



Using Race-Sensitive Approaches in the American Recovery and Reinvestment Act of 2009

What do Equal Opportunity and Race have to do with the American Recovery and Reinvestment Act?

The ongoing investments in the nation's economic recovery have the potential to revitalize not only our economy, but also the American promise of opportunity itself. The American Recovery and Reinvestment Act of 2009 (ARRA) will deliver much needed federal support to states, municipalities, communities, and businesses around the country. The President, Speaker Pelosi, and Majority Leader Reid have all described the Act as intended to create or save millions of jobs while rebuilding our nation's infrastructure, promoting energy independence, and enhancing long-term economic prosperity.

In order to achieve this promise of renewed opportunity, ARRA must also address the disproportionate impact of the economic downturn on people of color and women, groups that are currently or have traditionally been afforded unequal access to the economic benefits created through federal, state, and local contracts. In fact, **federal law requires that federally-funded projects ensure equal opportunity across race and gender** and refrain from disparately impacting any one racial group or gender.¹ However, possible government policies that seek to counteract the disproportionate negative impact of the recession on women and communities of color must operate within the bounds of federal court interpretation of the equal protection provisions of the U.S. Constitution's Fifth and Fourteenth Amendments.

This fact sheet summarizes the U.S. Supreme Court's rulings regarding permissible ways for government to use race as a factor in decision-making, particularly when awarding government contracts. This fact sheet is based on a detailed analysis produced by the ACLU Racial Justice Program.

The Supreme Court has interpreted the equal protection provisions of the Constitution to permit evaluation of government action using gender-based measures according to a more lenient standard than that applicable to race-based measures. As a result, gender-based measures that meet the stricter standards for race-based state and local government action will likely be considered constitutional and permissible by federal courts.

What does the Constitution say about using race in government programs?

Under the equal protection provisions of the U.S. Constitution, no one can be denied equal protection of the law based on their race or gender.² The U.S. Supreme Court has ruled that race is "a group classification long recognized as in most circumstances irrelevant," and therefore requires "strict scrutiny"—that is, a detailed examination by the courts—to guarantee that individual rights to equal protection are not being violated.³

In practice, "strict scrutiny" requires that any government action using race-based classifications must meet two standards: 1) it must seek to address a "compelling governmental interest," and 2) the action must be "narrowly tailored" to achieve its purposes with minimal negative impact on individual rights.

What is a "compelling governmental interest"?

A state or local governmental entity has a compelling interest in using race-based classifications in order to remedy present or past discrimination, even where the government is only a "passive participant" rather than the main actor, "in a system of racial exclusion" practiced by private entities.⁴ Supreme Court Justices have suggested that a state or local government must provide five pieces of evidence to demonstrate that use of race-based classifications is intended to redress or remedy discrimination, or to prevent perpetuation of private sector discrimination:⁵

- 1) **Provide evidence of intentional discrimination by private actors**, such as nonminority contractors, seeking to exclude people of color. A government entity *can* show that there is

discrimination by demonstrating a significant statistical disparity between the number of qualified persons of color willing and able to perform a particular service or participate in a program and the number of such persons actually engaged by the actors contracted to perform that service or run that program. Such statistical evidence needs to be as specific as possible in terms of the industry, service, and locality. However, simply stating that discrimination exists and that the government action is intended to remedy that discrimination *is not* enough.

- 2) **Provide evidence, if available, of a pattern of individual discriminatory acts.** While not required, such evidence of individual discrimination helps justify the need for remedial, race-based action. This evidence may exist in the form of statistics or individual anecdotes.
- 3) **Provide evidence that the government has implemented race-neutral devices** that attempt to increase program or service participation by all disadvantaged persons regardless of race, and that such means were proven ineffective in remedying racial discrimination. For example, in contracting, a state or local government might simplify bidding procedures, increase training and financial aid, and relax credit and bonding requirements.
- 4) **Identify and specify the group facing discrimination** and requiring remedial, race-based government action. For example, in contracting, the government *should* identify the number of contractors of color within the jurisdiction and their level of participation in government-funded contracts. A governmental entity *should not* use the overall proportion of a community of color in the local population as the measure of comparison to the level of participation of people of color in a particular program.
- 5) **Provide evidence that qualified individuals of color have been excluded** or passed over for state or local contracts or participation in other federally-funded programs, either as a group or in any individual case.

How does the government determine a race-based action is “narrowly tailored”?

The U.S. Supreme Court has interpreted the Constitution to require that any race-based governmental action be “narrowly tailored” to remedy discrimination so it does not unnecessarily infringe on individual rights to equal protection. An action must meet five requirements to be considered “narrowly tailored”:⁶

- 1) **Consider race-neutral alternatives** to race-based preferences in policies
- 2) **Be more than a mere promotion of “racial balancing”**
- 3) **Be based on the number of persons of color in the area qualified** for the program or service
- 4) **Not require numerical quotas**, but instead permit action on a case-by-case basis
- 5) **Not be overinclusive by presuming discrimination** against any particular community of color

Where can state and local governments go for this kind of evidence?

Much of the statistical evidence that can help show disparities or patterns of discrimination—thereby helping to justify race-based remedial action—already exists and is being collected by the federal government. For example, the Equal Employment Opportunity Commission collects “EEO1” data that tracks the representation of people of color in every industry across every metropolitan area in the United States. For more information on how to comply with equal opportunity requirements without running afoul of the limits imposed by the courts, contact the Office of Civil Rights of the federal agency responsible for the particular ARRA project under consideration.

¹ *E.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*

² U.S. Const., amend. 14, § 1.

³ *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (emphasis and internal quotation marks omitted). (1995)

⁴ *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899, 902, 909 (1996).

⁵ *Croson*, 488 U.S. at 509-510 (plurality opinion).

⁶ *Adarand I*, 515 U.S. at 237 (citing *Croson*, 488 U.S. at 507-8).