

MODULE 11

# **Equal Protection: Remedies for Segregation; Proving a Classification; Affirmative Action**

Green • Swann • Milliken • Washington v. Davis • Croson • Adarand • SFFA • Callais

Constitutional Law • Fall 2026 • Professor Jorge R. Roig

# Three questions after Brown

*Remedy, proof, and race used to help.*

## REMEDIES

- What must a district do?
- When may the court stop?

## PROOF

- Neutral text, racial purpose?
- What evidence proves it?

## RACE USED TO HELP

- Strict scrutiny even so?
- Which interests are compelling?

*Each question goes back to Step 1: what is the classification?*

# After Brown: the first fifteen years

*From “all deliberate speed” to “root and branch.”*

**1954**

Brown I:  
separate is  
inherently  
unequal.

**1955**

Brown II: “all  
deliberate  
speed.”

**1958**

Cooper v. Aaron:  
Brown binds the  
States.

**1963–64**

Goss; Griffin; the  
Civil Rights Act.

**1968**

Green: an  
affirmative duty.

Cooper v. Aaron: “the federal judiciary is supreme in the exposition of the law of the Constitution.”

# Green: freedom of choice is not enough

*A duty to dismantle, not merely to stop.*

## THE PLAN

- Every child chooses a school.
- No white child chose Watkins.

## THE COURT

- Dual system still in place.
- Dismantle it “root and branch.”

The test is a plan that works — judged by its results.

# Swann: the tools of a remedy

*Charlotte-Mecklenburg, 1971. Race-conscious remedies approved.*

1

## Ratios

A starting point, not  
a quota.

2

## One-race schools

Presumed suspect;  
must be justified.

3

## Attendance zones

Redrawn to  
integrate.

4

## Busing

Within reasonable  
time and distance.

*The limit: “the nature of the violation determines the scope of the remedy.”*

# Milliken: de jure and de facto

*Detroit, 1974. The city line becomes the remedy's wall.*

## DETROIT

- De jure segregation, found.
- A remedy is owed inside the city.

## THE SUBURBS

- No violation found there.
- No cross-district remedy.

Marshall: “unless our children begin to learn together, there is little hope that our people will ever learn to live together.”

# Ending desegregation decrees

*When is a district “unitary,” and the court's job done?*

1

## Good faith

Compliance with the decree, for a reasonable period.

2

## Vestiges gone

Eliminated to the extent practicable.

*Then the decree ends — and later imbalance is de facto.*

# Proving a racial classification

*Three routes to strict scrutiny.*

**On its face**

The law names race.

Korematsu; Loving.

**In its administration**

Neutral text, unequal hand.

Yick Wo, 1886.

**In purpose and effect**

Adopted because of race; it bites.

Washington v. Davis; Arlington Heights.

*No route, no strict scrutiny — whatever the impact.*

# Washington v. Davis, 1976

*A police test four times as many Black applicants failed.*

## THE TEST

- Test 21: verbal skills.
- Far more Black applicants failed.

## THE COURT

- Impact alone is not enough.
- Neutral, rational: upheld.

“Disproportionate impact is not irrelevant, but it is not the sole touchstone.”

# How purpose is proven

*Arlington Heights lists the evidence. Feeney defines the intent.*

## THE PATTERN

- Impact on one race.
- Stark enough, it may suffice.

## THE PROCESS

- History; sequence of events.
- Departures from the norm.

## THE RECORD

- What officials said.
- Minutes, reports, statements.

Feeney: chosen “‘because of,’ not merely ‘in spite of,’ its adverse effects.”

# McCleskey v. Kemp, 1987

*A statistical study of the death penalty in Georgia.*

## THE STUDY

- White victim: 4.3 times the risk.
- 39 other variables controlled.

## THE COURT, 5 - 4

- Prove purpose in your case.
- Statistics are not enough.

Brennan, dissenting: the majority's worry “seems to suggest a fear of too much justice.”

# Trump v. Hawaii, again

*A facially neutral order, and the end of Korematsu.*

## THE ORDER

- Neutral on its face.
- Statements suggested animus.

## THE COURT

- Rational basis, assumed.
- Upheld.

Korematsu “was gravely wrong the day it was decided.”

# Race used to help: which tier?

*My board's two columns. The Court chose the first.*

## FOR STRICT SCRUTINY

- Discrimination is discrimination.
- Individuals, not groups.
- Stigma.
- Who can tell what “benefits”?

## AGAINST

- Majority burdening itself.
- Vestiges of the past.
- Equal opportunity.
- Exclusion is not inclusion.

*Croson and Adarand: strict scrutiny, whoever is burdened or benefited.*

# From Bakke to Adarand

*Seventeen years to settle the tier.*

|                  |                             |                                     |
|------------------|-----------------------------|-------------------------------------|
| 1978 • Bakke     | State medical school        | Quota struck; race may be a “plus.” |
| 1980 • Fullilove | Congress: 10% set-aside     | Upheld; no majority standard.       |
| 1987 • Paradise  | Court-ordered promotions    | Upheld as a remedy.                 |
| 1989 • Croson    | City: 30% set-aside         | Struck: strict scrutiny.            |
| 1990 • Metro     | Federal: broadcast licenses | Upheld: intermediate scrutiny.      |
| 1995 • Adarand   | Federal contracting         | Strict for all; Metro overruled.    |

My Con Law II boards, digitized (2023), affirmative-action timelines 1960–1995 • Bakke, 438 U.S. 265 (1978) • Fullilove, 448 U.S. 448 (1980) • Paradise, 480 U.S. 149 (1987) • Croson (1989) • Metro Broadcasting, 497 U.S. 547 (1990) • Adarand (1995).

# Richmond v. J.A. Croson Co., 1989

*A city's 30% set-aside, and what a remedy must rest on.*

## THE PLAN

- 30% of subcontract dollars.
- Six minority groups, nationwide.

## THE COURT, 6-3

- Strict scrutiny for the States.
- No identified discrimination.

Richmond may never have had an Aleut contractor — yet Aleuts shared the remedy.

# Adarand, 1995

*One standard for every level of government.*

## THE HOLDING

- Strict scrutiny for all.
- Federal, state and local alike.

## THE CAVEAT

- Not “fatal in fact.”
- Some remedies survive.

Metro Broadcasting overruled: intermediate scrutiny for federal preferences is gone.

# Diversity as a compelling interest

*2003 to 2016: allowed, then narrowed.*

**2003**

Grutter: diversity  
is compelling.  
Gratz: no points.

**2007**

Parents  
Involved: not in  
K-12  
assignments.

**2013**

Fisher I: apply  
strict scrutiny for  
real.

**2014**

Schuette: voters  
may ban  
preferences.

**2016**

Fisher II: Texas's  
plan upheld.

Grutter: “We expect that 25 years from now, the use of racial preferences will no longer be necessary.”

# Students for Fair Admissions, 2023

*Harvard and North Carolina. The end of race-conscious admissions.*

## NO MEASURABLE GOAL

- Diversity goals are vague.
- Courts cannot review them.

## RACE AS A NEGATIVE

- A plus for some is a minus.
- It rests on stereotypes.

## NO END POINT

- Grutter's 25 years: a hope.
- Review is not an end.

“Eliminating racial discrimination means eliminating all of it.”

# Louisiana v. Callais, 2026

*Can complying with the Voting Rights Act justify drawing by race?*

## THE MAP

- A second majority-Black district.
- Drawn to satisfy a court.

## THE COURT, 6-3

- Section 2 did not require it.
- A racial gerrymander.

Section 2 now reaches only what supports “a strong inference” of intentional discrimination.

# Current case: Sargent v. School District of Philadelphia

*Is a zip code a proxy for race?*

## THE POLICY

- Six zip codes: automatic admission.
- Everyone else: a lottery.

## THE THIRD CIRCUIT

- A factfinder could find purpose.
- Vacated for trial.

*Race-neutral on its face. Is it race-neutral in purpose? Arlington Heights decides.*

# For discussion: after SFFA

*A hypothetical. Every case in this module is in play.*

## THE MEASURES

- Top 5% of every college.
- Preferences by wealth, not race.
- End a 1970 decree.
- A second majority-Black district.
- A new fitness test.

## QUESTIONS FOR DISCUSSION

1. Proof of purpose?
2. A proxy for race?
3. Unitary yet?
4. A compelling interest?
5. Impact without intent?

# Module 11 on one slide

*One line per rule.*

## THE LINE, ONE RULE AT A TIME

- Dismantle a dual system, root and branch (Green).
- The violation limits the remedy (Swann; Milliken).
- Impact alone is not a classification (Washington v. Davis).
- Purpose means “because of,” not “in spite of” (Feeney).
- Strict scrutiny for every racial classification (Croson; Adarand).
- Admissions diversity fails it (SFFA).

*Next — Module 11A: sex, alienage and the rest.*

Next: Module 11A — Gender; Alienage; Age; Disability; Wealth; Sexual Orientation.