THE CIVIL RIGHTS PROJECT

HARVARD UNIVERSITY

OVERVIEW OF CONSTITUTIONAL REQUIREMENTS IN RACE-CONSCIOUS AFFIRMATIVE ACTION POLICIES IN EDUCATION

INTRODUCTION

Almost all educational institutions are required to meet strict legal requirements when taking race into account in admissions, financial aid, student assignment, and other educational policy decisions. These requirements arise from the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which applies to "state actors" such as public school districts and public institutions of higher learning, and Title VI of the Civil Rights Act of 1964, which applies to both public and private institutions that receive federal funds.

Based on U.S. Supreme Court rulings, both the Equal Protection Clause and Title VI require that race-conscious policies be subject to ***"strict scrutiny,"*** which is a high standard of judicial review in which the courts carefully assess both the importance of the goals underlying a policy and the means by which those goals are attained. A court evaluates whether the policy (1) serves a ***"compelling governmental interest,"*** and (2) is ***"narrowly tailored"*** to satisfy that interest. Strict scrutiny is used to test both "invidious" policies that discriminate against racial minorities and "benign" policies designed to benefit racial minorities.

The courts have also ruled that a ***"strong basis in evidence"*** is usually required to justify a race-conscious policy. Although the term "strong basis in evidence" has not been clearly defined by the courts, it typically means that the governmental actor must provide more than a mere assertion of its interest and that a body of supporting evidence - which could include statistical evidence, policy evaluations, social science evidence, documentary evidence, or prior findings of discrimination - is available to justify the policy.

COMPELLING INTERESTS

Governmental interests can be divided into ***remedial*** interests, such as remedying the present effects of past discrimination, and ***non-remedial*** interests, such as promoting educational diversity. The courts have generally found interests in remedying past acts of discrimination to be compelling, but they have been divided over other types of interests. Some interests, such as remedying *societal* discrimination, have been found to be too remote or nebulous, and have been rejected outright as not sufficiently compelling.

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A. REMEDIAL INTERESTS

"Remedying the Present Effects of Past Discrimination." The courts have uniformly held that an institution can have a compelling interest in remedying the present effects of its own past discrimination. For example, a university that for several years denied admission to African American applicants because of race (its past discrimination) can have a compelling interest in remedying the current lack of African American students in its student body (the present effects) and can employ a race-conscious policy. There must be a strong basis in evidence, however, to show that there has been past discrimination, that there are present effects, and that the two are linked.

"Passive Participation Theory." In *City of Richmond v. J.A. Croson Co.*, a U.S. Supreme Court case involving minority set-asides in public contracting, Justice O'Connor suggested that a governmental body could have a compelling interest in remedying the present effects of past discrimination where the government acted as a "passive participant" in extensive private discrimination (such as in the contracting market). This theory could be applied in educational settings where a state passively participated in discrimination (e.g., segregation in K-12 school districts) and seeks to remedy the present effects of the discrimination (e.g., low minority enrollment at the state university). Very few cases have been brought under this theory, however, and one federal court of appeals has cast doubt on it. (*Hopwood v. Texas)*

B. EXAMPLES OF NON-REMEDIAL INTERESTS

"Promoting Educational Diversity." In *Regents of the University of California v. Bakke*, Justice Powell suggested that race could be a factor in higher education admissions if the goal of the admissions policy is to promote a diverse student body. Although Justice Powell's opinion is often assumed to be the guiding law for race-conscious admissions, a majority of the U.S. Supreme Court has not yet ruled on whether promoting educational diversity is a compelling interest. The lower courts have divided over the issue. (Compare *Hopwood v. Texas* (diversity is not compelling) with *Smith v. University of Washington Law School* (diversity is compelling) and *Grutter v. Bollinger* (same))) Important: Justice Powell's opinion states that *educational* diversity in a broad sense is a compelling interest, not that *racial* or *ethnic* diversity in particular is compelling.

"Reducing Racial Isolation." In the K-12 area, one federal court of appeals has ruled that reducing racial isolation within a school district is a compelling interest that could justify a race-conscious voluntary transfer plan between school districts. (*Brewer v. West Irondequoit Central School District*) One federal court of appeals has equated an interest in "avoiding racial isolation" with an interest in "racial diversity," but it declined to decide whether promoting racial diversity is a compelling interest; instead, the court assumed it was compelling but ruled that a race-conscious K-12 transfer policy was not narrowly tailored. (*Eisenberg v. Montgomery County Public Schools*)

"Promoting Educational Research." One federal court of appeals has ruled that promoting research in education is a compelling interest that could justify a race-conscious admissions policy, at least in the context of a university-based laboratory school whose purpose is to study

urban educational problems (including interaction and differences in learning among children of different races). (*Hunter ex rel. Brandt v. Regents of the University of California*)

C. INTERESTS REJECTED BY THE COURTS

In cases involving public contracting and public employment, the U.S. Supreme Court has held that the following are not compelling governmental interests and presumably would not be constitutional in public education:

remedying societal discrimination (*City of Richmond v. J.A. Croson Co.*)
providing role models for racial minorities (*Wygant v. Jackson Board of Education*)

Some lower courts have also rejected interests such as promoting diversity in employment and promoting diversity in broadcast programming; however, the U.S. Supreme Court has not yet ruled specifically on whether these interests are compelling.

NARROW TAILORING

The narrow tailoring requirement is designed to evaluate whether a race-conscious policy is necessary to satisfy a compelling governmental interest. In essence, the courts are evaluating the "fit" between the policy and the objective. If there are alternative policies that are race-neutral or less burdensome on third parties (such as non-minority students) and also achieve the same governmental interest, then a policy is likely to be struck down as not being narrowly tailored. Some courts have assumed that certain governmental interests such as educational diversity are compelling, but they have struck down race-conscious student selection policies because they are not narrowly tailored.

Paradise Factors. There is no single test for narrow tailoring, but several courts have relied on a set of factors offered in *United States v. Paradise,* a U.S. Supreme Court case that upheld a court-ordered promotion plan designed to remedy discrimination in public employment. Using the *Paradise* factors, a court examines:

- **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 numerical goals to the relevant market, and**
- **the impact of the relief on the rights of third parties**

Within a given case, some factors may be weighed more heavily and the factors may be weighed against each other.

Because *Paradise* involved a remedial interest, it is not clear if the same factors apply in non-remedial settings. Some of the factors, such as the duration of the relief, may not be applicable because of an ongoing interest in maintaining the policy (e.g., a permanent interest in having a diverse student body). However, some courts have suggested that unless there is a "logical stopping point," a policy is not narrowly tailored. (*City of Richmond v. J.A. Croson Co.*)

In examining alternatives, the courts are particularly attentive to *race-neutral* alternatives that may be able to accomplish the same governmental objectives. It is not clear from the case law whether a specific alternative must have already been tried and found ineffective, or if it is sufficient that a governmental body considered various alternatives before ultimately choosing a race-conscious policy.

Diversity and Narrow Tailoring. Justice Powell's *Bakke* opinion, issued before *U.S. v. Paradise,* suggests that the use of race as a **"plus" factor** among several admissions factors is a narrowly tailored policy to promote educational diversity. However, the use of quotas, set-asides, or exclusive admissions tracks that insulate particular applicants would not, in Justice Powell's opinion, be narrowly tailored.

One federal court of appeals recently adapted the *Paradise* factors to determine whether a higher education admissions policy was narrowly tailored to serve a compelling interest in promoting educational diversity. The court's inquiry looked at (1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity. (*Johnson v. Board of Regents*) The court struck down a policy that awarded bonus points to minority applicants because the policy lacked flexibility and failed to provide sufficient weight to non-racial factors.

Some federal courts of appeals have recently held that **"racial balancing"** in admissions - e.g., attempting proportionality between admitted students and the school district population - is not narrowly tailored to meet a non-remedial interest in a diverse K-12 student body. (*Wessman v. Gittens; Tuttle v. Arlington County School Board*) Another federal court of appeals has similarly rejected "racial balancing" in a magnet school transfer policy as not being narrowly tailored to meet a racial diversity interest (which the court assumed was compelling). (*Eisenberg v. Montgomery County Public Schools*)

Citations:

Brewer v. West Irondequoit Central School Dist., 212 F.3d 738 (2d Cir. 2000).
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir.), *cert. denied,* 529 U.S. 1019 (1999).
Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).
*Hopwood v. Texas,*78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).
Hunter ex rel. Brandt v. Regents of Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999), *cert. denied,* 121 S. Ct. 186 (2000).
Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
Johnson v. Board of Regents of Univ. of Ga., 2001 WL 967756 (11th Cir. Aug. 27, 2001).
Smith v. University of Washington Law School, 233 F.3d 1188 (9th Cir. 2000), *cert. denied,* 121 S.Ct. 2192 (2001).
Tuttle v. Arlington County School Bd., 195 F.3d 698 (4th Cir. 1999), *cert. dismissed,* 529 U.S. 1050 (2000).
United States v. Paradise, 480 U.S. 149 (1987).
Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998).
Wygant v. Jackson Bd. of Educ., 478 U.S. 1014 (1986).

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