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Narrow Tailoring

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INTRODUCTION

Since the Supreme Court announced in *Adarand Constructors, Inc. v. Pena*[1] that federal affirmative action programs will be subject to "strict scrutiny,"[2] a debate has reemerged over what constitutes a compelling government interest for classifications that favor traditionally disadvantaged

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1. 115 S. Ct. 2097 (1995).

2. Strict scrutiny analysis has two prongs. The government must show (1) a "compelling purpose" and (2) that the means chosen to accomplish that purpose are "narrowly tailored." *Adarand*, 115 S. Ct. at 2113.

races.[3] This Essay, however, does not address this interesting and vital issue. It instead focuses on the second prong of strict scrutiny analysis: the requirement that racial classifications "must be narrowly tailored" to further the compelling government interest at stake.

While many people believe that the government never has a compelling interest to use racial classifications, for the purposes of this Essay I ask the reader to accept the holdings of both *Adarand* and *City of Richmond v. J.A. Croson Co.*[4] that remedying past discrimination can constitute such a compelling interest.[5] Specifically, imagine that the Department of Transportation could show that past and present disparate treatment by private and public actors has caused the market share of qualified minority guardrail contractors to be substantially below what it would be without discrimination.[6] Assuming that a federal court found sufficient evidence to

3. For example, Justice Thomas in his *Adarand* concurrence suggested that the government would never have a compelling interest to enact a racial classification. Akhil Amar and Neal Kumar Katyal, however, argue in this Symposium that Justice Powell's holding in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)—that promoting diversity in education might constitute a compelling governmental interest under the strict scrutiny standard—is still good law. Akhil Reed Amar & Neal Kumar Katyal, Bakke's *Fate*, 43 UCLA L. REV. 1745 (1996). *But see* Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996) (holding that the diversity rationale is not a compelling government interest).

While affirmative action programs often create preferences for women, the constitutionality of such programs is not herein considered. Sex classifications need not satisfy the dual requirements of strict scrutiny. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (under intermediate scrutiny, classification need only be substantially related to important governmental objectives). Consequently, legislatures may find that they cannot engage in racial affirmative action, but that they can pursue affirmative action on the basis of gender. Judge Kozinski, for example, in reviewing a San Francisco program, struck down racial preferences but rejected a facial attack on preferences for women, finding such preferences valid under the Equal Protection Clause. Associated Gen. Contractors of Cal., Inc. v. City of S.F., 813 F.2d 922 (9th Cir. 1987). There are several indications, especially from Justice O'Connor, however, that gender preferences might be subjected to strict scrutiny or something very close to it. In *City of Richmond v. J.A. Croson Co.*, Justice O'Connor referred to "the close examination . . . we have engaged in when reviewing classifications based either on race or gender." 488 U.S. 469, 495 (1989). This is consistent with her concurrence in *Wygant v. Jackson Bd. Of Education*, where she intimated that strict and intermediate scrutiny were not so different. 476 U.S. 267, 286–87 (1986); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (sex discrimination demands "'an exceedingly persuasive justification'" (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981))).

4. 488 U.S. 469 (1989).

5. In *Adarand*, Justice O'Connor emphasized:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.

115 S. Ct. at 2117.

6. By assuming both past and present discrimination by both private and public actors, I am intentionally attempting to conflate important issues of what constitutes a sufficient predicate for establishing the government's compelling interest. *See, e.g.*, *infra* text accompanying note 26 (discussing types of past and present discrimination that might justify affirmative subsidies to

demonstrate a compelling government interest to increase minority participation,[7] this Essay considers what types of affirmative action programs would satisfy the narrow tailoring requirement.[8]

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increase minority participation). *Croson* made clear, however, that government "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment":

> It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. . . . [I]f the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.

Croson, 488 U.S. at 491–92 (footnotes omitted). The possibility that remedying private discrimination within an industry could be a compelling government interest might substantially expand the scope for affirmative action because disparate treatment against minority workers and applicants is likely to be more prevalent in the private than the public sector.

It is unclear, however, how far the government might go in trying to remedy private discrimination. If minorities, absent discrimination, would control 10% of both private and public construction contracts, the government might argue that 15% of its construction jobs need to go to minorities to compensate for private discrimination (which holds the minority market share of the private market to only 3%). Alternatively, the court might hold that government cannot seek a public market share that is greater than what the share would be in the absence of public and private discrimination. This latter interpretation would be especially likely if the court held only private discrimination that affected public decisionmaking—such as a private certification process improperly disqualifying minority contractors from bidding on government projects—constituted a sufficient basis for remedial action.

7. Assuming the government could have a compelling interest to increase minority participation as a remedy for past discrimination is also controversial, as Drew Days has observed:

> [Some critics of affirmative action] are willing to allow the explicit use of race only in situations where "identifiable victims" of discrimination are compensated. The definition of "identifiable victims," however, is often so narrow that it leaves most blacks, as a class, without redress for the harms that this society has caused them.

Drew S. Days, III, Fullilove, 96 YALE L.J. 453, 457 (1987) (footnote omitted). While requiring individual beneficiaries to establish that they were the identifiable victims of discrimination might easily be comprehended by a version of the narrow tailoring principle, I assume that a showing of disparate treatment by private and government actors (which cannot be remedied merely by prospectively prohibiting discrimination, *see supra* note 6) is sufficient to justify a government motive to increase minority participation. *See* Geier v. Alexander, 593 F. Supp. 1263, 1265 (M.D. Tenn. 1984), *aff'd*, 801 F.2d 799 (6th Cir. 1986) (rejecting argument of the Reagan Justice Department that the school desegregation remedy of a special "pre-enrollment" program for 75 black college sophomores is unconstitutional because the 75 black students who stood to benefit were not "actual victims" of discrimination).

8. This Essay does not address what would satisfy the narrow tailoring requirements when the government's compelling interest is based on the educational benefits of a diverse student and/or faculty community. Extracting narrow tailoring requirements that support one type of compelling interest and applying them in other contexts is dangerous. For example, Justice Powell's insistence in *Bakke* that race be one of several preferential characteristics may make sense when the compelling interest is to be achieved through diversity, but narrow tailoring does not mandate the inclusion of nonracial preference categories when the compelling interest is remedying past discrimination.

Two criticisms of the Supreme Court's narrow tailoring approach in *Adarand* and *Croson* form my central thesis:

1. The Court's preference for "race-neutral means to increase minority participation" is inconsistent with narrow tailoring and may not be a less restrictive alternative than explicit racial classifications. Extending affirmative action subsidies to non-victim whites produces less-tailored, over-inclusive programs. And because both race-neutral and explicitly racial means share the same race-conscious motivation of remedying past discrimination, it is not clear that race-neutral means represent a less restrictive alternative.
2. The Court's (and others') antipathy for quotas is overstated. Quotas may be more narrowly tailored to achieve the government's remedial interest than many racial preferences. While quotas are imperfectly tailored because they mandate an inflexible level of minority participation, bidding credits (and other preferences) may be poorly tailored because they induce *too much uncertainty and volatility* in minority participation. More narrowly tailored programs will exhibit a "sliding scale" of racial preferences in which the size of the preference will vary inversely with the degree of successful minority participation in the program. Under a narrowly tailored program, the farther minority participation falls below what it would be in the absence of discrimination, the larger the racial preference government might legitimately confer.[9]

Together, these criticisms suggest that when the government has a compelling interest to remedy past discrimination, the narrow tailoring principle should not bar racial classifications that tailor the size of the preference to the remedial need.

Sliding-scale preferences may come close to setting aside a minimum quota of contracts for minority bidders,[10] but this Essay will show that such quasi-quotas (for *fractions* of the legitimate remedial goal) are consistent with narrow tailoring when dramatic shortfalls in minority participation would undermine the government's remedial effort. For example, in an industry where the government has a legitimate interest in increasing

9. Under this sliding-scale approach, for example, minorities might be granted a 25% bidding credit for one-third of the procurement contracts, a 15% bidding credit for an additional third of the contracts, and no bidding credit for the remaining third. How to implement a sliding scale is discussed *infra* at notes 102–103.

10. For example, the FCC granted minority- and female-controlled firms 50% bidding credits for one-eighth of the licenses auctioned in recent paging auctions; these substantial credits effectively set aside these licenses for the designated entities. *See* Ian Ayres & Peter Cramton, *Pursuing Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 STAN. L. REV. (forthcoming 1996).

minority participation to thirty percent (what it would be absent discrimination), the government might find that allowing minority participation to fall below five percent would affect the long-term viability of all minority business. Under such circumstances, the government might be justified under the narrow tailoring principle in granting substantial bidding credits for five percent of government contracts, effectively guaranteeing that at least five percent will go to minorities.

Quasi-quotas might satisfy the narrow tailoring requirement for four reasons:

> (1) Unlike an absolute quota, a quasi-quota, by assuring a minimum level of minority cost-effectiveness, would at least to a small degree tailor the level of participation to the strength of minority applicants.
>
> (2) A quasi-quota would only be appropriate if the government found that shortfalls in participation below some minimum level would seriously undermine the government's remedial effort. In such circumstances, a quasi-quota would be better tailored because it would cause decisionmakers to internalize the true social costs of dramatic shortfalls in minority participation.
>
> (3) Because a quasi-quota would only set aside a fraction of the government's legitimate remedial goal, it would impose a smaller burden on the interests of non-beneficiaries.
>
> (4) Effectively granting minority enterprises guarantees of minimum participation can increase the quality of minority participants—so as to reduce the disparity between minority and non-minority recipients.[11]

In sum, the Court's distaste for explicitly race-based remedial programs, particularly programs with quota-like attributes, cannot be adequately justified by resort to the narrow tailoring principle.

The first two sections of this Essay explore dichotomous choices that policymakers face in designing an affirmative action program: whether the preference should be explicitly racial; and, if so, whether the preference should take the form of a quota or credit. In contrast to the top-down reasoning of these sections, the last section then briefly surveys current affirmative action programs and current evidence of past discrimination to consider what types of programs satisfy the narrow tailoring requirement.

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11. Just as a university can stimulate the strength of minority applications by guaranteeing a critical mass of admitted minorities, effectively guaranteeing a minimum amount of minority contracting may stimulate sufficient minority participation to bid away the effects of a substantial racial credit. *See infra* notes 88–89 and accompanying text.

I. WHEN DOES NARROW TAILORING MANDATE RACE-NEUTRAL MEANS?

The idea that a remedy needs to be tailored to further the government's legitimate interest is unexceptional—and is captured by the idea that remedial classifications should not be too overinclusive or underinclusive.[12] In considering the validity of affirmative action remedies for past discrimination, the Supreme Court's primary concern has been overinclusion; that is, giving affirmative action preferences to people who were not affected by past discrimination.[13] For example, in *Croson*, Justice O'Connor challenged the inclusion of nonblack minorities in Richmond's affirmative action plan:

> There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen. . . .
>
> If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.[14]

This represents a straightforward application of the narrow tailoring principal: The Richmond preferences were not narrowly tailored to remedy past discrimination because some of the beneficiaries were not victims of past discrimination.

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12. The underinclusiveness or overinclusiveness of a classification may be so severe that it cannot be said that the legislative distinction "rationally furthers" the posited state interest. *See* Nordlinger v. Hahn, 505 U.S. 1, 35 (1992) (Stevens, J., dissenting); Jimenez v. Weinberger, 417 U.S. 628, 636–37 (1974). With regard to suspect classifications, the requirement has been discussed in Fullilove v. Klutznick, 448 U.S. 448, 486–87 (1980) (warning of "deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications"). "[T]he [Minority Business Enterprise] provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress . . . ." *Id.* at 487; *see also Croson*, 488 U.S. at 488–89; Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

13. As a theoretical matter, one might also conclude that an underinclusive program is not narrowly tailored if victims of discrimination are arbitrarily excluded from the affirmative action preferences.

14. *Croson*, 488 U.S. at 506.

After this plausible beginning, however, *Croson* uses narrow tailoring as a reason for "the use of race-neutral means to increase minority business participation."[15] Just two paragraphs later, Justice O'Connor argues that the racial preferences were not narrowly tailored because the Richmond City Council did not consider a variety of race-neutral subsidies, including small business preferences, reduced bond requirements, and "training and financial aid for disadvantaged entrepreneurs of all races."[16] In essence, before implementing a racial classification, *Croson* requires policymakers to find that race-neutral means could not achieve the government's compelling interest.[17]

The problem with this requirement is that the "overinclusion" version of narrow tailoring, if anything, points away from race-neutral subsidies. If preferring the minuscule number of Aleuts in Richmond is "grossly overinclusive," then extending preferences to a much larger class of whites a fortiori would fail the narrow tailoring requirement. Whites, even more than Aleuts, are not the victims of race discrimination. Narrowly tailoring the beneficiary class for remedial subsidies so that it will not be overinclusive necessitates explicit racial classifications.

A simple way to resolve this apparent tension would be to admit that race-neutral subsidies (for, say, small businesses) are overinclusive in ways inconsistent with narrow tailoring, but to point out that race-neutral classifications are not subject to the narrow tailoring requirement. This solution, however, is not satisfactory. As emphasized below,[18] Justice O'Connor is recommending "the use of race-neutral means *to increase minority business participation*."[19] While legislatures could have a variety of motivations to pass small business subsidies that would not give rise to strict scrutiny, the purpose of "increas[ing] minority participation" triggers strict scrutiny and the narrow tailoring requirement.

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15. *Id.* at 507.

16. *Id.* at 507, 510.

17. *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) ("'[Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense.'" (alteration in original) (quoting Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975))); Days, *supra* note 7, at 483 ("I can see no good reason to require government agencies in this position to experiment with remedies that do not involve explicit racial classifications if these remedies offer no likelihood of success. Agencies should, however, demonstrate that these lesser alternatives were systematically and thoroughly explored prior to being rejected.").

18. *See infra* note 32 and accompanying text.

19. *Croson*, 488 U.S. at 507 (emphasis added).

Still, Justice O'Connor's inclination toward race-neutral means might be squared with another version of the narrow tailoring principle. In *Regents of the University of California v. Bakke*,[20] Justice Brennan noted that "a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no *less restrictive alternative* is available."[21] When applied to racial classifications, this principle seems to require the government to achieve its compelling remedial interest in the way that least restricts or burdens the fundamental rights of the program's nonbeneficiaries.[22] Justice Powell in *Bakke* noted:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. . . . [T]he remedial action usually remains subject to continuing oversight to assure that it work *the least harm possible to other innocent persons competing for the benefit.*[23]

In a footnote in *Wygant v. Jackson Board of Education*,[24] the Supreme Court described the "less restrictive alternative" requirement as being a subpart of narrow tailoring:

> The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of

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20. 438 U.S. 265 (1978).

21. *Id.* at 357 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (footnote omitted) (emphasis added).

22. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 596 (1990) (stating that "we do not believe that the minority ownership policies at issue impose impermissible burdens on nonminorities"), *overruled in part by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); *Croson*, 488 U.S. at 549 (arguing that Richmond's initiative "impose[d] only a diffuse burden on nonminority competitors") (Marshall, J., dissenting); *Wygant*, 476 U.S. at 282 (stating that the "actual burden shouldered by non-minority firms is relatively light" (internal quotation marks omitted)).

23. *Bakke*, 438 U.S. at 307–08 (citations omitted) (emphasis added).

24. 476 U.S. 267 (1986).

> whether lawful alternative and less restrictive means could have been used.[25]

Whether viewed as an independent requirement or as a subpart of narrow tailoring, this "less restrictive alternative" principle conflicts with the principle that affirmative action preferences be narrowly tailored to victims of discrimination: Narrow tailoring of subsidies to the victim class requires racial classifications that exclude non-victim whites from the remedial subsidy, while the Supreme Court—via something like the "least restrictive alternative" principle—disfavors such classifications.

To resolve this doctrinal conflict, it is useful to articulate what larger purposes the narrow tailoring and least restrictive alternative principles are meant to serve.[26] Although stated in a variety of somewhat amorphous ways, several commentators have suggested that the purpose of strict scrutiny is to limit the racial divisiveness caused by remedial efforts.[27] Aspects of both the narrow tailoring and less restrictive alternative requirements can be squared with this meta-purpose: Granting government benefits to minorities that were not the victims of past discrimination smacks of the

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25. *Id.* at 280 n.6. This "less restrictive alternative" requirement can be shoe-horned into the category of narrow tailoring as a requirement to narrowly tailor the burdens of affirmative action. Justice O'Connor's Aleut analysis in *Croson*, *see supra* note 14 and accompanying text, is consistent with an attempt to narrowly tailor the benefits to the victim class. But tailoring the burden might also intimate that costs of affirmative action subsidies should only be borne by the class of those who discriminated or those who benefited from discrimination. Justice O'Connor's approach of race-neutral subsidies paid for by taxpayers generally forces "innocent individuals" to bear the burden of racial preferences and does not attempt to tailor the costs so that they are borne by non-innocents.

Narrow tailoring of the costs has proven to be politically, if not empirically, infeasible. Instead of narrow tailoring, the Supreme Court's approach in *Bakke* (and in the Title VII cases reviewing private affirmative action) is to require that the burdens of remedial racial preferences be distributed broadly. Distributing the costs of affirmative action broadly does not constitute "narrow tailoring" of costs, but it might be *more* tailored distribution of the costs than unduly trammeling the interests of a discrete group of "innocent individuals." As an empirical matter, focusing the burden of procurement affirmative action on incumbent non-minority firms might be a narrower tailoring of the burdens to the class of people who have benefited from past discrimination (than distributing burdens among the general population).

26. Analysis of doctrinal categories when disconnected from their purposes may become rather hollow manipulations. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); RICHARD A. POSNER, OVERCOMING LAW (1995).

27. Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1949 n.88 (1996) ("[R]ace-based affirmative action might serve to inflame race-consciousness and . . . should be regarded as a 'suspect' policy that should not be implemented in the absence of strong, even compelling justification.").

illegitimate interest group politics that strict scrutiny was meant to "smoke out." And, superficially at least, race-neutral classifications seem less likely to provoke the kind of racial enmity that would itself undermine the remedial purpose of the legislative action.[28] This possibility might provide a rationale for the least restrictive alternative requirement to take priority over the requirement that the beneficiary class not be grossly overinclusive. The Constitution might tolerate or even require an overinclusive class of beneficiaries if a race-neutral proxy were less likely to inflame further prejudice and divisiveness.

This constitutional preference for race-neutral means is strongest when considering simple mandates for race-blind decisionmaking. If merely enjoining disparate treatment (by government and private actors) could adequately remedy past and current discrimination, this type of injunction would clearly be less restrictive—especially judged by the meta-purpose of minimizing racial division—than explicit racial classifications. But in *Croson*, Justice O'Connor implicitly acknowledged that remedying past and current discrimination may require more than merely prohibiting prospective disparate treatment.[29] When *Croson* declares a preference for race-neutral means, it is contemplating *affirmative* subsidies—including training, bond and financial subsidies for small or disadvantaged entrepreneurs—that the legislature would not grant absent its desire to remedy past (and possibly ongoing) disparate treatment.[30] Unlike the simpler mandates to end disparate treatment, *Croson* takes on the harder task of comparing two different kinds of "affirmative" remedies, which by hypothesis are only enacted because of the government's race conscious efforts to remedy past discrimination.

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28. *Cf.* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (busing may be race-neutral but still faces great opposition).

29. The government may not be able to induce adequate compliance with such a non-discrimination decree, and even if it could, the vestiges of past discrimination may have left minorities with shortfalls in access to financial, physical, and human capital that might lead to long-term disparities in economic participation.

30. If government in the past had originally increased the bond requirement *because of* its likely disparate effect on minority entrepreneurs, it would not be an affirmative subsidy to reduce the bond requirement to where it would be in the absence of discrimination. What I am calling "affirmative" remedies are those that require the government or a private actor to allocate benefits other than it would if it were colorblind. Race-neutral remedies that merely seek decision-making that does not take race into account (such as prohibiting prospective disparate treatment or reducing bond requirement to where they would have been in the absence of prior race consciousness) would be constitutionally preferable to explicit racial subsidies, if such race-neutral remedies by themselves could be effective in remedying past and present discrimination.

The point here is not merely that the preference for race-neutral subsidies contradicts the overinclusiveness prohibition,[31] but to take on the idea that race-neutral subsidies are less restrictive alternatives—or in some sense less of a burden on constitutional norms concerning racial divisiveness.

Properly understood, the Court's idea of "race-neutral means" is not necessarily less restrictive than affirmative action programs with explicit racial classifications. The central problem is that the race-neutral means still have a race-conscious motivation. The key phrase from *Croson*, which is quoted again in *Adarand*, is the admonition that policymakers must consider "the use of race-neutral *means to increase minority business participation.*"[32] The Court is still counseling legislatures to engage in race-conscious decisionmaking—to enact certain subsidies because of the race of the beneficiaries. And, of course, the Court cannot avoid this causal connection: Any race-neutral program attempting to remedy past racial discrimination would necessarily have a motive to benefit the victimized race. After *Washington v. Davis*,[33] it would seem that citizens' core equal protection interest is in being free from the effects of racially motivated legislative action.[34] Thus understood, the Court's preference for "facially-neutral, but racially-motivated" programs cannot sidestep strict scrutiny analysis.[35] Justice Scalia has argued that the legislature's motive in granting such

31. If this were the only problem with the Court's approach, it might simply admit that something like an overinclusion prohibition was subordinate to something like a "less restrictive alternative" requirement.

32. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (emphasis added), *quoted in* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118 (1995).

33. 426 U.S. 229 (1976).

34. One might try to reframe the fundamental right at stake as a right not to be denied government benefits because of one's own race—and then argue that explicit racial classifications burden this right more than "racially-motivated, but facially-neutral" classifications. This reframing, however, fails to capture the breadth of the equal protection interest. Specific non-beneficiaries of facially nonracial classification may not be denied benefits because of their individual race, but they are assuredly denied because the race of other citizens (as a class) induced the particular nonracial means. Accordingly, if a legislature levied a special tax on a neighborhood because the population was disproportionately Hispanic, an Anglo resident of the neighborhood, upon showing the legislature's intentional discrimination, should be able to bring a successful equal protection challenge.

35. Even though *Adarand*, in an early parenthetical, claims that "this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose," 115 S. Ct. at 2105, the Court's discussion of race-neutral means presents just these difficulties. The race-neutral means are necessarily "motivated by a racially discriminatory purpose" of benefiting the minority victims of past discrimination.

subsidies is not racially motivated, but is motivated by a desire to remedy past racial discrimination:

> A State can, of course, act "to undo the effects of past discrimination" in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.[36]

This type of hair-splitting should not, however, exempt such decidedly race-conscious legislative activity from strict scrutiny. While there are still nice questions about what degree of legislative race-consciousness rises to the level of "intentional discrimination" for purposes of equal protection analysis, the hypothesized genesis of Justice O'Connor's race-neutral subsidies is sufficient to trigger strict scrutiny. Last term in *Miller v. Johnson*,[37] the Supreme Court, in assessing whether a facially race-neutral districting plan violated the Equal Protection Clause, formulated the following "predominant factor" standard:

> Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. See Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979) ("'Discriminatory' purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects") (footnotes and citation omitted). . . . The plaintiff's burden is to show, either through circumstantial evidence . . . or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision . . . .[38]

The *Adarand/Croson* preference for "race-neutral means to increase minority participation" clearly contemplates legislative action "because of" its effects on minority entrepreneurs. And while it is difficult to clearly specify the

36. *Croson*, 488 U.S. at 526 (Scalia, J., concurring).
37. 115 S. Ct. 2475 (1995).
38. *Id.* at 2488 (citations omitted).

minimum requirement for establishing a "predominant" motivating factor,[39] it should not be difficult to conclude that subsidies fashioned to increase minority participation are predominantly motivated by race. If we intend to subject racially motivated legislation to strict scrutiny, at the end of the day we must still answer which racially motivated means is the least restrictive alternative. And in conducting this analysis, the Supreme Court cannot use legislative motive to distinguish between "explicitly-racial" and "race-neutral" means, because, by hypothesis, they share the same motive.[40]

If one cannot distinguish on the basis of motive or degree of the legislature's race-consciousness, then in what other sense might race-neutral means be less of a burden on constitutional interests? Here I would like to consider two ways in which "racially motivated, but facially neutral" might be "less restrictive"—especially in the sense of inducing less racial divisiveness.

A. The Argument from Opaqueness

First, it could be argued that race-neutral means induce less racial divisiveness because the citizenry is less likely to learn of the legislature's underlying race-conscious motivation. Even if empirically true (or maybe I

39. This adjective seems to require plaintiffs to show that race was more than one of many "but-for" causes for the legislative action, and instead show that race was in some vaguely specified sense *the* "but-for" cause. *Miller*'s predominant factor test itself conflicts with *Adarand*'s consistency principle—"the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." *Adarand*, 115 S. Ct. at 2100 (quoting *Croson*, 488 U.S. at 494). While plaintiffs challenging a redistricting benefitting minorities must show that race was a predominant motivating factor, I imagine that a plaintiff challenging a redistricting that disfavored minorities would only have to show that race played a role in the legislative decision. But see City of Mobile v. Bolden, 446 U.S. 55 (1980), and Rogers v. Lodge, 458 U.S. 613 (1982), in which minority plaintiffs challenging multi-member districting schemes were required to show that race had been a significant motivating factor.

40. The text has focused on the quality of the impact on non-beneficiaries, but one might also argue that explicit racial classifications are likely to have greater quantitative impacts on the non-beneficiaries than racially motivated, but race-neutral classifications. Justice Powell's concern that non-beneficiaries should not be completely insulated from competing for the benefits seems to turn on the degree of the racially motivated preference. But this concern (even if well-justified) should not militate for race-neutral means. A racially motivated set aside, given only to people born in the inner city, might insulate non-beneficiaries from the opportunity to compete just as much as an explicit racial classification. Thus, even if the degree of harm borne by non-beneficiaries militates against quotas and set asides—a subject addressed in the next section—this concern should not inform whether racially motivated remedies should be race-neutral or not.

should say, *especially* if empirically true), this justification provides an extremely weak, if not embarrassing, basis for constitutional decision-making. Preferring race-neutral subsidies because the racial motivation is less visible violates Kant's publicity principle that "[a]ll actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity."[41] While the Supreme Court at times has countenanced legislative or executive secrecy to further compelling government interests,[42] this would be the only time that the Constitution preferred or even required legislative opaqueness.[43]

Indeed, a particularly cynical extension of this argument would infer that the Supreme Court in *Croson/Adarand* was counseling legislatures not to explicitly discuss remedying past discrimination. Under this reading, the Court would in effect be telling legislatures: If you stop talking about remedying past discrimination, we will allow you to pass race-neutral subsidies that disproportionately favor minorities.

Cynical or not, the argument from opaqueness flatly contradicts Justice O'Connor's own classic statement of the process justification for strict scrutiny:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are

41. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995) (quoting a slightly altered translation of IMMANUEL KANT, KANT'S POLITICAL WRITINGS 126 (Hans Reiss ed. & H.B. Nisbet trans., 1970)).

42. As David Luban cogently explains:

> Th[e] publicity principle lies at the core of democratic political morality. Although the principle has exceptions because political morality cannot dispense with all forms of secrecy and confidentiality, these exceptions are themselves governed by the publicity principle. That is, awarding officials the discretion to keep secrets or grant confidentiality is itself a policy that should be able to withstand public scrutiny.

Id. (footnote omitted); *see also* David Luban, *The Publicity Principle*, *in* THE THEORY OF INSTITUTIONAL DESIGN (Robert E. Goodin ed., 1996).

43. However, as discussed below, another example might be Justice Powell's preference for Harvard's ambiguously defined plus-factor admissions program. *See infra* note 65 and accompanying text.

> in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.[44]

Attempts to shield the citizenry from legislators' race consciousness are bound to shield the Court as well. Whether intended or not, *Adarand* and *Croson* are bound to induce legislatures to conceal their race-conscious decisionmaking behind race-neutral classifications. Perversely, the net effect of these cases may be to subject racially motivated legislation to less scrutiny than under the more lenient *Metro Broadcasting* standard[45] because the Court will have more difficulty determining for which statutes race played a predominant motivating factor. It would be less burdensome to the equal protection rights of non-beneficiaries to force racially motivated policies into the open, where they can be more readily scruti-

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44. *Croson*, 488 U.S. at 493. Justice O'Connor's concern about identifying subsidies that are merely the by-product of racial politics (and are not therefore necessarily connected to a legitimate constitutional interest) might suggest another reason why race-neutral means might be preferable to explicit racial classifications: namely, the possibility that subsidies motivated by "simple racial politics" are more likely to take the form of explicit racial classifications. However, there is little theoretical or empirical reason to think that prohibiting racial classifications would retard impermissible political motivations more than it would permissible remedial motivations. Indeed, lowering the scrutiny for racially motivated subsidies that employ race-neutral proxies may spark an increase in illegitimate interest-group politicking divorced from legitimate remedial concerns.

It should be mentioned, however briefly, that simple racial politics has at times been an essential device for securing remedial relief. The mere fact that a well-organized racial group, such as the NAACP, petitions government by lobbying and casting its own votes for preferential treatment does not by itself indicate whether the preferences are appropriately remedial.

45. In *Metro Broadcasting*, the Court used the less demanding "intermediate level" review, not strict scrutiny, in judging whether congressional action violates the equal protection rights of whites; "[A] congressionally mandated, benign, race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose undue burdens on non-minorities." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 596–97 (1990) (emphasis omitted), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

nized by the courts and by the democratic process.[46] Racially motivated legislation is inherently suspect, but unacknowledged racial motivation by legislatures is all the more worrisome.

B. Avoiding Individual Racial Determinations

The second potential justification deserves more serious consideration. It is possible that race-neutral means induce less racial divisiveness (and are therefore "less restrictive alternatives") because they do not involve the government in individual determinations of race. Justice Stevens first gave voice to this concern in his dissent in *Fullilove v. Klutznick*:

> [T]he very attempt to define with precision a beneficiary's qualifying racial characteristics is *repugnant* to our constitutional ideals. . . . If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reich's Citizenship Law of November 14, 1935 . . . .[47]

Justice Stevens's concern was later echoed and expanded by Justice Kennedy in *Metro Broadcasting, Inc. v. FCC*:[48]

> The Court fails to address the difficulties, both practical and constitutional, with the task of defining members of racial groups that its decision will require. The Commission, for example, has found it necessary to trace an applicant's family history to 1492 to

46. Contrary to *Adarand* and *Croson*, this argument might suggest that the Supreme Court should subject race-neutral classifications to even more intense scrutiny whenever the Court has an inkling that the legislature had an unarticulated racial motive.

The Supreme Court has established "clear statement" rules with regard to some issues of federal preemption. *See* United States v. Lopez, 115 S. Ct. 1624, 1655 (1995) (Stevens, J., dissenting) ("In the absence of a clear statement of congressional design . . . we have refused to interpret ambiguous federal statutes to limit fundamental state legislative prerogatives."); *see also* Gregory v. Ashcroft, 501 U.S. 452, 460–64 (1991). Similarly, the Court might require more forthright statements of race consciousness, so that such legislation would be subject to a truly searching inquiry.

Subjecting facially neutral, but racially motivated statutes to stricter scrutiny might create an "information forcing" effect. *See* Ian Ayres & Robert Gertner, *Filling in Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1032 (1995); Saul Levmore, *Gomorrah to* Ybarra *and More: Overextraction and the Puzzle of Immoderate Group Liability*, 81 VA. L. REV. 1561, 1561–65 (1995).

47. Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1989) (Stevens, J., dissenting) (emphasis added).

48. 497 U.S. 547 (1990).

> conclude that the applicant was "Hispanic" for purposes of a minority tax certificate policy.[49]

Race-neutral means to increase minority participation still force the government to determine the racial characteristics of groups, but do not expose society to the intrusive painful process of defining the race of individual citizens: Determining that a particular neighborhood is predominantly Latino or Anglo may be much easier than determining whether any particular person is Anglo or Latino.[50]

Determinations of race that turn on how individuals label themselves have led in the past to at least a few instances where individuals claimed minority status merely to qualify for an affirmative action benefit.[51] While determining the racial characteristics of larger classes might also turn in part on self-labeling (such as contained in census data), groups would have much greater difficulty coordinating false claims of minority status to qualify for benefits.

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49. *Id.* at 633 n.1 (Kennedy, J., dissenting). While Justice Kennedy's concern with the practical problems of defining race is legitimate, his characterization that the FCC "found it necessary to trace an applicant's family history to 1492 to conclude that the applicant was 'Hispanic'" borders on the disingenuous. *See also* RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 544 (4th ed. 1993) (the Liberman family "qualified as Hispanic because they traced their family to Jews whom the King had expelled from Spain in 1492. If you assume 20 years to a generation, there were over 24 generations from 1492 to the [present]. That means that Mr. Liberman was as closely related to 16,777,216 ancestors."). In the case that Justice Kennedy relies upon, the family's Spanish emigration in 1492 probably played a very small role in the FCC's decision. The FCC found that the firm owners Adolfo Liberman and his sons Jose, Elias, and Julio were "regarded by both themselves and their community as being Hispanic." Their native language was Spanish, which "they still speak a majority of the time." The family members had lived together in Mexico, Guatemala, and Costa Rica before coming to the United States and becoming naturalized citizens. *In re* Storer Broadcasting Co., 87 F.C.C.2d 190, 190 (1981).

50. Analogous arguments about the intrusiveness of making individualized factual inquiries were provided in Walter Dellinger's and Gene B. Sperling's discussion of the rape exception to laws criminalizing abortion:

> With a "rape exception," [a victim would need to] prove that she was "in fact" raped; often a difficult task. Proving rape, though, would only be the beginning. Under the theory of the rape exception, a woman would be entitled to an abortion only if she could also prove that her pregnancy resulted from the rape and not from some other act of sexual intercourse. The privacy sacrifice in such a situation constitutes an additional argument against a statute that limits the permissible grounds for an abortion. Those hostile to all abortions are likely to seek appointment to committees that would decide these questions. In such a case, choice could be replaced by cross-examination.

Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 107 n.82 (1989) (emphasis omitted).

51. *See Taking Advantage: Some Pose as Members of Minority Groups to Promote Careers*, WALL ST. J., Feb. 12, 1991, at A1, A5; *see also* ROTUNDA, *supra* note 49, at 544; Daniel Seligman, *Only in America*, FORTUNE, Jan. 28, 1991, at 107.

Our visceral reaction against laws that define race undergirds a coherent justification for the Supreme Court's preference for race-neutral subsidies. Far from requiring a narrowly tailored class of beneficiaries, the Constitution might require using imprecise (poorly tailored) proxies for racial discrimination. Even if the general populace knows the remedial motivation for the subsidies, race-neutral means might avoid what Justices Stevens and Kennedy consider to be the abhorrent process of determining the race of individuals.

While this provides a coherent justification, it is not ultimately persuasive. Racial classification need not turn on the arcane measures of consanguinity used in the Nuremberg laws,[52] South Africa's Apartheid,[53] or our own Jim Crow regimes.[54] Instead, section 8(d) of the Small Business Act wisely defines "social disadvantage" as being "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to individual qualities."[55] Defining an individual's race from a viewer's perspective at once tailors the definition to the remedial goal of helping those that have been subject to disparate treatment without denying that race is "socially constructed."[56] As Henry Louis Gates has observed: "To declare that race is a trope, is to deny its palpable force in the life of every African American who tries to function every day in a still very racist America."[57] Defining an individual's race by making infer-

52. *See Fullilove*, 448 U.S. at 535 n.5 (Stevens, J., dissenting).

53. *See Metro Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting).

54. *See* Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT. L. REV. 371, 395 (1994) ("The legal definition of a white person in nineteenth-century Virginia required that a person have less than one-fourth African ancestry . . . .").

55. 15 U.S.C. § 637(a)(5) (Supp. 1996).

56. *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994); *see also* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 3 (1996).

57. HENRY LOUIS GATES, JR., LOOSE CANONS: NOTES ON THE CULTURE WARS 147 (1992).

> [To those that suggest that race does not exist], Houston Baker demands that we remember what we might characterize as the "taxi fallacy." Houston, Anthony, and I emerge from the splendid isolation of the Schomberg Library and stand together on the corner of 135th Street and Malcolm X Boulevard attempting to hail a taxi to return to the Yale Club. With the taxis shooting by us as if we did not exist, Anthony and I cry out in perplexity, "But sir, it's only a trope."

Id., *quoted in* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 860 (1995).

And repeated testing in a variety of retail contexts indicates that the taxi example is not merely hypothetical storytelling. *See, e.g.*, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); *Prime Time Live: True Colors* (ABC television broadcast, Nov. 26, 1992) (filming discrimination faced by a well-dressed African

ences (or possibly requiring evidence) about whether she was exposed to disparate treatment should not raise the same constitutional concerns.

As an empirical matter, the vast majority of people claiming affirmative action subsidies on the basis of self-reported minority status are bona fide under this standard in that they have been subjected to systematic disparate treatment because of their perceived minority status.[58] While hard cases of fraudulent or undeserving claims of minority status exist, they are by comparison statistical aberrations. The current stability of racial identity is empirically contingent,[59] but the difficulty posed by making determinations in hypothetical cases is not a sufficient "case in controversy" to justify the Supreme Court's strong preference for race-neutral means.

In sum, avoiding individual determinations of race represents the strongest justification for preferring race-neutral subsidies, but such a gain comes at the certain expense of poorer tailoring and the very probable expense of less-candid lawmaking and, therefore, less-exacting scrutiny. Richard Fallon notes in his contribution to this Symposium:

> [I]t is at least oddly disparate to maintain, on the one hand, that explicitly race-conscious reasoning is permissible in justifying an economically based affirmative action program, but to insist, on the other, that race-consciousness is an evil that may not be reflected in an affirmative action program's distributive criteria.[60]

This section has attempted to unpack this odd disparity. When the government's compelling interest is to remedy racial discrimination, the overinclusion prohibition of *Croson* inescapably points toward explicit racial classifications. Although the Supreme Court seems to have a "least restrictive alternative" principle behind its preference for race-neutral means, this section has shown that, properly understood, explicit racial classifications

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American in dealing with a landlord and several retail merchants). *See generally* ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS (1993) (describing the pervasive discrimination encountered by middle-class African Americans).

58. To personally verify this admittedly unsupported assertion, ask yourself how many of the self-identified minority students at your own school have not been exposed to unfavorable disparate treatment because of their perceived race.

59. *See* Jane Gross, *Identity Key Issue of New Multiracial Movement; Diversity: Growing Mixed-Race Population Seeks Recognition and a More Inclusive Way to Define Ourselves*, L.A. TIMES (Orange County), Jan. 14, 1996, at A16, A17; Vincent J. Schodolski, *Mixed-Race Americans Feel Boxed in by Forms: Effort Under Way to Change How Racial Questions Are Dealt with in 2000 Census*, CHI. TRIB., Feb. 14, 1996, § 1, at 8; *see also* STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981).

60. *See* Fallon, *supra* note 27, at 1949–50.

do not necessarily burden fundamental rights more than "race-neutral means to increase minority participation."

II. QUOTAS VS. CREDITS

> The United States insists that Japan commit itself to a clearly stated increase in the number of dealers handling American cars and that the two sides measure the progress annually. Japan has rejected that approach as a use of "numerical targets" and managed trade.[61]

The front page of the June 28, 1995, *New York Times* was remarkable because in adjacent articles the Clinton administration advanced seemingly contradictory arguments on the equity of quotas. In discussing the looming trade war with Japan, the administration argued that Japan had systematically discriminated against United States automobile imports and demanded that the Japanese government agree to import explicit numeric quotas. But in another article discussing the administration's review of federal affirmative action, President Clinton reiterated that he was against quotas. When the United States has been the victim of long-standing, systematic discrimination, quotas seem to be the only credible remedy: Assurances from the Japanese that they would stop discriminating against, and even start implementing, U.S. import preferences rang hollow. But when the United States was placed in the role of dismantling a history of past discrimination, quotas seemed unduly burdensome. The moral of these newspaper stories is that, from a victim's perspective, quotas do not seem so inequitable.

The purpose of this section is to show that something close to quotas might be consistent with—and possibly even required by—the narrow tailoring principle. This section builds upon the last in that the reader is now asked to accept that the government has established a compelling interest and that explicit racial preferences are permissible.[62] Given this premise, this section asks what form the racial preferences should take.

The central question I seek to answer is whether quotas or credits are more consistent with narrow tailoring. While the term "quota" has a fairly precise common meaning, the term "credit" has been loosely interchangeable with the terms "plus-factor," "plus," or, most generically, "preference."

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61. David E. Sanger, *U.S. Officials Say Japan Eases a Bit on Trade Stance*, N.Y. TIMES, June 28, 1995, at A1, D4.

62. Explicit racial preferences might be permissible—even if the analysis of the prior section is rejected—if race-neutral means were found to be ineffective.

By quotas, I mean a preference that only allows minorities to compete for set-aside government benefits—such as guardrail contracts or broadcast licenses or medical school slots. By credits, I mean a preference that forces minorities to compete with whites for government benefits, but gives minorities an advantage over similarly situated whites. A quota guarantees the highest-ranking minority a benefit, while a credit does not.

But before considering directly the choice between quotas and credits, it is useful to point out that both quotas and credits can be implemented by rules or standards.[63] Beginning with *Bakke*, analysts have often conflated these two dimensions by comparing a rule-like quota with a standard-like credit. Thus, Justice Powell compares Davis' quota/rule with Harvard's fuzzy plus-factor system—a classic credit/standard. But as illustrated in Figure 1, the other two permutations are also prevalent: A rule-like credit

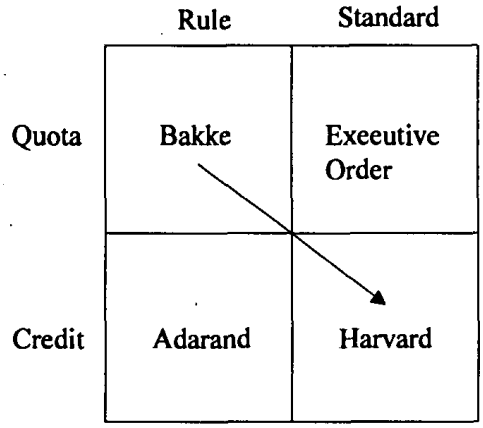

Figure 1: Two Different Dimensions on Which Affirmative Action Programs Differ

was at issue in *Adarand*, and Executive Order 11,246 might create a quota standard.[64]

63. The classic example used to distinguish rules and standards is the rule-like requirement to drive less than 40 miles per hour and the standard-like requirement to drive at safe speed. *See* Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S.C. INTERDISCIPLINARY L.J. 1 (1993); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 69 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–62 (1992).

64. The executive order mandates numerical goals and timetables for meeting these goals but is standard-like by not defining what turns on failure to meet the goals according to the timetable. *See* Bernard E. Anderson, *The Ebb and Flow of Enforcing Executive Order 11246*, 86 AM. ECON. REV. 298 (Paper & Proceedings 1996); Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 819–20 (1995). A quota might be standard-like either because the exact number that needs to be set aside is not known ex ante (for example a quota/standard might require setting aside for minori-

While Powell tried to justify his preference for credits over quotas, he did not explain his seeming preference for standards, as exemplified by his praise for Harvard's fuzzy individualized admissions process where race is used as merely one among many *ambiguously weighted* factors.[65] It is not self-evident that using standards to implement racial preferences is worthy of praise. Courts will have more difficulty scrutinizing whether fuzzy racial preferences are narrowly tailored to achieve their goals. Unlike rules, standards by definition submerge the degree of preference. Although a rules versus standards debate is not the focus of this section, rules might be more consistent with narrow tailoring.[66]

A. Comparing Quotas and Simple Credits

This section compares quotas and simple credits (which create constant marginal subsidies to increase minority participation). For example, affirmative action programs that granted minority law school applicants a constant number of points to their LSAT scores (or that granted employers an invariant subsidy for each additional minority hired) would constitute such a simple credit. The Appendix presents an economic model which illustrates, for very particular assumptions, that quotas can be better tailored to achieve the government's legitimate goals than simple credits. But because economic models are so off-putting—especially in the civil rights

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ties a *reasonable* number of benefits) or because the consequences of deviating from a numerical goal are not known ex ante (as with the executive order).

65. Powell's insistence that race be one of several factors might make sense when the government's compelling interest is furthering educational diversity. As Powell noted, "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (opinion of Powell, J.). But requiring that race be one of multiple factors in granting a benefit is not similarly implied if the government's compelling interest is remedying past discrimination. Extending procurement subsidies to people who have suffered other types of social disadvantage does not further the government's remedial interest.

66. Rule-like racial preferences would also allow legislatures to tailor the burdens of affirmative action programs and, thus, might promote the least restrictive alternative analysis. For example, if an admissions formula were more rule-like, it would be possible to identify and compensate individuals who had been denied admission or government contract work because of their race.

Tom Ulen suggested to me that standards might have an advantage in that they would be easier to phase out in the future. This has proved useful to the Supreme Court in other civil rights contexts. *See, e.g.*, Missouri v. Jenkins, 115 S. Ct. 2038 (1995) (redefining interdistrict school desegregation remedy); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (redefining business necessity defense).

context—this section describes the results of the model without graphs or equations.

1. Trading Off Quantity and Quality Burdens

To decide whether a quota or credit is the "less restrictive alternative," it is important to see that the constitutional burden of a racial classification is not solely captured by calculating the number of cases in which the racial preference is dispositive; the disparity in quality between minority and non-minority firms is also relevant.[67] Allocating a given number of contracts (or admission spots) to minorities is more burdensome to better qualified non-minorities when the preference countenances substantial disparities in quality. Reverting back to the meta-goal of minimizing racial divisiveness, non-minorities have a more legitimate claim of unfair treatment if they lose out to minorities who are substantially less qualified than to minorities who are only slightly less qualified.[68] To capture how much affirmative action deviates from race-blind decisionmaking, it is accordingly necessary to

67. Because the "quality" of someone seeking a government benefit is almost always multi-dimensional, ranking people competing for such benefits is often difficult or contestable. In the academic context, for example, important questions exist regarding how to measure quality, and many diversity proponents argue that minority applications do not need to be subsidized to win admission if truer measures of ability were used. Instead of having minorities meet current standards of merit, critical race scholars have challenged the validity of traditional measures of ability. *See* Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 8 (1979) ("[T]here is impressive evidence that grades and test scores cannot predict success in the practice of law or medicine."); Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 8–9 (1991) (stating that most critical race scholars question objectivity of merit standards); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 572 (1984) (advocating "an overhaul of the admissions process and a rethinking of the criteria that make a person a deserving law student and future lawyer" instead of affirmative action for law school admissions); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 707–12 (criticizing existing standards of merit as socially constructed and impossible to apply in a colorblind fashion).

These arguments are seldom made, however, with regard to affirmative action in government procurement. For the purposes of this discussion, I assume that the procurement contract adequately assures uniformity on all aspects of performance, so that the government can cardinally rank applicant/bidders by the price of their bid. Even though contract law does not in fact assure full performance, it is only necessary that some metric exist that allows the government to establish a cardinal ranking.

68. The larger the government's deviation from race-blind decisionmaking, the stronger the claim of the non-minorities who would have been allocated the benefit in the absence of the affirmative action program. Such equitable claims are rooted in the presumption that meritocratic allocation generally enhances social welfare. *See* Fallon, *supra* note 27, at 1919. The larger the deviation from meritocracy, the larger the government interest is needed to rebut the presumption.

measure not only the number of cases in which race is dispositive, but the average disparity in quality when race is dispositive.[69] In sum, both the quantity (of minority participation induced by affirmative action) and the quality (disparity between minorities and non-minorities) are constitutionally relevant.

A natural way to tailor affirmative action to minimize the divisive burden of racial classification is to acknowledge a tradeoff between the quantity-burden and quality-burden of affirmative action subsidies. A program that granted minorities a forty percent bidding credit on five percent of government contracts might be no more burdensome than one granting minorities a five percent bidding credit on forty percent of government contracts.[70] Even though the forty percent bidding credit might effectively operate as a set-aside (and impose a substantial quality burden),[71] it only forecloses non-minorities from five percent of the market: The quantity burden—the number of contracts where race is dispositive—is much less burdensome.[72]

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69. This approach does not constitutionalize a particular, narrow view of meritocracy as a benchmark. Instead, government institutions are allowed great latitude in choosing among race-blind benchmarks.

70. From behind a modified Rawlsian veil, it might not be clear which affirmative action program non-minorities would favor. The particular ignorance at issue might concern the relative strength of minority bidders.

71. *See infra* note 84.

72. An extremely crude way of combining the two types of burdens would be to multiply the quantity allocated because of a racial preference by the average quality disparity when race was dispositive. While this specific multiplicative burden measure is only one of several ways of trading off the two types of burden (and is not constitutionally required), performing this simple calculation can be illuminating. For example, several commentators have claimed that affirmative action in academic admissions has helped Caucasian women more than minorities. While it might be that the gender of Caucasian women has been a decisive factor in a larger number of slots than race has been for minority men and women, it is not clear that the total number of SAT (or LSAT) credits given to Caucasian women has been greater than to minorities. Even if the number of minority admissions due to race is relatively small, the constitutional burden is a function not only of the number of slots foreclosed, but of the average disparity in quality.

Unfortunately, the recent *Hopwood* decision only provided partial information about the quality burden. Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). The court did identify combinations of GPAs and LSAT scores for which white applicants would be presumptively rejected and for which black applicants would be presumptively admitted. *Id.* at 937. The court noted that to avoid being presumptively denied a white applicant with a 3.2 GPA would need to score in the top 32% of LSAT takers, while a black applicant with the same GPA would need only to score within the top 80%. *Id.* at 937 n.8. While the facial difference for this facet of the admissions program is substantial, the court reports nothing about the actual difference in scores between those students who were admitted because of their race and those who were rejected because of their race. (The table showing the median LSATs and GPAs for admitted white and black students is hardly probative of whether the cutoffs countenanced too great a disparity in quality (because infra-marginal white students may inflate the white median result). *See id.* at 937 n.7.) Most importantly, the opinion contains almost no discussion of the

If the quality disparity did not play an important role in assessing the burden of an affirmative action program, then one might easily argue that quotas are perfectly tailored. As long as the quota equals what minority participation would be without discrimination, then non-minorities are not foreclosed from competing for any contracts that they would have won absent past discrimination. But the Court's antipathy for quotas stems at least in part from the fact that quotas, by "insulating" minorities from non-minority competition, can countenance arbitrarily large differences in quality—and that racial differences in quality as well as the amount of participation induced by racial preferences are relevant. In her *Metro Broadcasting* dissent, Justice O'Connor has come closest to acknowledging the relationship between the quantity and quality burdens:

> The Court's emphasis on the multifactor process should not be confused with the claim that the preference is in some sense a minor one. It is not . . . . [R]ace is clearly the dispositive factor in a substantial percentage of comparative proceedings.[73]

Justice O'Connor sees that the size of the racial preference ("dispositive factor") as well as the number of cases ("substantial percentage") in which it is dispositive are relevant to determining the burden imposed by the racial classification. What is missing, however, is the crucial notion that the Constitution can tolerate more of one burden if the affirmative action program exhibits less of the other.

Recognizing this quantity-quality tradeoff provides a constitutional underpinning for the rather intuitive notion that in a narrowly tailored program, minority participation should be reduced when minority applicants are relatively weak. If the quality disparity between minorities and non-minorities is unexpectedly large, then the maximum quantity of contracts (or admission slots) where race is dispositive should be lowered to reduce the effective burden of the program. For example, even if the government could establish that the minority share of procurement contracts would be twenty percent without past discrimination, the Constitution might prohibit the use of twenty-five percent bidding credits to induce

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quantity burden. The court reports, but does not rely upon, the plaintiffs' assertion that "600–700 higher-scoring white residents were passed over before the first blacks were denied admission." *Id.* at 937 n.9. This number tells us almost nothing about how many slots were allocated because of race. Many of these so-called "passed over" whites may have lost out to better qualified whites under a race-blind regime. Without assessing the quantity burden, it is impossible to assess the constitutional burden imposed by the admissions program.

73. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting); *see* Amar & Katyal, *supra* note 3, at 1763 n.88.

this participation rate; but it might countenance twenty-five percent bidding credits if the credits were decisive in only five percent of the bidding. In short, the "less restrictive alternative" requirement suggests that the level of minority participation should be in part a function of the strength of minority quality. While this section has shown that the less restrictive alternative principle requires that affirmative action programs be sensitive to both quantity and quality burdens on non-minorities, the next two sections show that implementing racial preferences that trade off quantity and quality burdens can also be better tailored to achieve the government's remedial interest, and hence be more consonant with the narrow tailoring principle.

2. The Impact of Quotas and Credits on the Government's Remedial Interest

Credits seem to be "less restrictive alternatives" than quotas because, with a quota, the level of minority participation is not sensitive to the relative quality of minorities competing for the benefit in question.[74] Credits seem to be more narrowly tailored—in the sense of minimizing the quantity and quality burdens on non-minorities—because they allow flexibility on just this dimension. For example, in a law school admissions program, if minority applicants are relatively strong, a fixed LSAT credit will lead to increased minority acceptances. Or for a construction program in which a general contractor is given a fixed bonus for each additional minority contractor, unexpectedly high minority bids will lead to reduced participation. In each case, credits induce fluctuations in the level of minority participation that seem better tailored to the government's interest.

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74. If the government knew the relative quality of minority and non-minority applicants, it could always choose quotas that would induce the same quantity and quality burdens as a particular credit. *See infra* Appendix. But in many contexts, quotas are chosen before the government has full information about the relative strength of applicants or bidders. When the government must choose the type of racial preference ex ante (under such conditions of uncertainty), a quota is not as sensitive to realized quality as a credit.

But commentators have not realized that *credits can induce too much fluctuation: inducing too large a reaction to changes in relative minority quality.*[75] While credits laudably harness the general contractors' self-interest to reduce minority participation when minority bids are unexpectedly high, the general contractor is not a perfect agent in pursuing governmental objectives.

The possible divergence of the government's interest in adjusting minority participation to respond to the relative strength of minority bidders and the general contractor's interest under a credit regime represents a classic externality. If minority bids are unexpectedly strong, an invariant credit might induce general contractors to overshoot—by increasing minority participation above the level it would be without discrimination. But such a result would be inconsistent with narrow tailoring: The government has no compelling remedial interest in causing minority participation to exceed what it would be absent discrimination.

Analogously, if minority bids are unexpectedly weak, the general contractor—in reducing minority participation—internalizes the foregone credit subsidy but has no reason to consider the impact on the government's remedial purpose. The government might have a particularly strong interest in avoiding drastic shortfalls in minority participation: For example, one might imagine markets in which failing to maintain a minimum market share would undermine the long-term viability of all existing minority businesses. Simple credits give private decisionmakers no reason to consider how dramatic, short-term shortfalls in minority participation will affect the government's long-term remedial interest.

In short, the government's remedial interest in inducing marginal increases of minority participation is not constant, but simple credits give decisionmakers constant marginal subsidies. The government's interest in inducing "token" participation may be quite small, but assuring some criti-

75. Robert Cooter, in other contexts, has recognized that price incentives may give rise to too much quantity variation. *See* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1531 (1984).

cal mass of participation may be particularly important to achieving the government's long-term remedial goal. Moreover, there are strong reasons to think that the benefits of marginal increases in minority participation must at some point decline toward zero. As far as the government's remedial interest is concerned, there are likely to be diminishing returns to increasing minority participation with racial preferences.[76] Civil rights advocates might worry that acknowledging diminishing returns understates the government's interest in raising minority participation all the way to what it would be absent discrimination. But the flipside of diminishing benefits for increased minority participation is realizing that the government has a heightened remedial interest in forestalling drastic shortfalls in minority participation. Consider two markets where, without discrimination, minorities would have a forty-percent market share. Most civil rights advocates would find it more valuable to raise minority participation in one market from fifteen to twenty percent than it would be to increase participation in the other from thirty-five to forty percent.

But simple credits that grant a constant subsidy for marginal increases in minority participation do not give decisionmakers incentive to internalize this varying remedial interest. The crucial failure of simple credits, then, is that they might overshoot the legitimate response to the varying strength of minority bidders, countenancing large fluctuations in minority participation. When a credit creates the possibility of large fluctuations in minority participation and when there are significant social harms from large or small levels of participation, the fluctuations in participation caused by the credits might be more poorly tailored than the invariant participation caused by quotas. The Appendix shows this possibility for very specific assumptions, but the intuition is much broader: If credits do not give private decisionmakers incentive to choose the correct level of minority participation, then delegating this decisionmaking via a credit program may be more poorly tailored to achieve the government's interest than using a quota to mandate an invariant level of participation.

B. Declining-Credit Schedules

Let me be quick to emphasize that quotas are not perfectly tailored. A more enlightened choice than quotas or simple credits is to establish a declining-credit schedule that conditions the size of the credit on the quantity of minority representation. The goal would be to set the credit sched-

76. This diminishing marginal returns argument is formalized below in the Appendix.

ule to approximate the government's actual interest in marginal increases in participation. Instead of granting minorities a ten percent bidding credit for all procurement contracts, a credit schedule might create the incentives depicted in Table 1:

	Bidding Disparity Between Minority and Non-Minority Bidders	Maximum Minority Market Share
a 15% credit for 5% of the contracts	10% – 15%	5%
a 10% credit for 20% of the contracts	5% – 10%	25%
a 5% credit for 5% of the contracts	0% – 5%	30%
a 0% credit for 70% of the contracts	< 0%	100%

Table 1: Example of Declining-Credit Schedule

The next section will say more about how these percentages might be calculated, but for now it is only important to see that the declining-credit schedule still allows the strength of minority bids to affect the degree of participation: If minority bids are less than five percent above non-minority bids, the minority market share can be as high as thirty percent; but if minority bids are more than ten percent above non-minority bids, minority participation falls to at least five percent. The key to a declining-credit schedule is that the larger the disparity in quality (measured here by the size of the bid),[77] the smaller the minority market share.

Creating a credit schedule that more closely tracks the government's remedial interest would mitigate the externality problem of simple credits: The declining-credit schedule would cause the general contractor to internalize the welfare costs associated with foregone minority participation. Regardless of whether the minority bidders placed unexpectedly high or low bids, the general contractor facing a credit schedule would have a better incentive to adjust participation without over- or under-shooting.

77. *See supra* note 74 (discussing quality).

To implement a declining-credit schedule, it would not be necessary that all the procurement contracts be bid simultaneously or that the contracts with the highest minority credit be bid first. For example, to implement the declining-credit schedule, a government procurement agency could announce that it would award all contracts to low bidders, but that at year's end, minority bidders (who had won contracts) would be eligible for a bonus. The size of this year-end bonus would be a function of the minority market share of total procurement dollars. For example, the declining-credit schedule depicted in Table 1 would pay prevailing minorities fifteen percent more than their nominal bids if minorities won less then five percent of the procurement contracts, but only a ten percent bonus if the minority market share was between five percent and twenty-five percent, and no bonus if the minority market share was more than thirty percent.[78]

Indeed, the simplest way to create a declining-credit effect would be for a procurement agency to announce that winning minority bidders in a given fiscal period would share pro-rata in a fixed bonus. If several minority contractors prevailed, a fixed bonus split several ways would amount to a small bidding credit; but if relatively few minority contractors prevailed, the fixed bonus would be substantially higher.[79]

This fixed-bonus method not only might better trade the government's remedial interest but also naturally trades off the quantity and quality burdens described above:[80] Dividing a fixed bonus pro-rata among minorities could ensure that there would only be large disparities in quality (measured, as before, by price) when there is a relatively small quantity of the market being allocated on the basis of race. (And, conversely, race would only be decisive for a larger market share if the average quality difference was relatively small.) Fixed bonuses also have affinities with cumulative voting. Just as cumulative voting allows minority shareholders to cumulate their votes on a few candidates to ensure some minimum level of representation,

78. Such a bonus system would force minorities to bear some risk about what the size of the bonus would be, and hence might not encourage as much participation as bidding credits that were known ex ante. One might expect risk-averse minorities to bid more aggressively toward the end of the fiscal period when there is better information on the size of the bonus.

79. Of course, it would be possible for the procurement agency to stipulate that under no circumstance would the bonus paid to an individual firm be above some maximum percentage of its nominal bid—to remove the possibility that a firm would be paid an unconscionably large bonus. The possibility of such dramatic bonuses is remote, however, because minority firms on other contracts would normally reduce their bids to share in the bonus. Alternatively, the procurement agency might make the size of next year's bonus conditional on the minority market share of procurement in the past fiscal period.

80. *See supra* note 73 and accompanying text.

fixed bonuses allow the government procurement office to cumulate its remedial effort to assure the maximum amount of minority participation, while assuring that the total quantity and quality burdens to non-minorities would in no event be greater than a predetermined number of dollars. And as Peter Cramton and I have shown elsewhere, the cost to government of distributing such fixed bonuses is almost certainly less than the face value of the bonus—as these ex post bidding credits can induce more competition and induce non-preferred firms to bid more competitively.[81]

Several affirmative action programs currently implement a type of declining-credit schedules. For example, in a recent auction of (narrow-band) paging licenses, the FCC granted what amounted to a 50% bidding credit for 12.5% of the licenses; a 16% bidding credit for 25%; and 0% for the remaining 62.5%.[82] Moreover, the affirmative action program at issue in *Adarand* itself exhibited a kind of varying credit schedule: A maximum subsidy equaling 1.5% of the general contract could be earned for hiring one minority subcontractor, but only 0.5% more could be earned for hiring a second minority subcontractor, and no additional subsidy was offered for hiring more than two minority subcontractors.[83]

Moreover, implicit credit schedules lie behind many of the admission programs that grant minority applicants preferences. Few programs would give minorities an invariant credit. Imagine, for example, a college wishing to admit one thousand applicants almost exclusively on the basis of SAT scores—but with a preference for racial minorities. Even if a ten percentile credit had been sufficient to admit one hundred minority students in recent years, admissions directors would inevitably make this credit sensitive to the relative strength of minority applications in a given year. For example, in a particular year, if the ten percentile credit would only succeed in admitting eight minorities instead of the usual one hundred, I predict that most admissions offices would in effect increase the credit to admit a few more minority applicants. Conversely, if a ten percentile credit succeeded too well by admitting four hundred minorities, I predict that most admissions offices would decrease the minority preference. Thus, if we pierce the veil of standard-like affirmative action programs to discover the underlying rule-like formula, we are likely to find that the de facto credit is implicitly a

81. *See* Ayres & Cramton, *supra* note 10 (showing that bidding credits can even reduce the budget deficit).

82. *See id.*

83. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2104 (1995).

function of the degree of minority participation. Far from being bad, the foregoing analysis suggests that conditioning the size of a minority preference on the quantity of minority participation is generically the most tailored means. Countenancing larger preferences when minority participation is low better tailors the means to the government's legitimate interests without increasing the burden on non-minorities, because the larger disparity in quality is offset by the smaller quantity of minority beneficiaries.

C. Quasi-Quotas

Credit schedules might, however, be criticized for creating quasi-quotas. For example, granting minorities a fifty-percent bidding credit for a small number of FCC paging licenses effectively set-aside those licenses—insulating preferred bidders from non-minority competition. Granting substantial bidding credits to ensure at least small amounts of minority participation can, however, still be defended on narrow tailoring (and least restrictive alternative) grounds for four reasons.

First, unlike an absolute quota, by assuring a minimum level of minority quality, a quasi-quota would at least to a small degree tailor the level of participation to the strength of minority applicants. A fifty-percent bidding credit, unlike a set-aside, does not absolutely guarantee that the benefit will be allocated to a minority. While it is unlikely that minority bidders will be so weak that they cannot prevail, the substantial credit—as opposed to an absolute set-aside—provides some assurance that prevailing minorities must have minimal qualifications. Moreover, a substantial bidding credit is more readily subject to strict scrutiny than a quota. A quasi-quota states directly how much of a quality disparity the government is willing to tolerate (for example, how much of a cost difference) to assure a minimum level of minority participation. The absolute quota does not directly "price" the government's interest, or if it does, it implausibly implies that ensuring minority participation is worth any burden on non-minorities. However, many racial preferences which seem to be absolute set-asides already have built-in limited amounts of interrace competition. For example, both sec-

tion 8(a)[84] and the dreaded "Rule of Two"[85] allow minority set-asides only if the procurement officer certifies that minority bids will not be more than ten percent above non-minority bids.

Second, a quasi-quota would only be appropriate if the government found that shortfalls in participation below some minimum level would seriously undermine its remedial effort.[86] To justify a quasi-quota, the government would need to do more than simply establish its overall remedial goal: the level of minority participation that would have developed absent discrimination.[87] The secondary showing would likely focus on the

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84. The "8(a) program" derives from § 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), which requires the Small Business Association to enter into contracts with other federal agencies and arrange for the performance of those contracts with socially and economically disadvantaged small business concerns. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7102, 108 Stat. 3243, 3368 (authorizing civilian agencies to implement a program similar to the Department of Defense Small Disadvantaged Business program). The Department of Defense SDB program requires setting aside all contracts where there is a reasonable expectation of receiving two or more offers from SDBs, if the award will be made at no more than 10% above fair market price. 48 C.F.R. § 219.5 (1995).

85. Defense Federal Acquisition Regulation Supplement 219.506(a), 55 Fed. Reg. 36280 (1991) (codified at 48 C.F.R. § 219.506(a)).

> According to the rule of two, a contracting officer must set-aside an acquisition exclusively for small disadvantaged business participation when a reasonable expectation exists that there will be offers received from at least two responsible [small disadvantaged businesses] who will offer the goods or services requested at a price that does not exceed ten percent of the fair market price. A solicitation exclusively set aside for small disadvantaged business participation could not be withdrawn by the contracting agency unless the set-aside was inappropriate or the low, responsive, and responsible offeror submitted a price which exceeded the fair market price plus a ten percent ceiling.

Danielle Conway-Jones & Christopher Leon Jones, Jr., *Department of Defense Procurement Practices After* Adarand: *What Lies Ahead for the Largest Purchaser of Goods and Services and Its Base of Small Disadvantaged Business Contractors*, 39 HOW. L.J. 391, 399 (1995).

86. Professor (now Solicitor General) Drew Days suggested analogously that the set-asides included in the Public Works Employment Act were appropriate because government did not have the opportunity to calculate the appropriate credit size that would have helped ensure that minimal participation by minority businesses. Days, *supra* note 7, at 456 (The "fast-moving nature of the 1976 and 1977 public works programs justified the set-aside. Without some safeguard for minority businesses, the federal funding might have disappeared before corrective measures for discriminatoty practices could be undertaken." (citing Brief for the Secretary of Commerce at 42, Fullilove v. Klutznick, 448 U.S. 448 (1980) (No. 78-1007))).

87. *See infra* at note 92 (describing how the overall benchmark is calculated).

long-term impact of a dramatic shortfall in minority participation far below the ultimate goal. For example, evidence about the "minimum efficient scale" of production and technological "learning curves" might suggest that a shortfall would threaten a remedy's long-term success—by threatening the viability of minority contractors in the process of establishing themselves as self-sufficient competitors. In such circumstances, a quasi-quota would be better tailored because it would cause decisionmakers to better internalize the true social costs of dramatic shortfalls in minority participation.

Third, because a quasi-quota would only set aside a fraction of the government's legitimate remedial goal, it would impose a smaller burden on the interests of non-beneficiaries. As discussed above, in estimating the burden of an affirmative action plan on non-minorities, there is a tradeoff between the quantity of slots allocated because of race and the quality of the disparity between minorities and non-minorities when race is dispositive. A quasi-quota by definition imposes a larger quality-burden, but because it applies to a fraction of the government's overall goal, the quantity burden on non-minorities is relatively small. Non-minorities are practically foreclosed from a portion of the market, but the non-minority share is still much larger than it would be without discrimination. Creating quasi-quotas to meet the government's entire remedial goal would not be narrowly tailored. But substantial bidding credits, which create what I have called quasi-quotas, constitute the least restrictive way of forestalling against the negative remedial consequences of a dramatic shortfall in minority participation. For example, if the government demonstrated that absent past or ongoing discrimination, minorities would provide thirty percent of procurement contracts, it might be appropriate to create quasi-quotas for five percent or ten percent of the procurement dollars, but it would not be narrowly tailored to effectively set aside twenty-five percent or thirty percent of the procurement dollars.

Finally, granting minority enterprises effective guarantees of minimum participation can increase the quality of minority participants, so as to reduce the disparity between minority and non-minority recipients.[88] Offering minorities a "safety-net" can enhance the quality of minority participation and increase the quality of minority applicants/bidders. For example, a law school that guarantees that it would accept up to a fifty

88. Just as guaranteeing a critical mass of admitted minorities may stimulate the strength of minority applications, effectively guaranteeing a minimum amount of minority contracting may stimulate sufficient minority participation to bid away the effects of a substantial racial credit.

percentile difference in LSAT scores if it is necessary to admit five percent minorities might induce a much stronger pool of minority applicants (if minorities want to minimize the risk of going to a school where they will be a token presence). Effectively guaranteeing at least five percent participation may allow the school to increase minority participation with a much smaller LSAT credit. The reverse of this "herding" effect is occurring now in University of California schools. The Regents' directive that race not be used as an admissions criterion—even though not effective until 1998—has already caused a substantial decline in minority admissions.[89]

The usefulness of quasi-quotas in strengthening minority quality is not limited to educational contexts where non-economic motives abound and where minority applicants see their participation as complementary. The strongest evidence can be found in recent FCC paging auctions. In a regional narrowband auction of thirty licenses, the FCC granted designated entities (that is, minority- and female-controlled firms) what amounted to a fifty-percent bidding credit for ten of the licenses and a sixteen-percent bidding credit on the remaining twenty licenses. The fifty-percent bidding credit—by virtually assuring that at least ten licenses would go to "designated" firms—very likely induced a number of minority and female businesses to form. Knowing that there were at least ten licenses effectively set aside may have induced designated firms to undertake the fixed costs to organize, investigate, and finance. In this narrowband auction, the guarantee was so effective in inducing minority- (and female-) controlled firms to form that the designated entities bid away forty percent of the bidding credit on the set-aside licenses (meaning the nominal bids on the ten safety-net licenses were forty-percent higher than those paid by non-preferred firms for similar licenses), and a designated entity even ended up winning one of the licenses where only the sixteen-percent bidding credit obtained.

There is an important lesson here. The government can offer very substantial bidding credits to ensure minimal minority participation often without bearing the constitutional burden of large disparities in quality (or

89. I was told about this precipitous decline in admissions after my Symposium presentation by an administrator of the UCLA undergraduate admissions office. Prospective minority students worried that there will not be as large a minority cohort at California schools have started applying to colleges and universities outside the California system. Even if the recent holding of Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996), that "[a]ny consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment," were accepted by the Supreme Court, this "minority flight" might continue to non-governmental institutions that are not bound by the Equal Protection Clause requirements.

price). Guaranteeing a minimum amount of participation may induce stronger designated firms to form so that, in the end, the government need not pay off on the guarantee. Perversely, guaranteeing a very substantial subsidy for a minimum amount of participation may actually reduce the racial disparity that is needed to achieve the government's remedial goal.

Even though quasi-quotas might seem to violate the spirit of *Bakke*'s prohibition against quotas,[90] this subsection has shown that substantial racial preferences which virtually insulate minority bidders or applicants from competition are consistent with—and might be required by—the narrow tailoring and least restrictive alternative principles. Upon a showing that dramatic shortfalls in minority participation (from what it would be without discrimination) would substantially impede the government's remedial effort, and especially upon a showing that a quasi-quota would likely enhance minority participation,[91] the government would be justified in establishing substantial bidding credits to assure a small proportion of its overall remedial goal.

The take-home lessons of Part II have been threefold:

(1) Invariant credits may be less narrowly tailored than a quota to further the government's remedial objective because they may induce too much fluctuation in minority participation.

(2) Declining-credit schedules that grant larger racial preferences the larger the shortfall in minority participation (from what it would be absent discrimination) are most consistent with the narrow tailoring and less restrictive alternative principles. Declining-credit schedules are better tailored to the government's remedial interest, and countenancing a larger quality disparity for

90. Amar & Katyal, *supra* note 3, at 1763 n.88.

91. Historical evidence that minority applicants had bid away the lion's share of quasi-quotas in the past, or in analogous markets, would be strong evidence that the quasi-quota is not as burdensome as its facial appearance. At a minimum this type of evidence might show that the quasi-quota is akin to a 30-year flood levy which is likely to be tested in only rare instances. Moreover, comparisons among institutions with and without quasi-quotas might provide more affirmative evidence that substantial bidding credits for a small fraction of the market can enhance minority quality and participation. Courts need to be very cautious about facial scrutiny of such substantial credits. If a 5% bidding credit for 20% of procurement contracts would pass constitutional muster, it is possible that granting a 30% bidding credit for just 5% of procurement contracts will induce enough minority firms to form that one could expect a constitutionally permissible equilibrium (that is, a 5% quality disparity and a 20% minority participation).

a smaller quantity of government benefits can be a less restrictive alternative.

(3) A narrowly tailored credit schedule may attempt to achieve a small fraction of the government's legitimate remedial goal with bidding credits so substantial that they effectively set aside some government benefits.

While the foregoing analysis is theoretically coherent, the next section explores the difficulty of creating a declining-credit schedule in practice.

III. TAILORING THE SCOPE OF RACIAL PREFERENCES IN THE REAL WORLD

In contrast to the top-down doctrinal and economic analysis of the first two sections, this section works from the bottom up—looking at the kinds of data currently used to justify remedial affirmative action programs—to see how a declining-credit schedule might be implemented. The declining-credit curve is meant to approximate the government's remedial benefit from marginal increases in minority participation. Calculating such a curve is a daunting task. There is little social consensus whether there are *any* remedial benefits to race-conscious remedies. It blinks reality to think that the government could calculate numeric credits that precisely capture its remedial interest.

In the absence of precision, how might the government proceed? As a first step, one might retain the current method of assessing what minority participation would have been without discrimination. Calculating this market share would at least pin down one end of the credit schedule by establishing the participation level at which bidding credits should end. A number of states have conducted post-*Croson* studies estimating what the participation of minorities would be in particular markets absent discrimination. While this benchmark provides some evidence of the minority participation level where the credit schedule should phase out, it does not help estimate how steeply a narrowly tailored credit schedule should slope. This section first discusses the "state of the art" in calculating the overall remedial goal—what the minority market share would be without discrimination—and then speculates what types of evidence might be brought to bear in setting the size of bidding credits to encourage lower levels of participation.

A. Estimating the Overall Remedial Goal

The current "state of the art" is extremely crude.[92] In recent post-*Croson* disparity studies, the minority business market share absent discrimination has been estimated in two stages.[93] In the first stage, the number of minimally qualified *minority* firms is divided by the total number of minimally qualified firms. Much turns on how one defines "minimally qualified." In a New York study, firms were labeled minimally qualified if they appeared on "agency procurement 'bidders lists' which contain firms that have either made themselves available to do business, or have actually done business, with one or more agencies."[94] This first-stage calculation yields the minority percentage of firms who have attempted to bid. The second stage then adjusts this percentage to account for the possibility that more minority firms would have been available to bid absent discrimination. To make this "but-for discrimination" adjustment, the studies calculate a regression to determine how much more likely it is that non-minorities with similar educational and work will be entrepreneurs.[95]

In the New York disparity study, minority business enterprises constituted 11.6% of the bidders list. The "but-for discrimination" regression suggested that there would have been twenty percent more minority firms

92. The studies have been inspired by Justice O'Connor's suggestion in *Croson* that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989).

93. For a detailed discussion of one of the more sophisticated disparity studies, see Hyman Frankel, *Opportunity Denied!: New York State's Study of Racial and Sexual Discrimination Related to Government Contracting*, 26 URB. LAW. 413 (1994). For a list of publicly available disparity studies kept by the Project on Civil Rights and Public Contracts of the University of Maryland Graduate School, see *Prepared Testimony of George R. La Noue Before the Subcomm. on the Constitution, Federalism, and Property of the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (Sept. 22, 1995), *available in* LEXIS, NEXIS Library, Federal News Service File.

94. Frankel, *supra* note 93, at 427.

95. The regression calculates what types of educational and work experience lead non-minorities to become entrepreneurs and then estimates how many minority entrepreneurs would exist, given their current experiences, if these experiences had the probabilistic effect on minorities. *See* George R. La Noue & John Sullivan, *"But For" Discrimination: How Many Minority-Owned Businesses Would There Be?*, 24 COLUM. HUM. RTS. L. REV. 93 (Winter 1992).

Of course, it is possible that societal discrimination caused minorities to be less likely to obtain certain types of educational experience. But consistent with *Croson*'s holding that affirmative action could not be used to remedy these more general forms of discrimination, these but-for estimates take preexisting differences in education as given. Frankel, *supra* note 93, at 429.

absent discrimination[96]—so that after adjustment, the percentage of minority bidders who would have existed absent discrimination is 13.9.[97] This number is a crucial benchmark for establishing the government's overall remedial goal. In New York, the minority market share of state procurement dollars was only 5.8%. The disparity between the government's estimate of what the minority market share would be without discrimination (availability: 13.9%) and what it currently was (utilization: 5.8%) establishes not only the government's compelling interest but illuminates whether a particular affirmative action program is narrowly tailored to achieve the 13.9% remedial goal.

However, this whole methodology is based on a fairly extreme assumption that if 13.9% of the firms are minority-owned, these minority firms would, absent discrimination, control 13.9% of the procurement revenues. Courts have rejected head-counting—in that they have rejected using the minority percentage in the general population as a benchmark of what market share minorities would control without discrimination—but in its stead, they have accepted a fairly crude method of firm-counting. The assumption that existing minority firms would control a proportionate market share absent discrimination heroically compares firms with radically different capacities. In this calculus, a Fortune 500 firm is given the same weight as a firm one-thousandth its size. Even though the disparity studies label the first stage estimate as a measure of "availability," there is little or no attempt to control for the capacity of existing firms. The methodology is especially crude in a post-*Croson*, post-*Adarand* world where one by-product of two decades of affirmative action might be the nominal existence of a large number of small, low-capacity minority firms.[98] Indeed, nothing in this methodology limits the market share estimate to the minority share of the general population.[99]

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96. This estimate is taken from the Bates Report, Frankel, *supra* note 93, at 428, 432 (citing TIMOTHY BATES, OPPORTUNITY DENIED!: A STUDY OF RACIAL AND SEXUAL DISCRIMINATION RELATED TO GOV'T CONTRACTING IN NEW YORK STATE, EXECUTIVE SUMMARY 2 (1992)). A similar methodology applied to the construction industry indicated that a 30% adjustment might be appropriate. *Id.* at 431.

97. 1.2 * 11.6 = 13.92.

98. The current methodology would allow minority entrepreneurs to inflate the remedial goal by arbitrarily creating numerous corporate personalities to bid on state projects.

99. Although it might be possible that if the number of firms was inflated above the minority percentage in the general population, the "but-for discrimination" correction might perversely indicate that fewer firms would exist absent discrimination.

At the end of the day, I believe it is wishful thinking to think that firm-counting provides a more accurate benchmark than head-counting (for example, the minority percentage among college graduates). Indeed, it might be appropriate to do away with the first stage altogether and simply use the second-stage regression analysis not merely as an adjustment, but to accomplish a more sophisticated type of head-counting. The regression method used in the New York disparity study could be used—without ever adverting to existing number of firms—to calculate the number of minority entrepreneurs that should exist given existing minorities' various educational and work experiences. The regression is consistent with the *Croson* requirement that a state may not use procurement affirmative action to remedy discrimination in prior educational opportunity, because it takes the current number of minority MBAs as given. The regression, in a sense, calculates how many of these MBAs should be entrepreneurs—assuming that, without discrimination, minority MBAs would become entrepreneurs at the same rate as non-minority MBAs. The multivariate regression methodology, of course, controls not just for a person's MBA status, but for a variety of human capital variables. The point is that this sophisticated head-counting is likely to be more reliable than firm-counting: The assumption that human capacities would be similar absent discrimination, while controversial,[100] is more reliable than the assumption that firm capacity would be similar absent discrimination.[101]

B. Setting the Size of the Credits

The prior discussion only attempted to calculate the level of minority participation at which racial credits should equal zero. It becomes all the more Herculean to estimate what size credit is appropriate to encourage lower levels of participation. To enunciate any particular bidding credit is arbitrary because no empirical method exists for balancing the remedial benefit of increasing minority participation against the various potential costs (including inefficient production and reduced opportunities for non-beneficiaries). And I can offer here no magic formula for calculating the

100. *See* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994).

101. Of course, others might react to this imprecision by arguing that racially motivated remedies are not tailored narrowly enough to pass strict scrutiny. Jeffrey Rosen for example has said that trying to calculate this second stage is "a metaphysical, not an empirical, figure, and no state has convincingly calculated it." Jeffrey Rosen, *The Day the Quotas Died*, NEW REPUBLIC, Apr. 22, 1996, at 21, 21. While there are certainly severe problems with such but-for regressions, they are more precise than either head- or firm-counting.

optimal size of bidding credits within a bidding schedule. However, it still may be possible to make progress by recognizing that a declining credit schedule might pass strict scrutiny even if the government cannot deduce that this program uniquely maximizes some metric of social welfare.

Instead, the government might be able to establish strong reasons for encouraging some minimum level of minority participation. Even though a credit schedule relates a level of participation to a particular bidding credit size, evidence that maintaining a minimum participation level is essential to the government's remedial goal would go a long way toward justifying a more substantial bidding credit—including the type of quasi-quotas described above—even though it still would not provide very commensurable evidence about just how large this more substantial credit should be.

In essence then, I recommend that governments estimate multiple market shares. As before, they would estimate the share that would achieve the overall remedial goal, but they might also identify lower levels of minority participation that are particularly important to effectuate the remedy. Even though an idealized credit schedule (as depicted in the Appendix) could comprise an infinite number of bidding credits, given the limits of administrative feasibility, two or three bidding credit categories are much more likely—as arbitrarily exemplified earlier in Table 1. The government would adduce evidence that a minimum participation level is particularly important and then, probably without more, argue that the specific bidding credit is sufficiently tailored to meet this heightened remedial need.

Evidence that a minimum market share is particularly useful or necessary—even though not currently used in post-*Croson* litigation—might be adduced. Industrial organization economists could estimate the minimum efficient scale of existing minority enterprises and predict the effect of particular size credits on the ability of these firms to exist and grow.[102] Evidence that minority enterprises were establishing credit ratings and acquiring market-specific know-how might be particularly relevant in justifying a short-term safety net.

Moreover, in reviewing the size of bidding credits, the Court should be clear to distinguish between facial and applied reviews of affirmative action programs. As discussed above, programs that on their face grant substantial bidding credits may not, in practice, countenance substantial disparities. Thus, the fifty-percent bidding credits granted to minorities in FCC auc-

102. *See* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (2d ed. 1980) (discussing minimum efficient scale).

tions induced so many minority (and female) enterprises to form that the vast majority of the credit was bid away. In reviewing the reasonableness of a large credit, the Court needs to think about the likelihood that it will be used—that is, the expected quality difference between minority and non-minority bidders. The recent experience at the FCC auctions suggests that even a fifty-percent bidding credit might actually reduce the expected difference between minority and non-minority bids and thus provides an especially strong rationale for what, on its face, seems to be a rather extreme racial subsidy.[103]

C. Overview of the "160" Federal Affirmative Action Programs

To get a handle on how much *Adarand* is likely to change federal affirmative action programs, it is useful to begin with the "comprehensive list" of race- and gender-conscious programs that the Congressional Research Service compiled at Senator Bob Dole's request.[104] Although it has been reported repeatedly that there are 160 programs,[105] quantifying the pervasiveness of affirmative action by this type of program counting is pure folly. For example, nineteen of these programs merely "encourage" recipients of various government grants to deposit their funds in minority- and women-owned banks.[106] Since so little (read: nothing) turns on these provisions, they could probably be eliminated without affecting the viability of minority- or women-owned banks.[107] If President Clinton wanted to, he could easily halve the number of programs by eliminating the toothless exhortations—without affecting the core preferences in federal subsidies

103. At the extreme, imagine an auction where minority bidders were allowed to pay just one cent on the dollar for any winning bid. It is hard to conceive that competition among minorities themselves would not bid away a substantial amount of the nominal credit. While non-minority firms would be excluded from competing for these effectively set-aside licenses, the expected disparity would not turn on the nominal credit, but on an analysis of the expected (or observed) minority and non-minority demand.

104. *Congressional Research Service's Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals*, Daily Lab. Rep. (BNA) No. 147 (Special Report), at S-75 (Aug. 1, 1995).

105. *Affirmative Action: Dole Releases Affirmative Action List; GOP Renews Call to Reassess Programs*, Daily Lab. Rep. (BNA) No. 36, at A-1 (Feb. 23, 1995).

106. *See, e.g.*, 7 C.F.R. § 246.13(g) (1995) (encouraging state agencies participating in Special Supplemental Food Program for Women, Infants, and Children to make such deposits).

107. As Jeffrey Rosen points out in an excellent review of these 160 programs: "In 1992 there were only thirty-six banks owned by blacks and six banks owned by women in the country, which makes it unlikely that they can have much influence on the credit markets, no matter how much 'encouragement' they get from the government." Jeffrey Rosen, *Affirmative Action: A Solution*, NEW REPUBLIC, May 8, 1995, at 20, 23.

where, for example, $4.8 billion in contracts were set aside for minority and female contractors under the Small Business Administration's 8(a) program.[108]

The Clinton administration might also defend dozens of grants for "historically Black Colleges and Universities" (often referred to as "HBCUs") by arguing that they are "race-neutral means to increase minority participation." Unlike women's colleges, which need to discriminate against male applicants to preserve a female identity, many HBCUs could maintain a minority majority with a colorblind admissions process.[109] However, to avoid explicit racial classifications, some of the preferences would need to be more narrowly drawn to exclude the additional preference for "institutions which . . . [have] at least 50 percent minority [enrollment]."[110] While these programs might be strongly defended on remedial grounds,[111] these very substantial preferences are inconsistent with Amar and Katyal's diversity theory.[112] Far from their image of bringing diverse racial groups together, subsidizing the continued existence of virtually all-black colleges seems to produce just the balkanization that Amar and Katyal claim describes private contracting.[113]

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108. Steven A. Holmes, *Moratorium Called on Minority Contract Program*, N.Y. TIMES, Mar. 8, 1996, at A1.

109. HBCUs do not face the same "tipping" problem as women's colleges because not enough non-black applicants have sought admission to HBCUs to destabilize the racial identity of these institutions. (In contrast, just as male applicants quickly changed Vassar's gender identity, it is likely that historically female colleges could not maintain their gender identity with a gender-blind admissions program.)

110. 20 U.S.C.A. § 1112d(d)(2) (West Supp. 1996).

111. *See* Rosen, *supra* note 107, at 23 (arguing that these programs are the most easily defended).

112. Amar & Katyal, *supra* note 3, at 1773–79.

113. Once one considers the importance of HBCUs in government-sponsored affirmative action in education, it may be that affirmative action currently induces more balkanization in education than in procurement markets—where critics claim at least that many minority owners are merely figureheads that would not presumably alter the underlying employment diversity. *See* Alan Finder & Thomas J. Lucek, *Flaws Are Found in Dinkins Effort to Aid Minorities*, N.Y. TIMES, June 26, 1994, at A1 (finding in a three-month study that of 56 construction companies that received large contracts, 9 companies, or 16%, "have strong business and personal ties to white businessmen, casting doubt on their claims to be independently owned and controlled by women or minorities"); *see also* Selwyn Raab, *12 Charged in Minority Businesses Scheme*, N.Y. TIMES, May 19, 1995, at B2 (two brothers created three front companies in racketeering scheme to fraudulently obtain more than a dozen contracts intended for minority-owned companies). I could uncover, however, little information on whether minority-owned firms hired higher proportions of minority workers than their non-minority counterparts, save in the broadcasting field. African-American-owned radio stations have hired African Americans in top management and other important job categories at far higher rates than white-owned stations; the same has been true of Hispanic hiring at Hispanic-owned stations, even as compared to Anglo-owned stations with Spanish-language formats. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 582 n.34

Stepping back, one sees in the comprehensive list all four permutations of rules/standards and quotas/credits. Contrary to my earlier proposal, the Supreme Court may scrutinize fuzzy (standard-like) racial preferences more leniently, but at least with respect to rule-like quotas and credits which are especially prevalent in federal procurement, the administration will need to undertake disparity studies to establish not only its compelling remedial interest, but to justify the size of the racial preferences. Before such studies are completed, assessing precisely what types of programs can survive strict scrutiny is impossible. However, this Essay has tried to show that a stark shortfall in minority participation (compared to what it would be without discrimination) might, consistent with the narrow tailoring principle, justify a rule-like, explicitly racial preference.

CONCLUSION

An article reporting that the Clinton administration planned to impose a three-year moratorium on new procurement set-asides suggested that the administration was moving toward an approach consonant with declining-credit schedules:

> [T]he Administration has decided to allow Federal agencies, if they can justify it, to use other kinds of preferences, like giving price breaks and extra points in evaluating contract bids by minority and woman-headed companies. . . .
>
> . . . .
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> . . . [A]gencies then determine a benchmark for the percentage of minority or female contractors it ought to have. That benchmark will determine what kind of affirmative action steps the agency may take. *The further away from the benchmark an agency finds itself, the more blatant[ ] preference . . . in contracting it may employ.*[114]

The article makes clear that the agency benchmark will he derived from the type of post-*Croson* "disparity studies" described above. The last quoted

(1990) (citing David Honig, *Relationships Among EEO, Program Service, and Minority Ownership in Broadcast Regulation*, *in* PROCEEDINGS FROM THE TENTH ANNUAL TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE 88–89 (Oscar H. Gandy, Jr. et al. eds., 1983)); *see also* Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 336 n.122 (1991) (reporting data from Honig, *supra*, at 88–89, that black-owned radio stations employed blacks in 72% of all high-level job positions while white-owned, black-oriented stations employed blacks in 43% of all high-level jobs).

114. Holmes, *supra* note 108, at A18 (emphasis added).

sentence, in particular, seems to indicate that the preferred racial preferences will have the essential attributes of a declining-credit schedule, in that when minority participation is "further away from the benchmark," the agency can justify a larger racial credit.

I have argued that facially neutral, but racially motivated classifications are not more narrowly tailored (and may not provide a less restrictive alternative) than explicitly racial classifications. And that in choosing among different types of racial classifications, policymakers should consider declining-credit schedules that reduce the marginal racial subsidy as racial participation increases toward the overall remedial goal. Most provocatively, this Essay has argued that very substantial bidding credits, which come close to guaranteeing a minimum level of minority participation, may be consistent with narrow tailoring—both because they better reflect the substantial remedial benefits of maintaining a minimum, critical mass of participation, and because guaranteeing a virtual safety net enhances the quality of minority applicants and reduces the racial disparity among participants.

From a narrow doctrinal perspective, something must give in *Croson* and *Adarand*. The Supreme Court cannot consistently prohibit non-victim races from receiving remedial subsidies and at the same time encourage race-neutral subsidies (which include preferences for certain non-victim whites). And if the Court chooses to privilege race-neutral means to increase minority participation, it will likely need to abandon the "consistency" principle so that it can uphold racially motivated statutes that benefit the victims of racial discrimination.[115]

While this Essay has considered quotas versus credits, rules versus standards, and race-neutral versus non-neutral means, the narrow tailoring principle might apply on several other dimensions. For example, almost no consideration has been given to what might be called "Coasean" tailoring: whether it is more tailored to grant benefits directly to minorities or to parties who contract with minorities. When the stringent assumptions of the Coase theorem do not hold, the remedial incidence of direct and indirect subsidies may diverge.[116] After all, *Adarand* itself involved a subsidy to a non-minority general contractor, and the Viacom controversy this past

115. *See supra* note 38 and accompanying text (discussing Miller v. Johnson, 115 S. Ct. 2475 (1995)).

116. *See, e.g.*, John J. Donohue, III, *Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells*, YALE L.J. 549, 554 (1989) (finding empirically that bribing unemployed workers to find employment was more effective than bribing employers to hire).

summer involved an FCC tax subsidy for a non-minority licensee.[117] This Coasean choice has practical import. Most of our affirmative action efforts are directed toward increasing the participation of minority-owned firms and not toward increasing minority employment. While these capitalist-centered programs have much to say for themselves,[118] the vestiges of past discrimination are at least equally prevalent in many job categories, and increasing the power of minority capitalism may prove to be a poor method (as seen with other "trickle down" theories) to benefit minority labor.[119]

This Essay has also not discussed the crucial issue of temporal tailoring. There are increasing indications that a majority of the Supreme Court will require sunset provisions for affirmative action programs.[120] A sunset requirement makes most sense if discrimination is viewed strictly as a thing of the past. If this were true, the causal nexus between the initial victims of discrimination and the subsequent beneficiary class would become increasingly attenuated. And it would become all the more difficult to estimate with confidence what market share minorities would control absent

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117. Viacom agreed to sell its cable television systems to a "minority-led investor group" in what would be the largest-ever purchase of corporate assets by a minority-owned firm. One impetus for the sale was a tax program, administered by the FCC, that permitted companies to defer paying capital gains taxes for two years if they sold a media property to a black, Hispanic, Asian-American, or Native-American buyer. This deferral was, in effect, an interest-free loan. Viacom's gain on the sale was expected to be $1.1 billion; Congress' Joint Committee on Taxation estimated the value of the tax break to Viacom to be between $440 million and $640 million. *See* Paul C. Roberts, *Tax Breaks Based on Unfair Privilege*, ROCKY MTN. NEWS, Feb. 11, 1995, at 47A. The House and Senate later repealed this tax break. *See A New Blow to Viacom Deal*, N.Y. TIMES, Mar. 29, 1995, at D2.

Many indirect subsidies still involve explicit racial classifications, because, as in *Adarand*, the grantee is required to contract with minority enterprises. But indirect subsidies might be used to implement a race-neutral (but racially motivated) remedy: As discussed above, grants to historically black colleges and universities (or inner-city enterprise zones) might predictably lead to minority admissions (or employment) contracts.

118. A legitimate remedial goal might be to increase the entire distribution of minority wealth. Under this view, the vestiges of discrimination will not be eliminated until the probability that a black will be a millionaire begins to approximate the probability that a white will be a millionaire. Class-based substitutes for affirmative action hold out no hope of achieving this broader "bell curve" remedy: In the extreme, they would only pile up the current minority (and non-minority) poor just above the programs' poverty line.

119. *See supra* note 113 and accompanying text.

120. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118 (1995) (affirmative action program "'will not last longer than the discriminatory effects it is designed to eliminate'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 513 (1980) (Powell, J., concurring))); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 596 (1990) ("[S]uch a goal carries its own natural limit . . . . The FCC's plan, like the Harvard admissions program discussed in *Bakke*, contains the seed of its own termination."); *Fullilove*, 448 U.S. at 489 ("The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment.").

discrimination. Under such conditions, a temporally tailored program might gradually decrease the market share at which bidding credits (or other plus factors) are phased out.[121] Notice this temporal tailoring seeks to achieve diacronically what the declining-credit schedule seeks to achieve syncronically. Indeed, declining-credit schedules can help provide evidence of whether racial preferences are still necessary to induce the desired level of minority participation.[122] If credits diminish toward zero as participation rises toward the remedial goal, then the goal will only be reached if the weakest minority bidder can participate in the market with a vety small subsidy. As long as the vestiges of discrimination increase the costs of minority bidders, it is unlikely that a declining-credit schedule would overshoot the overall remedial goal—so there would be a smaller likelihood that courts will suspend a program mistakenly thinking that the credits are no longer necessary.

Let me quickly add, however, the assumption that discrimination is a thing of the past is repeatedly and strongly contradicted by a wide variety of empiricism.[123] We would not consider imposing a sunset requirement on traditional remedies for tortious assault, because we have evidence that assault continues to occur in the present day. A sufficient showing that the government is—to use the generative *Croson* phrase—"a passive participant" in present acts of disparate racial treatment strongly rebuts the unqualified argument that remedial affirmative action must soon end. To satisfy strict scrutiny, agencies should consider testing for both private and public disparate treatment as part of on-going "disparity studies."[124]

While this Essay has at times used economics to illuminate the narrow tailoring principle, let me end by emphasizing that there are many issues where economics is not particularly helpful. For example, I doubt whether economic analysis could help illuminate whether the remedial basis for

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121. Thus, even if one estimated in the past that 30% of industry revenues would be controlled by minority-owned firms absent discrimination, narrow tailoring might require that bidding credits phase out in future years at progressively lower levels.

122. This evidence is relevant because courts might wish to end a racial subsidy not only because the beneficiary class was insufficiently related to the injured class, but also because the beneficiary class would participate even without the subsidy.

123. *See* Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995) (documenting disparate treatment in new car sales); John Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 AM. ECON. REV. 881 (1986) (documenting disparate treatment in housing); *PrimeTime Live*, *supra* note 57 (hidden cameras recorded disparate treatment against black tester in variety of retail contexts).

124. Post-*Croson* disparity studies often include anecdotal, self-reported evidence of discrimination, but fail to engage in the kind of controlled experimentation that has provided such powerful evidence in the Fair Housing context. *See* Yinger, *supra* note 123.

affirmative action is a "compelling state interest." But tailoring a remedy to further a particular goal may constitute a type of low-level "tinkering" in which economics—especially with its focus on marginal costs and benefits—may aid constitutional policymaking.[125]

125. Judge Stephen Reinhardt suggested the usefulness of such low-level "tinkering."

APPENDIX

In the following discussion, whether a program is narrowly tailored is assessed using marginal cost-benefit analysis. Marginalism is particularly appropriate for the task because it focuses on whether incremental increases in the scope of one program or another is worth the candle. However, to proceed, I need to make some highly reductive assumptions about the general shape of the marginal costs and marginal benefits.[126] The goal here is merely to describe the slope that the marginal cost and benefit curves *might* take and to show the *possibility* that an invariant quota might be more effective (read: more narrowly tailored) than an invariant credit in inducing the desired minority participation.

To undertake this comparison, I begin by making several assumptions about the effects of different affirmative action programs in an *Adarand*-like procurement context. These assumptions allow me to apply the analysis from Martin Weitzman's classic article, *Prices vs. Quantities*.[127] Just as Weitzman's article questioned the "vague preference" that economists have toward price subsidies,[128] my purpose here will be to show that the preference for bidding or other price-like credits is overstated.

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126. Consonant with the assumption that remedying discrimination is a compelling governmental interest, assume that total social benefits of increasing the participation of minority contractors (including the benefit of remedying past discrimination) outweigh the total social costs (including the potentially higher costs of construction and all pecuniary and nonpecuniary costs induced by a race-based government subsidy). Moreover, assume that all these costs and benefits are commensurable and can be given quantitative representation.

127. Martin L. Weitzman, *Prices vs. Quantities*, 41 REV. ECON. STUD. 477 (1974). Similar analysis applied to law and economics can be found in Robert Cooter's fine writing. *See* Cooter, *supra* note 75; *see also* William Poole, *Optimal Choice of Monetary Policy Instruments in a Simple Stochastic Macro Model*, 84 Q.J. ECON. 197 (1970).

128. Weitzman noted:

> From a strictly theoretical point of view there is really nothing to recommend one mode of control over the other. This notwithstanding, I think it is a fair generalization to say that the average economist in the Western marginalist tradition has at least a vague preference toward indirect control by prices, just as the typical non-economist leans toward the direct regulation of quantities. . . .
>
> . . . .
>
> A reason often cited for the theoretical superiority of prices as planning instruments is that their use allegedly *economizes on information*. The main thing to note here is that generally speaking it is neither easier nor harder to name the right prices than the right quantities because in principle exactly the *same* information is needed to correctly specify either.

Weitzman, *supra* note 127, at 477–78 (first emphasis added).

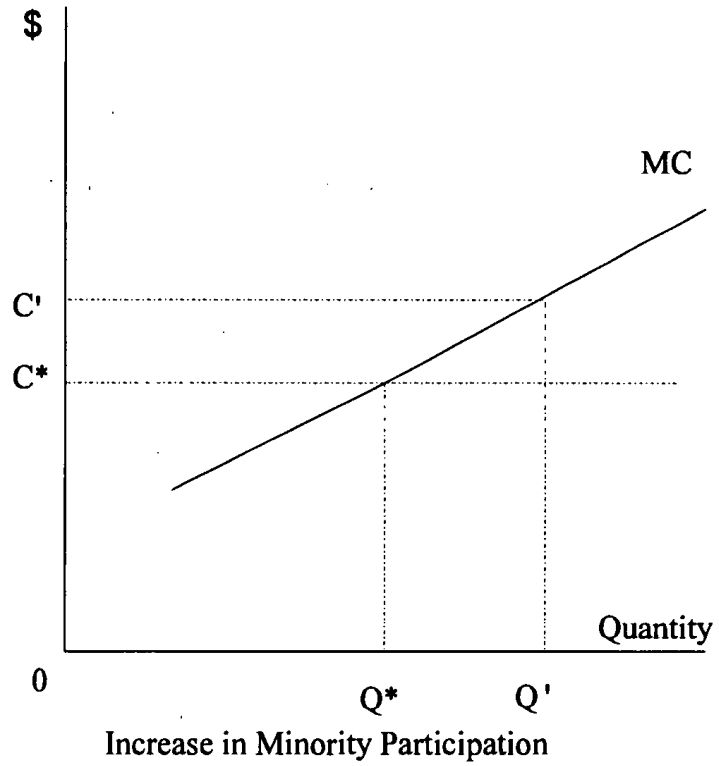

Figure 2: With an Upward Sloping Marginal Cost Curve, Larger Credits Induce Larger Minority Participation

I first assume that the general contractor's marginal costs of increasing minority participation are increasing.[129] This assumption is depicted in Figure 2 by the upward sloping marginal cost curve where the horizontal axis measures some quantum of minority participation such as the dollar revenue going to minority subcontractors (or the number of minority employees), and the vertical axis measures the marginal cost in dollars. This increasing marginal cost curve also crucially describes how the contractor will react to various minority subcontracting credits. The first credits that we consider are constant marginal subsidies for increased minority participation. Rational decisionmakers will respond to a credit by

129. This assumption is controversial. If general contractors discriminate against better qualified minority subcontracting bids, then increasing minority participation need not increase costs.

increasing minority participation to the point where the marginal costs equals this constant marginal subsidy.[130] As shown in the figure, if a general contractor is offered C* dollars for each unit increase in minority participation, then the general contractor would increase minority participation by Q*. And intuitively increasing the size of the credit (say, in Figure 2, up to C') induces the general contractor to increase minority participation even more (to Q').

To complete the model, we need to consider the marginal costs and benefits of increased minority participation to others in society. The goal here is to think about the shape of a "Marginal Net Benefits" (MNB) curve which aggregates the marginal impact on social welfare of increasing minority participation (excluding only the costs to the general contractor which are already captured in the marginal cost curve). Under our assumption that the total benefits of increasing minority participation are larger than the social cost, it must be true that the marginal net benefits are positive for at least some increases in minority participation.[131]

Moreover, there are strong theoretical reasons to think that the MNB curve must at some point slope downward. While the net benefits of creating "token" minority participation may be small, the marginal net benefits must at some point start to decline toward zero. Once a minority participation reaches what it would be without discrimination, there is no reason to think that the marginal net benefit of using subsidies to increase participation beyond this point would be positive: The benefit of remedying past discrimination would no longer be present and the cost to the non-beneficiary race, if anything, would be exacerbated.

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130. We might be concerned that discriminators would not hire the best qualified minority subcontractors. For example, general contractors might prefer to lose some potential profits rather than disturb their stereotyped views of minority inferiority. However, even if general contractors acted in this perverse way, it is not clear how such behavior should affect the government's choice between credits or quotas. Under either a credit or a quota, the general contractor might refuse to choose the most qualified minority contractor. And even given prejudiced disposition, one would still expect greater subsidies to lead to greater levels of minority hiring.

131. The model also assumes that the marginal net benefits curve is not affected by the choice of quotas or credits. One might argue that inducing a particular level of minority participation via a quota would produce smaller net benefits than a credit because quotas are offensive to many people in our society. As argued in earlier, however, the legitimate interest (fundamental right) of non-beneficiaries is to be free from the negative effects of racially motivated laws (unless such laws are narrowly tailored to further a compelling government interest). And because credits or quotas are both racially motivated, any injury that non-beneficiaries experience because of the type of means is not constitutionally cognizable.

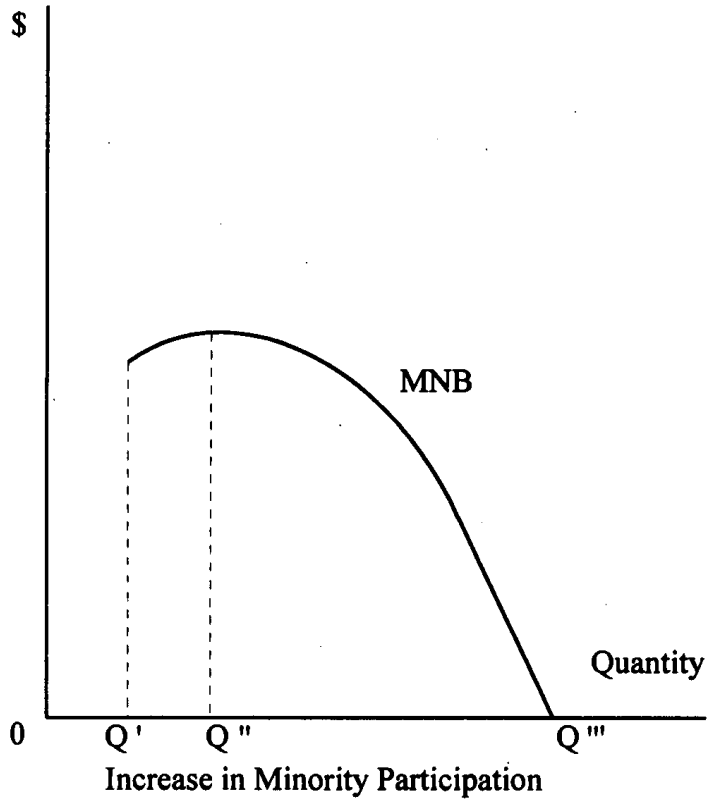

Figure 3: Marginal Net Benefit Curve Ultimately Extinguished When Minority Participation Reaches What It Would Have Been in Absence of Discrimination

The assumption that marginal (net) benefits of affirmative action are generally downward sloping is depicted graphically in Figure 3. Because the marginal benefit of inducing token participation is not as large, the MNB curve rises from Q' to Q". But after overcoming this "token" effect and reaching some critical mass, the curve declines toward Point Q"', which represents the participation that minorities would have attained in the absence of discrimination. The MNB curve might hit the horizontal axis before this "proportional representation" point depending on how one accounts for the burdens to non-beneficiaries. For purposes of this analysis, what is important is that the marginal cost curve generally declines after

minority participation reaches some critical mass, and that the marginal benefits for government to induce increased participation are extinguished *at least* by the time minority participation is what it would have been absent discrimination.

Even though there may well be factors—such as the "token" effect—that cause the marginal benefit curve to slope upwards, the remainder of this Appendix (for simplicity) considers only downward sloping MNB curves. Again, I only need to show that the MNB curve might plausibly be downward sloping and that the general contractor's marginal cost curve might be upward sloping. Accepting that a particular market might exhibit such marginal costs and benefits is enough to assess whether quotas or credits are more narrowly tailored.

To make the question interesting, we need to introduce some uncertainty about how the general contractor will react to a credit scheme. If the marginal cost and net benefit curves are precisely known, then either a quota or credit might implement the same equilibrium.[132] By identifying the intersection of the two curves, a social planner could choose a quota or credit that tailors the increased minority participation to the government compelling interest. This is done in Figure 4 by a credit set at C* or quota set at Q*.

To make quotas and credits non-equivalent policy instruments, imagine that the government is uncertain about how much higher minority bids will be than white subcontracting bids.[133] There are many types of uncertainty that the government might face, but (just to create a simple example) assume that the slope of the marginal cost curve is known, but that the intercept of the curve might be shifted either up or down by some amount, ε.[134]

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132. Weitzman made a similar point: "In an environment of complete knowledge and perfect certainty there is a formal identity between the use of prices and quantities as planning instruments. . . . If there is any advantage to employing price or quantity control modes, therefore, it must be due to inadequate information or uncertainty." Weitzman, *supra* note 127, at 480.

133. Uncertainty in the marginal benefit curve does not affect the choice between credit or quota, because uncertainty about external social benefits does not shift the decisionmaker's reaction curve.

134. For concreteness, imagine that half the time the marginal cost curve is shifted up and half the time it is shifted down. However, the analysis would be true for a great many other specifications, including, for example, if the MC curve were equally likely to be shifted up, down, or not at all.

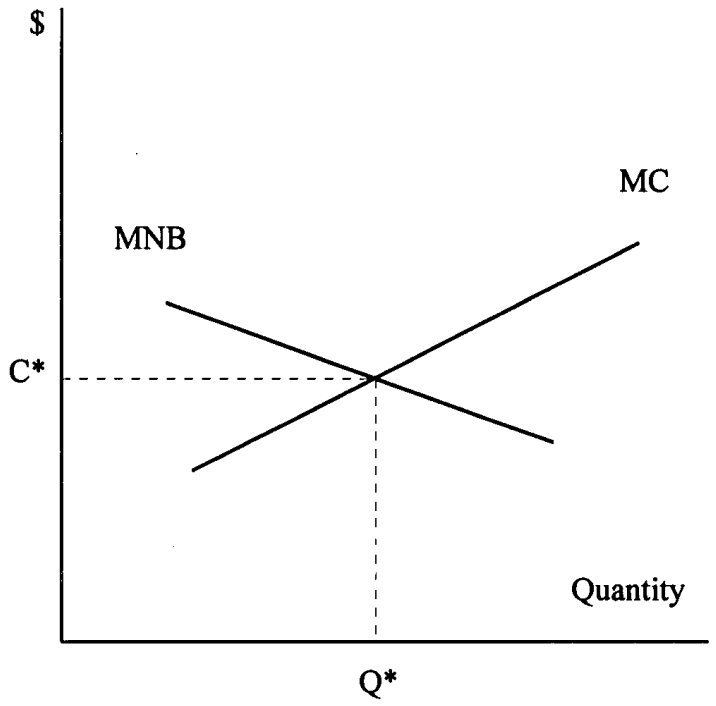

Figure 4: Equivalence of Quotas and Credits When Marginal Costs and Benefits Curves Are Known with Certainty

With these assumptions we can explore graphically whether a quota or a credit is more successful. A perfectly tailored rule would make the degree of minority participation depend on the relative strength of the minority bidders. If minority bids are unexpectedly high, increasing minority participation is more expensive—so the optimal amount of participation is lower. Analogously, if the minority bids are unexpectedly low, increasing minority participation is less expensive and the optimal participation rate is higher. These optimum participation rates for the two possible states of the world are depicted in Figure 5 by q^*_L and q^*_H which represent the quantities where the MNB curve intersects the two possible MC curves.

Figure 5 can help us assess how well quotas or credits succeed in tailoring actual participation rates to these optimal benchmarks. The quota induces minority participation of q_Q regardless of whether the minority bidders enter relatively high or low bids. When the minority bids are unexpectedly high, the quota induces too much minority participation ($q_Q > q^*_H$). The inefficiency caused by this oversupply is represented in Figure 5 by a triangle drawn between the optimal and actual quantity: When the

minority bids are unexpectedly high, the marginal cost of minority participation at q_Q is ε larger than the marginal net benefit. The marginal cost to the general contractor remains above the marginal net benefit to the rest of society at all points between q_Q and q^*_H, and the triangle area represents the total loss in welfare from the quota's failure to tailor when minority bids are unexpectedly high.

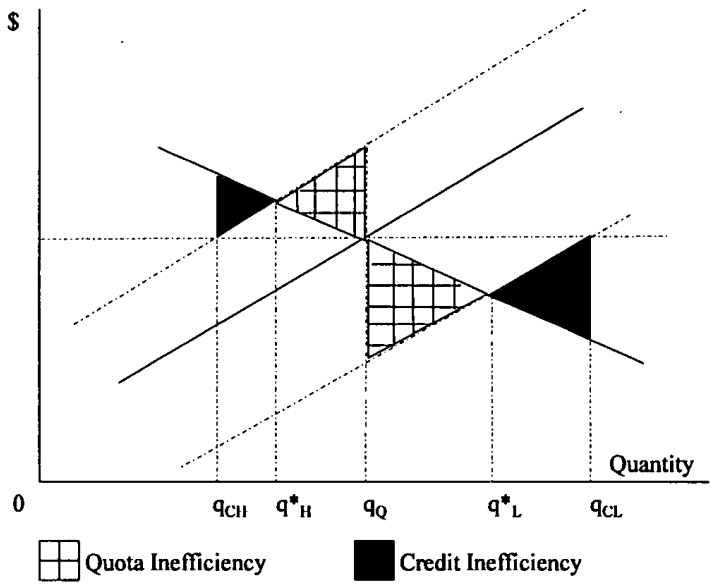

Figure 5: Example of Credit (Price Subsidy) Being More Efficient Than Quota—Caused by Substantial Uncertainty About Costs of Quota

Quotas create an analogous inefficiency by inducing too little minority participation when minority bids are unexpectedly low. When the cost of increasing minority participation is unexpectedly low, the optimum minority participation is greater than the quota ($q^*_L > q_Q$), but the quota restrains participation to a level where the marginal benefit is greater than the marginal cost. The tailoring inefficiency associated with this shortfall is depicted by an analogous triangle.

Figure 5 also shows, however, that a simple credit fails to induce the optimum participation rates. Quotas are inefficient because they do not vary with the strength of minority bids; credits are inefficient because they vary too much. When minority bids are unexpectedly high, the quota mandates too much minority participation, but Figure 5 shows that a credit induces too little participation. General contractors responding to a credit and high minority bids will increase minority hiring only to the point

where the marginal subsidy of the credit equals the marginal cost of increasing minority participation. In Figure 5, this point occurs at q_{CH}. But at this level of participation, the marginal net benefits to society are larger than the marginal costs. The tailoring inefficiency associated with this shortfall is represented by the smaller, shaded triangle between q_{CH} and q_Q. An analogous tailoring inefficiency is created when minority bids are unexpectedly low: The credit now induces too much minority participation ($q_{CL} > q_Q$), which is depicted by an analogous small triangle.

Comparing the tailoring inefficiencies, Figure 5 reveals the conventional result. The quota produces a less-tailored outcome than the credit. The credit is better tailored because it produces participation rates that are closer to the optimal.[135] Credits induce more variation in minority participation. Thus, for the assumed marginal cost and benefit curves, making minority participation sensitive to the strength of minority bids is more tailored than making minority participation completely invariant. The residual inefficiency of the credit is caused by general contractors ignoring the marginal benefits of enhanced minority participation; they only internalize the constant marginal subsidy of the credit. But as drawn in Figure 5 the externality caused by the credit is small, because the marginal benefit curve is relatively flat—meaning that under a credit there are only slight differences between the marginal benefits to society and the marginal subsidy created by the simple, invariant credit.

If we stopped here, there would be little added-value for this economic modeling. Consistent with Powell's discussion in *Bakke*, Figure 5 shows that a quota is less well tailored to the government's compelling interest than a credit. However, it is easy to construct an example in which the quota is better tailored than the credit. Indeed, if we merely increase the steepness of the marginal net benefit curve, the quota can become the better tailored means. Figure 6 shows just this possibility. As before, a credit makes the minority participation rate more sensitive to the strength of minority bidding. But in this case, the swings in minority participation are excessive compared to what an optimally tailored participation would be: The mandated quota participation (q_Q) is closer to the optimal participation (q^*_H and q^*_L) than the level induced by the credit (q_{CH} and q_{CL}). The deviations from the optimal participation level create analogous ineffi-

135. Graphically $q^*_H - q_{CH} < q_Q - q^*_H$.

ciency triangles, but in Figure 6 the tailoring inefficiency of the credit is more than that for the quota.

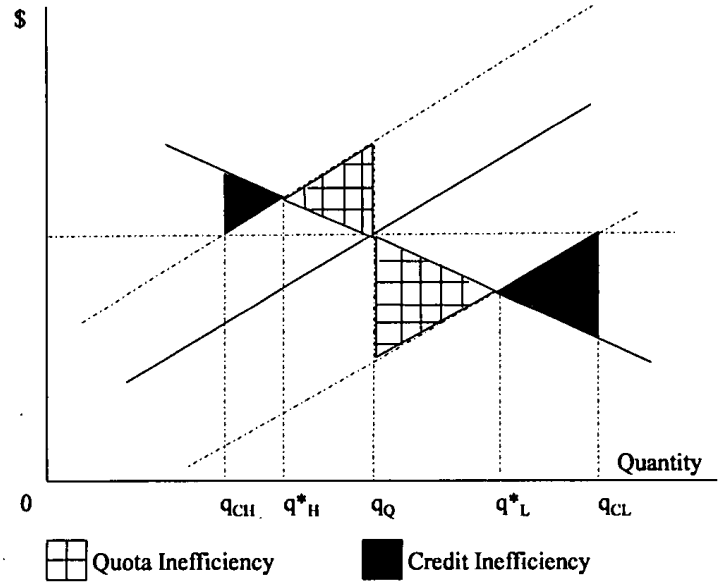

Figure 6: Examples of Quota Being More Efficient Than Credit (Price Subsidy)—Caused by Uncertainty About How Decisionmaker Will Respond to Credit

The geometry suggests that quotas become better tailored (relative to credits) as (1) the marginal benefit curve becomes steeper or (2) themarginal cost curves becomes flatter.[136] But what is the intuition behind this counterintuitive result? The flatness of the marginal cost curve determines how sensitive minority participation will be to size of the credit. If the marginal cost curve is very flat, then unexpectedly high minority bids will cause a large decline in minority participation, and unexpectedly low minority bids will cause a large increase in minority participation.[137] In other words, if a number of minority contractors are likely to place similar bids (but the government is uncertain about how much higher these bids

136. Indeed, in this model, the quota will be better tailored than the credit, whenever (the absolute value of) the marginal benefit curve slope is greater than the marginal cost curve slope.

137. Conversely, if the marginal cost curve is very steep, then even unexpectedly high or low minority bids will not dramatically affect minority participation.

will be than the white bids), it will be very difficult for the government to assess how a particular credit will affect minority participation. If the government sets the credit too low, the general contractor will not be willing to hire any minorities, but if the government sets the credit too high, the general contractor may hire only minorities. The slope of the marginal cost curve thus shows how much variation in minority participation will result from the use of simple credit.

The slope of the marginal net benefits curve then determines the size of the externality associated with this variation. As argued above, when a general contractor decides to reduce minority participation because of unexpectedly high minority bids, it only internalizes the foregone credit subsidy. The general contractor does not consider the foregone opportunity to remedy discrimination. When the marginal net benefit curve is steep, this externality problem becomes larger, and credits accordingly do a poorer job of tailoring minority participation to the government's compelling interest.