

This is acceptable, so long as there is no presumption made that certain racial, ethnic, or gender groups are entitled to a credit on the grounds that they have suffered discrimination and, accordingly, have "overcome substantial disadvantage." Such a presumption would amount to a classification and preference on the basis of race, ethnicity, or sex, which is presumptively unconstitutional. See *Adarand Constructors v. Peña* (1995), *Mississippi University for Women v. Hogan* (1982), *Personnel Administrator v. Feeney* (1979). The showing of overcoming substantial disadvantage in 2011 must be done on an individual basis, and all applicants should be treated without regard to race, ethnicity, or sex. If the new credits cannot be treated in a nondiscriminatory way, then they should not be awarded at all. (We note that, as the notice says, there is already attention given to groups that have historically been discriminated against, and the constitutional and fairness problems raised by adding a (second) layer of preference to the process would outweigh any benefits to improving communications policy.)