority firms (race-conscious portion of an annual DBE goal, and reports actual percentage of contract dollars awarded to minority firms (race-conscious portion of the annual DBE contract awards). Though there is no penalty for failing to achieve the proposed goals, state agencies need to demonstrate good faith efforts.

Existing scholarship on bureaucratic responsiveness mostly investigates external influences on actual agency outputs, enforcement decisions and implementation (Wood 1990; Ringquist 1995; Whitford 2005), rather than on the formulation of programmatic goals. Though often perceived as a symbolic and aspirational act, the setting of goals can still reflect an agency's level of commitment to a program or policy area (Thompson and McEwen 1958; Usher and Cornia 1981). California and Florida, for example, both have a relatively high percentage of minority-owned businesses in their states. Nevertheless, Florida had set their race-conscious DBE goal to be zero, whereas California had submitted a race-conscious goal of over 20%. Could this difference be at least partly a result of court influences in the respective states?

In addition, it is the proposed goals that will be subjected to strict scrutiny tests, as courts review the constitutionality of an affirmative action. Following a judicial review

and subsequent ruling, then, does a state DOT tend to adjust its affirmative action goal as well as its actual dollar commitments? Conceptually, this is an interesting question, because there are two dimensions to the examination of bureaucratic discretion in response to external stimulus. Therefore, in this chapter, I intend to study both goal-setting and achievement as two different types of bureaucratic activities, and their degrees of responsiveness to courts.

Secondly, what is also unique about this chapter is that both the goal setting and the contract awards models encompass judicial review frequency and rulings from all levels of state and federal courts. Previous literature mainly focuses on the impact of Supreme Court and federal circuit court decisions, which generate legal precedents that are applicable to all member states (Humphries and Songer 1999; Hume 2009a). According to open systems theory, bureaucratic agencies are susceptible to influences from the external environment. How responsive are state agencies to all levels of state and federal courts?

Overall, I argue that high intensity of judicial review of preferential government contracting programs in general, and the issuance of more state- and circuit-level rulings that invalidate these affirmative action programs, will lead to lower DBE goals and percent contract dollars for minority-owned firms at state transportation agencies. If a DOT is directly involved in a lawsuit, the lengthy, expensive, and resource-draining pre-trial discovery and litigation process could induce DBE program officers to limit the scope of current and future affirmative action efforts, in the hope of reducing the likelihood of being sued again. If the subject of judicial review is another public agency's

preferential contracting plan, DOT officials still have incentives to preemptively lower their own affirmative action goal and award amounts, to avoid direct lawsuits in the future.

6.2 Research Design

The empirical analysis is based on a panel dataset that compiles 50 state transportation agencies' annual affirmative action contracting goal and actual contract dollar awards between 2003 and 2007. The unit of analysis is state by year. The independent variables measure court activities, political institutions, and economic conditions among the states.

6.21 Measurement of Dependent Variables

The first dependent variable intends to measure a state transportation agency's affirmative action goal-setting in public contracting. It is the race-conscious portion of the Disadvantaged Business Enterprise (DBE) program goal, submitted each year by each state DOT. This will allow us to test whether, and how, a state adjusts affirmative action commitments in public procurement and contracting, in reaction to judicial review.

Data on state-level DBE goals have been obtained through a Freedom of Information Act (FOIA) request to the U.S. DOT. Upon request, the DOT has provided copies of the "Uniform Report of DBE Awards or Commitments and Payments Form",

reported to the Office of Civil Rights of the Federal Highway Administration[49] by each of the fifty state transportation agencies, between federal FY2003 and FY2007. These yearly reports contain both the annual DBE goals submitted by states, and the race-neutral and race-conscious split as well. Overall DBE goals submitted by states during this time range fall between 0 (Rhode Island) and 0.327 (or 32.7%) (District of Columbia). Figure 6.211 shows a general distribution of race-conscious goals across the states.

(Figure 6.211 about here)

The second dependent variable, the percentage of contract award dollars for minority-owned firms, is the percentage of total contract amount a state DOT awarded to minority-owned DBE firms in the total amount awarded to all contractors. This variable specifically measures the extent to which a state has made dollar commitments to implement their preferential affirmative action program. Figure 6.212 shows a general distribution of this dependent variable across the states.

(Figure 6.212 about here)

6.22 Measurement of Political Institutions

6.221 Court Activity Intensity

The major explanatory variables in this empirical chapter are judicial activities. Specifically, this chapter investigates whether, and the extent to which, judicial review of

[49] Federal Highway Administration (FHWA), where the bulk of federal transportation contracts are let, is one of the three operating agencies within the U.S. Department of Transportation, along with the Federal Transit Administration (FTA) and Federal Aviation Administration (FAA).

preferential federal and state government contracting programs affects state DOT decision-making regarding the size and scope of their own DBE program. Similar to the first empirical chapter, I examine both court activity intensity and court rulings, using two separate measurements of judicial activity.

The first court variable is court activity intensity, which is the annual cumulative count of state- and circuit-level judicial decisions concerning affirmative action programs in public contracting from 2003 to 2007 across all fifty states plus Washington DC. This measure is intended to capture the general legal climate in a state. A higher number can signal to rational state DOT officials a higher litigation risk associated with their own preferential DBE program.

Judicial data is again collected through keyword search in the Westlaw online legal database. Since FOIA data for the dependent variables--DBE goals and contract awards--are available from 2003 and 2007, I use the key phrase "affirmative action" to locate all cases between 2001 and 2007, due to the one-year and two-year lags on the judicial variables. Next, I drop all the cases concerning affirmative action in public university admissions and public employment. Judicial review and ruling regarding the narrow tailoring of a city or state agency's preferential contracting plan communicate more information on the legal requirements and permissible constitutional contours of DBE and similar programs, and therefore will have a more direct bearing on a state DOT's DBE goal-setting and achievement.

The second step yields a total of 18 cases that challenge race-based contracting programs on the grounds of equal protection between 2001 and 2007 among the fifty

states and Washington DC. In the third step, I obtain detailed histories about each of the 18 cases from Westlaw. *Northern Contracting Inc. v. State of Illinois DOT*, for example, was consecutively overruled in an Illinois-based federal district court in 2004 and 2005. Upon the plaintiff's appeal, the U.S. Court of Appeals for the Seventh Circuit reviewed the lower court's decision in 2007, and had reached the conclusion that the Illinois DOT's DBE program was sufficiently narrowly-tailored and should be upheld. This step leads to a total count of 28 judicial decisions.

Last but not least, I aggregate the 28 decisions by state and by year. Figure 6.221 presents a list of states that have undergone judicial review of affirmative action efforts in public contracting. Each of these judicial decisions is issued either from a state's internal court system (e.g. the Supreme Court of Missouri), from the state-based federal district court (e.g. U.S. District Court for the Eastern District of Missouri), or from the overseeing federal circuit court where the state-level judicial decision gets appealed (e.g. the Eighth Circuit Court of Appeals which oversees the state of Missouri).

(Figure 6.221 about here)

Based on these 20 decisions, I measure court activity intensity by the annual cumulative count of judicial decisions arising from the state level and the respective federal judicial circuit that oversees the individual state. Suppose no court decisions were made between 2001 and 2002 regarding an affirmative action program in government contracting in the state of Missouri and Missouri's federal circuit, the number 0 is entered for this state for years 2001 and 2002. There were a total of two legal rulings in 2003, one delivered from the Missouri Supreme Court, one from the Eighth Circuit Court where

Missouri is a member state. Consequently, the number 2 is entered for Missouri for year 2003. The value of this variable for this state will remain 2 for years 2004 to 2007, unless a new judicial decision was issued within those years, in which case it will be increased to 3.

Meanwhile, if the Eighth Circuit Court issued a decision in 2003, the value of this variable will increase by 1 for all member states for years 2003 through 2007. Federal circuit court decisions, different from state court judgments, create legal precedents that are citable and interpretable by all judges at equal or lower level legal institutions. *Western States Paving Co. v. Washington State DOT* (2005), for example, is one of the most frequently cited circuit court decisions in judicial reviews in subsequent years, of affirmative action plans similar to the DBE program. The invalidation of the Washington DOT's DBE plan based on the problematic disparity study has produced widespread repercussions across the ninth federal circuit, where Washington and eight other states are located. In response to the *Western* ruling, the U.S. DOT issued further directives to the ninth circuit states regarding the quality of disparity studies necessary for narrowly tailoring a DBE program[50].

6.222 Court Rulings

The next court variable measures the annual cumulative index score of pro-and anti-affirmative action court decisions at state- and circuit-level. Courts can decide on cases in various different ways. Among the 18 cases collected for this study, specifically,

[50] Ibid.

there are lawsuits that were dismissed because there was insufficient evidence for a judge to rule on motions (e.g. *Dynalantic Corp. v. DOD* 2007). In other cases, a plaintiff's attempt to challenge a state DOT's participation in the mandatory federal DBE program was overruled (e.g. *Sherbrooke Turf Inc. v. Minnesota DOT* 2003). In some decisions, courts upheld a city's race-based contracting plan that had survived the rigorous strict scrutiny judicial review (e.g. *Concrete Works of Colorado v. Denver* 2003). Conversely, courts could strike down an existing plan when the statistical evidence was deemed inaccurate and unreliable to justify the narrow focus of the plan (e.g. *Hershell Gill Consulting Engineers v. Miami* 2004). In other circumstances, a higher court could reverse and remand a previous ruling, re-establish the plaintiff's legal standing to bring suit, and order additional review of the plaintiff's claims (e.g. *Coral Construction v. San Francisco* 2004).

Similar to the first empirical chapter, coding for pro-affirmative action rulings relies on a content analysis of the judicial opinions in each case available through Westlaw. A pro-affirmative action ruling, and a decision to dismiss a legal challenge against affirmative action in public contracting, is assigned an index score of 1, an anti-affirmative action court order assigned the value of -1, and ambiguous decisions such as a remand as 0.

In coding for the court rulings variable, for example, if there is one pro-affirmative action ruling and one anti-affirmative action ruling concerning a Californian state or local preference contracting program, the value of the variable will equal the sum of the values of the two substantial decisions, which is 0. And if the pro-affirmative action ruling was

issued by the federal circuit court that oversees California, the value of this variable for all other members within this judicial circuit will increase by 1 as well.

Overall, this variable identifies how pro-affirmative action decisions, or lack thereof, influence DBE programmatic decisions. Scholars of judicial impact predominantly analyze case outcomes, as unfavorable rulings to a bureaucracy can signal significantly higher litigation risks to agency decision-makers, by redefining the legal contours of a policy program, and mandating programmatic changes to pre-existing agency plans (Johnson 1979; Canon and Johnson 1999). In this chapter, this measurement will enable us to examine whether the issuance of anti-affirmative action rulings deters race-conscious DBE goal-setting and achievement.

6.223 State Government

State-specific environmental factors are likely to condition the impact of judicial review on bureaucratic behavior. Affirmative action is one of the redistributive social policy areas that tend to manifest the different ways in which political leadership on the ideological spectrum set priorities between efficiency and equity. More liberal oriented administrations are found to be more likely to support affirmative action efforts (Wood 1990; Nicholson-Crotty and Nicholson-Crotty 2009). To take into account the possibility of state political influence on bureaucratic discretion, I include a state government ideology variable, which is an index score developed by Berry et al. (2003). Berry et al. derived this measure from interest group ratings of legislators based on their voting records, party affiliation of governors and the partisan makeup of each house of the state

legislatures. Higher scores are assigned to more liberal state governments. I expect this variable to be positively correlated with the dependent variable.

6.23 Economic Conditions and Public Opinion

Variation in state DBE goal-setting and award amounts may also partially reflect differences in economic conditions across the states. Studies have demonstrated that state bureaucracies tend to adjust decision-making to accommodate state and local economic circumstances (Wood 1992). One common index for economic well-being is unemployment rate (Kam and Nam 2007). As a control variable, I include state unemployment rates reported by the U.S. Bureau of Labor Statistics, and expect this variable to have a significant relationship with the dependent variable.

Meanwhile, public attitudes towards race-related policies can also affect a state's affirmative action policy environment and thus DBE program implementation, as it has been shown that agency decision-makers typically do not deviate far from the mainstream preferences of its constituents (Wright et al. 1987). Public opinion studies often suggest mixed feelings for race-conscious policies (Kinder and Sanders 1996). While the mass public is generally supportive of affirmative action programs to redress historical discrimination, attitudes towards affirmative action when framed as "preferential" on the basis of race tend to fall between uncertain and negative, and reflect the belief that such programs amount to reverse discrimination (Steeh and Krysan 1996; Alvarez and Brehm 1997; Schuman et al. 1998; Kemmelmeier 2003).

To measure public support for affirmative action, I include a dummy variable for anti-affirmative action ballot initiatives and referendums adopted at the state level. Ballot measures such as the well-known California Proposition 209 have successfully amended state constitutions, invalidating state government practices that grant preferential treatment on the basis of race (Hajnal et al. 2002; Kellough 2006). These state-level data are available through the ballot measures database on the National Conference of State Legislatures website[51]. Table 6.23 presents a list of states that have successfully or unsuccessfully introduced race-neutral initiatives in recent years. If a state passed an initiative of this nature in 1996 that has never been repealed since, I will enter 1 for this state for the entire time range of this sample (2003 to 2007). If a state passed an initiative in 2004, 0 will be entered for this state for 2003, 1 for 2004 through 2007, as a state constitutional amendment is expected to hold lasting effect on agency decision-making, as long as it has not been abolished. States with successful anti-affirmative action measures may be more likely to limit DBE-related efforts, as they implement this controversial and yet mandatory federal program.

(Table 6.23 about here)

6.3 Models and Statistical Methods

The empirical analysis is based on a panel dataset that is cross-sectional (fifty states plus the District of Columbia) and in time-series format (annually from 2003 to 2007). The unit of analysis is state in a given year. The primary approach I use to test the

[51] http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx

hypotheses is fixed-effects multivariate regression. Though a series of control variables are also included to account for any additional influences a state's political economy on affirmative action decision-making, there may be other unobserved differences that are essentially state-specific and are having potentially varying effects upon bureaucratic behavior at different points in time. Such unobserved factors could bias the direction and degree of statistical correlation between the dependent variable and the substantial predictors in the models. Therefore, I implement a fixed-effects method that treats potentially unobserved factors as fixed parameters, to control their possible impact on the estimation of the substantial variables (Frees 2004).

Similar to the federal chapter, the dependent variables in the state chapter are in fiscal year format, while data for the independent and control variables are collected by calendar years. The models test the impact of court and socio-political data lagged by one and two calendar years on the current fiscal year DBE goals, so that the independent variables in a current calendar year do not end up predicting agency decisions in same fiscal year.

Goal-Setting Models:

Model 1: Race-Conscious DBE Goal (each fiscal year) = *f* {*Court Activity Intensity (lagged 1 calendar year), Court Rulings (lagged 1 calendar year), Other Political Institutions and Socio-Economic Conditions (lagged 1 calendar year)}*

Model 2: Race-Conscious DBE Goal (each fiscal year) = *f* {*Court Activity Intensity (lagged 2 calendar years), Court Rulings (lagged 2 calendar years), Other Political Institutions and Socio-Economic Conditions (lagged 2 calendar years)}*

Contract Awards Models:

Model 3: Percent Contract Dollars for Minority Firms (each fiscal year) = *f* {*Court Activity Intensity (lagged 1 calendar year), Court Rulings (lagged 1 calendar year), Other Political Institutions and Socio-Economic Conditions (lagged 1 calendar year)}*

Model 4: Percent Contract Dollars for Minority Firms (each fiscal year) = *f* {*Court Activity Intensity (lagged 2 calendar years), Court Rulings (lagged 2 calendar years), Other Political Institutions and Socio-Economic Conditions (lagged 2 calendar years)}*

6.4 Findings

In summary, the major explanatory variables primarily measure the intensity of court activities in general, and the amount of pro-affirmative action decisions in particular from all levels of courts. I also take into account characteristics of other state political institutions and the socio-economic environments that are likely to moderate the impact of the judicial branch on a state DOT's decision-making on redistributive public policies (see table 6.4 for summary statistics of these variables). Overall, fixed-effects multivariate regressions results show some degree of agency responsiveness to courts in DBE goal-setting, but a lack of significant judicial impact on percent contract dollars for minority-owned firms.

(Table 6.4 about here)

6.41 Judicial Impact on Race-Conscious DBE Goal

First, I examine the impact of judicial review on the setting of race-conscious DBE goal. Table 6.41 reports results from the fixed effects regression model controlling for additional influences from state-based socio-economic circumstances[52]. In the one-year

[52] One of the common problems in the analysis of cross-sectional time-series panel data is the possibility of serial correlation (Beck and Katz 1995). In this case, the size and scope of a state's prior race-conscious

lag model, an increase in the quantity of pro-affirmative action rulings appears to have a negative impact on the dependent variable, contrary to expectation. In the two-year lag model, consistent with the hypothesis, the intensity of judicial review from all levels of state and federal courts has a significant (at 0.1 level) and negative impact on the size of the race-conscious DBE goals. This shows that state transportation agencies are somewhat susceptible to the general legal environment among their states and respective judicial circuit. In a legal environment with more frequent judicial review of affirmative action programs in government contracting, the DOTs in these states are a bit likely to set lower DBE goals.

Among the other variables, unemployment rates have no discernible impact on race-conscious goal-setting. Contrary to expectation, state government ideology is weakly significant but negatively correlated with the dependent variable in the one-year lag model, while anti-affirmative action ballot variable appears positively correlated with the dependent variable in the two-year lag model, suggesting that states with more conservative political leadership and less public support for affirmative action tend to report higher race-conscious DBE goals. Generally speaking, the results suggest that the deterrent effect of judicial review, regardless of actual case outcomes, tends to become salient two years following the issuance of court decisions. State DOTs are somewhat likely to lower their DBE goals in reaction to court activities concerning affirmative action in public contracting.

DBE goals may influence the state's decision-making about current-year DBE goal. I therefore run the *xtserial* diagnostic test for serial correlation for all of the 4 fixed effects models in this empirical chapter. In the first model, the p-value for the *xtserial* test nears 0.1, indicating a slight risk of serial correlation. Tables 6.41 and 6.42 report results after controlling for this factor.

(Table 6.41 about here)

6.42 Judicial Impact on Percent Contract Dollars for Minority Firms

The original FOIA data provides a unique opportunity to not only investigate how courts influence the setting of programmatic goals, but also gauge the extent to which the judicial branch affects actual affirmative action dollar commitments. This is interesting because it is the actual enforcement of the DBE goals that will generate a real impact on minority business owners. It is the actual dollar commitments a state DOT has ended up making that will deliver the intended benefits of affirmative action programs. If evidence points to possible deterrent effects of court activities and anti-affirmative action rulings on state DBE goal achievement, then this empirical test will be able to shed some light on strategic bureaucratic decision-making in response to, or in anticipation of, judicial review and its consequences.

I have not found enough evidence supporting the judicial impact hypothesis for DBE contract awards (see Table 6.42). While the court activity intensity variable achieves some degree of statistical significance in the one-year lag model, it works opposite from the hypothesized direction. None of the court variables in the other models are statistically significant. Interestingly, even though it is the actual agency contract-awarding decisions that invite legal challenges by unsuccessful bidders and subsequent court actions, the regression results show that such court actions, in turn, do not appear to affect agency contract-awarding behavior in any significant way.

Among the other variables, similar to findings from the goal-setting model, state government ideology is significant but negatively correlated with the dependent variable in the one-year lag model, while anti-affirmative action ballot variable appears positively correlated with the dependent variable in the two-year lag model. Overall, I did not find sufficient evidence of judicial influence on percent contract dollars for minority-owned firms. Court activity intensity in general, and the amount of pro-affirmative action rulings in particular, do not have a statistically meaningful impact on the actual race-conscious DBE contracting decisions[53].

(Table 6.42 about here)

6.5 Conclusion and Implications

This empirical study focuses on U.S. DOT's preferential DBE program, and attempts to approach the research question of judicial impact from all levels of state and federal courts on state bureaucratic agencies. By examining variation in affirmative action goal-setting and contract awards among states, this chapter aims to provide further insights into the degree to which bureaucratic agencies make discretionary decisions in response to the legal and socio-political environment. My primary hypothesis centers on state DOT responsiveness to courts. Specifically, I predict a decrease in a state's race-conscious DBE goals and percent contract dollars for minority firms as a result of state-

[53] In an alternative model, I also included annual DBE goal as one of the independent variables. The results still indicated a lack of significant judicial impact on the dependent variable. Though not surprisingly, the annual DBE goal was found to be highly statistically significant and positively correlated with the dependent variable, suggesting that the higher the DBE goal was set for a year, the more the agency tended to spend doing business with minority contractors in this year.

and circuit-based judicial review of affirmative action in public contracting. Similar to the first empirical chapter, this expectation is based on the assumption that in the face of court activities that subject a government agency's preferential contracting plans to strict scrutiny test, rational DOT DBE program officers have incentives to lower race-based affirmative action goals and contract award amounts to minority firms, in an attempt to reduce future litigation risks.

Overall, key findings offer very limited support for the judicial impact hypothesis on bureaucratic decision-making. These findings shed interesting light on courts-bureaucracy dynamics. Firstly, judicial impact appears to be slightly more significant during an agency's goal-making process, as compared to goal-achievement. While it is the actual awarding of contracts that raises the legal question of over-utilizing minority firms and invites legal challenges initiated by non-minority contractors in courts, judicial activities, in turn, tend to have a more discernible deterrent effect on the setting of race-conscious goals. This makes sense since the set goals are a crucial component of an agency's affirmative action plan, and are the key subject of judicial review.

Secondly, this chapter provides a unique opportunity to test the impact of all levels of court on agency decision-making. While the first empirical study indicates a lack of substantive agency responsiveness to the Supreme Court's *Adarand* ruling, this chapter suggests a similar lack of agency responsiveness to all state- and circuit-level court activities within two years. Given the paucity of existing literature on judicial impact from all levels of court, these findings reveal more about the relationship between state bureaucracy and its state- and circuit-wide legal environment.

As summarized in the literature review in Chapter 2, judicial impact, or lack thereof, on bureaucratic behavior may be understood from various theoretical perspectives. From a rational choice angle, the extent of bureaucratic responsiveness depends at least partly on agency decision-makers' perception of costs arising from complying with court rulings, and the assessment of future litigation risks. From a communications point of view, judicial decisions written in less ambiguous texts can facilitate agency responsiveness to courts. Institutionally, political principals in the legislative and the executive branches possess more effective tools to exert control on bureaucratic decision-making, as compared to courts. In the following concluding chapter, I discuss how these lines of reasoning may help us further understand the findings from the previous two empirical studies.

Figure 6.211: Density Plot for Race-Conscious DBE Goals (2003-2007)

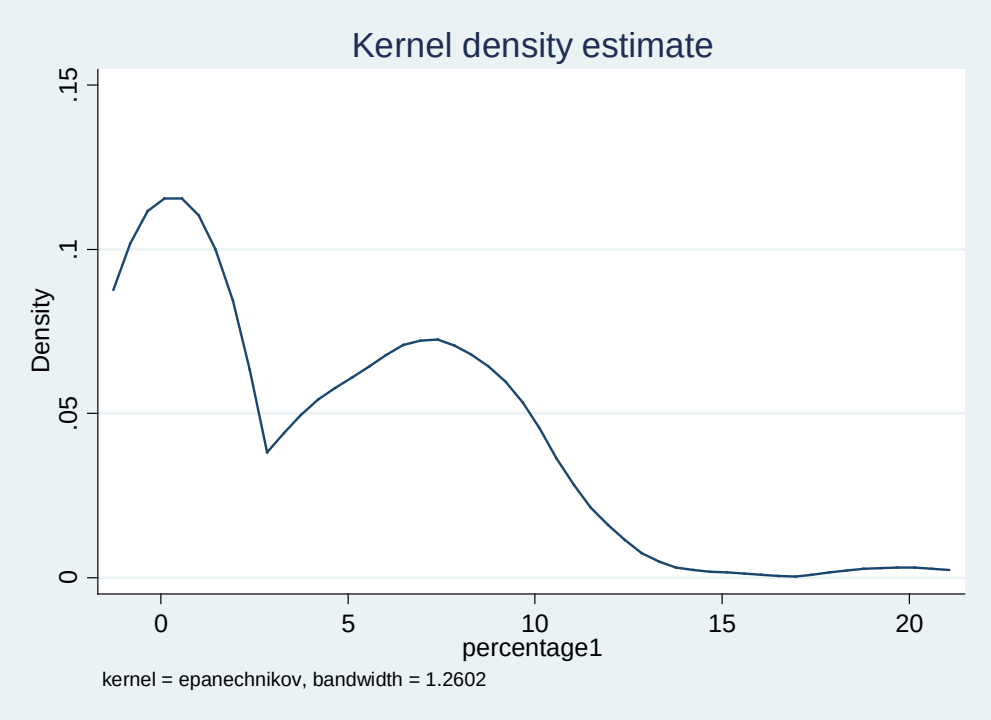


Figure 6.212: Density Plot for Percent Contract Dollars for Minority Firms (2003-2007)

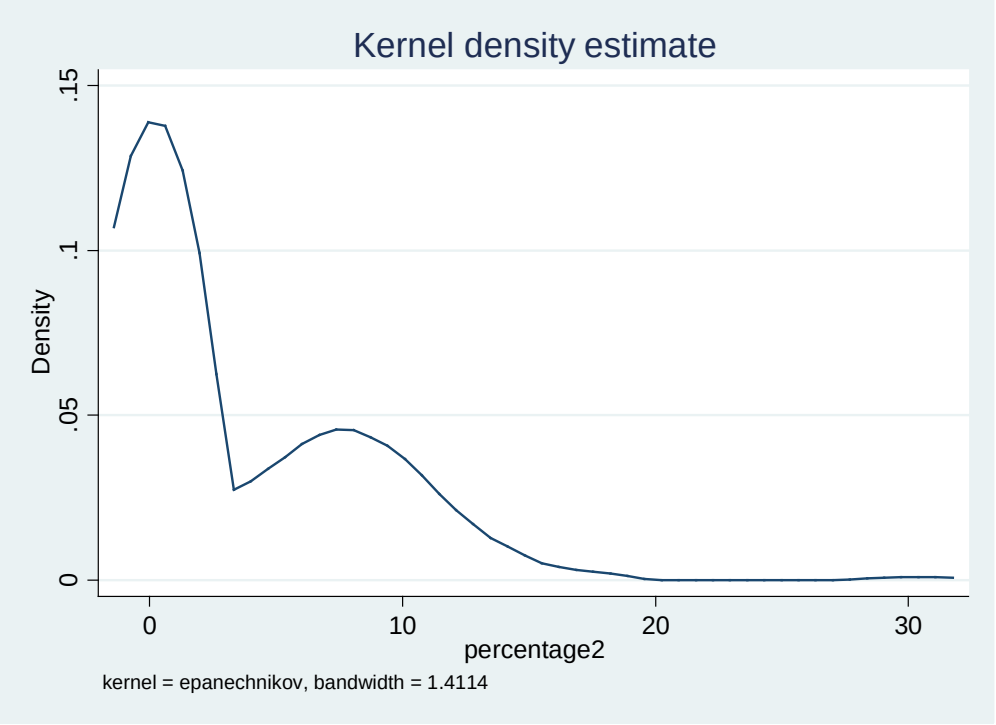


Figure 6.221: Court Activity Intensity by State (2001-2007)

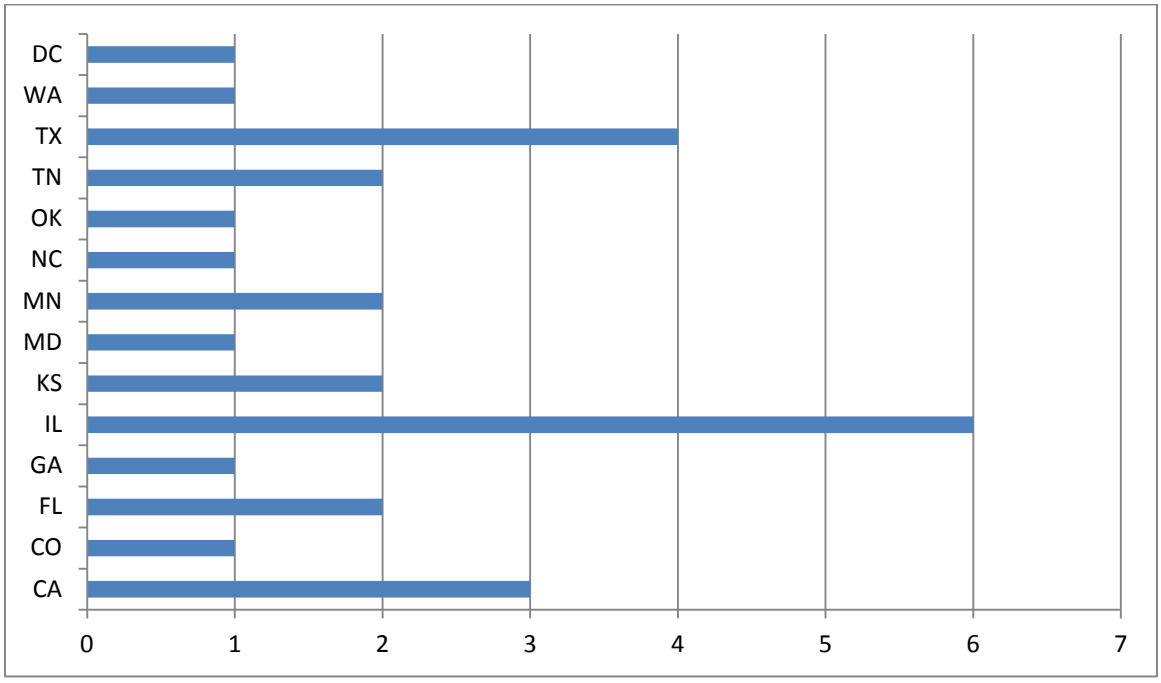


Table 6.23: Anti-Affirmative Action State Actions (Reverse Chronological Order)

STATE	YEAR	INITIATIVES & REFERENDA	STATUS
AZ	2010	Prop. 107: Preferential Treatment or Discrimination Prohibition	Pass
CO	2008	Amendment 46: Discrimination and Preferential Treatment by Governments	Fail
NE	2008	Initiative 424: Affirmative Action Ban	Pass
MI	2006	Prop. 06-2: Proposal to Amend the State Constitution to Ban Affirmative Action Programs	Pass
CA	2003	Prop. 54: Classification by Race, Ethnicity, Color or National Origin	Fail
WA	1998	Initiative 200: Employment Discrimination	Pass
CA	1996	Prop. 209: Prohibition against Discrimination or Preferential Treatment by State and Other Public Entities	Pass
Maine	1995	Initiative: Limiting Protected Classes	Fail
Oregon	1994	Initiative: Amends Constitution: Guarantees Equal Protection	Fail

Table 6.4: Descriptive Statistics

Variable	Mean	Std. Deviation	Range
Race-Conscious DBE Goal	4.12	4.24	[0, 19.79]
Percent Contract Dollars for Minority Firms	3.46	4.75	[0, 30.33]
Court Activity Intensity (lag 1 year)	0.44	0.67	[0, 3]
Court Activity Intensity (lag 2 years)	0.50	0.81	[0, 5]
Court Rulings (lag 1 year)	0.14	0.68	[-2, 2]
Court Rulings (lag 2 years)	0.11	0.70	[-2, 3]
Ballot Initiatives (lag 1 year)	0.04	0.19	[0, 1]
Ballot Initiatives (lag 2 years)	0.03	0.17	[0, 1]
Unemployment Rates (lag 1 year)	5.09	1.11	[2.5, 8.1]
Unemployment Rates (lag 2 years)	5.11	1.08	[2.8, 8.1]
Government Ideology (lag 1 year)	47.11	21.80	[7, 89]
Government Ideology (lag 2 years)	46.89	21.98	[7, 89]

Table 6.41: Judicial Impact on Race-Conscious DBE Goal

Variable	1-Year Lag	2-Year Lag
Judicial Branch		
Court Activity Intensity	-0.73	-1.09*
	(0.84)	(0.55)
Court Rulings	-1.86*	0.44
	(0.94)	(0.65)
Other Environmental Characteristics		
Anti-Affirmative Action Ballot Initiatives	-0.97	10.61***
	(3.48)	(3.72)
Unemployment Rates	0.72	0.11
	(0.46)	(0.58)
State Government Ideology	-0.06*	0.007
	(0.03)	(0.02)
Constant	4.88*	4.05
N	200	200
R-Square	0.06	0.07
F-Score	1.85	2.22

*p<0.1, **p<0.05, ***p<0.01

Table 6.42: Judicial Impact on Percent Contract Dollars for Minority Firms (State)

Variable	1-Year Lag	2-Year Lag
Judicial Branch		
Court Activity Intensity	1.19*	0.03
	(0.61)	(0.56)
Court Rulings	0.05	-0.47
	(0.68)	(0.69)
Other Environmental Characteristics		
Anti-Affirmative Action Ballot Initiatives	-4.46	8.37**
	(2.99)	(3.64)
Unemployment Rates	0.27	0.91*
	(0.50)	(0.49)
State Government Ideology	-0.07***	-0.003
	(0.02)	(0.02)
Constant	5.08*	-1.20
N	250	250
R-Square	0.07	0.05
F-Score	2.87	2.13

*p<0.1, **p<0.05, ***p<0.01

Chapter 7: Conclusion

7.1 Summary of Empirical Studies and Results

This dissertation research project primarily examines the impact of courts on bureaucratic behavior. Specifically, I investigate the influence of affirmative action-related judicial review upon federal and state agency decision-making regarding their preferential contracting programs. This project comprises of two studies. The first empirical study reviews aggregate federal agency contract awards to small minority contractors by year, and tests the degree of federal agency responsiveness to Supreme Court jurisprudence and changing legal requirements about the size and scope of affirmative action programs in government procurement and contracting. The second empirical study focuses on the Department of Transportation's Disadvantaged Business Enterprise program, its annual goal-setting and percent contract dollars for minority firms at each of the fifty states, and the amount of state transportation agency discretion in response to judicial review against DBE and other similar programs from all levels of state and federal courts.

Overall, I did not find sufficient evidence that supports the judicial impact hypothesis in my two empirical studies. Previous literature did present numerous findings of significant changes in bureaucratic decision-making in response to the Judiciary (see literature review in Chapter 2.32). In the area of public procurement and contracting, landmark court decisions have changed the political and legal landscape over time. The

issuance of 49 CFR Part 26 to state DOT agencies, for example, has imposed new requirements and structures to state race-based contracting programs. Nevertheless, in my two empirical chapters, which examined relatively more short-term judicial impact in post-*Croson* and post-*Adarand* years, I did not have sufficient findings in support of my hypotheses on agency responsiveness to courts.

My findings in this study suggest that compared to the judicial branch, federal executive agencies are found more likely to adjust minority contract award amounts with the changing political leadership. During Democratic presidential administrations, federal government agencies tend to make higher affirmative action dollar commitments. State transportation agencies appear to be somewhat cognizant of state- and circuit-level court activities when making annual race-conscious contracting goals. Findings suggest that regardless of the actual case outcomes, the judicial review process per se is likely to generate some deterrent effects upon the setting of race-conscious DBE goals. This makes sense because it is the proposed race-conscious and overall DBE goal, which determines the size and scope of a state DOT's affirmative action program in public contracting, that is subject to the strict scrutiny test in the event of a judicial review. Meanwhile, I have not found enough evidence that indicates significant and meaningful judicial impact on the actual dollar amounts that state transportation agencies award annually to minority contractors. Next, I discuss how the various theoretical perspectives of judicial impact may help explain these findings.

7.2 Understanding Lack of Federal Agency Responsiveness to Courts

7.21 Utility Theory

From the utility theory standpoint, government agencies would want to narrowly tailor their preferential contracting plans in order to reduce future litigation risks. Lawsuits and the judicial review process are costly and time-consuming, and yet are also rare. In comparison, agency reforms of their affirmative action programs in response to new court orders and constitutional requirements can be equally costly. *Croson* (1989) marks the beginning of judicial review of affirmative action programs in public contracting by strict scrutiny standards.

If *Croson* applies directly to state, county and city level programs, *Adarand Constructors v. Pena* (1995) extends the *Croson* decision to federal programs, and imposes narrow-tailoring requirements upon all federal bureaucratic agencies which administer procurement and contracting programs with racial components. Following *Adarand*, the Department of Justice in the Clinton Administration proposed further directions and guidelines to federal agencies regarding the constitutional parameters of preference contracting under the *Adarand* framework and against the background of color-blind Supreme Court jurisprudence. In the proposal, first and foremost, the DOJ affirms the continued use of race-based measures as justified, stating that "the Justice Department takes as a constitutionally justified premise 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"[54].

[54] Department of Justice "Proposed Reforms to Affirmative Action in Federal Procurement", p. 26042

Next, the DOJ compiles the following list of principal factors that courts would consider when reviewing an affirmative action plan[55]. In response to each of these judicial requirements, DOJ provided examples of appropriate measures to narrowly tailor an existing program, in terms of eligibility and certifications, benchmark limits, mechanisms for expanding minority participation, and outreach and technical assistance. In summary, the core recommendations by the DOJ center on the maximum exploration of race-neutral alternatives, so that federal agencies do not end up awarding public contracts solely on the basis of race, and over-utilizing minority firms while compromising the equal rights of nonminority groups[56].

a) Whether the government considered race-neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action;

b) The scope of the program and whether it is flexible;

c) Whether race is relied upon as the sole factor in eligibility, or whether it is used as one factor in the eligibility determination;

d) Whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool;

e) Whether the duration of the program is limited and whether it is subject to periodic review;

f) The extent of the burden imposed on nonbeneficiaries of the program.

[55] Ibid.
[56] Ibid, p. 26049

Ten years after *Adarand*, however, the U.S. Commission on Civil Rights reported that federal public contracting programs remained grossly over-inclusive, and largely failed to meet the *Adarand* benchmark. Among the commission's major findings was agencies' lack of serious considerations of race-neutral solutions, such as outreach, the unbundling of large contracts, and the establishment of mentor-protégé programs. With regards to data and measurement, the commission found that except for the Department of Education, most other federal agencies did not formulate comprehensive and scientific data collection plans and procedures to uncover evidence of disparity, and instead relied heavily on federal regulations and public laws to justify the use of race-conscious approaches. In addition, interagency sharing of information on the effectiveness of race-neutral measures was scarce, making it less likely for agencies with fewer resources to develop the incentives to fully explore substitutive or supplementary race-neutral options. Conceptually, we would expect agencies to adjust their preference contracting plans and lower their race-based award amounts in response to *Adarand* and other judicial decisions that challenged affirmative action. Nonetheless, reforming existing procedures in large bureaucracies can be a demanding task. The cost factors that new legal requirements impose may discourage agency responsiveness to the judicial branch.

7.22 Communications Theory

From a communications perspective, the *Adarand* opinion, on the one hand, uses definitive terms to affirm that any future government decision-making on the basis of race is to be subjected to the most stringent strict scrutiny test. A review of the historical

development of Supreme Court jurisprudence of affirmative action up to *Croson* has led the majority court led by Justice Sandra O'Connor to conclude the following three aspects to be mindful of when reviewing all government-sponsored racial classifications[57]:

a) Skepticism: Any preference based on racial or ethnic criteria must necessarily receive a most searching examination.

b) Consistency: All racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.

c) Congruence: Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.

On the other hand, the Court uses generally ambiguous terms to explain that the rigorous narrow-tailoring standard does not automatically invalidate most of the existing preferential plans. As O'Connor wrote,

> "We wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact. The unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it…When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the narrow tailoring test this Court has set out in previous cases."[58]

This position asserting that the application of strict scrutiny review does not necessarily result in the dismantling of affirmative action programs in general, is not, however, shared by all the other justices to a large extent. In a concurring opinion, Justice Scalia argued,

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[57] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), at 223.
[58] Ibid, at 237.

> "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race… To pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American." He went on to the conclusion that "It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny."[59]

Following the same line of reasoning, Justice Thomas asserted in his concurring opinion that "There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution", that the well-intentioned race-based contracting programs will inevitably "provoke resentment among those who believe that they have been wronged by the government's use of race", and "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[60]

Even though the Adarand ruling has been frequently cited by lower courts as a landmark legal precedent to strike down other preference contracting plans, this case was decided by a 5-4 vote, meaning one single swing vote would have likely changed the course of Supreme Court jurisprudence by upholding the equal protection principles underpinning today's public contracting programs that grant preferential treatment to historically disadvantaged racial and ethnic groups (Canon and Johnson 1999). Three justices wrote separate dissenting opinions to express their differing views from the majority opinion. Justice Stevens, for example, clarified on the significant difference

[59] Ibid, at 239.
[60] Ibid, at 240-241.

between “a policy that is designed to perpetuate a caste system”, and “one that seeks to eradicate racial subordination”[61], which would render the majority ruling faulty, as “a single standard that purports to equal remedial preferences with invidious discrimination cannot be defended in the name of ‘equal protection’”[62].

Justice Souter added that current affirmative action programs are necessary. Even with the potential risk of compromising nonminority interests, they are largely temporary measures to create a level playing field for individuals of minority backgrounds, that “if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing.”[63]

The division of opinions among the Supreme Court justices has more or less led to distinctive ways of interpreting the *Adarand* decision by federal agencies. Whereas the majority report presented by the U.S. Commission on Civil Rights in 2005 emphasized the ideal of race-neutral adjustments to race-based programs, to which federal agencies did not live up in the years following *Adarand*, Commissioner Michael Yaki published a dissenting statement cautioning against a misreading of *Adarand*. As he explained:

“The *Adarand* standard is rigorous, but race-conscious programs are still acceptable. The Commission Majority states that *Adarand* requires agencies to ‘consider, and employ race-neutral strategies before resorting to race-conscious ones.’ This is a reading of

[61] Ibid, at 243.
[62] Ibid, at 246.
[63] Ibid, at 270.

Adarand that simply does not exist in the text of the decision, nor is it a reading that has gained any prominence, save by the current administration."[64]

Yaki warned that the overly color-blind interpretation of *Adarand* was problematic, that by "stating that this kind of legislation would help enforce nondiscrimination in procurement, facially it appears neutral. In practice, however, it would, with one stroke, eliminate all race-conscious programs in federal contracting and provide private rights of actions to aggrieved majority-owned contractors against the federal government."[65] The key takeaway from *Adarand*, based on his arguments, was that government decision-making on the basis of race should follow reasonable standards. But the necessity of such affirmative measures is well-justified. "In the beginning, a helping hand--the hand that elevates someone from the basement of opportunity in which historical discrimination placed so many--was needed and that assistance came from race-conscious minority business enterprise and women business enterprise programs."[66]

From a communications perspective, the Supreme Court ruling laid out the constitutional contours of future preferential contracting programs--surviving the strict scrutiny test upon judicial review. But it also left ample room for future interpretation about how much race-based decision-making at public agencies is legally permissible. Ambiguous legal texts, lack of specific guidance, and highly divisive opinions among Supreme Court Justices can contribute to lower incentives for agency staff to respond to the judicial branch in general.

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[64] U.S. Commission on Civil Rights, *Federal Procurement after Adarand*, p. 81.
[65] Ibid, p. 88.
[66] Ibid, p. 92.

7.23 Organizational Theory

Studies of judicial impact often examine the political and socio-economic environment in which agency decisions are made. Compared to court decisions which are non-self-executing in nature, each presidential administration has various ways, such as budget-making and political appointments, of facilitating agency responsiveness to the changing political leaderships in the executive branch. Affirmative action tends to be a divisive issue between the two political parties, with Democrats and Democratic Presidents more likely to support and favor programs and policies of this nature (see Table 7.23). To keep race-based public contracting from being completely dismantled following the *Adarand* ruling, the Clinton administration asked the Department of Justice, in the "Proposed Reforms to Affirmative Action in Federal Procurement" (1996), to reiterate the government's compelling interest in taking positive steps to reduce historical racial disparity in access to opportunities in the public sector (Davila et al. 2012).

Judicial scholars argue that actions from the other political branches in support of the judicial mandate are likely to prompt agency response to courts, whereas inactions, or even resistance from the other pivotal political players, can lead to delayed agency reaction to judicial review (Rosenberg 2008). In the wake of *Adarand*, one of the major congressional actions that followed up with the new constitutional requirement was the enactment of Public Law 105-178 Transportation Equity Act for the 21st Century, otherwise known as TEA-21, in June 1998. This statute is the most recent reauthorization of affirmative action concerns in transportation-related government procurement and

contracting, following the Surface Transportation Assistance Act of 1982, the Surface Transportation and Uniform Relocation Assistance Act of 1987, and the Intermodel Surface Transportation Efficiency Act of 1991.

In adherence with the race-neutral standard in *Adarand*, TEA-21 prohibits states from implementing rigid, inflexible race-based quotas, and instead establishes a purely aspirational and non-mandatory goal of awarding 10% of a transportation agency's annual procurement and contracting dollars[67], to firms owned and controlled by presumably disadvantaged demographic groups including Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans and subcontinent Asian Americans[68]. The gist of TEA-21 is requiring the narrow tailoring adjustments of affirmative action goals to reflect true availabilities of willing, able and ready minority firms, and the maximization of race-neutral means to achieve small business participation in public works regardless of race[69].

Nevertheless, congressional committees that oversee small business participation in public procurement and contracting have not issued legislations or conducted hearings that significantly challenge race-based government contracting plans. The Small Business Administration's 8(a) minority business program was reviewed, for example, at a Senate Committee on Small Business hearing in 1995. But most congressional actions, such as the Greater Opportunities for Small Business Act of 2014 (H.R. 4093), do not specifically target minority firms and the scope of preferential contracting programs.

[67] 49 CFR § 26.41
[68] 49 CFR § 26.5
[69] 49 CFR § 26.51

Aside from the political principals, public opinion can also play a mediating role in agency-court interactions. Surveys from the Pew Research Center from 2009 demonstrate that by 2007, up to 70% of survey respondents generally favored affirmative action programs intended to improve employment, education and contracting opportunities for disadvantaged groups such as African Americans, women, etc., nearly 21% higher than the public approval rate reported in 1995 (see Figure 7.23 and Table 7.23). Despite color-blind jurisprudence from the Supreme Court, federal agency decision-making in public contracting on the basis of race are still likely to receive general societal support.

(Figures 7.23 and 7.232 about here)

7.3 Understanding Lack of State DOT Responsiveness to Courts

7.31 Utility Theory

Utility theory contends that rational individuals tend to base decision-making upon cost-benefit analysis, and invariably seek solutions that minimize costs and maximize utility. Part of the reason why a state transportation agency would exercise some degree of discretion in the implementation of the DBE program in response to judicial activities, may come from the weighing of the costs associated with being responsiveness to judicial review, against the costs of inaction regardless of court activities.

In this study, the costs of a lack of agency responsiveness to courts are most likely incurred from the possibility of future lawsuits and potential judicial sanctions that follow. Long-term over-utilization of minority firms expose state DOTs to greater risks of being sued by unsuccessful nonminority bidders seeking injunctive relief, and having courts

review the fairness of the agency's DBE program. Even not as the defendant party in a lawsuit per se, a risk-averse state transportation agency has the rationale to assess the potential ramifications of rulings by courts within the state and its federal circuit, regarding the constitutional contours of preferential contracting programs in general. Lawsuits that challenge similar affirmative action plans implemented by other bureaucratic agencies signal the vulnerability of government-initiated racial classifications and remedies, and indicate the importance of developing narrowly-tailored and defensible DBE programs to reduce the possibility of future judicial review. To gauge the likelihood of legal challenges, there are multiple factors a state DOT's legal department should consider, from the amount of recognition for the importance of affirmative action efforts in the local contracting community, the strength of relationships between the state DOT and the local DBE and non-DBE firms, to the size and scope of existing DBE plans[70].

The higher the race-conscious DBE goal and contract awards, the more likely the state DOT will be sued by unsuccessful nonminority plaintiffs, and be subjected to a strict scrutiny test during judicial review. The quality of a disparity/availability study can play a decisive role in the defensibility of the DBE goal-setting process and program in general, and therefore in an agency's perception of the likelihood of lawsuits and possible outcomes of judicial review. Table 7.311 presents a list of court cases in recent decades

[70] 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, Washington, DC, 2010

in which DBE programs failed to withstand the strict scrutiny test because of outdated or incomplete studies insufficient to serve as the basis of these programs.

(Table 7.311 about here)

It is reasonable to assume that bureaucratic agencies have strong intentions to avoid getting into expensive and protracted lawsuits. Many plaintiffs, even small businesses, oftentimes are not without the resources and capacity to initiative full-scale challenges, especially for those who have received interest group representation, or are themselves members of organized interests. Small nonminority firms are likely to have experts testify in court and present counterevidence that could render the factual basis of a state DOT's disparity/availability study questionable, just as a state is likely to have consultants defend its own study process as well. In *GEOD Corporation v. New Jersey Transit Corporation* (2009), John Lunn, a Robert W. Haack Professor of Economics of Hope College in Michigan, argued on behalf of the plaintiff, that the New Jersey DOT's disparity study was insufficient to justify the agency's race-conscious DBE contracting plan.

In his opinions, Professor Lunn cited summary findings from the U.S. Commission on Civil Right's 2006 report on the quality of disparity studies: (a) using obsolete or incomplete data; (b) resulting in ways that exaggerate disparities; (c) failing to test for nondiscriminatory explanations for the differences; (d) finding purported discrimination without identifying instances of bias or general sources; (e) relying on anecdotal information that they have not collected scientifically or verified; (f) not examining disparities by industry; and (g) not identifying which racial/ethnic groups suffer from

disparities[71]. He then introduced evidence that would back up most of these official findings. Via request for admissions and depositions, Lunn made the following arguments. The NJ DOT and its consultants must demonstrate, in their own reports and testimonies, that the pre-existing studies can offer sufficient evidence to justify their race-based contracting plans.

> "NJT cannot identify any prime contract on which a DBE was discriminated against by a NJ Transit Employee; NJT has no evidence of discrimination against a DBE subcontractor by a prime contractor; NJT admits it knows of no pattern of deliberate exclusion of DBEs; NJT cannot identify any instance in which there was discrimination against a DBE by a lender; NJT cannot identify any instance in which there was discrimination against a DBE by a surety; NJT cannot identify any instance in which there was discrimination against a DBE by a union, trade association, or apprenticeship program; NJT has taken no action to punish any non-DBE for discriminating."[72]

There were no less than 35 major court cases initiated by unsuccessful nonminority bidders between the 1990s and 2000s at the state and federal circuit levels, in which courts reviewed public agencies' procurement and contracting preferences on the basis of racial classifications[73]. Even if a state DOT stands a good chance of winning a future case, prudent program officers would still consider adjusting their affirmative action plan to avoid legal challenges, as the litigation and judicial review process itself is typically time-consuming, resource-draining, likely to produce negative public impressions toward

[71] U.S. Commission on Civil Rights, "Disparity Studies as Evidence of Discrimination in Federal Contracting", Briefing Report, May 2006.
[72] Civil Action No. 04-2425, GEOD Corporation, et al. Plaintiff v. New Jersey Transit Corporation, et al. Defendants. Initial Report of Plaintiff's Expert by John Lunn, Robert W. Haack Professor of Economics, Hope College, Holland, Michigan 49423.
[73] These major lawsuits took place in the following states: Colorado, Pennsylvania, Washington, Tennessee, Florida, Minnesota, New Jersey, Illinois, District of Columbia, Virginia, Ohio, Georgia, Mississippi, Wisconsin, New York, North Carolina, Maryland, California, Connecticut.

the agency's reputation, and may increase litigation risks for the agency in the future as well.

However, compared to costs associated with agency indifference to courts, the costs of agency responsiveness, which primarily come from compliance with the newly installed legal requirements, can be high too. 49 CFR Part 26, in accordance with the Supreme Court's mandate for strict scrutiny standards in reviewing affirmative action policies since *Croson* (1989) and *Adarand* (1995), require that state DOTs split the DBE goals into race-conscious and race-neutral portions, and encourage states to conduct availability and disparity studies to fully explore race-neutral measures in meeting their annual DBE goals. A majority of states have undergone reverse discrimination lawsuits initiated by white male plaintiffs who argue that an existing affirmative action plan installed by a public entity cannot be justified by clear and strong evidence of racial disparity and discrimination in the marketplace, and therefore has imposed undue burden upon nonminority groups. Bureaucracies of many forms, including school districts, transit agencies, police department, even an entire city or state government, have been sued for carrying out preferential decisions based on unreliable and unscientific statistical studies documenting evidence of historical disparity and racial exclusion.

Due to a lack of detailed instructions from the federal Department of Transportation on the collection of discriminatory evidence and the development of disparity studies, as well as a lack of agency expertise in statistical analysis, great variations exist in the scope and quality of such studies performed at the state level. In a 2010 report commissioned by the Federal Highway Administration and the American Association of State Highway and

Transportation Officials, and produced by the U.S. Transportation Research Board, it has been revealed that hundreds of disparity studies have been conducted over the last two decades, of which only a small fraction (around 13%) came from state transportation agencies. By 2010, 26 of the 51 state DOTs had produced, or were producing, such studies in reaction to the new strict scrutiny legal requirement. Five of them have ongoing projects[74]. 15 states have performed studies within the previous six years[75], of which only 8 states specifically utilized these studies to justify the setting of their annual DBE goals[76]. 7 states have not produced new studies with updated data in six years or longer[77]. Appendix IV presents a summary of the type of studies states have conducted, and the transportation agencies that have yet to demonstrate any efforts in systematically examining evidence of disparity and discrimination to serve as the basis of DBE goal-setting.

Whereas availability studies mainly canvass the proportion of disadvantaged firms within a geographic market area that are willing and able to participate in government-let contracts, disparity studies are typically expected to provide extensive quantitative and anecdotal evidence of discrimination in an industry, and to rely on rigorous statistical analyses to identify not only the existence of racial disparity when a race-based preference program is in place, but more importantly, the estimated level of disparity and

[74] Hawaii DOT; Montana DOT; Colorado DOT; New York DOT; North Carolina DOT.
[75] Arizona DOT; California DOT; Idaho DOT; Nevada DOT; Washington DOT; Alaska DOT; Georgia DOT; Illinois DOT; Maryland DOT; Minnesota DOT; Missouri DOT; New Jersey DOT; North Carolina DOT; Tennessee DOT; Virginia DOT.
[76] California DOT; Illinois DOT; Maryland DOT; Minnesota DOT; Missouri DOT; Nevada DOT; North Carolina DOT; Washington DOT.
[77] Colorado DOT; Florida DOT; Louisiana DOT; Nebraska DOT; New Mexico DOT; Ohio DOT; South Carolina DOT.

minority business utilization in the absence of an affirmative action component. If availability studies can be compared to the data collection steps for a census, disparity studies tend to have a higher demand for historical review and analytical synthesis. Because of the more scientific and comprehensive nature of the latter type of study, periodic disparity studies are often strongly recommended by the federal DOT as one of the better, if not the best, approaches to justify race-conscious remedies and narrowly tailor an agency's program to make sure it is defensible in the event of a reverse discrimination lawsuit.

Appendix IV shows that approximately half of the state DOTs have not conducted any type of disparity or availability studies in compliance with the new strict scrutiny standard and race-neutral jurisprudence at the federal courts. Among those that have already done so, only a slight majority of them are capable of presenting studies that are less than six years old. Most of the state transportation agencies have been relying on one single version of an availability or disparity study for years that does not necessarily reflect either an updated list of ready and able DBE-certified businesses in the market area, or an up-to-date summary of evidence of discriminatory exclusion. The absence of such studies, as well as the lack of quality studies per se, tend to make state agencies more vulnerable for being involved in future litigations that subject their racially preferential plans to highly stringent strict scrutiny tests.

A primary reason why states oftentimes fall short of meeting the expectations toward such studies has to do with the amount of efforts needed to produce the type of work sufficient as justifications for racial remedial measures at a public agency. In order

to better understand why the empirical data suggests a general lack of agency responsiveness to courts, it is necessary to find out specifically what types of efforts agencies are expected to commit but may be discouraged from fully committing. The U.S. Transportation Research Board has identified the following key elements that constitute a well-conceived disparity study as the basis of a truly defensible, narrowly-tailed DBE program[78]:

1. A legal review of landmark Supreme Court rulings such as *Croson* (1989) and *Adarand* (1995), to demonstrate a good understanding of the shifting legal requirements towards race-neutrality, as well as the constitutional obligation that state transportation agencies must bear to make sure that the remedial DBE program is narrowly-tailored.

2. An assessment of the geographic market area in which at least 75% of the public contracting expenses are made, which can often be achieved by mapping out areas using the zip codes of prime and sub-contractors.

3. The determination of the appropriate product markets area where at least 75% of the public contracting dollars are expended. Agencies are encouraged to use the NAICS (North American Industry Classification System) codes to identify different categories in which government purchasing activities take place[79], such as construction industry, professional services, etc.

[78] Ibid.

[79] Contract types may include, but are not limited to: highway and street construction; bridge, tunnel and elevated highway; excavation work; concrete work; water, sewer and utility lines; nonresidential construction; heavy construction; lawn and garden services; electrical work; ready-mixed concrete; single-family housing construction; metals service centers and offices; structural steel erection; local trucking without storage; industrial buildings and warehouses; equipment rental and leasing; engineering services; concrete products; painting; electrical apparatus and equipment, wiring supplies and construction materials; petroleum and petroleum products wholesalers; architectural metal work, etc.

4. A reasonable measurement of DBE availabilities in the marketplace, which lays the foundation for a valid and reliable availability or disparity study. The total number of business establishments in an industry, as the numerator, can be collected via business population data sources such as the Dun & Bradsheet's Marketplace database. Agencies are encouraged to develop more precise measurement of the number of DBE firms. Common approaches of data collection, such as using the census data on minority businesses, may create a slightly upward bias, as the total number of minority-owned firms is likely to be larger than the number of those officially certified DBEs and eligible for federal-aid highway contracts. Whereas approaches such as using the past bidders list may not be able to reflect the complete number of ready and willing DBE firms, if the previous DBE participation rates themselves were partly affected by discriminatory practices in the financial market, networking opportunities and the bidding process. Therefore, state agencies are recommended to conduct telephone interviews to verify the number of DBE establishments against data obtained from census and internal agency records.

5. The collection of data on DBE utilization rates, measured as the proportion of prime and sub-contract dollars awarded to DBE firms, in the total dollar amounts expended on small businesses in general. It is considered highly helpful to break down utilization analyses by race/ethnicity, and categories of industry groups as well.

6. The calculation of a public sector disparity ratio, derived by dividing the utilization rate by the DBE availability numbers. This step serves as a statistical comparison of the degree of minority business participation in public procurement and

contracting, against the actual pool of all ready and able DBE firms. A suggested threshold for identifying the existence of disparity is 80% for the disparity ratio.

7. Disparity analyses of DBE firms' access to capital and business development in the private market. Such evidence may be collected by performing regression analyses comparing business formation rates, credit denial rates, earnings and market shares across minority and nonminority groups, holding factors such as creditworthiness and other nondiscriminatory factors constant. This step will be particularly useful for justifying the necessity of employing race-conscious remedies in government contracting activities.

8. A collection of anecdotal evidence documenting societal discrimination and differential treatment experienced by individual business owners. Data may be collected through multiple sources ranging from phone and face-to-face interviews, to mailed surveys and focus groups. Agencies are encouraged to diversify data collection methods to improve response rates, expand sample representation of various racial and ethnic groups, and gather ample evidence of the existence of discriminatory barriers DBE firms are faced with in the public contracting process. Figure 7.31 provides a general breakdown of the different sources of anecdotal evidence collected.

9. An examination of the effectiveness of existing procedures, and the proposal of recommendations for improving the DBE program in the future. States can again utilize survey instruments to review the effectiveness of any current race-neutral measures such as technical assistance and educational outreach. This will help state DOT officials to identify most successful strategies, and to increase agency compliance with strict scrutiny legal standards.

(Figure 7.31 about here)

Depending on the type of studies conducted, data collection and analyses can be a costly process. Given the nature and scope of disparity studies, they are typically much more expensive than availability studies along. The bulk of the costs often come from the employment of professional consultants who are generally better equipped, compared to in-house staff already on payroll, with the capacity to perform the necessary analytical procedures, and to serve as expert witnesses in case of reverse discrimination lawsuits where the DBE program has to withstand strict scrutiny test. According to a 2010 survey conducted by the U.S. Transportation Research Board, state agencies usually spend less than $400,000 commissioning availability studies, while disparity studies can cost from approximately $400,000 for smaller transportation agencies to over $1,500,000 for agencies of larger sizes. DOTs that chose to collaborate with other state agencies (e.g. department of economic development, state university, etc.) in the study process paid an average of $20,000 to consulting services[80].

The production of such studies usually requires a sizeable one-time investment, around 1.5 million on average. Nonetheless, given the total amount of federal fund apportionments to state DOTs, the cost of disparity or availability studies is likely to make up only a small percentage of an agency's total expenses within a certain period of time. That being said, the reason why more than dozen of the 51 state DOTs have not yet produced any studies, or high-quality studies, perhaps has to do with the key components

[80] 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, Washington, DC, 2010

listed above that will impose greater costs upon a state agency in terms of the development of full understandings of the common elements in the study process by agency personnel, the hiring of consultants to complete the required tasks, and the allocation of resources to overseeing the delivery of quality reports that can be presented in court.

Besides availability/disparity studies, another primary cost factor associated with being responsive to judicial review of affirmative action concerns the introduction of race-neutral measures by state DOT officials. Federal regulations state that disparity studies not only serve as the factual basis for race-conscious DBE goals, but are also intended to inform state officials of potential race-neutral alternatives that will contribute to the achievement of overall DBE goals by increasing participation from small businesses regardless of owner's racial background. The main rationale behind the installation of race-neutral measures is that DBE goals should always be narrowly tailored so that a state DOT does not over-utilize minority-owned firms at the expense of nonminority contractors. The mandatory split of a DBE goal into race-conscious and race-neutral portions will provide an opportunity for agency decision-makers to devise creative ways of assisting small business participation in government projects without impeding fairness in the public contracting process.

The federal DOT grants a great amount of discretionary power to state agencies in the development of race-neutral strategies that apply to state-specific business environment and circumstances. Some of the highly recommended approaches include providing technical assistance to individual DBE firms, offering consultation, either one-

on-one meetings or group workshops, that will guide business owners through the bidding process, and qualification statement writing process. States are expected to gauge the needs of different DBE subgroups, and introduce customized training opportunities that meet the needs of vendors of various backgrounds. For example, trainings on contract listings search and electronic bid submissions may be especially helpful to technically challenged owners. State DOTs are also encouraged to make outreach efforts to promote their DBE programs. Moreover, states play a crucial role in cultivating relationships among DBE firms, and between DBEs and better-established and experienced prime contractors. Implementation of a mentor-protégé program can help strengthen project partnerships and facilitate the growth of disadvantaged firms. Last but not least, financial assistance measures for loans and bonding opportunities may prove to be effective as well. All these recommended approaches are expected to serve as viable alternatives to traditional ways of meeting proposed DBE goals solely by letting contracts to minority-owned firms, and are intended to assist state agencies in gradual transitions to completely color-blind or race-neutral small business contracting programs in the near future.

Several other factors could be adding up the costs associated with the disparity study process and the subsequent race-neutral measures. Obstacles may arise as agencies tackle organizational challenges, budget constraints, and commitment issues with nonminority prime contractors. As survey results in table 7.312 reveal, DOT officials tend to perceive a lack of support at the organizational level for reforming existing DBE programs in compliance with the strict scrutiny requirement. Some have cited a lack of

support and buy-in from internal construction and engineering departments that would have to review and alter long-existing procurement and contracting strategies, and expend extra efforts to develop race-neutral solutions (e.g. unbundling large contracts for disadvantaged firms), if faced with judicial review or its possibility.

Another key challenge for state DBE program officers comes from a lack of funding. As the Transportation Research Board survey shows, states have expressed uncertainties over the amount of federal dollars each year that will be appropriated to support their DBE programs. Under-funded and under-staffed agencies are likely to have less capacity, and fewer incentives, to adjust programmatic decision-making in response to external environment. The lack of general guidance and uniform program procedures, and the mainstream contracting community's level of commitment to the status quo, can impose further costs on updating a DBE program. Some prime contractors are reported to remain reluctant to establish new working relationships with DBE subcontractors, and to offer meaningful mentoring experience to less established DBE firms[81].

(Table 7.312 about here)

The generally limited statistical significance of judicial review in the models suggests that the costs of being responsive to courts and subsequent programmatic adjustments could be perceived by DOT officials as exceeding the costs of agency inaction, namely the risk of judicial review. Although a lawsuit can travel to different levels of courts and run on for years, the number of legal challenges that eventually make

[81] National Cooperative Highway Research Program (NCHRP) Synthesis 416 "Implementing Race-Neutral Measures in State Disadvantaged Business Enterprise Program", Transportation Research Board of the National Academies, Washington, DC, 2011

their way in front of a judge remains few. Many more nonminority contractors who believe they receive unfair treatment because of the DBE policies may opt for the less expensive and time-consuming grievance procedure, by filing complaints against the state DOT. For those lawsuits that do reach the courts, the defendant party in a greater majority of the cases tend to be city of state public agencies other than the DOT, who implement preferential procurement and contracting programs in a similar nature. A less resourceful state DOT may have fewer incentives to be responsive to court activities toward other government entities, if its own DBE program is not being legally challenged.

7.32 Communications Theory

Next, we turn to the communications perspective to further understand state transportation agencies' discretion in response to court decisions regarding government preference programs in public procurement and contracting. This line of reasoning primarily focuses on the clarity of judicial opinions, and its impact on lower court interpretations and bureaucratic decision-making. Specifically, more clearly articulated opinions that contain straightforward recommendations and directives are more likely to facilitate agency responsiveness to courts. Conversely, vague and ambiguous opinion language creates more leeway in different ways of understanding a court ruling, and, as a result, the selection of different courses of actions at the agency level. The way a court communicates its legal arguments and policy consequences in the official opinions, may greatly influence how agency decision-makers come to grips with the legal requirement imposed by the ruling, the costs and benefits of compliance with the decision, the

assessment of perceived likelihood of future judicial review upon its own agency programs, and therefore the scope of change to be made to its existing program in response to the ruling.

All trial and appellate courts have to interpret previous U.S. Supreme Court rulings and apply the legal precedents to new cases being presented. Landmark Supreme Court decisions in recent years regarding the constitutionality of race-based affirmative action programs would not have produced a profound impact in our society, if lower federal and state courts were to deliver opinions on similar cases of their own accord, regardless of Supreme Court jurisprudence. Granted, judges enjoy a considerable amount of discretion and leeway in making decisions that partly reflect their personal attitudes and policy preferences. But they are largely constrained to interpreting Supreme Court rulings within the framework laid out by the High Court. Supreme Court's requirement that all government-sponsored racial classifications should be treated as suspect, and must be able to survive strict scrutiny tests, is to be adopted by all lower courts in their reviews of affirmative action-related cases in the future.

As lower courts follow the High Court's jurisprudence, nonetheless, they do have to further interpret Supreme Court opinions in their own opinion-writing, mainly out of two reasons. Firstly, Supreme Court decisions concerning a same policy area may not be completely consistent over time, especially when the issues at hand are highly controversial, as is the case with affirmative action. With regard to preferential college admissions procedures, for example, *Regents of the University of California v. Bakke*

(1978)[82] struck down fixed quotas for admitting minority applicants, and invalidated the practice of awarding extra points to minority undergraduate students in *Gratz v. Bollinger* (2003)[83], but upheld the same university's law school policy of considering race as a plus factor in screening applicants in *Grutter v. Bollinger* (2003)[84]. Following the *Bakke* decision, however, the Supreme Court maintained that minority set-asides in public procurement and contracting, namely allocating a pre-determined percentage of government funding each year exclusively to awarding minority contractors, were perfectly constitutional (*Fullilove v. Klutznick* 1980)[85], while also supporting the use of fixed quotas in the Alabama Department of Public Safety hiring practices (*United States v. Paradise* 1987)[86]. The lack of consistency in the Supreme Court jurisprudence of a controversial policy area may require a significant amount of legal interpretations, reasoning, analysis and clarification on the part of lower court judges when they get to decide similar cases in their own jurisdictions.

A second reason why higher court decisions often get interpreted and reinterpreted at lower courts has to do with the specificity of judicial opinion language. Vaguely written opinions give lower court judges more opportunities to fill in the blanks, and adjust the interpretation of a high court ruling with changing circumstances and demographics. As many of the cases the Supreme Court justices review deal with fairly complicated issues, and given the fact that it is almost impossible for a court to foresee

[82] 438 U.S. 265
[83] 539 U.S. 244
[84] 539 U.S. 306
[85] 448 U.S. 448
[86] 480 U.S. 149

every scenario to which a current ruling may be applied in the future, there is reason to expect that higher court opinions may intentionally leave room for future interpretations by lower court judges as they deem reasonable and appropriate in specific situations. For example, the landmark Supreme Court ruling in *Roe v. Wade* (1973)[87] established women's right to privacy and free decision-making regarding abortion. But it was not until several lower courts at the federal and state level made further interpretations of the *Roe* decision, that a father's right in such a situation was properly addressed, which was not articulated in the original Supreme Court opinion (Canon and Johnson 1999).

The federalist structures of the U.S. court systems, along with the nature of Supreme Court opinions, lends great importance to the examination of lower court opinions, as lower court judges constitute the chief interpreting body after a Supreme court ruling is handed down. And the various ways in which they choose to understand and interpret a higher court opinion can lead to different ways of social welfare redistribution. The distinctive ways of judicial interpretations, in turn, may result in numerous degrees of agency responsiveness to these court decisions. Before reviewing lower court opinion-writing regarding state-level preference programs in public contracting, it is important to first revisit the landmark Supreme Court decision in *J. A. Croson Co. v. City of Richmond* (1989)[88], and the new strict scrutiny requirement that this ruling has since imposed on state and local preferential contracting programs.

The city of Richmond's race-based contracting plan was challenged by white plaintiffs, and struck down by the Supreme Court mainly because the city relied heavily

[87] 410 U.S. 113
[88] 488 U.S. 469

upon evidence of gross disparity between the percentage of minority population in Richmond (50%) and the proportion of city contract awards to minority firms (0.7%). In the majority opinion, Justice Sandra O'Connor argued,

> "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. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[89]

This landmark decision led to the emergence of disparity studies at state and local government entities. However, it did not prescribe exactly what kinds of analytical procedures would suffice to produce evidence of "significant statistical disparity". Nor did it specify how narrowly focused a racial preference program should be, in order to survive the narrow-tailoring requirement, the second prong of a strict scrutiny test. The Court cautioned that low minority participation rates in public works, and low minority membership rates in trade organizations along could be the effects of "past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices"[90], and could not serve as strong evidence to "establish a prima facie case of discrimination"[91].

The majority opinion briefly mentioned some race-neutral options to replace race-conscious overutilization, such as "simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of

[89] Ibid, at 509
[90] Ibid, at 503
[91] Ibid, at 503

all races"[92], and yet did not address to what extent a state or local preference program should implement such alternative measures. If a public agency ascertains no significant evidence of racial disparity, is the race-based contracting plan to be entirely substituted by race-neutral solutions? While this landmark ruling has since subjected the most stringent level of judicial review to all future state and local preference programs, many detailed questions are left to the lower courts to be further addressed when such opportunities arise. Now, we turn to some major state and federal appeals court opinions in an effort to examine their interpretations of *Croson*, and how these interpretations may have communicated to state transportation agencies the constitutional requirements on affirmative action programs such as the DBE plans.

In terms of general understandings of the gist of the Supreme Court jurisprudence of affirmative action, lower court opinions typically include a reiteration of the potential dangers of government-sponsored racial classifications. In *Builders Association of Greater Chicago v. City of Chicago* (2003), for example, the district court concluded that "Racial and ethnic classifications remain highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Race and ethnicity do matter--but remedies must be more akin to a laser beam than a baseball bat. The equal protection clause means what it says, we are one nation, indivisible"[93], and that one of the ever-lasting consequences of *Croson* was "a greatly increased reliance on econometrics and regression analysis, coupled with anecdotal evidence, to justify set-aside programs,

[92] Ibid, at 509-510
[93] 2003 U.S. Dist. LEXIS 23287, at 742

despite, in many cases, the paucity of reliable, relevant data bases."[94] In *Rothe Development Corporation v. Department of Defense* (2008), nevertheless, the federal circuit recognized that there was no uniform standard to be employed by courts in assessment of the quality of disparity studies a public agency had conducted for justifying a race-based contracting program, that "there is no precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark. Rather, the sufficiency of a government's findings of discrimination in a local industry, or for that matter in a state-wide or nationwide industry, must be evaluated on a case-by-case basis."[95]

7.321 Evidence of Disparity and Discrimination

Narrow focus of a preference program is typically achieved in two ways. First, the program must be justified by clear and strong evidence of racial disparities in the industry, the evidence being primarily quantitative, and sometimes coupled with qualitative anecdotal evidence as well. As the *Croson* opinion provides no blanket rule as to what kinds of disparity studies would survive strict scrutiny judicial review, it is usually up to lower courts to interpret the meaning of what may constitute as "significant statistical disparity", and to examine the actual evidence submitted by public agencies. Among the following cases that have invalidated a city or state's preferential contracting plans, the judicial opinions vary in terms of clarity and the amount of guidance provided to procurement and contracting officers.

[94] Ibid, at 728
[95] 545 F.3d 1023, at 1049

In *C&C Construction, Inc. v. Sacramento Municipal Utility District* (2004), a court of appeal in California ordered that even if evidence of statistical disparities were strong enough to justify current race-conscious efforts, "without a federal law or regulation that requires a race-based program, there is no way to determine whether a simple showing of a disparity, which normally only raises an inference of discrimination, is a sufficient factual predicate to justify a race-based program."[96] This ruling is straightforward, and would impose minimal costs upon an agency, if the agency sees to it that a summary of federal laws and regulations related to affirmative action precedes the presentation of actual statistical evidence.

In *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, Florida* (2004)[97], a U.S. district court offered more concrete explanations as to under what circumstances a disparity study would fail the strict scrutiny review. According to the official opinion, the Miami County's preference program relied on unreliable market survey data, and consequently did not accurately measure the geographic and product markets--key steps in determining the baseline race-based contracting goal--and compromised the validity of the county's disparity study. The court's order that "questions in a survey must be clear, precise and unbiased" might not have given clear directions to government officials on the kinds of survey designs scientific enough to yield more reliable data regarding the size and scope of the geographic and product market. And agencies that have strong intentions to implement defensible preference

[96] 2004 Cal. App. LEXIS 1529, at 732
[97] 2004 U.S. Dist. LEXIS 17197

programs may have a higher tendency to invest extra resources in the production of quality disparity studies, oftentimes with the help of outside experts.

In comparison, two federal courts of appeals decisions shed more light on what makes evidence of statistical disparities more significant. In *Western States Paving Co., Inc. v. Washington State Department of Transportation* (2005), the ninth circuit court judges argued,

> "The only figure upon which Washington can plausibly rely to demonstrate discrimination is the disparity between the proportion of DBE firms in the state (11.7%) and the percentage of contracting funds awarded to DBEs on race-neutral contracts (9%). This oversimplified statistical evidence is entitled to little weight, however, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work. Indeed, the fact that DBEs constitute 11.7% of the Washington market does not establish that they are able to perform 11.7% of the work."[98]

In *Rothe v. DOD* (2008), the Department of Defense' race-based procurement and contracting plan did rely on studies that took into account relative capacity of DBE firms, and ensured that "each minority-owned business in the studies met a capacity threshold--i.e., had the capacity to bid for and to complete any one contract". The ninth circuit went further to argue that such a study yet still failed to "account for the relative capacities of businesses to bid for more than one contract at a time"[99], and therefore could not serve as the basis of a narrowly-tailored plan. These two federal court opinions presented legal reasoning and explanations with relative clarity, while also raised additional requirements about the quality of disparity studies sufficient to reach the *Croson* benchmark.

[98] 407 F.3d 983, at 1000
[99] 545 F.3d 1023, at 1044

In *Rothe*, the court maintained that "where the calculated disparity ratios are low enough, we do not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. And we recognize that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. But we hold that the defects we have noted detract dramatically from the probative value of these six studies, and, in conjunction with their limited geographic coverage, render the studies insufficient to form the statistical core of the 'strong basis in evidence' required to uphold the statute."[100] To what extent, then, would anecdotal evidence be considered as significant enough to support the use of race as a factor in awarding public contracts?

In *Rothe*, the judges simply mentioned that during the litigations, the defendant DOD never "cited to a single instance of alleged discrimination by DOD in the course of awarding a prime contract, nor to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract."[101] In the case of the Washington state DOT, the agency presented three formal complaints indicating discriminatory barriers in the state contracting process. But "such claims of general societal discrimination, and even generalized assertions about discrimination in an entire industry", as the court ruled, "cannot be used to justify race-conscious remedial measures"[102]. In terms of the sheer quantity and validity of anecdotal accounts that

[100] Ibid, at 1044
[101] Ibid, at 1048
[102] 407 F.3d 983, at 1002

complement statistical evidence, judicial opinions up to 2010 did not provide permissible examples that agency officials could easily refer to.

7.322 Race-Neutral Alternatives

A second way in which narrow focus of a preference program can be achieved is the installment of race-neutral measures. Lower court cases between 2003 and 2010 that ultimately invalidated a state or local race-based contracting program generally submitted opinions that echoed the Supreme Court order in *United States v. Paradise* (1987), an earlier important ruling regarding the constitutional boundaries of such programs, that narrowly tailored programs should at least be able to address "the efficacy of alternative remedies; the flexibility and duration of the relief"[103]. *Coral Construction, Inc. v. City and County of San Francisco* (2010), *Hershell Gill v. Miami* (2004), and *Builders Association v. Chicago* (2003) were some of the cases in which judges came to strike down a preference plan partly due to the lack of demonstrated good faith efforts, on the parts of government entities, in exploring race-neutral alternatives. "Goals do not directly impact difficulties in accessing credit. A set-aside does not address discriminatory loan denials or higher interest rates. But other race-neutral means are available to do so."[104] Whereas *Florida A.G.C. Council, Inc. v. The State of Florida* (2004) listed more straightforward examples of legally permissible options, such as "simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for

[103] 480 U.S. 149, at 171
[104] 2003 U.S. Dist. LEXIS 23287, at 741

disadvantaged entrepreneurs of all races which would open the public contracting market to all those who have suffered the effects of past discrimination"[105].

Generally speaking, in this study, judicial review language may help us further understand the state DOTs' discretionary decision-making in response to courts. Opinions that are able to communicate clearly the expectations toward public contracting officers about the efforts necessary to narrowly tailor a program, may be more likely to facilitate bureaucratic responsiveness. Sometimes the differences in opinions among judges are outstanding to the point where a basic agreement cannot be reached, leading to vague and ambiguous final opinions or remand to a lower court for further review.

In addition to textual analysis of judicial opinions, the study of the impact of judicial review on agency behavior from a communications perspective sometimes also draws insights from voting records for a case. Vote unanimity communicates the strength of a court's opinion and legal arguments, whereas a lack of consensus among the judges or justices signals differences in judicial attitudes and ideologies, and uncertainty over the way a case shall be decided. Dissenting opinions are not uncommon these years. More controversial policy areas, such as affirmative action, are more likely to divide the court and elicit dissenting voices from judges who do not share the same viewpoints with the majority of the court, and believe it necessary to submit their own, and inform the legal community and the public of a nonminority but equally valid viewpoint.

Going back to *Croson* (1989), three liberal justices on the Supreme Court dissented from Justice O'Connor's majority opinion. In the dissenting opinion written by John

[105] 2004 U.S. Dist. LEXIS 1695, at 1315

Marshall Harlan, he considered the simple statistical disparity between the availability of minority population (50%) and their participation rate in city contracts (0.7%) as sufficiently telling evidence of the gross racial gaps in public contract awards that could have justified a racial preferential plan, contrary to how Justice O'Connor evaluated the statistical evidence. Justice Marshall went further to argue that to uphold the city's plan would have been in line with the precedent set by the Supreme Court ruling in *Fullilove v. Klutznick* (1980), an earlier case that reviewed the constitutionality of a race-based set-aside program in public works. The *Fullilove* opinion specified, as quoted by Justice Marshall in his dissent in *Croson*, "Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, … such programs should not be subjected to conventional 'strict scrutiny'--scrutiny that is strict in theory, but fatal in fact"[106].

As Justice Rehnquist put it, the diversity of opinions nowadays made the court as if it was "a virtual tower of Babel from which no definitive principles can clearly be drawn"[107]. The publication of both concurring and dissenting opinions that follow a majority or plurality opinion may decrease the possibility of consistent interpretations by lower court members, and is likely to cause confusion and disincentivize agency decision-makers from responding to court decisions in a prompt manner.

[106] 448 U.S., at 518-519
[107] Dissenting in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), at 569

7.33 Organizational Theory

Last but not least, judicial impact on the bureaucracy may be mediated by a variety of environmental factors. The political and socio-economic environment in a state can remarkably shape the degree of agency responsiveness to a court ruling, given the inherent organizational limitations of the judicial branch. In *The Hollow Hope: Can Courts Bring About Social Change?* (2008), Gerald Rosenberg critiques the dynamic court view which places courts at the center of dramatic social transformations, and presents numerous empirical evidence to support the constrained court argument, which regards judicial decisions primarily as a catalyst for gradual social change over the years.

The constrained court view holds that judicial impact on the bureaucracy is conditioned by the institutional constraints of courts, as judicial rulings are not self-executing. When the constituents of bureaucratic agencies, as well as their political principals in the legislative and the executive branches, have policy preferences and attitudes that are more or less aligned with the jurisprudence of a court, judicial decisions are more likely to be accepted and implemented by agency decision-makers. By contrast, if the political elites and the mass public have yet demonstrated substantial support, it may be much more challenging for the judicial branch to singlehandedly bring about immediate changes in bureaucratic behavior. In short, advocates of this view assert that the predominant role of courts in the political process resembles a catalyst, inspiring social movements, mobilizing interest groups, and facilitating political actions by other government entities.

Acceptance of, and response to, court activities at the individual level can be influenced by several psychological factors, such as perceptions of the legitimacy of the court in adjudicating the matter at hand, perceptions of the societal consequences of a ruling, and perceptions of the impact of the decision on the individual's everyday life. Yet above all, a most fundamental psychological dimension tends to be one's prior attitudes (Canon and Johnson 1999). Empirical studies of agency discretion in reaction to federal and state court mandates on racial desegregation, abortion and gay rights, suggest that compliance with judicial decisions on controversial social issues often varies across communities of different preferences and beliefs. Judicial sanctions of same-sex marriage are found to have been more readily accepted and implemented in ideologically liberal states. The impact of the desegregation ruling of *Brown v. Board of Education* in the 1950s remained limited in southern states, until the passage of the Civil Rights Act by Congress and the issuance of anti-discrimination presidential executive orders a decade later (Rosenberg 2008).

In this case, one way of gauging the attitudes of elected officials and the electorate towards race-based affirmative action programs is an examination of the state-level ballot initiatives that are aimed at ending government preferential treatment on the basis of race. In the wake of the landmark Supreme Court ruling in *Croson* (1989), Oregon[108] and

[108] Oregon Measure (1994)—Amends Constitution: Guarantees Equal Protection: Lists Prohibited Grounds of Discrimination (Yes votes: 43.3%)
Summary: This measure would add a new section to the Oregon Constitution's Bill of Rights. This new section would provide: a) The equal protection of the laws shall not be denied or abridged by any public entity in this state on account of race, color, religion, gender, age or national origin; b) The state shall have the power to enforce by appropriate legislation the provisions of this section

Maine[109] were among the first to introduce, though both failed, initiatives between 1994 and 1995. California Proposition 209 was the first successful attempt to dismantle affirmative action in the public sector. Otherwise known as the California Civil Rights Initiative, this measure amended the state constitution by enforcing entirely race-neutral efforts on the constitutional basis of equal protection[110]. Up to 2012, similar measures prohibiting states from employing government-sponsored racial classifications, some of which narrowly defeated, occurred in Colorado[111], Washington[112], Michigan[113], Nebraska[114], Arizona[115], and Oklahoma[116]. Texas[117], Florida[118] and New Hampshire[119] also eliminated preference state contracting, employment and college admissions through house bills and executive orders. Such examples of affirmative action retrenchment signal

[109] Maine State Question (1995)—Limiting Protected Class (Yes votes: 46.7%)
"Do you favor the changes in Maine law limiting protected classifications in future state and local laws to race, color, sex, physical or mental disability, religion, age, ancestry, national origin, familial status, and marital status, and repealing existing laws which expand those classifications?"

[110] California Proposition 209: Prohibition against Discrimination or Preferential Treatment by State and Other Public Entities (1996) (Yes votes: 54.6%)
"a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting … h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section."
[111] Colorado Amendment 46: Discrimination and Preferential Treatment by Governments (2008) (Yes votes: 49.2%)
[112] Washington Initiative 200: Employment Discrimination (1998) (Yes votes: 58.2%)
[113] Michigan Proposal 06-2: A Proposal to Amend the State Constitution to Ban Affirmative Action Programs that Give Preferential Treatment to Groups or Individuals Based on Their Race, Gender, Color, Ethnicity or National Origin for Public Employment, Education or Contracting Purposes (2006) (Yes votes: 57.9%)
[114] Nebraska Initiative 424: Affirmative Action Ban (2008) (Yes votes: 57.5%)
[115] Arizona Proposition 107: Preferential Treatment or Discrimination Prohibition (2010) (Yes votes: 59.5%)
[116] Oklahoma State Question 759: Affirmative Action (2012) (Yes votes: 59.2%)
[117] Texas House Bill 588: "10 Percent Plan" (1997)
[118] Florida Executive Order 99-281: "One Florida" (1999)
[119] New Hampshire House Bill 0623 (2011)

lessened support for race-based preference programs in these states. Nonetheless, more than half of the states today do not have comprehensive anti-affirmative action ballot initiatives such as the California Proposition 209. As mentioned in the federal empirical chapter, up to 70% of voters nationwide do support general affirmative action measures, which may help us further understand the lack of agency responsiveness to judicial review against preferential contracting programs.

7.4 Conclusion

In conclusion, this project contributes to current literature on affirmative action. The public sector introduces and implements race-based affirmative action programs and plans in three major spheres--university admissions, employment, and government procurement and contracting. Numerous studies have delved into the history and development of affirmative action in the first two areas. However, relatively little is known about the third. As a major and common type of government agency activity, preferential contracting programs can lead to substantial redistribution of benefits and business opportunities, and can play a significant role in creating a level playing field for historically disadvantaged groups in terms of increased access to and participation in government-let contracts. This study adds to current knowledge about the goal-setting and actual dollar commitments in government-sponsored affirmative action programs in public procurement and contracting at both state and national level.

In addition, this project also improves our understanding of the impact of courts on bureaucratic behavior. Open-systems theory is often used to gauge agency responsiveness

to the political and economic environment in which bureaucracies operate. We know less about the impact of judicial review and decisions on bureaucratic decision-making, especially at the state level. The empirical chapters in this study provide further insights into the extent to which the legal environment explains variations in agency programmatic decision-making. Previous literature suggests several mediating factors in agency-court interactions. From utilitarian, communications and environmental perspectives, this study also analyzes different ways of understanding the lack of judicial impact.

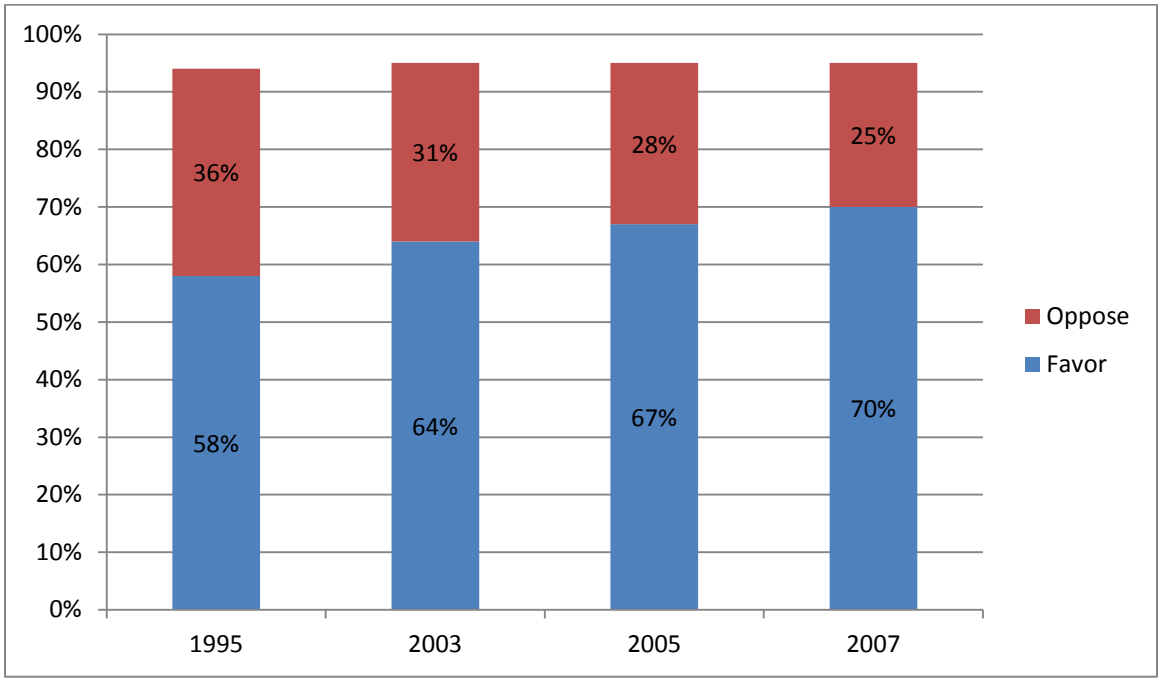
While this dissertation project hopes to contribute to our understandings of affirmative action and agency responsiveness to courts, data availability has limited the extent of this study. The state empirical chapter relies on original DBE program data submitted by state transportation agencies between 2003 and 2007 to the Federal Highway Administration, one of the three major departments within the U. S. Department of Transportation. Without time and budgetary constraints, researchers will be able to collect more historical data from all three DOT departments via Freedom of Information requests, and to examine the long-term impact of landmark court decisions on agency programmatic decisions over time.

In addition, my conclusion of limited evidence supporting the judicial impact hypothesis was based on the understanding that judicial impact, in this study, was measured as when affirmative action program goals and contract dollars for minority firms changed in years with judicial review. While this may be one way to test judicial impact, alternative ways of gauging judicial impact could potentially uncover evidence of

agency responsiveness to courts, such as changing the process in which goals are set, improving methodologies to assess evidence of disparities in public contract participation, and developing supplemental assistance programs to facilitate the growth of minority-owned firms. Qualitative research methods such as survey instruments may serve as tools to help researchers further examine bureaucratic decision-makers' incentives and disincentives to respond to the judicial branch, how litigation risks are assessed, and ways in which agency officials respond to the shifting legal environment.

Figure 7.23: Public Support for Affirmative Action Programs, 1995 to 2007[120]

Survey statement: Affirmative Action programs designed to help blacks, women and other minorities get better jobs and education…



[120] http://www.pewresearch.org/2009/06/02/public-backs-affirmative-action-but-not-minority-preferences/

Figure 7.31: Different Methods of Anecdotal Evidence Collection by State DOTs

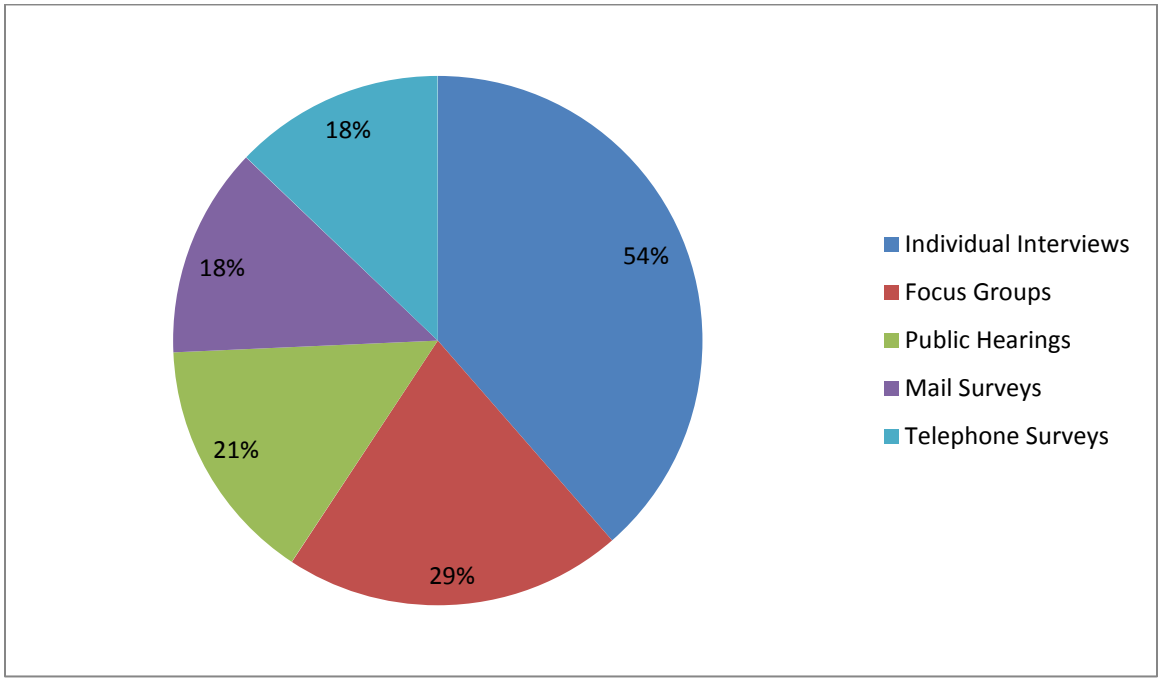


Table 7.23: Public Support with Racial and Partisan Breakdown[121]

Survey statement: We should make every effort to improve the positions of blacks and minorities, even if it means giving preferential treatment.

	Agree	Disagree	N
Total	31%	65%	1492
White	22%	76%	1117
Black	58%	36%	126
Hispanic	53%	35%	137
Dem/Dem Leaner	42%	53%	738
White	31%	66%	481
Black	60%	34%	104
Hispanic	57%	31%	95
Rep/Rep Leaner	16%	81%	584
White	12%	85%	513

[121] Ibid.

Table 7.311: Examples of Failed Preferential Contracting Plans

Cases	Reason for Failure
Associated General Contractors of Connecticut v. City of New Haven (D. Conn. 1992)	No disparity study
Associated General Contractors of America v. City of Columbus (S. D. Ohio 1996)	Incomplete disparity study
Associated General Contractors of Ohio v. Drabik (S. D. Ohio 1999)	Outdated disparity study
W. H. Scott Construction Company v. City of Jackson, MS (5th Cir. 1999)	Incomplete disparity study
Associated Utility Contractors of Maryland v. Mayor and City Council of Baltimore (D. Md. 2000)	Outdated disparity study
Builders Association of Greater Chicago v. County of Cook (7th Cir. 2001)	No disparity study
Thomson Building Wrecking Company v. Augusta, GA (S. D. Ga. 2007)	Outdated disparity study

Table 7.312: Organizational Challenges to State DBE Programs[122]

Administrative Challenges (budget constraints, lack of staff)
Not a problem (3%); Minor problem (18%); Problem (21%); Significant problem (31%); Severe problem (23%); Don't know (5%)
Internal agency challenges (lack of support or attention from upper management, bureaucracy, agency reluctance to alter method of procuring contracts or to unbundle contracts planned in advance)
Not a problem (31%); Minor problem (21%); Problem (18%); Significant problem (13%); Severe problem (8%); Don't know (10%)

[122] National Cooperative Highway Research Program (NCHRP) Synthesis 448 "State Department of Transportation Small Business Programs", Transportation Research Board of the National Academies, Washington, DC, 2012

Appendix I: CFO Federal Agencies

Agency for International Development (USAID)
Department of Agriculture (USDA)
Department of Commerce (DOC)
Department of Defense (DOD)
Department of Education (Education)
Department of Energy (DOE)
Department of Health and Human Services (HHS)
Department of Homeland Security (DHS)
Department of Housing and Urban Development (HUD)
Department of the Interior (DOI)
Department of Justice (DOJ)
Department of Labor (DOL)
Department of State (State)
Department of Transportation (DOT)
Department of the Treasury (Treasury)
Department of Veterans Affairs (VA)
Environmental Protection Agency (EPA)
General Services Administration (GSA)
National Aeronautics and Space Administration (NASA)
National Science Foundation (NSF)
Nuclear Regulatory Commission (NRC)
Office of Personnel Management (OPM)
Small Business Administration (SBA)
Social Security Administration (SSA)

Appendix II: Court Cases in Federal Empirical Chapter

Rothe Development Corporation v. DOD Defendant: DOD Circuit Court ’01: Remand; District Court ’04: Partially invalidated plan; Circuit Court ’05: Remand; District Court ’07: Upheld plan
Adarand Constructors v. Pena, Department of Transportation Defendant: DOT Supreme Court ’95: Invalidated plan (dissent)
Adarand Constructors v. Slater, Department of Transportation Defendant: DOT Supreme Court ’00: Remand
United Fence & Guard Rail Corp v. Cuomo, Department of Transportation Defendant: State DOT District Court ’91: Upheld plan; Circuit Court ’92: Upheld plan
Western States Paving Co. v. Washington State Department of Transportation Defendant: State DOT Circuit Court ’05: Invalidated plan (dissent)
Northern Contracting Inc. v. State of Illinois DOT Defendant: DOT District Court ’04 & ’05: Overruled; Circuit Court ’07: Upheld plan
Sherbrooke Turf Inc. v. Minnesota DOT Defendant: DOT Circuit Court ’03: Overruled
H. B. Rowe Inc. v. W. Lyndo Tippett et al. (DOT) Defendant: DOT District Court ’07: Dismissed
Western States Paving Co. v. Washington State Department of Transportation Defendant: State DOT Circuit Court ’05: Invalidated plan (dissent)
Dynalantic Corporation v. US DOD Defendant: DOD District Court ’07: Dismissed

Appendix III: Court Cases in State Empirical Chapter

California
C&C Construction Inc. v. Sacramento Municipal Utility District Defendant: Municipal utility district State Court ’04: Invalidated plan (dissent)
Coral Construction Inc. v. City and County of San Francisco Defendant: County State Court ’04: Remand; State Court ’07: Remand (dissent)
Colorado
Concrete Works of Colorado Inc. v. City and County of Denver Defendant: City Circuit Court ’03: Upheld plan
Florida
Hershell Gill Consulting Engineers Inc. v. Miami-Dade County, Florida Defendant: County District Court ’04: Invalidated plan
Florida A.G.C. Council Inc. v. State of Florida Defendant: State District Court ’04: Invalidated plan
Georgia
Thompson Building Wrecking Co. v. City of Augusta, GA Defendant: City District Court ’07: Invalidated plan
Illinois
Builders Association of Greater Chicago v. County of Cook Defendant: City Circuit Court ’01: Invalidated plan
Builders Association of Greater Chicago v. City of Chicago Defendant: City District Court ’03: Invalidated plan
Northern Contracting Inc. v. State of Illinois DOT Defendant: DOT District Court ’01: Overruled; District Court ’04 & ’05: Overruled; Circuit Court ’07: Upheld plan
Kansas
Klaver Construction Inc. v. Kansas DOT & U.S. DOT Defendant: DOT

District Court ’01: Overruled; District Court ’02: Dismissed
Maryland
Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore Defendant: City District Court ’02: Dismissed
Minnesota
Sherbrooke Turf Inc. v. Minnesota DOT Defendant: DOT District Court ’01: Overruled; Circuit Court ’03: Overruled
North Carolina
H. B. Rowe Inc. v. W. Lyndo Tippett et al. (DOT) Defendant: DOT District Court ’07: Dismissed
Oklahoma
Kornhass Construction Inc. & Daco Construction Co. v. State of Oklahoma, Dept. of Central Services Defendant: State District Court ’01: Invalidated plan
Tennessee
West Tennessee Chapter of Associated Builders and Contractors Inc. v. City of Memphis Defendant: City District Court ’02: Dismissed; District Court ’04: Dismissed
Texas
Rothe Development Corporation v. US DOD & Dept. of Air Force Defendant: DOD Circuit Court ’01: Remand; District Court ’04: Partially invalidated plan; Circuit Court ’05: Remand; District Court ’07: Upheld plan
Washington
Western States Paving Co. v. Washington State Department of Transportation Defendant: State DOT Circuit Court ’05: Invalidated plan (dissent)
DC
Dynalantic Corporation v. US DOD Defendant: DOD District Court ’07: Dismissed

Appendix IV: State Transportation Agency Disparity Studies

State	Consultant	Type of Study	Year Completed
AK	D. Wilson Consulting	Disparity	2008
AL	N/A	N/A	N/A
AR	N/A	N/A	N/A
AZ	MGT of America	Disparity	2009
CA	BBC Research & Consulting	Disparity	2007
CO	MGT of America & D. Wilson Consulting	Disparity	2001 & ongoing
CT	N/A	N/A	N/A
DC	N/A	N/A	N/A
DE	N/A	N/A	N/A
FL	MGT of America	Disparity	1999
GA	Boston Research Group	Disparity	2005
HI	NERA Economic Consulting	Disparity	ongoing
IA	N/A	N/A	N/A
ID	BBC Research & Consulting	Disparity	2007
IL	NERA Economic Consulting	Availability	2004
IN	N/A	N/A	N/A
KS	N/A	N/A	N/A
KY	N/A	N/A	N/A
LA	D.J. Miller & Associates; Lunn/Perry	Disparity	1991
MA	N/A	N/A	N/A
MD	NERA Economic Consulting	Disparity	2006
ME	N/A	N/A	N/A
MI	N/A	N/A	N/A
MN	NERA Economic Consulting	Availability	2005
MO	NERA Economic Consulting	Availability	2004
MS	N/A	N/A	N/A
MT	D. Wilson Consulting	Disparity	ongoing
NC	EuQuant	Disparity	ongoing
ND	MGT of America	Disparity	2004
NE	MGT of America	Availability	2000
NH	N/A	N/A	N/A
NJ	Mason Tillman Associates	Disparity	2005
NM	BBC Research & Consulting	Disparity	1995
NV	BBC Research & Consulting	Disparity	2007

NY	NERA Economic Consulting	Disparity	ongoing
OH	D.J. Miller & Associates; Mason Tillman Associates	Disparity	2001
OK	N/A	N/A	N/A
OR	MGT of America	Disparity	2007
PA	N/A	N/A	N/A
RI	N/A	N/A	N/A
SC	MGT of America	Disparity	1995
SD	N/A	N/A	N/A
TN	Mason Tillman Associates	Disparity	2007
TX	N/A	N/A	N/A
UT	N/A	N/A	N/A
VA	MGT of America	Disparity	2004
VT	N/A	N/A	N/A
WA	NERA Economic Consulting	Availability	2006
WI	N/A	N/A	N/A
WV	N/A	N/A	N/A
WY	N/A	N/A	N/A

Source: 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, Washington, DC, 2010.

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