



The Evolution of Affirmative Action

An Executive Summary of the Research Series:
Best Practices, Imperfections, and Challenges in State Inclusive
Business Programs

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INSIGHT

CENTER FOR COMMUNITY
ECONOMIC DEVELOPMENT

HELPING PEOPLE AND COMMUNITIES BECOME, AND REMAIN, ECONOMICALLY SECURE

Overview

Affirmative action plans seek to put in place voluntary and mandatory efforts by federal, state and local government, private employers, and schools to combat discrimination and foster fair hiring and advancement of qualified individuals. The original intention of affirmative action policies was to address the effects of past discrimination, and to encourage public institutions to be more representative of the population.

Based on that intent, the federal government set the stage for affirmative action in contracting with the passage of the Small Business Act in 1958 and the creation of the Office of Minority Business Enterprise in 1969.¹ States began to follow suit, starting with Mississippi in 1972, Connecticut in 1973, and at least 18 additional states and the District of Columbia between 1973 and 1990,² as well as many local governments. According to federal procurement data, affirmative action increased federal procurement from minority- and women-owned businesses.

Despite the fact that affirmative procurement programs do not involve quotas and rarely involve set-asides and preferences, some view affirmative action as “reverse discrimination” and “unwarranted preferences.”

Opposition to affirmative action has led to many legal challenges to these programs, beginning with the U.S. Supreme Court’s *City of Richmond vs. J.A. Croson 1989 decision*³, which required states and local governments to utilize more rigorous evidence of disparities to justify the need for their programs. Soon thereafter, Michigan and Oregon ended their affirmative procurement programs.

The *Croson* decision led to additional legal challenges, among them the *Adarand* decision in 1995⁴, which obligated minority- and women-owned businesses to demonstrate specific evidence of disadvantage. Besides legal challenges, programs began to face political challenges with the 1996 approval of Proposition 209 in California.⁵ This ballot measure ended preferences based on race or gender in higher education, employment, and public contracting, demonstrating that the legal and political challenges to affirmative action in contracting are related to similar challenges faced by preference programs in higher education and employment.

How has affirmative action in state purchasing evolved in response to these challenges? To answer that question, the Insight Center for Community Economic Development conducted a scan of policies and programs in all 50 state governments and the District of Columbia. This scan focused on what we call ‘inclusive business programs’ – small business finance, business development services, and procurement from minority- or women-owned businesses (MBEs and WBEs, respectively).

Between 1996 and 2007, legal challenges continued in numerous states, including Colorado, Ohio, Oklahoma, New Jersey, Minnesota, Nebraska, Missouri, and Washington. Political challenges continued as well, with the passage of ballot measures in Washington and Michigan, similar to Proposition 209.

Yet, surprisingly, more states have initiated or enhanced their inclusive business programs since 1996, than states which have ended or reduced such programs. Fourteen states have enhanced their inclusive business programs since 2003, although due to the legal and political challenges, some have limited their programs to targeted vendor outreach and voluntary procurement goals.

This study tells the story of 'inclusive business programs' as they have evolved across the country. This research includes the following major findings:

1. More and more policy-makers are seeing the need to have the increasing diversity of their states reflected in the pool of suppliers and contractors to their state. In 2003, Arizona, Ohio, and Tennessee introduced initiatives to create equal opportunity for MBEs and WBEs in state procurement, followed by Colorado, Virginia, and nine other states between 2004 and 2006. This reversed the 1996 to 2001 trend, when eight states curtailed affirmative action in contracting or other inclusive business programs.
2. States have used a variety of approaches to respond to ballot initiatives and legal challenges that threaten affirmative action in contracting:
 - More rigorous disparity studies, which show differences in the utilization of available MBEs and WBEs compared to other firms
 - Assertive outreach programs, along with electronic procurement, which allows all interested firms to receive information regarding potential contract and sub-contracting opportunities
3. For many states, the federally mandated disadvantaged-business enterprise (DBE) program, attached to federal Department of Transportation (USDOT) funds to states, is the only inclusive business program. This highlights the importance of the USDOT DBE programs at the state level.
4. State affirmative procurement policies do matter. After ballot initiatives in California and Washington, which effectively curtailed affirmative procurement, both MBEs and WBEs faced lower than expected business growth rates.
5. Ending affirmative action corresponded with increased self-employment rates among women and all minority groups in California and among white, African American, and Latina women in Washington. This may be a result of fewer available jobs for women and minorities, causing many to turn to self-employment.

Finding One

Many states have initiated inclusive business programs since 2003.

Fourteen states either initiated or enhanced their inclusive business programs from 2003 to 2006, compared to seven states which ended or reduced their programs. The impetus for the new or enhanced programs has come from both legislative bodies and executive leadership who recognize the importance of inclusive business development to the overall economic strength of their state. Governors from both major parties have led efforts to enhance inclusive business programs in their state, including Republican governors Jeb Bush (former, FL), Robert Ehrlich (former, MD), and Mitch Daniels (IN) and Democratic governors Bill Ritter (CO) and Tim Kaine (VA).

On the other hand, as the state policy trend chart demonstrates (Fig. 1, p.10), Missouri and Michigan, with the November 2006 ballot initiative, are two of the seven states to curtail inclusive business programs since 2003. Missouri was responding to a legal challenge but later adopted a targeted vendor outreach program with voluntary procurement goals, as an alternative. In addition, several western states dropped mandatory DBE participation⁶ in transportation construction projects, in response to a court decision⁷. Washington later reinstated its program following a rigorous disparity study. Likewise, California, Idaho, Nevada, and Oregon have completed or will soon complete disparity studies and announce new DBE programs.

Finding Two

States responded in a variety of ways to legal challenges and ballot initiatives that aimed at limiting affirmative procurement programs.

There have been many legal challenges and ballot initiatives that have aimed at curtailing affirmative procurement programs in the last twelve years. In addition to challenges to state-administered USDOT DBE programs, such as the 1995 *Adarand*⁸ case in Colorado, there have been legal challenges to broader state programs in Ohio, Minnesota, Oklahoma, Nebraska, New Jersey, and Missouri. Ballot initiatives partially ended both state and local affirmative procurement in California (1996), Washington (1998), and Michigan (2006).

There have been four main responses to the legal challenges and ballot initiatives:

1. Undertaking rigorous disparity studies that document differences in utilization of MBEs and WBEs when states use only voluntary measures, leading to race- and gender-conscious procurement goals and programs. These programs use race and gender as one of the determinants in the selection of contractors or suppliers in the provision of services. Examples of this approach include Illinois' IDOT DBE program, the state-wide program in Maryland, and the county-wide program in Denver.
2. At the other extreme, a few states have done little to respond to the legal challenges or ballot initiatives, including Louisiana, Oklahoma, and California. In fact, California dismantled much more than it was required to do under Proposition 209, which voters passed in 1996. Proposition 209 required that California remove its provision for mandatory participation of MBEs (15%) and WBEs (5%) in public contracts. However, the state voluntarily removed many other aspects of its program that it was not required to, including certification of M/WBEs, tracking the procurement dollars to M/WBEs, and some of its targeted outreach to M/WBEs.

3. A third approach is a program based on proactive vendor outreach and voluntary procurement goals to M/WBEs. Many states are following the lead of the private sector to create 'supplier diversity' programs. Supplier diversity refers to efforts to diversify the pool of suppliers and contractors to the state as well as to ensure them equal procurement opportunity. Florida began the first state supplier diversity effort with a proactive vendor outreach and networking initiative called 'One Florida' in 2000. State supplier diversity efforts are greatly aided by rapid advances in technology and communications, such as electronic bidding and notification, electronic procurement tracking, and integrated, open-network databases. They also include M/WBE vendor outreach events and supplier diversity plans, led by a supplier diversity coordinator, in each state agency and state university.



"Our long-term growth model is predicated on business with both the federal government as well as state government. We have grown from 12 employees a year ago to 23 today, due in part to the business we have gained as a result of MBE and 8(a) opportunities."

"The more that smaller diverse businesses can compete for opportunities and be awarded work, the more growth they bring in terms of employment and subsequent tax base. It is a 'trickle-down' effect with direct benefit to communities."

"We hope these opportunities continue."

Nancy Fitzgerald

Owner
CFM Engineering, Maryland

Other states that have initiated supplier diversity programs include Indiana, Delaware, Virginia, Washington and Missouri. A vulnerability of race- and gender-neutral supplier diversity programs is that they are especially dependent on the political will of the Governor and executive leadership in each agency.

4. Finally, a few states have combined a race/gender-neutral approach with a race/gender-conscious approach, including Ohio's EDGE program and Minnesota's Targeted Group and Economically Disadvantaged small business program. These states combined a mandatory procurement goal program for all small businesses (including those owned by white-males) in economically depressed areas of the state with a procurement goal program for all M/WBEs throughout the state.

Finding Three

Federally mandated disadvantaged business programs are the only inclusive business program used by many state governments.

One of the main inclusive business programs of many state governments is the US Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) program. States and local governments which receive USDOT funds for construction must have DBE participation in contracts or subcontracts, either on a voluntary or a mandatory basis. USDOT has established a standard definition of DBEs, which primarily consists of minority- or women-owned small businesses. The overall USDOT goal is 10% procurement from DBEs, but state and local recipients of USDOT funds set their own DBE procurement goal, based on the availability of firms in their region.

The USDOT DBE program is important for two reasons:

- For 24 of the 50 states, administration of the USDOT DBE program is their only inclusive business program. This tends to be especially true of smaller states and states with a smaller proportion of non-white population groups.
- Transportation is generally one of the largest expenditure items in state budgets, with a large potential impact on the business development of MBEs and WBEs.

The largest share of US Department of Transportation funds going to states is through the Federal Highway Administration (FHWA). Between \$2.3 and \$2.8 billion in contracts went to DBEs in FY2006 from the Federal Highway Administration (FHWA) funds channeled through state governments. DBEs include small businesses owned by minorities, women, or other

'socially disadvantaged' persons. States vary greatly in their FHWA DBE procurement goals from 4% at the lowest extreme (Alaska) to 24% at the high end (Maryland). States with the highest goal levels, Maryland and Illinois, established those goals based on the availability level of DBEs as determined by rigorous disparity studies (Fig.2).

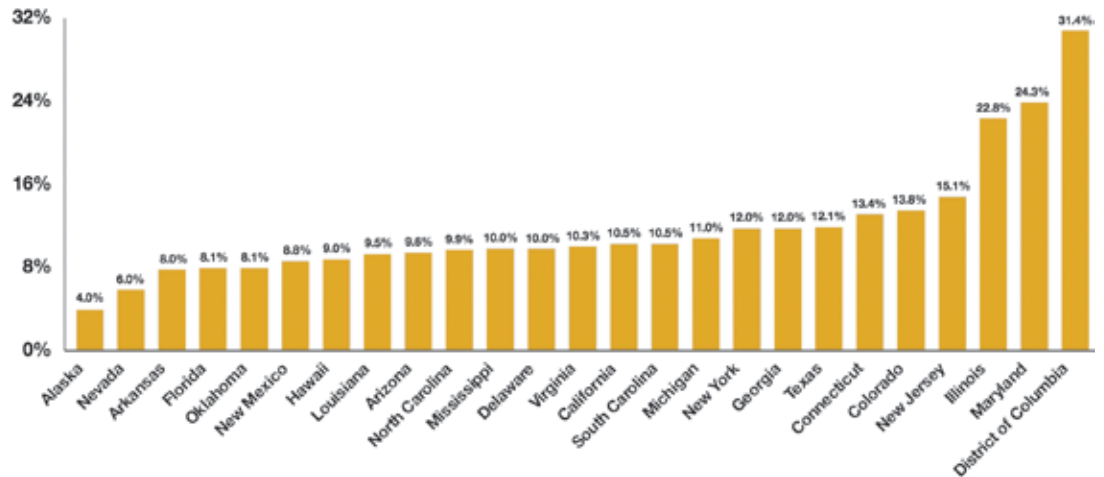
While states must submit their plans, methodology, and goals to USDOT for approval, USDOT monitoring of state DBE programs has been lax. For example, between 2003 and 2006 the FHWA did not compile a list of the goals and actual amount and percentage of DBE procurement for each state.

Several states have had their DBE programs challenged in the courts. The results have generally led states to prepare more sophisticated disparity and availability studies to provide a stronger factual basis for their programs. The biggest challenge to DBE programs was the May 2005 *Western States Paving* decision by the Ninth Circuit Court of Appeals, in which the Washington DBE program was found not to adhere to relevant case law for state and local government. In particular, Washington had not tied its race- and gender-conscious program to direct evidence of discrimination against M/WBEs nor did it prescribe a narrowly tailored remedy to that discrimination.

As a result, Washington and some of the other eight states in the Ninth Circuit had to suspend the race- and gender-conscious portion of their DBE programs, pending updated disparity studies. A 2006 disparity study by Washington did find disparities between the utilization and availability of DBEs, compelling the state to reinstate the race- and gender-conscious portion of its DBE program in October 2006, with a 18.77% DBE goal on FHWA funds.

Fig.2

FY2007 State DBE Goals on federal USDOT highway funds (FHWA)
States with at least 20% non-white population



Note: Alabama is not in the chart as it failed to provide researchers with its DBE goal level.

Finding Four

Ballot initiatives that ended affirmative procurement in California and Washington adversely affected the expected business growth rate of minority- and women-owned businesses.

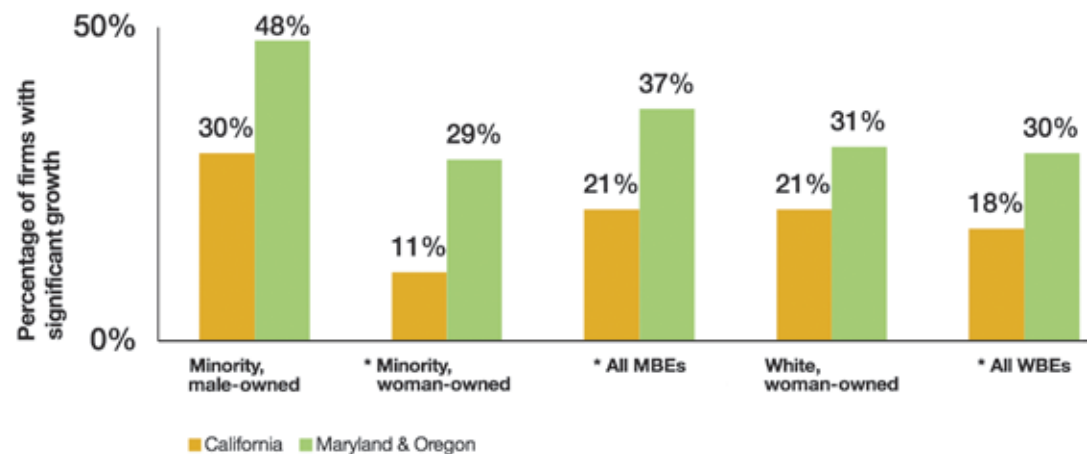
One part of this study analyzed the impact of state affirmative procurement policies on the performance of minority- and women-owned businesses (MBEs and WBEs), including the end of affirmative action policies in California and Washington. By examining business outcomes in five states – California, Florida, Maryland, Oregon, and Washington – we concluded that state procurement policies do have an impact on M/WBEs, especially immediately after a major policy change. The study focused on small businesses with annual sales between \$50,000 and \$10 million.

The study found that:

- Both MBEs and WBEs – especially businesses owned by minority women– were less likely to expand in the years immediately after passage of Proposition 209 in California and Initiative 200 in Washington, compared to MBEs and WBEs in Maryland and Oregon. These are the two states in this analysis that either enhanced or did not change their affirmative procurement policies from 1996 to 2001 (Fig 3.)
- Well-established MBEs and WBEs in Maryland (those that began operations before or during 1992), are in 2007 significantly larger than MBEs and WBEs of a similar-age in the other four states. Maryland is the one state among the five that consistently maintained an affirmative procurement policy.

Fig. 3

Business Growth by MBE and WBE status 1996 to 2001



*The California rate is significantly lower than Maryland and Oregon (combined) at the $p = 0.05$ level. **Note:** Significant business growth is defined by at least a 33% growth in number of employees from 1996 to 2001. The control states, Maryland and Oregon, represent what may be a 'typical' proportion of firms with significant business growth. The macro economic trends of California, Oregon, and Maryland did not differ significantly during this period, demonstrated by white male-owned businesses which grew at a statistically equivalent rate within each of the three states.

Finding Five

The self-employment rate among women and across most minority groups rose after California and Washington curtailed affirmative action in employment and contracting.



“A chain is only as strong as its weakest link, when you strengthen the weakest link you strengthen the whole chain. We all benefit from an educated citizenry and economic development, such as business development, and that is why we have bipartisan support for affirmative action in Indiana. The state’s economic growth is dependent on growth in all parts of the state, including the inner city, suburbs, and rural areas.”

Indiana State Representative William Crawford (1972 – current), Chair of the IN House Ways and Means Committee; long-time advocate for minority- and women-business development.

Indiana’s M/WBE program has been supported by Democratic Governors Bayh, O’Bannon, and Kernan, and current Republican Governor Mitch Daniels.

The passage of Proposition 209 in California and Initiative 2000 in Washington corresponded with a rise in self-employment among most minority groups and white women, when compared to white men. The analysis also took into account the self-employment rate trend over the long-term and among minorities and women in other states. The rise in self-employment was especially acute in the construction sector. Two previous studies have shown a clear decline in employment in the construction industry on the part of women and minorities following Proposition 209 in California.⁹ After Proposition 209, construction and trades companies were no longer required to have a diverse workforce or to enroll women and minorities in apprenticeship programs, unless working on federal contracts. It is possible that this caused some women and minorities to turn to self-employment, contributing to the rise in the self-employment rate.

While this may appear to be a positive outcome on the surface, it is possible that some newly self-employed persons have a lower income than when they were not self-employed. About one out of four new businesses fails within two years of start-up.¹⁰ Women and minorities often have fewer personal and family options for start-up capital and have a more difficult time obtaining start-up business loans than white males.¹¹ In addition, securing construction contracts typically relies on informal social connections more often than in many other industries, which may create an additional hurdle for women and minorities.¹²

Conclusions

Outcomes

Inclusive business practices have made a difference in ensuring that minority- and women-owned businesses (MBEs and WBEs) have the opportunity to grow at a pace similar to white-male-owned businesses. Both MBEs and WBEs in Maryland grew at a faster pace than those in states which had recently eliminated or suspended inclusive business practices, such as California in 1996 and Washington in 1998, while the business growth rate among white-male-owned firms was equal across the three states. When programs in California and Washington ended, MBEs and WBEs saw their growth rate languish and were not able to make up the difference later, increasing the average revenue gap between these firms and white-male-owned firms.

In addition, the end of public affirmative action in California and Washington has increased the self-employment rate for most groups of minorities and women. This may have been caused by curtailed equal employment opportunities, especially in the construction sector.

Practice

State government inclusive business practices are multi-faceted and varied in their implementation. Examples include race and gender-conscious contracting programs, targeted vendor outreach, inclusive business plans and liaisons in each state agency, and targeted small business services and finance.

Disparity or discrimination studies can provide the basis for a race- and gender-conscious goals-based program. Targeted vendor outreach and electronic procurement systems can help eliminate the isolation and lack of business networks that many MBEs and WBEs face. Accountability throughout the state agency structures is also important, such as inclusive business plans and coordinators within each agency and university. Finally, connecting the procurement and vendor outreach efforts with targeted small business services and finance – often done in partnership with the private, academic, and nonprofit sectors – can help take programs to the next level.

The Future

Additional research is needed, such as examining the inclusive business policy trends at the local government level, as well as studying the impact of the implementation of various inclusive business program models. Finally, there is a need to continue the type of disparity studies such as those recently carried out by Maryland, Illinois, Washington, and the City/County of Denver, in order to document the degree of disparity in the utilization of MBEs and WBEs, and to propose policy solutions.

Many Fortune 1000 companies strive to further their competitive advantage by implementing inclusive business practices. States are making internal and external changes to follow suit. Internally, states can connect the dots between their small business finance, small business development, procurement, and vendor outreach programs. Externally, states can deepen partnerships with corporate supplier diversity programs, ethnic and women's chambers of commerce, and nonprofit business and supplier development associations.

The Insight Center for Community Economic Development is a national research, consulting and legal organization dedicated to building economic health and opportunity in vulnerable communities.

We work in collaboration with foundations, nonprofits, educational institutions and businesses to develop, strengthen and promote programs and public policy that:

- Lead to good jobs—jobs that pay enough to support a family, offer benefits and the opportunity to advance
- Strengthen early care and education systems so that children can thrive and parents can work or go to school
- Enable people and communities to build financial and educational assets

Fig. 1

State Policy Trend on Inclusive Business Programs 1996 to 2006



States listed **above** the date indicate actions that enhanced inclusive business programs.
States listed **below** the date indicate actions that diminished inclusive business programs by the state.

Narrative of Changes in Selected State Inclusive Business Programs, 1996-2006

Glossary:

MBE goal: Procurement goal for minority business enterprises

WBE goal: Procurement goal for women business enterprises

DBE goal: For USDOT funds; procurement goal for disadvantaged business enterprises, includes small MBEs and WBEs

Alaska, Nevada, and Oregon 2005:

All three states suspend race- and gender-conscious goals in its DBE programs to comply with *Western States Paving, Inc. vs. Washington DOT* decision of the 9th Circuit Court.

Arizona 2004:

Creates a plan to enhance M/WBE procurement and an electronic vendor directory which includes M/WBE status. It begins to require M/WBE bidders on state contracts under \$50,000.

California 1996:

Voters pass Proposition 209 which eliminated its 15% MBE and 5% WBE goal program on state funding and prevented local governments from having similar programs. **2006:** CALTRANS suspends race- and gender-conscious goals in its DBE programs to comply with *Western States Paving* decision.

Colorado 1996:

As a result of the *Adarand* Supreme Court decision, the CO DOT restricts firms that can certify as DBEs to only those that can certify disadvantage. **2006:** CO attaches mandatory M/WBE goals to state construction spending in Denver, based on city/county disparity study.

Delaware 2000:

Begins supplier diversity efforts and in 2001 begins procurement tracking. In **2003**, EO 52 establishes that any RFP over \$10,000 must be transmitted to M/WBE business development associations.

Florida 2000:

Eliminates its goals-based program, faced with the threat of a ballot initiative. It will be replaced by a supplier diversity program, but in the meantime, M/WBE procurement falls dramatically. **2000:** Republican Governor Jeb Bush announces the creation of the 'One Florida' supplier diversity program, with aggressive targeted outreach, to be led by the former head of a private sector supplier diversity council. After program planning and set-up, the program effectively is initiated in 2001. **2005:** State procurement percentage from certified M/WBEs nearly doubled in 2004-05 from the previous year, rising to 8.5% of total, as the One Florida program continues to gain momentum.

Illinois 2004:

Procurement from M/WBEs drops dramatically in FY2004 despite a strong affirmative action program on paper. **2006:** IDOT completes disparity study that lead to a 22.8% DBE goal on federal highway funds, the second highest rate in U.S.

Indiana 2001:

Creates an M/WBE procurement goals program, based on 1999 Disparity Study. **2003:** Creates an M/WBE advisory commission and a new administrative division to lead its supplier diversity effort. Each state agency is now required to have a supplier diversity plan and coordinator. The newly created division also provides technical assistance to each agency and sets up M/WBE vendor fairs.

Louisiana 1996:

Eliminates its mandatory goals program.

Maryland 2000:

Increases its procurement goal from 14% to 25%, based on a new disparity study. As part of the 25% goal, it establishes a 10% WBE goal and becomes the first state to set a specific African-American-owned business procurement goal of 7%. **2003:** Reorganizes its M/WBE program and institutes uniform procurement data reporting, including payment data. **2006:** MD completes comprehensive disparity study that leads to 24.3% DBE goal, the highest rate in U.S., and continued 25% M/WBE goal on state funds.

Massachusetts 1996:

Governor Weld introduces a goals-based procurement program, with E.O. 390. In **2004**, legislation passes that improves monitoring of its M/WBE program and requires local governments that receive state construction funding to have M/WBE participation goals.

Michigan 2006:

Voters pass Proposal 2, ending local government race- and gender-conscious contracting programs. State policies changed little since the state had no such program prior to Proposal 2.

Minnesota 1998:

Ends part of its formal goals program on state funds after a legal challenge. In 2003, the state's race- and gender-conscious goals for its DOT DBE program are upheld in *Sherbrooke Turf, Inc.* by 8th Circuit Court. Minnesota doubles procurement from M/WBEs from 2003 to **2004**, its largest increase in over 12 years.

Missouri 2004:

Eliminates its 15% M/WBE contract-specific goals program after a legal challenge. In **2005** the state sets up a voluntary supplier diversity program with voluntary goals and targeted outreach; gains momentum in **2006** and **2007**.

New Hampshire 1999:

Ends race- and gender-conscious goals for its DOT DBE program.

New Jersey 2003:

Eliminates its M/WBE goals program due to a lawsuit, replacing it with a 25% small business procurement goal.

North Carolina 1999:

Under EO 150 establishes the Office for Historically Underutilized Businesses (HUBs) and sets specific state HUB procurement goals.

Ohio 1998:

State's 15% MBE contract goal on construction projects is judged unconstitutional and eliminated. The MBE goal for other goods and services is suspended, but then restored in **1999** after successful appeal of a legal ruling. **2003:** The state creates the EDGE program, setting a 5% goal for contracting with EDGE-certified firms—small businesses located in an area with high unemployment or small M/WBEs.

Oklahoma 2001:

Eliminates its 5% M/WBE bid preference program after it unsuccessfully appealed a legal challenge.

Pennsylvania 2004:

Overhauls its M/WBE certification process and requires each state agency to have a supplier diversity plan and coordinator, after an administrative audit.

South Carolina 2006:

Overhauls its M/WBE program with new procedures and tracking measures to ensure implementation.

Tennessee 2004:

Passes legislation that requires all state agencies to implement supplier diversity practices, with assistance and tracking provided by the newly created Office of Diversity Business Enterprise.

Virginia 2006:

Sets up e-procurement system and requires each agency to have voluntary M/WBE sub-goals.

Washington 1998:

Voters pass Initiative 200 which reverses affirmative procurement efforts on the part of a few state agencies as well as local governments. The state begins supplier diversity plans in **2004**, with coordinators in each state agency. M/WBE procurement slowly increases after six years of decline post-I200. **2005:** Washington DOT dismantles the race- and gender-conscious portion of its DBE program on federal transportation funds after the *Western States Paving Inc.* The 9th Circuit Court found that its program was not narrowly tailored and the state must show concrete examples of discrimination. In late **2006**, WDOT completed a rigorous disparity study, demonstrating discrimination, and set a DBE goal of 18.8%, including race- and gender-conscious goals.

Note: Inclusive business policies and programs include mandatory or laudatory contract goals, certification programs, supplier diversity articulation across state agencies, DBE goal level on FHWA funds, and targeted business services and financing.

¹ Section 8(a) required federal government assistance to “socially and economically disadvantaged” small businesses. This was followed by Executive Order 11458 in 1969, which created the Office of Minority Business Enterprise and directed federal agencies to promote and assist minority-owned business enterprises.

² The states include California, Connecticut, Florida, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Tennessee. Texas began its program in 1995. At least six other states began partial or undefined programs during the same period – Arkansas, Indiana, New York, South Carolina, Virginia, and Washington.

³ *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). The Supreme Court stated that state and local governments must apply strict scrutiny and are limited to redressing discrimination within their own jurisdictional borders.

⁴ Supreme Court’s 1995 decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁵ Proposition 209 passed as a state-wide ballot initiative in November 1996. It required California and all local governments to remove provisions for mandatory participation of MBEs and WBEs in public contracts and any other race- or gender-based preferences, except as a remedy to overcome specific evidence of discrimination.

⁶ Expected ‘mandatory’ DBE participation varies from project to project and always includes a waiver for ‘good faith efforts’ to locate qualified DBE sub-contractors.

⁷ *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). The Court struck down WDOT’s race- and gender-conscious DBE program as not being sufficiently narrowly tailored to further Congress’ remedial objectives and concluded that remedy requires showing of actual discrimination.

⁸ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Supreme Court stated that strict scrutiny was appropriate and remanded the case to District Court for strict scrutiny analysis. The District Court then concluded that the Colorado DOT incentive program was not narrowly tailored because benefits were available to all minorities regardless of disadvantage.

⁹ Discrimination Research Center, The, & Equal Rights Advocates, “Proposition 209 and the Decline of Women in the Construction Trades” (2004, June). Berkeley, CA.

¹⁰ Headd, B. “Redefining Business Success: Distinguishing Between Closure and Failure,” *Small Business Economics*, 21:51-61, 2003. Netherlands: Springer. Headd found that 34% of firms closed within two years of start-up, although 29% of owners of these firms felt that the firm was successful at closure, such as a merger or sale to other owners.

¹¹ Fairlie, R.W. & Robb, A.M. (2007). “Why are Black-Owned Businesses Less Successful than White-Owned Businesses: The Role of Families, Inheritances, and Business Human Capital,” *Journal of Labor Economics*, 25(2): 289-323. Also, Cavalluzzo, K. & Cavalluzzo, L. “Market Structure and Discrimination: The Case of Small Business,” *Journal of Money, Credit and Banking*, 30:4, Nov. 1998, pp. 771-92. Also, Bates, T. (2005). “Financing Disadvantaged Firms” in *Credit Markets for the Poor*, Bolton, P. & Rosenthal, H., ed. New York, NY: The Russell Sage Foundation. Also, Blanchflower, D.G., Levine, P., & Zimmerman, D. (2003). “Discrimination in the small business credit market,” *Review of Economics and Statistics*, November, 85(4), pp. 930-943.

¹² Enchautegui, M.E., Fix, M., Loprest, P., von der Lippe, S.C., & Wissoker, D. (1997). *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* Washington, DC: The Urban Institute. Also, Blanchflower, D.G. & Wainwright, J. (2005, November). *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry*. Cambridge, MA: National Bureau of Economic Research.

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Inclusive Business Initiative

This research is part of InBiz, an Inclusive Business Initiative of the Insight Center. This initiative seeks to promote policies and programs in the public, private, and nonprofit sectors that enhance minority and women business (MBE and WBE) development. Go to www.insightccd.org to join the InBiz community.

This report is the Executive Summary of the Research Series: "Best Practices, Imperfections, and Challenges in State Inclusive Business Programs." It summarizes the findings from two research reports which:

- Provide a broad descriptive overview and trend of the policies and programs in all 50 states related to affirmative procurement and targeted small business development services. The details of this research will be presented in an online information center to be released in November 2007.
- Examine the impact of state policies on the business growth rates of MBEs and WBEs and the impact of the end of affirmative action in California and Washington on self-employment rates of women and persons of color.

The next phase of InBiz will include the creation of a peer learning network among states that want to enhance their affirmative procurement and targeted small business development programs.

