The Economics of Affirmative Action

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The Supreme Court has mandated that government affirmative action plans must serve some compelling government interest and must be narrowly tailored to further this interest. Economics doesn't have much to say about whether, say, remedying racial discrimination is a compelling interest, but the tools of economics shed light on what types of affirmative action programs satisfy the narrow tailoring requirement. Economic analysis suggests that the most narrowly tailored affirmative action program will (a) be racially explicit (rather than the Supreme Court's current preference for "race neutral means to increase minority participation"); (b) will use a sliding scale of credits in which the size of the racial preferences declines with minority participation; and (c) may at times create "quasi-quotas" which effectively ensure a participation floor for minorities.

The idea that a remedy needs to be tailored to further the government's legitimate interest is captured in part by the unexceptional idea that remedial classifications should not be too overinclusive or underinclusive. The Supreme Court, for example, in Croson (1989) was particularly concerned about the problem of overinclusion; that is, giving affirmative action preferences to people (such as Aleuts) who were not injured by past discrimination in a particular jurisdiction. However, the same opinion also expressed a strong preference for the

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"the use of race-neutral means to increase minority business participation." This preference for "race-neutral means" -- such as general subsidies for small entrepreneurs -- necessarily conflicts with the Court's aversion with overly inclusive programs. If preferring the minuscule number of Aleuts in Richmond is "grossly overinclusive," then extending preferences to a much larger class of whites – as would race-neutral subsidies -- a fortiori would fail the narrow tailoring requirement. Narrowly tailoring the beneficiary class for remedial subsidies so that it will not be overinclusive necessitates explicit racial classifications.

Clearly, the Supreme Court has something more in mind by narrow tailoring than a mere insistence on not too much over- or under-inclusion. Indeed, the Court's decisions suggest that narrow tailoring may also requires that racial preferences do not unduly burden non-minorities. Government decisionmakers are constitutionally required to remedy discrimination using the"least restrictive alternative." Here too economic analysis can be of help – especially in evaluating the relative costs (burdens to minorities) and benefits (remedying racial discrimination) of different affirmative action programs. Narrow tailoring implies a sensitivity to the contours and scope of racial preferences and economic analysis is especially attuned to analyzing effects on the margin.

Simple economics suggests that the Supreme Court's antipathy for quotas is overstated. Quotas may be more narrowly tailored to achieve the government's remedial interest than many other types of 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.

The question of whether affirmative action racial preferences should be implemented with quotas or credits is similar to the more general question of whether laws should take the form of quantity or price regulation. Economists (Weitzman, 1974; Cooter, 1984) have suggested circumstances where either type of regulation might be the most efficient. Applied to the question off affirmative action, these models suggest that 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. (Ayres, 1996). 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.

Sliding-scale preferences may come close to setting aside a minimum quota of contracts for minority bidders, but 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 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 can be defended as a narrowly tailored remedy because they cause decisionmakers to internalize the true social costs of dramatic shortfalls in minority participation. The problem with, say, simple (invariant) bidding credits is that the participation of minorities may fluctuate in ways that are inconsistent with narrow tailoring the preferences to the government's underlying remedial interest. Quasi-quotas for a fraction of the overall remedial goal dampen this potential damaging fluctuation. And because the 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. Finally, 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.

Economics also suggests that government can at times remedy private discrimination without unduly burdening non-minorities. Ayres & Vars, 1998. Government racial preferences in procurement, for example, can counteract private underutilization in the same market without unduly burdening non-minority firms who are by hypothesis overutilized in the overall market because of their race.

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