

PART THREE: LEGAL ANALYSES

Chapter V Remedial Justifications For Race-Conscious Policies

As discussed above in Chapter I, remedying the present effects of past discrimination can be a compelling interest justifying race conscious affirmative action policies by public entities, including states and their subdivisions.¹⁴² A college or university faced with a challenge to its race-conscious programs, may, in some instances, successfully defeat such a challenge by asserting that its programs are designed to remedy past discrimination. This Chapter describes the legal contours of the remedial justification, including the “passive participant” theory, which appears to provide a broader basis upon which to justify remedial affirmative action, and the rigorous “strong basis in evidence” requirement, which has limited the reach of the remedial justification. The remedial justification will not apply to all schools, and may be of use only on a case-by-case basis.

A public entity may assert remediation as a compelling interest justifying its race-conscious program only when the program is designed either to remedy the public entity’s own discriminatory practices or to dismantle a system of discrimination in which the entity is a “passive participant.”¹⁴³ A public entity may not use race-conscious policies simply to combat “societal discrimination,”¹⁴⁴ to provide role models for students, or to benefit “racial groups that . . . may never have suffered.”¹⁴⁵

To institute a race-conscious policy based on a remedial justification, the public entity must show that it has a “*strong basis in evidence* for its conclusion that remedial action was necessary.”¹⁴⁶ If a public entity can meet the requirements of this compelling interest, even quota systems may be permitted.¹⁴⁷ For this reason, in the admissions context, colleges and universities with a clearly documented or proven discriminatory past may find the remedial approach useful as a justification for more aggressive uses of race which might not be permitted under the diversity rationale discussed above.

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The Supreme Court has upheld remedial race-conscious policies in a number of cases and set forth the general contours for such policies in *City of Richmond v. J.A. Croson Co.*¹⁴⁸ In *Croson*, the Court struck down the city’s plan that required prime contractors awarded public construction contracts to subcontract at least 30 percent of the dollar amount of each contract to “Minority Business Enterprises.”¹⁴⁹ According to the Court, the city could not show that the plan was justified to remedy anything other than “societal discrimination.”¹⁵⁰ The Court held that a state or its subdivisions have the authority to remedy the effects of specific instances of its own discrimination.¹⁵¹ It also held that where a state or local government has identified a

system of discrimination in its jurisdiction with particularity, and where it has evidence that its spending practices are perpetuating the effects of that system of discrimination, it may use a race-conscious policy as a remedy.¹⁵²

A. An Entity's Remediation of Its Own Discrimination

A public entity may successfully assert remediation as a compelling interest when it seeks to remedy the effects of its own discrimination via race-conscious means.¹⁵³ For example, in *U.S. v. Paradise*,¹⁵⁴ the Supreme Court upheld a one-for-one promotion requirement as a temporary measure to combat rampant discrimination in the Alabama Department of Public Safety.¹⁵⁵ Faced with detailed evidence of discrimination in hiring and promotions among state troopers, the district court required that 50 percent of promotions go to African Americans until the Department of Public Safety implemented other prior orders or consent decrees.¹⁵⁶ The Supreme Court held that the department's own history of egregious discrimination justified a race-conscious remedy. The Court indicated that quotas are permitted in very limited circumstances, and only when they are temporary and are designed to remedy overwhelming and intractable discrimination.¹⁵⁷

Similarly, in *Boston Police Superior Officers Federation v. Boston*,¹⁵⁸ the First Circuit Court of Appeals held that the Boston Police Department's race-conscious promotions program withstood strict scrutiny. The Department asserted that its program was justified on the basis of its past active participation in discrimination within its jurisdiction. The Department referenced a judicial finding that its own hiring tests unfairly disadvantaged African American applicants. Though the entry level tests were eventually improved, vestiges of the Department's specific discrimination endured years later because officers were promoted only from within, and were selected from a pool that had an artificially low number of African Americans due to past discrimination by the police department itself. The Department supported this inference at trial with statistical data and projections of expected hires versus actual hires. The court found that this showing of direct discrimination within the jurisdiction of the police department was sufficient to support a race-conscious program.¹⁵⁹

Although the case law clearly permits a public entity to enact race-conscious programs for remedial purposes, the ability of any such program to withstand strict scrutiny will depend in large part upon the "strong basis in evidence" inquiry. The "strong basis in evidence" requirement is discussed further in Section C.

B. Remedying the Discrimination of Others: "Passive Participant" Theory

A state or its subdivisions may have a compelling interest in dismantling a system of discrimination in which it has been a "passive" or joint participant.¹⁶⁰ Although this "passive participant" theory, endorsed in *Croson*, ostensibly provides public entities with a broader basis upon which to justify race-conscious affirmative action, there is very little case law delineating this justification. The justification is not discussed in detail in the *Croson* decision itself, and lower court decisions provide little additional guidance. Nevertheless, it appears

from *Croson* that the passive participant theory applies and race-conscious remedial efforts are justified when: (a) a system of discrimination exists, and (b) the state's provision of tax dollars perpetuated that system of discrimination.

For instance, the Seventh Circuit Court of Appeals has defined the passive participant theory in *Builders Association of Greater Chicago v. County of Cook*¹⁶¹ as follows:

If prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit (a kind of joint tortfeasor, coconspirator, or aider and abettor) to be entitled to take remedial action.¹⁶²

The Seventh Circuit held, however, that the County ultimately had not shown that the passive participant theory applied to the facts of the case. The Third Circuit similarly endorsed the passive participant theory in *Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia*,¹⁶³ but held that the City did not adequately show that it was a "passive participant."¹⁶⁴ On the other hand, in *Concrete Works of Colorado, Inc. v. Denver*,¹⁶⁵ the Tenth Circuit endorsed the passive participant theory and held that Denver had established that it was "at least, an indirect participant"¹⁶⁶ in a system of racial and gender discrimination in the Denver construction industry. According to the court, Denver had demonstrated that it was a passive participant by presenting evidence of marketplace discrimination in the city's construction industry and then linking its spending practices to that private discrimination.¹⁶⁷

Although there are few federal appellate court decisions analyzing the passive participant theory, given the clear language of *Croson*, the passive participant theory is a legitimate justification for race-conscious remedial programs where the state asserts that it has passively participated in a system of discrimination on the part of private actors. The application of the theory to remediation of discrimination on the part of other public actors is, however, as yet undecided.

In the educational context, an example of "passive participant" remediation might involve remedying a school district's passive participation in discrimination committed by private schools that received contracts to provide educational services within the district. Another example might involve remedying a state's passive participation in discrimination committed by individual school districts that received funding and educational mandates directed by the state.

C. The "Strong Basis in Evidence" Requirement

Whether an institution asserts a remedial justification based on its own discrimination or on the passive participant theory, there must be a "strong basis in evidence" to justify its use of a race-conscious policy.¹⁶⁸ The Supreme Court has not explicitly defined a "strong basis

in evidence” beyond suggesting that it would be evidence “approaching a prima facie case of a constitutional or statutory violation.”¹⁶⁹ Because many remedial affirmative action cases are decided on the basis of whether a public entity has met the strong basis in evidence requirement, there is a large body of case law analyzing what does or does not constitute a “strong basis in evidence.” However, these analyses are highly fact dependent, and the lower courts have not articulated a specific legal definition. Public entities should review these decisions, nonetheless, to evaluate the likelihood that a remedial affirmative action plan might be upheld on this basis.

Strong Basis in Evidence consists of:
Direct Evidence

- Judicial Findings
- Facially Discriminatory Laws or Policies

Indirect Evidence

- Gross Statistical Disparities
- Statistical Disparities *plus* Anecdotal Evidence

Among the most powerful forms of evidence available to justify a remedial race-conscious policy is direct evidence of past discrimination, including judicial findings and discriminatory laws and policies.¹⁷⁰ A public entity may present direct evidence of laws or policies which are discriminatory on their face, as well as anecdotal evidence that discrimination has occurred. However, even direct evidence of past discrimination may not be sufficient in the absence of evidence of the *present effects* of that past discrimination.¹⁷¹ Therefore, when a public entity seeks to rely on past judicial findings of discrimination or discriminatory laws or policies that are not recent, it must also offer evidence of the present effects of that discrimination. Such evidence may be offered in the form of statistical data, as discussed below.

Because direct evidence of discrimination is often difficult to come by in the absence of recent and blatant *de jure* discrimination, the most common form of evidence presented in support of the remedial justification is indirect evidence. In particular, many public entities have relied on, with varying degrees of success, statistical data evidencing disparities between the proportion of minorities in the general population and the proportion of minorities in the workforce or university under scrutiny. For example, in *Croson*, the City of Richmond presented statistical data evidencing a disparity between the proportion of African Americans in the population, and the proportion of Minority Business Enterprises granted contracts. Although the Supreme Court rejected the city’s statistical comparison,¹⁷² it stated, “where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”¹⁷³ Therefore, statistical data may either be used to buttress past findings of discrimination, as discussed above, or may stand alone as proof of past discrimination and its present effects.

A public entity seeking to present evidence of gross statistical disparities must offer evidence that clearly shows discriminatory exclusion. That is, “where special qualifications [for employment] are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.”¹⁷⁴ As noted above, the *Croson* Court rejected the evidence presented by the City of Richmond partly on this basis. The Court found that the city failed to meet the “strong basis in evidence” requirement because it did not present evidence on how many minority businesses in the relevant market were *qualified* to undertake contracting work on public projects; the city had presented evidence only on how many minority businesses *existed* in the relevant market.¹⁷⁵ The Court implied that such evidence would meet the requirement, raise an inference of discriminatory exclusion, and justify race-conscious affirmative action:

If the statistical disparity between eligible [minority business enterprises] and [minority business enterprise] membership [in local contractors’ 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.¹⁷⁶

In the admissions context, a university seeking to justify its program on the basis of statistical data evidencing discriminatory exclusion should present evidence of gross statistical disparities between the population of qualified minority candidates and the number of enrolled minority students; statistical evidence of disparities between the entire population of minority residents and the number of enrolled minority students might be considered insufficient. However, if there were other forms of discrimination (including passive participant discrimination) that affected the pool of qualified applicants itself so that fewer minority applicants were in the pool, then general population statistics could also be relevant.

Despite the Supreme Court’s endorsement of the use of statistical data, many lower courts have rejected statistical evidence of disparities as inadequate when it is not buttressed by anecdotal evidence or when the court is unconvinced of the causation. The Fourth Circuit, for example, rejected as inadequate statistical evidence of disparities between the proportion of minimally-qualified African Americans in the general population and the proportion of African Americans in the Maryland State Police.¹⁷⁷ It rejected this evidence because it found that “[i]nferring past discrimination from statistics alone assumes the most dubious of conclusions: that the true measure of racial equality is always to be found in numeric proportionality.”¹⁷⁸ Because there was no gross statistical disparity and no anecdotal evidence to explain the disparity that did exist, discriminatory exclusion could not be inferred.¹⁷⁹ Similarly, in *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*,¹⁸⁰ the Eleventh Circuit agreed with the district court’s rejection of statistical data as inadequate evidence because the County’s evidence of disparities in the contracting industry did not control for firm size, which would have eliminated much of the disparity.¹⁸¹