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Legal Sidebar

Equal Protection and Race- or Sex-Conscious Government Action: Case Developments

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A number of federal lawsuits have alleged that certain race- or sex-conscious federal programs are unconstitutional on equal protection grounds. Challenged programs include COVID-19 relief programs, admissions programs at service academies, and minority business preferences, among others. Courts have enjoined several federal programs, old and new, as unconstitutional. This Sidebar discusses the equal protection principles at play in these cases. It then highlights aspects of several recent challenges, including reasons courts have struck down various federal race- and sex-based programs. The Sidebar closes with potential considerations for Congress.

Equal Protection Principles

The Equal Protection Clause of the Fourteenth Amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Generally, the same equal protection obligations apply to the federal government through the Fifth Amendment. When federal legislation or agency action targets benefits to groups based, in whole or in part, on race or sex, it may trigger equal protection scrutiny. While the federal government can consider race or sex in narrow circumstances, the Constitution's equal protection guarantees require that the government have sufficient justification for doing so.

To determine the sufficiency of such a justification, federal courts apply *strict scrutiny* to racial classifications and *intermediate scrutiny* to sex-based classifications. Strict scrutiny requires the government to demonstrate a *compelling* interest in considering race and show that its action is *narrowly tailored* to further that interest. Intermediate scrutiny requires the government to show that its consideration of sex serves an *important* government interest and that its action is *substantially related* to achieving that interest.

When the government asserts that it has targeted benefits based on race because of its compelling interest in remedying discrimination, Supreme Court precedent requires that the government show a "strong basis in evidence" that such remedial action is necessary. Federal appellate courts have repeatedly observed that the record necessary to satisfy the "strong basis in evidence" standard depends on the specific facts of a

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case. Showing an important government interest under intermediate scrutiny is simpler; the government must show its justification is "genuine, not hypothesized or invented *post hoc* in response to litigation."

In determining whether a government program is appropriately tailored, courts may examine whether the government's action is too broad, benefiting groups for which there is little or no evidence of intentional discrimination. For example, in 1989, the Supreme Court concluded that the City of Richmond could not justify contracting set-asides for (among others) "Eskimo [and] Aleut persons" without a record of discrimination against these groups in the relevant industry. If race- or sex-conscious legislation fails to provide redress to groups that experienced the discrimination the government intends to address, this underinclusiveness may also lead a court to find that the law is not appropriately tailored.

Together with these considerations of under- and overinclusiveness, courts analyzing a racial preference often consider whether the preference uses specific narrow tailoring elements described in the Supreme Court's plurality opinion in *United States v. Paradise*. These tools for narrow tailoring include using individualized determinations of social disadvantage (instead of race-based presumptions), waivers, race-neutral criteria, methods to limit negative effects on third parties (including fellow grant or contract competitors), sunset provisions, and scheduled reauthorizations or updated studies. Sunset provisions and similar time limits received particular attention in the Supreme Court's recent decision on higher-education affirmative action. There, the Court stated that racially conscious government programs must "be limited in time" with a "logical end point." Although that decision's holding is limited to higher education and the case did not address preferences in contracting, grants, or loans, it has been cited in cases addressing those kinds of preferences.

Several courts that have addressed equal protection challenges to federal programs in recent years have concluded that the government failed, in various circumstances, to justify race- and sex-based classifications and did not show that the programs were sufficiently tailored. This Sidebar discusses 2021 and 2024 rulings enjoining American Rescue Plan Act of 2021 (ARPA) and U.S. Department of Agriculture (USDA) emergency relief funding programs; a 2023 ruling enjoining certain minority contracting preferences; a 2024 injunction barring race-conscious administration of the Minority Business Development Agency; and ongoing challenges to race-conscious admissions procedures at West Point and the Naval Academy.

Equal Protection Challenges to Three Emergency Relief Programs

In 2021, the ARPA established a relief fund for small, privately owned foodservice businesses. Priority applicants, that is, businesses owners who were women, veterans, or "socially and economically disadvantaged" would be considered first. The legislation defined "socially and economically disadvantaged," through reference to the Small Business Act, as "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." Under an applicable SBA regulation, some applicants were presumed to be "socially disadvantaged" because they belonged to a specified race or ethnicity. Arguing that the fund might run out before nonpriority applicants could be considered, several applicants ineligible for the preference filed suit.

The U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit), in *Vitolo v. Guzman*, concluded that the ARPA process violated the Equal Protection Clause and ordered the SBA to "fund the plaintiffs' grant application, if approved, before all later-filed applications." In reviewing the race-based prioritization, the Sixth Circuit held that the government offered "little evidence" of past discrimination "against the many groups to whom it grants preferences." Although the Court acknowledged evidence that Hispanic- and Black-owned businesses disproportionately failed during the COVID-19 pandemic, it concluded that the government did not sufficiently link that disparity to intentional discrimination or show any government participation in the discrimination.

The Sixth Circuit also found that the racial preference was not appropriately tailored. For one thing, the court identified "race-neutral" alternatives that Congress could have enacted to achieve its goals. It also concluded that the ARPA's preference was both overbroad and underinclusive. The preference was overinclusive, according to the court, in that it applied to "vast swaths" of the population, not just those racial minorities for which the government had offered evidence of past discrimination. The preference was at the same time underinclusive, the court concluded, in requiring a prioritized business to be "at least 51% owned by women or minorities." As an illustration, the court noted that the plaintiff's restaurant was 50% owned by a Hispanic female and found it "far from obvious why that 1% difference in ownership is relevant." The Sixth Circuit concluded that the prioritization of female-owned businesses did not survive even the more lenient standard of review applied to gender-based preferences.

Another ARPA provision mandated monetary relief for racial minority farmers in the form of loan forgiveness. Specifically, it directed USDA to provide each "socially disadvantaged farmer or rancher" a debt-relief payment on qualifying loans the USDA made or guaranteed. The statute defined "socially disadvantaged farmer or rancher," by cross-reference to the Food, Agriculture, Conservation, and Trade Act of 1990, as one belonging to a group "subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." The USDA defined the "socially disadvantaged" groups as Black/African American, American Indian, Alaskan native, Hispanic/Latino, Asian, or Pacific Islander.

Several White farmers, self-identified as such in the litigation, brought claims, including a class action, challenging the USDA loan forgiveness program, and several courts imposed nationwide orders forbidding the USDA from making the ARPA farm payments. A federal district court in Texas, for instance, concluded that the government did not demonstrate a "strong basis in evidence" for the program, as the government's evidence cited certain statistical racial disparities (in USDA program participation, for example) without linking them to intentional discrimination. A district court in Wisconsin ruled that the government had, at least at the preliminary injunction stage, "not established that the loan-forgiveness program targets a specific episode of past or present discrimination."

On narrow tailoring, the Wisconsin district court found the loan forgiveness program likely overbroad, offering relief "without actually considering the financial circumstances of the applicant." The district court further concluded that the government did not show that Congress meaningfully explored whether race-neutral policies could address the harm it sought to remedy. Meanwhile, a district court in Florida pointed out that the program benefited farmers who secured USDA loans, and the government did not show that this "particular group" of disadvantaged farmers suffered discrimination. The court questioned the plan's underinclusiveness in that, among other things, it offered no remedy to minority farmers who were discriminatorily denied loans. In 2022, Congress repealed the relevant ARPA provision.

In *Strickland v. USDA*, a district court in Texas evaluated race and gender preferences in other programs distributing USDA emergency relief funds. The June 2024 decision concluded that funding practices enabling larger relief payments to socially disadvantaged farmers and ranchers likely violated equal protection principles. The court preliminarily enjoined the USDA program after finding that the agency did not present adequate, recent evidence of government discrimination against minority farmers. The one statistical study in evidence, the court concluded, did not show any USDA connection to disparities in disadvantaged farmers' income, debt, and landownership. The court also found that the USDA could have used race-neutral means to address cited economic disparities, targeting its relief based on need. As did other courts in the ARPA context, the court also concluded that the USDA's relief program burdened third parties and made arbitrary distinctions—such as between Afghan and Pakistani ethnicity.

The *Strickland* court also concluded that the fund's sex-based preference favoring women farmers likely failed intermediate scrutiny. The USDA relied on general, societal discrimination (rather than evidence of USDA discrimination) to justify the preference, the court concluded, and it used overinclusive criteria

rather than limiting emergency funds to under-resourced women farmers. After granting a preliminary injunction, it requested the parties submit additional evidence and briefing to facilitate a final ruling.

Equal Protection Challenge to Certain Minority Contracting Preferences

Some federal contracting preferences have also been subject to recent equal protection challenges. In *Ultima Services Corp. v. USDA*, a district court in Tennessee enjoined aspects of the SBA's contracting preferences for "socially and economically disadvantaged small business concerns," known as the "8(a) program." Under the 8(a) program, the SBA designated certain businesses as disadvantaged, and those businesses received government contracting preferences across several industries. Businesses owned by certain minorities were presumed to be disadvantaged. The district court found that the 8(a) program's racial presumption failed strict scrutiny. For one thing, in the court's assessment, it did not remedy specific past discrimination. The 8(a) program applies to contracts across a wide range of industries and to many government contracting programs. The court said that the government did not document "whether certain minorities are underrepresented in a particular industry," and it did not identify specific instances of discrimination in the relevant industries.

The *Ultima Services* court also concluded that the SBA 8(a) program's use of racial presumptions was not narrowly tailored. The 8(a) program, the court held, was potentially over- and underinclusive given that some minority ethnic groups received an automatic designation of "disadvantaged" while others did not. The *Ultima Services* court assessed the 8(a) program's lack of time limits as well, quoting the Supreme Court's recent higher-education affirmative action decision; and concluded that the program could have used race-neutral alternatives, such as an individualized assessment (rather than a race-based presumption) of a contractor's social disadvantage. The district court accordingly barred the SBA from using race-based presumptions of disadvantage, and SBA changed its procedures to require an individualized determination of social disadvantage for each potential program participant. The government has not appealed the district court's decision.

Equal Protection Challenge to the Minority Business Development Agency (MBDA)

In *Nuziard v. MBDA*, a district court in Texas permanently enjoined the MBDA from offering assistance (including counseling, training, and grant opportunities) on more favorable terms to minority business owners. First founded by executive order in 1969, the MBDA received statutory authorization in 2021. Its authorizing statute directs MBDA to serve "socially or economically disadvantaged" individuals, those "subjected to racial or ethnic prejudice or cultural bias (or the ability of whom to compete in the free enterprise system has been impaired . . .) because of the identity of the individual as a member of a group, without regard to any individual quality of the individual that is unrelated to that identity." The statute further specifies some ethnic groups that are presumed to be socially disadvantaged. Those in ethnic groups not listed are presumptively ineligible.

The *Nuziard* court concluded that the statute's racial presumption violated equal protection. First, the court considered the agency's evidence of discrimination against minority-owned businesses. It concluded that there was a compelling government interest, but only in one area: federal contracting. In federal contracting, the court concluded, the record showed both statistically significant racial disparities in which firms won contracts and anecdotal evidence of discriminatory treatment.

Outside of government contracting, however, the court concluded that the agency did not show a firm basis in evidence for its race-based action. In the court's assessment, it did not show either "specific historic incidents it seeks to redress" or government involvement in discrimination. The court acknowledged that the agency pointed to disparities in minority firms' access to capital, but the court

noted that it did not connect those disparities to discrimination or otherwise show what caused them. Disparities and general, societal discrimination are not enough to validate a race-based presumption, the court concluded: "Otherwise, any race-based program could be justified considering our country's history of race-based discrimination."

Next, the court considered whether the MBDA statute's race-based preference was narrowly tailored to address the compelling government interest. It failed that test, in the court's assessment. The court viewed the preference as overinclusive, as it operated when there was no evidence of discrimination against a group; and potentially underinclusive, as it arbitrarily excluded several minority racial groups. There was no "concrete evidence establishing why certain groups make the list and others don't." The court further observed the presumption relied on the stereotype that all minority-owned businesses were economically disadvantaged, without considering their individual financial situations. Finally, the court pointed out, the 54-year-old program had no "logical endpoint" or "sunsetting" that would end the preference after discrimination had been remedied; the plan neglected race-neutral alternatives; and it burdened nonminorities, who had no practical way to access agency services. The court permanently enjoined the agency from using the statute's racial presumption to provide future services. The government has decided not to appeal the district court's decision.

Ongoing Equal Protection Challenges to Service Academy Admissions

Two pending cases against the U.S. Military Academy at West Point and the U.S. Naval Academy, brought by the same organization that challenged Harvard's and the University of North Carolina's race-based admissions policies at the Supreme Court in the *Students for Fair Admissions* case, seek to extend that ruling. The Supreme Court in that case declined to bind the U.S. military service academies when it restricted affirmative action in higher education admissions generally, indicating that such schools were not before the court and might present "distinct interests."

In complaints against West Point and the Naval Academy, the plaintiff alleges that equal protection principles bar the use of race in service academy admissions. The complaints allege the schools improperly set admissions goals to match the racial composition of each incoming class (whom the military envisions as future leaders) to the racial composition of enlisted personnel.

West Point, in its answer, explains that it "considers race and ethnicity flexibly as a plus factor in its individualized, holistic assessment of candidates" for some admissions spots. It argues that "diversity in the officer corps is vital to national security." The Naval Academy makes similar arguments about its "limited" use of race and a "compelling national security interest" in a diverse officer corps.

The district courts in both cases have denied injunctions, stating that the record in each, so early in the proceedings, did not show that the academies' policies could not be justified. In the Naval Academy case, the district court also wrote that "courts have consistently deferred to the military regarding its personnel decisions." Subsequently, the Court of Appeals for the Second Circuit declined to issue an injunction in the case against West Point. Citing the underdeveloped record, the Supreme Court also declined the injunction request. District court proceedings are ongoing in both cases.

Considerations for Congress

Government race-based preferences undergo strict scrutiny in court, and sex-based programs are subject to intermediate scrutiny. Legislation cannot diminish those standards. At the same time, federal courts' equal protection analyses are highly fact- and context-specific. In other words, the invalidation of one program does not necessarily mean that similar programs are unconstitutional in another context. Should Congress seek to enact legislation responsive to specific racial discrimination, and thus target certain racial groups for relief, such remedial action generally requires the development of a legislative record—a

"strong basis in evidence." The evidence must justify Congress's conclusion that a particular group or groups suffered intentional discrimination in a given context, setting, or industry. Courts have generally required also that the government show at least passive participation in that discrimination. Such a legislative record might include congressional hearings and testimony, for example, presenting evidence supporting an inference of intentional discrimination. Courts look for evidence beyond general assertions of society-wide discrimination. Sex-based programs, while easier to justify, also require concrete evidence. They may fail intermediate scrutiny if based on generalized assumptions about social inequality.

Because federal courts' equal protection analyses are fact- and context-specific, some governmental entities have successfully reintroduced race-conscious relief after an equal protection challenge. To accomplish this result, amended or reauthorized legislation may need to be supported by further fact-finding and evidence of intentional discrimination. A reviewing court need only consider the reauthorization record; previous legislative shortcomings are no longer relevant.

In addition, amended or reauthorized legislation might more narrowly tailor the race-based remedy at issue, such as in specifying which groups are included and excluded from the beneficiary class. Narrow tailoring, like the record of discrimination, generally requires a detailed and fact-specific approach, addressing individual contexts and markets. Using the narrow tailoring factors from the Supreme Court's plurality opinion in *United States v. Paradise* can be helpful. These factors include using time limits, scheduled reauthorizations or updated studies, individualized determinations of social disadvantage, and race-neutral criteria. If a program includes a quota or goal for minority participation, legislators may consider mechanisms for waiving the requirement in special circumstances, such as when there are too few minority applicants. Additionally, any steps legislators can take to minimize harms to third parties can reduce a program's vulnerability to equal protection challenges. While sex-based remedies need not be *narrowly* tailored, they can be rejected if overbroad. The government must show sex-based preferences are *substantially related* to an important government interest. Greater tailoring of the remedy strengthens the government's case.

Alternatively, lawmakers may target action without a sex- or race-based preferences, potentially avoiding heightened scrutiny. For example, legislation could target benefits based on a firm's financial resources or its operating in an economically depressed area. Another alternative is using race- or sex-conscious measures that do not amount to preferences, such as enhancing outreach to increase program participation.

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