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The Constitution and Race-Conscious Government Action: Narrow Tailoring Requirements

Constitutional equal-protection principles require that state and federal government actors deny no one “the equal protection of the laws.” Equal-protection claims against government actors allege unconstitutionally unequal treatment between groups. Unequal treatment based on race is of particular constitutional concern. Accordingly, a statute, policy, or program that distributes benefits or burdens based on race, ethnicity, or national origin often invites an equal-protection challenge. The Constitution does not bar all race-based action, but it does require the government’s justification for such action to meet a high bar. To determine whether government action involving racial classification is constitutional, courts apply a rigorous test known as “strict scrutiny.”

Strict scrutiny for racial classifications involves a two-part test. First, the government must identify a compelling interest that its race-based action serves. The most often-accepted interest is to remedy the government entity’s own past discrimination. To invoke that interest, the government must document a history of significant, relevant discrimination. Second, the constitutional inquiry turns to the means the government selects to pursue its interest. The government must prove that its statute, policy, or program aims to achieve the government’s interest and is “narrowly tailored” such that it uses or considers race no more than necessary. This report focuses on this second aspect of strict-scrutiny analysis: the requirement that a government’s remedy be well designed to minimize the use of race. The report evaluates the methods for narrowly tailoring race-based action, presents examples from case law, and closes with considerations for Congress.

All in all, courts seek to determine whether a race-based classification is overinclusive or underinclusive. Courts have identified some general tools a government can use to tailor race-based action, including considering race-neutral alternatives, incorporating durational limits on the use of race, designing waivers from racial requirements, and minimizing burdens on third parties. A race-based classification need not incorporate all of these methods, but using them wherever possible makes it more likely the action will survive strict scrutiny.

In evaluating the first of these tools, consideration of race-neutral alternatives, courts will generally look at a government’s prior endeavors to achieve its aims, such as using outreach and recruiting to increase minority employment or offering race-neutral support for small businesses to increase minority subcontracting. Courts may also consider evidence that decisionmakers studied race-neutral alternatives and found them unworkable. A durational limit, the next tool in aid of narrow tailoring, might take the form of a sunset provision or a requirement for reauthorization. Any waivers from racial requirements, such as allowing exemptions from hiring goals when there are too few qualified minority applicants, also supports narrow tailoring, as do other ways of restricting the beneficiary class, such as excluding larger, well established subcontractors from minority preferences. Courts generally disfavor quotas because of their inflexibility. When a provision or plan does use quotas or goals, they should reflect relevant factors such as the number of qualified minority firms or job applicants. Another important consideration regarding whether a race-based classification is narrowly tailored is the potential harm to third parties. Ideally, a government would minimize harm to others seeking the jobs, contracts, or other benefits at issue.

Court analysis of narrow tailoring with respect to racial classifications is case-specific and dependent on context; it is difficult to predict when a particular provision or plan will meet strict scrutiny. Contributing to this difficulty is the fact that many of the Supreme Court’s cases on narrow tailoring have led to splintered, plurality opinions.

To improve a race-based measure’s chances of passing strict scrutiny, Congress may wish to consider building a detailed record supporting a compelling government interest, and then design the race-based remedy to reflect that record. It may consider including several of the narrow-tailoring methods courts have outlined. Alternatively, when lawmakers aim to prioritize resources for underserved communities, they may choose race-neutral means, perhaps by identifying populations through measured need, vulnerability, or resource availability, to avoid having to meet strict scrutiny.

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The Equal Protection Clause of the Fourteenth Amendment provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹ The Supreme Court has interpreted the Fifth Amendment to apply the same equal-protection obligations to the federal government.² Equal-protection claims allege unconstitutionally uneven treatment between groups. Although unequal treatment of any group can raise equal-protection concerns, most laws pass muster so long as their classifications are rational, rather than “arbitrary.”³ However, the Supreme Court has held that differentiation based on race calls for enhanced safeguards. Accordingly, government action that distributes benefits or burdens based on race, ethnicity, or national origin must meet a more difficult equal-protection standard.⁴ To evaluate the constitutionality of racial classifications, federal courts apply a rigorous test known as “strict scrutiny.”⁵ To pass strict scrutiny, a law must be narrowly tailored to serve a compelling government interest.⁶ Strict scrutiny applies to some other government actions as well; this report focuses on racial classifications.⁷

Statutes often fail the strict-scrutiny test. Recently, race-based aid programs for certain businesses enacted in the American Rescue Plan Act came under strict scrutiny and were enjoined in the lower federal courts.⁸ In a case to be decided by the Supreme Court this term, North Carolina’s use of affirmative action in its admissions process faces an equal-protection challenge.⁹ Even so,

¹ U.S. CONST. amend. XIV, § 1.

² *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), *supplemented sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (noting that under Supreme Court case law, “the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable,” so that “the standards for federal and state racial classifications [are] the same”).

³ *See* *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 597 (2008) (noting the Court’s “traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications”). Most nonracial classifications, such as those based on age, disability, or poverty, are evaluated under the permissive “rational-basis” review. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (upholding mandatory retirement at age 70 for state judges under rational-basis review); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (holding that disability classifications do not face heightened equal-protection review); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44–45 (1973) (applying rational-basis review to reject claim that using local property taxes to fund public schools unconstitutionally disadvantaged poorer districts). Rational-basis review looks for “some rational relationship to a legitimate state purpose.” *Rodriguez*, 411 U.S. at 44. Sex classifications undergo “intermediate scrutiny,” a standard more difficult to meet than rational-basis review but less stringent than strict scrutiny. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *H.B. Rowe Co. v. Tippet*, 615 F.3d 233, 242 (4th Cir. 2010).

⁴ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). Only intentional race-based action violates the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

⁵ *Adarand Constructors*, 515 U.S. at 227.

⁶ *Id.* at 235.

⁷ Certain limits on fundamental rights, for example marriage and free speech, are subject to strict scrutiny. *See* CRS Legal Sidebar LSB10820, *Privacy Rights Under the Constitution: Procreation, Child Rearing, Contraception, Marriage, and Sexual Activity*, by Kelsey Y. Santamaria; CRS In Focus IF12308, *Free Speech: When and Why Content-Based Laws Are Presumptively Unconstitutional*, by Victoria L. Killion.

⁸ P.L. 117-2, §§ 1005(a)(1), 5003(c)(3)(A), 135 Stat. 4, 12, 88–89, (2021); *Vitolo v. Guzman*, 999 F.3d 353, 366 (6th Cir. 2021); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 478 (E.D. Wis. 2021); *see also* CRS Legal Sidebar LSB10631, *The American Rescue Plan Act: Equal Protection Challenges*, by Christine J. Back and April J. Anderson, at 2.

⁹ Order List, *Students for Fair Admission v. Univ. of N.C.*, No. 21-707 (U.S. Aug. 3, 2022), <https://www.supremecourt.gov/docket/docketfiles/html/public/21-707.html>. The Court is also considering the same issue in a case alleging that Harvard’s admissions process violates Title VI of the Civil Rights Act of 1964. Order List, *Students for Fair Admission v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. Aug. 12, 2022), <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1199.html>. The Court has held that Title VI and the Constitution’s equal protection guarantees are coextensive. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (“tak[ing] as given” that Title VI “proscribes only those racial classifications

the difficulty of meeting strict scrutiny does not mean, as is sometimes said, that the test is “strict in theory and fatal in fact.”¹⁰ According to one observer, courts uphold some 30 percent of statutes they evaluate under strict scrutiny (including cases involving statutes outside the context of the racial classifications discussed here).¹¹

This report focuses on one aspect of strict-scrutiny analysis in cases involving racial classifications: the requirement that a government’s race-based remedy be “narrowly tailored,” using race no more than necessary to achieve the law’s purpose. The rule ensures that the remedy does not impose an improper racial classification, even in the service of a compelling interest such as remedying past discrimination. The government, as the Seventh Circuit admonished, may not “discriminate more than is necessary to cure the effects of the earlier discrimination.”¹² Given that the narrow-tailoring analysis requires close examination of a statute’s text and structure, this piece of the strict-scrutiny test may be a significant drafting consideration in designing race-conscious provisions. This report first outlines the requirements of strict-scrutiny analysis, then describes factors that courts consider to determine whether remedies are narrowly tailored, and closes with considerations for Congress.

Race, Equal Protection, and Compelling Government Interests

When a court determines that a statute, regulation, or other government action challenged under equal protection distributes burdens or benefits based on race, ethnicity, or national origin, it will apply the rigorous “strict scrutiny” test.¹³ This test applies even if the government rule is intended to benefit, rather than harm, a minority racial group.¹⁴ The test also applies whether or not other factors are considered alongside race. For example, if a grant program prioritizes applicants who are veterans, people with disabilities, or members of a minority racial group, the racial preference is subject to strict scrutiny even though it is not the only preference.¹⁵ Similarly, if race is a factor in deciding who receives a benefit, the use of race is subject to strict scrutiny even if factors other than race play a role in selection.¹⁶

After deciding that strict scrutiny applies, a court will determine whether the government’s action (1) serves a compelling government interest, and (2) is narrowly tailored to serve that interest. The government has the burden of proving both a compelling interest and narrow tailoring,¹⁷ and

that would violate the Equal Protection Clause”).

¹⁰ *Adarand Constructors*, 515 U.S. at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)).

¹¹ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96 (2006).

¹² *Builders Ass’n of Greater Chi. v. Cnty. of Cook*, 256 F.3d 642, 646 (7th Cir. 2001). For purposes of brevity, references to a particular circuit in this report (e.g., the Seventh Circuit) refer to the U.S. Court of Appeals for that particular circuit (e.g., the U.S. Court of Appeals for the Seventh Circuit).

¹³ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Adarand Constructors*, 515 U.S. at 219; see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–91 (1978) (opinion of Powell, J.); *Oyama v. California*, 332 U.S. 633, 640 (1947). Legal definitions of race, ethnicity, or national origin have not been at issue in this context. Accordingly, this report does not address the issue.

¹⁴ *Adarand Constructors*, 515 U.S. at 218, 222; see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (opinion of O’Connor, J.).

¹⁵ See *Vitolo v. Guzman*, 999 F.3d 353, 366 (6th Cir. 2021).

¹⁶ *Grutter v. Bollinger*, 539 U.S. 306, 337–38 (2003).

¹⁷ *Johnson v. California*, 543 U.S. 499, 505 (2005).

neither is easy to do. As for what counts as a compelling government interest, the Supreme Court has held that a public university's goal to admit a diverse student body may be such an interest.¹⁸ The Court has not extended this rule beyond the context of higher education admissions, however, and petitioners before the Court are asking it to reconsider the rule.¹⁹ The Court has not approved other potential government interests for using race in higher education admissions and has said that "racial balancing" in higher education admissions is "patently unconstitutional."²⁰

More generally, the Supreme Court has held that the government has a compelling interest in remedying past discrimination.²¹ To establish this interest, a government must prove that there *was* discrimination and provide "a strong basis in evidence for its conclusion" to take remedial action.²² A government seeking to employ a racial classification is on strongest ground when it seeks to remedy its own discrimination: the Court has stated in a plurality opinion that remedying general, "societal discrimination" is not a sufficiently compelling interest to satisfy strict scrutiny.²³

To uphold race-based action because of past discrimination, courts require there to have been an extensive and specific record of discrimination before the relevant decisionmaker when it considered the challenged law or policy.²⁴ The government "cannot rely on mere speculation, or legislative pronouncements, of past discrimination."²⁵ Statistical evidence is important; such evidence could come from agency data, congressional studies, or academic research.²⁶ Anecdotal evidence can also help establish the requisite record of past discrimination, particularly in showing that a statistical disparity is likely the result of discrimination rather than benign

¹⁸ *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); see also CRS Report R45481, "Affirmative Action" and Equal Protection in Higher Education, by Christine J. Back, at 27; Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1917 (2017) ("The Court has recognized a basic equal protection right not to be treated differently by the government on account of your race. But there is a longstanding exception for affirmative action, at least in the realm of higher education.").

¹⁹ Order List, *Students for Fair Admission v. Univ. of N.C.*, No. 21-707 (U.S. Aug. 3, 2022), <https://www.supremecourt.gov/docket/docketfiles/html/public/21-707.html>; Order List, *Students for Fair Admission v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. Aug. 12, 2022), <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1199.html>.

²⁰ *Grutter*, 539 U.S. at 330. Justice Powell, in *Bakke*, discussed but did not endorse such interests as reducing the historic deficit of minorities attending medical schools, remedying "societal discrimination," and educating minority doctors to improve medical care in underserved communities. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306–12 (1978) (opinion of Powell, J.).

²¹ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (opinion of O'Connor, J.); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (opinion of Powell, J.) ("We have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account."); *H.B. Rowe Co. v. Tippet*, 615 F.3d 233, 241 (4th Cir. 2010); *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021).

²² *J.A. Croson Co.*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277 (plurality op.).

²³ *Id.* at 276 (plurality opinion; see also *id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment)). A plurality opinion is the opinion that received the greatest number of votes of any of the opinions filed but did not receive enough votes to constitute a majority of the court. See Admin. Off. of the U.S. Courts, *Glossary – U.S. v. Alvarez*, U.S. COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/glossary-us-v-alvarez> (last visited March 5, 2023).

²⁴ *J.A. Croson*, 488 U.S. at 500; *H.B. Rowe*, 615 F.3d at 241.

²⁵ *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000).

²⁶ *E.g.*, *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1041 (Fed. Cir. 2008); *H.B. Rowe*, 615 F.3d at 243.

factors.²⁷ A record for a nationwide program needs to show discrimination of national significance, although state-by-state evidence is not required.²⁸

Courts will consider findings, reports to Congress, expert testimony, studies commissioned or reviewed by legislators, hearings, and other aspects of the legislative record.²⁹ Courts will not generally evaluate evidence first introduced in litigation, after a law is passed, to decide whether a legislature's action is justified.³⁰ There is also no specific quantum of evidence that will be considered sufficient or insufficient; courts consider each record case-by-case.³¹

A Narrowly Tailored Remedy

Once a court has decided that a challenged government act or program serves a compelling interest, it will look to see if the government's use of race is narrowly tailored to accomplish that purpose. Put differently, after a court has approved the government's end goal, the second step of the strict-scrutiny inquiry calls for an assessment of the *means* for achieving that *end*.³² Narrow tailoring requires, as the Seventh Circuit explained, "a close match between the evil against which the remedy is directed and the terms of the remedy."³³ As the Sixth Circuit put it, "[w]hen the government promulgates race-based policies, it must operate with a scalpel."³⁴ On the whole, a court will consider whether a law's racial distinctions are over-inclusive or under-inclusive,³⁵ matching up the remedy with the evidence presented in the previous step—the compelling government interest.³⁶ For example, Justice Alito discussed this relationship in a 2016 dissent in *Fisher v. The University of Texas at Austin (Fisher II)*, a case involving the university's use of race in admissions, arguing that university officials' description of its compelling interest, student body diversity, was "not concrete or precise, and they offer[ed] no limiting principle for the use of racial preferences."³⁷ This lack of concreteness and limitation meant, in his view, that the Court could not "ensure than an admissions process is narrowly tailored," because the Court could not "pin down the goals that the process is designed to achieve."³⁸

There are no absolute requirements for a narrow remedy, though, and no bright-line rules that establish a racial classification as constitutional. Because they are unlikely to survive judicial scrutiny, laws that use race are rare. As a result, Supreme Court case law applying strict scrutiny in this context is somewhat limited, making predictions harder. Precedent on racial classifications comes almost entirely from three contexts—contracting, hiring, and higher education

²⁷ *H.B. Rowe*, 615 F.3d at 248–49.

²⁸ *Rothe Dev.*, 545 F.3d at 1045–46; *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 970 (8th Cir. 2003).

²⁹ *H.B. Rowe*, 615 F.3d at 243–45; *Rothe Dev.*, 545 F.3d at 1040.

³⁰ *Rothe Dev.*, 545 F.3d at 1040; *see also Sherbrooke Turf*, 345 F.3d at 971 (indicating that the "compelling interest analysis focused on the record before Congress").

³¹ *See Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); *H.B. Rowe*, 615 F.3d at 241.

³² *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1333 (2007).

³³ *Builders Ass'n of Greater Chi. v. Cnty. of Cook*, 256 F.3d 642, 646 (7th Cir. 2001).

³⁴ *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021).

³⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989).

³⁶ *Id.* at 507.

³⁷ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 403 (2016) (Alito, J., dissenting).

³⁸ *Id.*

admissions.³⁹ Because strict scrutiny is highly context-dependent, extrapolating from these cases to assess the constitutional vulnerability of other kinds of race-based actions is difficult.

Although the facts presented could change the context significantly, courts have identified several specific factors to consider under the narrow-tailoring component of strict scrutiny for governmental race-based actions. For most courts, a starting point is the list of factors described in the Supreme Court's plurality opinion in *United States v. Paradise*: "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."⁴⁰

Lower courts have arrived at different formulations of these factors.⁴¹ The Eleventh Circuit, for example, has summarized the factors as entailing "three distinct inquiries": "(1) the prior consideration of race-neutral alternative measures; (2) the relationship between the degree of preference and the effects of prior discrimination; and (3) the severity of the burden placed upon third parties."⁴² Specific precedent for higher education admissions focuses on whether schools give applicants holistic, individualized consideration.⁴³ All in all, although a given factor may not be meaningful in a particular case, the *Paradise* factors are widely cited and may be useful to consider in designing a narrow remedy.⁴⁴ The next sections discuss examples of each *Paradise* factor.

Need for Race-Based Measures

The first *Paradise* factor for narrow tailoring considers "the necessity for the relief and the efficacy of alternative remedies."⁴⁵ In considering this factor, a court may look to whether alternative, race-neutral methods might make race-based measures unnecessary.⁴⁶ The government can support its policy by showing it has already tried race-neutral measures.⁴⁷ Race-neutral measures can include programs to increase outreach to minority applicants before setting

³⁹ See *J.A. Croson*, 488 U.S. at 477; *Grutter v. Bollinger*, 539 U.S. 306 (2003); *United States v. Paradise*, 480 U.S. 149 (1987) (plurality opinion).

⁴⁰ 480 U.S. at 171 (plurality opinion).

⁴¹ E.g., *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 252 (4th Cir. 2010).

⁴² *Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1557 (11th Cir. 1994).

⁴³ *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 311 (2013); *Fisher II*, 579 U.S. at 377; *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). The Ninth Circuit identifies "five hallmarks of a narrowly tailored affirmative action plan: (1) the absence of quotas; (2) individualized consideration of applicants; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point." *Smith v. Univ. of Wash.*, 392 F.3d 367, 373 (9th Cir. 2004). At least one commentator has warned against using higher education admissions precedent, where diversity is the accepted governmental interest, in other matters. Ian Ayers, *Narrow Tailoring*, 43 *UCLA L. REV.* 1781, 1783 n.8 (1996) ("Extracting narrow tailoring requirements that support one type of compelling interest and applying them in other contexts is dangerous.").

⁴⁴ See H. Lee Sarokin, Jane K. Babin, & Allison H. Goddard, *Has Affirmative Action Been Negated? A Closer Look at Public Employment*, 37 *SAN DIEGO L. REV.* 575, 616–17 (2000) (noting while the factors are widely used, courts "do not treat the *Paradise* factors as individually dispositive; instead, they review the circumstances of each case and weigh the factors against each other").

⁴⁵ *Paradise*, 480 U.S. at 171 (plurality opinion).

⁴⁶ *J.A. Croson*, 488 U.S. at 507; *H.B. Rowe*, 615 F.3d at 252.

⁴⁷ *H.B. Rowe*, 615 F.3d at 252.

a hiring goal, for example.⁴⁸ The government is afforded some flexibility in crafting its remedy to serve a compelling interest, however—as the Supreme Court plurality explained in evaluating an employment-discrimination remedy, “there is obviously no one plan that will do the job in every case.”⁴⁹

In approving affirmative action in higher education admissions, for example, the Court has required “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”⁵⁰ The government need not choose a race-neutral option that does not meet its interests but should consider any alternative that serves its interests “about as well.”⁵¹ The government should consider “workable” alternatives but need not address every “conceivable” one.⁵²

The Supreme Court may further refine these standards as it continues to consider the issue of affirmative action in higher education admissions.⁵³ In *Fisher II*, for instance, the Court questioned the neutrality of a university’s policy of admitting the top 10% of students at each public high school. The Court suggested that, because the school first started using the “facially neutral” ten-percent plan to increase minority enrollment, the policy was not entirely race neutral.⁵⁴ In affirmative action cases involving the University of North Carolina and Harvard College, the Court is again weighing requests that schools adopt similar, facially neutral admissions criteria and reduce or eliminate race-based decision making. Advocates against affirmative action contend, for example, that narrow tailoring requires universities to eliminate preferences for athletes or children of alumni if doing so will further diversity goals, before universities consider race.⁵⁵ The advocates also suggest that socioeconomic, geographic, or other preferences could enhance diversity.⁵⁶ Whether or not the Court considers such preferences truly race neutral remains to be seen. The Court’s decision in *Fisher II* raises the possibility that it may consider “race conscious” any policy enacted with information about the potential racial breakdown of beneficiaries in mind. As Justice Kavanaugh noted at oral argument in the case

⁴⁸ See *Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1549 (11th Cir. 1994).

⁴⁹ *Paradise*, 480 U.S. at 184 (plurality opinion) (quoting *Green v. Sch. Bd., New Kent Cnty.*, 391 U.S. 430, 439 (1968)).

⁵⁰ *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

⁵¹ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 377 (2016). The Court, albeit in a fractured opinion, expressed a similar view in an employment case. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (opinion of Powell, J.) (“[Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense.” (internal quotation marks omitted)).

⁵² *Fisher II*, 579 U.S. at 377.

⁵³ Amy Howe, *Affirmative Action Appears in Jeopardy After Marathon Arguments*, SCOTUSBLOG (Oct. 31, 2022), <https://www.scotusblog.com/2022/10/affirmative-action-appears-in-jeopardy-after-marathon-arguments/>; Rahem D. Hamid, Vivi Lu, & Nia L. Orakwue, *‘Bad News for Harvard’: Future of Affirmative Action in Doubt as Conservative Court Takes Up Admissions Cases*, HARV. CRIMSON, Jan. 25, 2022, <https://www.thecrimson.com/article/2022/1/25/scotus-admissions-expert-opinions/>.

⁵⁴ *Fisher II*, 579 U.S. at 386.

⁵⁵ Brief for Petitioner at 15–16, 25–26, 30–36, *Students for Fair Admission v. Univ. of N.C.*, No. 21-707, and *Students for Fair Admission v. President & Fellows of Harvard College*, No. 20-1199 (U.S. May 2, 2022), https://www.supremecourt.gov/DocketPDF/20/20-1199/222325/20220502145522418_20-1199%2021-707%20SFFA%20Brief%20to%20file%20final.pdf. At the time the petitioner’s brief was filed, the two cases were consolidated; they were subsequently separated.

⁵⁶ *Id.* at 33, 44, 85.

involving the University of North Carolina, changes barring race-conscious admissions policies “will put a lot of pressure going forward . . . on what qualifies as race-neutral.”⁵⁷

Courts have also considered race-neutral alternatives when evaluating government-contracting preferences for minority-owned businesses. In one case, the Fourth Circuit approved North Carolina’s race-based preference in part because the State had first tried other measures to help small or disadvantaged businesses become more competitive.⁵⁸ The State had waived bonding and licensing requirements for small businesses and offered disadvantaged firms technical assistance with matters such as bookkeeping, bidding, and negotiation.⁵⁹ The court said that the plaintiff had identified “no viable race-neutral alternatives” that the State had not considered and, where feasible, used.⁶⁰ The case revealed that despite the race-neutral alternatives, unjustified racial disparities persisted in state contracts, supporting North Carolina’s race-conscious plan.

In contrast, the Sixth Circuit enjoined a 2021 federal law prioritizing COVID-19 relief funds for minority-owned restaurants, pointing out that the government had neglected potential race-neutral alternatives to remedy minority businesses’ underutilization of government aid.⁶¹ The government could have, the court said, prioritized firms that had not received previous aid or those firms with demonstrated capital or credit struggles. Similarly, in invalidating Ohio’s minority-contracting preference, the Sixth Circuit pointed out that “the historical record contains no evidence” that the state legislature “gave any consideration” to race-neutral ways to increase minority contracting participation.⁶²

Flexibility, Time Limits, and Waivers

Courts may also consider a race-conscious program’s flexibility. Race-based quotas or set-asides, which insulate beneficiaries from competition, represent the least flexible options.⁶³ In higher education admissions, for example, the Supreme Court has instructed that race should not be used as “a mechanical plus factor,” without genuine individualized assessment.⁶⁴ More flexible measures might include mechanisms for opting into or out of the preference, or tailoring the preference to those most likely suffering lasting effects of past discrimination. For example, a preference for minority contractors might exclude larger or wealthier firms, regardless of ownership.⁶⁵ Options for flexibility depend on a given program’s structure. For example, in *H.B. Rowe Co. v. Tippett*, a Fourth Circuit case, the State allowed prime contractors to bank minority subcontracting rates against targets for future contracts.⁶⁶ If a contractor exceeded minority subcontracting requirements in one project, they could use fewer minority subcontractors on the

⁵⁷ Transcript of Oral Argument at 43–44, *Students for Fair Admission v. Univ. of N.C.*, No. 21-707 (U.S. Oct. 31, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_9o6b.pdf.

⁵⁸ *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 252 (4th Cir. 2010).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Vitolo v. Guzman*, 999 F.3d 353, 363 (6th Cir. 2021).

⁶² *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 738 (6th Cir. 2000).

⁶³ *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

⁶⁴ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 375 (2016).

⁶⁵ *See Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 968, 972 (8th Cir. 2003) (citing wealth-based exclusions in contracting preferences as indicative of flexibility); *Cone Corp. v. Hillsborough Cnty.*, 908 F.2d 908, 917 (11th Cir. 1990) (noting minority subcontractor goals were aimed at minority businesses “disadvantaged in terms of size, volume of business, and number of employees”).

⁶⁶ 615 F.3d 233, 253–54 (4th Cir. 2010).

next one. The court found that this enhanced flexibility, along with other characteristics, helped make the program narrowly tailored.⁶⁷ In higher education admissions, the Supreme Court has thus far approved rules that allow race to be counted as a “plus” in a holistic consideration of applicants, as long as a school does not automatically award the “plus” to every minority candidate and the rules are “flexible enough to ensure that each applicant is evaluated as an individual.”⁶⁸

Adding waiver provisions can also support narrow tailoring. Even if a government sets a minority hiring goal, for example, a waiver provision could excuse noncompliance if hiring officials show good-faith efforts at outreach and recruiting. In the *Paradise* case, assessing a court’s order that a police department promote equal numbers of Black and White officer candidates, the Supreme Court plurality observed approvingly that the department could still select any number of White candidates for those positions if there were no qualified Black applicants.⁶⁹ The Fourth Circuit approved a similar provision in *H.B. Rowe*, observing that contractors falling short of subcontracting goals could show good-faith efforts to solicit bids.⁷⁰

Courts also consider a race-based provision’s duration. A preference with a sunset provision or a reauthorization requirement is narrower. As the Supreme Court explained, a preference should “not last longer than the discriminatory effects it is designed to eliminate.”⁷¹ In *H.B. Rowe*, the Fourth Circuit approvingly pointed out the contracting preference’s expiration date and recurring, five-year disparity studies.⁷² In *Paradise*, the Supreme Court plurality labeled the promotion quota “ephemeral,” as it would end as soon as the department could design promotions criteria that did not disparately impact black candidates.⁷³ In contrast, the Sixth Circuit held unconstitutional a contracting preference program in part because it “remained in effect for twenty years and has no set expiration.”⁷⁴

A court may also be satisfied with periodic reviews of a program, rather than an explicit expiration date.⁷⁵ The Supreme Court in *Grutter* approved Michigan Law School’s use of race in admissions even though the policy had no projected expiration but conveyed that it “[oo]k the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”⁷⁶ The *Grutter* Court also expressly stated that race-conscious admissions policies “must be limited in time”⁷⁷ and signaled its expectation that the use of racial preferences would “no longer be necessary” in 25 years.⁷⁸ The Court later characterized *Grutter*’s holding as including a durational

⁶⁷ *Id.*

⁶⁸ *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). The Court’s rules on higher-education admissions are under reconsideration, and many assume they will change. *See Howe, supra*, note 53.

⁶⁹ *United States v. Paradise*, 480 U.S. 149, 177–79 (1987) (plurality opinion).

⁷⁰ *H.B. Rowe*, 615 F.3d at 253.

⁷¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) (citation and internal quotation marks omitted).

⁷² *H.B. Rowe*, 615 F.3d at 253.

⁷³ *Paradise*, 480 U.S. at 178 (plurality opinion).

⁷⁴ *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 738 (6th Cir. 2000).

⁷⁵ *E.g., H.B. Rowe*, 615 F.3d at 253 (agreeing that statutory requirement of regular reevaluation supported narrow tailoring).

⁷⁶ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

⁷⁷ *Id.* at 341–42.

⁷⁸ *Id.* at 343. The Justices’ separate opinions reflected disagreement about the 25-year limit. *See id.* at 346 (Ginsburg, J., concurring) (“From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span,

requirement,⁷⁹ and Justices repeatedly raised *Grutter's* 25-year declaration at oral argument in cases considering Harvard's and the University of North Carolina's admissions policies.⁸⁰

Quotas, Racial Balancing, and Goals

The *Paradise* plurality calls for courts to consider any remedy's "numerical goals" given "the relevant labor market."⁸¹ This principle—that any targets be closely tied to specific remedial needs—also applies outside the context of employment. While courts disfavor quotas—inflexible metrics that may eliminate competition—they may allow targets or goals, provided they are carefully constructed and not arbitrary.⁸² Since narrowly tailored race-based remedies aim to undo or prevent racial exclusion from a specific benefit, any goal or metric needs to be tied to the population eligible for that benefit. A goal based on an arbitrary number or the number of minorities in the population is not narrowly tailored.⁸³ Thus, courts consider goals in light of the relevant market, the qualified applicant pool, or the potential recipient population.⁸⁴ For this analysis, a court will refer to the government's evidence supporting the compelling interest, reflecting demonstrated disparities in minority participation.⁸⁵

In *H.B. Rowe*, for example, the Fourth Circuit approved state-set participation goals that were based on the percentage of minority contractors in the state.⁸⁶ The state set a tailored goal for each project after considering a database of minority firms that could perform each type of work. The goals were genuinely responsive to the data, the Fourth Circuit said: for some projects, when there were few minority subcontractors available, the goal was zero.⁸⁷ In contrast, the Supreme Court in *J.A. Croson* criticized a city's contracting set-aside as arbitrary, observing, "In this case,

progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."); *id.* at 394 (Kennedy, J., dissenting) ("It is difficult to assess the Court's pronouncement that race-conscious admission programs will be unnecessary 25 years from now."); *id.* at 351 (Thomas, J., concurring in part and dissenting in part) (agreeing "with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years"); *id.* at 375–76 (agreeing "that in 25 years the practices of the Law School will be illegal, [because] they are . . . illegal now").

⁷⁹ *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 313 (2013) ("In *Grutter*, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed 'serious, good faith consideration of workable race-neutral alternatives.'").

⁸⁰ Transcript of Oral Argument at 39, 100, 115, *Students for Fair Admission v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. Oct. 31, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/20-1199_6537.pdf; *id.* at 115; Transcript of Oral Argument at 86, *Students for Fair Admission v. Univ. of N.C.*, No. 21-707 (U.S. Oct. 31, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_906b.pdf. Chief Justice Roberts said to the University of North Carolina's counsel: "I don't see how you can say that the program will ever end." *Id.* at 83.

⁸¹ 480 U.S. at 171 (plurality opinion).

⁸² *See Grutter*, 539 U.S. at 335; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 502–03, 507 (1989); *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 253 (4th Cir. 2010); *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1050 (Fed. Cir. 2008); *Cone Corp. v. Hillsborough Cnty.*, 908 F.2d 908, 917 (11th Cir. 1990).

⁸³ *J.A. Croson*, 488 U.S. at 507 (rejecting quota as improperly based on "assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population").

⁸⁴ *See id.*; *Rothe Dev.*, 545 F.3d at 1050.

⁸⁵ *Rothe Dev.*, 545 F.3d at 1050; *Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1559 (11th Cir. 1994).

⁸⁶ *H.B. Rowe*, 615 F.3d at 253; *see also Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 972 (8th Cir. 2003).

⁸⁷ *H.B. Rowe*, 615 F.3d at 253.

the city does not even know how many [minority business enterprises] in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”⁸⁸

In the higher education admissions context, the Supreme Court in *Grutter* identified the problem with quotas as being that they “insulate the individual [applicant] from comparison with all other candidates for the available seats.”⁸⁹ The Court has repeatedly rejected the use of quotas in higher education admissions for “racial balancing.”⁹⁰

When allowing the use of race as a remedy for past discrimination, courts similarly reject efforts at racial balancing that aim to numerically match minority applicants, employees, or contractors with local populations or with the people employees serve. Thus, in *Wygant v. Jackson Board of Education*, the Supreme Court held, in a plurality opinion, that a school board may not assign Black teachers in proportion to a school’s Black students, even if the policy aims to provide “role models” to minority students.⁹¹

Burdens on Third Parties

Courts reviewing whether race-conscious remedies are narrowly tailored also consider the potential effect on third parties. Ideally, a remedy minimizes disadvantages imposed on non-minority firms, applicants, or recipients. As one Supreme Court Justice put it, although “innocent persons may be called upon to bear some of the burden of the remedy”⁹² in these cases, “there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making.”⁹³ When entities or individuals compete for limited benefits, a court may find that racial preferences impose unjustified harms.

According to another Justice, a contracting set-aside, for example, could deny “certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race,” a fact that weighs against a finding of narrow tailoring.⁹⁴ In considering racial preferences in the distribution of COVID-19 relief funds in *Vitolo*, the Sixth Circuit emphasized the heavy costs on nonpreferred groups. Many non-minority-owned restaurants, with their applications “sen[t] . . . to the back of the line,” would likely never get funding.⁹⁵ The details matter in this assessment. Although the Sixth Circuit in *Vitolo* acknowledged an “opt in” mechanism, allowing a nonpreferred business to show specific disadvantages and receive the preference, it concluded the measure would not work quickly enough to enable participation.⁹⁶

In *Paradise*, in contrast, a Supreme Court plurality found a promotion quota’s impact on third parties acceptable. A one-to-one promotion rate for Black and White officers did not “impose an

⁸⁸ *J.A. Croson*, 488 U.S. at 502.

⁸⁹ *Grutter*, 539 U.S. at 335 (citation and internal quotation marks omitted).

⁹⁰ *Id.* at 328; *see also* *Gratz v. Bollinger*, 539 U.S. 244, 280 (2003); CRS Report R45481, “*Affirmative Action*” and *Equal Protection in Higher Education*, by Christine J. Back, at 36.

⁹¹ *See* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (plurality op.); *id.* at 294–95 (White, J., concurring in the judgment); *Robinson v. Shelby Cnty. Bd. of Educ.*, 566 F.3d 642, 656 (6th Cir. 2009).

⁹² *Wygant*, 476 U.S. at 280 (opinion of Powell, J.).

⁹³ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.).

⁹⁴ *J.A. Croson*, 488 U.S. at 493 (opinion of O’Connor, J.).

⁹⁵ *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021).

⁹⁶ *Id.* at 363.

absolute bar to white advancement.”⁹⁷ No layoffs would ensue. The Court plurality also observed that “the temporary and extremely limited nature of the requirement substantially limits any potential burden on white applicants for promotion.”⁹⁸ As a general matter, a racial classification is more problematic under this factor if it impacts a third parties’ vested interests in some way, leaves third parties worse off than they were before (e.g., layoffs), is unavailable to non-minorities, or reduces access to a zero-sum benefit.⁹⁹

In higher education admissions, the Supreme Court has said that a holistic admissions process using race as a “‘plus’ factor” does not unduly burden non-minority applicants.¹⁰⁰ Each applicant has a chance to show how he or she will contribute to diversity of thought through his or her personal circumstances or history. However, the Court in *Bakke* disapproved (though without a majority opinion) a plan setting aside a specific number of spots for members of certain races.¹⁰¹ It remains to be seen whether the Court will place more weight on burdens to disfavored student groups, particularly Asian-American students, in its most recent school admissions cases.¹⁰²

An Overinclusive or Underinclusive Remedy

As a whole, the *Paradise* factors assist courts in assessing whether a race-conscious remedy in service of a compelling government interest is underinclusive or overinclusive. Sometimes, however, courts consider more directly, and aside from the specific factors, whether race-based remedies are overinclusive or underinclusive. These courts look to see, for example, whether race-based policies benefit those who have not suffered discrimination (i.e., are overinclusive) or fail to benefit those who have (i.e., are underinclusive). A narrowly tailored remedy, one that passes strict scrutiny, is one that fits the class of logical beneficiaries well. That said, categorizations cannot be perfect, and observers have noted precedent provides no real way of knowing “[h]ow much under- or overinclusiveness is tolerable.”¹⁰³

An overinclusive preference might be one that “lump[s] together”¹⁰⁴ or “random[ly] inclu[des] . . . racial groups that, as a practical matter, may never have suffered from discrimination” in the

⁹⁷ *United States v. Paradise*, 480 U.S. 149, 182 (1987) (plurality opinion).

⁹⁸ *Id.* (plurality opinion).

⁹⁹ *See id.*; *Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1562 (11th Cir. 1994); *Associated Gen. Contractors of Cal. v. S.F. Unified Sch. Dist.*, 616 F.2d 1381, 1387 (9th Cir. 1980).

¹⁰⁰ *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

¹⁰¹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.).

¹⁰² Adam Liptak, *Supreme Court Seems Ready to Throw Out Race-Based College Admissions*, N.Y. TIMES (Oct. 31, 2022), <https://www.nytimes.com/2022/10/31/us/supreme-court-harvard-unc-affirmative-action.html>. Justice Alito, dissenting in *Fisher II*, stressed this concern about an affirmative action plan that, in his view, “discriminates against Asian-American students” by effectively treating “the classroom contributions of Asian-American students as less valuable than those of Hispanic students” in deciding which group to give special consideration to during holistic review. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 410 (2016) (Alito, J., dissenting). At oral argument in the most recent case involving the University of North Carolina, Justice Alito also expressed a concern that admissions are “a zero sum game,” where a preference for one kind of applicant inevitably harms others. Transcript of Oral Argument at 133, *Students for Fair Admission v. Univ. of N.C.*, No. 21-707 (U.S. Oct. 31, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_9o6b.pdf. Other Justices repeatedly asked about admissions criteria potentially harming Asian Americans as well. *Id.* at 29; *see also* Transcript of Oral Argument at 51, 53, 63, *Students for Fair Admission v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. Oct. 31, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/20-1199_6537.pdf.

¹⁰³ Fallon, *supra*, note 32, at 1330; *see also* Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 519 (2007).

¹⁰⁴ *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000).

relevant context.¹⁰⁵ In *Vitolo*, for instance, the Sixth Circuit determined that the policy favoring minority-owned restaurants for COVID-19 relief was overinclusive, stating that the government gave “racial preferences to vast swaths of the population.”¹⁰⁶ The Supreme Court has expressed concern that an overbroad remedy is less effective. As the *J.A. Croson* Court put it in invalidating a city contracting preference, “If a 30% set-aside was ‘narrowly tailored’ to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this ‘remedial relief’ with an Aleut citizen who moves to Richmond tomorrow?”¹⁰⁷

Underinclusivity is also a problem. In *Vitolo*, the Sixth Circuit observed that the racial preference left out businesses with 49% or less minority ownership. The exclusion seemed arbitrary given the government’s justification for the law, which suggested that partially minority-owned businesses might also have suffered discrimination.¹⁰⁸ What is more, the court pointed out, the scheme inexplicably excluded some minority ethnicities, including Afghans, Iranians, and Tunisians.¹⁰⁹

At times, a court may uphold some parts of a preference program while striking down under- or overinclusive aspects of the program. In *H.B. Rowe*, the court upheld preferences for Black and Native American subcontractors, but not those for Asian and Hispanic subcontractors because the record of discrimination did not justify including those groups.¹¹⁰

Considerations for Congress

Strict-scrutiny analysis may be difficult and unpredictable. Many of the Supreme Court’s strict-scrutiny pronouncements on the constitutionality of racial preferences under the Equal Protection Clause have come in plurality opinions, weakening their precedential authority. Most such cases also come from three fields: higher education admissions, contracting, and employment. When preferences fall outside these areas, it is harder to predict how courts will apply these precedents.

At all stages of the strict-scrutiny analysis, from evaluating the government’s compelling interest justifying a racial classification to deciding whether a remedy is narrowly tailored, courts make fact-specific, context-based judgments. There are no bright-line rules.

For these reasons, when legislators do undertake race-based actions, they may wish to build a comprehensive record supporting a compelling government interest, with findings and supporting evidence. On that score, because the Supreme Court has not accepted diversity as a compelling government interest outside of higher-education admissions, a race-based preference to enhance diversity outside of that context would require breaking new legal ground.¹¹¹ Outside of higher education, the government’s interest in remedying its own past discrimination is the more established compelling government interest.

¹⁰⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989).

¹⁰⁶ *Vitolo v. Guzman*, 999 F.3d 353, 364 (6th Cir. 2021).

¹⁰⁷ *J.A. Croson*, 488 U.S. at 506.

¹⁰⁸ *Vitolo*, 999 F.3d at 363.

¹⁰⁹ *Id.* at 364.

¹¹⁰ *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 252, 257 (4th Cir. 2010).

¹¹¹ See CRS Report R45481, “*Affirmative Action*” and *Equal Protection in Higher Education*, by Christine J. Back, at 26.

Once a record is built, the race-based remedy should be as narrow as possible to survive legal challenge. Sunset provisions, reauthorization requirements, and race-neutral criteria can help. If legislation includes a numerical goal or preference, legislators may consider mechanisms for opting in non-minority beneficiaries, opting out certain minority beneficiaries, or granting waivers. Any goal would benefit from being carefully tied to available, relevant data. Finally, any steps legislators can take to minimize harms to third parties can reduce a statute's vulnerability to equal-protection challenges under strict scrutiny.

Alternatively, when lawmakers aim to prioritize resources for underserved communities, they may find that race-neutral methods can be used alone. Without a race-based preference, legislative action would not undergo strict scrutiny. Possibilities for race-neutral action include enhancing outreach and recruiting,¹¹² relying on race-neutral measurements of need and vulnerability, or providing technical assistance.¹¹³ Even with such measures, courts may look more critically at facially race-neutral action when lawmakers act with the intent to benefit minority groups, although this area of the law is unsettled.

Lawmakers could also target benefits and create set-asides but do so based on nonracial characteristics that define a class well enough to benefit an underserved group. Classifications that assess resource availability—such as income, access to transportation, or proximity to hospitals, grocery stores, and other services—need not consider race. Lawmakers can also classify based on measured resource *use*, identifying individuals who do not participate in banking, home ownership, or health care, for example. Lawmakers can identify at-risk groups using race-neutral criteria such as proximity to high-crime areas or environmental hazards, or rates of bad outcomes like illness, accidents, or death. Congress could use more than one of these factors to define a beneficiary class, more closely targeting needy recipients. Many datasets are available to help lawmakers identify underserved or disadvantaged populations, including census data, Centers for Disease Control and Prevention data, the Federal Emergency Management Agency's National Risk Index, the Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy dataset, and other government sources.¹¹⁴ Such methods for identifying disadvantaged communities are less likely to result in successful equal-protection legal challenges.

¹¹² See *Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1549 (11th Cir. 1994) (acknowledging, as “race-neutral means,” a fire department sending recruiters to colleges and high schools to recruit minority students and outreach by department’s “minority members”); *but see MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, 21 (D.C. Cir. 2001) (holding that rigorous recruitment and outreach requirements agency imposed went so far as to exclude non-minorities, and “some prospective nonminority applicants who would have learned of job opportunities but for the Commission’s directive now will be deprived of an opportunity to compete simply because of their race”).

¹¹³ *H.B. Rowe*, 615 F.3d at 252.

¹¹⁴ *American Community Survey (ACS)*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs> (last visited March 5, 2023); *Places: Local Data for Better Health*, CTDS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/places/index.html> (last visited March 5, 2023); *National Risk Index for Natural Hazards*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/flood-maps/products-tools/national-risk-index> (last visited March 5, 2023); *Comprehensive Housing Affordability Strategy (CHAS) API*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.huduser.gov/portal/dataset/chas-api.html> (last visited March 5, 2023); U.S. Gen. Servs. Admin., *DATA*, <https://data.gov> (last visited March 5, 2023). For an example of such use of data, see COUNCIL ON ENV’T QUALITY, *Climate & Econ. Just. Screening Tool*, <https://screeningtool.geoplatform.gov/en/methodology> (last visited March 5, 2023).

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