Constitutional Law: Affirmative Action in the Public Sector: The Admissibility of Post-enactment Evidence of Discrimination to Provide a Compelling Governmental Interest

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COMMENT

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The theory of affirmative action acknowledges a contradiction in the democratic promise of equality and the practical consequences of hundreds of years of slavery, oppression, and segregation. Affirmative action proponents argue that the United States can only be a color-blind society after minorities are put in a competitive position. Affirmative action programs accomplish this through a complex system of setting "minority hiring goals" and giving "preferences" to minorities applying for certain state and local government contracts or employment positions. However, as the United States completes its third full decade without de jure segregation, many courts, legislatures, and political commentators continue to question the wisdom and legality of affirmative action programs.

1. While courts have extended affirmative action analysis under the Fourteenth Amendment to the private sector through Title VII, Taxman v. Bd. of Educ., 91 F.3d 1547, 1567 (3d Cir. 1996) (holding that an affirmative action program violated Title VII of the Civil Rights Act of 1964); see also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that the Fifth Amendment requires courts to apply strict scrutiny to all federal affirmative action programs), this comment only deals with the analysis of state and local government affirmative action programs. Throughout this comment, the terms "public," "state and local," and "governmental entity" are used interchangeably to distinguish affirmative action programs implemented by state or local governments, which are subject to the Equal Protection Clause of the Fourteenth Amendment, from private affirmative action programs, which generally are not governed by the Fourteenth Amendment because of the state-action requirement.


4. See Michel Rosenfeld, Affirmative Action and Justice: A Philosophical and Constitutional Inquiry 42 (1991) (defining affirmative action as an attempt to bring members of an underrepresented group to a higher level of participation in some beneficial program); Adam Winkler, Sounds of Silence: The Supreme Court and Affirmative Action, 28 Loy. L.A. L. Rev. 923, 926 (1995) (defining affirmative action as "the use of race consciousness in a preferential manner intended not to stigmatize, but to provide a modicum of equality to members of those groups that historically have been the victims of discrimination and subordination").

5. Compare Bowen & Bok, supra note 3 (defending the use of affirmative action), and Hacker, supra note 2, and John C. Duncan, The American 'Legal' Dilemma: Colorblind I/Colorblind II — The Rules Have Changed Again, 7 Va. J. Soc. Pol'y & L. 315 (2000) (arguing that the Supreme Court's move to a "colorblind" Fourteenth Amendment jurisprudence prevents progressive social and governmental progress in the area of race relations), with Dinesh DSouza, The End of Racism (1995), and Stephan Thernstrom & Abigail Thernstrom, America in Black and White: One Nation, 121
While the Supreme Court has yet to formally end affirmative action, a series of decisions in the late 1980s and 1990s have seriously limited its application in the state and local context.6 In Wygant v. Jackson Board of Education7 and City of Richmond v. J.A. Croson Co.,8 the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment requires the application of strict scrutiny to all race-based affirmative action programs. To satisfy this test, the governmental entity seeking to impose a race-based preference must show a "compelling state interest" for maintaining the program and must illustrate how the particular plan is "narrowly tailored" to fulfill the purported interest.9 Currently, the Supreme Court has only accepted remediating past or present discrimination as a sufficiently compelling interest to justify an affirmative action program.10

Since Wygant and Croson, district and circuit courts have had difficulty applying the strict scrutiny test.11 One of the questions not answered in these

INDIVISIBLE (1997) (criticizing the use of affirmative action and supporting a "colorblind" society).


9. Id. at 507-08.
10. See Messner v. Meno, 130 F.3d 130, 136 (5th Cir. 1997) (rejecting diversity as a compelling state interest for a race-conscious plan); Hopwood v. Texas, 78 F.3d 932, 944-48 (5th Cir. 1996) (rejecting diversity in the student body as a compelling state interest); Hayes v. N. State Law Enforcement Officers Ass'n, 10 F.3d 207, 210 (4th Cir. 1993) (rejecting diversity as a compelling state interest for a race-conscious plan); Podberesky v. Kirwan, 38 F.3d 147, 154-55 (4th Cir. 1994) (rejecting the argument that a poor reputation in the African American community and a climate on campus that is perceived as being racially hostile is sufficient evidence of present effects of past discrimination to justify a university's affirmative action program); Hiller v. County of Suffolk, 977 F. Supp. 202, 206-07 (E.D.N.Y. 1997) (rejecting diversity as a compelling state interest for a race-conscious plan); see also Andy Portinga, Racial Diversity As a Compelling Governmental Interest, 75 U. DET. MERCY L. REV. 73, 85 (1997); Susan M. Maxwell, Note, Racial Classifications Under Strict Scrutiny: Policy Considerations and the Remedial-Plus Approach, 77 TEX. L. REV. 259, 259 (1998).
landmark cases, or their Supreme Court progeny, involves the admissibility of post-enactment evidence of discrimination to provide a compelling governmental interest.\footnote{Second Generation of Croson-Inspired Disparity Studies, 26 URB. LAW. 485, 485 (1994) [hereinafter La Noue, Standards]; Douglas D. Scherer, Affirmative Action Doctrine and the Conflicting Messages of Croson, 38 U. KAN. L. REV. 281, 281 (1990).} Post-enactment evidence is evidence compiled by a state or local entity after implementation of the affirmative action program, while pre-enactment evidence is evidence compiled by the governmental entity before implementing the affirmative action program.\footnote{See Docia Rudley & Donna Hubbard, What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set-Asides Ten Years After City of Richmond v. J.A. Croson, 25 S. ILL. U. L.J. 39, 43 (2000) (mentioning that Croson and its progeny failed to address the issue of post-enactment evidence of discrimination).} The dispute over the admissibility of post-enactment evidence of discrimination arises when a city or state compiles statistical or anecdotal evidence of past discrimination after the affirmative action program has been put into effect.\footnote{See generally W. Tenn. Chapter of Associated Builders & Contractors v. Bd. of Educ., 64 F. Supp. 2d 714 (W.D. Tenn. 1999) (laying out the issue of post-enactment evidence of discrimination very precisely).} A governmental entity might collect evidence of discrimination post hoc for a variety of reasons. Many times the affirmative action program itself mandates periodic studies to ensure that the program is still needed and that its percentages comport with the narrow-tailoring requirement of the strict scrutiny test. In addition, because many governments implemented affirmative action plans before the Supreme Court's decision in Wygant and Croson, these plans lacked the proper type and quantity of evidence to justify their existence. Therefore, many states and municipalities added additional evidence of discrimination to comport with the higher standard mandated by the Supreme Court. Finally, once an affirmative action program is attacked by a nonminority plaintiff, many government defendants have chosen to conduct disparity studies to defend the lawsuit.\footnote{While some defendants of a particular affirmative action plan may oppose post-enactment anecdotal evidence of discrimination, all of the circuit cases cited in this comment deal with post-enactment disparity studies. See supra note 10.} Plaintiffs oppose this last classification of post-enactment evidence most vehemently.

Preventing government defendants from using post-enactment evidence of discrimination will result in many affirmative action programs being declared unconstitutional, even though sufficient post-enactment evidence to justify a finding of past or present discrimination might exist. At the summary judgment stage, a district court judge must determine whether a defendant in an affirmative action case has enough evidence of past or present racial discrimination to support a finding that the defendant has a compelling state interest in maintaining the

\begin{thebibliography}{10}
\bibitem{Webster} While some defendants of a particular affirmative action plan may oppose post-enactment anecdotal evidence of discrimination, all of the circuit cases cited in this comment deal with post-enactment disparity studies. See supra note 10.
\bibitem{Webster_2} See Webster v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), for a good example of an affirmative action program that mandated periodic studies, added more complex evidence of discrimination to comport with changing Supreme Court precedent, and conducted additional disparity studies after a nonminority plaintiff filed suit.
\end{thebibliography}
program. If there is not sufficient evidence of past or present discrimination, the district court judge should grant summary judgment for the plaintiff. As this comment will argue, post-enactment evidence of discrimination can effectively reveal past or present discrimination. If district courts begin rejecting post-enactment evidence of discrimination, many affirmative action programs will be declared unconstitutional at the summary judgment stage despite the existence of credible evidence of past or present discrimination.

Recently, two district courts, rejecting the position of several circuit courts, have held post-enactment evidence of discrimination inadmissible. In Associated Utility Contractors of Maryland, Inc. v. Mayor of Baltimore16 and West Tennessee Chapter of Associated Builders & Contractors v. Board of Education,17 both courts rejected racial disparity studies composed by experts after the implementation of the programs in question. In justification of this position, the courts cited both the language and the spirit of Wygant and Croson.18 This comment argues that these two district court rulings on the admissibility of post-enactment evidence of discrimination should be overruled and should not be viewed as a judicial trend limiting admissible evidence in an affirmative action suit. This comment also demonstrates how post-enactment evidence should fit within a district court's analysis of an affirmative action program under the Equal Protection Clause of the Fourteenth Amendment.

Part I of this comment outlines the current Supreme Court standard for evaluating state and local affirmative action programs under the Equal Protection Clause of the Fourteenth Amendment. Part II considers the use of disparity studies in affirmative action litigation and explains how the controversy over the admissibility of post-enactment evidence of discrimination arises. Part III focuses on the recent challenges of circuit court precedent admitting post-enactment evidence, while part IV evaluates the conflicting circuit court positions in light of the Supreme Court's decisions in Croson and Wygant. Part IV also considers the admissibility of post-enactment evidence of discrimination in light of Shaw v. Hunt,19 a Supreme Court decision rejecting the use of post-enactment evidence of discrimination to justify racial gerrymandering of voting districts.20 This comment argues that the logic and policy justifications used in Shaw should not apply to the affirmative action context. Part V argues that the Supreme Court's strict scrutiny test only produces just results if all evidence of past discrimination is examined. Part VI highlights several policy reasons for declaring post-enactment evidence admissible. Finally, Part VII argues that courts should look at all available evidence of discrimination when reviewing an affirmative action program. This section rejects the position taken by several circuits that some pre-

17. 64 F. Supp. 2d 714 (W.D. Tenn. 1999).
20. Id. at 909-10.
enactment evidence of discrimination must be presented before a court should admit post-enactment evidence of discrimination.

I. The Supreme Court's Standard for Evaluating a State or Local Affirmative Action Program

Affirmative action programs, commonly called "set asides" or "racial preferences," attempt to eradicate discrimination, both past and present, by increasing minority participation in a particular employment area. 21 Through necessity, then, affirmative action programs require consideration of race or gender in employment and contracting decisions. However, these programs, when implemented by a state or one of its subdivisions, must comply with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. 22 Section 1 of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." 23 Because of these seemingly conflicting mandates and the highly political and moral implications affirmative action evokes, the Supreme Court has historically had difficulty reconciling the conflict between the goals of affirmative action and the Fourteenth Amendment. 24 Initially, courts drew a strong distinction between invidious racial discrimination and "benign" discrimination under an affirmative action plan that sought to "level the playing field" for minorities. 25 Hence, the Supreme Court's early decisions sometimes applied intermediate scrutiny to affirmative action programs. 26 In Wygant and Croson, the Supreme Court, for the first time, firmly decided the standard of review for all state and local affirmative action programs. These two cases collectively set the standards for maintaining a state or local affirmative action program. 27

A. Wygant v. Jackson Board of Education

The Supreme Court first applied strict scrutiny to a state affirmative action program in the Wygant decision. 28 Wygant involved the use of an affirmative action program to maintain a certain percentage of minority teachers in the Jackson,
Michigan, school system. In 1972, due to racial tension in the community, the Jackson Board of Education (the School Board) considered adding a layoff provision to the Collective Bargaining Agreement (the CBA) between the School Board and the Jackson Education Association (the Union). The provision protected employees who were members of certain minority groups against layoffs. The School Board and the Union eventually adopted a new provision, article XII of the CBA, covering layoffs. Among other provisions, the amendment provided that if the School Board decided to lay off teachers, those teachers with the most seniority in the district would be retained. However, at no time was there to be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.

When layoffs became necessary in 1974, the School Board did not adhere to article XII of the CBA. The School Board laid off minority teachers even though the number of laid-off minority teachers exceeded the percentage of minority personnel employed at the time of the layoff. In response, the Union and two minority teachers filed suit in federal court and eventually prevailed on a breach of contract claim. After this suit, the School Board adhered to article XII. As a result, during the 1976-1977 and 1981-1982 school years, the school laid off nonminority teachers, while the school retained minority teachers with less seniority. The displaced nonminority teachers brought suit alleging, inter alia, violation of the Equal Protection Clause of the Fourteenth Amendment.

The Wygant Court began its analysis by stating several principles of equal protection analysis. First, "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." This principle is founded on the belief that distinguishing between citizens solely because of their ancestry is "odious to a free people whose institutions are founded upon the doctrine of equality." Second, the Court announced the test used to ensure that any classification based on race comports with this pillar of American constitutionalism. "Any racial classification must be justified by a compelling governmental interest . . . [and] the means chosen by the State to effectuate its purpose must be narrowly tailored to the achievement of that goal."

The School Board offered a "role model theory" to justify its preference for retaining minority teachers with less seniority than their nonminority colleagues.

29. Id. at 270.
30. Id. at 270-71 (citing article XII of the Jackson Board of Education Collective Bargaining Agreement).
31. Id. at 271.
32. Id. at 271-72.
33. Id. at 272; see also U.S. Const. amend. XIV, § 1.
34. Wygant, 476 U.S. at 273 (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982)).
35. Id. (citing Loving v. Virginia, 388 U.S. 1, 11 (1967)).
36. Id. at 274.
37. Id.
The role model theory hypothesized that minority students interact and relate better with minority teachers. Because the district in question was highly composed of minority students, the School Board felt justified in giving preference to minority teachers during layoffs. This role model theory was the only evidence offered to support the minority hiring preference.

The Wygant Court, in evaluating the evidence presented by the School Board, first noted:

This Court never has held that societal discrimination alone is sufficient to justify a racial classification.

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind.

Instead, the Court insisted upon some concrete showing of prior discrimination by the governmental unit involved before allowing the limited use of racial classification to remedy discrimination. Based on Supreme Court precedent, the proper inquiry for determining the existence of actual discrimination by the School Board was the disparity "between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."

Giving instruction to the district court, the Wygant Court explained that "a public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted." That is, the employer must have sufficient evidence to justify the conclusion that there has been prior discrimination. It is the trial court's duty to "make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." After instructing the lower court on the proper analysis of an affirmative action program, the Wygant Court held that even if the School Board could post hoc supply enough evidence of past discrimination to

38. Id. at 276.
39. Id. This is significant because the defendants in Wygant did not attempt to use post-enactment evidence to justify the racial preference.
40. Id. at 274-76.
41. Id. at 275.
42. Id. (citing Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977)).
43. Id. at 277 (emphasis added).
44. Id. This language in Wygant is used as the primary argument against the admissibility of post-enactment evidence of discrimination.
45. Id. (emphasis added). The italicized "before" and "had" are the basis for the exclusion of post-enactment evidence of discrimination in West Tennessee and Associated Utility. The two district courts argued that this language shows that the Supreme Court only looks at evidence of past or present discrimination compiled before the implementation of the affirmative action program. See infra Part III.
provide a compelling governmental interest, the minority preference for layoffs could not satisfy the narrow-tailoring prong of the strict scrutiny test. Thus, the Wygant Court specifically failed to address whether a plaintiff could satisfy the compelling-interest prong of the strict scrutiny test by presenting data compiled after the statute's implementation.

B. City of Richmond v. J.A. Croson Co.

While the Wygant decision implicitly overruled prior Supreme Court precedent applying a less exacting standard of analysis to public affirmative action programs, the opinion did not unequivocally mandate that courts apply strict scrutiny to all state and local government minority-preference programs. This directive would come, however, three years later in the Croson opinion.

The plaintiff, J.A. Croson Company, bid on a city contract to install a new plumbing system in the Richmond City Jail. J.A. Croson was the only company to submit a bid for the contract. However, several years earlier, Richmond adopted a Minority Business Utilization Plan (the Plan). The Plan required all contractors receiving city contracts to subcontract at least 30% of the total dollar amount of the contract to Minority Business Enterprises. J.A. Croson, unable to meet the requirement, applied for a waiver and was denied. Although J.A. Croson was the only bidder on the contract, the firm eventually lost the contract and Richmond resubmitted the contract for new bids.

After the Supreme Court remanded the case to be decided in light of its decision in Wygant, the case again came before the Court in 1989. Justice O'Connor, writing for the majority, held that the Plan failed to satisfy either prong of the strict scrutiny standard. First, she noted, the Plan failed the compelling-interest prong because the City could not specifically show that it had previously discriminated

46. Wygant, 476 U.S. at 280-84.
47. In Croson, the defendant relied heavily on the Supreme Court's decision in Fullilove. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 486-88 (1989). The Fullilove opinion applied intermediate scrutiny to an affirmative action plan instituted by the federal government. See Fullilove v. Klutznick, 448 U.S. 448 (1980). Because the Wygant Court did not explicitly overrule Fullilove, many hoped that intermediate scrutiny would still be applied to certain state and local affirmative action programs. See Croson, 488 U.S. at 489-92 (clearly distinguishing federal and state affirmative action programs and rejecting the decisions of those circuit courts that still followed Fullilove when evaluating a state affirmative action program).
48. Croson, 488 U.S. at 482.
49. Id. at 477.
50. Id. at 483.
51. Id.
53. Croson, 488 U.S. at 498-506. While concurring with the circuit court's decision, the Supreme Court wanted to eliminate any ambiguity concerning its position on state affirmative action programs. Id.
against certain minorities when it awarded government construction contracts.\textsuperscript{54} Second, the Plan was not narrowly tailored to remedy past discrimination because it afforded members of particular minority groups located anywhere in the country a preference over other bidders solely based on race.\textsuperscript{55} According to the Supreme Court, to satisfy the narrow-tailoring prong of the strict scrutiny test, the program must only benefit those minority contractors that could have been victim to any alleged past or present discrimination.\textsuperscript{56} Since out-of-state contractors normally did not bid on Richmond construction contracts, the Court found that the Richmond affirmative action program did not satisfy the narrow-tailoring prong. To satisfy this prong, the preference program should have been limited to in-state minority construction contractors.\textsuperscript{57}

In examining the first prong, the majority noted that a compelling governmental interest is served when a public entity engages in activity to eradicate the effects of past or present racial discrimination.\textsuperscript{58} Therefore, if a city could show that it had in any way participated in discrimination against minority contractors in connection with the administration of public-works contracts, a city could validly enact legislation to remedy the effects of that discrimination.\textsuperscript{59} The defendant could not simply rely on a finding of "societal discrimination" to show that it participated in discrimination against minority contractors.\textsuperscript{60} Instead, a city must offer particularized findings that could raise an inference that it had indeed, either passively or actively, participated in discrimination in connection with public construction contracts.\textsuperscript{61}

To show prior racial discrimination, Richmond relied on the following evidence: (1) conclusory statements of racial discrimination in the construction industry in Richmond, in Virginia, and around the nation; (2) statistical evidence that minority

\textsuperscript{54} Id. at 507-09.

\textsuperscript{55} Id. at 505-07. Further, the Court noted that the rigid 30\% quota used by the City of Richmond also violated the narrow-tailoring prong of the strict scrutiny test. Id. Justice O'Connor explained that the preference given a minority group must reflect the amount of discrimination identified by the entity seeking to maintain the affirmative action program. Thus, the evidence showing a compelling interest to remedy past or present discrimination also serves as a benchmark for quantifying the preference given to different minority groups. Id. at 505-09.

\textsuperscript{56} Id. at 506. The Court also noted that the inclusion of other minority groups such as "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons" in the Richmond affirmative action program further illustrates a lack of narrow tailoring. Id. The City of Richmond offered no evidence that these additional minority groups suffered any past or present discrimination. Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 505. To justify a racial classification in its plan, Richmond had to show that it engaged in prior discrimination, either actively or as a "passive participant." Id.; see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

\textsuperscript{59} Croson, 488 U.S. at 492.

\textsuperscript{60} Id. at 497-99; see also Wygant, 476 U.S. at 274.

\textsuperscript{61} Croson, 488 U.S. at 497-501. In the context of employment and construction contracts, these "particularized findings" generally require a showing of racial disparity in the "relevant labor market." The relevant labor market in construction contracts is generally those contractors located in the area where the contract is to be awarded who are willing and capable of performing the particular construction contract. Id. at 501-02.
businesses received 0.67% of prime contracts from the City of Richmond, while minorities constituted 50% of the city's population; and (3) the fact that membership of minority contractors in local and state contractors' associations was very low. The City of Richmond compiled this evidence prior to implementing the Plan and presented it during a public hearing to debate the adoption of the program. The City did not offer any post-enactment evidence of discrimination.

The Court found this pre-enactment evidence insufficient to raise an inference that Richmond participated in racial discrimination within its construction industry. The Court instead found the City's conclusory evidence of racial discrimination of little or no probative value in establishing identifiable discrimination against minority contractors in Richmond. Justice O'Connor reiterated that generalized findings of discrimination in society will not suffice to prove the necessary level of specific discrimination. The Court also found the disparity between minority businesses receiving contracts and the minority population of the City insufficient to prove discrimination. The relevant labor pool, for purposes of identifying discrimination in the construction industry, consisted of the number of minority contractors qualified to undertake contracting work on city projects compared to the number of those minority contractors actually awarded contracts. Finally, the Court found that the low number of black memberships in state and local contractor associations could not establish identifiable racial discrimination because many possible explanations besides racial discrimination existed for this lack of participation.

Under the second half of the strict scrutiny test, the Court found it almost impossible to determine whether the Plan was narrowly tailored to rectify past racial discrimination because the Plan failed to satisfy the compelling-governmental-interest prong. However, apparently as guidance for the future, the Court did explain that to satisfy the narrow-tailoring requirement, governments should explore race-neutral alternatives to any set-aside programs and avoid rigid quotas. In both Wygant and Croson, the Court acknowledged a compelling governmental interest in remedying both contemporaneous discrimination in a particular industry and the present effects of discrimination. However, "[b]ecause racial characteristics so

62. Id. at 499-500.
63. Id. at 479-80.
64. The two courts rejecting the use of post-enactment evidence conceded that the Croson Court was not confronted with the issue. See infra note 119 and accompanying text.
66. Id. at 500.
67. Id. at 499. The Supreme Court, after Croson, will focus on concrete empirical evidence of discrimination. See La Noue, Impact, supra note 27, at 36.
68. Croson, 488 U.S. at 501.
69. Id. at 501-02. Disparity studies must focus on these numbers to meet the Croson standard. See La Noue, Standards, supra note 11, at 496-97.
70. Croson, 488 U.S. at 503.
71. Id. at 507.
72. Id. at 507-08.
73. Id. at 509; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-75 (1986).
seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic,74 the reasons for any such classifications must be clearly identified and unquestionably legitimate.75

After Croson, it is clear that the evidentiary burden placed on an affirmative action defendant is quite high. Most courts have interpreted Wygant and Croson to collectively require statistical evidence of discrimination before a state may use affirmative action as a remedy.76 However, neither opinion considered the use of post-enactment evidence of discrimination to satisfy this lofty standard.77 The Wygant Court decided the case based on the defendant's inability to satisfy the second prong of the strict scrutiny test. The defendant in Wygant only offered the role model theory as justification for the affirmative action program.78 The role model theory is not empirical evidence that can be classified as pre- or post-enactment evidence of discrimination. Thus, the precise holding in Wygant should have no bearing on the admissibility of post-enactment evidence of discrimination. As for Croson, the Court ultimately held that all of the pre-enactment evidence of discrimination, the evidence viewed by the Richmond City Council when it decided to adopt the affirmative action program, was insufficient to establish past or present discrimination.79 The defendant in Croson never sought to admit any post-enactment evidence of discrimination.80 Therefore, the two cases should be viewed as guidance to deciding what types of evidence are sufficient to show past discrimination, rather than a firm command against the use of post-enactment evidence.

II. The Importance of Identifying Past or Present Racial Discrimination and the Use of Disparity Studies

After Wygant and Croson, identifying past or present discrimination is a condition precedent to legally implementing an affirmative action program.81 In order to satisfy the first prong of the strict scrutiny test, an affirmative action defendant must identify with relative certainty either past discrimination or the present effects of past discrimination in a particular industry.82 No longer are rhetorical statements or sweeping generalizations sufficient to establish racial classifications.83 Instead,
contemporary analysis of an affirmative action program focuses on the use of disparity studies.83

A. The Emergence of Disparity Studies to Identify Discrimination

Conducting disparity studies has become the "business" of affirmative action.84 As of 1998, 140 state and local jurisdictions spent over $55 million conducting disparity studies.85 Disparity studies are judicially recognized as the best indicators of racial discrimination within a particularized industry.86 These highly technical and expensive tests seek to compare the number of minorities available to perform a particular job or contract with the number actually chosen to perform the job.87 Where "significant statistical disparity [exists] 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, . . . an inference of discriminatory exclusion could arise."88

While disparity studies generally provide the most effective evidence of past discrimination, plaintiffs frequently challenge these studies in affirmative action suits.89 The expense, quality, and methodology utilized differs significantly depending on the individual or group conducting the study.90 Also, because the methodology and effectiveness of disparity studies have so rapidly advanced over the last decade, most tests utilized in the early 1990s are obsolete today.91 The most effective studies rely on information compiled from employment contracts documenting the race, gender, and nationality of employees or contractors.92 However, in many situations these statistics have not been properly maintained or

503; Wygant, 476 U.S. at 276-79.
84. Id. at 797.
85. Id.
86. Id. at 795.
87. Id. at 795-96.
88. Croson, 488 U.S. at 509; see also Rudley & Hubbard, supra note 12, at 42.
89. In all of the following cases, plaintiffs challenged the validity of the particular disparity study: Contractors Ass'n v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996) (finding the City's affirmative action program was not narrowly tailored in light of the disparity study offered in the program's defense); Associated Contractors of Cal., Inc. v. Coalition for Econ. Equity, 950 F.2d 1401 (9th Cir. 1991) (upholding a disparity study that sought to justify a 5% preference for minority and women contractors in California based in part on a lack of discovery by the plaintiff); Associated Gen. Contractors of Am. v. City of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996), vacated and remanded, 172 F.3d 411 (6th Cir. 1999) (rejecting the City's disparity study based on improper methodology).
90. See La Noue, Who Counts?, supra note 83, at 797-98. There are currently five firms that account for about 60% of all existing disparity studies: (1) Browne, Bortz and Coddington; (2) D.J. Miller; (3) MGT of America; (4) Mason Tillman Associates; and (5) National Economic Research Associates. Id.
91. Id. at 797-829.
92. Id.
they only date back a few years. To compensate for this problem, many studies are based on less reliable industry-wide surveys. Because no uniform system for calculating the disparity in minority hiring in a particular industry exists, affirmative action defendants often place the fate of their programs in the hands of the best statisticians they can afford. Depending on the jurisdiction, that particular study may or may not satisfy the court.

B. Three Ways Plaintiffs Challenge Disparity Studies As Inadmissible Post-enactment Evidence

While the evolution of disparity studies has helped affirmative action proponents identify discrimination with the particularity required by the Supreme Court, it has also given rise to the controversy over the use of post-enactment evidence of discrimination. There are three scenarios in which nonminority plaintiffs may seek to challenge disparity studies as inadmissible post-enactment evidence of discrimination. First, plaintiffs may challenge a disparity study prepared for the purpose of litigation. In this situation, the affirmative action program was not thoroughly researched before its implementation, and the defendants gathered evidence to support the program only after the lawsuit was filed. Most set-aside programs based on conclusory anecdotal evidence have been updated with some form of disparity study. However, even a decade after Croson's firm mandate, some affirmative action programs are still based on constitutionally insufficient anecdotal evidence, and the governmental units plan to conduct their first disparity study only if needed in preparation for litigation. Second, there are those instances in which a state or political subdivision conducted some type of study before implementing the preference program, but seeks to update the study in preparation for litigation. Third, some affirmative action programs mandate periodic disparity studies and appoint an individual or panel to reevaluate the program. These programs are generally the most likely to survive judicial scrutiny.
Without periodic reevaluation, the narrow-tailoring prong of the strict scrutiny test will rarely be met. Should the Supreme Court choose to exclude post-enactment evidence of discrimination, all three types of evidence, even disparity studies used to update or amend affirmative action programs, will not be admissible to show a continuing need for remedial racial preferences.

C. Circuit Courts Approve the Use of Post-enactment Evidence of Discrimination

All circuit courts that have visited the issue of admitting post-enactment disparity studies to provide a compelling state interest have admitted the evidence. However, several of the courts have required some pre-enactment evidence of discrimination before a defendant may use a post-enactment study to validate the belief that discrimination exists in the particular industry. Those circuits that only allow post-enactment evidence if accompanied by some pre-enactment evidence, the Ninth and the Tenth Circuits, do so on the basis that it would be impossible to narrowly tailor an affirmative action program without some evidence of discrimination before the legislative body implementing the program. Thus, the Ninth and Tenth Circuits assume that unless the governmental entity responsible for the affirmative action program had some evidence of past discrimination when it began the program, the state actor could not have formulated guidelines for the program that would satisfy the narrow-tailoring prong of the strict scrutiny test.

cannot satisfy the narrow-tailoring requirement); NAACP v. Seibels, 31 F.3d 1548, 1577 (11th Cir. 1994) (requiring the district court to rewrite the decree to make clear that the annual goals cannot last indefinitely); see also John Cocchi Day, Comment, Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace, 89 CAL. L. REV. 59, 111-15 (2001). Lower courts have generally maintained that an affirmative action plan must be "flexible" to satisfy the narrow-tailoring prong of the strict scrutiny test. This "flexibility" includes requiring periodic updates to the affirmative action program to make sure the plan's preference numbers comport with the current disparity in the particular labor market. Id.

103. See Concrete Works of Colo. v. City of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994) (explaining the importance of post-enactment evidence in determining whether an affirmative action program is narrowly tailored).

104. See Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997) (reaffirming the Eleventh Circuit's position on admitting post-enactment evidence of discrimination); Concrete Works of Colo. v. City of Denver, 36 F.3d 1513 (10th Cir. 1994) (allowing post-enactment evidence of discrimination if there is enough pre-enactment evidence to establish a good-faith belief that the entity implementing the program found past discrimination in the industry); Seibles, 31 F.3d at 1548 (allowing post-enactment evidence of discrimination even in the absence of any pre-enactment evidence); Contractors Ass'n v. City of Phila., 6 F.3d 990 (2d Cir. 1993) (admitting post-enactment evidence); Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 30 (2d Cir. 1992) (considering all evidence of past discrimination by the State or its subdivision); Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991) (requiring some pre-enactment evidence of discrimination to satisfy Croson, but also considering post-enactment evidence); Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990) (allowing the wholesale use of post-enactment evidence of discrimination); see also Builders Ass'n v. County of Cook, 123 F. Supp. 2d 1087, 1093 (N.D. Ill. 2000) (noting that the Seventh Circuit has not ruled on the admissibility of post-enactment evidence and holding that post-enactment evidence could be sufficient to support race-based or gender-based preferences).

105. See Concrete Works, 36 F.3d at 1521; Coral, 941 F.2d at 920.

106. See Concrete Works, 36 F.3d at 1521; Coral, 941 F.2d at 920.

107. The Coral and Concrete Works opinions relied on Wygant and Croson in requiring some pre-
Neither the Ninth nor Tenth Circuit has explained how much post-enactment evidence is needed before a court should admit post-enactment evidence.\textsuperscript{108}

\section*{III. Two District Courts Reject Circuit Court Authority and Declare Post-enactment Evidence of Discrimination Inadmissible}

\subsection*{A. West Tennessee Chapter of Associated Builders \& Contractors v. Board of Education}

In the summer of 1999, a case out of the Western District of Tennessee challenged the strong circuit court authority for admitting post-enactment evidence of discrimination. In \textit{West Tennessee Chapter of Associated Builders \& Contractors v. Board of Education},\textsuperscript{109} a Tennessee district court located in the Sixth Circuit rejected the use of post-enactment evidence of discrimination in an affirmative action lawsuit. Because the Sixth Circuit has not yet addressed the issue of post-enactment evidence, the \textit{West Tennessee} court's decision could create a split among circuit courts.

In \textit{West Tennessee}, the court evaluated a plan adopted by the City of Memphis (the City) and the Memphis Board of Education (the Board) creating a Minority and Women Business Enterprise Program (MWBE).\textsuperscript{110} The program required non-minority prime contractors to meet certain goals with respect to using minority-owned subcontracting companies.\textsuperscript{111} The City and the Board originally adopted the MWBE programs in 1996. Before enacting the plans, the City commissioned D.J. Miller and Associates to perform a disparity study of public contracting in the Memphis metropolitan area (the Miller study).\textsuperscript{112} The study concluded "that [the] consortium members had actively discriminated against MWBEs in the past and passively participated in present-day discrimination against minority subcontractors."\textsuperscript{113} The City and the Board based their program goals on these findings.\textsuperscript{114}

The plaintiffs in \textit{West Tennessee} intended to challenge the validity of the Miller study and sought to point out several flaws in the methodology used in the study.\textsuperscript{115} The City then began conducting another disparity study to supplement the Miller study

\begin{footnotesize}
\begin{enumerate}
  \item \textit{Concrete Works}, 36 F.3d at 1521; \textit{Coral}, 941 F.2d at 920.
  \item \textit{Concrete Works}, 36 F.3d at 1521; \textit{Coral}, 941 F.2d at 920.
  \item \textit{Id.} at 714 (W.D. Tenn. 1999).
  \item \textit{Id.} at 716. It should also be noted that while affirmative action programs based on gender preferences receive intermediate scrutiny, they should be treated the same as race or nationality for purposes of the admissibility of post-enactment evidence of discrimination. \textit{See Gerald Guntther \& Kathleen Sullivan, Constitutional Law 716-20} (1997) (discussing the Supreme Court's confusion in regard to gender-based affirmative action).
  \item \textit{W. Tenn.}, 64 F. Supp. 2d at 716.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item The district court did not address the merits of the Miller study in \textit{West Tennessee}. \textit{Id.}
\end{enumerate}
\end{footnotesize}
and to provide more evidence of the need for remedial action.\textsuperscript{116} The nonminority plaintiffs responded by filing a motion to have the post-enactment disparity study declared inadmissible.\textsuperscript{117} Citing \textit{Croson} and \textit{Wygant}, the plaintiffs asserted that an entity seeking to maintain an affirmative action program must have a strong basis in evidence of discrimination before implementing a race-based program. Therefore, any evidence of prior discrimination by the governmental entities themselves or by the prime contractors gathered after enactment of the MWBE (post-enactment) is irrelevant.\textsuperscript{118}

In analyzing the issue, the \textit{West Tennessee} court first noted that the issue of post-enactment evidence of discrimination was not squarely before the \textit{Croson} Court.\textsuperscript{119} However, the \textit{West Tennessee} court noted that the language in the \textit{Croson} opinion "suggest[ed] that the Court meant to require the governmental entity to develop the evidence before enacting a plan."\textsuperscript{120} The \textit{West Tennessee} court emphasized \textit{Croson}'s characterization of racial classification as a "highly suspect tool" and noted that the very purpose of strict scrutiny is to "smoke out" impermissible uses of racial classifications.\textsuperscript{121}

The \textit{West Tennessee} court did, however, believe that the Supreme Court addressed the issue of post-enactment evidence in \textit{Wygant}.\textsuperscript{122} In \textit{Wygant}, the Court stated that a public employer "must ensure that, \textit{before} it embarks on an affirmative-action program, it has convincing evidence that remedial action is necessary."\textsuperscript{123} The \textit{Wygant} majority also noted that it is the trial court's duty to make sure "the employer \textit{had} a strong basis in evidence for its conclusion that remedial action was necessary."\textsuperscript{124} The \textit{West Tennessee} court focused on the words "before" and "had" in the above Supreme Court quotations from \textit{Wygant} to illustrate the Supreme Court's requirement of pre-enactment evidence and rejection of post-enactment evidence.\textsuperscript{125}

The \textit{West Tennessee} court further noted that the Supreme Court's opinion in \textit{Shaw v. Hunt}\textsuperscript{126} erased any possible ambiguity in the \textit{Wygant} and \textit{Croson} holdings.\textsuperscript{127} \textit{Shaw} involved the use of racial considerations to draw a state voting

\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 717. Since the \textit{Croson} Court did not address the issue of post-enactment evidence, it is "not surprising that it did not specifically state whether [a] strong basis in evidence must be developed before a plan is enacted or whether it is sufficient that the underlying factual predicate is proven at trial." Id.
\textsuperscript{120} Id. (emphasis added).
\textsuperscript{121} Id. (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).
\textsuperscript{122} Id.
\textsuperscript{123} Id. (citing \textit{Wygant} v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).
\textsuperscript{124} Id. (emphasis added) (citing \textit{Wygant}, 476 U.S. at 277).
\textsuperscript{125} Id. The \textit{West Tennessee} court specifically emphasized that the word "had" in the \textit{Wygant} opinion denotes the past tense. Id. The district court believed this indicated that the Supreme Court would reject the use of post-enactment evidence of discrimination. Id.
\textsuperscript{126} 517 U.S. 899 (1996).
\textsuperscript{127} \textit{W. Tenn}., 64 F. Supp. 2d at 718-19.
district. The Shaw Court looked to Croson for precedent in striking down the creation of an oddly shaped voting district. Writing for the Court in Shaw, Chief Justice Rehnquist stated that "the institution making the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary 'before' it embarks on an affirmative-action program." According to the West Tennessee court, the Chief Justice specifically emphasized the word "before" in the above quoted passage. Therefore, opined the West Tennessee court, the holdings in Wygant, Croson, and Shaw collectively suggest the following:

[T]he court's task is not to determine if there is now a compelling interest to justify race-based remedial action; its task is to determine if the defendants, at the time they adopted race-based plans, had a compelling interest to act on the basis of race. A compelling interest is present only if at the time of implementing their race based plans, the defendants "had a strong basis in evidence for [their] conclusion that remedial action was necessary."

According to the district court, the strict scrutiny test not only analyzes whether the factual predicate exists to justify the defendant's action, but also whether the defendant's actual purpose was remedial. This standard focuses on the defendant's motivation for implementing the program as an additional safeguard against impermissible racial classification. Thus, according to the West Tennessee court, post-enactment evidence provides no insight into whether the governmental body was actually acting to remedy a problem.

The West Tennessee court also rejected the defendant's argument that after offering some pre-enactment evidence, an affirmative action defendant should be allowed to supplement the record with post-enactment evidence. Under this standard, a defendant may use post-enactment evidence of discrimination if the legislative body considered sufficient pre-enactment evidence to establish a good-faith belief that remedial action should be taken. Allowing a defendant to

129. Shaw, 517 U.S. at 910 (citing Wygant, 476 U.S. at 277).
130. W. Tenn., 64 F. Supp. 2d at 718.
131. Id. (alteration in original).
132. Id. at 719.
133. Id. at 719-20. But see Concrete Works of Colo. v. City of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994) (explaining how post-enactment evidence illuminates the motivation of the legislative body implementing an affirmative action plan).
134. W. Tenn., 64 F. Supp. 2d at 719. The Ninth and Tenth Circuits have adopted the position that post-enactment evidence of discrimination may be admitted only after a showing of some pre-enactment evidence. Concrete Works, 36 F.3d at 1521; Coral Constr. Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991).
135. See W. Tenn., 64 F. Supp. 2d at 719-20; see also Concrete Works, 36 F.3d at 1521; Coral Constr., 941 F.2d at 920.
utilize post-enactment evidence after presenting some unspecified amount of pre-enactment evidence troubled the court.\textsuperscript{136} The \textit{West Tennessee} court found that allowing post-enactment evidence after a showing of some pre-enactment evidence has a propensity to weaken the strict scrutiny test.\textsuperscript{137} Lowering the standard from a "strong basis in evidence" for believing remedial action is necessary to "sufficient evidence to form a good-faith belief" that race-conscious measures are necessary only increases the possibility that a legislative body has employed an unnecessary race-based preference.\textsuperscript{138} Under this rationale, there is no difference between an affirmative action program based on no evidence of past discrimination and one based on a constitutionally insufficient amount of pre-enactment evidence.\textsuperscript{139}

Further, the \textit{West Tennessee} court contended that a lower standard would unduly burden nonminorities seeking to enforce their Fourteenth Amendment rights.\textsuperscript{140} Allowing the use of post-enactment evidence of discrimination, according to the district court, could "encourage a government with strong racial political motivations" to enact a race-based program without thoroughly researching to determine if such a program is needed.\textsuperscript{141} If sued, the government could then use all its powers and resources to support the program.\textsuperscript{142} The \textit{West Tennessee} court feared this could have a "chilling-effect" on the prospect of nonminority plaintiffs challenging unconstitutional affirmative action programs.\textsuperscript{143} The prospective plaintiff may determine that the governmental entity did not have enough evidence of past discrimination to implement an affirmative action program, but then decide not to bring suit for fear that doing so would be futile because the government could conduct a contemporaneous disparity study to save the program.\textsuperscript{144}

\textbf{B. Associated Utility Contractors of Maryland, Inc. v. Mayor of Baltimore}

Less than one year after \textit{West Tennessee}, a Maryland district court in the Fourth Circuit also rejected the use of a post-enactment disparity study showing racial discrimination in Baltimore public contracts.\textsuperscript{145} In \textit{Associated Utility Contractors

\begin{thebibliography}{99}
\bibitem{} W. Tenn., 64 F. Supp. 2d at 718-19.
\bibitem{} See id.
\bibitem{} Id.
\bibitem{} Id. The \textit{West Tennessee} court is correct on this point; however, because there is no distinction between the two situations, post-enactment evidence should be admitted in both scenarios. \textit{See infra} text accompanying notes 256-63.
\bibitem{} W. Tenn., 64 F. Supp. 2d at 720.
\bibitem{} See id. at 720.; \textit{see also} D'SOUZA, supra note 5, at 30-49 (discussing the different political motivations for maintaining racial preferences).
\bibitem{} W. Tenn., 64 F. Supp. 2d at 720.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} Associated Util. Contractors of Md., Inc. v. Mayor of Balt., 83 F. Supp. 2d 613 (D. Md. 2000). On December 17, 1999, the \textit{Associated Utility} court granted a preliminary injunction against the enforcement of the 1999 goals. In granting the preliminary injunction, the court also denied the plaintiff's motion for summary judgment on the facial attack on the ordinance. The opinion in this case came from the City's motion to stay the December injunction. The City argued that the judge should have allowed

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of Maryland, Inc. v. Mayor of Baltimore, a nonminority Baltimore contractor challenged City Ordinance 610 on the basis that it impermissibly used racial preferences in the allotment of city contracts. In 1986, the Baltimore City Council enacted Ordinance 790, establishing the first set of city-wide affirmative action goals. The goals required that for all city contracts, 20% of the value of subcontracts be awarded to minority-owned businesses and 3% to women-owned businesses. In compliance with the Supreme Court doctrine at the time, the city council cited general societal discrimination as its justification for the program.

In 1990, after Croson, the City formed a task force to hold hearings and submit findings on specific discrimination in the awarding of public contracts. In response to these findings, the City enacted Ordinance 610 to replace Ordinance 790. One of the provisions in Ordinance 610 ordered a yearly reevaluation of the program and required the city council to vote on the continuation of the plan. However, Ordinance 610 readopted the original goals set in Ordinance 790. The same set-aside goals had been adopted without dispute every year since 1990. The plaintiff specifically challenged the 1999 version of Ordinance 610. Before the plaintiff in Associated Utility filed suit, the City had never conducted a disparity study. Further, the City did not keep data from which a disparity study could be conducted. The Baltimore City Council based its decision to maintain the program on anecdotal evidence and historical studies outlining discrimination in the letting of Baltimore public contracts.

The Associated Utility court, like the West Tennessee court, based its decision to reject post-enactment evidence of discrimination on the Supreme Court's holdings in Croson, Wygant, and Shaw. The court in Associated Utility explicitly adopted the West Tennessee court's interpretation of the three cases and found a firm mandate against the use of post-enactment evidence in the Supreme Court's language describing the strict scrutiny test. Prior to Associated Utility,

the defendants to conduct further discovery in the form of new disparity studies to justify the program.

Id. at 614-15.

147. Id. at 614-15.
148. Id. at 615.
149. Id. The task force held hearings and issued a Public Comment Draft Report on November 1, 1989. It held additional hearings, reviewed public comments, and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. Id.

150. Id.
151. Id.
152. Id.
153. Id. at 616.
154. Id.
155. Id.
156. Id. The unavailability of data needed to conduct disparity studies is a common occurrence. See La Noue, Who Counts?, supra note 83, at 797-805.

158. Id. at 619-21. The Associated Utility court relied heavily on West Tennessee's analysis of the use of post-enactment evidence. Id. at 621 n.6; see also supra text accompanying notes 117-42.
the Fourth Circuit had not explicitly rendered an opinion on the admissibility of post-enactment evidence.\footnote{160} In the Fourth Circuit's seminal affirmative action cases, Podberesky v. Kirwan\footnote{161} and Maryland Troopers Ass'n, Inc. v. Evans,\footnote{162} the court apparently relied (without comment) upon post-enactment evidence when evaluating two affirmative action plans.\footnote{163} However, the Associated Utility court noted that both Podberesky and Evans were decided before the Supreme Court's clarification of Wygant in Shaw.\footnote{164} Further, all circuit court opinions addressing this issue, except one, were rendered before Shaw.\footnote{165} Therefore, the Associated Utility court found the West Tennessee court's interpretation of Wygant and Shaw controlling.\footnote{166}

C. The Practical Consequences If These Two Decisions Are Followed

Proponents of affirmative action programs should be very concerned about the two district court decisions excluding the use of post-enactment evidence of discrimination. While the issue is primarily one of procedure, it could have devastating substantive effects on a state or local government's ability to utilize affirmative action. In fact, it is hard to imagine any affirmative action program surviving strict scrutiny without the use of post-enactment evidence.

As extensively explained earlier, the disparity study has become the single most important factor in a court's decision to accept or reject an affirmative action plan.\footnote{167} The methods and effectiveness of these studies are developing at an almost unprecedented pace. Due to this fact, many states find that the disparity studies used to assess their affirmative action programs become outdated almost before the programs can be put in place.\footnote{168} If an affirmative action defendant is limited to presenting only pre-enactment evidence, the court is essentially excluding the use of evidence that has the highest probability of identifying any discrimination that may exist. Especially if the affirmative action program has been in place for several years, the exclusion of post-enactment evidence of discrimination has a high probability of precipitating an incorrect decision.\footnote{169}

\footnote{160} Id. at 621 n.6.
\footnote{161} 38 F.3d 147 (4th Cir. 1994).
\footnote{162} 993 F.2d 1072 (4th Cir. 1993).
\footnote{163} Both Podberesky and Evans struck down the challenged affirmative action plans after examining the defendants' post-enactment evidence. See Podberesky, 38 F.3d at 188; Evans, 993 F.2d at 1074.
\footnote{164} Associated Util., 83 F. Supp. 2d at 621 n.6.
\footnote{165} Id. The Supreme Court decided Shaw on June 13, 1996. The Eleventh Circuit's opinion in Engineering Contractors is the only circuit opinion explicitly permitting the use of post-enactment evidence of discrimination rendered after the Supreme Court's decision in Shaw. The Eleventh Circuit decided Engineering Contractors in September 1997. Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997).
\footnote{166} Associated Util., 83 F. Supp. 2d at 620-22.
\footnote{167} See supra notes 80-103 and accompanying text.
\footnote{168} See supra notes 84-103 and accompanying text.
\footnote{169} See supra notes 84-103; see also Concrete Works of Colo. v. City of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994) (noting the importance of post-enactment evidence as a tool for determining
Because contemporary disparity studies are considered more effective at identifying discrimination, courts almost always require a disparity study done within the last several years. Few, if any, affirmative action programs have satisfied strict scrutiny without the use of a disparity study using up-to-date methods. Realistically, if the position taken in West Tennessee and Associated Utility is adopted by the Supreme Court, state-based affirmative action programs will cease to exist.

IV. Supreme Court Precedent Does Not Specifically Exclude Post-enactment Evidence of Discrimination

A. Neither Croson nor Wygant Mandates the Exclusion of Post-enactment Evidence of Discrimination

According to West Tennessee and Associated Utility, both Croson and Wygant support the exclusion of post-enactment evidence of discrimination. This conclusion is not supported by the text or circumstances of the Supreme Court's opinions in these two seminal decisions. In Croson and Wygant, the Supreme Court admittedly heightened the judicial scrutiny of affirmative action programs and demanded more probative evidence of past discrimination. The Court, however, did not foreclose an affirmative action defendant's ability to further develop evidence of discrimination after the implementation of the set-aside program.

The pivotal language cited by the district courts to support the exclusion of post-enactment evidence comes from two Supreme Court opinions that do not deal with the precise issue discussed in this comment. The issue of admitting post-enactment evidence of discrimination was not before the Supreme Court in Croson or Wygant. While the district courts conceded that the issue was not properly before the Croson Court, they both used Wygant as controlling precedent. This assumption is flawed because the Wygant Court did not consider the use of post-enactment evidence. The only evidence of past discrimination presented in

whether an affirmative action program complies with Croson).

170. See La Noue, Who Counts?, supra note 83, at 798-804 (examining different types of disparity studies).
171. Id.
174. See supra Part I.A & B.
175. See supra Part I.A & B.
177. Wygant, 476 U.S. at 275-76; see also supra notes 35-44 and accompanying text.
Wygant consisted of the Jackson School District's role model theory.\textsuperscript{178} The school district based this theory on racial assumptions not supported by empirical evidence.\textsuperscript{179} In addition, the school district developed the theory and presented it for public debate before implementing the program.\textsuperscript{180} The school district offered no post-enactment evidence of discrimination in defense of its racial-preference program.\textsuperscript{181} Therefore, the language from Wygant cited by the West Tennessee and Associated Utility courts should only be considered guidance in applying the strict scrutiny test and should not be considered a mandate against the use of post-enactment evidence of discrimination.

B. The Supreme Court Did Not Clarify Its Position on the Use of Post-enactment Evidence of Discrimination in Shaw v. Hunt

The two district courts rejecting the use of post-enactment evidence of discrimination contended that Shaw erased any ambiguity that possibly existed after Wygant and Croson.\textsuperscript{182} In Shaw, the Supreme Court condemned North Carolina's use of racial considerations in drawing voting districts. In doing so, the Court specifically addressed the issue of admitting post-enactment evidence of discrimination to provide a compelling state interest.\textsuperscript{183} However, the Shaw opinion addressed a distinguishable factual situation; therefore, its exclusion of post-enactment evidence should not apply to affirmative action cases.

The Shaw court first looked to Croson for the applicable standards used to assess a state program that purports to classify individuals based on race.\textsuperscript{184} After determining that strict scrutiny applied to all such programs, the Court stated that the defendant must provide evidence of past discrimination in the state to justify taking race into account when drawing voting-district lines.\textsuperscript{185} However, the Supreme Court rejected reports outlining discrimination in North Carolina because the reports were not composed until after the General Assembly drafted the district lines being challenged in Shaw.\textsuperscript{186} Thus, the Supreme Court in Shaw held that the critical inquiry in a suit challenging voting districts is whether the legislature believed discrimination existed before implementing the program.\textsuperscript{187} According to the West Tennessee and Associated Utilities courts, by making the legislature's motive the fact of consequence, the Shaw court rendered post-enactment evidence irrelevant to the strict scrutiny analysis.\textsuperscript{188}

\textsuperscript{178} See supra notes 37-39 and accompanying text.
\textsuperscript{179} See supra notes 37-39 and accompanying text.
\textsuperscript{180} See supra notes 37-39 and accompanying text.
\textsuperscript{181} See supra notes 37-39 and accompanying text.
\textsuperscript{184} Id. at 909-10.
\textsuperscript{185} Id. at 909.
\textsuperscript{186} Id. at 910.
\textsuperscript{187} Id.
\textsuperscript{188} See supra notes 130-36, 158-59 and accompanying text.
While the Supreme Court used Croson as precedent for evaluating certain aspects of voting-rights cases, Shaw should not be used as precedent for excluding post-enactment evidence in other affirmative action cases. 189 There is a critical distinction between the use of racial classifications in drawing voting districts and the use of race in other affirmative action contexts. 190 The drawing of voting districts is one of the most politically contentious activities conducted by a legislature. 191 Politicians have historically used gerrymandering to manipulate the political process and bolster their parties' positions within the legislature. 192 Because of this fact, the actual motive for drawing race-conscious voting districts may involve a subversive attempt to gain political power and have little to do with an individual's right to be free from discrimination. 193 Therefore, there exists a strong need to determine the legislature's motive for drawing voting lines in a particular pattern. 194

This need to focus on the legislative body's motive is not equally portentous in other affirmative action contexts. The typical affirmative action program, especially in the public-employment realm, deals more with distributive justice for the individual and less with party-line political considerations. Admittedly, when an affirmative action program is considered, legislators sometimes have political motives other than mending harms done by slavery, segregation, and contemporaneous discrimination. However, those considerations are not as deeply intertwined in the decision-making process. While a legislator's decision to support an affirmative action program giving preference to certain minority contractors may cost him or her some votes in the next election, the choice does not affect the political party in the same manner as voting-district decisions. Thus, the motive for implementing an affirmative action program is not as important as the motive behind the drawing of voting districts. For this reason, Shaw should not be used to exclude the use of post-enactment evidence of discrimination in other affirmative action contexts.

V. The Strict Scrutiny Test Is Only Effective If Courts Are Allowed to Evaluate All Evidence of Past Discrimination

While the courts in West Tennessee and Associated Utility held otherwise, the Supreme Court has not rendered any specific indication of its position on the admissibility of post-enactment evidence of discrimination in an affirmative action case. As indicated in the above analysis of Croson, Wygant, and Shaw, the

189. Shaw, 517 U.S. at 941 (Stevens, J., dissenting) (articulating several differences between "pure" affirmative action programs and voting-rights cases and questioning the application of interchangeable legal standards).
190. Id.
191. Id. at 941-42 (Stevens, J., dissenting).
192. Id.; see also William A. McLenaghan, Magruder's American History 213 (rev. ed. 1990) (discussing the use of gerrymandering to manipulate elections).
193. See Shaw, 517 U.S. at 941-42 (Stevens, J., dissenting).
194. See id.
Supreme Court has not had the opportunity to scrutinize the issue. Therefore, a proper discussion of the issue should first examine the standards articulated in the Supreme Court's strict scrutiny test, and then examine the various policy justifications for admitting post-enactment evidence.

The strict scrutiny test is applied to affirmative action programs to ensure that states only classify individuals on the basis of race when absolutely necessary. This goal is accomplished through the compelling-interest prong of the analysis. The entity seeking to give a preference to an individual based on race must identify the compelling interest of remedying past discrimination with relative certainty. Further, once the compelling interest is identified, the use of a minority-preference program must be narrowly tailored to alleviate the identified compelling interest. The Supreme Court utilizes this analysis to make sure affirmative action programs are used only in the proper circumstance and to the appropriate extent. The courts in *West Tennessee* and *Associated Utility* contended that to abide by these principles, a court must focus exclusively on whether discrimination existed at the time the legislative body implemented the program. The courts presumed post-enactment evidence was irrelevant to the question of whether discrimination existed before the implementation of the program. However, allowing a defendant of an affirmative action program to present post-enactment evidence of discrimination does not circumvent this Supreme Court standard. Instead, it enables courts to precisely apply the first prong of the strict scrutiny test and determine whether prior discrimination existed.

Due to the nature of discrimination in the United States, the use of post-enactment evidence increases the accuracy of the compelling-interest prong of the strict scrutiny test. Discrimination in the United States has frequently changed shape. For the most part, employers no longer make racist comments in conjunction with a refusal to use a minority contractor. Today, discrimination is more complex and much less obvious. But our country's history of

195. See supra notes 172-93 and accompanying text.
197. Croson, 488 U.S. at 492-94 (stating the purpose of the strict scrutiny test.)
198. Id. (describing the type of evidence that may satisfy the compelling-interest prong of the strict scrutiny test).
199. Id.
202. See supra notes 119-44, 158-66 and accompanying text.
203. See BOWEN & BOK, supra note 3, at 1-14, for a discussion of America’s checkered history of discrimination and how it affects current affirmative action policy.
204. See STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991) (explaining the intricacies of the current racial problem through the eyes of an African American intellectual).
205. Id.
discrimination is highly relevant to identifying current unequal treatment. In addition, the inverse is true. Identifying contemporary racial disparity in a particular area can indicate a history of discrimination. This truism is reflected in the Supreme Court's recognition of remedying both present discrimination and the present effects of past discrimination as a compelling state interest. By including the present effects of past discrimination, the Supreme Court implicitly acknowledged that discrimination does not exist in a vacuum. Past and present discrimination are not mutually exclusive. Therefore, when a court attempts to determine whether sufficient evidence of past discrimination exists, the inquiry becomes more effective if the court considers the particular segment of society over a long period of time. If a court is limited to using pre-enactment evidence, the inquiry ends with the creation of the affirmative action program. This prevents the court from looking at possible discrimination that may have occurred after the program's inception. Because in most circumstances discrimination will not immediately end with the implementation of an affirmative action program, excluding post-enactment evidence excludes relevant evidence, and many times excludes the best evidence.

Based on the above analysis, West Tennessee and Associated Utility misapplied basic principles of the Federal Rules of Evidence. Wygant's requirement that a state or local legislature have convincing evidence of discrimination before it uses race-based remedial measures does not preclude the use of post-enactment evidence of past or present discrimination. Evidence that discrimination does or does not exist after the implementation of an affirmative action program makes it more or less likely that discrimination existed before the implementation of the set-aside plan. Therefore, based on the Supreme Court's analysis in Croson and Wygant, post-enactment evidence of discrimination is relevant to proving a fact of consequence: whether sufficient discrimination existed to justify the use of remedial action.

206. Id. at 55-59.
207. See Rosenfeld, supra note 4, at 135-62 (examining how the Supreme Court applies equal protection analysis to affirmative action cases).
210. See Fed. R. Evid. 401; see also Liberty Envtl. Sys., Inc. v. County of Westchester, No. 94 CIV.7431 (WK), 2000 WL 1341403 (S.D.N.Y. Sept. 15, 2000) (finding that Rule 401 of the Federal Rules of Evidence requires the court to admit post-event evidence in a discrimination suit). In Liberty, the plaintiff brought suit alleging discrimination by the defendant in its allotment of construction contracts. Id. at *1. (It is not clear whether the plaintiff in Liberty was a minority alleging discrimination in violation of the Fourteenth Amendment or a nonminority alleging reverse discrimination.) The defendant filed a motion in limine to preclude the plaintiff from offering any evidence at trial of events that occurred after the alleged discriminatory conduct. Id. The plaintiff contended that two incidents that occurred after the award of the contract provided circumstantial evidence that the defendant did not
VI. The Policy Arguments for Admitting Post-enactment Evidence


The courts in West Tennessee and Associated Utility based their opinions on several public-policy considerations. According to the West Tennessee court, allowing a governmental unit to use post-enactment evidence of discrimination to save its affirmative action program would "create a chilling-effect that discourages non-minorities from protecting their rights." The district court feared the possibility of some nonminority individuals refraining from bringing suit because the public defendant is capable of conducting extensive additional research throughout the legal process in an attempt to support the plan. The plaintiff would then be forced to "attack a moving target of newly developing evidence to support past motivations."

This argument should not prohibit the use of post-enactment evidence for three reasons. First, prospective affirmative action plaintiffs are capable of attacking post-enactment disparity studies in the same manner as pre-enactment studies. In all of the circuits that have adopted the use of post-enactment evidence, affirmative action programs are still frequently terminated on the basis of flawed disparity studies. Second, plaintiffs' attorneys' knowledge and skill in attacking disparity studies have greatly increased over the last decade. Disputing a disparity study conducted by a state or local defendant does not require a full-blown disparity study by the plaintiff. Through the discovery process, a nonminority plaintiff may dispute the defendant's disparity study without conducting a second study. Third, an affirmative action defendant must accept the findings of a post-enactment disparity study even if the study does not find discrimination. In some cases, a post-enactment study could actually help a

award the contract to the plaintiff because of a discriminatory animus. Id. In admitting the post-contract evidence, the court relied on Rule 401 of the Federal Rules of Evidence. Id. at *2. The Liberty court found the post-event occurrences "highly probative" of a preexisting illegal custom or practice and found that the probative value of the evidence was not outweighed by its prejudicial effect under Rule 403 of the Federal Rules of Evidence. Id. at *2, *3.

212. W. Tenn., 64 F. Supp. 2d at 720.
213. Id.
214. Id.
216. See, e.g., Cache Valley Elec. Co. v. Utah Dep't of Transp., 149 F.3d 1119 (10th Cir. 1998); Monterey Mech. Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997); Hopwood v. Texas, 21 F.3d 603 (5th Cir. 1994).
217. See La Noue, Who Counts?, supra note 83, at 797-820.
218. Id.
219. Id.
220. See Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895, 911-29 (11th Cir. 1997), for a case allowing post-enactment evidence of discrimination but ultimately holding that this evidence was insufficient to provide a compelling state interest.
plaintiff show a lack of discrimination.221 If this is the case, the defendant cannot argue that absent an affirmative action program, sufficient evidence of discrimination would have been found.222 Thus, the concern expressed in *West Tennessee* is greatly overstated. Affirmative action plaintiffs have ample ability to challenge post-enactment studies conducted by states.223 The courts in *West Tennessee* and *Associated Utility* should have focused more on the harm defendants would suffer from the exclusion of post-enactment evidence and less on the rights of potential nonminority plaintiffs.

**B. The Possibility of Dual Liability**

In *NAACP v. Seibels*,224 the Eleventh Circuit articulated a strong policy reason for permitting defendants of state affirmative action plans to use post-enactment evidence to establish a compelling state interest. According to the Eleventh Circuit, preventing a defendant from using post-enactment evidence of discrimination does not strike a proper balance between the conflicting civil rights obligations that public employers face.225 If the State fails to act on a reasonable belief that discrimination exists in a certain industry, minorities may bring suit against the State for passive participation in discrimination.226 Conversely, if the State implements an affirmative action policy without sufficient evidence of discrimination, it risks liability to nonminority plaintiffs.227 Because of these conflicting obligations, a state employer must tread an extremely fine line when dealing with discrimination.228

Preventing the use of post-enactment evidence would make this already difficult situation almost unsolvable. Instead of implementing a small-scale program that is amended as further disparity studies come into existence, a state would be forced to wait the for the outcome of lengthy disparity studies before taking any action to remedy the problem.229 According to the *Seibles* court, state defendants should be able to "act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary."230 Then, if the program is challenged by a nonminority, all of the evidence of discrimination, both pre-enactment and post-enactment, should be examined to determine whether the program violates strict scrutiny.231

221. *Id.*
222. *Id.*
224. 31 F.3d 1548 (11th Cir. 1994).
225. *Id.* at 1566.
226. *Id.* The Equal Protection Clause prevents states from discriminating on the basis of race. See U.S. CONST. amend. XIV, § 1. If a state entity is aware of discrimination in an industry, that state must either attempt to remedy the discrimination or accept liability. See *Seibles*, 31 F.3d at 1566.
227. *Seibles*, 31 F.3d at 1566.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
C. Post-enactment Evidence Should Be Admitted Because of the Harsh Remedies Plaintiffs May Seek

Another justification for admitting post-enactment evidence of discrimination involves the type of remedies that nonminority plaintiffs generally seek. In addition to monetary damages, courts generally grant prospective injunctive relief to victorious plaintiffs. According to several circuit courts, this type of relief should only be granted after a court examines all evidence of discrimination. In *Concrete Works of Colorado v. City of Denver*, the Tenth Circuit found post-enactment evidence of discrimination exceptionally relevant when an affirmative action plaintiff sought permanent injunctive relief.

In *Concrete Works*, the Tenth Circuit examined a city ordinance establishing goals for participation in the construction industry by minority- and female-owned businesses. In 1990, the Denver City Council passed Ordinance 513 in an attempt to help minority-owned business enterprises (MBEs) and women-owned business enterprises (WBEs) participate in public-works projects "to an extent approximating the level of [their] availability and capacity." The City determined availability and capacity by conducting periodic studies of minority participation in each contract area. The ordinance also directed the Office of Contract Compliance (OCC) to establish MBE and WBE participation goals on each individual city contract. The statutory goals for total annual construction expenditures were 16% for MBEs and 12% for WBEs. According to the ordinance, if the OCC established an individual project goal, all bidders must either demonstrate how they intend to satisfy the goal or show that they made a good-faith effort to do so. On January 6, 1992, Concrete Works, a construction company owned by a nonminority male, filed suit alleging the ordinance caused

232. Most challenges to affirmative action programs are brought by conservative special-interest groups. While these groups are concerned with the rights of the individual plaintiff, they also want to make sure the affirmative action program is ended. Therefore, injunctive relief is very important to most affirmative action plaintiffs. See CARTER, supra note 204, at 222-50 (explaining how conservative coalitions fighting affirmative action find plaintiffs).

233. Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895, 911 (11th Cir. 1997); Concrete Works of Colo. v. City of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994); Contractors Ass'n v. City of Phila., 6 F.3d 990, 1004 (3d Cir. 1993).

234. Eng'g Contractors, 122 F.3d at 911 (citing Concrete Works, 36 F.3d at 1521).

235. 36 F.3d 1513 (10th Cir. 1994).

236. Id. at 1521. Ultimately, the *Concrete Works* court took the position that some pre-enactment evidence of discrimination must be offered before the court will look at post-enactment evidence of discrimination. Id. at 1521-22. However, the argument in this section concerning prospective injunctive relief applies with equal force to the position that all post-enactment evidence of discrimination should be admitted.

237. Id. at 1515.

238. Id. at 1515-16.

239. Id. at 1516.
it to lose three public contracts.\textsuperscript{240} Concrete Works' complaint sought a permanent injunction against enforcement of the ordinance and damages for lost contracts.\textsuperscript{241}

The City of Denver presented three categories of evidence to demonstrate a compelling interest in enacting the ordinance: (1) evidence of discrimination in city contracting from the mid-1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs, WBEs, and city officials who had either witnessed or experienced both public and private discrimination.\textsuperscript{242} The City implemented the program after compiling an unspecified amount of the above evidence.\textsuperscript{243} A large portion of the evidence, however, came into existence after the program began.\textsuperscript{244}

After reciting the Supreme Court standards for evaluating state and local affirmative action plans under \textit{Wygant} and \textit{Croson}, the \textit{Concrete Works} court addressed the plaintiff's contention that the court should only look at pre-enactment evidence of discrimination to determine whether the City had a compelling interest in remedying discrimination in the allotment of local construction contracts.\textsuperscript{245} First, the \textit{Concrete Works} court noted that the strong weight of authority among other circuit courts supported admitting the post-enactment evidence.\textsuperscript{246} The court took special notice of the fact that all courts addressing the issue allowed post-enactment evidence to come into the record.\textsuperscript{247} Second, the court focused on the type of relief sought by the plaintiff. Because the permanent injunction sought by the plaintiff would effectively end the affirmative action program, the court in \textit{Concrete Works} believed it should consider all of the available evidence.\textsuperscript{248}

While the Tenth Circuit did not articulate its reason for this concern, it is likely based on a realization that unlike monetary damages, permanent injunctive relief affects more than one individual's rights.\textsuperscript{249} Should a court permanently enjoin an affirmative action program without looking at all of the available evidence of past discrimination, potential benefactors under the plan are unjustly deprived of state benefits. Further, as the number of affirmative action programs declared unconstitutional increases, the possibility of a legislative body replacing these plans decreases.\textsuperscript{250} This is not to say that unconstitutional affirmative action programs should not be overturned. The \textit{Concrete Works} court, as well as this comment, only

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\begin{itemize}
  \item \textsuperscript{240} \textit{Id.} at 1517.
  \item \textsuperscript{241} \textit{Id.}
  \item \textsuperscript{242} \textit{Id.} at 1523.
  \item \textsuperscript{243} \textit{Id.}
  \item \textsuperscript{244} See \textit{id.}
  \item \textsuperscript{245} See \textit{id}. The \textit{Concrete Works} court went to great efforts to illustrate the Tenth Circuit's adherence to \textit{Croson} and \textit{Wygant}.
  \item \textsuperscript{246} \textit{Id.}
  \item \textsuperscript{247} \textit{Id.; see also supra notes 102-04 (listing the circuits that have admitted post-enactment evidence).}
  \item \textsuperscript{248} \textit{Concrete Works}, 36 F.3d at 1521.
  \item \textsuperscript{249} \textit{Id.}
  \item \textsuperscript{250} See \textit{Day, supra note 102, at 69-80 (noting the differing opinions on whether affirmative action programs can and do survive \textit{Croson}).}
\end{itemize}
argue that because of the extreme nature of the remedy in affirmative action cases, courts should look at all available evidence of discrimination before determining the fate of a program that can positively affect minority business owners.251

D. Post-enactment Evidence Helps Courts Determine Whether an Affirmative Action Plan Is Narrowly Tailored

The primary need for post-enactment evidence of discrimination is to satisfy the compelling-interest prong of the strict scrutiny test by illuminating the existence of racial discrimination. However, eliminating the viability of such evidence also profoundly affects the narrow-tailoring requirement. Under Wygant and Croson, the preference goals in an affirmative action plan must reflect the relevant labor pool as determined in the compelling-interest leg of the inquiry.252 Therefore, if minority construction contractors in a particular city comprise 10% of the total number of contractors and are receiving less than 1% of the city's annual contracts, the affirmative action plan must be designed to allocate 10% of contracts to minorities. If the program sets goals higher than 10% minority participation, the plan will fail the narrow-tailoring test.253 Post-enactment evidence of discrimination can be used to determine the current number of minority businesses in the relevant labor market and how many projects or jobs are allocated to minority-owned enterprises.

The Concrete Works court took particular notice of the importance of post-enactment evidence in determining whether an affirmative action plan is narrowly tailored.254 In the Tenth Circuit case, the City of Denver first implemented the challenged set-aside program in 1983, almost a decade prior to the lawsuit.255 Particularly because the City frequently amended the program, the Concrete Works court found post-enactment evidence of discrimination helpful to determining whether the program's preference goals reflected the vast disparity studies and other findings of discrimination compiled after the program's inception.256 In the court's opinion, "post-enactment evidence, if carefully scrutinized for its accuracy, will often prove quite useful in evaluating the race-conscious program."257

VII. All Post-enactment Evidence Should Be Admitted

Any empirical critique of a district court's opinion should include a normative solution. To accomplish this, a split among those circuit courts allowing post-enactment evidence must be addressed.258 While all of the circuit courts addressing the issue of post-enactment evidence allow it under some circumstances, the Ninth and

251 Concrete Works, 36 F.3d at 1521-22.
253 See Wygant, 476 U.S. at 274-75.
254 Concrete Works, 36 F.3d at 1521-22.
255 Id. at 1515.
256 Id. at 1521.
257 Id.
258 See supra notes 104-08 and accompanying text.
Tenth Circuits only allow post-enactment evidence of discrimination after a showing of some pre-enactment evidence. The requirement of some pre-enactment evidence of discrimination, according to those two circuits, ensures that the entity seeking to implement the affirmative action program had a good-faith belief that discrimination existed. At first glance, this additional requirement set by the Ninth and Tenth Circuits appears to strike a middle ground between the wholesale use of pre-enactment evidence and the wholesale exclusion of the evidence. However, the requirement of some pre-enactment evidence of discrimination before allowing post-enactment evidence is an unnecessary and impractical prerequisite for two reasons.

First, requiring some pre-enactment evidence of discrimination before allowing post-enactment evidence, if used to screen unconstitutional affirmative action programs, will rarely prevent post-enactment evidence of discrimination from being admitted. In Croson, the Supreme Court erased all doubts about the evidentiary standard required for a state to maintain an affirmative action program. Nearly a decade after this mandate, most state and local governments have at least attempted to satisfy Croson’s high evidentiary requirements. Few, if any, affirmative action programs are implemented without some findings of past discrimination. Thus, requiring some pre-enactment evidence would impact an extremely small number of cases.

Second, even in those few cases in which an affirmative action plan is completely unsupported by pre-enactment evidence, the court needs to look at all of the evidence to make a just determination as to whether past discrimination exists. The concern that a legislative body may impose an unconstitutional affirmative action program does not increase if post-enactment evidence is admitted. If a legislative body arbitrarily implements an affirmative action program without sufficient findings of past discrimination, it should be reflected in the disparity study. If the study is flawed, a judge or jury has an opportunity to review the post-enactment evidence. Therefore, regardless of the presence of pre-enactment evidence of discrimination, courts should consider post-enactment evidence of discrimination to determine whether a state had a compelling interest in remedying past discrimination.

VIII. Conclusion

In Wygant and Croson, the Supreme Court seriously hindered a state’s ability to maintain affirmative action programs. However, the Court did not prohibit racial-preference plans in all circumstances. In fact, the Supreme Court emphatically recognized the need for affirmative action to repair certain past wrongs by the racial majority. If a state is able to identify its past mistakes with a relative degree of certainty, it may use affirmative action to repair the damage. District courts should not

259. Concrete Works, 36 F.3d at 1521; Coral Constr. Co. v. King County, 941 U.S. F.2d 910, 920 (9th Cir. 1991).
260. Coral, 941 F.2d at 920.
262. See supra notes 100-02 and accompanying text.
263. See supra notes 100-02 and accompanying text.
deprive states of the ability to attempt racial healing in this limited manner until the Supreme Court decides otherwise.

The district courts in *West Tennessee* and *Associated Utility* made a procedural decision that effectively ended all affirmative action programs in their respective jurisdictions. The courts read a mandate against post-enactment evidence of discrimination into two Supreme Court opinions that did not actually confront the issue. The district courts wanted to ensure that nonminority plaintiffs had the ability to disprove the most accurate evidence available. In so doing, the courts completely ignored the rights of those minorities who benefited from the affirmative action programs. *West Tennessee* and *Associated Utility* ignored circuit authority and gave precedential value to a misapplication of *Wygant* and *Croson*. The Sixth and Fourth Circuits should respectively overrule *West Tennessee* and *Associated Utility* and allow states the unencumbered ability to use post-enactment evidence of discrimination. Additionally, the Ninth and Tenth Circuits should abandon the requirement of some pre-enactment evidence of discrimination before admitting post-enactment evidence of discrimination. Courts should consider all circumstantial evidence of past and present discrimination to determine whether the governmental entity has a compelling interest for maintaining the affirmative action program.

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