AFFIRMATIVE ACTION IN OHIO
a resource for POLICYMAKERS and ADVOCATES

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The following is a legal guide on how to implement an Affirmative Action program within an organization. However, please note that when presenting such programs to general audiences, studies suggest a title such as “Equal Opportunity Program” is more positively received. This booklet does not constitute legal advice or create a lawyer client relationship. If you seek to change your diversity policies, please consult an attorney.
For too many Americans, the promise of equal opportunity remains elusive. In our country women don’t get hired or promoted in many companies the same way as men, particularly if they took time off to raise their kids. Employers sometimes look differently at older workers than younger ones. Underfunded rural or urban schools with crumbling walls and 1980s textbooks put kids at a disadvantage, whether they’re African American, white, or brown. Studies show that even with identical qualifications, resumes with more “African American sounding” names are less likely to be called for a job interview. Affirmative Action programs let business, government, and educational leaders act responsibly and flexibly to make sure everyone is treated fairly.

**What is Affirmative Action**

Affirmative action is a set of programs or polices designed to provide equal access and opportunity to disadvantaged groups, including people of color and women. Typical affirmative action initiatives include targeted outreach and recruitment efforts, the use of multiple criteria (including consideration of race and gender) in admissions and hiring, and targeted training programs.

**Why is Affirmative Action Important**

Research suggests that individual life chances are shaped by opportunity structures, the web of resources and influences such as good schools, safe neighborhoods, health care, and entry-level jobs that enhance or constrain our ability to succeed and excel. These opportunity structures are often just as important as the choices that individuals make. A person’s location within this “web of opportunity” plays a decisive role in determining his or her life-long potential. Current statistics show the depth and breadth of modern-day racial disparities, which are rooted in modern-day opportunity structures as well as historical discrimination. Generations of accumulated disadvantages have created significant opportunity barriers for many groups. Affirmative action programs help women, many people of color, and other disadvantaged groups overcome these obstacles and secure equal opportunity to achieve success.

**Federal Law Allows Government Officials to Make Race-Conscious Decisions to Promote Equal Opportunity and Address Racial Inequality and Discrimination**

Government officials may undertake race-conscious decisions to promote equal opportunity and address racial inequality and discrimination. The U.S. Constitution permits government officials to consider race in policymaking in a wide variety of circumstances. A race-conscious action is a general policy or program that seeks to prevent or address racial inequality or promote racial diversity without classifying individuals, businesses, or other entities by race. For example, government officials are permitted to monitor the use of government contracts or university enrollment by race. Government officials may also target certain neighborhoods or geographic regions with investment, jobs creation, or recruitment with recognition of racial demographics.
Federal Law Allows Government Officials to Use “Racial Classifications” in Certain Circumstances

Government officials may also employ racial classifications in certain circumstances, such as remedying past or present racial discrimination or promoting diversity in university enrollment or in the classroom. However, all programs or governmental decision-making that use racial classifications must also be carefully limited:

- The discrimination being remedied must be presently identified. “Stale” evidence cannot support such a program.
- Race-neutral alternatives must be considered.
- Statistical evidence of a disparity in the award of public contracts is not enough; the data must also account for readiness and capacity of minority-owned businesses to perform work.
- The use of racial classifications in government contracting must be limited in duration.

State Law Requires Race-Conscious Decision-Making to Promote Equal Opportunity

Under Ohio law, every public agency must establish and carry out an Affirmative Action Program designed to promote equal opportunity in recruitment, hiring, and promotion of employees. Fifteen percent of the estimated total value of all state contracts for purchasing material and equipment must be set aside for minority bidding. Also, certain disadvantaged businesses in qualified regions must be awarded 5 percent of eligible goods, services, and construction contracts.

In this report, we will specify how affirmative action programs may be structured to comply with federal and state law. Part I sets out the general requirements of federal law. Part II provides an overview of affirmative action in the context of higher education and provides a checklist for race-conscious admissions policies. Part III sets out the requirement of law with respect to public employment and explains how public agencies may legally implement race-conscious hiring and promotion policies. Part IV sets out the requirement of state and federal law in the context of minority contracting and procurement.
AFFIRMATIVE ACTION AND FEDERAL LAW

Overview

The U.S. Constitution permits government officials to consider race in policymaking in a variety of ways. Governments may undertake race-conscious decisions that promote equal opportunity and address racial inequality and discrimination. A race-conscious action is a general policy or program that seeks to prevent or address racial inequality or promote racial diversity without classifying individuals, businesses, or other entities by race. Race-conscious action that does not classify individuals or entities by race will not trigger strict scrutiny review, and is therefore permissible in a wide range of circumstances. For example, government officials are permitted to monitor the use of government contracts or university enrollments by race. Governments can target certain neighborhoods or geographic regions with investment, jobs creation, or recruitment with recognition of racial demographics.

In addition, governments may employ racial classifications in certain circumstances. Racial classifications are legally permissible under federal law if they are (1) “narrowly tailored” to (2) “further compelling governmental interests.” The Supreme Court has recognized several compelling governmental interests that may justify the use of racial classifications, including remedying past or present racial discrimination, and promoting racial diversity in higher education. A majority of Justices on the Court have held that ameliorating the harms of racial isolation and promoting student diversity in the K-12 context are compelling government interests.

However, racial classifications are subject to certain limitations. According to strict scrutiny review, racial classifications justified by a compelling governmental interest must also be narrowly tailored. Although the tailoring required depends upon the context, courts have generally held that narrow-tailoring requires good faith consideration of race-neutral alternatives.
Brief History

In 1961, President Kennedy made the first reference to affirmative action through the implementation of Executive Order 10925, which established a Committee on Equal Employment Opportunity and required that government employment and projects receiving federal funding act in a way that was free from racial and ethnic bias. (Exec. Order No. 10925, 1961 WL 8178 (Pres.), 26 FR 1977). The succeeding Johnson Administration further embraced the policy with the passage of Executive Order 11246, later amended by Executive Order 11375, which specified that the government would “provide equal opportunity in Federal employment and in employment by Federal contractors on the basis of merit and without discrimination because of race, color, religion, sex or national origin.” (Exec. Order No. 11375, 1967 WL 97841 (Pres.), 32 FR 14303).

In 2009, the Supreme Court heard a well-publicized affirmative action case brought by a group of White and Hispanic firefighters against the City of New Haven, Connecticut. (Ricci v. DeStefano, 129 S.Ct. 2658, at 2664 (2009)). A group of 118 firefighters had taken an exam to qualify for a promotion. (Id.) When the fire department found that none of the African-American firefighters who were successful on the exam would be promoted under the selection structure it created, it stayed the promotions and attempted to formulate a new structure. (Id.) The firefighters who filed suit alleged violations of Title VII of the Civil Rights Act of 1964. Id. The Supreme Court ruled that by using race as a deciding factor in the decision to stay the promotions, the city had violated Title VII. (Id. at 2665).

It is important to point out, however, that this ruling does not change the current affirmative action precedent; race-conscious decisions are broadly permissible, while racial classifications are subject to strict limitations. Similar to affirmative action in other settings, the rationale for this policy remains the same: to provide equal opportunities for groups who are disadvantaged, have experienced historical and contemporary discrimination, and do not enjoy equal opportunities with those outside of their protected class.

Equal Protection Jurisprudence

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.” (U.S. Const., amend. 14, § 1). The equal protection obligations imposed on state and local governments by the fourteenth amendment are identical to those imposed on the federal government by the fifth amendment. (Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)).

In Adarand, the Supreme Court held that any racial classification used by any level of government, regardless of its purpose, is subject to “strict scrutiny” review. According to this standard, racial classifications by government authorities “are constitutional only if they are narrowly tailored to further compelling governmental interests.” (Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).
What is a Compelling Governmental Interest?
The Supreme Court has identified several “compelling governmental interests” that justify the government’s use of racial classifications. First, the government has a compelling government interest in remedying the present effects of past racial discrimination. (See Freeman v. Pitts, 503 U. S. 467, 494 (1992)).

Second, the government has a compelling government interest in promoting student-body diversity in higher education and in other contexts. (See Grutter v. Bollinger, 539 U.S. 306 (2003)). Third, a majority of Justices have held that there is a compelling governmental interest in ameliorating the harms of racial isolation. (See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007)).

When is a Racial Classification Narrowly Tailored?
Even though a government-imposed racial classification may be justified by a compelling government interest, it must still be narrowly tailored. The Supreme Court has explained that the tailoring required depends upon the context and the nature of the interest asserted. (Grutter, 539 U. S., at 327 (citing Gomillion v. Lightfoot, 364 U. S. 339, 343–344 (1960)).

However, courts typically find the following factors to be relevant in determining whether a racial classification is narrowly tailored: (1) the governmental entity considered race-neutral alternatives prior to adopting a program that uses racial classifications; (2) the program is more than a mere promotion of racial balancing; (3) the program does not require numerical quotas; (4) the program does not “unduly harm” members of any racial group; (5) the program does not presume discrimination against certain minority groups; and (6) if the program involves a set-aside plan, the plan is based on the number of qualified minorities in the area capable of performing the scope of work identified (rather than the total number of minority businesses in the area covered by the program).

Another factor sometimes considered is whether the program was limited in duration, such that it will not last longer than the discriminatory effects it is designed to eliminate.

Race-Conscious Decision Making

Government officials may undertake race-conscious decision-making or activities that promote equal opportunity and address racial inequality and discrimination. A race-conscious action is a general policy or program that seeks to prevent or address racial inequality or promote racial diversity without classifying individuals, businesses, or other entities by race.

Race-conscious decision-making that does not classify individuals or other entities on the basis of race may be used in almost any context, so long as the purpose is not discriminatory. This is because race-conscious decision-making that does not impose a racial classification will not trigger strict scrutiny review. For example, government officials are permitted to monitor the use of government contracts or university enrollment by race. The Supreme Court has held that strict scrutiny does not apply when government officials undertake redistricting with consciousness of race because “Electoral district lines are ‘facially race neutral.’” (See Bush v. Vera, 517 U. S. 952, 958 (1996) (plurality opinion)).
Government officials may also target certain neighborhoods or geographic regions with investment, jobs creation, or recruitment with recognition of racial demographics. Justice Kennedy explained:

_School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race-conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. (Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J. Concurring in part and concurring in the judgment))._
**Checklist for Determining the Constitutionality of an Affirmative Action Program**

___ Is the policy or program race-conscious?

___ If so, does the policy or program employ individual racial classifications?

___ If so, is the policy in pursuit of a compelling state interest?

___ If so, is the racial classification narrowly-tailored?

✓ The program or policy does not use quotas or insulate applicants in any way.
✓ The program has given serious, race-neutral considerations to race-neutral alternatives that would further the same goal.
✓ The program does not cause undue harm to any member outside of the protected racial group.
✓ The program contains sunset provisions in its policies and will undergo periodic review in order to determine whether racial preferences are still necessary to achieve the goal.
Affirmative Action in Ohio: A Resource for Policymakers and Advocates

AFIRMATIVE ACTION AND HIGHER EDUCATION

Overview of Affirmative Action and College Admissions

In the United States, racial and gender disparities still act as an obstacle for certain groups in receiving the same opportunities. Unequal educational opportunities are a feature of increasing patterns of racial and economic segregation throughout the State of Ohio. Nearly 40 percent of African American and Latino students attend “intensely segregated schools” in which 90-100 percent of the students are minority. (Gary Orfield, The Civil Rights Project, Reviving the Goal of an Integrated Society: A 21st Century Challenge 13 (January 2009)).

Almost 1 in 6 Black and Latino students are hyper-segregated, and attend schools in which the student body is 99-100% minority. (Id. at 12). High-poverty schools are extremely disadvantageous for students, regardless of the quality of the teaching corps or dedication of the administrators. Half of African American and Latino public school students attend a school where at least 75 percent of the student body is poor, compared to only 5 percent of white students. (National Center for Education Statistics, Condition of Education 2004 (Washington, DC: U.S. Department of Education, 2004)).

African American and Latino students are disproportionately tracked into lower-ability groupings, and lack access to college prep classes. Access to advanced placement, honors, and other college prep classes is one of the single most important factors in university admissions decisions. Affirmative action seeks to level the playing field for women and minorities so that they are on an equal footing for job and education opportunities. The benefits of affirmative action, however, are not limited to the disadvantaged groups it seeks to help. Creating a more diverse student body, for example, helps overcome racial stereotypes, promotes cross-cultural understanding, expands individual viewpoints, and helps prepare all students for citizenship in a diverse, pluralistic society. In an era of globalization, it is increasingly important for colleges and universities to foster an open-minded student body, so that they may cultivate leaders who are well-
equipped to address the concerns of an increasingly multicultural society. This section will focus specifically on the use and validity of affirmative action policies in college admissions.

**Brief History**

The first, and one of the most well-known, affirmative action case that the Supreme Court heard was *Regents of the University of California v. Bakke* (438 U.S. 265 (1978)). Upon being rejected twice from the University of California – Davis Medical School, a white male challenged the constitutionality of the institution’s policy of reserving 16 of its 100 positions for members of “disadvantaged” minority groups. (Id. at 265). The petitioner filed suit for declaratory relief to compel his admission to Davis, claiming that their use of a quota system, which excluded him on the basis of race, violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. (Id. at 266).

The Court was split 5-4, in favor of *Bakke*. Four justices declared that the use of race in university admissions should be completely eliminated. (Id. at 267). Another four justices declared that race could be used as a factor in admissions. (Id.). Justice Powell joined the latter group, but wrote his own opinion, which stated that racial and ethnic classifications of any type are inherently suspect and are therefore subject to “the most exacting judicial scrutiny.” (Id.). In this case, the use of a numerical quota system was prohibited because it discriminated against non-minority applicants. However, Justice Powell conceded that race could be used as a factor in admissions in order to further the goal of diversity. (Id.).

The most important Supreme Court case that deals with affirmative action policy in undergraduate admissions is *Gratz v. Bollinger* (539 U.S. 244 (2000)). Petitioners Gratz and Hamacher were both denied admission to the University of Michigan’s College of Literature, Science, and Arts. (Id.). The admissions committee utilized a point system whereby applicants could be awarded a possible total of 160 points, with at least 100 needed in order to gain admission. (Id.). The committee awarded points for a number of factors, including GPA, standardized test scores, curriculum strength, alumni relations, leadership experience, etc. (Id.). All members of “underrepresented minorities” (African Americans, Hispanics, and Native Americans) automatically received 20 points. (Id.).

Petitioners filed a class action, claiming that the points system, like the quota system in *Bakke*, violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. (Id.). In a 6-3 ruling, the Court held that, while achieving diversity is a compelling interest, the use of a numerical system was too mechanistic so that it had the effect of making “the factor of race… decisive” for underrepresented minorities who were only minimally qualified for admission. (Id. at 246-247).

The controlling law on affirmative action comes from *Grutter v. Bollinger* (539 U.S. 306 (2003)). Petitioner was a female Caucasian from Michigan who applied to the University of Michigan School of Law in 1996 with a 161 LSAT score and 3.8 GPA. (Id. at 316). The law school waitlisted her and subsequently rejected her. (Id.). Petitioner filed suit, alleging that she was rejected because the admissions committee used race as the “predominant factor,” thus giving minorities a “significantly greater chance” of admission over comparable nonminority applicants, and that the school had “no compelling interest” to justify such use of race. (Id.).
Like Bakke and Gratz, Petitioner alleged discrimination on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. (Id.). In a 5-4 decision, the Court held that the admissions committee’s narrowly-tailored use of race in fulfillment of a compelling interest in obtaining the benefits of a diverse student body did not violate the Equal Protection Clause or Title VI. (Id. at 343).

After Bakke, courts had trouble determining whether Justice Powell’s lone opinion was nonetheless binding precedent under Marks v. U.S. (430 U.S. 188 (1976)). In this case, the Court held that when a court is fragmented and there is no single explanation for the result supported by five justices, the holding may be the position taken by those who concurred on the “narrowest grounds.” (Id. at 193). Justice Sandra Day O’Connor’s majority opinion in Grutter essentially made Justice Powell’s plurality opinion in Bakke controlling.

Columbia Law School has recently released a troubling study, which found that while African-American and Mexican-American students have improved their grades and LSAT scores, their enrollment in American law schools continues to drop.ii Between 1993 and 2008, African American enrollment has dropped 7.5% while Mexican American enrollment has dropped 11.7%. (Id.). This news is troubling, and serves as proof that affirmative action policies are still needed today in order to cultivate diverse student bodies.

**Analyzing Affirmative Action**

Analysis under the Equal Protection Clause involves three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis. Courts adopt strict scrutiny for issues dealing with fundamental rights and race-based classifications. Intermediate scrutiny is used for gender classifications. All other classifications fall under rational basis review. Thus, when analyzing the constitutionality of affirmative action plans, one should apply a standard of strict scrutiny. In order to meet this standard, racial classifications (1) must serve a compelling government interest, and (2) must be narrowly tailored to further that interest. (Adarand, 515 U.S. 200, at 235 (1995)). Before Adarand, all racial classifications were merely given intermediate scrutiny. This case held that all racial classifications must be subject to strict scrutiny.

Grutter explained how affirmative action in college admissions can serve a compelling government interest and lists the narrow tailoring requirements. First, the Court adopted Justice Powell’s view that a diverse student body is a valid compelling state interest. (Grutter v. Bollinger, 539 U.S. at 324 (2003)). The Court acknowledged the benefits of a diverse student body, including cross-racial understanding, breaking down stereotypes, and more enlightening and spirited classroom discussions. (Id. at 330). Moreover, exposure to diverse people, cultures, and viewpoints helps cultivate the skills needed to be successful in an increasingly global marketplace. (Id.). Law schools in particular are training grounds for a large proportion of leaders and elected officials. (Id. at 331). Exposure to diversity in school better prepares students to represent the interests of an increasingly heterogeneous society. (Id.).

The four requirements of narrow tailoring in the context of race-based university admissions are: (1) prohibition of any quota system; (2) serious, good faith considerations of workable race-neutral alternatives that will achieve the diversity the university seeks; (3) prohibition of any undue harm on
those who are not members of the favored racial and ethnic groups; and (4) inclusion of sunset provisions in race-conscious admissions policies.

- Prohibition of a quota system: universities cannot determine admissions in a mechanical fashion, or separate minorities from the general applicant pool. (Id. at 334. Rather, decisions should be made in a flexible manner so that an evaluation of each applicant is individualized. (Id. at 336. Race can only be considered as a plus factor. (Id.).

- Serious, good faith considerations of race-neutral alternatives: this element does not require that a school exhaust every possible alternative or compromise academic quality for the sake of extending opportunity to all groups; it merely requires that the school explore and evaluate other means of achieving diversity. (Id. at 340.) In Grutter, the Law School had considered using a lottery system and decreasing emphasis on LSAT scores and GPAs for all applicants, but determined that both ideas would compromise the educational value of the school for all students, including minorities. (Id.)

- Prohibition of any undue harm on those who are not members of the favored racial or ethnic group: this provision is similar to the first; an applicant’s rejection must have been based on a fair weighing of his qualifications, and not because of race. (Id. at 341). The Law School showed that it adhered to this by selecting nonminority applicants over minority applicants who were even more likely to enhance diversity. (Id.)

- Sunset provisions: the Court stated that “race conscious admissions policies must be limited in time,” because they have the potential to be used more broadly than interest demands. (Id. at 342). Thus, race-conscious policies need to undergo periodic review to determine if they are still necessary in order to achieve a diverse student body. (Id.) The court predicted that in twenty-five years, racial preferences would be unnecessary to further this goal. (Id. at 343).

**Affirmative Action in College Admissions in Ohio**

There are no major statutes or case law in Ohio that deals with affirmative action in the context of college admissions. Moreover, there are no statewide or national organizations that track university policies and data regarding this issue. Thus, the best means of providing an overall snapshot of the state of affirmative action in college admissions in Ohio is to research the policies of the major colleges and universities in Ohio. Generally, almost all of the major institutions of higher education in Ohio have a policy that encourages diversity and/or an office that deals with diversity issues. The remainder of this section will describe the stated diversity policies at three major Ohio universities, and then seek to analyze the state of affirmative action in Ohio based on these policies.

**Policies at Three Institutions: The Ohio State University, Miami University, and Case Western Reserve University**

At The Ohio State University, the Office of Diversity has continued to build upon a Diversity Action Plan, initiated in 2000. During that year, the University created an affirmative action committee, spearheaded by OSU Law Professor Deborah Merritt. Deborah Merritt, Memo, Sept. 20, 2000,
http://www.osu.edu/affirmative_action/affirmative.pdf. This committee listed five pressing needs for affirmative action:

“(1) making clear the University’s commitment to affirmative action; (2) developing a system of accountability in all areas related to affirmative action; (3) improving retention of African American and Latino/a undergraduates; (4) increasing racial, ethnic, and gender diversity among faculty members in departments lacking that diversity; and (5) creating a dialogue among all members of the University community to foster understanding of and support for the University’s commitment to affirmative action.” (Id.)

Since then, the University has adhered to the diversity action plan, of which goals include: (1) enhancing diversity among undergraduates, graduate students, faculty, staff, and upper-level administrative positions; (2) promoting diversity and cultural understanding on campus; and (3) dedicating resources towards researching diversity, which included the establishment of the Kirwan Institute. (“Renewing the Covenant: Diversity Objectives and Strategies for 2007 to 2012,” http://www.osu.edu/diversityplan/index.php.) Since the original implementation of the diversity plan in 2001, Ohio State has noted trends at the undergraduate level. From 2001-2006, minority undergraduate representation overall dropped from 1,081 to 976. (Id.)

While Asian American and Hispanic enrollment increased, a small drop occurred in Native American enrollment, and a major drop occurred in African American enrollment following the Supreme Court decision in Grutter v. Bollinger, 539 U.S. 306 (2003). (Id.) Nonetheless, retention rates for minority students remained relatively high in 2006, the latest year in which data was released. These rates include: 89.3% for African Americans, 89.3% for Hispanics, 82.8% for Native Americans, and 94.3% for Asian Americans. (Id.) Ohio State has also expanded its Minority Scholars Program, which awards 435 minority students each year. Since Grutter, the award has become more inclusive and has received more funding from the Provost. (Id.)

Other major schools in Ohio also emphasize the importance of diversity. In their student handbook, Miami University states that diversity helps enhance the overall quality of education that all students receive; thus, socioeconomic background, representation of particular minority groups, and unique geographical backgrounds are all characteristics that the admissions committee may take into account. (The Student Handbook: 2009-2010 Edition, Miami University, http://www.units.muohio.edu/secretary/policies_guidelines/student_handbook/documents/2009-2010%20Student%20Handbook.pdf. )


In “Forward Thinking: Our Strategic Plan for Case Western University, 2008-2013,” http://www.case.edu/stratplan/ForwardThinking0708.pdf, the school emphasizes diversity as the second of
the four university-wide goals. One of the methods emphasized for achieving this goal is to enhance endowments in order to fund scholarships for under-represented undergraduates. These include merit awards and initiatives to help those who come from racial/ethnic minorities, first-generation college students, disabled, and low-income students. (Id.) This suggests that diversity is one of the factors which the school employs in its evaluation of applicants for undergraduate admissions.

Analysis

Many universities employ affirmative action policies by considering diversity as a factor in decisions for college admissions. As the Supreme Court has ruled, diversity may be a positive factor to be considered, but may not be dispositive. As Bakke and Gratz have stipulated, “minority” applicants cannot be insulated from the general applicant pool through the use of quotas and numerical evaluations. There are no indications which would suggest that the major universities in Ohio do this.

Most universities do not explicitly outline affirmative action policies in college admissions. Affirmative action remains a hot-button issue, especially in school admissions. It is worth noting that many schools do not make their policies regarding diversity in the admissions process well-known. On the websites for large schools in Ohio—including Ohio University, University of Cincinnati, Xavier University, and Cleveland State University—diversity is often discussed in relatively vague terms that do not exclusively relate to college admissions. When affirmative action policies are explicitly discussed, it is primarily within the context of employment.

It appears likely that the current state of affirmative action will remain fixed: schools will continue to emphasize the importance of diversity and use it as a factor in their admissions decisions, while withholding more explicit policies considering the use of affirmative action in their decisions.

As evidenced by the drop in the number of African American students at Ohio State following the Grutter decision, it is important to maintain a positive attitude towards affirmative action in order to encourage minority applicants. Schools could possibly accomplish this through placing a stronger emphasis on diversity in admissions materials, and increasing research and publication of reports dealing with the effects and benefits of affirmative action. However, barring any illegal action by university admissions committees, any further state action regarding affirmative action policies in college admissions would seem too preemptive rather than helpful.
Checklist for Determining the Constitutionality of an Affirmative Action Program:

___ Is the policy in pursuit of a compelling state interest, such as a diverse student body?
___ Does the compelling state interest meet the four narrow tailoring requirements?

✓ The program does not use quotas or insulate applicants in any way.
✓ The program has given serious, race-neutral considerations to race-neutral alternatives that would further the same goal.
✓ The program does not cause undue harm to any member outside of the protected racial group.
✓ The program contains sunset provisions in its policies and will undergo periodic review in order to determine whether racial preferences are still necessary to achieve the goal of a diverse student body.

Recommendations for Maintaining Strong Affirmative Action Programs in Ohio

For the State

- In order to gain a better snapshot of diversity in the student body of Ohio schools, the state could issue surveys to collect useful data at each respective school about the number of minority applicants, the number of minority students, retention rates of minority students, and methods of promoting diversity on campus.

- The state could draft legislation that would codify the Constitutional standard listed above and require or encourage admissions policies that promote student body diversity while complying with requirements of law. The State of Ohio could also direct periodic review phases.

For Colleges

- Promoting a positive attitude towards diversity in admissions materials is crucial. This can be accomplished in several ways, including but not limited to: featuring pictures of minority or female students on a school’s website, emphasizing the importance of diversity on brochures and other promotional materials, and clearly outlining affirmative action policies on admissions websites.

- Most colleges have already established an office that deals with diversity issues. These offices act as resources for minority students and research diversity issues on campus.
AFFIRMATIVE ACTION AND OHIO PUBLIC EMPLOYMENT

Overview

Race-preference hiring appears to be fully within the bounds of Ohio Law, with a basis in both the Ohio Revised Code and the Ohio Administrative Code. Chapter 123:1-49 of the Ohio Administrative Code outlines the guidelines for Affirmative Action programs in Ohio State Agencies. This section, promulgated under Chapter 119 of the Ohio Revised Code, mandates that “[e]ach Agency shall establish, maintain, and carry out a continuing Affirmative Action plan designed to promote equal opportunity in every aspect of agency personnel policy and practice.” (OAC § 123:1-49-04). “The head of each agency shall exercise personal leadership in establishing, maintaining, carrying out and evaluating a continuing Affirmative Action Plan designed to promote equal opportunity in every aspect of agency personnel policy and practice in the recruitment, employment, development, advancement, and treatment of employees.” (OAC § 123:1-49-40).

An affirmative action plan is defined, in part, as “a set of specific, result-oriented procedures to which all state agencies must apply every good faith effort. The objective is to insure equal employment opportunities for all persons. A workable affirmative action plan must include an analysis of areas within which the agency is deficient in the hiring and promotion of members of minority groups and women. Each agency must establish goals and timetables to correct these deficiencies and increase materially the opportunities of minorities and women at all levels of state government. There must be identification and analysis of problem areas inherent in minority employment and evaluation of the opportunities for minority group personnel. All barriers, legal or artificial, must be eliminated.” (OAC § 123:1-49-41).

After submission, the Division of Equal Employment Opportunity for State Personnel will review the plan. “If said agency meets its minority and women personnel goals or if the agency can demonstrate
that it has made every good faith effort to meet said goals, the agency shall be presumed to be in compliance with these regulations. Where the Division finds that the agency has failed to comply with the requirements of these regulations and its obligations, the Division shall take such action as may be appropriate.” (OAC § 123:1-49-42). Additional requirements for affirmative action plans can be found at (OAC § 123:1-49-43).

Analysis

The Court of Appeals for the Sixth Circuit recently upheld race-based preferences in hiring state employees in Rutherford v. City of Cleveland. (179 Fed.Appx. 366 C.A.6 (Ohio Jun 01, 2006)). Here, non-minority police officer applicants brought an action against the city and police department, alleging reverse discrimination and disparate treatment due to the city’s race-based plan to advance the hiring and promotion of minority police officers. The court noted, “[i]t is now beyond question that all racial preferences instituted by a government actor - even those actions sanctioned, like here, under a consent decree - must pass strict judicial scrutiny.” (Id. at 373). Further, “[t]o satisfy strict scrutiny, a race-based remedial plan must be narrowly tailored to accomplish a compelling governmental purpose or interest.” (Id.)

A major issue is whether there is a compelling governmental interest in remedying the effects of past discrimination. The court noted it is, but cautioned, “societal discrimination alone is insufficient, though - the city defendants must make ‘some showing of prior discrimination’ on their part to justify the ‘limited use of racial classifications in order to remedy such discrimination.’” (Id. at 374). Further, "[t]he only cases found to present the necessary 'compelling interest' sufficient to 'justify a narrowly tailored race-based remedy' are those that expose ... 'pervasive, systematic, and obstinate discriminatory conduct.’” (Id.) Another 6th Circuit case found that there was no compelling interest for an Affirmative Action Plan because, in part, there had never been a complaint of discrimination lodged against the city, nor had there been any adjudication or formal findings of discrimination against the city in its hiring of officers. (Long v. City of Saginaw., 911 F.2d 1192 (6th Cir. 1990)). The Supreme Court stated, “A public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” (Wygant v. Jackson Bd. of Educ. 476 U.S. 267, 277 (1986)).

These decisions suggest an affirmative action plan to remedy societal discrimination will only be upheld if the state can show instances of previous discrimination. A survey of case law shows the affirmative action plans that were upheld were done so because of a need to remedy a provable history of discrimination. This might prove troublesome if state agencies are unable to show they discriminated in the past.

In the event that the state cannot show a history of discrimination, an affirmative action plan can still be valid if the state can make a prima facie case of discrimination using statistical disparities. The Rutherford court stated, “While evidence of ‘mere statistical disparities’ is not enough by itself to show a compelling interest, a prima facie case of discrimination can be made where ‘a gross disparity exists between the expected percentage of minorities selected [for hire] and the actual percentage of minorities selected [for hire].’” (Id. at 376). The court looked at statistics back to the 1970s, suggesting state agencies can also look back that far in compiling statistics.
One final factor going against the state plan is that there is no indication that the race-based hiring practices will end. The Rutherford court indicated, “Courts view with disfavor those affirmative action plans that are not temporary and do not terminate when the identified racial imbalances have been eliminated.” (Id. at 380).
Checklist for Affirmative Action Programs in State Agencies

___ Has the head of the agency established and promulgated an affirmative action program under OAC § 123:1-49-03?

___ Has the head of the agency appointed an Affirmative Action Executive under OAC § 123:1-49-03?

___ Has the agency established, maintained, and carried out a continuing Affirmative Action Plan designed to promote equal opportunity in every aspect of agency personnel policy and practice under OAC § 123:1-49-04?

___ Is this a proper affirmative action program under OAC § 123:1-49-05?

  ✓ The agency periodically appraises its personnel operations to ensure conformity.
  ✓ The Affirmative Action Executive advises the head of the agency with respect to the affirmative action plan.
  ✓ The Executive evaluates from time to time the sufficiency of the program and reports findings to the head of the agency.
  ✓ The Executive evaluates tests, employment policies, practices and qualifications and reports to the head of the agency and to the State Employees EEO Coordinator any such policies, practices and qualifications which have unequal impact on minorities and women.
  ✓ The agency submits annually for the review and approval of the Division of Equal Employment Opportunity for State Personnel written equal employment opportunity plans of action.

___ Is this a proper affirmative action plan under OAC § 123:1-49-41 and OAC § 123:1-49-43?

  ✓ It includes an analysis of areas within which the agency is deficient in the hiring and promotion of members of minority groups and women.
  ✓ It establishes goals and timetables to correct these deficiencies and increases materially the opportunities of minorities and women at all levels of state government.
  ✓ It includes a statistical evaluation of the agency’s work force and information regarding the labor market composition.

Recommendations for Maintaining Affirmative Action Programs in Public Employment

While there is no case expressly going against the affirmative action plans found in the Ohio Administrative Code, recent history shows a court might be unwilling to allow race-preference hiring without a showing of past discrimination. Courts are increasingly unwilling to allow race-preference decisions based simply on a desire to achieve racial equality. To ensure staying within the bounds of the constitution, the state should:

- Be prepared to show that it has a history of racial discrimination in its agencies or compile statistics to show a prima facie case of discrimination.
• Include some kind of sunset provision to show courts that the program will not go on forever.
• Periodically survey the program in order to determine if the program is still necessary.
• Favor race-based hiring as opposed to race-based promotions because the latter involves direct harm to identifiable individuals.
CONTRACT SET ASIDES FOR MINORITY OWNED BUSINESSES

Overview

Setting aside money for particular groups is a legal alternative to employment based affirmative action. Using this method allows the state to divert funds in a perfectly constitutional way to a group with a history of being discriminated against—minority owned businesses.

Legal History

In 1980, the Ohio General Assembly passed the Minority Business Enterprise Act (MBEA), which required five percent of all state constructed projects to be set aside, by value, for bidding by certified minority owned businesses. (ORC § 123.151 (C)(1)). In addition, the MBEA required every contractor awarded a contract to make “every effort to ensure that certified minority-business subcontractors and materialmen participate in the contract.” (ORC § 123.11(C)(2)(a)). The MBEA also required that approximately fifteen percent of the estimated total value of all State contracts for purchasing of equipment, materials, supplies, or contracts for the purchase of insurance be selected and set aside for bidding by minority businesses only. (ORC§ 125.081(A)).

Overruling a 1982 decision in the Southern District of Ohio, the Sixth Circuit Court of Appeals held that the MBEA was constitutional under the equal protection clause of the Fourteenth Amendment. (See Ohio Contractors Ass’n v. Keip, 713 F.2d 167 (6th Cir.1983)). The court held that the Ohio General Assembly was competent to identify past discriminatory practices that would justify the remedial scheme at issue. In addition, the court found that the remedial scheme at issue was sufficiently narrow in scope to satisfy narrow tailoring requirements under Fullilove v. Klutznick. (448 U.S. 448, 480 (1980)).
Specifically, the court held that the plan chosen by the state legislature was “reasonably calculated to promote greater participation by minorities in business with the state and did not unduly limit the opportunities of non-minority businesses.” (Keip, at 175).

In 2000, the Sixth Circuit Court of Appeals reversed its decision in Keip and struck down the MBEA under the heightened standard of review announced by the United States Supreme Court in City of Richmond v. J.A. Croson Co., (488 U.S. 469 (1989)) and Adarand, (515 U.S. 200 (1987)). (See Associated Gen’l Contractors of Ohio Inc. v. Drabik, 214 F.3d 730 (2000)).

The court cited four specific defects. First, the court found that the evidence presented by the Ohio General Assembly in support of the MBEA was outdated. The most recent studies cited in support of the act were conducted in the mid-1970s, evidence which is “too remote” in time to continue to justify a compelling governmental interest in remediating past discrimination. (Id. at 735, citing Brunet v. City of Columbus, 1 F.3d 390, 409 (6th Cir.1993)).

Secondly, the court found that most of the evidence provided in support of the act consisted of data showing a statistical underrepresentation of particular minority groups in the percentage of contracts awarded. The court noted that the state did show statistical evidence comparing the percentage of contracts awarded to minorities to the percentage of minority-owned businesses, and thus made a stronger statistical showing than the statistics in Croson, which made a comparison only to the general population.

However, the court still found that the state’s statistical showing was insufficient on the grounds that it did not take into account the number of such businesses that were construction companies, and not simply minority-owned businesses in general.

Third, the court found that the statistical showing did not demonstrate that the minority-owned businesses were qualified, willing, and able to perform the state construction contracts at the time that the bidding occurred. (Id. at 736). The court indicated that the state must show that the minority-owned business must be capable of performing the work in question in drawing a statistical comparison.

The court rejected the state’s request for a continuance to enhance the relevant evidence to make these particular showings. Finally, the court found that the MBEA was not sufficiently tailored on the grounds that the historical record demonstrated no consideration of race-neutral alternatives, and that the MBEA inappropriately lumped together several racial groups, two of which were ambiguous in their exact designations.

The Ohio Supreme Court unanimously upheld the procurement provisions of the MBEA a year earlier. (See Ricci Produce Co. Inc. v. St. of Oh. Dept. of Adm. Services, 85 Ohio St.3d 194 (1999)).

After a thorough review of United States Supreme Court jurisprudence under the Fourteenth Amendment, including a careful parsing of Croson and Adarand, the Ohio Supreme Court held that MBEA provision regarding state procurement contracting constituted a compelling government interest in remediating past discrimination, and that the act was sufficiently narrowly tailored to withstand constitutional muster.
Specifically, the court cites the legislative testimony and statistical evidence gathered by the Assembly and concludes that it had a “strong basis in evidence” for finding that “remedial action was necessary to ameliorate the effects of identified racial discrimination in which the state itself had either actively or passively participated.” (Id. at 261). In addition, the court carefully specifies the differences between the case at bar and deficiencies identified in *Crosan*. Most poignantly, the United States Supreme Court cited *Keip* twice in *Crosan* to illustrate the kinds of evidence and other predicate facts that would support a finding of a pattern of discriminatory conduct that would justify an MBE set-aside program.

**Executive and Legislative Branch Response**

**Changes to MBEA**

Due to the constitutional challenges, Governor Voinovich suspended the MBEA program in 1998. After the *Ricci* and *Drabik* decisions were announced, Governor Taft reinstated the procurement set asides of the MBEA and signed Executive Order 2000-03T. This order sought to clear up any confusion regarding the MBEA program’s constitutionality, and exempted construction contracting from the 15% set aside, consistent with the Sixth Circuit’s opinion in *Drabik*. The current MBEA was amended to reflect these changes, and it only calls for the procurement set aside.

**The EDGE Program**

In 2002, Governor Taft established the EDGE Program through Executive Order 2002-17T. The EDGE Program, codified as ORC § 123.152, orders the Director of Administrative Services to establish agency procurement goals for contracting with EDGE business enterprises in the award of certain contracts based on the availability of eligible program participants by region or geographic area, as determined by the director, and by standard industrial code or equivalent code classification. EDGE’s current goal is that 5 percent of eligible goods, services, and construction be placed with suppliers and contractors that have been certified by the State as EDGE business enterprises (EBE). Former "set-aside" suppliers are automatically grandfathered into this program until such times as they are recertified.

Under the EDGE legislation, a business may be designated as an EBE by showing both social and economic disadvantage. Economic disadvantage is based on the relative wealth of the business seeking certification as well as the personal wealth of the owner. Membership in a minority group or personal disadvantage due to color, ethnic origin, gender, physical disability, long term residence in an isolated environment, or location in a high unemployment area prompts a rebuttable presumption of social disadvantage.

Otherwise, social disadvantage is determined by business placement in a qualified census tract or demonstration of personal disadvantage not common to other small businesses. This definition is broader than the MBEA program in that minority status is one of a group of factors to be considered in determining social disadvantage.

**Analysis**

Despite the apparent conflict between the Ohio Supreme Court’s decision in *Ricci* and the Sixth Circuit’s opinion in *Drabik*, the Ohio Supreme Court’s holding in *Ricci* remains good law. Three facts support this conclusion. First, although the Sixth Circuit’s opinion in *Drabik* expressed disagreement with the Ohio
Supreme Court’s decision in *Ricci*, the Sixth Circuit declined to overrule the Ohio Supreme Court’s decision. Secondly, the Ohio Supreme Court specifically limited its holding to the 15 percent purchasing contracts set-aside (procurement) under ORC § 125.081(A). The Sixth Circuit’s opinion did not directly address this provision of the MBEA. Rather, the provision being challenged in *Drabik* was the 5 percent construction contract set-aside. If the Sixth Circuit intended to reverse the Ohio Supreme Court’s opinion in *Ricci*, it could have done so by permanently enjoining the entire statute. Instead, the Sixth Circuit affirmed the District Court’s permanent injunction of the construction set-aside provision without enjoining the entire statute. Third, although the Sixth Circuit opined that its analysis was not reconcilable with the Ohio Supreme Court’s opinion in *Ricci*, this part of the Sixth Circuit’s opinion was dicta, and is not legally binding.
**Checklist for the EDGE Program**

___ Has the Director of Administrative Services established the EDGE business program under ORC § 123.152?

___ Has the Director established agency procurement goals for contracting with EDGE business enterprises in the awarding of contracts under ORC § 123.52?

___ Has the Director established a system to track data and analyze each certification category established under the EDGE program under ORC § 123.52?

___ Has the Director established a system to assist State agencies in identifying and utilizing EDGE business enterprises in their contracting processes under ORC § 123.52?

___ Is the targeted business a legitimate EDGE business enterprise? Is it a sole proprietorship, association, partnership, corporation, limited liability corporation, or joint venture certified as a participant in the EDGE program by the Director under ORC § 123.52?

**Recommendations**

While the State has ceased its MBEA contracting set asides but continues to use MBEA procurement set asides, it appears that the State may be anticipating a challenge to the procurement provisions. The State, as described above, has implemented the race-conscious but not exclusively race-based EDGE program for procurement contracts. EDGE relies on race as one of many factors that would qualify a business for the 15% procurement set aside, a measure that - with the rebuttable presumption provision - may satisfy the concerns highlighted in Drabik.

In addition, the EDGE program requires periodic reevaluation of procurement goals by the Director of Administrative Services. However, even with the changes implemented in the EDGE program, the State would be well advised to:

- Conduct a study and accumulate the statistical evidence that the Sixth Circuit found to be lacking in Drabik. Specifically, collecting and maintaining a database of the MBEs and EBEs and their qualifications, capacity, and workload would not only help support the State in future litigation, but would also provide the legislative foundation for similar statutes which might be enacted in the future.

- Establish standards to determine when an EDGE business enterprise no longer qualifies for EDGE business enterprise certification.
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