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Legislate First, Ask Questions Later: Post-Enactment Evidence in Minority Set-Aside Litigation

Mark L. Johnson

Following the Supreme Court's decision in *Fullilove v Klutznick*, where the Court upheld a federal minority business set-aside program against an equal protection challenge, the 1980s saw a dramatic expansion in the use of such programs to remedy perceived racism in the awarding of government contracts. The jurisprudential landscape changed in 1989, when the Supreme Court subjected one such program to strict scrutiny in *City of Richmond v J.A. Croson Co.* To fulfill the requirements of the Fourteenth Amendment, the Court held, a governmental entity must demonstrate a compelling interest justifying the minority set-aside plan, and narrowly tailor that plan to remedy the effects of prior discrimination.

Local governmental entities have found the requirements of *Croson* difficult to meet. They have had to invest significant resources to produce statistical evidence establishing a level of racism sufficient to justify minority set-asides and preferences. Some localities have been hesitant to implement remedial programs in light of the general uncertainty as to how courts will apply the *Croson* standard. Others have implemented set-asides

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1 B.A. 1998, Purdue University; M.A. 2000, Purdue University; J.D. Candidate 2003, University of Chicago.
2 Docia Rudley and 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, 40, 45 (2000) (criticizing *Croson* and noting that its strict scrutiny of set-asides has made it more difficult for states and municipalities to defend their programs).
4 Id at 491–93.
5 Nicole Duncan, *Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 Colum Hum Rts L Rev 679, 682 (1995) (noting that localities are less likely to enact affirmative action programs after *Croson*).
6 See, for example, *Harrison & Burrowes Bridge Constructors, Inc v Cuomo*, 981 F2d 50, 60 (2d Cir 1992).

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with relatively little quantifiable empirical evidence, gathering
the requisite data at the commencement of litigation and some-
time after enactment of the plan.\footnote{See, for example, Coral
Construction Co v King County, 941 F2d 910 (9th Cir 1991),
and Harrison, 981 F2d 50 (2d Cir 1992).}

Federal Courts of Appeals have divided over whether such
post-enactment evidence is admissible to establish the constitu-
tionality of a racial preference program.\footnote{Compare Coral
Construction, 941 F2d at 919–21 (holding post-enactment evi-
dence admissible) with Rothe Development Corp v United States
DOD, 262 F3d 1306, 1326–28 (Fed Cir 2001) (holding post-enactment
evidence inadmissible).} The Second,\footnote{Harrison, 981 F2d at 60.}
Third,\footnote{Contractors Association of Eastern Pennsylvania, Inc
v City of Philadelphia, 6 F3d 990, 1003–04 (3d Cir 1993).}
Ninth,\footnote{Coral Construction, 941 F2d at 919–21.}
Tenth,\footnote{Concrete Works of Colorado v Denver, 36 F3d 1513,
1521 (10th Cir 1994).}
and Eleventh Circuits\footnote{Engineering Contractors Association
of South Florida Inc v Metropolitan Dade County, 122 F3d 895
(11th Cir 1997); Ensley Branch, NAACP v Seibels, 31 F3d 1548,
1568 (11th Cir 1994).} have held that courts may properly
consider such evidence, whereas the Sixth,\footnote{Associated
General Contractors of Ohio, Inc v Drabik, 214 F3d 730, 738–39
(6th Cir 2000), cert denied, Johnson v Associated General
Contractors of Ohio, Inc, 531 US 1148 (2001).}
Seventh,\footnote{Builders Association of Greater Chicago v County
of Cook, 256 F3d 642, 645 (7th Cir 2001).}
and Federal Circuits\footnote{Rothe, 262 F3d at 1325–28.}
have held to the contrary. In 1996, the Supreme Court in \emph{Shaw
v Hunt}\footnote{517 US 899 (1996).} held that, in the context of
racial gerrymandering, a legislature must have sufficient
evidence to support a racial distinction \emph{"before it embarks on an
affirmative action program."} This Comment argues that the
Court's decision in \emph{Shaw} forecloses the admission of post-
enactment evidence in the context of minority set-asides, arguing
that its consideration is unjustifiable in all but a few limited con-
texts.

Part I briefly outlines the major Supreme and circuit court
cases relevant to the admissibility of post-enactment evidence in
constitutional challenges to racial set-asides. In light of this case
law, Part II argues that, under \emph{Shaw}, post-enactment evidence is
not admissible to establish the constitutionality of such pro-
grams. It critiques the logic of the appellate courts which have
admitted such evidence. The Comment concludes by suggesting...
an alternative regime which would allow governmental entities to avoid the pitfalls of inadmissibility, while requiring courts to consider only that evidence available at the time of enactment.

I. RACIAL SET-ASIDES IN THE COURTS

A. Applying Strict Scrutiny: Croson

In *Croson*, the Supreme Court clarified its opinion in *Fullilove* by holding that the Equal Protection Clause of the Fourteenth Amendment requires a municipality to make specific findings of racial discrimination prior to awarding contracts through a racial set-aside program. Croson further held that a city must narrowly tailor such programs to redress empirically established wrongs.

At issue in *Croson* was the city of Richmond’s requirement that prime construction contractors subcontract at least 30 percent of the work to Minority Business Entities (MBEs). The statute defined an MBE as a business in which “black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleutian native” owners held at least a 51% interest. The city claimed that the plan was “remedial” and enacted to promote wider minority participation in public construction projects.

The Supreme Court determined that the city had failed to demonstrate a compelling governmental interest justifying the plan. Since the plan denied non-MBEs the opportunity to compete for a fixed percentage of public contracts on the basis of race, the Court analyzed the plan under strict scrutiny. Strict scrutiny requires a firm evidentiary basis for concluding that the underrepresentation of minorities is the result of past discrimination. Only with such evidentiary justification can a governmental entity utilize the “highly suspect” tool of racial classification, with its inherent risks of stigmatic harm and illegitimate motiva-

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19 *Croson*, 488 US at 493, 498–500 (applying strict scrutiny and noting that Richmond did not have a “strong” evidentiary basis to justify its set-aside program).
20 Id at 507–08 (noting that Richmond’s program was not narrowly tailored because it employed a quota and did not consider race-neutral alternatives to race based remedies).
21 Id at 477–78 (describing Richmond’s program).
22 Id at 478.
23 *Croson*, 488 US at 478.
24 Id at 485–86.
25 Id at 493–98.
26 Id at 489–99.
tion (such as racial animus or politicking). In addition, a court must consider such evidence to determine whether the means chosen are narrowly tailored to remedy past discrimination.

As evidence in support of the set-aside, Richmond offered the fact that, though the city’s population was 50 percent African-American, it awarded less than 1 percent of its construction contracts to MBEs. While such a statistical disparity might suggest racism in the hiring of relatively fungible entry-level employees, the Court held that the relevant sample for demonstrating discriminatory exclusion in the construction context, where bidders must have special qualifications, is the number of minorities qualified to undertake the particular task. In Croson, Richmond would have had to adduce evidence to the effect that, though 30 percent of the qualified contractors in the area were minority-owned, the city awarded a much smaller percentage of its contracts to MBEs.

The city also pointed to low minority membership in the various trade organizations that appeared at hearings in opposition to the set-aside. The Court noted that there were numerous explanations other than racism for this low minority membership, including past societal discrimination and the possibility that minorities might simply be attracted to industries other than construction. For low minority membership to be relevant, the city would have had to provide statistical evidence of a disparity between the number of MBEs eligible for membership in trade organizations and the number actually accepted as members.

Finally, the city pointed to Congress’s generalized findings in Fullilove that there had been nationwide racial discrimination in the construction industry. The Croson Court found these of limited value because they suggested very little about the relevant construction market of Richmond, Virginia. The Court noted

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27 Croson, 488 US at 493.
28 Id.
29 Id at 479–80.
30 Id at 501–02.
31 See Croson, 488 US at 502–03 (noting that without such evidence, Richmond cannot justify its affirmative action plan).
32 Id at 480, 503.
33 Id at 503.
34 Id at 503–04.
35 Croson, 488 US at 504 (discussing Fullilove).
36 Id.
that Congress had explicitly recognized that market conditions will vary from place to place, and therefore had provided a procedure for obtaining a waiver from set-aside requirements where warranted by local conditions.\(^{37}\)

The *Croson* Court determined that Richmond’s statistical evidence provided insufficient grounds for concluding that remedial action was necessary.\(^{38}\) Further, even if some remedial action was warranted, the Court found that the evidence provided no basis for determining whether the requirement that 30 percent of all municipal contracts be awarded to MBEs was narrowly tailored to remedy past discrimination.\(^{39}\) The Court was particularly troubled by the inclusion of Eskimos and Aleutian Natives on the list of eligible minorities, groups against which the city of Richmond had likely never had even the opportunity to discriminate.\(^{40}\) The Court believed that the city had imposed its 30 percent quota arbitrarily.\(^{41}\)

The Court further noted that the city had failed to consider race-neutral remedies, such as municipal financing for small firms, which might have helped to improve minority access to capital, thus leveling the playing field.\(^{42}\) Even if an outright racial classification were the only practicable means of remedying discrimination, the 30 percent quota would only be narrowly tailored to the goal of achieving a balance between the minorities in the general population and those in the construction industry.\(^{43}\) Such a goal, the Court suggested, rests on the unrealistic assumption that minorities will choose a given trade or industry in mathematical proportion to their representation in the local population.\(^{44}\)

Though the *Croson* Court clearly stated its preference for race-neutral remedial measures, it did not specifically consider whether, where such measures have been found impracticable or

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\(^{37}\) Id.

\(^{38}\) Id at 500 (“None of these ‘findings,’ singly or together, provide the city of Richmond with a ‘strong basis in evidence for its conclusion that remedial action was necessary.’”).

\(^{39}\) *Croson*, 488 US at 507 (“It is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.”).

\(^{40}\) Id at 506 (“The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.”).

\(^{41}\) Id at 507–08.

\(^{42}\) Id.

\(^{43}\) *Croson*, 488 US at 507.

\(^{44}\) Id.
ineffectual, a governmental entity can implement a racial set-aside or similar program on insufficient evidence, and then gather supporting evidence in the event of litigation. Lower courts have struggled to determine what the outcome might have been had Richmond produced post-enactment evidence establishing that its 30 percent set-aside was indeed narrowly tailored to remedy past discrimination in the awarding of construction contracts.

B. Applying Croson: Post-Enactment Evidence before Shaw

The Ninth Circuit, in Coral Construction Co v King County, was the first federal court of appeals to consider whether courts should admit post-enactment evidence in racial set-aside litigation. In that case, King County, Washington had put into place a system that gave preference to bids from minority- and woman-owned construction contractors that were within 5 percent of the lowest non-MBE bid. In litigation challenging the scheme, the county sought to introduce two reports documenting the impact of discrimination in the local construction industry and in local goods and services industries. The county prepared the reports in its amended ordinance one year after it had originally enacted the program.

With regard to the admissibility of these post-enactment reports, the Ninth Circuit held that while a "municipality must have some concrete evidence of discrimination in a particular industry before it may adopt a remedial program," even if only limited disparity studies and anecdotal evidence, it would not automatically strike down a program if the evidence available at the time of enactment did not completely satisfy both prongs of the strict scrutiny test. Instead, the Ninth Circuit held that courts should evaluate such programs on the basis of all the evidence presented to the district court, whether that evidence was avail-

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45 See id at 509 (noting that "If the City of Richmond had evidence before it..." but did not specify when it had to have such evidence.)
46 See text accompanying notes (noting circuit split on the admissibility of post-enactment evidence).
47 941 F2d 910 (9th Cir 1991).
48 Id at 919–22.
49 Id at 914 n 3 (5 percent for bids of $10,000 and under; a different system if the bid is greater than $10,000).
50 Id at 915 (noting that the county prepared statistical and anecdotal evidence).
51 Coral Construction, 941 F2d at 915.
52 Id at 920.
able to the legislature before or after enactment. The Coral Construction court's only requirement was that there be sufficient evidence to establish that, at the time of enactment, the legislature had good-faith reason to believe that discrimination had occurred.

The Coral Construction court thought that admitting all evidence available at the time of trial was the only sensible legal rule. To support this decision, the court noted that if post-enactment evidence were inadmissible, governmental entities would be in a no-win situation. Presented with evidence that is solid, though insufficient under Croson, of its own culpability in fostering racial discrimination, a city would have to expend substantial resources developing evidence in support of a racial set-aside or preference plan. While studying the problem, existing discriminatory practices would likely continue, thus exposing the city to liability from discrimination suits brought by minorities.

Alternatively, requiring a showing of some evidence of discrimination at the time of enactment reduces the likelihood that whites injured by a set-aside plan could successfully sue the city. This is because such a rule gives a city the opportunity to produce the evidence necessary to defeat reverse-discrimination suits. A set-aside without evidence of a violation is presumptively invalid. The Coral Construction court would not invalidate a plan, however, where the government had a good faith reason to believe that discrimination had occurred, so long as evidence before the court demonstrated the need for the program.

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53 Id.
54 Id at 921 (“[W]here a state has a good faith reason to believe that systemic discrimination has occurred, and is continuing to occur, in a local industry, we will not strike down the program for inadequacy of the record if subsequent factfinding bears out the need for the program.”).
55 Coral Construction, 941 F2d at 920–21.
56 Id.
57 Id at 921.
58 Id (“... a municipality having such evidence would face the dilemma of deciding whether to wait the months necessary for further development of the record, risking constitutional culpability due to its inaction, or to act and to risk liability for acting prematurely but otherwise justifiably. The rule we articulate today lessens the likelihood of such dilemmas.”)
59 See Coral Construction, 841 F2d at 921.
60 See id.
61 Id (“[A] remedy without any evidence of a violation is presumptively void.”
62 Id (holding that a plan will not be invalidated “solely because the record at time of enactment did not measure up to constitutional standards,” and that courts should consider post-enactment evidence).
The Second Circuit's decision in *Harrison & Burrowes Bridge Constructors, Inc v Cuomo* accepted the Ninth Circuit's reasoning, determining that it would assess the constitutional sufficiency of a state's justification for an affirmative action plan on whatever evidence was presented at trial, whether pre- or post-enactment. The court noted that the original statute did not set specific goals for its set-aside program, leaving these to be determined by the implementing agency upon review of whatever data it found post-enactment. The court wrote that "when reviewing a statute's constitutionality, courts routinely consider any interpretive limitations placed on it by implementing regulations, which obviously must follow the statute's enactment." The court referred to cases where the Supreme Court had upheld statutes as enforced even though they may have been facially invalid. Since evidence of how a statute is enforced necessarily post-dates enactment, and there is no doubt as to the admissibility such of evidence, the court held that empirical data gathered following the enactment of a minority set-aside program may be considered by a court ruling on the program's constitutionality.

The Eleventh Circuit has twice held that courts may consider post-enactment evidence in suits challenging race-based classifications, first in *Ensley Branch, NAACP v Seibels*, and later in *Engineering Contractors Association of South Florida Inc v Metropolitan Dade County*. In *Seibels*, the court reconsidered the validity of a consent decree which a city put in place to combat the racially disparate effects of a written test it used in the hiring and promotion of police officers and firefighters. The court held that, as long as the city could show strong evidence of the need...

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*981 F2d 50 (2d Cir 1992).*

*Id at 60.*

*Id.*

*Id.*

*Harrison*, 981 F2d at 60, citing *Ward v Rock Against Racism*, 491 US 781, 795 (1989) (upholding statute against facial challenge because city interpreted the guideline in a manner that provided sufficient guidance to officials charged with its enforcement); *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc*, 455 US 489, 504 (1982) ("The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance.").

*Harrison*, 981 F2d at 60.

*31 F3d 1548, 1568 (11th Cir 1994).*

*122 F3d 895, 912 (11th Cir 1997).*

*Ensley Branch*, 31 F3d at 1564–78 (analyzing the consent decrees under *Croson*'s compelling government interest and narrow tailoring requirements, with respect to long-term and annual goals).
for affirmative action in a department at the time of trial, future affirmative action in that department would be justified.\textsuperscript{72}

The Third Circuit has also upheld the admissibility of post-enactment evidence in considering injunctive relief.\textsuperscript{2} The court worried, as did the Ninth Circuit in Coral Construction, that excluding post-enactment evidence would put cities and states in a precarious position.\textsuperscript{74} The Third Circuit noted that governmental entities must proactively remedy past discrimination and simultaneously ensure that their efforts do not violate the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{6} Disallowing post-enactment evidence where there is some evidence of governmental participation in discriminatory practices, the court noted, would prevent cities from enacting remedial measures until further study, thus perpetuating the government’s discriminatory practices.\textsuperscript{6} The court noted the risk that allowing such evidence might enable legislators to enact racial set-asides without sincere remedial intent, but found that concern negligible because the evidence in question there was essentially a reordering of evidence that was available at the time of the initial enactment.\textsuperscript{77}

The Tenth Circuit allowed consideration of post-enactment evidence in Concrete Works of Colorado v City of Denver.\textsuperscript{78} There, the city had implemented a plan whereby bidders for some city construction work would receive preferential treatment if they were minority- or woman-owned, involved a minority- or woman-owned subcontractor or venture partner, or that they had made good faith efforts to involve minority- or woman-owned contractors.\textsuperscript{79} Concrete Works brought an equal protection challenge to the ordinance when it lost a contract to a less competitive bid solely because the winning bidder met the requirements of the

\textsuperscript{72} Id at 1567–68 (upholding the consideration of post-enactment evidence because "this case concerns only the prospective validity of the decrees, and prospective validity can be established just as well with new evidence as with old. . .").

\textsuperscript{73} Contractors Association of Eastern Pennsylvania, Inc v City of Philadelphia, 6 F3d 990, 1003–04 (3d Cir 1993).

\textsuperscript{74} Id at 1004.

\textsuperscript{75} Id, citing Wygant v Jackson Board of Education, 476 US 267, 291 (1986) ("[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken. . .") (O'Connor concurring).

\textsuperscript{76} Contractors Association, 6 F3d at 1004.

\textsuperscript{77} Id.

\textsuperscript{78} 36 F3d 1513, 1521 (10th Cir 1994).

\textsuperscript{79} Id at 1516.
Concrete Works challenged the evidentiary basis for the ordinance, arguing that the city’s evidence offered at trial impermissibly considered discrimination from other geographic areas, constituted limited anecdotal evidence, and relied on data about minority- and woman-owned business activity in the Denver construction market through two years after the enactment of the ordinance.

The Concrete Works court upheld the consideration of all the challenged evidence, writing that it did not read “Croson’s evidentiary requirement as foreclosing the consideration of post-enactment evidence.” Accurate post-enactment data, the court noted, could be very useful in evaluating the remedial effects or shortcomings of the race-conscious program. This was, the court said, all the more true in the instant case where the ordinance had initially been enacted in 1983, and then reenacted with modifications in 1990. Evidence of discrimination subsequent to the 1990 ordinance might, the court said, be useful in determining whether the deviation from equal treatment continues to be necessary.

C. Shaw: Increased Scrutiny for Post-Enactment Evidence

Lower federal courts decided all of these cases prior to the Supreme Court’s decision in Shaw. There, the Court considered an equal protection challenge alleging that an electoral redistricting scheme impermissibly utilized racial gerrymandering. Discussing Croson and Wygant v Jackson Board of Education, the Court identified two conditions necessary to finding that a government’s interest in combating racial discrimination is compel-

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80 Id at 1518 n 5 (noting that Concrete Works presented “uncontested” evidence that it submitted the lowest bid and did not get the contract because it was not a minority-owned business, or otherwise qualified for special treatment under the statute).
81 Id at 1520–21.
82 Concrete Works, 36 F3d at 1521.
83 Id (noting that such evidence is only valuable after it is “carefully scrutinized for accuracy”).
84 Id (noting that since Concrete Works sought a preliminary injunction, the post-enactment evidence was relevant because it related to prospective relief).
85 Id.
86 See Shaw, 517 US at 910 (noting that a legislature must have evidence of past discrimination before enacting a race-based gerrymandering of voting districts); See also Part I B (discussing pre-Shaw decisions admitting post-enactment evidence).
87 Id at 901–08 (outlining the procedural history and facts of the case).
88 476 US 267, 277 (1986) (noting that legislatures must have some evidence of discrimination to justify their affirmative action programs).
First, Shaw held that the state must identify the targeted discrimination with some specificity. A generalized assertion of discrimination is inadequate because it provides a legislative body no guidance to determine the scope of the injury it seeks to remedy. Second, Shaw held that the legislature must have a "strong basis in evidence" to conclude that remedial action was necessary "before it embarks on an affirmative-action program."

Shaw emphasized Wygant's requirement that a legislative body have pre-enactment evidence sufficient to support a racial classification in order to fulfill the requirements of strict scrutiny. In Wygant, teachers challenged the validity of a collective bargaining agreement under which the Jackson School Board extended certain protections against layoffs exclusively to minority employees. The Board defended the agreement by pointing to its desire to combat general societal discrimination by using layoff protection to maintain minority role models among the ranks of its educators. Though the district court and the Sixth Circuit had upheld the provision, the Supreme Court was not convinced of its constitutionality. The Court held that an assertion of general societal racism does not meet the requirement that a legislature act pursuant to empirical evidence of prior discrimination by a governmental entity before allowing that specific entity the remedial use of racial classifications. Furthermore, the Wygant role model theory provided no logical stopping point for extending remedial layoff protection. The Court worried that such a theory would allow the Board to engage in discriminatory hiring and layoff practices even when they no longer furthered a legitimate remedial purpose.

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89 See Shaw, 517 US at 910.
90 Id at 909.
91 Id, citing Croson, 488 US at 498, (noting that generalized assertions of past discrimination are inadequate because they provide "no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decisionmaking essentially limitless in scope and duration.").
93 Shaw, 517 US at 908–910.
94 476 US at 270–73.
95 Id at 274.
96 546 F Supp 1195, 1202 (E D Mich 1982); 746 F2d 1152, 1156–57 (6th Cir 1994).
97 See Wygant, 476 US at 274–76 (rejecting the lower courts' analysis).
98 Id at 274.
99 Id at 275.
100 Id.
Wygant, however, did not specifically foreclose the admissibility of post-enactment evidence. As Coral Construction noted, in a post-Wygant decision, a court may find a program constitutional if a governmental entity presented evidence which convinced the legislature that there had been prior discrimination. Thus, while Wygant requires some pre-enactment evidence, supplementary post-enactment evidence might still be admissible.

Shaw appears to bar such a reading of Wygant. The Court there held that a compelling interest requires that "the State . . . show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification . . . and the legislature must have had a strong basis in evidence to support that justification before it implements the classification." Therefore, the only way a court can determine whether a legislature's intent was to remedy past racial discrimination is by looking at the evidence before that body at the time it drafted the legislation. Without a strong evidentiary basis at the time of enactment, a court can only rely on the legislature's self-interested claims of good intentions. Such claims are insufficient without substantial evidence to provide constitutional support for a racial classification.

D. The Admissibility of Post-Enactment Evidence after Shaw

While the decisions prior to Shaw uniformly allowed the admission of post-enactment evidence, the post-Shaw jurisprudential landscape is not nearly so neat and tidy. Some courts have

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101 See Wygant, 476 US at 277 (determining 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, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.").

102 Coral Construction, 941 F2d at 921 ("[W]here a state has a good faith reason to believe that systematic discrimination has occurred, and is continuing to occur, in a local industry, we will not strike down the program for inadequacy of the record if subsequent factfinding bears out the need for the program."); see also notes 103–105.

103 Shaw, 517 US at 908 (emphasis added).

104 See id at 908–09, n 4 (noting that avoiding meritless lawsuits is not a compelling state interest).

105 Id, citing Croson, 488 US at 500 (noting "strong basis in evidence" requirement).

106 See Croson, 488 US at 493 (noting that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

107 See part I B (discussing pre-Shaw cases).
continued to consider post-enactment evidence, while others have held that Shaw precludes such evidence.

More than a year after Shaw, the Eleventh Circuit in Engineering Contractors upheld a district court’s consideration of post-enactment evidence. There, Dade County had implemented a multifaceted program to increase minority participation in county construction projects. A group of trade associations had previously challenged the program and reached a settlement, but now challenged it again in light of Croson’s holding that such a programs are subject to strict scrutiny. The district court found that the evidentiary basis for the program was insufficient to pass strict scrutiny. The bulk of the evidence was drawn from years post-dating the initial enactment of the program in 1982. Dade County charged that the district court had erred insofar as it had failed to recognize that the reductions in racial discrimination apparent in the post-1982 statistical data were in part due to the existence of the program in question.

Making no mention of Shaw, the Eleventh Circuit upheld the consideration of post-enactment evidence and the district court’s decision not to speculate about how the data might have looked in the absence of the challenged program. The Eleventh Circuit held that “formal findings of discrimination need neither precede nor accompany the adoption of affirmative action.” The court warned that governmental entities must be careful in their use of post-enactment evidence, however, as the challenged programs

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98 See Engineering Contractors, 122 F3d at 912 (ruling, in 1997, that post-enactment evidence is admissible); Adarand Constructors, Inc v Slater 228 F3d 1147, 1166 (10th Cir 2000) (admitting post-enactment evidence).
99 See, for example, Rothe Development Corp v United States DOD, 262 F3d 1306, 1325–28 (Fed Cir 2001).
100 122 F3d 895.
101 Id at 911–12.
102 Id at 901 (noting that the program provided set asides, subcontractor goals, project goals, bid preferences of up to 10 percent, and preferences for factors other than price to minority- and woman-owned businesses).
103 Id at 901–02.
104 Engineering Contractors Association v Metropolitan Dade County, 943 F Supp 1546, 1584 (S D Fla 1996) (holding that the statistical “evidence presented by the defendants does not constitute an adequate showing of discrimination” to pass constitutional muster under strict or intermediate scrutiny review).
105 Id at 1557–58 (noting that most of the data at trial was post enactment evidence from the years 1989–1991).
106 See Engineering Contractors, 122 F3d at 912.
107 Id (“What the district court did not do is speculate about what the data might have shown had the BBE program never been enacted. We find no fault in that approach, because a strong basis in evidence can never arise from sheer speculation.”).
108 Id at 911, citing Ensley Branch, 31 F3d at 1565.
may sometimes reduce apparent discrimination such that the evidence no longer supports the racial classifications as enacted.  

In its decision in Adarand Constructors, Inc v Slater, on remand from the Supreme Court, the Tenth Circuit also allowed the consideration of post-enactment evidence. Adarand had lost a contract to install guardrails along a federal highway to a less competitive bid by a minority-owned business. Adarand challenged the constitutionality of a federal statute which provided prime contractors a bonus of up to 10 percent of the value of an approved subcontract for employing a disadvantaged business entity, defined in part as a minority-owned entity qualified to perform the subcontract. The Supreme Court had considered various aspects of the litigation several times, and reviewed the statute under a strict scrutiny standard.  

In reviewing the evidentiary basis for the federal program at issue in Adarand, the Tenth Circuit considered post-enactment evidence introduced by the defendants in addition to Congressional findings. Consideration of such evidence was appropriate, the court noted, because the defendants had gathered it in response to the Supreme Court’s decision to apply a strict scrutiny standard to the statutes in question. This is presumably because it would be unfair to require a program to have met the requirements of strict scrutiny when it was only subjected to such scrutiny after enactment. The court reviewed a plethora of evidence, much of it postdating enactment of the program, suggesting a nationwide pattern of private discrimination by prime contractors, bonding companies, suppliers, and others, making it difficult for minority owned contractors to win subcontracts on government funded projects. On the basis of this evidence, the court

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119 Engineering Contractors, 122 F3d at 912 ("Government actors are free to introduce post-enactment evidence in defending affirmative action programs, but if that evidence fails to meet the applicable evidentiary burden, a federal court cannot simply presume that, absent the programs, sufficient evidence of discrimination would have been found.").

120 228 F3d 1147, 1174 (10th Cir 2000) (holding that the government met its evidentiary burden to support a compelling interest), on remand from the Supreme Court, 528 US 216 (1995), cert regranted as Adarand Constructors, Inc v Mineta, 532 US 941, and cert dismissed, 534 US 103 (2001).

121 Id.

122 Adarand, 228 F3d at 1156.

123 Id at 1160–61 (describing the statute).


125 Adarand, 228 F3d at 1167, citing Coral Construction, 36 F3d at 1521.

126 Id at 1166 n 11.

127 See id at 1168–1175.
found that the government had fulfilled its burden of presenting a strong basis in evidence demonstrating a compelling interest.\(^{129}\)

In *Associated General Contractors of Ohio, Inc v Drabik*,\(^{129}\) Ohio-based contractors challenged a state program enacted in 1980 which set aside 5 percent of the value of all state contracts for minority owned contractors.\(^{130}\) The evidence before the Ohio legislature at the time of enactment was limited to comparisons between the percentage of all state construction contracts that went to minority owned businesses and the total percentage of businesses in the state with minority ownership.\(^{131}\) The program failed the strong basis in evidence prong of *Croson*, because the legislature did not consider how many of the qualified and willing construction companies in Ohio were MBEs.\(^{132}\) The legislation also failed the narrow tailoring prong because it benefited minorities against whom there was no documented discrimination in the construction industry and because it contained no provision for its own demise at such time as it fulfilled its goal of eliminating racial discrimination in the awarding of state construction contracts.\(^{133}\)

The state sought a continuance to perform the requisite statistical studies.\(^{134}\) Without mentioning *Shaw*, the Sixth Circuit upheld the district court’s refusal to grant the motion.\(^{135}\) Under *Croson*, the court wrote, the state must have had a sufficient basis in evidence for a racial classification prior to enactment, noting that “the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding.”\(^{136}\) The court noted with approval the district court’s admonition that the city should have updated its statistical database throughout the program’s twenty-year duration.\(^{137}\) This suggests that the court approved of using post-enactment evidence to determine whether a set-aside is still narrowly tailored, or might require some amendment in

\(^{128}\) Id at 1174–75.


\(^{130}\) Id at 733 (describing procedural history and Ohio’s Minority Business Enterprise Act).

\(^{131}\) Id at 736.

\(^{132}\) Id.

\(^{133}\) *Drabik*, 214 F3d at 737–38.

\(^{134}\) Id at 738.

\(^{135}\) See id at 738–39.

\(^{136}\) Id at 738.

\(^{137}\) *Drabik*, 214 F3d at 738–39.
light of the remedial effect of the set-asides during the course of their existence.\footnote{128 See West Tennessee Chapter of Associated Builders and Contractors, Inc v City of Memphis, 138 F Supp 2d 1015, 1020 (W D Tenn 2000), citing Drabik, 214 F3d at 736, (holding that a city should update statistics to ensure that a remedial plan remains framed to meet its objectives).}

The Federal Circuit in *Rothe Development Corp v United States DOD*\footnote{129 262 F3d 1306 (Fed Cir 2001).} held that post-enactment evidence is inadmissible to establish the constitutionality of a program as enacted.\footnote{130 See id at 1324–1328 (discussing the admissibility of post-enactment evidence to establish the constitutionality of a program as enacted).} In *Rothe*, a Department of Defense contractor challenged a federal statutory scheme that allowed a percentage adjustment to the bids of MBE contractors, thus rendering bids by such contractors more competitive.\footnote{131 Id at 1312–16 (describing the program at issue).} The Department of Defense sought to introduce evidence of past discrimination which postdated the reauthorization of the statutory scheme.\footnote{132 Id at 1324–25.} The court noted substantial support among the circuits that such evidence is admissible in limited circumstances.\footnote{133 Rothe, 262 F3d at 1325.} These circumstances include where the legislature has changed the scope of racial classification since enactment,\footnote{134 Id, citing Concrete Works, 36 F3d at 1521.} when injunctive relief is requested; and when a court must determine whether an existing race-based program is narrowly tailored.\footnote{135 Rothe, 262 F3d at 1325, citing Contractors Association of Eastern Pennsylvania, Inc v City of Philadelphia, 6 F3d 990, 1004 (3d Cir 1993).}

The Federal Circuit in *Rothe* acknowledged that statements in *Wygant* and *Croson* can be interpreted as requiring substantially less evidence to support enactment than must be presented at trial.\footnote{136 Id at 1326–27.} The court noted, however, that *Shaw* clarified the Court's position on the admissibility of post-enactment evidence.\footnote{137 Id.} The court interpreted *Shaw* as holding that there is no difference in the evidentiary burden that must be faced during litigation and that which a legislature must have when it enacts a racial classification.\footnote{138 Id.}

In particular, *Shaw* requires that a legislature have a "strong basis in evidence" \textit{before} it enacts a racial classification.\footnote{139 Id at 1327, citing Shaw, 517 US at 910.} The *Rothe* court note that "strong basis in evidence" is the same
phrase used by the Court in *Croson* and *Wygant* to describe the volume of evidence required *at trial* to uphold a racial classification. The court wrote that *Shaw* makes it clear that "the quantum of evidence that is ultimately necessary to uphold racial classifications must have actually been before the legislature at the time of enactment." Establishing that a legislature had a constitutionally permissible intent requires strong pre-enactment evidence. As such, under *Shaw*, a governmental entity cannot use post-enactment evidence to establish the constitutionality of a racial classification as enacted, because such evidence is necessarily silent on the crucial constitutional question of legislative intent.

The district court for the District of Maryland in *Associated Utility Contractors of Md, Inc v Mayor and City Council of Baltimore* explicitly held that post-enactment evidence is inadmissible, because the Supreme Court in *Shaw* provided controlling authority on the role of post-enactment evidence. The Seventh Circuit in *Builders Association of Greater Chicago v County of Cook* noted the city's admission that it had no pre-enactment evidence to support its racial set-aside program. The court struck down the ordinance, citing *Shaw, Coral Construction*, and *Concrete Works* for the proposition that a city must have a strong basis in evidence for considering a discriminatory remedy appropriate before adopting such a remedy. A district court in that circuit later held such evidence inadmissible in *Petit v City of Chicago*.

While the Supreme Court has never squarely faced the question of the admissibility of post-enactment evidence in the context of racial set-asides, it strongly signaled in *Shaw* that courts should not consider such evidence when ruling on the constitutionality of racial classifications. Several lower courts, including...
the Federal Circuit in *Rothe*, have held that this encompasses racial set-asides. Some courts continue to consider post-enactment evidence, however, and future courts must still reckon with the pre-*Shaw* arguments for admitting such evidence.

II. POST-ENACTMENT EVIDENCE IS CONSTITUTIONALLY INADMISSIBLE

This Comment does not challenge the admissibility of post-enactment evidence in determining the prospective validity of injunctions or consent decrees. As the Eleventh Circuit noted in *Seibels*, post-enactment studies seem relevant where the concern is whether an existing program is working and narrowly tailored now or will continue to be so in the future. Nor does this Comment challenge the admissibility of evidence post-dating the initial enactment of legislation when the legislature has subsequently changed the scope of the racial classification. It does not challenge the admissibility of post-enactment evidence where a court unexpectedly subjects the classification in question to heightened scrutiny sometime after enactment, as occurred in *Adarand*.

Rather, this Comment considers whether courts can and should admit post-enactment evidence when initially scrutinizing a statutory set-aside scheme. Following the Federal Circuit in *Rothe*, this section argues that the *Shaw* Court signaled that such evidence is inadmissible in determining the constitutionality of a classification as enacted. *Shaw* is relevant not only in the racial gerrymandering context, but in the racial set-aside context as well.

This section then critiques the legal justifications courts have offered for accepting post-enactment evidence: The Second Circuit's analogy to interpretive limitations, and the Ninth Circuit's concern over the "Hobson's Choice" faced by local governments between liability to minorities and to a white majority if post-enactment evidence is inadmissible. To deal with these concerns, courts should adopt an alternative legal regime incorporating an

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161 See *Rothe*, 262 F3d at 1328.
162 See, for example, *Engineering Contractors Association of South Florida Inc v Metropolitan Dade County*, 122 F3d 895, 911 (11th Cir 1997) ("formal findings of discrimination need neither precede nor accompany the adoption of affirmative action.").
163 31 F3d at 1567–68.
164 228 F3d at 1160 n 11.
affirmative defense against liability where good faith, reasonable efforts are underway to study and address racial discrimination.

A. The Inadmissibility of Post-Enactment Evidence After Shaw

The Shaw Court described two requirements for a state’s interest in remedying the effects of racial discrimination to rise to the level of a compelling interest. First, the legislature must show that remedying past discrimination was its actual objective in enacting the racial classification, and second, it must have strong empirical evidence of discrimination before it enacts an affirmative action program.

To illustrate the first requirement, consider Shaw. The district court determined that the North Carolina legislature failed to establish that an interest in ameliorating past discrimination had precipitated the use of race in its redistricting plan. Upholding the district court, the Supreme Court noted that the bulk of the state’s evidence came from a report dated well after enactment of the redistricting scheme at issue, and, indeed, after the commencement of litigation. The evidence contained in the report could not have driven the legislature to remedy a history of electoral racism because it was not available until years after enactment, and thus provided no basis for determining the legislature’s intent. Because the report was irrelevant to the constitutionally-necessary inquiry into legislative intent, it could not be admitted at trial.

Consider now the Shaw requirement that a state have a strong basis in evidence before it enacts a racial classification. The Federal Circuit in Rothe thought it instructive both that the Shaw Court emphasized the word “before” in quoting this language from Wygant and that the Court used the phrase “strong basis in evidence.” The Federal Circuit noted that Shaw clarified the “strong basis in evidence” standard used by the Supreme Court in Croson and Wygant. This sends a clear signal that legislatures must have a “strong basis in evidence” prior to enacting

107 Id at 908–09 n 4.
108 Id at 909–10.
109 Id at 910.
110 Shaw, 517 US at 910.
111 Id.
112 Id.
113 Rothe, 262 F3d at 1327, citing Wygant, 476 US at 277.
114 Rothe, 262 F3d at 1326, citing Wygant, 476 US at 277–78; Croson, 488 US at 500.
What does this mean for post-enactment evidence? Under Shaw, unless the legislature can prove a classification was constitutional based on evidence available to it on the day of the statute’s enactment, the law will be found unconstitutional.

Even if the Supreme Court signaled that post-enactment evidence is inadmissible, one might argue that lower courts should not apply that rule outside Shaw’s racial gerrymandering context. The two contexts are different in that the injury in the racial gerrymandering context implicates the fundamental right to vote, whereas the injury in the racial set-aside context implicates no such right. The Supreme Court has held, however, that racial classifications in any context cause fundamental injury to the individual rights of a person. As such, the Court has applied strict scrutiny in both contexts. To the extent that strict scrutiny requires the inadmissibility of post-enactment evidence, Shaw requires its application in all strict scrutiny contexts.

Furthermore, the Rothe court noted that, though racial gerrymandering differs from public contracting, it is appropriate to rely upon Supreme Court precedent from other factual situations in determining whether a racial classification is constitutional. The Supreme Court’s opinion in Shaw, which draws extensively upon precedent outside the gerrymandering context, bolsters this conclusion. Shaw referenced extracontextual cases such as Croson, which dealt with racial set-asides in public contracting, and Wygant, which considered racially discriminatory layoff policies in public schools, in describing the evidentiary burden that North Carolina failed to meet. The Court’s willingness in Shaw to rely upon its reasoning in these contexts to determine the meaning and requirements of strict scrutiny suggests that lower courts should apply analogical reasoning in contexts other than that of racial gerrymandering.

174 See Rothe, 262 F3d at 1326–27 (discussing Croson and Wygant).
175 Id.
176 See, for example, Reynolds v Sims, 377 US 533 (1964) (noting that “the right of suffrage is a fundamental matter in a free and democratic society”).
178 See Shaw, 527 US at 908 (applying strict scrutiny in racial gerrymandering context); see also Croson, 488 US at 498–500 (applying strict scrutiny to racial set-asides).
179 Rothe, 262 F3d at 1326–27 n 19.
180 See Shaw 517 US at 931–935.
B. The Unsound Reasoning of Appeals Courts That Admit Post-Enactment Evidence

1. Analogy to interpretive limitations.

In *Harrison & Burrows Bridge Constructors v Cuomo*,[102] the Second Circuit considered post-enactment evidence in a racial set-aside case.[103] The court considered the evidence because it was used to draft regulations to implement the statutory scheme, and the breadth of these regulations was at issue.[104] The Second Circuit noted that courts routinely consider this kind of evidence when analyzing the constitutionality of speech-restrictive statutes.[105]

In *Ward v Rock Against Racism,*[106] cited by the Second Circuit in *Harrison,*[107] the Supreme Court upheld a municipal sound ordinance against a First Amendment challenge.[108] In evaluating the ordinance, the Court noted that it had to consider "any limiting construction that a state court or enforcement agency has proffered."[109] If an ordinance as interpreted and applied following its enactment was constitutional, then it would not be held unconstitutional even if it was facially invalid.[109] In *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc.*[110] also cited by the *Harrison* court,[111] the Supreme Court upheld an ordinance regulating the marketing and sale of drug paraphernalia against First Amendment challenges.[112] Again, the Court refused to invalidate the ordinance where post-enactment administrative regulations limited its application to constitutionally proscribable speech.[113] The Second Circuit concluded that courts could similarly consider

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[102] 981 F2d 50.
[103] Id at 52-56.
[104] Id at 59-60.
[107] *Harrison,* 981 F2d at 60.
[109] Id at 795.
[109] See id.
[113] Id at 504.
post-enactment evidence of racial discrimination where such evidence was used to craft regulations to implement the statute.\footnote{Harrison, 981 F2d at 60.}

The court's analogy to the First Amendment context is misplaced. The crucial inquiry in the First Amendment context is not into legislative intent, but into the extent to which state action proscribes constitutionally protected speech.\footnote{See Ward, 491 US at 497 (noting that a complainant must show that a law is impermissibly vague in its applications to fail under the due process clause).} Thus, the Supreme Court noted in United States v O'Brien,\footnote{391 US 367 (1968).} a First Amendment challenge to a statute making it a crime to burn one's draft card, "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."\footnote{Id at 383.} If an administrative or judicial limitation keeps a statute from restricting protected speech, its constitutionality will be saved.\footnote{Id.}

Fourteenth Amendment strict scrutiny, however, demands a searching inquiry into legislative intent. "The purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."\footnote{See Croson, 488 US at 492.} Indeed, a statute whose real-world effects are wholly laudatory will still be struck down if a court determines that the legislature acted with invidious intent. The Harrison court's analogy to the First Amendment context is misplaced, because legislative intent is a non-issue in First Amendment jurisprudence, but is utterly dispositive in Fourteenth Amendment strict scrutiny.

2. The Hobson's Choice.

As noted earlier, the Ninth Circuit in Coral Construction allowed the consideration of post-enactment evidence so long as the municipality had some concrete evidence of discrimination in a particular industry prior to the enactment of a race-conscious remedial program.\footnote{See note 52 and accompanying text.} The court believed that this was the only legal rule that would allow governmental entities to adopt racial classi-
fications to avoid liability stemming from their failure to act upon available evidence of discrimination.

It is possible, however, to imagine an alternative regime wherein post-enactment evidence would be inadmissible, but which would avoid the Hobson’s choice through the availability of a corollary affirmative defense. Courts might apply a rule like the following: in the absence of a remedial program, a governmental agency has an affirmative defense in suits alleging discrimination where the agency can establish that it is making reasonable, good faith efforts to assess the scope of the problem and craft a constitutionally satisfactory solution. This would provide governmental entities a period of time during which to perform the statistical disparity studies required under Croson, to make the determination that only a racial set-aside can effectively remedy the discrimination (as opposed to a race-neutral policy), and to craft a set-aside that is narrowly tailored to address the discrimination. The availability of such a defense would not preclude a city from choosing a race-neutral remedial program if its study showed that this was the best available option. This combination of inadmissibility and affirmative defense would allow governmental entities to avoid liability to minorities while studying discrimination, but still exclude post-enactment evidence as required by Shaw.

The Supreme Court has previously created affirmative defenses where public policy so demands. In Burlington Industries, Inc v Ellerth the Court considered a case in which a female employee claimed that the hostile work environment brought about by supervisor’s sexual harassment had forced her constructive discharge. The Court held that an employer is vicariously liable where a supervisor creates a hostile work environment. The Ellerth Court then crafted an affirmative defense allowing the employer to show that it had exercised reasonable care to prevent or promptly correct any sexually harassing behavior, and that the employee had unreasonably failed to take advantage of

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203 See notes 55–57 and accompanying text.
204 See note 18 (discussing Croson’s evidentiary requirement).
205 See notes 85–92 and accompanying text.
206 See, for example, Burlington Industries, Inc v Ellerth, 524 US 742, 765 (1998).
207 Id. See also Faragher v City of Boca Raton, 524 US 775 (1998) (decided the same day as Ellerth, and authorizing the same affirmative defense).
208 Ellerth, 524 US at 747–51 (describing facts and procedural history).
209 Id at 765.
any corrective opportunities presented by the employer to avoid the harm.\textsuperscript{110}

Obviously, the sexual-harassment context in \textit{Ellerth} differs significantly from the racial set-aside context. Whereas sexual harassment suits deal with the vicarious liability of employers for the behavior of their employees,\textsuperscript{111} minority set-aside suits such as \textit{Rothe}, \textit{Coral Construction}, and \textit{Harrison} have to do with the direct liability of a governmental agency accused of unconstitutional racial discrimination in the awarding of contracts.\textsuperscript{112} \textit{Ellerth} provides an affirmative defense against a suit brought under Title VII, whereas the racial set-aside context implicates concerns of constitutional magnitude—a context in which a court might be disinclined to create affirmative defenses.

If considering post-enactment evidence is unconstitutional, however, courts face a Catch-22: they can either unconstitutionally admit such evidence, or can deny a remedy for unconstitutional behavior. The \textit{Coral Construction} court's reasoning is flawed because it fails to recognize that it could resolve this Catch-22 in either direction: to justify admitting or excluding the evidence at issue. Given that consideration of such evidence is apparently unconstitutional, however, the dilemma should be resolved against admissibility.

The \textit{Ellerth} court held that where an employer makes a good faith, reasonable effort to protect employees against sexual harassment, that employer will be granted limited immunity from suit.\textsuperscript{113} If \textit{Shaw} does not allow the consideration of post-enactment evidence, and if no effective race-neutral solution is available, a governmental entity finds itself in a dilemma in the absence of some similar kind of affirmative defense.\textsuperscript{114} It cannot institute an affirmative action program without "convincing evidence,"\textsuperscript{115} but it might continue to cause actionable injury to minorities while it gathers such evidence.\textsuperscript{116} This could be avoided if courts allowed an affirmative defense where a governmental entity can establish

\textsuperscript{110} Id.

\textsuperscript{111} See, generally, Susan Bisom-Rapp, \textit{Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession}, 24 U Ark Little Rock L Rev 147, 149–52, 165–66 (2001) (describing sexual harassment law and arguing that, unless more is known about sexual harassment training, programs should not be relevant in litigation).

\textsuperscript{112} See notes 47–80 and 136–56 and accompanying text.

\textsuperscript{113} Id.

\textsuperscript{114} See notes 54–58 and accompanying text.

\textsuperscript{115} \textit{Wygant}, 476 US at 277.

\textsuperscript{116} See id.
that, at the time of the injury, it was engaged in good faith, reasonable efforts to craft a constitutionally satisfactory affirmative action program.\footnote{See text accompanying notes 204–09.}

One might worry that this regime would provide a governmental entity a shield behind which to hide until the plaintiffs in a case lose standing, lose interest, or just give up. In response to Ellerth, a sizable industry has grown up around providing training and consulting services to employers to facilitate a "reasonable effort" affirmative defense.\footnote{See Bisom-Rapp, 24 U Ark L Rev at 148 (discussing sexual harassment training programs) (cited in note 201).} The regime proposed in this Comment might similarly create an incentive to slowly study discrimination in order to take advantage of the affirmative defense while avoiding liability to injured minorities. To minimize this potential, courts could limit the affirmative defense to allow only a reasonable period of time to study the problem and craft a constitutionally satisfactory solution. A governmental entity's plea that it is studying the problem would succeed only if it could show a good faith effort that would likely bear fruit in the reasonably near future. Courts would be free to conclude that a city whose investigation had dragged on for years is stalling to avoid liability and the necessity of taking action. Further, given the time-lag between injury, filing of suit, and the first court appearances, it might frequently be the case that such efforts would already have borne fruit by the time of trial.

In any event, the problems created by such a regime would be no worse than those created by the alternative. Allowing post-enactment evidence produces a system that encourages governmental entities to legislate with insufficient evidence, leading to insufficiently narrow tailoring and consequent harms to individuals unconstitutionally denied government contracts because of their race. If courts invite governmental entities to, as it were, legislate first and ask questions later, it seems altogether likely that they will accept the invitation. Given that racial classifications cause injury to fundamental individual rights\footnote{Shaw, 517 US at 908.} and actual economic harm to people barred from competing for government contracts on the basis of race,\footnote{Croson, 488 US at 493–498.} governmental entities must be given reasonable time to study the problems to avoid crafting overly broad remedies.
CONCLUSION

The purpose of strict scrutiny is to "smoke out" illegitimate motives behind racial classification and to ensure that remedies chosen are sufficiently narrow to avoid unnecessary harm. In determining whether a legislature was motivated by racial hatred or myths of racial inferiority, as opposed to the desire to remedy racial discrimination, evidence gathered after enactment is simply irrelevant.

The Supreme Court recognized in Shaw that a legislature must have a strong basis in evidence before enacting a racial classification, and must narrowly tailor its remedy in order to fulfill the requirements of strict scrutiny. As the Federal Circuit held in Rothe, this means courts cannot consider post-enactment evidence when determining the constitutionality of racial classifications.

This Comment has agreed with the Ninth Circuit's argument in Coral Construction that requiring action on the part of cities to avoid liability to minorities, while simultaneously barring post-enactment evidence, creates a serious quandary for municipalities faced with evidence of their own culpability in fostering racial discrimination. In light of its unconstitutionality under Shaw, courts should resolve this dilemma by creating an affirmative defense against suits by minorities where the city can establish that, at the time of the litigated injury, it was engaged in good faith and reasonable efforts to study the discrimination and craft a constitutionally sound remedy. This would encourage cities to address racial discrimination while leaving post-enactment evidence out of consideration as required under Shaw.

Courts must discourage legislatures from acting hastily when drafting measures to remedy perceived racism. Legislative bodies must carefully study the racial discrimination to determine its scope and have sufficient evidence available to tailor the remedy as narrowly as the problem will allow. Excluding post-enactment evidence while giving a governmental entity a limited affirmative defense is the best way to encourage limited use of racial classifications to combat racial discrimination, while providing govern-

\(^{21}\) Id at 493.
\(^{22}\) Id.
\(^{23}\) See Shaw, 517 US at 910.
\(^{24}\) Rothe, 262 F3d 1306, 1312.
mental entities the 'safe harbor' from liability necessary to care-
fully craft constitutionally satisfactory programs.