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The Evidentiary Predicate for Affirmative Action after Croson: A Proposal for Shifting the Burdens of Proof*

David S. Cohen

Despite popular commentary to the contrary,1 the Supreme Court's recent decision in City of Richmond v. J.A. Croson Co.2 does not signal the end of voluntary affirmative action in America. Although the Court did indeed strike down Richmond, Virginia's minority business set-aside program on constitutional grounds, Croson nevertheless represents the first recognition in a Supreme Court majority opinion that race-conscious affirmative action is, in some circumstances, a constitutionally permissible tool for remedying the effects of prior racial discrimination.3 Justice O'Connor, the author of the

* This article was written and accepted for publication before the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S., No. 1387 (June 5, 1989). Although that decision involves the allocation of the burden of proof in Title VII cases, it does not affect the proposal in this Current Topic.—Eds.


majority opinion in *Croson*, concluded by noting that "[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. . . . In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." Racial classifications in affirmative action plans, the Court held, are henceforth subject to strict scrutiny, but apparently not to scrutiny that is "strict in theory but fatal in fact."

Although *Croson* finally settled the larger debate regarding the constitutionality of affirmative action, many issues remain unresolved. Most importantly, the Court has failed to define the character and amount of evidence of prior discrimination that a public entity must gather before adopting a voluntary affirmative action program. To pass constitutional scrutiny, a legislative affirmative action program must be based on a sufficient evidentiary predicate of prior discrimination and be narrowly tailored to remedy the identified problem. The *Croson* Court struck down Richmond's minority business set-aside program because the City failed the evid-

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5. Id. at 721; see also id. at 735 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny rule is consistent with our precedents. . . ."); id. (Scalia, J., concurring in the judgment) ("I agree with . . . the Court's . . . conclusion that strict scrutiny must be applied to all governmental classifications by race. . . ."). When a legislative classification is subjected to strict scrutiny by the courts, it is upheld only if the classification serves a compelling governmental interest and is narrowly tailored to achieve that interest. See generally City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-42 (1985). See also Korematsu v. United States, 323 U.S. 214 (1944); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). This Current Topic addresses only the first prong of this inquiry—the evidentiary predicate for affirmative action. Tailoring is beyond the scope of this Current Topic. See infra note 22.

6. *Bakke*, 438 U.S. at 362 (opinion of Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment in part and dissenting in part) (quoting Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972)). See *Croson*, 109 S. Ct. at 729; id. at 734 (Kennedy, J., concurring in part and concurring in the judgment) ("rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents").

7. This Current Topic takes affirmative action programs adopted by state and local legislatures as its model for analysis. Programs adopted by Congress apparently are subject to somewhat relaxed constitutional scrutiny, since Congress acts pursuant to "the unique remedial powers of Congress under § 5 of the Fourteenth Amendment" when it implements an affirmative action program. *Croson*, 109 S. Ct. at 718 (O'Connor, J., joined by Rehnquist, C.J., and White, J.). See *Fullilove*, 448 U.S. at 483-84 (Burger, C.J., joined by White and Powell, J.J. (set-aside for minority businesses in Public Works Employment Act supported, in part, by Congress’ unique powers under § 5).

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entiary predicate prong of this test: Richmond presented "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." While criticizing the factual predicate proffered by the City in great detail, the Court failed to clarify what Richmond or other public actors must show in order to survive constitutional review. State and local legislatures considering the adoption of affirmative action plans, as well as courts reviewing such plans, need clear direction regarding the kind of evidence that will satisfy the evidentiary predicate requirement. In the absence of satisfactory guidance from the Court on this question, the fate of existing and future affirmative action programs remains uncertain.

This Current Topic proposes that courts adopt a "shifting-of-the-burdens" technique, similar to that employed in disparate treatment litigation under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, to resolve the issue of the evidentiary predicate required for voluntary race-based affirmative action. Under this proposal, a plaintiff challenging an affirmative action plan would bear the initial burden of production to show that an explicit racial classification exists in the program at issue. If the plaintiff carries this burden, the burden of production shifts to the defendant to produce evidence that it concluded, from evidence that it had gathered to the point of the plan's adoption, that a compelling governmental interest would be served by the program. If the defendant carries this burden, the plaintiff can then attempt to rebut this assertion of legitimacy by producing additional evidence that the intent of the legislature was not to achieve such a purpose. The burden of persuasion, as distinguished from the burden of production, remains on the plaintiff throughout the litigation.

9. The majority only briefly criticized the tailoring of Richmond's plan, noting at the outset that "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." Croson, 109 S. Ct. at 728.

10. Id. at 714.

11. In this Current Topic, "evidentiary predicate," "factual predicate," and "showing" will be used interchangeably. The reader should note that these terms are not intended to correspond precisely to the "particularized, contemporaneous finding of discrimination" that Justice O'Connor discusses in her concurrence in Wygant. See Wygant, 476 U.S. at 289. Indeed, the difference between such a "finding" of discrimination that Justice O'Connor discusses and the "evidentiary predicate" that is discussed here is particularly important. See infra Section IV(B)(2).


13. 42 U.S.C. § 2000e-2(a)(1). See, e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 792 (1973); see infra notes 57-60 and accompanying text.
This procedural regime is consistent with both burden-allocation and affirmative-action case law. In addition, this distribution of burdens will promote certainty and regularity in the inquiry into the evidentiary foundation for affirmative action. Just as the burden-shifting technique was adopted in Title VII litigation “to bring order out of a chaotic situation that had developed within the lower courts,” adoption of the proposal presented here will assist the expeditious and fair adjudication of challenges to affirmative action.

I. The Evidentiary Predicate Requirement

A. The Purposes of the Evidentiary Predicate Requirement

The Court is in general agreement, as it has been since affirmative action was first challenged in Bakke, that some form of an evidentiary predicate of prior discrimination must be assembled before a legislature may enact an affirmative action program. While the precise formulations of the showing requirement vary among Justices and opinions, the reasons advanced in support of this requirement are consistent.

First, the showing requirement serves to define the nature of the injury that the legislature seeks to redress. Affirmative action is warranted, the Court has held, only to achieve either of two compelling governmental interests: to redress the current effects of prior discrimination by the government itself or to prevent the government from being a “passive participant” in private discrimination. An adequate evidentiary backdrop permits courts to determine whether

15. Bakke, 438 U.S. at 307-309 (Powell, J., announcing the judgment of the Court); id. at 361 (opinion of Brennan, White, Marshall, and Blackmun, J.), concurring in the judgment in part and dissenting in part). The plurality in Wygant noted, “the Court has insisted upon some showing of prior discrimination . . . before allowing limited use of racial classifications in order to remedy such discrimination.” 476 U.S. at 274 (Powell, J., joined by Burger C.J., and Rehnquist and O’Connor, J.).
16. See infra Section I(B).
17. Wygant, 476 U.S. at 274 (Powell J., joined by Burger, C.J., and Rehnquist and O’Connor, J.); id. at 286 (O’Connor, J., concurring in part and concurring in the judgment); id. at 302 (Marshall, J., dissenting, joined by Brennan and Blackmun, J.).
the purpose of the affirmative action program was sufficiently com-
pelling, thereby "ensur[ing] that new forms of invidious discrimina-
tion are not approved in the guise of remedial affirmative action." 19
As will be developed in greater detail below, 20 judicial review of af-
firmative action programs is primarily an inquiry into the intent of
the legislature adopting the plan; the evidentiary predicate require-
ment provides the grist for this inquiry.

Second, an adequate evidentiary basis is necessary to tailor an af-
firmative action plan appropriately. The Court in *Croson*, criticizing
Richmond's evidentiary predicate, pointed out that "a generalized
assertion that there has been past discrimination . . . provides no
guidance for a legislative body to determine the precise scope of the
injury it seeks to remedy." 21 Moreover, the lack of a sound eviden-
tiary predicate prevents a court, when the constitutionality of the
plan is litigated, from assessing whether the means employed are
sufficiently narrowly tailored to meet proper legislative goals. 22

Finally, policy concerns also animate the evidentiary predicate re-
quirement. As Justice Powell noted in his concurrence in *Fullilove*,
"[r]espect and support for the law, especially in an area as sensitive
as this, depend in large measure upon the public's perception of
fairness. It therefore is important that the legislative record sup-
porting race-conscious remedies contain evidence that satisfies fair-
minded people that the congressional action is just." 23

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   (1981). See also *Fullilove*, 448 U.S. at 534-35 (Stevens, J., dissenting). The finding re-
   quirement has also been defended as especially important when local governments
   adopt affirmative action plans. See Associated Gen. Contractors of Cal. v. City & County
   of San Francisco, 813 F.2d 922, 929 (9th Cir. 1987) (arguing that local legislatures
   should be required to gather extensive evidence of discrimination before acting to rem-
  edy that discrimination because "the narrower a government's domain, the greater the
   likelihood of oppression . . . ").

20. See infra text accompanying notes 36-37.

21. 109 S. Ct. at 723. See also *Days*, Fullilove, 96 Yale L.J. 453, 458 (1986) (Affirma-
   tive action plans that "have not been openly adopted . . . have not benefited from the
   scrutiny and testing of means to ends assured by public deliberation.").

   and Kennedy, JJ.). Tailoring, as noted above, supra note 5, is beyond the scope of this
   Current Topic. Briefly, however, courts analyze the means selected to achieve legitimate
   state interests on two grounds: first, whether the burden imposed on innocent third
   parties is too great (i.e., whether less burdensome, equally effective alternative remedies
   are available); and second, whether the affirmative action plan affords sufficient flexibil-
   ity in application to assure that it achieves only its explicit and legitimate goals. See
   *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring in part and concurring in the
   judgment).

23. 448 U.S. at 507 n.8 (Powell, J., concurring) (citations omitted). Alexander Ham-
  ilton, in The Federalist Papers, warned:
   
   [N]o man can be sure that he may not be tomorrow the victim of a spirit of injustice,
   by which he may be a gainer today. And every man must now feel that the inevitable
action plans, after all, are designed to remedy a national disgrace through means that are themselves deeply troubling; establishing the wisdom of such plans by developing an adequate evidentiary predicate is certainly nothing less than sound public policy.\textsuperscript{24}

\textbf{B. The Court’s Formulation of the Evidentiary Predicate Requirement}

Although the Court is in general agreement regarding the purposes served by the showing requirement, the Justices have been unable to agree on a precise verbal formulation for a standard. The Court’s failure to settle on one definition of the evidentiary predicate requirement—let alone to give content to that definition—reflects the futility of the Court’s current approach to the question. The various opinions in \textit{Fullilove, Wygant,} and \textit{Croson} all demonstrate that the Court conceives of the evidentiary predicate requirement in quantitative terms. That is, if a sufficient quantity of evidence exists, then the predicate for affirmative action exists. The current debate concerns the definition of sufficiency, not the validity of the quantitative approach.

In \textit{Wygant}, for example, Justice Powell’s plurality opinion interpreted the evidentiary predicate requirement as demanding that a legislature have either “convincing evidence,” “sufficient evidence,” or “a strong basis in evidence” to conclude that affirmative action is appropriate.\textsuperscript{25} In Justice O’Connor’s view, the finding requirement would be satisfied if the legislature had “a sufficient basis for concluding” or “a firm basis for determining” that remedial action was
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tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.


\textsuperscript{24} See \textit{Croson}, 109 S. Ct. at 730 (O’Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) ("[F]indings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."); see also Days, supra note 21, at 460 ("Our national sensitivity to racial classifications requires that they be used only when they represent a focused effort to remedy the effects of racial discrimination and to prevent its recurrence."). The factual predicate requirement has also been defended as a means to assure that affirmative action programs are not used to dole out special benefits to key constituents. \textit{See Croson}, 109 S. Ct. at 733 n.9 (Stevens, J., concurring in part and concurring in the judgment) (affirmative action “ordinance might be nothing more than a form of patronage”); \textit{Fullilove}, 448 U.S. at 539 (Stevens, J., dissenting) (If affirmative action programs are not required to be remedial, they would constitute a “legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a piece of the action” for its members."); see Brief Amicus Curiae of Mountain States Legal Foundation at 10, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998) (same).

\textsuperscript{25} 476 U.S. at 277 (Powell, J., joined by Burger, C.J., and Rehnquist and O’Connor, JJ.).

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warranted. Finally, Justice Marshall viewed the standard as requiring "a legitimate factual predicate" for affirmative action. While the Justices could not agree on language, each opinion in Wygant groped for a quantitative definition of the evidentiary predicate requirement.

The Court’s recent opinion in Croson, moreover, did not settle the matter. Rather, Justice O'Connor's majority opinion simply recast the existing formulations in new language. After criticizing Richmond's evidentiary predicate as "generalized assertion[s]," "observation[s]," and "amorphous claim[s]," she concluded that "[n]one 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.' There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry." Responding to Justice Marshall's characterization of the evidentiary predicate requirement as simply an "onerous documentary obligation," Justice O'Connor went on to assert that public actors "must identify [prior] discrimination,

26. Id. at 291-92 (O'Connor, J., concurring).
27. Id. at 297 (Marshall, J., dissenting, joined by Brennan and Blackmun, J.J.).
28. This verbal potpourri began in Fullilove. There, the plurality opinion authored by Chief Justice Burger found that Congress had satisfied the evidentiary predicate requirement because it "had [an] abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." 448 U.S. at 478 (Burger, C.J., joined by White and Powell, J.J.). Justice Powell contended that the Court had never, and never should, "approve[] race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." Id. at 497 (Powell, J., concurring). Justice Marshall asserted that voluntary affirmative action is justified "only by showing 'an important and articulated purpose for its use.'" Id. at 519 (Marshall, J., concurring, joined by Brennan and Blackmun, J.J.) (quoting Bakke, 438 U.S. at 561 (opinion of Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment in part and dissenting in part)).
29. The briefs submitted in Croson did not themselves offer much in the way of a certain definition for the evidentiary predicate requirement. See, e.g., Brief of Appellee at 17, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998) ("[I]f the race-based action is taken to remedy past discrimination by the governmental body, then a fact finder must be able to determine whether the employer was justified in instituting a remedial plan."); Brief for the United States as Amicus Curiae Supporting Appellant at 16, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998) (affirmative action justified "only if a prior history of unlawful discriminatory action, whose effects are to be remedied, has been identified with some particularity"); Reply Brief for Appellant City of Richmond at 11, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998) ("a government need only have evidence of discrimination sufficient to ensure that its plan is truly remedial").
31. Id. at 724 (emphasis and citations omitted).
32. Id. at 750 (Marshall, J., dissenting, joined by Brennan and Blackmun, J.J.).
public or private, with some specificity before they may use race-conscious relief.

Although Croson clearly presented the question of what would satisfy the evidentiary predicate requirement, the Court failed to end a decade of verbal imprecision and legal confusion when it declined to provide a single, workable definition for this requirement. This result was inevitable, given that the Croson Court continued to view the evidentiary predicate requirement in entirely quantitative terms, as if five (or seven or ten) instances of discrimination along with a statistical study (or maybe two) constituted "a strong basis in evidence." The Court's efforts will continue to be fruitless as long as the Court formulates the evidentiary predicate requirement in purely quantitative terms. By framing the requirement in procedural terms, however, the Court could give real content to the evidentiary predicate requirement. Drawing on the procedural regimes developed for Title VII and constitutional antidiscrimination litigation, the Court should implement a burden-shifting regime to resolve controversies concerning the evidentiary predicate for voluntary affirmative action. As a result, the evidentiary predicate requirement would become a coherent and useful guide for legislatures contemplating affirmative action and courts reviewing such programs.

33. Id. at 727.
34. Justice Marshall foresaw that the lower federal courts would have to struggle to find some common, intelligible principle in the Court's many opinions. Wygant, 476 U.S. at 312 n.7 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.) ("I do not envy the District Court its task of sorting out what this Court has and has not held today."). Indeed, the jurisprudence of the lower courts has been far from uniform. See, e.g., J. Edinger & Son, Inc. v. City of Louisville, 802 F.2d 213, 216 (6th Cir. 1986) ("[T]he City should be required to present evidence of invidious discrimination."); South Fla. Chapter of Associated Gen. Contractors of Am. v. Metropolitan Dade County, 723 F.2d 846, 851-52 (11th Cir.) ("[A]dequate findings [must] have been made to ensure that the governmental body is remedying the present effects of past discrimination...") (emphasis in original), cert. denied, 469 U.S. 871 (1984); Michigan Road Builders' Ass'n, Inc. v. Milliken, 834 F.2d 583, 589-90 (6th Cir. 1987) ("[T]his court must decide whether the Michigan Legislature, based upon the evidentiary factual record before it, 'had a firm basis for believing that such action was required based on prior discrimination' by the state itself."), aff'd, 109 S. Ct. 1333 (1989).
35. Indeed, the Croson Court, by discussing a "prima facie case of a constitutional or statutory violation," hinted that a procedural approach to the evidentiary predicate question is in order. 109 S. Ct. at 724.
II. The Evidentiary Predicate as a Burden-Shifting Regime

A. The Purposes of Burden-Shifting

At root, the inquiry into the evidentiary predicate for affirmative action is a question of legislative intent. A court reviewing an affirmative action program ultimately must determine whether the legislature’s motive in adopting a race-conscious plan was to achieve a compelling governmental interest. In *Croson*, Justice O’Connor defended the application of strict scrutiny to affirmative action plans by arguing that “[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact *motivated* by illegitimate notions of racial inferiority or simple racial politics.”36 Any workable conceptualization of the evidentiary predicate requirement must, therefore, recognize that the ultimate factual issue in affirmative action litigation is the defendant legislature’s motivation.37

Inquiries into the intent of an actor, of course, are notoriously difficult.38 To begin with, only the actor has access to the relevant evidence.39 Even when some “hard evidence” exists, it is often difficult to infer intent from action, for a particular action could be motivated by any number of rationales. To complicate matters further, assessing the intent of a complex deliberative body such as a legislature presents its own host of problems.40 The wide range of information that is taken into account and the dispersed responsibility

36. *Id.* at 721 (O’Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) (emphasis added). Justice O’Connor continued: “Indeed, 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.” *Id.*

37. See Choper, Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle, 72 Iowa L. Rev. 255, 265 (1987) (“[T]he trial court must make a factual determination that the [actor] had an adequate evidentiary basis for its conclusion that remedial action was necessary.”). Cf. Player, The Evidentiary Nature of Defendant’s Burden in Title VII Disparate Treatment Cases, 49 Mo. L. Rev. 17, 22 (1984) (“ultimate factual issue in disparate treatment cases [under Title VII] is the defendant’s motivation”).

38. Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 Vand. L. Rev. 1205, 1280 (1981) (“Intent is rarely susceptible to direct proof; rather, it must be inferred from a totality of circumstances.”).

39. See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 641 (1980) (“[W]hether [good-faith] immunity has been established depends on facts peculiarly within the knowledge and control of the defendant.”).

40. See generally J. Ely, Democracy and Distrust: A Theory of Judicial Review 130-34 (1980) (each representative in the legislative process may have a different motivation for supporting a statute); Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870 (1930) (“That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition.”).
for action—the institutional strengths of legislative decision making\(^1\)—impede efforts to determine intent. Despite the difficulties, the constitutional demand that public actors have an adequate evidentiary predicate before adopting an affirmative action program requires an inquiry into intent.

Employing a procedural burden-shifting technique to test the evidentiary predicate would help "smoke out"\(^2\) a public actor's intent in enacting an affirmative action program by focusing the court's and the litigants' attention on the issue of legislative intent. As the Supreme Court has noted, the allocation of burdens of proof, both the burden of persuasion\(^3\) and the burden of production,\(^4\) "is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation. . . ."\(^5\) Moreover, because evidence of intent is frequently not conclusive, burden allocation is especially important when intent is the ultimate factual issue in the litigation.\(^6\)

Normally, the plaintiff bears both the burden of production and the burden of persuasion in civil matters; the party seeking judicial

\(^{1}\) See Note, Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans, 53 U. Chi. L. Rev. 581, 602-06 (1986). See also Fullilove, 448 U.S. at 502-03 (Powell, J., concurring) (Congress "has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue."); id. at 520 n.4 (Marshall, J., concurring, joined by Brennan and Blackmun, J.J.) ("Congress is engaged in the broad mission of framing general social rules, not adjudicating individual disputes."). Congress' "special attribute" is shared by legislatures at the state and local levels.

\(^{2}\) Golden v. Kentile Floors, Inc., 512 F.2d 838, 849 (5th Cir. 1975) (burden of production "can be an effective means to 'smoke out' a party with peculiar knowledge of the facts").

\(^{3}\) See Belton, supra note 38, at 1207.

\(^{4}\) The burden of persuasion, or "the risk of nonpersuasion," 9 Wigmore, Evidence § 2485 (rev. ed. 1981), "contains the dual elements of location and weight: the location specifies the party who will lose if the burden is not met, and the weight specifies how persuasive the evidence must be to sustain this burden." Belton, supra note 38, at 1207. In civil litigation, the usual formulation for the weight of the burden of persuasion is that there must be a preponderance of the evidence in favor of the party bearing the burden. Whether the party bearing the burden of persuasion has satisfied that burden is a question for the fact-finder to determine. See generally C. McCormick, McCormick on Evidence §§ 336, 339-41 (3d ed. 1984).

\(^{5}\) See generally McCormick, supra note 43, §§ 336, 338.

\(^{6}\) See Note, Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation, 100 Harv. L. Rev. 653, 653-54 (1988) [Hereinafter Allocating the Burden].
intervention to change the status quo typically is required to justify the request.\textsuperscript{47} Courts, however, are not hesitant to reallocate both burdens in order to achieve the purposes of the underlying substantive law and to fulfill notions of good public policy.\textsuperscript{48} In fact, beyond the basic approach, the Supreme Court has noted that “[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, ‘is merely a question of policy and fairness based on experience in the different situations.’"\textsuperscript{49}

Courts consider a variety of factors when reallocating burdens. First, and most importantly, considerations of fairness influence the allocation of the burden of production. The party with superior and readier access to knowledge about a relevant fact ought to bear the burden of production.\textsuperscript{50} Put simply, “[i]f the evidence is in his favor, he will have every incentive to make it known. If it goes against him, his silence will seal his defeat.”\textsuperscript{51} Second, matters of substantive law also inform the placement of the burdens. For example, a defendant relying on what courts perceive as a disfavored contention of law will often bear both burdens on that issue.\textsuperscript{52} Third, courts often “require the party who is more likely to be wrong to plead the issue and to prove the relevant facts.”\textsuperscript{53} Fourth, the desire to expedite trials, especially trials with complex and difficult factual backgrounds, often calls for a shift in the burden of production.\textsuperscript{54} Finally, courts are concerned with the proper “allocation


\textsuperscript{48} Allen, supra note 47, at 898; Belton, supra note 38, at 1283.

\textsuperscript{49} Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973) (quoting 9 J. Wigmore, Evidence § 2486 (3d ed. 1940)). See, e.g., Gomez, 446 U.S. at 641 (burden of producing evidence of subjective good faith is on police officer claiming the defense, not on plaintiff); see also F. James & G. Hazard, Civil Procedure § 7.8 (3d ed. 1985); Allen, supra note 47, at 896.

\textsuperscript{50} James & Hazard, supra note 49, § 7.8.

\textsuperscript{51} Epstein, Pleadings and Presumptions, 40 U. CHI. L. REV. 556, 579 (1973). One of the best known burden-shifts in the service of public policy occurred in Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948). There, the California Supreme Court placed the burden of proof on each defendant to prove that his buckshot had not injured the plaintiff because the two defendants were in the best position to know.

\textsuperscript{52} An example of a “disfavored contention” is contributory negligence. See Epstein, supra note 51, at 578. See generally McCormick, supra note 43, § 337. The purpose of this rule of allocation is “to avoid the disfavored result [by] requiring the defendant to plead the issue in his answer and to prove it at trial. . . .” Epstein, supra note 51, at 578.

\textsuperscript{53} Epstein, supra note 51, at 580 (citing Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 STAN. L. REV. 5, 12-14 (1959)).

\textsuperscript{54} Allen, supra note 47, at 895. See Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (per curiam).
of error costs.” Placement of the burden of persuasion reflects a policy judgment regarding how a suit should be resolved in the case of uncertainty.

B. Representative Uses of Burden-Shifting Regimes

The Court has adopted burden-shifting regimes to assist the inquiry into the motivation of an allegedly discriminatory actor in several areas of antidiscrimination law. For example, in Title VII disparate treatment litigation, the ultimate factual issue is the employer’s motivation for rejecting a job applicant. To help identify the employer’s intent, the Court has implemented a burden-shifting mechanism that places the initial burden of production on the plaintiff to show that she was denied a job for which she was qualified. Once the plaintiff establishes this prima facie case of discrimination, the burden of production then shifts to the employer to “articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” If the employer carries this burden, the burden then reverts to the plaintiff to show that the employer’s “stated reason for [the] rejection was in fact pretext.” The shifting burden of production is designed to illuminate the employer’s motivation in rejecting the plaintiff’s job application.

Similarly, in school desegregation litigation where de jure segregation does not exist, but actions of the school board create de facto segregation, the school board’s liability under the equal protection clause turns on the board’s intent. Accordingly, the Court fashioned a burden-shifting regime requiring the plaintiff, who initially bears both burdens, to show deliberate racial segregation in a “meaningful portion” of the school district. If the plaintiff carries this burden, a prima facie case of unconstitutional segregation exists, and both burdens of proof shift to the school board to show

56. Allocating the Burden, supra note 46, at 657.
57. Litigation under § 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), is termed “disparate treatment” litigation. Section 703(a)(1) provides: “It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual’s race, color, religion, sex, or national origin. ...”
59. Id. See also Burdine, 450 U.S. at 253-54 (only the burden of production shifts to the defendant).
61. Keyes, 413 U.S. at 208.
62. Id.
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that segregation elsewhere in the district was not also caused by "intentionally segregative actions."\(^6\) The purpose of this mechanism, as in Title VII disparate treatment litigation, is to discover the relevant actor's intent.\(^6\) The inquiry into the legislature's motivation in adopting an affirmative action plan compelled by the evidentiary predicate requirement calls for a similar procedural mechanism.

III. A Burden-Shifting Regime for the Evidentiary Predicate Requirement

The ultimate factual inquiry in affirmative action litigation under the equal protection clause\(^6\) is whether the evidence of prior discrimination considered by a legislature was sufficiently strong to sustain the legislature's claim that it adopted a race-conscious remedy to achieve a compelling governmental interest. The following burden-shifting regime would assist a court in making this complex factual determination.\(^6\)

As a preliminary matter, the court must determine whether the challenged legislation is indeed an affirmative action plan or, on the

\(^6\) Id. See Allocating the Burden, supra note 46 (proposing a burden-shifting allocation for litigation of school segregation claims after a court determination of unitariness).

\(^6\) The Court developed similar burden-shifting techniques to adjudicate claims of retaliatory firings for exercise of first amendment rights and for disparate impact claims based on the Constitution's equal protection clause. See Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (if plaintiff carries burden of showing that exercise of first amendment rights motivated firing, burden of persuasion shifts to defendant to show firing would have occurred absent plaintiff's protected conduct); Washington v. Davis, 426 U.S. 229, 242 (1976); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977) (in constitutional disparate impact suit, if plaintiff shows defendant's intent to discriminate underlies disparate impact, burden shifts to defendant to prove that race-neutral criteria produced discriminatory result).

\(^6\) Affirmative action plans may also be challenged under Title VII. In such suits, courts use a burden-shifting approach drawn from the burden-shifting regime developed for Title VII disparate treatment litigation. Johnson, 480 U.S. at 626-27. This procedure, however, deviates from the burden-shifting regime proposed here for constitutional challenges to affirmative action plans. As the Court in Johnson held, "[t]he fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which that employer must contend was not intended to extend as far as that of the Constitution." Id. at 627-28 n.6 (emphasis in original). That is, affirmative action plans challenged under Title VII are subject to less stringent review than plans challenged under the Constitution. But see id. at 664-65 & n.3 (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting) (Title VII and the Constitution impose equivalently severe limits on public employer's ability to adopt affirmative action plans); id. at 649 (O'Connor, J., concurring in the judgment) (same). The paradigm presented here, since it fulfills Croson's demand that affirmative action challenged under the equal protection clause survive strict scrutiny, is not designed to assess the legality under Title VII of affirmative action.

\(^6\) As with the burden shifting regimes for Title VII, the procedure proposed here does not call for a "judicial minuet" in which the progress of the case strictly tracks the shifting burdens of production. Rather, what is proposed here is a technique for post hoc analysis by the court. See Larson, supra note 14.
contrary, is simply an invidious racial classification defended as an affirmative action plan. The burden-shifting paradigm presented here is designed to facilitate the strict scrutiny of affirmative action plans only; any other racial classification in legislation merits traditional strict scrutiny. Once the court is satisfied that the challenged legislation is an affirmative action plan, the initial burden of production rests on the plaintiff to demonstrate that the program has taken race into account. Presumably, for most affirmative action programs, this showing would be quite easily accomplished.

If the plaintiff meets this burden, the burden of production, but not the burden of persuasion, shifts to the defendant to introduce evidence that the adoption of the affirmative action program was motivated by a desire to achieve one of the two recognized governmental interests—either to ameliorate the present effects of past governmental discrimination or to end government complicity in private industry discrimination. If the affirmative action plan is defended on the first ground, then the government should introduce a study, of which the legislators were aware when the program was adopted, showing a statistically significant disparity between minority and non-minority receipt of governmental benefits. The legislature should also introduce evidence of its contemporaneous conclusions—based on some array of testimony taken, studies performed by or on behalf of the government, administrative findings, court decisions, or other similar evidence—that the government unit involved had engaged in prior discrimination.

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67. Most legislation containing a racial classification would be easily categorized as either an affirmative action plan or not. The plain language of the statute would indicate its purpose. Nevertheless, if an invidious racial classification were reviewed as an affirmative action plan under the procedures presented here, the statute would fail; the legislature would be unable to meet its burden of production of showing that the statute was enacted to achieve a compelling governmental purpose.

68. On the relationship between strict scrutiny in the affirmative action context and traditional strict scrutiny, see infra Section IV(A).

69. If classifications by race or ethnicity do not appear on the face of the statute, then a constitutional disparate impact challenge would proceed under the doctrine enunciated in Davis, 426 U.S. at 229, and Arlington Heights, 429 U.S. at 252, supra note 64.

70. Affirmative action plans based on criteria other than race, such as the set-aside for disadvantaged business enterprises contained in the Small Business Administration Act, 15 U.S.C. § 631 et seq., should not be subject to strict scrutiny. Accordingly, the procedure described here, as well as the strictures of Croson, would not apply to the analysis of such programs. But see Milwaukee County Pavers Ass’n v. Fiedler, 707 F. Supp. 1010 (W.D. Wis. 1989) (applying Croson to invalidate a set-aside for socially and economically disadvantaged businesses).

71. This demonstration would constitute a showing of the “present effects.”

72. This demonstration would constitute a showing of “past governmental discrimination.”

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If the affirmative action plan is defended as achieving the second compelling interest—the termination of governmental complicity in private industry discrimination—then the legislature should introduce statistical evidence of which the legislators were aware when the program was adopted. Such evidence should constitute a prima facie case of disparate impact under Title VII\(^3\) or the equal protection clause, or a prima facie case of disparate treatment under Title VII.\(^4\) The defendant should also introduce evidence of a contemporaneous legislative conclusion—again based on some array of testimony taken, studies performed by or on behalf of the government, administrative findings, court decisions, or other similar evidence—that the government unit either funds or is otherwise passively participating in the private industry.

If the defendant legislature meets its burden of production, that burden then shifts back to the plaintiff to show that the legislature did not, in fact, intend to achieve the purported compelling interest. The plaintiff could make this showing by producing evidence demonstrating that the legislature's intent was to achieve some purpose other than a compelling governmental interest or by demonstrating that a rational legislative body, honestly assessing the evidence before it, could not have concluded that race-based remedies were necessary to achieve a compelling interest.

Throughout the litigation, the burden of persuasion remains on the plaintiff.

**IV. Evaluation of the Burden-Shifting Regime**

By requiring the defendant to present and defend its conclusions regarding the existence of a factual predicate of prior discrimination, the burden-shifting regime outlined above will "sharpen the inquiry"\(^5\) into the legislature's motive for adopting an affirmative action program. Beyond fulfilling the constitutional demand that a legislature have a sound evidentiary predicate for its affirmative action program, this procedure is entirely consistent with existing law.

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\(^3\) Section 703(a)(2) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2), provides: "It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." See Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

\(^4\) See supra notes 57-60 and accompanying text. Either prima facie case would constitute a showing of present discrimination in the relevant industry.

\(^5\) **Burdine**, 450 U.S. at 255 n.8.
regarding the allocation of burdens of proof and with constitutional doctrine regarding the evidentiary predicate requirement.

A. Allocation of the Burdens

As noted above, courts are quite willing to allocate both the burdens of production and persuasion in order to achieve important policy goals. Accordingly, the burden allocation in the proposal presented here is designed to address legal and policy considerations surrounding affirmative action. Placement of the initial burden of production on the plaintiff is, of course, only natural: as the party requesting judicial action to change the status quo, the plaintiff is justifiably required to make an initial showing that a valid claim exists. Once the plaintiff makes this showing, however, considerations of fairness and efficiency dictate that the defendant legislature produce evidence regarding the basis for its conclusion that race-conscious relief was warranted. Placing the burden of production on the defendant is supported by a number of considerations. First, challenges to the constitutionality of affirmative action plans are likely to produce complex, fact-intensive litigation. Since intent is inherently elusive, extensive factual records must be developed to illuminate the intent of the legislature. As the Court has recognized, burdens of production are appropriately placed on the party that can help expedite the progress of complicated cases by bringing forth evidence.

Second, and related, since the defendant in affirmative action litigation is uniquely capable of producing evidence that bears directly on the central inquiry of motive, considerations of fairness suggest that the defendant should bear the interim burden of production.

76. The range of evidence that could be gathered to support an affirmative action program is extraordinarily broad. In Croson, for instance, the City of Richmond relied on: 1) a statistical survey of the percentage of City construction dollars awarded to minority firms compared to the percentage awarded to non-minority firms, 2) a survey of the membership of minority construction firms in professional associations, 3) testimony of individuals involved in the construction industry and in city government, and 4) congressional findings, validated in Fullilove, that discrimination is endemic in the national construction industry. Croson, 109 S. Ct. at 724-727. See also San Francisco, 813 F.2d 922 (evidence consisted of reports solicited by city from all city agencies and interested private organizations, extensive public hearings, and a 172-page city report); Metropolitan Dade County, 723 F.2d at 853 (evidence presented included, inter alia, “reliable, substantial information compiled by independent investigations”); Keip, 713 F.2d at 170-71 (evidence included floor debates, court decision finding the State was a “joint participant” in private industry discrimination, study completed by an independent examiner, and study completed by the State).

77. See Burdine, 450 U.S. at 249-50; see generally Sweeney, 439 U.S. 24.
Not only does the legislature have unparalleled access to the relevant information, it also has every incentive to make its motivation known, providing, of course, that its motivation was legitimate. If the legislature cannot present legally sufficient evidence verifying that it intended to achieve a compelling governmental interest, that failure will—as it should—doom the affirmative action program.

These considerations, nevertheless, do not warrant imposing the burden of persuasion on the defendant legislature. Most importantly, Justice O'Connor noted in Wygant that “[i]n ‘reverse discrimination’ suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated.” That is, the burden of persuasion throughout the litigation rests on the plaintiffs challenging the affirmative action plan.

In addition, important policy concerns related to the fulfillment of the underlying substantive law of affirmative action counsel against shifting the burden of persuasion to the defendant. First, under traditional strict scrutiny, legislation that contains a racial classification is presumptively invalid. Although the cases are not explicit in this regard, the defendant seems to bear the burden of demonstrating that the classification is designed to achieve a compelling state interest. In contrast, the plaintiff’s initial showing that an affirmative action plan contains a racial classification does not establish a presumption that the plan is unconstitutional. If every affirmative action plan were presumptively invalid, the law’s embrace of affirmative action to combat discrimination would be gravely impaired.

Justice O’Connor stressed this point in Wygant. Noting “this Court’s and Congress’ consistent emphasis on the value of voluntary efforts to further the objectives of the law,” Justice O’Connor crafted her opinion to promote “public employers’ incentive to meet voluntarily their civil rights obligations.” She went on to emphasize that “[t]he value of voluntary compliance is doubly important when it is
a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance.\textsuperscript{82}

Second, the opinion in \textit{Croson}, while adopting strict scrutiny as the standard for analyzing affirmative action plans, clearly indicated that race-based remedial action, in some instances, would be constitutional.\textsuperscript{83} The form of strict scrutiny adopted in \textit{Croson} for affirmative action plans stands in stark contrast to traditional strict scrutiny, which invalidates virtually all other racial classifications.\textsuperscript{84} In short, racial classifications contained in affirmative action programs do not, standing alone, establish the legislature as a wrongdoer. Accordingly, the burden of persuasion should not shift to the defendant to prove that the statute does not violate the equal protection clause.

This point is illustrated by considering how the burden-shifting regimes for disparate impact and disparate treatment claims under Title VII diverge. In a disparate impact claim, once the plaintiff establishes a prima facie case that a supposedly neutral employment practice has a disproportionate impact on a protected group, the

\textsuperscript{82} Wygant, 476 U.S. at 290 (O'Connor, J., concurring). The current regulations of the United States Equal Employment Opportunity Commission, moreover, call for "each person subject to Title VII [to] take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation." 29 C.F.R. § 1608.1(c) (1988). The EEOC regulations continue:

Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII. . . . Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation.

\textit{Id. See also} 29 C.F.R. §§ 1608.3 & 1608.4 (1988).

\textsuperscript{83} The Court took pains to counter Justice Marshall's contention that the majority viewed "racial discrimination as largely a phenomenon of the past" and that, after \textit{Croson}, "governmental bodies need no longer preoccupy themselves with rectifying racial injustice." 109 S. Ct. at 752 (Marshall, J., joined by Brennan and Blackmun, J., dissenting). The Court explained that state and local governments "have many weapons at their disposal both to punish and to prevent discrimination and to remove arbitrary barriers to minority advancement," including, in appropriate circumstances, affirmative action. 109 S. Ct. 721. \textit{See also supra} notes 3-6 and accompanying text.

\textsuperscript{84} The exceptions prove the point. Only two cases have upheld non-remedial racial classifications: in \textit{Korematsu}, 323 U.S. 214, the Court let stand the Japanese internment program during World War II because of national security imperatives; and in \textit{Lee v. Washington}, 390 U.S. 333 (1968) (per curiam), the Court approved the temporary racial segregation of prison inmates in the aftermath of a prison race riot. Except for these two cases, strict scrutiny indeed has been strict in theory but fatal in fact. \textit{See supra} note 6 and accompanying text.
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burden of persuasion shifts to the defendant to show the "job-relatedness" of the practice. Because the plaintiff's prima facie case of adverse impact alone, in the absence of a legally sufficient defense, entitles the plaintiff to relief, the burden of persuasion—as well as the burden of production—shifts; in other words, the plaintiff's prima facie case establishes the defendant as a wrongdoer. In contrast, when the plaintiff makes out a prima facie case in disparate treatment litigation, the burden of production, but not the burden of persuasion, shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the purported employment discrimination. The plaintiff's prima facie case of disparate treatment does not establish a presumption that the defendant acted illegally. Without evidence of illicit motive on behalf of the employer, being denied a job for which one is qualified does not entitle one to relief

85. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (employer must "prove that the challenged requirements are job related"); Albermarle Paper Co., 422 U.S. at 425 (employer must "meet the burden of proving that its tests are 'job related'"); Griggs, 401 U.S. at 432 ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.") (emphasis added in each). The recent plurality opinion in Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988), blurred the distinction between disparate impact and disparate treatment with regard to the allocation of the burden of persuasion. In holding that disparate impact analysis applies to subjective criteria for promotion, Justice O'Connor wrote that "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." 108 S. Ct. at 2790 (O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, J.J.). In his concurrence, Justice Blackmun took issue with this position: "The plurality's discussion of the allocation of burdens of proof and production that apply in litigating a disparate impact claim...is flatly contradicted by our cases." 108 S. Ct. at 2792 (Blackmun, J., joined by Brennan and Marshall, J.J., concurring in part and concurring in the judgment). In any event, Justice O'Connor's modification of the burden allocation regime established in Griggs and subsequent disparate impact cases has never commanded a majority of the Court.

86. The Court noted in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 359-60 n.45 (1977):

Although the prima facie case did not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it did create a greater likelihood that any single decision was a component of the overall plan. Moreover, the finding of a pattern or practice changed the position of the employer to that of a proved wrongdoer. See also Watson, 108 S. Ct. at 2792-94 (Blackmun, J., joined by Brennan and Marshall, J.J., concurring in part and concurring in the judgment) (describing and contrasting the rationale for burden-shifting in disparate impact and disparate treatment litigation).

87. A plaintiff's prima facie case of disparate treatment consists of a showing that she belongs to a group protected by Title VII, that she applied for a job for which she was qualified, that she was rejected, and that the employer continued to seek applicants for the job. McDonnell Douglas, 411 U.S. at 802.

88. Id.
under Title VII. When disparate treatment is alleged, the prima facie case does not establish the employer as a wrongdoer.

Returning to the affirmative action context, the plaintiff’s prima facie case under the paradigm presented here does not, standing alone, establish the legislature’s liability; the plaintiff’s initial showing that race was explicitly considered in a statute does not demonstrate that the evidentiary predicate relied upon by the legislature was at all inadequate. Before the legislature can be regarded as a wrongdoer, evidence that the legislature’s motive was not proper must be presented. Just as in disparate treatment claims under Title VII, the lack of substantiation in the plaintiff’s prima facie case that the defendant was motivated by illegitimate goals counsels against shifting the burden of persuasion to the defendant.

B. The Legislature’s Burden of Production

Although the defendant legislature does not bear the burden of persuasion, the duty to produce evidence of legislative motive underlying the affirmative action program constitutes a significant check on the legislature’s activity. To satisfy its burden of production, the legislature must introduce evidence tending to show that it reasonably concluded—based on evidence before it when the affirmative action plan was adopted—that race-based remedial action was warranted. The legislature’s burden of production, then, is not to come forward with scatter-shot evidence hoping to establish an evidentiary predicate, but rather to produce evidence focusing directly on the issue of legislative intent.

1. The Legislature’s Conclusions. That the legislature must conclude, based on the evidence before it, that affirmative action is an appropriate remedy for the discriminatory situation identified is clearly established in the Court’s jurisprudence. In Fullilove, the Court found the factual basis for the challenged affirmative action plan sufficient because the Court was “satisfied that Congress had [an] abundant historical basis from which it could conclude that traditional procurement practices . . . could perpetuate the effects of

89. Teamsters, 431 U.S. at 335 n.15 (“Proof of discriminatory motive is critical” under a disparate treatment theory).
91. Satisfaction of the burden of production requires that the evidence produced is of sufficient character that the judge believes that a reasonable fact-finder could conclude that the alleged fact exists. McNaughton, Burden of Production of Evidence: A Function of a Burden of Persuasion, 68 Harv. L. Rev. 1382, 1385 (1955).
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prior discrimination." 92 Six years later, in Wygant, the Court demanded even more: the School Board's plan failed because the Board did not have "a strong basis in evidence for its conclusion that remedial action was necessary." 93 The Wygant Court required not simply that the public actor could have concluded that affirmative action was warranted, but that it had in fact made such a conclusion. 94 Most recently, the Court struck down the set-aside program in Croson because the Richmond legislature failed to make the requisite conclusion. Disparaging Richmond's efforts as amounting to only a "generalized assertion [of] past discrimination," an "amorphous claim" of discrimination in the construction industry, and "sheer speculation," 95 the Court opined that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight. . . . Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." 96 Instead, quoting Wygant, the Court demanded "a strong basis in evidence for the conclusion that remedial action was necessary." 97

The Court's insistence that a legislature forthrightly consider the evidence of prior discrimination and reach a conclusion based on that evidence before implementing an affirmative action program is certainly warranted. Even under less rigorous equal protection scrutiny, courts commonly inquire into the underlying legislative deliberations to help identify unconstitutional discrimination. 98 As Justice Brennan has noted in regard to rational relation review, a

92. Fullilove, 448 U.S. at 478.
94. Wygant, 476 U.S. at 277 (Board "must have sufficient evidence to justify the conclusion that there has been prior discrimination") (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, J.J.); id. at 291 (Board needs "information which gives them a sufficient basis for concluding that remedial action is necessary") (O'Connor, J., concurring). Similarly, the actor's concession or admission that it had discriminated in the past does not amount to a satisfactory conclusion. Id. at 279 n.5 ("Nor can the [governmental unit] insulate itself from this key constitutional question by conceding that it has discriminated in the past, now that it is in its interest to make such a concession.") (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, J.J.).
96. Id. at 724 (citations omitted). Cf. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").
98. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (classification satisfies rational basis test only if it "rationally furthers the purposes identified by the State"); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (classification satisfies rational basis test only if it "rationally furthers some legitimate, articulated state purpose") (emphasis added in both). But cf. McGowen v. Maryland, 366
“challenged classification may be sustained only if it is rationally related to achievement of an actual legitimate governmental purpose.” In the sensitive area of affirmative action, in which legislative classifications are subject to strict scrutiny, requiring legislatures to deliberate and reach conclusions regarding necessity is especially important. The purposes of the evidentiary predicate requirement—identifying the problem, tailoring the remedy, and garnering public support—are best served by a legislature’s careful and honest evaluation of the evidence.

2. Contemporaneous Conclusions. Simply requiring the legislature to introduce evidence that it concluded that race-conscious remedies were appropriate is not, in itself, sufficient to satisfy the evidentiary predicate requirement. Rather, the Court must insist that the legislature produce its contemporaneous conclusion that remedial relief was necessary. Under the proposal presented here, the legislature can sustain its burden only by introducing concrete evidence that it concluded—at the time that it enacted the affirmative action program and on the basis of the evidence gathered to that point—that affirmative action was necessary.

Requiring such a contemporaneous conclusion, however, has been criticized as creating a potential disincentive to legitimate affirmative action. In her Wygant concurrence, Justice O’Connor noted that “a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer’s voluntary adoption of an affirmative action plan.” While recognizing that such findings

99. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 188 (1981) (Brennan, J., joined by Marshall, J., dissenting) (emphasis in original). See also Gunther, supra note 6, at 21 (Court should “assess the means in terms of legislative purposes that have substantial basis in actuality, not merely conjecture”).

100. It should be noted that the deliberation requirement is designed “not to redirect [the legislature’s] decisions; rather, the Court, in order to evaluate and rule in a principled manner, should compel [the legislature] to act in an equally principled fashion.” Days, supra note 21, at 470.

101. Of course, the purpose of the evidentiary predicate generally, and the burden-shifting regime presented here in particular, is to create a disincentive to affirmative action that is not premised upon a legitimate need to remedy discrimination. In so doing, however, no disincentive to legitimate affirmative action should be tolerated. Properly justified and properly tailored affirmative action continues to be an important constitutional tool to ameliorate the effects of racial prejudice in our country. Any difficulty a legislature may face in enacting a constitutional plan stems from the nature of strict scrutiny itself, not from the proposal presented here.

102. Wygant, 476 U.S. at 289 (O’Connor, J., concurring). Justice O’Connor’s argument, as a matter of precedent, is correct. See Fullilove, 448 U.S. at 478 (plurality opinion of Burger, C.J., joined by White and Powell, JJ.) (“Congress, of course, may legislate

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“obviously are [a] desirable . . . evidentiary safeguard,” Justice O’Connor eschewed such a requirement, arguing that “[t]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers’ incentive to meet voluntarily their civil rights obligations.” Such findings, she feared, could expose the public actor to liability under Title VII and, perhaps, the equal protection clause, thereby impeding the effort to remedy discrimination.

without compiling the kind of ‘record’ appropriate with respect to judicial or administrative proceedings.’); id. at 502 (Powell, J., concurring) (“Congress is not expected to act as though it were duty bound to find facts and make conclusions of law[.]’); id. at 520 n.4 (Marshall, J., concurring, joined by Brennan and Blackmun, JJ.) (Congress does not need to make “particularized findings” of constitutional or statutory violations.); Perez v. United States, 402 U.S. 146, 156 (1971) (Congress need not “make particularized findings in order to legislate[,]”); Cox, The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 105 (1966) (“[T]he practice of relying upon the legislative record when it exists should not be taken to show that such a record is required. . . . No case has ever held that a record is constitutionally required.”). But see supra notes 98-99 and accompanying text.

103. Wygant, 476 U.S. at 290 (O’Connor, J., concurring); see id. at 289 (Contemporaneous findings serve “as a means by which it can be made absolutely certain that the governmental actor truly is attempting” to achieve a compelling governmental purpose.);

104. Wygant, 476 U.S. at 290 (O’Connor, J., concurring). See also Bakke, 438 U.S. at 364 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“[T]he requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial action would be self-defeating.”); Joint Statement, supra note 1, at 714 (“[I]t is essential not to deter voluntary efforts by forcing . . . governments to point fingers needlessly or to make compromising public admissions in order to establish the necessary predicate for race-conscious remedies.”).

105. Wygant, 476 U.S. at 291 (O’Connor, J., concurring). The contemporaneous finding requirement also has been criticized as unwise because it is likely to fuel existing racial tensions in the locale, as unnecessary because of the political accountability of legislators who enact the affirmative action program, and as unworkable because state and local legislatures normally do not keep legislative histories. See Brief of the States of New York, et al. as Amici Curiae in Support of Appellant at 7-10, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998); see also May v. Cooperman, 572 F. Supp. 1561, 1564 (D.N.J. 1983) (“The New Jersey legislature does not preserve an official record of its hearings and debates, and consequently this source of information concerning the purpose of legislation is not available.”). To be sure, these criticisms are well-taken; none of them, however, is serious enough to warrant a retreat from a contemporaneous conclusion requirement. First, forthrightly presenting the evidentiary basis for a remedial program may anger some elements in the community, but it also will alert the larger community to the need to act and galvanize support for the program. Second, the Constitution requires that the decision to enact a race-conscious program be done with utmost deliberateness; reliance on the political process alone in this context has been rejected repeatedly by the Court. Finally, although state and local legislatures may not keep legislative histories routinely, certainly nothing prevents these bodies from doing so.
This concern, while valid, does not undermine the burden-shifting regime offered here. Regardless of which compelling governmental interest the legislature seeks to fulfill by enacting the affirmative action plan—whether to redress the current effects of past governmental discrimination or to terminate governmental complicity in private industry discrimination—satisfying the contemporaneous conclusion requirement does not require the legislature to establish its own legal liability. On the contrary, according to the Court's opinion in *Croson*, the evidence that a legislature must produce to support an affirmative action plan need only amount to a "prima facie case of constitutional or statutory violation." For a number of reasons, such a showing can be made without exposing the government to legal liability.

If the affirmative action plan is enacted to remedy the current effects of past discrimination by the governmental entity itself, evidence that the government had, in the past, illicitly considered race in its hiring or procurement practices would suffice to justify the affirmative action plan. Such evidence would constitute a prima facie case of disparate treatment under Title VII. This evidence, however, would not expose the public actor to Title VII liability because, under disparate treatment doctrine, evidence of discriminatory treatment alone does not establish liability; to establish liability for disparate treatment, intent to discriminate must be shown. The evidence necessary to support the affirmative action plan—a prima facie case of disparate treatment—need not include such evidence of intent. Accordingly, affirmative action based on this compelling governmental interest would not expose the legislature to Title VII liability.

Furthermore, an affirmative action plan designed to end passive governmental participation in private industry discrimination need not establish the government's statutory or constitutional liability. If a passive participation rationale underlay the plan, the legislature would need to produce evidence of discriminatory practices in the industry or a statistically significant disparity between minority and

106. 109 S. Ct. at 724. For the purposes of this Current Topic, I assume that the Court requires an actual prima facie case of constitutional or statutory violation, not evidence somehow "approaching a prima facie case." *Id.* What evidence "approaches" a prima facie case of statutory or constitutional violation is not readily apparent. Ambiguity, as is obvious from the discussion in Part I(B), supra, abounds in the Court's approach to the evidentiary predicate requirement. To regard the Court's current demand as amounting to evidence that somehow "approaches" a prima facie case, rather than an actual prima facie case, only would add to the existing confusion.

107. See supra notes 57-60 and accompanying text.
non-minority participation in public contracting opportunities. Such a showing could constitute a prima facie case of disparate treatment or disparate impact, but would not expose the government to liability. First, the discriminatory treatment shown would pertain to the private industry's practices, not to the government's practices. The evidence produced, accordingly, could be used only in a Title VII suit against the private actors. Second, since an employer-employee relationship for Title VII purposes does not exist between a city and private entities vying for and performing city construction contracts, no Title VII disparate impact suit against the city could arise from the statistical disparity shown. Finally, a constitutional disparate impact suit may be maintained only if the plaintiff can show intent to discriminate and that the impact occurred "because of" the legislature's desire to discriminate. A showing of a prima facie case of constitutional disparate impact in the receipt of public benefits, standing alone, does not provide this sort of evidence. In short, the defendant legislature may fulfill the contemporaneous conclusion requirement without producing conclusions of its own legal liability. Consequently, the disincentives to affirmative action feared by Justice O'Connor are avoided.

The Federal Rules of Evidence 407 and 408 provide an additional means to insulate a government from potential statutory or constitutional liability. Courts should rely on Rules 407 and 408, "Subsequent Remedial Measures" and "Compromise and Offers to Compromise," to exclude evidence developed by the government to satisfy the contemporaneous conclusion requirement in subsequent suits against the government alleging Title VII or equal protection

108. In *Croson*, the Court held that "[i]f the statistical disparity between eligible MBEs and MBE membership [in professional associations] were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market." 109 S. Ct. at 726.

109. *See supra* note 73.

110. A Title VII disparate impact suit against private parties arising from the legislature's collection of data cannot be regarded as an unwarranted impediment to affirmative action. On the contrary, such a suit should be regarded as a public good.


112. *See supra* note 64.

violations.\textsuperscript{114} These Rules, most commonly invoked in tort litigation, were designed to promote the general public policy of encouraging remedial action and the voluntary settlement of disputes by excluding evidence of such actions in subsequent litigation.\textsuperscript{115} Similarly, precluding the use of the evidence necessary to meet the contemporaneous conclusion requirement in subsequent litigation would encourage properly substantiated affirmative action by alleviating the threat of collateral governmental liability.\textsuperscript{116}

Requiring contemporaneous conclusions is the only way to assure that the evidentiary predicate requirement has real bite.\textsuperscript{117} As described above, the defendant's burden is to put forth its conclusion, based on evidence gathered in whatever manner, that affirmative action was warranted. The relevant inquiry, then, is the actual motivation of the legislature, not its post hoc rationalizations. If legislatures were permitted to come into court and offer newly formed conclusions regarding the need for race-conscious relief, the purposes of the evidentiary predicate requirement would be undermined. Indeed, a recurring problem in affirmative action litigation is that courts are "presented with a series of post hoc arguments . . . in defense of the program, along with scores of amicus briefs hypothesizing how the program might be found to accord with federal legal and constitutional requirements."\textsuperscript{118} Demanding that legislatures introduce their contemporaneous conclusions regarding the need for affirmative action would negate this problem.\textsuperscript{119}

\textsuperscript{114} Of course, the evidence supporting the affirmative action plan properly would be introduced in the direct action challenging the legitimacy of the affirmative action plan; Rules 407 and 408 would bar the use of such evidence only in unrelated suits against the government actor.

\textsuperscript{115} See Fed. R. Evid. 407 & 408 advisory committee's notes. See also McCormick on Evidence, supra note 43, §§ 274-75.


\textsuperscript{117} Croson's call, after all, is for strict scrutiny of all race-conscious legislation, including affirmative action plans.

\textsuperscript{118} Days, supra note 21, at 187 (discussing the Bakke litigation).

\textsuperscript{119} This demand, however, has obvious separation of powers difficulties. As a general rule, courts do not demand any particular mode of legislative decision-making beyond that specified in the Constitution. See, e.g., Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983) (invalidating legislative veto as violating constitutional demands of bicamerality and presentment); Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 222-44 (1976) (legislatures cannot be required to legislate in any particular manner). However, as Justice Brennan noted in his dissent in Fritz, 449 U.S. at 187 (Brennan, J., joined by Marshall, J., dissenting), the "Court has frequently recognized that the actual purposes of Congress, rather than the post hoc justifications offered by Government attorneys, must be the primary basis for [equal protection] analysis . . . ." Moreover, even if not directly required by a court, a legislature would be wise to adopt such contemporaneous findings in order to increase the likelihood that its affirmative action plan would pass constitutional muster.
Shifting the Burden of Proof

V. Conclusion

In the aftermath of Croson, litigation challenging the sufficiency of the evidentiary predicate for affirmative action is likely to accelerate. This Current Topic proposes that courts implement a procedural regime to resolve these controversies. This regime calls for the plaintiff challenging the affirmative action plan to bear the initial burden of production to show that a race-based classification exists in the affirmative action statute. The burden of production then would shift to the defendant legislature to offer evidence that it concluded, based on evidence before the legislature at the time the program was adopted, that affirmative action was necessary to achieve a compelling governmental interest. If the legislature meets this burden, the burden of production would then shift back to the plaintiff to show that the legislature's intent was not, in fact, to achieve a legitimate interest. The burden of persuasion rests on the plaintiff throughout.

Adoption of this procedural regime, while it would not alter the substantive law of affirmative action, would assist courts greatly in resolving controversies regarding the evidentiary predicate for affirmative action. By substituting a procedural approach for the current quantitative approach, the burden-shifting process would focus the court's and the litigants' attention on the relevant question: was the legislature motivated, based on evidence it had gathered at the time that the affirmative action plan was adopted, to achieve a compelling governmental interest?

120. Indeed, within six weeks after Croson was decided, two courts struck down affirmative action plans because of the lack of a sound evidentiary predicate. See Fiedler, 707 F. Supp. at 1016 (Wisconsin set-aside); American Subcontractors Ass'n, Ga. Chapter v. Atlanta, 376 S.E.2d 662 (Ga. 1989) (Atlanta set-aside). Moreover, according to an amicus brief filed in Croson, 32 states and over 150 municipal and county governments currently have minority business set-aside affirmative action programs. Brief of National League of Cities, et al., as Amici Curiae in Support of Appellant, at App. I & II, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).