1-1-1998

When Does Private Discrimination Justify Public Affirmative Action?

Ian Ayres
Yale Law School

Fredrick E. Vars

COLUMBIA LAW REVIEW

VOL. 98 NOVEMBER 1998 NO. 7

WHEN DOES PRIVATE DISCRIMINATION JUSTIFY PUBLIC AFFIRMATIVE ACTION?

Ian Ayres and Fredrick E. Vars***

At a moment when judicial tolerance of race-conscious government action seems to be waning, this Article develops a new set of constitutionally viable justifications for affirmative action. Rather than enter the familiar debate over the legitimacy of the Court's application of strict scrutiny to remedial affirmative action, Ayres & Vars excavate widely overlooked language in the Supreme Court decision in City of Richmond v. J.A. Croson Co., *which notes the ability of government to eradicate the effects of private, not just governmental or "public," discrimination. The authors develop three justifications for remedying private discrimination through public affirmative action, each of which produces non-arbitrary goals that do not unduly burden "innocent" third parties—making them narrowly tailored to a compelling governmental interest. Thus, the authors re-cast* Croson, *an opinion routinely understood as the death knell for affirmative action, into a model for its redirection and possible expansion.*

Beginning with the story of Marian Anderson's 1939 concert at the Lincoln Memorial, the authors demonstrate how public affirmative action used to remedy private discrimination is neither counter-intuitive nor unprecedented in our historical memory. They then focus on affirmative action in government procurement, and demonstrate how the larger size of private markets and the stronger evidence of private discrimination suggest that the future of affirmative action in procurement may turn largely on private discrimination justifications. Three private discrimination rationales follow: (1) to ensure that government spending does not directly or indirectly facilitate private discrimination (the "causal" justification); (2) to correct for the depressive effect of private discrimination on the capacity of minority-owned firms (the "but-for" justification); and, most radically, (3) to compensate for shortfalls in private sales caused by purely private discrimination, so long as the scope of the government remedy is restricted to that particular market (the "single-market" justification). The Article applies the justifications it offers

* William K. Townsend Professor, Yale Law School; Ph.D. (Economics) M.I.T., 1988; J.D. Yale Law School, 1986; B.A. Yale College, 1981.

** J.D. Yale Law School, expected 1999; A.B. Princeton University, 1995. Timothy Bates, Bill Bowen, Bill Carney, David Goldberg, John Jeffries, Jr., Jonathan Macey, Dan Ortiz, Victor Rosenblum, Peter Siegelman, Paul Sonn, Bill Spriggs and seminar participants at Cornell, Florida State, Kansas, Valparaiso, and Yale law schools provided helpful comments. (Professor Ayres has advised the Justice Department in its post-*Adarand* review of affirmative action. The authors have also submitted comments to the Small Business Administration and the Department of Transportation. The opinions expressed in this Article are not necessarily the views of the Justice Department, or any other federal agency.)

to the related context of employment and argues that public remedies for private discrimination in employment can be narrowly tailored. Thus, a position which at first appears to be incompatible with the Supreme Court's present unwillingness to uphold affirmative action programs emerges as a remarkably compelling and constitutionally grounded argument in support of the government's ability to remedy private discrimination in a wide array of settings.

TABLE OF CONTENTS

Injustice anywhere is a threat to justice everywhere.[1]

INTRODUCTION

Marian Anderson was a contralto with a voice of rare power, a voice that Toscanini said "came once in a hundred years."[2] But in the late

1. Martin Luther King, Jr., Letter From Birmingham Jail (Apr. 16, 1963), *in* Why We Can't Wait 76, 77 (1964).

2. Liane Hansen, Marian Anderson Sings, Weekend Edition, Transcript #97022315-215 (National Public Radio broadcast, Feb. 23, 1997) [hereinafter Hansen].

The authors thank David Goldberg for suggesting this historical parallel. A more accessible version of the Marian Anderson discussion appeared in the Los Angeles Times shortly after the 59th anniversary of Anderson's Easter performance. See Ian Ayres, Remedying Past Discrimination: Following the 'Anderson' Model, L.A. Times, Apr. 26, 1998, at M2.

1930s, the Daughters of the American Revolution (DAR) refused to rent Constitution Hall—the only large concert hall in Washington, D.C. at the time—to Anderson because she was black. Eleanor Roosevelt was outraged by the DAR's action and not only resigned from the organization, but prompted the National Park Service to invite Anderson to sing at the Lincoln Memorial on Easter Sunday, 1939.[3] The concert was a monumental success. More than 75,000 people came to hear Anderson sing before the statue of the Great Emancipator and millions more listened by radio.[4] Beyond the concert's emotional impact, the event soon came to be seen "as the first strategic victory of the modern civil rights movement."[5] Decades later, when Martin Luther King, Jr. chose to speak at the Lincoln Memorial, the memory of the masses assembling for Anderson's concert must have served as a guide.[6]

Amazingly, many federal courts today would probably find Anderson's invitation unconstitutional, because they believe that the government can take race-conscious action only to remedy its own discrimination.[7] Even the Clinton Justice Department—which as a general matter has worked so assiduously at trying to "mend, not end"[8] affirmative action—has explicitly rejected private discrimination as a rationale for public affirmative action:

---

3. Roosevelt influenced Harold L. Ickes, Secretary of the Interior, to have the National Park Service issue this extraordinary invitation. Before the recital began, Ickes addressed the audience: "Genius, genius draws no color line. She has endowed Marian Anderson with such a voice as lifts any individual above his fellows, as is a matter of exultant pride to any race." Hansen, supra note 2; cf. Charles L. Black, My World with Louis Armstrong, 95 Yale L.J. 1595 (1986) (describing the genius of Louis Armstrong).

4. See Marian Anderson: A Life in Song—Singing to the Nation, Penn Library Exhibitions [hereinafter Singing to the Nation] (visited Feb. 8, 1998) <http://www.lib.upenn.edu/special/gallery/anderson/lincoln.html> (on file with the *Columbia Law Review*); see also Marian Anderson, My Lord, What a Morning: An Autobiography (1992).

5. Marian Anderson 1897–1993 (visited Feb. 8, 1998) <http://www.ctforum.org/cwhf/anderson.html> (on file with the *Columbia Law Review*). In July, 1939, Eleanor Roosevelt presented Anderson the NAACP's Spingarn Medal. See Singing to the Nation, supra note 4. Four years later, the DAR reversed its policy and invited Anderson to sing at Constitution Hall. See id.

6. The 75,000 person audience was the largest to date ever assembled at the Memorial. See Singing to the Nation, supra note 4. A dramatic picture of Anderson singing before the mass assemblage can be viewed at Marian Anderson: A Life in Song—Photographs from: Lincoln Memorial Concert, Washington, D.C., 9 April 1939 (visited Feb. 8, 1998) <www.lib.upenn.edu./special/gallery/anderson/linimage2.html> (on file with the *Columbia Law Review*), and a moving quicktime clip of her singing "My Country 'Tis of Thee" at the Memorial can be found at Videotape of Marian Anderson Performing at the Lincoln Memorial, Washington, D.C., Easter Sunday 1939 (visited Feb. 8, 1998) <www.lib.upenn.edu/special/gallery/anderson/av/lincoln.html> (on file with the *Columbia Law Review*).

7. See infra note 17 (cases cited).

8. John F. Harris, Clinton Avows Support For Affirmative Action: "Mend It, but Don't End It," President Says in Speech, Wash. Post, July 20, 1995, at A1 (quoting July 19, 1995 speech at the National Archives).

> [A]ffirmative action in federal procurement is not a means to make up for opportunities minority-owned firms may have lost in the private sector . . . .[9]

But the whole purpose of Anderson's invitation was to make up for the opportunities she lost in the private sector. The federal government at that time did not normally open the Lincoln Memorial for public concerts. The invitation to Anderson was a race-conscious preference, a form of affirmative action, to remedy the DAR's private discrimination. Anderson's invitation was one of the federal government's first attempts in this century to rectify the continuing harms of racial discrimination. Yet, somehow, we have gone from thinking that making up for private discrimination is an appropriate first step to thinking such remediation is illegal.

Rejecting private discrimination as a rationale for public affirmative action has ramifications far beyond the provision of concert space. Limiting public affirmative action to remedying discrimination by the government itself may eviscerate affirmative action in federal contracting. Jeffrey Rosen has offered the following syllogism, which succinctly summarizes the argument: "[T]he Supreme Court will only uphold federal racial set-asides in light of convincing evidence of past discrimination by the federal government itself; but, for almost twenty years, the federal government has been discriminating in favor of minority contractors rather than against them."[10] From these two premises Rosen concluded that federal set-asides were doomed.

Rosen's first premise, that the federal government can act only to remedy its own discrimination, is not true. In *City of Richmond v. J.A. Croson Co.*, Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, concluded that the City of Richmond "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment."[11] And, while *Croson* concerned state and local procurement, the Court in *Adarand Constructors, Inc. v. Pena* has more recently held that the *Croson* analysis applies to federal programs.[12] Thus, even though *Croson* and

---

9. Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648, 25,650 (1997).

10. Jeffrey Rosen, The Day the Quotas Died, New Republic, Apr. 22, 1996, at 26. Like Rosen, we confine our attention primarily to affirmative action based on race.

11. 488 U.S. 469, 492 (1989) (plurality opinion). Although this statement appeared in a plurality opinion, a majority of the Justices in *Croson* accepted private discrimination as a constitutionally sufficient rationale for a racial set-aside. See id. at 538 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) ("the interest in ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is . . . compelling").

12. And, while the *Adarand* Court emphasized "congruence" in applying strict scrutiny to both state and federal affirmative action programs, see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995), it did not repudiate the principle that Congress deserves greater deference than states because Congress is a co-equal branch of government and explicitly charged with enforcement power by Section 5 of the Fourteenth

Adarand are usually viewed as restricting the government's ability to implement affirmative action (by subjecting such legislation to strict scrutiny),[13] these decisions in at least one dimension expand that ability—by

---

Amendment. See id. at 231 ("We need not, and do not, address these differences [in deference] today."); see also *Croson*, 488 U.S. at 490 (plurality opinion) ("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment"); Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,051 (1996) (noting that Congress's mandate of enforcement under the Thirteenth and Fourteenth Amendments means it "need not make findings of discrimination with the same degree of precision as do state or local governments"). Some commentators have missed this point. See, e.g., Proposed Reform of the 8(A) Program Through H.R. 3994, The Entrepreneur Development Program Act of 1996: Hearing Before the House Comm. on Small Bus., 104th Cong. 92, 2d Sess. (1996) (statement of Jeffrey Rosen, Legal Affairs Editor, The New Republic) [hereinafter Rosen Testimony]; The Constitutionality of Race-based Preferences: Oversight Hearing on the Impact of Adarand v. Pena Before the Subcomm. on the Constitution, Federalism, and Property Rights and the House Judiciary Comm. Subcomm. on the Constitution, 104th Cong. 651 (1995) (statement of George R. La Noue, Director of the Project on Civil Rights and Public Contracts) [hereinafter La Noue Statement]. The first federal court to rule on this question concluded that: "Reading *Adarand* and *Croson* together, it is clear that race-conscious actions by Congress must meet a strict scrutiny standard, but in determining whether they do so, Courts should give Congress somewhat greater deference." Cortez III Serv. Corp. v. NASA, 950 F. Supp. 357, 361 (D.D.C. 1996).

As noted above, Section 5 of the Fourteenth Amendment provides Congress with constitutional power to enforce the Equal Protection Clause. This clearly supports the proposition that Congress is entitled to greater deference than states on matters touched by that Amendment. But because the Equal Protection Clause is directed specifically towards *states*, it is more difficult to read Section 5 as creating power for Congress to remedy *private* discrimination. However, the Thirteenth Amendment may provide Congress with power to counter private discrimination in contracting.

Section 1 of the Thirteenth Amendment prohibits "slavery or involuntary servitude," and Section 2 is an enforcement provision exactly parallel to Section 5 of the Fourteenth. Pursuant to Section 2, Congress enacted 42 U.S.C. § 1981 (1994), which protects the right of all citizens to enter into and enforce contracts. The Supreme Court has held that "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968). One might plausibly infer that congressional action to eradicate the effects of private discrimination in contracting (as a "badge of slavery") is subject to rational relation review, rather than strict scrutiny. Of course, such action is still subject to the judicially-incorporated Equal Protection component of the Fifth Amendment, see *Adarand*, 515 U.S. at 213–18, but there remains a relatively strong textual argument for greater deference to Congress.

In this Article, we follow *Adarand*'s mandate of "congruence" without considering residual deference to Congress. However, if the private discrimination rationales offered satisfy the *Croson* standard for justifying state and local affirmative action, then they apply a fortiori to congressional programs.

13. This doctrinal development has drawn harsh criticism. See, e.g., Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.*: The Backlash Against Affirmative Action, 64 Tul. L. Rev. 1609 (1990). This Article does not enter the familiar debate over the appropriateness of strict scrutiny; rather, we take strict scrutiny as a given and outline when affirmative action based on private discrimination can satisfy the *Croson* standard.

making clear that remedying private discrimination is a compelling interest of state and federal governments.[14]

The idea that government affirmative action can only be used to remedy government discrimination comes from Justice Powell's plurality opinion in *Wygant v. Jackson Board of Education*, which noted that the Supreme Court "has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[15] But *Croson* overturned this *Wygant* limitation by squarely holding that remedying private discrimination is a compelling governmental interest.[16] Notwithstanding *Croson*, many federal circuits (and commentators such as Rosen) continue to insist that governmental units can only use affirmative action to remedy their own discrimination.[17] This Article seeks to end this mis-

---

14. Scholars from opposing perspectives have noted this change. Compare Judith C. Areen et al., Constitutional Scholars' Statement on Affirmative Action After *City of Richmond v. J.A. Croson Co.*, 98 Yale L.J. 1711, 1713 (1989) ("The Supreme Court has rejected the notion[ ] that race-conscious affirmative action measures adopted by a local government or other body must as a constitutional matter be limited to redressing the effects of that government's or body's own past discrimination . . . ."), with Charles Fried, Affirmative Action After *City of Richmond v. J.A. Croson Co.*: A Response to the Scholars' Statement, 99 Yale L.J. 155, 160 (1989) ("The Court makes clear that a governmental unit may act to remedy not only its own past discrimination but that of identified others within its jurisdiction.").

Even though he recognized the important point, Fried subtly misconstrued *Croson*. What is essential for a constitutionally sufficient predicate for affirmative action after *Croson* is not that the "others" be identified, but that the *discrimination* be identified. If individual private discriminators could be identified, race-neutral enforcement of anti-discrimination laws would suffice.

15. 476 U.S. 267, 274 (1986) (plurality opinion of Powell, J.).

16. See *Croson*, 488 U.S. 469, rev'g 822 F.2d 1355 (4th Cir. 1987). The *Croson* decision overruled the Fourth Circuit's holding that "[f]indings of *societal* discrimination will not suffice; the findings must concern 'prior discrimination *by the government [sic] unit involved.*'" 822 F.2d at 1358 (quoting *Wygant*, 476 U.S. at 274). See infra text accompanying notes 122–125 for a more extensive discussion of the relationship between *Wygant* and *Croson*.

17. In as many as ten federal circuit and district courts, majority opinions have favorably quoted the *Wygant* language limiting race-conscious remedies to the "governmental unit involved" notwithstanding the interceding *Croson* decision. See Messer v. Meno, 130 F.3d 130, 136 (5th Cir. 1997); Aiken v. City of Memphis, 37 F.3d 1155, 1162 (6th Cir. 1994); In re Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525, 1540 (11th Cir. 1994); Billish v. City of Chicago, 962 F.2d 1269, 1280 (7th Cir. 1992); Hiller v. County of Suffolk, 977 F. Supp. 202, 206 (E.D.N.Y. 1997); McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001, 1008 (D. Mass. 1996); Koski v. Gainer, No. 92 C 3293, 1995 U.S. Dist. LEXIS 14604, *40 (N.D. Ill. 1995); Mallory v. Harkness, 895 F. Supp. 1556, 1559 (S.D. Fla. 1995); Sbuford v. Alabama State Bd. of Educ., 846 F. Supp. 1511, 1521 (M.D. Ala. 1994); Concrete Gen., Inc. v. Washington Suburban Sanitary Comm'n, 779 F. Supp. 370, 378 (D. Md. 1991). For additional examples of continued misplaced reliance on the *Wygant* limitation, see our discussions of Taxman v. Board of Education of Piscataway, 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. granted, 117 S. Ct. 2506 (June 27, 1997), cert. dismissed, 118 S. Ct. 595 (Dec. 2, 1997), and Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied 518 U.S. 1033 (1996), infra notes 200, 205–208 and accompanying text.

placed reliance on *Wygant* and instead identifies when affirmative action in government procurement to remedy private discrimination can be "narrowly tailored" to pass strict scrutiny.

Rosen's syllogism, while flawed, usefully underscores the importance of private discrimination. His second premise—that the federal government has not been discriminating for twenty years—may be much closer to the truth. As an empirical matter, government discrimination, standing alone, may not suffice to justify the current patterns of affirmative action in state and federal procurement. While government discrimination in some procurement markets may be a thing of the past,[18] the same cannot be said of private discrimination.[19] Underutilization[20] of minority

---

At the same time, several circuits have correctly recognized that *Croson* modified the *Wygant* limitation. See Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1529 (10th Cir. 1994); Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1002 n.10 (3d Cir. 1993); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring); Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 974 (6th Cir. 1991); Coral Constr. Co. v. King County, 941 F.2d 910, 916 n.6 (9th Cir. 1991). For example, the Ninth Circuit wrote:

> The declaration of the *Croson* plurality that a city "can use its spending powers to remedy private discrimination," in conjunction with the opinion of the three dissenting justices, appears implicitly to overrule our requirement in AGCC I that to justify a race-based preference, "the state or local government must be acting to remedy government-imposed discrimination."

Associated Gen. Contractors Inc. v. Coalition for Econ. Equity, 950 F.2d 1401, 1413 n.10 (9th Cir. 1991) (citations omitted); see also Am. Subcontractors Ass'n v. City of Atlanta, 376 S.E.2d 662, 664 n.5 (Ga. 1989) (citing to *Croson* in support of state's right to remedy private discrimination).

18. Racial discrimination persists in other areas of government action. African Americans and Hispanics are routinely discriminated against in the criminal justice system. See, e.g., Ian Ayres & Joel Waldfogel, A Market Test for Race Discrimination in Bail Setting, 46 Stan. L. Rev. 987, 990–91 & nn.11–14 (1994) (citing, among several others, a report that found bail amounts in Hartford, Connecticut, for black defendants to be 70 percent higher than for white defendants); David C. Baldus et al., Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661, 707–10 (1983) (reporting a substantial race-of-victim disparity in the imposition of the death penalty in Georgia); Paul W. Valentine, ACLU Files Suit Against Md. Police; Group Says Blacks Targeted Along I-95, Wash. Post, June 5, 1998, at B1 (noting, in addition to the Maryland suit, legal action against law enforcement agencies in New Jersey, Pennsylvania, Florida, and Indiana). In recent years, several hundred (mostly state and local) law enforcement officials attended the infamous "Good Ol' Boys Roundup" gathering in Tennessee. See Pierre Thomas, Treasury Finds Limited Involvement in "Roundup," Wash. Post, Jan. 6, 1996, at A14. Federal loan programs and employment are plagned by racial discrimination. See, e.g., Michael A. Fletcher, Weighing in "Hard" Against USDA Discrimination, Wash. Post, Feb. 9, 1998, at A17 (reporting a backlog of around 1000 complaints from minority farmers of discrimination in lending); Michael A. Fletcher, Bias Settlement Approved in Corps of Engineers Case; Pittsburgh District to Pay Blacks $800,000, Wash. Post, Jan. 25, 1997, at A9 (settlement addressed subjection of black employees to physical abuse, verbal abuse, and job discrimination).

19. See, e.g., Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817 (1991) (finding systematic discrimination against women and African Americans in auto sales) [hereinafter Ayres, Fair Driving]; J. Linn Allen, Civil Wrongs, Chi. Trib., Nov. 14, 1993, at C1 (citing HUD findings that blacks

businesses is a much bigger problem in private markets than in public markets. Indeed, there may be some public markets where minority firms are not underutilized at all.[21] If affirmative action procurement programs in these areas are going to pass constitutional muster, it will be because of underutilization in private markets. Thus, our focus on private discrimination is not just a nice question of law—it is likely to become *the* critical question in deciding the future of the federal government's 10 billion dollar race-conscious procurement programs.[22]

Croson, however, did not fully explain what types of private discrimination are remediable. It is clear that certain forms of "societal discrimination" do not create a sufficient factual predicate.[23] For instance, the Court rejected evidence of discriminatory exclusion of blacks from skilled construction trade unions and training programs as too amorphous to support race-conscious preferences for minority businesses.[24] At the same time, however, the Court suggested that discriminatory exclusion of eligible minority-owned businesses from professional trade associations could suffice: "In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market."[25] Consequently, it is unclear how evidence of private discrimination might be used to validate an affirmative action program.

---

experience discrimination over half of the times they try to buy or rent a home, and that levels of housing discrimination in 1993 were "basically unchanged" from the 1970s); PrimeTime Live: True Colors, (ABC television broadcast, Sept. 26, 1991) (transcript on file with the *Columbia Law Review*) (using undercover cameras and matched testers to document blatant discrimination in employment, car sales, and housing) [hereinafter PrimeTime Live].

20. In *Croson*, Justice O'Connor suggested that public entities could prove the requisite discrimination in a market by comparing the minority market share of contracts (utilization) to the minority market share of qualified firms (availability). O'Connor suggested that "some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion" on the basis of "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." *Croson*, 488 U.S. at 509. While O'Connor measured utilization in terms of the minority share of the *number* of contracts, some lower courts applying *Croson* have implied that the percentage of contract *dollars* going to minority-owned firms would be a better measure. See, e.g., Associated Gen. Contractors v. City of Columbus, 936 F. Supp. 1363, 1389 (S.D. Ohio 1996) (concluding that availability statistics that did not account for the smaller average size of MBEs were "invalid"). We consider the significance of this difference below, see infra notes 58, 114.

21. See infra Part I.B.

22. See George Stephanopoulos & Christopher Edley, Jr., Affirmative Action Review: Report to the President, July 19, 1995, at 62–63.

23. *Croson*, 483 U.S. at 497. Justice O'Connor noted that Justice Powell in both *Bakke* and *Wygant* distinguished "between 'societal discrimination' which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief." Id.

24. See id. at 498–99.

25. Id. at 503.

This Article attempts to answer this question. We offer three broad justifications for using evidence of private discrimination to narrowly tailor affirmative action in government procurement, which for convenience we label as the causal, but-for, and single-market justifications.[26]

The Causal Justification. The causal justification is based on the government's compelling interest in ensuring that its spending does not cause private discrimination. The causal justification was implicitly embraced by *Croson*'s "passive participant" discussion:

> [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. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.[27]

The causal justification allows the government to more narrowly tailor the affirmative action to remedy discrimination that the government itself has caused.[28] Thus, if prime contractors working on government contracts are shown to discriminate against minority subcontractors, then the government should be able to implement affirmative action on behalf of the affected subcontractors. In this sense, the government is a passive participant in private discrimination when its procurement facilitates private discrimination.

The But-For Justification. There is, however, a second way that the government can be a "passive participant." The government is a passive participant in private discrimination when it does not adjust its affirmative action goal to account for how private discrimination has reduced minority availability—i.e., reduced the number of minority firms that are ready, willing, and able to perform. This second meaning is most clearly captured by *Croson*'s analysis of discrimination by local contractors' associations. When a private association refuses to accredit minority businesses, the government would be a passive participant in the association's private discrimination if the government relied on membership status as a criterion for bidder eligibility: "In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market."[29] Even

---

26. While the bulk of this Article is concerned solely with affirmative action in procurement, we briefly apply our thesis to the employment context. See infra Part V.

27. *Croson*, 488 U.S. at 492.

28. We examine two versions of this causal argument: (1) direct causation, i.e., when prime contractors on government jobs discriminate with public money in the awarding of subcontracts; and (2) indirect causation, i.e., when government money facilitates private discrimination, by giving government contractors more financial freedom to discriminate on nongovernment jobs. The *Croson* Court approved affirmative action as a response to the direct causal case with language that also supports the broader second justification.

29. *Croson*, 488 U.S. at 503.

though the government did not cause the private discrimination, the government can constitutionally take action to ensure that its procurement process is not distorted by the private discrimination.

This second "passive participant" theory suggests that the government would be justified in changing its procurement criteria so that it would purchase as much from minority firms as it would but for private discrimination. In standard terms, this would mean making a "but-for" adjustment to increase the estimate of available minority firms to what it would be absent private discrimination.

But *Croson* makes clear that not all types of discrimination would be remediable under a but-for theory. We argue that the government should be able to make but-for availability adjustments to counteract the effects of private discrimination against the minority businesses *qua minority businesses.* Private (or government) discrimination against the much larger class of potential minority entrepreneurs would not be remediable by affirmative action in procurement. This distinction suggests that but-for adjustments should not be used to estimate how many more minority firms would exist but for private discrimination, but should be limited to estimating how much more available existing firms would be—in terms of capacity or ability to charge a lower price—in the absence of private discrimination.

Restricting the types of remediable private discrimination is necessary to satisfy the narrow-tailoring requirements that remedies be neither arbitrary nor unduly burdensome. Estimating how many more firms would exist absent discrimination against potential entrepreneurs is necessarily more attenuated than estimating how much more capacity existing minority firms would have in the absence of discrimination; thus, estimates based on existing firms offer a less arbitrary basis for tailoring an affirmative action goal. Furthermore, restricting the remedy to counteract private discrimination against minority firms is less burdensome to disfavored nonminority firms. Nonminority businesses that are disadvantaged by the but-for adjustment in competing for a small proportion of government purchases are not "unduly burdened" if the government can show that they are the beneficiaries of private discrimination with regard to selling the same product. But-for adjustments to remedy societal discrimination against potential minority entrepreneurs, in contrast, are more burdensome to nonminority businesses because they may not have benefitted as directly from the private discrimination. This criterion nicely explains the examples discussed in *Croson* itself. While the Court suggested that but-for adjustments to counteract private discrimination which excluded minority-owned businesses from professional trade associations would be constitutional, it maintained that but-for adjustments to counteract private discrimination in education or employment markets against potential minority entrepreneurs would be unconstitutional.

The Single-Market Justification. The but-for justification suggests that the government can constitutionally act to remedy the effects of private discrimination which it has not caused. The crucial requirement is a non-arbitrary estimate of how much private discrimination against minority firms has reduced minority sales to the government (i.e., how much more the government would have purchased but for private discrimination). But a parallel argument suggests a final "single-market" justification: The government should be able to use affirmative action in procurement not just to correct shortfalls in government purchasing caused by private discrimination, but also to correct shortfalls in private purchasing caused by private discrimination.

Our core thesis is that the government can remedy shortfalls in private purchasing only when the firms disadvantaged by the government's affirmative action were likely beneficiaries of the private discrimination. This principle implies that the government cannot use affirmative action in one market to remedy discrimination in another. But when purchasing a particular product, the government should be able to remedy private discrimination against sellers of the same product. The but-for adjustment does just this to remedy shortfalls in government purchasing; the single-market justification expands the procurement remedy to correct for shortfalls in private purchasing.

While the Supreme Court has rejected generalized claims of past discrimination that "provide[ ] no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy,"[30] estimating the impact of private discrimination on the minority market share in a particular industry provides a non-arbitrary basis[31] for selecting a utilization target. Indeed, the same utilization analysis suggested by Justice O'Connor in *Croson* regarding government procurement can be applied to private purchases of the same products to determine whether a shortfall in minority participation exists.[32] If a utilization analysis of private purchases in a particular market suggests that minority businesses are selling less than one would expect absent discrimination, then the government may constitutionally increase its purchases *of that product* from minority businesses to offset the private discrimination.[33]

---

30. Id. at 498.

31. Although this exact phrase did not appear in *Croson* (or in other Supreme Court cases on affirmative action), we believe it accurately captures one of the criteria Justice O'Connor applied in *Croson*. See infra note 68.

32. While several commentators have criticized the *Croson* underutilization approach, see, e.g., Ian Ayres, Narrow Tailoring, 43 UCLA L. Rev. 1781, 1819–20 (1996) [hereinafter Ayres, Narrow Tailoring]; George R. La Noue, Social Science and Minority "Set-Asides," 110 Public Interest 49, 57–62 (Winter 1993), our point is that whatever method one uses to determine a non-arbitrary amount to remedy the government shortfall in minority purchases could be applied as well to determine an amount to remedy the private shortfall.

33. If guardrail producers do not compete with businesses that engage in other types of construction, then the government could not use minority underutilization in these

Nonminority businesses disadvantaged by affirmative action in competing for a proportion of government purchases are not "unduly burdened" if the government can show that they are the beneficiaries of private discrimination with regard to the same product. The crucial test is whether the nonminority firms disadvantaged by a remedial program in a particular market have benefitted from private discrimination in the form of increased private sales. If the answer to this question is yes, then the government should be able to use affirmative action in procurement to narrowly tailor a remedy that does not unduly burden the nonminority competitors.

This single-market justification might dramatically increase government utilization targets. Because the private consumption of most products is often much larger than government consumption, and because private discrimination is more pronounced,[34] a goal of remedying private discrimination might conceivably justify the government purchasing 100 percent of certain products from minority firms. Take, for example, the $2.9 billion spent by the Department of Defense (DoD) in prime contract awards for construction in 1992. This figure represented roughly one percent of the $307 billion (combined public and private) construction market in that year. Minority Business Enterprises (MBEs) were 9.1 percent of all construction firms, but earned only 5.1 percent of public and private sales.[35] No doubt, much of this four percentage point disparity was due to the fact that minority-owned firms are, on average, smaller and younger. But suppose that one-quarter of this difference, or one percentage point, could be attributed to discrimination. In order to increase the overall MBE market share to the level one would expect absent private discrimination (6.1 percent), the DoD would have to direct 100 percent of its prime construction contracts to MBEs.

We ultimately argue that 100 percent targets violate the Equal Protection Clause. But at a minimum, the government should still be able to engage in what we term "proportional overutilization." If there is a gross underutilization of minority contractors of 3 percent in the private market, the government should be able to engage in a gross overutilization of 3 percent with respect to its purchases. The government's ability to remedy private discrimination would be limited to the government's overall size in the market. If, for instance, government purchases represented 10 percent of the overall (private and public) market, the government's overutilization would make up for 10 percent of the private underutilization. The "proportional overutilization" approach would usually cap the government's minority utilization target well below 30

---

other types of construction to justify race-conscious purchasing of guardrails. See infra text accompanying notes 146–148.

34. See Timothy Bates, Viewing Minority Business Assistance as a Job-Creation Strategy 30 (Mar. 1997) (unpublished manuscript, on file with the *Columbia Law Review*); infra text accompanying notes 41–61.

35. See infra notes 38, 51, and 53.

percent and would tie the scope of the remedy to the government's relative position in the overall market. We also offer a more aggressive "shifting availability" approach for calculating the government's utilization target, which would assume that the underutilized capacity in the private sector was shifted to the public sector. Both approaches avoid the expressive harm of a 100 percent minority procurement goal.

This Article is divided into four parts. Part I provides the empirical impetus for our analysis by summarizing evidence that underutilization of minority businesses is a much larger problem in private markets than in government purchasing. Parts II through IV examine our causal, but-for, and single-market theories for using private discrimination to justify public affirmative action. Part V analyzes how private discrimination could be used to justify government affirmative action in employment.

I. THE EMPIRICAL IMPORTANCE OF PRIVATE DISCRIMINATION

Two stylized facts suggest that the way the Court adumbrates the contours of the private discrimination rationale is likely to have a dramatic impact on the scope of constitutional race-conscious procurement. In this Part, we provide prima facie evidence for the following propositions:

(1) Private markets are much larger than public markets;

(2) Minority underutilization[36] by private purchasers is more pronounced than underutilization by government purchasers.[37]

Together these facts suggest that the harm caused by private discrimination is much greater than the harm caused by government discrimination. Accordingly, the allowable scope of race-conscious procurement programs will turn importantly on the extent to which private discrimination is remediable. Because the first stylized fact—private markets are bigger than public markets—is relatively straightforward, we establish it briefly in the next Section, and then spend the remainder of the Part on the second and more controversial proposition.

A. *The Relative Size of Private and Public Markets*

The Gross Domestic Product of the United States was roughly 12 times larger than the amount of federal, state, and local procurement put together.[38] Sales by all firms in 1987 to private businesses were over seven

---

36. Because the Court effectively requires a statistical disparity to justify a numerically-targeted affirmative action program, we do not consider more direct and localized evidence of discrimination by government actors. See *Croson*, 488 U.S. at 509 ("evidence of a pattern of individual discriminatory acts can, *if* supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified") (emphasis added). In *Croson*, anecdotal evidence from one councilperson, see id. at 480, and from the city manager, see id. at 500, could not compensate for the fact that Richmond "[did] not even know how many MBE's in the relevant market [were] qualified to undertake prime or subcontracting work in public construction projects." Id. at 502. Nor could stronger anecdotal evidence suffice. When the Court rejected the 30 percent Richmond target because it could not "be said to be narrowly tailored to any goal," id. at 507, it effectively required evidence of a statistical disparity to justify numerically-targeted affirmative action, because anecdotes alone cannot provide an independent basis for setting a goal. At least one lower court has missed this point. In dicta, the Third Circuit suggested that "anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under Croson." Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1003 (3d Cir. 1993). The court made this statement while determining whether the factual predicate for a set-aside plan satisfied the compelling government interest prong of strict scrutiny. In a later section, the court correctly listed four elements of narrow-tailoring, the second of which was "the basis offered for the percentage selected." Id. at 1008. By compartmentalizing its review, the Third Circuit missed a crucial point: Anecdotal evidence of discrimination may be compelling, but it provides no basis for selecting a percentage target for a racial preference program; it cannot satisfy the narrow-tailoring requirement. Of course, this narrow-tailoring critique of anecdotal evidence does not apply to an already existing program that was enacted (or justified after enactment) on the basis of a prior statistical disparity.

37. We limit our focus to situations in which the government participates in the market as a purchaser, but note that the government can also participate as a seller. For many products that the government sells, there are few or no competing private sellers (for example, broadcast licenses), so the issue of private discrimination as a justification for affirmative action in selling does not arise.

38. In 1990, government procurement was approximately $450 billion annually. See María Enchautegui et al., Do Minority-Owned Businesses Get a Fair Share of Government Contracts? 3 (The Urban Institute ed., 1996) (citing Steven Kelman, Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance

times the size of sales to federal, state, and local governments combined.[39] Sales to private businesses overwhelm sales to the government in every industry division.[40] Because private purchasing is so much larger than government procurement, even relatively small amounts of discrimination in the private sector can be more harmful than discrimination in government procurement. But, as we demonstrate, there are strong reasons to believe that discrimination against minority-owned enterprises is a much larger problem in the private sector.

---

2 (1990) (reporting federal procurement of $200 billion plus $250 billion in state and local procurement)). The federal component at least has remained basically constant since. See Bureau of the Census, U.S. Dep't of Commerce Consolidated Federal Funds Report: Fiscal Year 1996, at 3 [hereinafter CFFR] (reporting total federal procurement contract awards of $200 billion). By way of comparison, the total Gross Domestic Product was $5744 billion in 1990, and $7246 billion in 1995. See U.S. Bureau of the Census, Statistical Abstract of the United States: 1996, at 445 [hereinafter Statistical Abstract].

39. See the following table:

TABLE 1. PERCENTAGE OF 1987 SALES TO CUSTOMER CATEGORIES BY INDUSTRY DIVISION

Industry division	*Govt.* *A*	*Private businesses* *B*	*Individuals* *C*	*All others* *D*	*Not Reported* *E*	*Ratio (B/A)* *F*
All industries	3.3	23.7	48.7	2.6	21.7	*7.2*
Agricultural services*	2.0	29.7	41.1	2.7	24.4	*14.5*
Construction	2.6	21.5	50.9	2.2	22.8	*8.3*
Manufacturing	3.0	50.4	28.9	1.9	15.9	*16.8*
Transportation and public utilities	3.1	29.1	25.7	3.3	38.7	*9.3*
Wholesale trade	3.8	53.4	27.0	3.2	12.6	*14.0*
Retail trade	3.4	11.7	65.0	2.4	17.5	*3.5*
Finance, insurance, and real estate	1.4	14.2	63.4	2.0	19.0	*10.2*
Selected services	4.0	25.0	46.2	3.8	21.0	*6.2*
Industries not classified	3.6	24.3	41.9	4.1	26.2	*6.8*

Source: Figures derived from Bureau of the Census, U.S. Dep't of Commerce, Characteristics of Business Owners 8-11 tbl.1, 202-03 tbl.27a (1987) [hereinafter Census Bureau, CBO].

* Includes forestry, fishing, and mining.

This general pattern continues as we look at more refined industry segments. The ratio of private businesses-to-government sales (Column F) ranged from 3.5 in retail trade to 16.8 in manufacturing.

40. This is not, however, equivalent to saying that in any particular market, private purchases exceed public ones. For instance, it may be that some products are unique to the government, like fighter planes, so that there is no demand-side substitutability between the public and private sector. Nonetheless, producers of such products can likely switch to private alternatives, such as commercial airplanes, and this supply-side substitutability establishes a common public and private market for planes. The key to defining a market is determining where competition occurs. And while we return to this important issue later, see infra Section IV.B, it is obviously beyond the scope of this Article to define all such relevant markets. Rather, we depend on the industry figures and the reader's common sense to establish the prima facie case for the proposition that the private market is generally larger than the public market.

B. *Minority Underutilization by Government and Private Purchasers*

Underutilization of minority businesses is much more pronounced in the private sector than in government procurement. Controlling statistically for firm size, age, and industry, Timothy Bates has found that minority firms have significantly greater difficulty selling to private than public purchasers.[41] In 1987, MBEs that were "ready, willing, and able" to sell goods and services to the government[42] were 22 percent less likely to do so successfully (all else held equal) than were nonminority-owned firms.[43] The results for the private sector, however, were more striking: MBEs were 55 percent less likely to sell to other businesses than were nonminority firms.[44] Bates recently updated the analysis for 1992 and 1994, and found significant progress in the public sector: In the more recent years, MBEs were actually 33 percent *more* likely to sell to the government than were nonminority firms.[45] However, underutilization remained pronounced in the private sector: MBEs were still 41 percent less likely to sell to other businesses.[46] In short, Bates's research suggests that private discrimination is a much larger problem than public discrimination.

Statistics published by the Census Bureau are consistent with the view that minority underutilization is more severe in private than public markets. Across all industries in 1987, nonminority male-owned firms made 25 percent of their sales to private businesses, while black-owned firms made only 12.1 percent of their sales to private businesses.[47] Con-

41. See Bates, supra note 34, at 13–20 (using the Census Bureau 1987 Characteristics of Business Owners database).

42. A firm was considered available (i.e., "ready, willing, and able") if it had actually sold goods or services to government clients in the past. See id. at 21. Government clients included all units of government, from federal to local districts. See id. at 13. While this methodology obviously derives from language in *Croson*, it is less generous than the Constitution allows. We argue that availability can be adjusted upward to correct for the effects of private discrimination against minority-owned firms. See infra Part III.

43. See id. at 23 tbl.4.

44. See id. at 29 tbl.6.

45. See Timothy Bates, Minority Business Access to Government Procurement: The Case of Chicago 25 tbl.7 (Nov. 1997) (unpublished manuscript, on file with the *Columbia Law Review*).

46. See id. at 23 tbl.6.

47. See the following table:

TABLE 2. PERCENTAGE OF 1987 SALES TO GOVERNMENT AND OTHER BUSINESSES

	Black-owned		*Non-minority male-owned*	
Industry division	*Government* A	*Private Business* B	*Government* C	*Private Business* D
All industries	5.0	12.1	3.3	25.0
Agricultural services*	3.7	12.5	2.0	31.1
Construction	6.0	14.7	2.4	21.6
Manufacturing	4.1	27.5	3.1	52.3

versely, the proportion of sales to the government was slightly higher for black-owned firms (5 percent) than for nonminority male-owned firms (3.3 percent).[48] This overall pattern held in every major division of industry. These data suggest that minority firms have a more difficult time selling to private than to public purchasers.[49]

Indeed, in large part due to the success of public affirmative action, there is probably at present no overall minority underutilization in federal procurement. President Clinton's own 1995 review of federal affirmative action reported:

> Agencies first achieved the 5 percent SDB [Small Disadvantaged Businesses] goal in 1993 and, government-wide, prime contracts for minority-owned businesses were 6.4 percent of the total dollar volume. This approaches the proportion of minority-owned businesses among all U.S. firms . . . .[50]

Transportation and public utilities	5.6	18.4	3.0	30.4
Wholesale trade	5.5	30.0	3.8	54.6
Retail trade	4.0	5.0	3.6	12.3
Finance, insurance, and real estate	3.9	5.9	1.2	15.2
Selected services	5.3	12.7	4.1	26.5
Industries not classified	3.9	11.1	3.5	25.3

Source: Figures derived from Census Bureau, CBO, supra note 39, at 202–203 tbl. 27.
* Includes forestry, fishing, and mining.

48. See Table 2, supra note 47.

49. A critic might argue that government affirmative action is responsible for this pattern, by shifting black-owned sales out of the private and into the public sector. However, this theory can at most account for a small portion of the disparity in private sector sales. Recall that sales to the government were 5 percent of all sales by black-owned firms, which is much less than the 12.9 percentage point shortfall in sales to other businesses.

Another criticism of this conclusion is that our figures ignore sales to individuals. If black-owned firms do comparatively well in private retail sales, one might find no overall private underutilization. Indeed, one finds that black firms make a larger proportion of their sales arguably to individuals: 82.9% for black firms versus 71.7% for white male firms. See U.S. Bureau of the Census, Characteristics of Business Owners 202-03 tbl.27a (1987) (combining sales to "individuals," "all others," and "not reported"). One possible response to this criticism is that retail firms generally operate in different markets than wholesale firms and firms that sell to government. In the end, however, we concede that these summary statistics are merely suggestive, not demonstrative, of private discrimination.

50. Stephanopoulos & Edley, supra note 22, at 63. Note that SDBs must be controlled and operated by socially *and* economically disadvantaged persons and do not include businesses owned by nonminority women. See id. at 60.

Although a handful of SDBs are owned by nonminorities, there is no question that the 8(a) program is race-conscious. Economic disadvantage is relatively easy to establish. In construction, for example, the firm size limitations make 98 percent of the businesses in the country eligible. See Proposed Reform of the 8(a) Program Through H.R. 3994, The Entrepreneur Dev. Act of 1996: Hearings Before the House Comm. on Small Bus., 104th Cong., 2d Sess., 49 (1996), available in 1996 WL 528254 (F.D.C.H.) (Sept. 18, 1996), at 4 (statement of Professor George R. La Noue). The real hurdle is social disadvantage: "Socially disadvantaged individuals are those who have been subjected to racial or ethnic

To assess whether a 5 percent market share represents underutilization or not, we would need to assess the availability of minority businesses. However, one would expect the actual availability of minority-owned firms to be below 6.4 percent, since they are, on average, smaller and younger than nonminority firms.[51] Accordingly, there is not strong evidence that the federal government underutilizes minority-owned firms in spending its annual 200 billion dollar procurement budget.

The picture from the department level is consistent with this impression. The Department of Defense (DoD) is by far the biggest government spender, accounting for roughly two-thirds of all procurement.[52] In fiscal year 1994, 5.5 percent of all DoD prime contracting dollars were awarded to SDBs.[53] It may be argued that, due to the smaller average size of minority-owned businesses, the appropriate analysis is limited to Small Businesses (SBs). Of DoD prime contract dollars awarded to SBs, 24.6 percent went to SDBs.[54] Limiting the analysis to construction (which accounted for $11.6 billion in DoD prime contracts), SDBs received 15.6 percent of the total dollars awarded[55]—even though minority-owned firms in 1992 were only 9.1 percent of all construction firms.[56]

---

prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities." 13 C.F.R. § 124.105(a) (1998). Members of certain groups—in general, Black Americans, Hispanic Americans, Native Americans, and Asian Americans—are presumed to be socially disadvantaged. See 13 C.F.R. § 124.105(b)(1) (1998). And while it is possible for nonmembers of such groups to establish social disadvantage, see 13 C.F.R. § 124.105(c) (1998), in fact, only one-half of one percent of SDB owners in 1994 were not in one of the presumptively eligible groups. See La Noue, supra, at 49 ("of the 5,628 8(a) firms, 9 of them were owned by white women, 9 . . . by disabled persons and 8 . . . by white males").

51. The mean receipts of minority-owned firms in 1992 were $102,747, compared to mean receipts of $192,680 for all U.S. firms. See Bureau of the Census, U.S. Dep't of Commerce, Survey of Minority-Owned Business Enterprises: Summary 6 tbl.C (1992) [hereinafter Bureau of the Census, SMOBE]. It should be noted that SMOBE data are limited to individual proprietorships, partnerships, and subchapter S corporations. We would expect the difference to be even larger if *all* firms were included.

52. See CFFR, supra note 38, at 3 (reporting DoD procurement figure of $129 billion).

53. See Letter from Dep't of Justice to Ian Ayres, Professor, The Yale Law School tbl.1 (Mar. 3, 1996) (on file with the *Columbia Law Review*).

54. See id.

55. See id.

56. See Bureau of the Census, SMOBE, supra note 51, at 6 tbl.C. Recall that the SMOBE figures exclude larger corporations.

Narrowing the analysis to federal procurement by state suggests that in some markets there may be even more significant overutilization in government procurement. In 1992, minority-owned firms constituted only 24.9 percent of all New Mexico firms, see id. at 6 tbl.D, "and yet the Dep't of Defense . . . set aside virtually *all* of its road-building contracts at the White Sands military base, the largest military base in the country, for minority-owned construction firms." Rosen, supra note 10, at 25 (describing the facts of C.S. McCrossan Constr. Co. v. Cook, No. 95-1345-HB, 1996 WL 310298 (D.N.M. Apr. 2, 1996) (mem.)). New Mexico is not unique: In ten states, more than 40 percent of all federal construction contracts awarded to small businesses were awarded to SDBs. See Stephanopoulos & Edley, supra note 22, at 66. In contrast, the minority-owned percentage

There is stronger evidence for minority underutilization in state and local procurement, but even here the findings are mixed, and the overall percentage shortfalls in utilization are much smaller than in private markets. In the eight years since *Croson*, many states and localities have compiled detailed disparity studies to justify their contracting affirmative action programs. A recent Urban Institute review of 163 disparity studies found a "median" disparity ratio (Utilization/Availability) for all minorities of 0.57, suggesting overall underutilization.[57] Setting aside methodological criticisms of both the underlying disparity studies and this meta-analysis,[58] it should be noted that 36 percent of the included studies found either no disparity or overutilization.[59] In the construction subcontracting industry at issue in *Croson*, the Urban Institute report found no statistically significant evidence of underutilization—the authors report a median disparity ratio of 0.95, with 62 percent of the studies finding either no disparity or overutilization.[60] The disparity studies suggest that some public underutilization persists, but that there are significant pockets of state and local contracting where no disparities exist.

In sum, Rosen's claim that "the federal government has been discriminating in favor of minority contractors rather than against them" has at least some support in the data.[61] While there may still be impor-

---

of firms was above 40 percent in 1992 in only one state, Hawaii (where it was 52 percent). See Bureau of the Census, SMOBE, supra note 51, at 6 tbl.D. In at least some states, Rosen's assertion that the federal government has on net been discriminating in favor of minorities seems to be true.

57. See Enchautegui et al., supra note 38, at tbl.II.1. The authors attached the following interpretation to this figure: "Minority firms received only $0.57 for every one dollar they would be expected to receive based on their availability." Id. at fig.1.

58. The biggest criticism of the underlying studies is their selected measure of availability: "Instead of comparing the number of qualified, willing and able businesses owned by different groups, studies have substituted headcounts based on census data or vendor lists." La Noue Statement, supra note 12, at 43. On average, MBEs are younger and smaller; therefore, "when disparities exist using the headcount technique, what may be shown is that smaller businesses receive smaller contracts than large businesses, not that MBEs are being discriminated against." Id. Courts have been receptive to this criticism. See, e.g., Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1528 (10th Cir. 1994); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 426–27 (D.C. Cir. 1992); Michigan Road Builders Ass'n, Inc. v. Milliken, 834 F.2d 583, 592 (6th Cir. 1987); Associated Gen. Contractors v. City of Columbus, 936 F. Supp. 1363, 1389 (S.D. Ohio 1996). In addition to reflecting studies that utilized different and perhaps flawed methodologies, the "median" reported by the Urban Institute study was not weighted by the dollars awarded, so it may not be an accurate representation of the underlying studies.

A study which addressed these criticisms by limiting its analysis to one state and by controlling for firm size and industry found statistically significant evidence of discrimination in the awarding of government contracts in New Jersey before, during, and after a minority set-aside program. See Samuel L. Myers, Jr. & Tsze Chan, Who Benefits from Minority Business Set-Asides? The Case of New Jersey, 15 J. Pol'y Analysis & Mgmt. 202 (1996).

59. See Enchautegui et al., supra note 38, at tbl.II.1.

60. See id.

61. Rosen, supra note 10, at 26.

tant pockets of discrimination and underutilization coexisting with the government's substantial efforts at affirmative action, this Part has tried to show that the greater degree of discrimination in the larger private markets makes the public remediability of private discrimination a central concern.

II. THE CAUSAL JUSTIFICATION

The remainder of this Article analyzes three ways that private discrimination can justify a government affirmative action program. Even in the absence of public underutilization of minority businesses, evidence of private discrimination can be used to narrowly tailor a program of race-conscious government procurement. This Part examines the case in which government spending, directly or indirectly, *causes* private discrimination. But before explaining the causal justification for affirmative action, some comments applicable to all three justifications are in order.

While our discussion will often adopt Justice O'Connor's underutilization approach as a core means of measuring discrimination,[62] our thesis does not depend on any particular methodology for proving public or private discrimination. Moreover, this Article does not address what means should be used to enhance minority representation (e.g., quota versus bidding credit).[63] Regardless of what quantum of evidence is deemed constitutionally sufficient to prove discrimination, and regardless of what legal instrument is deemed an acceptable means of increasing minority participation, our purpose is to assess what types of private discrimination are constitutionally remediable. In particular, this Article seeks to identify which categories of private discrimination can constitutionally increase the size of the government's minority utilization goal.

Unless otherwise noted, we also assume that the proposed affirmative action programs satisfy certain prerequisites of narrow tailoring.[64] The

---

62. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) ("Where 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."). Elsewhere, O'Connor criticized the City of Richmond for not knowing the percentage of total city construction dollars minority firms received. See id. at 502. Thus, the question of whether the appropriate unit for disparity analysis is the number of contractors or dollars was unresolved. The general approach of disparity studies has been to compare "utilization," the percentage of contracting dollars going to minority-owned firms, with "availability," the percentage of "willing and able" firms that are minority-owned.

63. One of the authors has previously suggested that declining credit schedules will generically be the most narrowly tailored means of effectuating affirmative action. See Ayres, Narrow Tailoring, supra note 32, at 1808–12.

64. Narrow tailoring requires:

(1) flexibility in the form of waiver provisions;

> See *Croson*, 488 U.S. at 508 ("Unlike the program upheld in Fullilove [v. Klutznick, 448 U.S. 448 (1980)], the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular

most notable of these is the requirement that the government body adopting the program give serious consideration to race-neutral alternatives.[65] If the government could remedy private discrimination merely by enforcing non-discrimination statutes (such as Section 1981's prohibition of race discrimination in contracting)[66] then race-conscious government procurement would unduly burden the interests of the disfavored nonminority contractors.[67] Assuming then the insufficiency of race-neutral alternatives, we focus our attention on two core aspects of narrow tailoring:

(1) when can evidence of private discrimination provide a non-arbitrary basis for increasing the minority utilization goal;[68] and

---

MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors."). The plan upheld in *Fullilove* "allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination." *Croson*, 488 U.S. at 508.

(2) tailored geographical scope;

In addition to insisting upon evidence of "identified discrimination in the Richmond construction industry," the *Croson* Court considered it objectionable that under Richmond's program a successful minority entrepreneur "from anywhere in the country" enjoyed a preference. Id.

(3) limited duration, or at least provision for regular review.

In remanding *Adarand*, the Court instructed the lower court to consider "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238 (1995) (citing *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)). Responding to Justice Marshall's dissent, the Court in *Croson* rejected the long and sordid history of racial discrimination in Richmond as a justification for the set-aside because it "could justify a preference of any size or *duration*." 488 U.S. at 505 (emphasis added). But see infra note 221 (discussing inappropriateness of "sunset" requirements).

65. See *Croson*, 488 U.S. at 507. This requirement is not absolute: "*Croson* does not compel the county to consider every imaginable race-neutral alternative, nor to try alternatives that would be plainly ineffective." Coral Constr. Co. v. King County, 729 F. Supp. 734, 739 (W.D. Wash. 1989).

One of the authors has criticized in particular *Croson*'s preference for "race-neutral policies *to increase minority participation*." Ayres, Narrow Tailoring, supra note 32, at 1787. Facially, race-neutral programs—such as poverty-based subsidies—will confer benefits to many more nonvictims than would a race-conscious program; in this sense, race-neutral alternatives are actually less narrowly tailored to the injury they seek to remedy. See id.

66. Section 1981—as interpreted by the Supreme Court—prohibits "intentional discrimination" on the basis of race by private parties in the formation of contracts. See 42 U.S.C. § 1981 (1994); Patterson v. McLean Credit Union, 491 U.S. 164, 171–72 (1989). Evidence of private disparate treatment has been sufficient to show intentional discrimination. See Ayres, Fair Driving, supra note 19, at 857–63 (discussing relationship between disparate treatment and intentional discrimination standards).

67. It is also possible that the government would need to enforce disparate treatment prohibitions more vigorously—for example, by devoting more investigative resources or by granting plaintiffs punitive damages—before implementing race-conscious procurement preferences.

68. See *Croson*, 488 U.S. at 507 ("[T]he 30 percent quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing."). Thus, the Court upheld the Court of Appeals's finding that "the 30 percent figure was 'chosen arbitrarily'

(2) when would such a remedy not unduly burden innocent third parties.[69]

Croson has already clearly stated that remedying private discrimination is a compelling government interest. This Article now proceeds to show that evidence of private discrimination can be used to narrowly tailor remedies that are neither arbitrary in scope nor unduly burdensome.[70] The first example is when government spending directly causes private discrimination.

A. *Direct Causation—Public Money Pays for Discrimination*

The government has a compelling interest in ensuring that public money does not directly cause private discrimination. Thus, even in the absence of public underutilization of minority-owned prime contractors, statistical evidence that prime contractors discriminate in the awarding of subcontracts on public jobs is a sufficient justification for a government affirmative action program. In this context, without an affirmative action

---

and was not tied to the number of minority subcontractors in Richmond or to any other relevant number." Id. at 486.

69. See United States v. Paradise, 480 U.S. 149, 183 (1987) (plurality opinion) (race-conscious decree "does not disproportionately harm the interests, or unnecessarily trammel the rights, of innocent individuals"); cf. *Fullilove*, 448 U.S. at 484 (opinion of Burger, C.J.) ("It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." (citation omitted)); United Steelworkers v. Weher, 443 U.S. 193, 208 (1979) (upholding voluntary affirmative action plan against Title VII challenge in part because plan "does not unnecessary trammel the interests" of third parties). And while it is true that the exact language "undue burdens" was only employed in the since overruled case of Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 597 (1990), the phrase accurately captures the focus of the Court on the effects of affirmative action programs on nonminorities. See, e.g., *Adarand*, 515 U.S. at 276 (Ginsburg, J., dissenting) ("Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups." (citation omitted)).

70. Because the text in Justice O'Connor's *Croson* opinion directly supports the causal and but-for justifications, see infra Parts II.A, II.B., and III, we reserve a rigorous examination of these two key elements of narrow tailoring for the more novel single-market justification. See infra Part IV. We ask the reader likewise to withhold judgment on the constitutionality of the causal and but-for theories. The narrow-tailoring arguments for the single-market justification (e.g., the unjust enrichment principle, see infra Part IV.B.2) support all three rationales.

We only intend to delineate when remedying private discrimination with government affirmative action is constitutionally viable. We do not claim that the Equal Protection Clause *requires* the government to use race-conscious procurement to remedy private discrimination, although others have made analogous arguments in scholarly articles, see Vikram D. Amar & Evan H. Caminker, Equal Protection, Unequal Political Burdens, and the CCRI, 23 Hastings Const. L.Q. 1019 (1996) (arguing that the California Civil Rights Initiative, a "color-blind" state constitutional initiative, is unconstitutional), and in recent litigation in California concerning Proposition 209. See Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), rev'd, 122 F.3d 692 (9th Cir. 1997), cert. denied, 118 S. Ct. 397.

plan, government spending is a but-for cause of private discrimination by prime contractors. It would undermine the purpose of the Fourteenth Amendment if the government could avoid its duty not to discriminate by hiring private contractors to discriminate for it.

The *Croson* Court endorsed this rationale. Justice O'Connor wrote for the majority:

> [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. *It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.* Cf. Norwood v. Harrison, 413 U.S. 455, 465 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish").[71]

The Richmond subcontracting set-aside failed, in part, because there was no showing of discrimination in subcontracting by prime contractors. The decision emphasized counterfactually:

> If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion.[72]

This reasoning was foreshadowed by at least one commentator,[73] and lower courts applying *Croson* have uniformly recognized the significance of discrimination in the awarding of subcontracts.[74] An affirmative action goal set at the level of subcontracting one would expect absent this type of discrimination can clearly be a narrowly tailored response.[75]

The logic of this argnment suggests that the government has a compelling interest in remedying discrimination by prime contractors in purchasing not just subcontracting services but any inputs used on gov-

---

71. *Croson*, 488 U.S. at 492–93 (emphasis added) (parallel citations omitted).

72. Id. at 509.

73. See Drew S. Days, III, *Fullilove*, 96 Yale L.J. 453, 481 (1987) ("If, for example, government agencies find that prime or major contractors to whom they traditionally award contracts consistently refuse to hire minority subcontractors, reasonable grounds exist for acting to remedy that situation.").

74. See, e.g., Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1529 (10th Cir. 1994); Coral Constr. Co. v. King County, 941 F.2d 910, 916, 922 (9th Cir. 1991).

75. At least one circuit court has suggested that evidence of prime contractor discrimination is not only *sufficient* but also *necessary* to justify a local affirmative action plan with a subcontracting goal. See Contractors Ass'n v. City of Philadelphia, 91 F.3d 586, 606 (3d Cir. 1996).

ernment jobs, labor being a prime example.[76] Indeed, *Croson* implied that evidence of employment discrimination by government contractors would have strengthened Richmond's justification for the affirmative action program in contracting.[77] The government has as compelling an interest in not promoting employment discrimination as it does in not causing subcontracting discrimination.

But the requirement that affirmative action plans be "narrowly tailored" to further the government's "compelling interest" limits the means that the government may employ. In particular, the government cannot use affirmative action to increase the participation of minority prime contractors as a narrowly tailored means to remedy prime contractor discrimination against either minority subcontractors or minority employees. Even though as an empirical matter, minority-owned businesses tend to hire more minority employees than nonminority-owned businesses,[78] using affirmative action in prime contracting benefits minority prime contracting firms that—at least under this theory—have not been the victims of discrimination.[79] Furthermore, a numerically-targeted affirmative action program in contracting cannot be a narrowly tailored response to employment discrimination, because there is no non-arbitrary basis upon which to set the size of the goal.

When government procurement is facilitating private discrimination by prime contractors against minority employees or subcontractors, the appropriate affirmative action remedy is to encourage heightened minority utilization for these particular inputs.[80] For example, evidence of pervasive employment discrimination by government contractors can justify a program that requires minority employment goals for all firms receiving government money. Such goals in employment would be narrowly tailored to benefit the victims of discrimination caused by government

---

76. Prime contractors also often purchase a host of goods and service inputs—such as steel, electricity, and bank loans—directly from other suppliers.

77. See *Croson*, 488 U.S. at 502 n.3 ("The city points to no evidence that its prime contractors have been violating the [city race discrimination] ordinance in either their employment or subcontracting practices.").

78. See Timothy Bates, Utilization of Minority Employees in Small Business: A Comparison of Nonminority and Black-Owned Urban Enterprises, Rev. Black Pol. Econ., Summer 1994, at 113.

79. Affirmative action in prime contracting, however, does have the advantage of burdening those prime contractors that are most likely to be discriminating against minority employees and subcontractors. This factor explains why *Croson* implied that employment discrimination would strengthen Richmond's case, even though, as the text will demonstrate, employment discrimination alone cannot be a sufficient justification for a narrowly tailored affirmative action program in contracting. See infra text accompanying notes 108–109.

80. There is no doubt that withholding government money from individual firms that use the money to discriminate is *exactly* tailored to the compelling government interest in not financing the evils of private prejudice. As always, affirmative action is only constitutional when efforts to enforce nondiscrimination laws are ineffective. See supra notes 65–67 and accompanying text.

spending, and would not create an undue burden on nonminorities because the remedy merely counteracts what would otherwise be illegitimate discrimination in their favor. In fact, lower courts have adopted this approach when upholding affirmative action plans that establish percentage goals for the employment of minority workers on federal projects when evidence exists that the government's money is funding contractor employment discrimination.[81]

B. *Indirect Causation—Public Money Encourages Discrimination on Private Jobs*

The government has a compelling interest in ensuring that its money does not *directly cause* private discrimination, but problems arise because government spending can also *indirectly cause* private discrimination. Suppose, for example, that the government can stop prime contractors from discriminating against minority subcontractors on government projects, but the same prime contractors discriminate against minority subcontractors on private jobs. Restricting the inquiry to how taxpayer dollars are spent on government procurement projects is a naive way to determine whether public money is "financ[ing] the evil of private prejudice."[82]

Adding a dollar to the accounts of a discriminatory firm may indirectly induce the firm to discriminate on other contracts. Most recipients of public contracts also have nongovernmental sources of revenue,[83] so when the government gives public money to discriminatory firms, it frees more of that private money to be spent in a discriminatory manner by the recipient firms. In economic terms, public money covers part of the fixed costs of discriminatory firms, thereby increasing their ability to discriminate in subcontracting on private jobs. Prime contractors savvy enough to refrain from discriminating on public jobs may be buoyed by public money, and be able to discriminate more on private jobs as a result of government dollars received. In this sense, government spending can indirectly cause private discrimination.[84]

---

81. See, e.g., Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 174–75 (3d Cir. 1971); Joyce v. McCrane, 320 F. Supp. 1284, 1290 (D.N.J. 1970).

82. *Croson*, 488 U.S. at 492–93.

83. See Bates, supra note 34, at 15 tbl.2 (74 percent of nonminority firms and 63 percent of minority firms with sales to the government in 1987 also sold to private firms).

84. Government expenditures to discriminatory firms might indirectly cause these firms to discriminate not just as buyers of inputs, but as sellers as well. For example, a contractor buoyed by government revenues may find it easier to discriminate against minority buyers of its product. The more money it gets from the government, the more this contractor can afford to discriminate against minority buyers.

The government can certainly withhold money from firms guilty of discriminating against minority buyers, but even pervasive evidence of this practice probably cannot justify a government affirmative action program. The appropriate affirmative action remedy as a conceptual matter would be to require firms receiving government contracts to sell a certain proportion of their goods to minority firms. Yet as discussed below, it is likely to be impossible to determine how much of such private discrimination is caused by government

Croson's reliance on *Norwood v. Harrison*[85] suggests that the Supreme Court would find that the government has a compelling interest in remedying the effects of private discrimination indirectly caused by government procurement.[86] Quoting *Norwood*, *Croson* emphasized:

> [I]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.[87]

Norwood held that Mississippi's policy of providing textbooks to private schools that excluded blacks violated the Equal Protection Clause. By analogy, awarding contracts to firms that discriminate privately is "inducing, encouraging or promoting" discrimination.[88]

In remanding a post-*Croson* case, the Tenth Circuit implicitly adopted the indirect causal rationale as a compelling government interest.[89] To justify its subcontracting affirmative action plan, the City of Denver offered evidence of combined public and private sector underutilization of minority subcontractors.[90] The court accepted this evidence as probative of prime contractor discrimination, and suggested that evidence of "an exact linkage between [the municipality's] award of public contracts and private discrimination" would "at least enhance" the City's factual predicate for its program.[91] Such evidence might show that "Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors *in other private portions of their business*."[92] The court con-

---

procurement, so that as a practical matter it will be extremely difficult to produce a nonarbitrary goal.

85. 413 U.S. 455 (1973).

86. *Croson*, 488 U.S. at 492.

87. Id. at 492–93 (citation and internal quotation marks omitted) (quoting *Norwood*, 413 U.S. at 465).

88. The analogy breaks down somewhat at the remedy stage. The private schools in *Norwood* were openly discriminatory, so the appropriate remedy was to stop giving textbooks to these schools. The direct parallel in government contracting would be withholding government contracts from individual firms that have been identified as discriminating privately in awarding subcontracts (i.e., not affirmative action). The problem here, of course, is in identifying the individual firms guilty of discrimination. The argument against affirmative action based on statistical evidence of affirmative action must be that some innocent firms will be burdened along with the guilty. But this criticism applies with equal force to the direct causal rationale, which the *Croson* Court explicitly endorsed; it is an argument against affirmative action generally, not against this particular rationale. In order to support the indirect causal justification, the reasoning of *Norwood* must be combined with *Croson*'s approval of statistical evidence of discrimination as sufficient to justify affirmative action. The combination suggests that statistical evidence of subcontracting discrimination by nonminority primes can justify the government shifting its resources away from nonminority firms.

89. See Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1522, 1529 (10th Cir. 1994).

90. See id. at 1525–29.

91. Id. at 1529.

92. Id. (emphasis added).

trasted this situation to one in which "the private discrimination was practiced by firms who did not receive any public contracts."[93] In short, evidence of subcontracting discrimination on private jobs by prime contractors who receive government money can support a public sector affirmative action plan.[94]

Ultimately, the problem with this indirect causation theory is "narrow tailoring."[95] It is exceedingly difficult to estimate how much of a government contractor's discrimination on nongovernment jobs results from government money. Even though the government has a compelling interest in remedying private discrimination which its purchasing has indirectly caused, we are skeptical that the government can provide a nonarbitrary basis for the size of such a remedy. Fortunately (at least for supporters of affirmative action), the government's interest in remedying private discrimination is not limited to private discrimination that it has either directly or indirectly caused, so the inability to prove that the government caused private discrimination need not constrain the scope of an affirmative action remedy.

III. THE BUT-FOR JUSTIFICATION

The most widely accepted example of using government affirmative action to eliminate the effects of private discrimination that the government has not itself caused concerns what is commonly referred to as "but for" adjustments to utilization goals.[96] Justice O'Connor's analysis in

---

93. Id. The court left open the possibility that purely private discrimination, without contribution from the government, could justify a public affirmative action program. See infra Part IV.

94. Language from a Ninth Circuit decision is consistent with this rationale: "Mere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy [the compelling interest] prong [of strict scrutiny]." Coral Constr. Co. v. King County, 941 F.2d 910, 916 (9th Cir. 1991). The court cited the "passive participant" language from *Croson* in support of this proposition, but did not provide any additional analysis.

95. The form of the affirmative action relief is relatively uncontroversial—the government could respond to prime contractor discrimination against minority subcontractors on nongovernmental projects by requiring government contractors generally to increase their uilization of minority subcontractors (on government projects, nongovernment projects, or both).

96. The Justice Department adheres to this interpretation: "Each industry benchmark limitation will represent the level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects." Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,045 (1996). The benchmark would then be adjusted upward to reflect "the estimated effect of race in suppressing minority business activity." Id. at 26,046. This essentially adopts the position of Drew Days:

> [T]he [set-aside percentage] should initially correspond to the percentage of minority contractors within the jurisdiction who are qualified and available to participate in government projects. These percentages might then be increased, if findings of discrimination support it, to reflect the number of minority entrepreneurs who were deterred in the past from entering the contracting

Croson suggests that the government's utilization goal or benchmark should be the percentage of available ("willing and able") firms that are minority-owned businesses.[97] But-for analysis uses evidence of private discrimination to show that the raw availability percentage understates what true minority availability would be but for private discrimination.[98] When private discrimination against minority businesses has reduced their capacity to win government contracts, the government should be able to adjust the scope of the affirmative action remedy to set a utilization goal for government purchases equal to the utilization percentage that the government would have purchased in the absence of discrimination.[99]

The government's compelling interest in making this kind of but-for correction to eliminate the effects of private discrimination on government purchasing is strongly supported by *Croson*'s analysis of discrimination by private contractor associations. When a private association refuses to accredit minority contractors, the government is a "passive participant" in the private discrimination if it uses this private accreditation as an eligibility criterion for bidders on government contracts:

> [If the local contractors' association excluded minority firms from membership,] the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. See . . . Ohio Contractors [Ass'n v. Keip, 713 F.2d 167,] 171 [6th Cir. 1983] (upholding minority set-aside based in part on earlier District Court finding that "the state had become 'a joint participant' with private industry and certain craft unions in a pattern

---

business because of racial barriers, but who are likely to take advantage of the remedial program.

Days, supra note 73, at 484.

The Third Circuit has recognized that "[t]he small number [of certain minority-owned construction businesses] itself may reflect barriers to entry caused in part by discrimination." Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1008 (3d Cir. 1993). The court upheld an affirmative action plan for businesses owned by Blacks against a summary judgment motion, but enjoined the program as applied to Hispanics and Asians due to a lack of concrete evidence of discrimination against these groups. See id.

97. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989).

98. Just as private discrimination may have suppressed minority availability, public affirmative action may have increased it. A sensitive but-for correction would take both effects into account. But this problem of determining what true minority availability would be but for both discrimination and affirmative action also affects traditional attempts to remedy public discrimination. Our point is that whatever methodology is sufficient to determine minority availability with regard to remedying public discrimination should suffice to determine minority availability with regard to remedying private discrimination.

99. A possible objection to this argnment would be that different firms sell in the public and private markets. There are two responses to this objection: (1) it is empirically false, see supra note 83; and (2) even if it were true in some market, the relevant inquiry is whether the firms would have had the capacity to sell to both public and private buyers in the absence of discrimination, not whether they actually do so.

of racially discriminatory conduct which excluded black laborers from work on public construction contracts").[100]

Even though the government has not caused the private discrimination, if the government does not adjust its eligibility criteria it would—possibly unwittingly—"assist these organizations" in excluding minority firms from the market place.[101] *Croson* suggests that the government should treat as available those minority firms that would have been accredited but for private discrimination.[102]

Justice O'Connor's approving citation to *Ohio Contractors*[103] is particularly relevant: When private discrimination by employers and unions has made it more difficult for black laborers to be employed on government jobs, government affirmative action can ensure that the government is no longer a "joint participant" in excluding minority workers from public construction projects. When unions exclude minority laborers, the government should reject union membership as an eligibility requirement for working on government jobs. Instead, the government should treat as available those minority laborers who would have been union members but for the union's private discrimination.[104]

This but-for availability adjustment can be applied more generally to remedy other types of discrimination by input suppliers to minority businesses. For example, if the suppliers of steel or credit discriminate against minority businesses, then the minority businesses will have higher

---

100. *Croson*, 488 U.S. at 503–04 (citation omitted); cf. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

101. One might analogize the private accreditation of contractors' associations to the accrediting function served by administrators of the LSAT (or other standardized tests). A private organization accredits prospective students before they are accepted into state law schools. The LSAT has a disparate impact on black and Hispanic applicants to law schools. See Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1, 20 tbl.3 (1997) (reporting lower LSAT means for nonwhite ethnic groups). Disparate impact is not sufficient to show an Equal Protection violation, see Washington v. Davis, 426 U.S. 229 (1976), so use of the LSAT is probably not unconstitutional. But see Daria Roithmayr, Deconstructing the Distinction Between Bias and Merit, 85 Cal. L. Rev. 1449, 1486–91 (1997) (arguing that the rise of testing was motivated in part by discriminatory intent). In either case, statistical evidence of disparate impact, like underutilization, may suffice to justify an affirmative action program.

102. Requiring one entity to take into account discrimination by another entity at an earlier point in time is not a new concept. In effect, Title VII requires private employers to consider the effects of public discrimination in education. See Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971) (holding that an employer must demonstrate that high school completion and aptitude test scores are related to job performance, even though the disparate impact of such criteria resulted from inferior, segregated public education).

103. See supra text accompanying note 100.

104. As discussed supra notes 78–81 and accompanying text, the form of the remedy in *Ohio Contractors*—setting aside construction contracts for minority businesses, as opposed to mandating higher minority employment on such projects—was not narrowly tailored to remedy the type of private discrimination at issue. See Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983).

production costs. If the government then relies primarily on low-price bidding competitions to award public contracts, the government will be assisting the private discriminators "in maintaining a racially segregated . . . market"[105] just as much as if it relied on the accreditation of discriminatory private contractors' associations.[106] The appropriate response is for the government to treat as available all minority contractors who would have been able to compete effectively for government contracts in the absence of the private discrimination.[107]

The major impediment to a but-for availability correction is producing an adjustment that is both non-arbitrary and not unduly burdensome. *Croson*, for example, rejected generalized assertions that past societal discrimination in education and employment had impeded minority entrepreneurship, because such assertions provided "no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[108] The question becomes, what types of private discrimination can be used to make a narrowly tailored but-for adjustment?

---

105. *Croson*, 488 U.S. at 503.

106. There is, however, a danger that using but-for adjustments to counteract the effects of upstream private discrimination will also have the effect of creating more opportunities for upstream discrimination. (Upstream discrimination is defined infra Part IV.B.) Any program that confers a competitive advantage to minority-owned contractors may increase private sellers' ability to discriminate. Suppose a hardware store charges its black customers 10 percent more for supplies than its white customers, and the customers are all firms buying supplies to fill government contracts. An affirmative action program puts relatively more money in the hands of black customers, who may therefore be able to afford an even higher discriminatory mark-up. In response, the hardware store may increase the level of price-discrimination to, say, 20 percent. In this example, it can be said that affirmative action, not race-neutral procurement, *causes* additional private discrimination. This possibility does not mean, however, that public affirmative action cannot make progress in counteracting the effects of private discrimination. Remedying the effects of private discrimination is still a compelling governmental interest even when the remedy is not effective in eliminating the private discrimination itself. See id. at 491–92.

107. Private downstream discrimination (by the private purchasers that buy from minority businesses) might also reduce the availability of minority businesses. If there are "learning curve effects" or a "minimum efficient scale" of production, then discrimination by private buyers might also result in higher production costs when minority businesses bid on government contracts. For basic descriptions of elements of industrial economics, see F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance (3d ed. 1990).

108. *Croson*, 488 U.S. at 498. However, O'Connor made it clear that a state or local entity could take "action to rectify the effects of *identified* discrimination within its jurisdiction." Id. at 509 (emphasis added).

There is some language in *Croson* suggesting a rejection of the assumptions underlying all statistical evidence of discrimination. O'Connor dismissed extremely low MBE membership in local contractors' associations as by itself not probative of discrimination: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction." Id. at 503 (citation omitted). Statistical evidence of racial discrimination can always be countered by such "cultural" explanations for observed

At a minimum, we believe that the government should be able to make but-for availability adjustments to counteract the effects of private discrimination against the minority businesses *qua minority businesses.* Under this theory, private discrimination against potential minority entrepreneurs would not provide a valid basis for a but-for adjustment. This distinction suggests that but-for adjustments should not be used to estimate how many more minority firms would exist but for private discrimination, but should be limited to estimating how much more available existing firms would be—in terms of capacity or ability to charge a lower price—in the absence of private discrimination. Distinguishing discrimination against minority firms and potential minority entrepreneurs is consonant with the examples discussed in *Croson*: But-for adjustments to counteract private discrimination which excluded existing minority-owned *businesses* from professional trade associations would be constitutional, but adjustments to counteract private discrimination in education or employment markets against *potential minority entrepreneurs* would not be.[109]

Using the but-for adjustment to counteract discrimination only against existing minority businesses is justified by the narrow tailoring requirements that remedies be neither arbitrary nor unduly burdensome. It is much more difficult to come up with a non-arbitrary basis for the size of an adjustment to include minority individuals who would have begun minority businesses but for discrimination.[110] In effect, one would need

---

disparities, so this logic is potentially crippling for antidiscrimination plaintiffs and affirmative action supporters alike. Significantly, O'Connor made these statements in the course of dismissing a single statistic—MBE membership in local trade associations. She immediately proceeded to note that a comparison of this figure with the proportion of eligible contracting firms owned by minorities could be probative. See id.

Nonetheless, this passage and the broader discussion of "societal discrimination" have led many commentators to read *Croson* as much less tolerant of affirmative action than we argue careful analysis reveals the opinion to be. For instance, Reva Siegel uses the "societal discrimination" language of *Croson* to argue that

> today doctrines of heightened scrutiny function primarily to constrain legislatures from adopting policies designed to reduce race and gender stratification, while doctrines of discriminatory purpose offer only weak constraints on the forms of facially neutral state action that continue to perpetuate the racial and gender stratification of American society.

Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1143 (1997). Both these assertions may be true, but they ignore the "passive participant" and "private discrimination" passages in *Croson* which specifically address the facially neutral state action with which Siegel is concerned.

109. See *Croson*, 488 U.S. at 503. Statistical evidence of discrimination against potential entrepreneurs may, however, justify an affirmative action program in employment or any earlier stage at which evidence of discrimination exists, even if the connection to procurement is too attenuated to support a non-arbitrary procurement goal. See infra Part V.

> 110. [T]he figure . . . is metaphysical, not empirical, and no state has convincingly calculated it. In Texas, for example, the state tried to suggest that low percentages of self-employed minorities, and high percentages of

to estimate two different linkages: First, one would have to predict how many of these individuals would have begun businesses, and, second, then go on to predict how many of these businesses would have been qualified—in the sense of having been ready, willing, and able—to do business with the government. The more temporally remote the private discrimination against potential entrepreneurs, the harder it will be to estimate this first link of how many more minority businesses would exist. Restricting the but-for adjustment to counteracting discrimination against existing firms only requires estimating the second link—how much more available existing minority firms would have been in the absence of discrimination—and thus affords a more precise and less arbitrary basis for adjustment.

To date, most discussions of but-for adjustments have centered on the wrong question: But for discrimination against *potential minority entrepreneurs*, how many more minority businesses would exist?[111] The far more relevant question is: But for private discrimination against *existing minority businesses*, how much more *available* would these firms be? Private upstream discrimination[112] can inhibit the ability of minority firms to compete solely on the basis of price. Even minority firms that have not been able to compete successfully for government contracts should be deemed available under this theory if the government can establish that but for private discrimination by input suppliers they would be ready, willing, and able. But-for adjustments thus may be necessary to ensure that the government does not become a passive participant in the private discrimination.

> discrimination lawsuits filed, might indicate that minority business formation had been suppressed by discrimination. But the General Services Administration refused to accept the claim, conceding that business formation may be affected by cultural factors or personal choices that have nothing to do with discrimination.

Rosen Testimony, supra note 12, at 209. Rosen may be overstating his critique. For examples of sophisticated but-for analyses in the New York state construction market, see Hyman Frankel, Opportunity Denied! New York State's Study of Racial and Sexual Discrimination Related to Government Contracting, 26 Urb. Law. 413, 429–33 (1994). And even critics of the but-for adjustment recognize that legislative bodies are not required to produce rigorous scientific proof. See George R. LaNoue & John Sullivan, "But For" Discrimination: How Many Minority-Owned Businesses Would There Be?, 24 Colum. Hum. Rts. L. Rev. 93, 99 (1992–93) (recognizing the distinction between the standards of social science and "[t]he judicial requirement . . . that the studies in general be 'thorough and impartial'"). More sympathetic commentators argue that the goal of avoiding undercorrection for discrimination should be balanced against empirical uncertainty. See Paul Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 Colum. L. Rev. 728, 788–89 (1986) ("To limit or reject the corrective conception because of empirical problems in precisely tracing out causal links is to turn the very extensiveness and duration of wrongs into an excuse for doing nothing about them.").

111. Although La Noue and Sullivan describe studies that consider the effects of discrimination on both existing and would-be firms, the title focuses on the latter: "How Many Minority Businesses Would There Be?" La Noue & Sullivan, supra note 110.

112. The concepts of upstream and downstream discrimination are defined and more fully discussed infra Part IV.B.

It might be possible to go slightly further back in time in making a non-arbitrary but-for adjustment. For example, looking at the class of qualified potential entrepreneurs, it might be possible to estimate statistically how many more minorities would have started businesses but for private discrimination against the class of qualified potential minority entrepreneurs. This approach would not attempt to remedy discrimination that disabled minorities from gaining basic qualifications (such as a college degree), but would look only at differences in minority business creation given basic qualifications. As recently implemented by Timothy Bates,[113] this approach employs multivariate regression analysis to estimate how much less likely it is for a 30-year-old with an M.B.A. and $50,000 to start a business if she is African American, for example.[114] This statistical approach for calculating the percentage of missing minority businesses takes potential entrepreneurs as it finds them, commences the inquiry at the point that they would decide to begin a business, and excludes the effects of past discrimination that might have led minorities to have less wealth, education, or work experience.[115] While this approach holds the prospect of providing non-arbitrary estimates for but-for adjustments, its limited focus has, not surprisingly, led to rather modest adjustments of the utilization target (on the order of one or two percentage points).[116]

---

113. See Timothy Bates, Self-Employment Entry Across Industry Groups, 10 J. Bus. Venturing 143, 148 (1995) (in a logistic regression which controlled for education, wealth, age, experience, marital status, and sex, the minority variable was a statistically significant predictor of self-employment entry in each industry group analyzed). For another multivariate analysis that likewise found significant ethnic and racial differences in self-employment, see Robert W. Fairlie & Bruce D. Meyer, The Ethnic and Racial Character of Self-Employment (National Bureau of Econ. Research Working Paper No. 4791, 1994).

114. Multiple regression analysis is a far cry from the single statistic (low MBE membership in local contractors' associations) which the Court dismissed as not probative of discrimination because it could be explained in part by "both black and white career and entrepreneurial choices." *Croson*, 488 U.S. at 503. One could also argne that O'Connor's opinion tacitly accepts the but-for rationale by defining availability in terms of the *number* of minority contractors qualified for government jobs, instead of the minority share of total *dollars* awarded. Because minority firms are, on average, smaller than nonminority firms, see supra notes 51 & 58, it is natural to expect their average contract to be of a lower dollar amount. To the degree that discrimination has contributed to this smaller firm size, the utilization/availability comparison endorsed by O'Connor implicitly corrects for this discrimination. But for discriminatory impediments to firm development, the average dollar amount of minority firms' contracts would be greater. However, O'Connor also stressed that only firms that are "qualified . . . willing and able" be considered available, *Croson*, 488 U.S. at 509, and some lower courts have required disparities to be corrected for differences in firm size. See, e.g., Engineering Contractors Ass'n v. Metropolitan Dade County, 943 F. Supp. 1546, 1573, 1576 (S.D. Fla. 1996), aff'd, 122 F.3d 895, 923–24 (11th Cir. 1997).

115. This approach is also consonant with our single-market justification, discussed infra Part IV, in that discrimination in the past or in other markets is not used to define the scope of the remedy.

116. See Bates, supra note 113, at 154–55. Consonant with this approach, we could imagine some types of employment or union discrimination that could be the basis of a

Regardless of where the courts demarcate the limits of "identifiable" private discrimination for the purposes of a but-for adjustment, it is clear that any non-arbitrary estimate of how much more available minority firms would have been in the absence of private discrimination does not unduly burden nonminority contractors. Nonminority businesses that are disadvantaged by the but-for adjustment in competing for a small proportion of government purchases are not "unduly burdened" because the but-for adjustment merely aims to counteract what would otherwise be the unjust benefits these firms would receive because of private discrimination. If the government is purchasing less from the minority firms only because of private discrimination, then nonminority firms are not burdened by a but-for adjustment that reduces their market share of procurement down to what it would have been in the absence of discrimination. To the extent that nonminority firms would have been unjustly enriched by private discrimination—in the sense that they would have received more government contracts than they would have in the absence of private discrimination—they are not unconstitutionally burdened by an affirmative action program that reduces their unjust enrichment.

IV. THE SINGLE-MARKET JUSTIFICATION

The causal and but-for justifications both require a nexus between private discrimination and public spending. The causal theory turns on public spending causing private discrimination; the but-for justification turns on private discrimination causing otherwise neutral public purchasing criteria to have a discriminatory effect. In the absence of affirmative action, either of these causal relationships would make the government a "passive participant" in the private discrimination. But the *Croson* decision did not limit the government's ability to remedy private discrimination to situations where its action or inaction would cause discriminatory effects.

Justice O'Connor's use of the phrase "passive participant" underscores the idea that the government can constitutionally remedy private discrimination even when there has not been the type of state action that would trigger the Equal Protection Clause. When inaction ("passive," color-blind behavior) would tend to maintain racially segregated markets, the government has a compelling interest to counteract this effect. The government's constitutional ability to correct discrimination that it has not caused might include remedies to correct underutilization of minority firms in private markets. Under this broad interpretation, the govern-

---

but-for availability adjustment. For example, imagine that a particular type of subcontractor firm was almost exclusively created by a group of experienced craftspeople. If discrimination by unions or private employers keeps otherwise qualified minority workers from getting this last bit of requisite experience, we can imagine that it would be possible to calculate a non-arbitrary estimate of how many additional minority subcontracting firms would exist but for this private discrimination.

ment would be a "passive participant" in private discrimination whenever its inaction left intact the effects of identifiable private discrimination.

This Part argues that purely private discrimination can justify a government affirmative action program in the same market. Eradicating the effects of private discrimination is a compelling governmental interest, and, where nonminority sellers have been unjustly enriched by private discrimination, a government affirmative action program does not impose an undue burden. Defining the relevant market is obviously critical to this justification, so principles of market analysis developed in the antitrust context may be instructive. Because the private market for a given product is generally so much larger than the public market, the single-market justification can countenance a 100 percent minority procurement goal. Such an absolute goal would create unconstitutional "expressive harm," so we offer two more moderate alternatives.

A. *Purely Private Discrimination as a Compelling Governmental Interest*

Remedying purely private discrimination is a compelling governmental interest. The Fourth Circuit in *Croson* had interpreted *Wygant* to require "prior discrimination *by the government unit involved.*"[117] And Justice O'Connor's own concurring opinion in *Wygant* concluded that "a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."[118] But Justice O'Connor's opinion in *Croson* explicitly distinguished *Wygant* twice in rejecting this narrow interpretation. Because so many courts and commentators continue to believe that the government can remedy only its own discrimination, we quote the relevant language of *Croson* at length:

> It would seem equally clear, however, that a *state . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.* This authority must, of course, be exercised within the constraints of § 1 of the Fourteenth Amendment. Our decision in *Wygant* is not to the contrary. *Wygant* addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union. It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the government unit involved." *Wygant,* 467 U.S., at 274. As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and *can use its spending powers to remedy private discrimination, if it identifies*

117. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1358 (4th Cir. 1987) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality opinion) (internal quotation marks omitted)), aff'd, 488 U.S. 469 (1989).

118. *Wygant,* 476 U.S. at 288 (concurring opinion).

> *that discrimination with the particularity required by the Fourteenth Amendment.* To this extent, on the question of the city's competence, the Court of Appeals erred in following *Wygant* by rote in a case involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction.[119]

The crucial issue after *Croson* then is not whether the government has discriminated or even whether the government is a passive participant in private discrimination; it instead, is whether private discrimination has been identified "with the particularity required by the Fourteenth Amendment."[120] This language suggests that the government has a compelling interest in remedying private discrimination even where there is no causal nexus between public spending and private discrimination.[121]

---

119. *Croson*, 488 U.S. at 491–92 (1989) (emphasis added) (footnote omitted). Karst synopsized this language as follows:

> In one respect, *Croson* extends the range of permissible state and local government affirmative action beyond *Wygant*. The Fourth Circuit . . . had applied *Wygant* literally, holding that a city could use affirmative action in contracting only for the purpose of remedying its own past discrimination. Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, rejected this limitation, making clear that the city can accept its share of the public responsibility for remedying private discrimination, using its spending powers to remedy discrimination in the local construction industry.

Kenneth L. Karst, Private Discrimination and Public Responsibility: *Patterson* in Context, 1989 Sup. Ct. Rev. 1, 44. In Justice O'Connor's *Croson* opinion, the adjective "societal" changes from meaning "not governmental" to meaning "not identified." See 488 U.S. at 497 ("[In *Wygant*] Justice Powell, writing for the plurality, . . . drew the distinction between 'societal discrimination' which is an inadequate basis for race-conscious classifications, and the type of *identified* discrimination that can support and define the scope of race-based relief." (emphasis added)). (We say "changes" advisedly since a careful reading of *Wygant* suggests that the former interpretation was never valid. See infra text accompanying notes 122–125.)

120. Putting the issue this way raises the question of whether the causal and but-for justifications actually point to types of private discrimination that can be identified with the required specificity. While government surely has a more compelling interest in remedying discrimination that its own policies have caused, the presence of government causation may not assist the government in estimating more precise utilization targets. Even worse, but-for corrections add imprecision to utilization goals without the countervailing super-compelling interest.

121. The single-market rationale is supported by analogy to Commerce Clause doctrine, which holds that a state can do more as a market participant than it can do as a nonparticipant. See U.S. Const. art. 1, § 8, cl. 3. The Court has upheld state policies discriminating against out-of-staters when the state is a "market participant," as opposed to a "market regulator." See Reeves Inc. v. Stake, 447 U.S. 429, 436 (1980) (cement market); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (abandoned automobile market). Of course, the importance in this context of the participant-regulator distinction derives from the specific language of the Commerce Clause ("[t]o regulate").

Under antitrust law, the government actually has *less* latitude as a market participant than it has as a regulator: Government regulation of the marketplace, even when it clearly restrains trade, is upheld, whereas government participation in private combinations to restrain trade is generally struck down. In upholding a raisin marketing program adopted by the State of California, the Court noted that "we have no question of the state or its

Properly understood, the holding in *Wygant* actually *supports* our argument that private discrimination can justify government affirmative action in the same market. In *Wygant*, the Jackson Board of Education attempted to justify its affirmative action program in hiring school teachers—not on the basis of its own prior employment discrimination—but as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren.[122] For a plurality of the Court, the crucial defect of the role model theory was that it did "not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices."[123] In contrast, evidence of discrimination "by the governmental unit involved" would have ensured a narrow tailoring of both the benefits and burdens of affirmative action.[124] Limiting affirmative action to the "government unit involved" helps assure that (1) the minority beneficiaries of the affirmative action are the same class of people who were victims of the government's discrimination and (2) the nonminorities now burdened by affirmative action are the same class of people who were previously unjustly enriched by the government's prior discrimination. Significantly, there was no claim of private employment discrimination against teachers in Jackson. Thus, *Wygant* is not a rejection of private discrimination as a sufficient rationale for public affirmative action; rather, it stands for the proposition that the benefits and burdens of a race-conscious remedial program must be sufficiently tailored. To accomplish this, racial preferences need not be restricted to the "governmental unit involved" in discrimination; rather, the Constitution should only require that we restrict public affirmative action to the "same market involved" in the discrimination. As with *Wygant*'s restriction, limiting government's affirmative action to the "same market involved" in private discrimination ensures a double nexus between those who benefit and those who were harmed and between those are burdened and those who were unjustly enriched. Justice O'Connor was quite right in *Croson* to emphasize that nothing in *Wygant* diminishes the government's compelling interest in remedying private discrimination.[125]

The government's broad power to remedy private discrimination was foreshadowed one year prior to *Croson*, in *New York State Club Ass'n v. City*

---

municipality becoming a participant in a private agreement or combination by others for restraint of trade." Parker v. Brown, 317 U.S. 341, 351–52 (1943).

122. *Wygant*, 476 U.S. at 271–73.

123. Id. at 276.

124. In a sense, our single-market justification is narrower than *Wygant*. Following *Wygant*, discrimination by the school board in hiring janitors may justify the race-conscious hiring of teachers. We would reject such slippage between distinct segments of the labor market. Like the role model theory, the "by the governmental unit involved" requirement does not necessarily ensure a tight fit between remedy and injury; the single-market rationale does better.

125. The compelling interest of the federal government in remedying private racial discrimination is augmented by Congress's power under Section 5 of the Fourteenth Amendment and Section 2 of the Thirteenth Amendment. See supra note 12.

of New York.[126] The Supreme Court upheld a city law prohibiting discrimination by private clubs, recognizing "the State's 'compelling interest' in combating invidious discrimination."[127] Because her opinion is so often decisive in affirmative action cases, the statements of Justice O'Connor on this issue are worth emphasizing. In her concurrence to *New York*, O'Connor labeled "profoundly important" the goal of ensuring nondiscriminatory access to private commercial opportunities.[128] This opinion reinforces the notion that the government has a compelling interest even in remedying private discrimination that it has not caused.[129]

B. *Narrowly Tailoring the Single-Market Justification*

Recognizing the government's compelling interest in remedying private discrimination, narrow tailoring becomes the crucial prong of strict scrutiny. Subject to the constraints we outline in this Part, a government affirmative action program can be a narrowly tailored response to private discrimination in the same market.

Private discrimination against minority firms can take two forms, which we term upstream and downstream discrimination. Upstream discrimination exists when suppliers of inputs charge higher prices to or refuse to deal with minority firms, thereby raising the cost of production. Downstream discrimination exists when buyers offer lower prices to or refuse to deal with minority firms. Either upstream or downstream discrimination can reduce the private sales of minority firms and upstream discrimination can reduce the sales of minority firms to the government.

---

126. 487 U.S. 1 (1988).

127. Id. at 14 n.5 (citation omitted).

128. Id. at 18 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring in part and concurring in judgment) (internal quotations marks omitted)). Elsewhere, O'Connor has suggested that the difference between an "important" and "compelling" goal may be "negligible." *Wygant*, 476 U.S. at 286.

129. Several lower courts have followed suit by implicitly or explicitly recognizing this governmental interest. In *Concrete Works of Colo., Inc. v. City and County of Denver*, discussed at supra text accompanying notes 89–94, the Tenth Circuit noted that *Croson* did not "requir[e] the municipality to identify an exact linkage between its award of public contracts and private discrimination." 36 F.3d 1513, 1529 (10th Cir. 1994). The court considered probative a racial disparity in the overall Denver MSA construction market, i.e., combined public and private sector utilization of MBEs and WBEs. See id. Similarly, the Ninth Circuit has quoted at length affidavits of private discrimination by buyers in considering whether the government had provided sufficient evidence of a compelling interest. See, e.g., Coral Constr. Co. v. King County, 941 F.2d 910, 918 (9th Cir. 1991) ("'I believe the refusal of prime contractors, developers and architects to award contracts to my business for private sector work is due to discrimination against minority persons and minority-owned businesses generally.'" (quoting testimony of Barbara H. Pool, president of Seaway Construction, Inc.)). A Connecticut district court put the point directly: "By producing evidence that MBEs and WBEs attempted to win *private* contracts and were systematically rejected despite their bids having been the lowest, the city might have shown that discrimination exists and, thus, that the need for a set-aside existed." Associated Gen. Contractors v. City of New Haven, 791 F. Supp. 941, 947 (D. Conn. 1992) (emphasis added), vacated as moot, 41 F.3d 62 (2d Cir. 1994).

Consistent with the narrow tailoring requirement, the government can use affirmative action in procurement for particular goods to favor minority firms when private upstream or downstream discrimination has reduced minority sales of similar goods to private buyers. Thus, the government, when buying pencils, could advantage minority bidders upon showing that minority pencil sales to private buyers had been depressed by upstream or downstream discrimination.[130]

This theory contains two core limiting principles. The government can provide a race-conscious remedy for private underutilization of minority businesses:

> (1) only to counter the effects of private upstream or downstream discrimination against the minority businesses *qua minority businesses*; and
>
> (2) only to the extent that the remedy burdens those who as a group have unjustly benefitted from private discrimination.

These limiting principles assure that the scope of the remedy is neither arbitrary nor unduly burdensome. This Part discusses these limiting principles in turn to demonstrate how adhering to each allows the government to narrowly tailor an affirmative action program.

1. *The Existing Business Principle.* — As argued in our discussion of but-for corrections, limiting the single-market rationale to discrimination against minority firms themselves (instead of remedying discrimination against potential minority entrepreneurs) is more likely to produce nonarbitrary estimates for affirmative action goals. While the Supreme Court has rejected generalized claims of past discrimination that "provide[ ] no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy,"[131] estimating the impact of private discrimination on the minority market share in a particular industry provides a "non-arbitrary basis" for selecting a utilization target. Thus, whatever type of statistical disparity analysis that is sufficient to prove public discrimination should be sufficient when applied to private data to provide a nonarbitrary estimate of the magnitude of private discrimination. For example, the same underutilization analysis that was suggested by Justice O'Connor in *Croson* with regard to government procurement can be applied to private purchases of the same products to determine whether there is a shortfall in minority participation.[132]

Statistical evidence of private upstream or downstream discrimination against minority enterprises in a particular industry can provide a

---

130. Downstream discrimination by private buyers could directly reduce minority sales; upstream discrimination by input suppliers could indirectly reduce minority sales by increasing minority firms' costs of producing pencils.

131. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989).

132. Again, while several commentators have criticized the *Croson* underutilization approach, our point is that whatever method one uses to determine a nonarbitrary amount to remedy the government shortfall in minority purchases could be applied equally well to determine an amount to remedy the private shortfall. See supra note 32.

basis for a narrowly tailored government goal: recreating the minority market share one would expect absent private discrimination.[133] Estimating the minority-owned business market share in a world without private discrimination provides a non-arbitrary basis for the percentage selected as a goal for the program. In contrast to the situation in Richmond where "the 30% quota [could not] be said to be narrowly tailored to any goal,"[134] the single-market justification produces a goal that corresponds exactly to the government's authority to "eradicate the effects of private discrimination."[135]

2. *The Unjust Enrichment Principle.* — The second core limitation might be characterized as an "unjust enrichment" principle. While the harms of racial discrimination are evident, we often overlook the fact that racial discrimination against minorities in the marketplace also necessarily unjustly enriches the nonminorities who benefit because of their race.[136] Translated into the terms of disparity analysis, a statistical finding that minority firms are underutilized necessarily implies that nonminority firms are being overutilized.

Nonminority businesses that are disadvantaged by affirmative action in competing for a proportion of government purchases are not "unduly burdened" if the government can show that they were unjustly enriched by the private discrimination that the government is trying to remedy. As Chief Justice Burger argued in *Fullilove*:

> [A]lthough we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.[137]

---

133. The single-market rationale may also apply at the subcontracting level if prime contractors in an exclusively public prime contracting market buy from the same subcontracting market as private prime contractors. Here, the government could institute a subcontracting affirmative action plan to correct for discrimination by private prime contractors.

134. *Croson*, 488 U.S. at 507.

135. Id. at 491–92.

136. This unjust enrichment may not always take the form of increased profits. A sufficient degree of competition among nonminority suppliers may drive their economic profits to zero even though they are being overutilized. Conversely, however, in such a market affirmative action will not reduce their profits, so the unjust enrichment argument is unnecessary for narrow tailoring. A broader conception of the relevant burdens and benefits would include the raw number of contracts won on the theory that participation has value independent of business profits. See infra note 170. Under this conception, both the undue burden and unjust enrichment arguments would apply even to zero-profit suppliers.

137. Fullilove v. Klutznick, 448 U.S. 448, 484–85 (1980) (plurality opinion of Burger, C.J.); accord Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 173 (6th Cir. 1983) ("Even if it is assumed that the plaintiffs in this action are innocent of discriminatory conduct themselves, they are part of a group which did reap competitive benefit from past discriminatory practices . . . .").

When the government produces statistical evidence of nonminority overutilization, affirmative action is predicated on more than an assumption of unjust enrichment. The minority preferences in government procurement merely seek to eliminate nonminority overutilization—to reduce the nonminority market share to what it would be absent private discrimination.[138] Thus, reducing an unjust enrichment is not an unconstitutional burden.[139]

---

138. As one of us has stated previously, "focusing the burden of procurement affirmative action on incumbent nonminority firms might be a narrower tailoring of the burdens to the class of people who have benefitted from past discrimination (than distributing burdens among the general population)." Ayres, Narrow Tailoring, supra note 32, at 1789 n.25. It should be noted, however, that the Court in *Bakke* and in the Title VII cases reviewing affirmative action seemed to favor a broad distribution. See id.

If the Court chooses to adhere rigidly to this approach, it could nonetheless accept the single-market rationale, but require monetary damages to compensate nonminority firms for lost profits attributable to affirmative action. See McAleer v. AT&T, 416 F. Supp. 435, 440–41 (D.D.C. 1976) (awarding damages to a male employee who would have been promoted but for an affirmative action plan favoring women); see also Setser v. Novack Inv. Co., 638 F.2d 1137, 1145 n.20 (8th Cir. 1981) (following *McAleer*); cf. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983) (sustaining an arbitrator's award in favor of male employees who were laid off because an affirmative action plan suspended the regular seniority system). But see Dennison v. City of Los Angeles Dep't of Water and Power, 658 F.2d 694, 696 n.1 (9th Cir. 1981) (rejecting *McAleer*).

139. The burden on nonbeneficiaries of an affirmative action plan in contracting may be perceived by the Court to be relatively light if it does not interfere with settled, legitimate expectations. In this respect, procurement is more like hiring than like layoffs. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (plurality opinion of Powell, J.) (footnote omitted); see also *Croson*, 488 U.S. at 549 (Marshall, J., dissenting) (quoting *Wygant*); cf. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 479 (1986) (plurality opinion of Brennan, J.) (upholding a judicially-ordered affirmative action plan against a Title VII challenge in part because the order "did not require any member of the union to be laid off, and did not discriminate against *existing* union members").

This distinction is consistent with the tendency to perceive direct losses as more painful than foregone gains. The intuition dates back at least as far as Aristotle, see The Nicomachean Ethics 49 (David Ross trans., Oxford Univ. Press rev. ed. 1992), but Amos Tversky and Danny Kahneman were the first to formalize the theory of loss aversion. See Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263 (1979); see also Jack L. Knetsch, The Endowment Effect and Evidence of Nonreversible Indifference Curves, 79 Am. Econ. Rev. 1277 (1989). For an application of loss aversion to the affirmative action context, see Fredrick E. Vars, Attitudes Toward Affirmative Action: Paradox or Paradigm?, *in* Carol M. Swain, Race Versus Class: The New Affirmative Action Debate (1996). Winning a particular contract in the past may create an expectation of winning it again in the future, see Cortez III Serv. Corp. v. NASA, 950 F. Supp. 357, 359 (D.D.C. 1996), but this entitlement is less firmly-rooted than a permanent employment contract by virtue of the fact that government contracts are regularly reopened for competitive bidding. And, of course, no one is deprived of an endowment when affirmative action is applied to a new government contract.

The unjust enrichment principle suggests that the government cannot use affirmative action in one market to remedy private discrimination in another. The crucial test is whether the nonminority firms disadvantaged by a remedial program in a particular market have benefitted from private discrimination in the form of increased private sales. Under our theory, the government could not use its pencil procurement to remedy private discrimination against minority suppliers of other products. Thus, private discrimination that reduced the minority provision of construction services could not justify government affirmative action in pencil procurement. The nonminority pencil producers were not unjustly enriched by private discrimination in the construction industry and hence would be unduly burdened by the minority preference in pencil procurement.

In assessing whether remedying private discrimination unduly burdens nonminority firms, courts should analyze combined public and private purchases to see whether the government affirmative action does more than counteract private *over*utilization of nonminority firms. The unjust enrichment principle suggests that so long as affirmative action does not create nonminority underutilization, nonminorities are not unduly burdened by the government's racial preferences in procurement.

Justice Powell explicitly applied just this combined-market approach in *Fullilove* to assess whether nonminority construction firms were unduly burdened by a federal statute setting aside 10 percent of federal highway contracts for minority firms. Applying strict scrutiny in his concurrence, Powell concluded that a minority preference leaving "96% of contractors" free "to compete for 99.75% of construction funds" was not a "burden . . . so great that the set-aside must be disapproved."[140] Citing the same statistic, the plurality opinion of Chief Justice Burger held that the "actual 'burden' shouldered by nonminority firms [was] relatively light . . . as compared with overall construction contracting opportunities."[141] Since the government's affirmative action plan would still leave nonminority contractors overutilized, the nonminority contractors are not unduly burdened.

It is of crucial importance that Powell and Burger chose the combined market of private and public purchases as the appropriate unit of

---

140. *Fullilove*, 448 U.S. at 514–15 (Powell, J., concurring).

141. Id. at 484. Although the plurality opinion did not adopt the tiers of scrutiny approach, see id. at 492, it noted that the *Fullilove* program "would survive judicial review under either 'test' articulated in the several [Regents of the University of California v. Bakke, 438 U.S. 265 (1978)] opinions," id., one of which was, of course, Justice Powell's strict scrutiny.

Justice Marshall, in his dissent to *Croson*, noted that: "Like the federal provision [in *Fullilove*], Richmond's has a minimal impact on innocent third parties. While the measure affects 30% of *public* contracting dollars, that translates to only 3% of overall Richmond area contracting." *Croson*, 488 U.S. at 548–49 (citations omitted). The Justices in the *Croson* majority did not mention the slight effect on third parties, perhaps because they found a host of other constitutional defects.

analysis. Their opinions did not merely look at the percentage of federal purchases for which nonminorities could compete (90 percent), but at the percentage of public and private purchases for which nonminority firms could compete (99.75 percent). Looking at the government market alone, the 10 percent set-aside would cause nonminority firms to be underutilized—as 96 percent of contracting firms who were nonminority were free to compete for only 90 percent of these federal contracting jobs. However, Powell and the Burger plurality rejected this approach. By focusing on the continuing overutilization of nonminority firms in the combined public and private markets, the Court implicitly accepted the unjust enrichment principle. Nonminority firms were not unduly burdened by the 10 percent set-aside, because these same firms were still unjustly garnering a disproportionate share of the overall market.

C. *Market Definition*

To apply the unjust enrichment principle, it is necessary to define the relevant markets and to assess the competitive impact of both private discrimination and government affirmative action. An over-broad definition of the market would resemble the "societal" discrimination rationale, emphatically rejected by *Croson*, and could unduly burden nonminority firms in sub-markets where there is no private discrimination in their favor. For example, if private buyers discriminate against minority electricians, but not against minority plumbers, a government affirmative action plan that encompassed both electrical and plumbing procurement[142] would unduly burden nonminority plumbers.

For the single-market rationale to be viable, it is essential that the public affirmative action take place in the same market as the private discrimination. A set of minority and nonminority firms must compete for both public sales (affected by affirmative action) and private sales (affected by private discrimination). The single-market rationale allows the government to make up for the lost sales caused by private upstream or downstream discrimination by purchasing more of the same product from minority sellers (than it would purchase absent private discrimination).

Principles of antitrust market analysis can be usefully applied to determine what constitutes the *same* product for affirmative action purposes.[143] The objective in defining the relevant line of commerce for antitrust purposes is "to recognize competition where, in fact, competition exists."[144] Most obviously, when the goods that a set of producers sell to public and private purchasers have homogeneous attributes (or are

142. This is assuming no supply or demand substitutability. See infra text accompanying notes 144–148.

143. Such application, however, should not be mechanical. See infra notes 148–155 and accompanying text.

144. Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962); see also Ian Ayres, Note, Rationalizing Antitrust Cluster Markets, 95 Yale L.J. 109, 109 n.1 (1985) ("Because

close demand substitutes), it is appropriate to place them in the same market under the single-market rationale. Our earlier discussion of pencils is apposite. There is both a private and public demand for pencils, and (assuming private overutilization of nonminority producers) the government could increase its minority purchasing without burdening nonminority sellers.

However, as recognized in antitrust law, supply substitutability constitutes an independent rationale for placing non-homogeneous products in the same market.[145] The basic idea is that if producers can shift between two different products at a low cost, those products belong in the same market. For example, if manufacturers can switch easily between making left-handed and right-handed guitars, both types of guitars belong in the same market. This is true even though only ambidextrous musicians could substitute one product for the other; that is, there is no demand substitutability.

The products involved in *Croson* and *Adarand* illuminate the issues of market definition. The J.A. Croson Company lost a project to install stainless steel urinals and toilets in the city jail because it did not meet the Richmond minority subcontracting goal.[146] If private buyers of identical plumbing fixtures discriminate against minority sellers, an affirmative action plan could be designed to achieve the minority market share one would expect absent private discrimination. Estimating the size of the preference would be relatively straightforward, and the overutilization of nonminority sellers in the private sector would minimize the burden of the program. A harder question concerns whether ceramic urinals and toilets should be included in the same market. If we assume that steel and ceramic urinals are not supply substitutes, the question becomes the degree to which ceramic and steel toilets compete for private demand. If the two types of products have a relatively high cross-price elasticity of demand—i.e., a small decline in the relative price of steel could induce a substantial portion of private ceramic buyers to switch to steel fixtures—then a sensible market definition would include both types of plumbing fixtures. If ceramic and steel manufacturers compete for private and public demand, then using affirmative action to increase minority sales of steel urinals to the government would not unduly burden nonminority manufacturers who could look to a larger private market demand for ceramic and steel.

In contrast to *Croson*, the facts of *Adarand* highlight issues of supply-side substitution. A nonminority firm, Adarand Constructors, Inc., did not receive a subcontract to install guardrails on a federal project despite having submitted the lowest bid. Instead, the contract went to a minority

---

substitutes compete, substitutability in demand or supply has been the prime criterion for setting the boundaries of a market.").

145. See *Brown Shoe Co.*, 370 U.S. at 325 n.42 ("cross-elasticity of production facilities may also be an important factor in defining a product market").

146. See *Croson*, 488 U.S. at 481–83.

firm because of an affirmative action program.[147] Unlike plumbing fixtures, guardrails are purchased almost exclusively by the government, so there is no demand substitutability. This does not, however, end our inquiry. It is possible that guardrail suppliers can shift their production to supply alternative construction services. If this were the case, the alternative construction services would be supply substitutes and the relevant market should include them. The government would be justified in using affirmative action in guardrail procurement to counteract minority underutilization in the general contracting industry. Nonminority guardrail suppliers who were disadvantaged in competing for government contracts would not be unduly burdened if the government could show that they could compete for (and had an unjust advantage in competing for) a variety of private non-guardrail construction jobs. If, however, as a factual matter guardrails are not a demand or supply substitute with any other privately demanded product, then the single-market justification would not apply—the government could not use guardrail affirmative action to remedy private discrimination.

While the concepts of demand and supply substitutability are helpful, they do not answer the question of what level of specificity is required to define a market. Opponents of affirmative action might set the standard so high that only perfect demand substitutes could be lumped together in a particular market. (Taken to its extreme, the result could approximate Justice Scalia's position that the state can remedy only individual discriminatory acts.[148]) In the antitrust context, the Justice Department guidelines envision a product-by-product review.[149] Given the fact that the federal government spends roughly $200 billion annually in procurement of tens of thousands of different products and services, requiring legislative or executive bodies to conduct analysis at this level of detail would be prohibitively burdensome.

The Justice Department has decided to define industries according to two-digit Standard Industrial Classification (SIC) codes for the purpose of establishing minority contracting benchmarks.[150] The Department justified this decision on the ground that existing data would not support

147. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 205 (1995).

148. See *Croson*, 488 U.S. at 524–27 (Scalia, J., concurring in judgment). O'Connor does not go this far. In her view, prima facie statistical evidence of discrimination can suffice to justify race-conscious public policy. See id. at 509.

Level-of-specificity problems are unavoidable. For instance, O'Connor's discussion of a hypothetical Aleut newcomer suggests that evidence of discrimination in the relevant market against a particular minority group is required for inclusion of that group among the beneficiary class. See id. at 506. Consideration of the boundaries among minority groups is obviously beyond the scope of this Article, but we do attempt to add sophistication to O'Connor's market analysis.

149. See Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,554 (1992) ("The Agency will first define the relevant product market with respect to each of the products of each of the merging firms.").

150. See Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648, 25,650 (1997).

estimates at the four-digit level, but left open the possibility of more refined analysis in the future if better data permitted it.[151] A closely related issue is the geographical boundaries of a market.[152] The Justice Department proposes to start from the premise that federal contracting is conducted in a national market but to set the benchmarks on a regional basis where the data indicate that an industry operates regionally.[153] While not as refined as some antitrust analyses, we believe that this SIC approach captures empirically sufficient "competitive reality" to assess whether nonminority firms are unduly burdened by affirmative action. If the Court is sincere in its assertion that strict scrutiny is not "strict in theory, but fatal in fact,"[154] it cannot require more validation than can be practicably estimated.[155]

D. *The 100 Percent Problem*

The single-market rationale is so potent a justification that it might at times justify a 100 percent minority government contracting goal. This possibility presents itself whenever the size of the minority shortfall in the private sector is equal to or exceeds total government spending in that market.[156] In the Introduction, we suggested that the DoD might have to

---

151. See id.

152. Recall that the Court objected to the lack of geographical limits on the Richmond plan in *Croson*. See supra note 64.

153. See Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,045 (1996).

154. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

155. Cf. Gewirtz, supra note 110 (arguing that the costs of uncertainty should not be borne by the historical victims of discrimination).

In evaluating the adequacy of environmental impact statements, courts tolerate incomplete information even when better data are expected. See Alaska v. Andrus, 580 F.2d 465, 473–74 (D.C. Cir.), vacated in nonpertinent part sub nom. Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978).

> Where [the] cost [of proceeding without more and better information] has been considered, and where the responsible decisionmaker has decided that it is outweighed by the benefits of proceeding with the project without further delay, the courts may not substitute their judgment for that of the decisionmaker and insist that the project be delayed while more information is sought.

Id. (emphasis omitted).

156. One way to avoid the 100 percent problem is to increase total government purchases in a particular market. Like providing direct payments to nonminority sellers disadvantaged by affirmative action, see supra note 138, increasing government spending would have the effect of shifting the burden of the affirmative action program from the nonminority sellers in the relevant market to taxpayers generally. In some markets, expanding government purchasing could eliminate completely the burden on nonminority sellers. The burden on the public fisc of such a policy, however substantial, is of lesser constitutional weight than the goal of remedying private discrimination. As a policy matter, expanding government purchasing may not be totally implausible given congressional willingness to buy and destroy surplus agricultural products. Taken to an extreme, however, increased government spending to remedy private discrimination—buying and throwing away vast quantities of minority-produced cheese, for instance—may

direct 100 percent of its prime construction contracts to minority firms to correct for private sector underutilization.[157] The facts of *Fullilove* provide another example. Justice Powell's concurrence found that

> [a 10 percent government] set-aside would reserve about 0.25% of all the funds expended yearly on construction work in the United States for approximately 4% of the Nation's contractors who are members of a minority group. The set-aside would have no effect on the ability of the remaining 96% of contractors to compete for 99.75% of construction funds.[158]

But if a 10 percent set-aside would reserve only 0.25 percent, then a 100 percent set-aside would have reserved only 2.5 percent of the overall—combined public and private—construction market. The disfavored nonminority contractors under the unjust enrichment principle might not be unduly burdened by even a 100 percent government set-aside, because these 96 percent of contractors would still be able to compete for 97.5 percent of total construction funds.[159] Thus, sufficient private underutilization of minority contractors in a market where private purchases are much larger than public sales could lead to a 100 percent minority construction goal. In this Section, we explore whether there is something uniquely objectionable about a 100 percent affirmative action goal.

Federal courts have already shown a hostility toward 100 percent goals. For example, in *Carter v. Gallagher*, the Eighth Circuit struck down a district court order requiring the Minneapolis Fire Department to fill 100 percent of its next twenty positions with eligible minority applicants.[160] The court rejected this "absolute preference," but suggested that a one-to-two hiring ratio (33 percent goal) would be appropriate.[161]

---

create a constitutionally objectionable "expressive harm." See infra text accompanying note 171.

157. See supra text accompanying notes 34–35.

158. *Fullilove*, 448 U.S. at 514 (Powell, J., concurring) (citation omitted).

159. The combined market analysis in Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994), provides another example. Minority availability was approximately 5.8 percent, see id. at 1525 (17.4 percent [utilization] ÷ 3 [estimated disparity index] = 5.8 percent [availability]), so the combined public and private disparity index of 0.43 for 1990, see id. at 1529, implies an overall minority utilization rate of 2.5 percent. Because the relevant public construction programs represented approximately 2 percent of all construction in the Denver metropolitan area, see id., directing 100 percent of public spending to minority firms would (at a maximum) increase overall utilization to 4.5 percent, still short of the 5.8 percent one would expect absent discrimination.

160. 452 F.2d 315 (8th Cir. 1971) (en banc).

161. Id. at 324, 331. The closest the court came to articulating a justification for the distinction between a 100 percent and 33 percent goal was the following: "[A] hiring remedy based on an alternating ratio such as we here suggest will by no means *necessarily* result in hiring less qualified minority persons in preference to more qualified white persons." Id. (emphasis added). This statement is true, but the same could be said of an absolute preference. If the next twenty most qualified applicants are all minorities, a 100 percent hiring goal merely ensures that the best applicants are in fact hired. Conversely, a

And in *United States v. Paradise*, three sitting Supreme Court Justices criticized a 50 percent promotion goal on the explicit ground that it could not be distinguished from a 100 percent quota.[162] Faced with a long history of recalcitrance on the part of the Alabama Department of Public Safety to integrate the ranks of its state troopers, a federal district court ordered a temporary one-to-one promotion plan. Justice Brennan, for a plurality of the Court, concluded that the requirement did "not disproportionately harm the interests, or unnecessarily trammel the rights, of innocent individuals," because "it only postpone[d] the promotions of qualified whites."[163] In a dissent joined by Chief Justice Rehnquist and Justice Scalia, Justice O'Connor argued:

> Such a justification, however, necessarily eviscerates any notion of "narrowly tailored" because it has no stopping point; even a 100% quota could be defended on the ground that it merely "determined how quickly the Department progressed toward" some goal. . . . [P]rotection of the rights of nonminority workers demands that a racial goal *not substantially exceed the percentage of minority group members in the relevant population* or work force absent compelling justification.[164]

Thus, the dissenters' objection to the 100 percent goal was derived from concern for "the rights of nonminorit[ies]."

However, the combined market figures from *Fullilove* and the unjust enrichment principle more generally suggest that the rights of nonminorities need not be unduly burdened by a high government affirmative action goal—if there are *private* alternatives for which the nonminorities

---

strict one-to-two mandate will result in the hiring of a less qualified minority person any time three white applicants in a row are more qualified than the best minority applicant. Decided in 1971, *Carter* preceded the Supreme Court's landmark affirmative action decisions, so it is perhaps understandable that the Eighth Circuit in effect limited affirmative action to the role of a prophylactic against future discrimination. But to the extent affirmative action also seeks to eradicate the effects of past discrimination, a goal the Supreme Court has time and again endorsed, some preference for equally or lesser qualified minorities is appropriate. If there is a unique constitutional defect to a 100 percent affirmative action goal, *Carter* did not identify it.

162. 480 U.S. 149, 198–99 (1987) (O'Connor, J., dissenting).

163. Id. at 183 (plurality opinion of Brennan, J.). Justice Powell made essentially the same point in his concurrence: "Although some white troopers will have their promotions delayed, it is uncertain whether any individual trooper, white or black, would have achieved a different rank, or would have achieved it at a different time, but for the promotion requirement." Id. at 189 (Powell, J., concurring).

Justice Stevens cast the fifth vote to uphold the plan. The key for Stevens was the discretionary power of a district judge to fashion an equitable remedy in response to a proven constitutional violation. See id. at 193–94 (Stevens, J., concurring in judgment). Stevens suggested more rigorous review of affirmative action adopted by legislative bodies, but minimized the burden on white officers in terms consistent with our "unjust enrichment" argument: "Inevitably, promotions of the white officers who have been beneficiaries of the past illegal conduct may be delayed even though they are 'innocent victims' in the sense that they are not individually responsible for the past illegal conduct." Id. at 193 n.2.

164. Id. at 199 (O'Connor, J., dissenting) (emphasis added) (citation omitted).

can compete. Indeed, a narrow way to read the *Paradise* dissent to make it consistent with the foregoing is to focus on the possibility that the nonminorities who were denied promotion were not as a class unjustly enriched by private discrimination in favor of nonminority police.[165] Such conditions are much different from the procurement context, where private buyers may overutilize the same nonminorities disadvantaged by public affirmative action.[166] In the procurement context, even a 100 percent minority utilization goal may have very little effect on the total size of nonminority firms' opportunities.[167] And, properly designed, a corrective affirmative action program would (at most) reduce the nonminority combined market share to the level one would expect absent private buyer discrimination.

Justice O'Connor thus could still maintain that a racial goal cannot "substantially exceed the percentage of minority group members in the relevant population" but conclude that when sellers compete for both government and private buyers, the relevant population should be a combined public and private market. In the *Fullilove* context, preferring minority-owned firms on 100 percent of government contracts might accordingly be seen as just a 2.5 percent utilization goal in the combined public and private market (for the 4 percent of construction firms that are owned by minorities).[168]

Nonetheless, even if a 100 percent minority goal is non-arbitrary and does not unduly burden non-beneficiaries, we believe it is unconstitutional.[169] Strict scrutiny of race-conscious decisionmaking implies an additional criterion for constitutionality.[170] A government goal of 100 per-

---

165. The State of Alabama is clearly a monopsonist with respect to Alabama state troopers. In other words, there is no demand substitutability for troopers. With the massive increase in private policing services, see Welcome to the New World of Private Security, Economist, Apr. 19, 1997, at 21, there may be some degree of supply substitutability, but the possibility of nonminorities switching to a competitive private job at the time of promotion might be de minimis. If so, a 100 percent minority promotion goal forecloses 100 percent of nonminority opportunities in the relevant market.

166. The procurement context is also distinguishable from employment in that minority-owned firms may include nonminorities. Even a 100 percent minority set-aside allows substantial nonminority participation. Nonminorities "may participate by having up to 49% ownership or control of a minority establishment, by taking up to 50% participation in a joint venture with a minority contractor and by bidding successfully for subcontracts awarded by minority prime contractors." Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 174 (6th Cir. 1983).

167. See supra notes 157–159 and accompanying text.

168. See supra notes 158–159 and accompanying text.

169. We emphasize that we focus on the constitutionality of the goal itself, not the means by which the government seeks to achieve it. Thus a 100 percent goal does not necessitate a quota or set-aside which as a means might be independently objectionable. We instead are concerned with whether narrowly tailored means—such as a declining schedule of bidding credits, see Ayres, Narrow Tailoring, supra note 32—to effectuate a 100 percent goal could be constitutional.

170. The Supreme Court has held that nonminority contractors have standing to challenge an affirmative action program because such a program creates "a barrier that

cent minority utilization may be constitutionally objectionable because such action creates an "expressive harm." As described by Richard Pildes and Richard Niemi:

> An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. . . . Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values.[171]

The concept was originally applied to race-conscious redistricting to explain the Court's antipathy for bizarrely shaped districts:

> [R]eapportionment is one area in which appearances do matter . . . because, even apart from any concrete harm to individual voters, such appearances themselves express a value structure that offends constitutional principles.[172]

The Supreme Court has increasingly embraced this notion of "expressive harms," most recently in *Bush v. Vera*.[173]

Even though we stand by our prior analysis in arguing that a 100 percent minority goal need not unduly burden nonminority firms in terms of "concrete costs" (if the government shows that these firms are being overutilized when competing for private sales),[174] an independent

---

makes it more difficult for members of one group to obtain a benefit than it is for members of another group." Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993). Plaintiffs are not required to show that a nonminority firm would have won a contract but for the affirmative action program. See id. The loss of opportunities to compete for contracts is recognized as a constitutional harm, independent from the loss of particular contracts. It would seem to follow that the inquiry into undue burden must extend beyond the actual loss of contracts to the magnitude of the barrier itself. A 100 percent contracting goal may be an undue burden because by appearing to exclude nonminorities it imposes a barrier of unconstitutional magnitude, quite apart from its actual effect on contracts won and lost. Thus, the "expressive harm" discussed in the text below could be conceptualized as an undue burden, not an additional criterion for constitutionality. We do not think this conceptual choice significantly affects the analysis that follows.

171. Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 506–07 (1993).

172. Id. at 509 (footnote omitted).

173. 517 U.S. 952, 1053 (1996) (Souter, J., dissenting) (summarizing majority opinion); see also id. at 984 (majority opinion). In this case, the Court struck down three congressional voting districts in Texas as not narrowly tailored because they were bizarrely shaped and noncompact.

174. If sellers catalogue public and private sales of a particular item in separate "mental accounts," they may not perceive them as interchangeable. See Richard H. Thaler, Anomalies: Saving, Fungibility, and Mental Accounts, J. Econ. Persp., Winter 1990, at 193. Thus, the psychological injury of losing all pencil sales to the government may be pronounced, even when private pencil sales are booming. A similar problem of conceptual severance arises in applying the diminution-in-value test in Takings jurisprudence. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis,

limitation of "expressive harms" can explain why the extreme (and facially bizarre) scope of a 100 percent goal offends constitutional principles.[175]

Excluding nonminorities from public contracting creates a new kind of racial segregation. The *Croson* Court expressed concern with more than the economic costs of discrimination to minority contractors—it suggested that the government had an interest in dismantling "a racially segregated construction market."[176] But a procurement goal of 100 percent minority utilization seeks to do just this with regard to the sub-market of government purchasing. When the government's goal is not to contract with the nonminority vendors in a particular market, the government's impulse to remedy private discrimination is no longer in tension with, but has completely trumped, the long-run constitutional aspiration of race-blind decisionmaking.[177] Pildes and Niemi have argued that such eclipsing race-consciousness in the redistricting context sends a constitutionally impermissible message:

> Government cannot redistrict in a way that conveys the social impression that race consciousness has overridden all other, traditionally relevant redistricting values. In the Court's view, certain districts whose appearance is exceptionally "bizarre" and "irregular" suggest that impression. Plaintiffs need not establish that they suffer material harm, in the sense of vote dilution, from such a district. *Shaw* is fundamentally concerned with expressive harms: the social messages government conveys when race concerns appear to submerge all other legitimate redistricting values.[178]

While the remedial impulse is compelling, expressive harm theory suggests that it cannot be transcendent. A 100 percent goal sends the message that the government is willing to "balkanize the races by encouraging their segregation"[179] and to foreclose one form of contact (that is

---

J., dissenting). This psychological harm to nonminorities does not, however, deserve the same constitutional weight as the very real economic injury private buyer discrimination inflicts on minority sellers. Ultimately, for-profit firms are interested not in *competing for* contracts in particular sub-markets, but in *winning* contracts in the overall marketplace. Rather, as we discuss in the text, the constitutional problem derives from the fact that people would infer expressive meaning from minority-only participation in the government "account."

175. Voting is the central legitimating process of a democratic system. For this reason, it may be more important to avoid expressive harms in redistricting than in government spending. Thus, "expressive harm" theory, as developed in voting district cases, may not apply with the same force in the context of government procurement.

176. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989).

177. This aspiration is distinct from the popular rhetoric of color-blindness, which ignores current patterns of racial subordination. The expressive harm limitation falls well short of mandating race-neutrality; rather, it excludes only remedies that contribute more to the disease of discrimination than to the cure.

178. Pildes & Niemi, supra note 171, at 526–27.

179. Akhil Reed Amar & Neal Kumar Katyal, *Bakke*'s Fate, 43 UCLA L. Rev. 1745, 1749 (1996).

the relationship of contractual privity) that a class of citizens can have with its government. Because of these additional harms, the Fourteenth Amendment should not countenance a 100 percent goal.

What then? If 100 percent is too much, how can the government formulate a non-arbitrary goal that—à la *Croson*—seeks to remedy private discrimination?[180] Under the single-market justification, is there any utilization goal between the traditional availability target[181] (set to remedy only public discrimination) and the 100 percent objective that will withstand strict scrutiny? We believe there is. At a minimum, the government should be able to engage in what we call "proportional overutilization" to remedy private underutilization. If governmental purchases account for X percent of the overall (combined public and private) market, we propose that the government should at least be able to remedy X percent of the overall shortfall in minority utilization. For example, imagine that: (1) The government purchases 20 percent of all widgets; (2) minority businesses have 10 percent of all widget capacity; and (3) absent affirmative action, the government would purchase 10 percent of its widgets from minority firms (i.e., no public underutilization), but because of racial discrimination, private buyers would purchase only 5 percent of their widgets from minority firms. These assumptions imply that, absent affirmative action, minority-owned firms would supply only 6 percent of the overall market, representing a gross underutilization of 4 percentage points.[182] Our proportional overutilization standard would allow the government to set a minority utilization target of 14 percent, which is 4 percentage points above the assumed overall minority availability of 10 percent. This proportional overutilization standard ties the scope of the remedy to the government's relative position in the overall market. If government purchases represent 20 percent of the overall market, the government can try to remedy 20 percent of the overall minority underutilization. If (notwithstanding the prohibition against private racial discrimination) the private market can get away with a 4 percentage point underutilization, the public market (notwithstanding the undue burden

---

180. This narrow-tailoring problem does not arise in the redistricting context. For while *Shaw* and its progeny prohibit "bizarreness," there is no requirement that the nonbizarre district shapes be tailored to produce a nonarbitrary goal. Shaw v. Reno, 509 U.S. 630 (1993).

181. In accordance with Justice O'Connor's suggestion in *Croson*, the traditional target to remedy government discrimination is tied to minority availability. See supra notes 20, 62 and accompanying text. This actual minority availability percentage, however, needs to be adjusted to take into account what availability would be "but for" discrimination. See supra Part III.

182. Since government and private total purchases are assumed to be 20 and 80 respectively, minority enterprises sell 2 to the government (20 x .1) and 4 to private purchasers (80 x .05), which amounts to 6 out of 100 sales.

and expressive harm restrictions of the Fourteenth Amendment) should be able to tolerate a 4 percentage point overutilization.[183]

In practice, limiting the government remedy to proportional overutilization will steer public affirmative action far away from the 100 percent problem. Under this standard, the government's targets will be much closer to the estimate of minority availability (the traditional *Croson* utilization target). Proportional overutilization never generates a government utilization target percentage more than twice the estimate of minority availability.[184] Since estimates of minority firm availability are often less than 15 percent,[185] and government purchases usually compose only a small portion of the combined public and private market, most government remedial targets will be less than 25 percent and we predict that many will be less than 20 percent.

These limitations alone may be sufficient to insure that "a racial goal not substantially exceed the percentage of minority group members in the relevant population."[186] The proportional overutilization standard certainly does not make remedying private discrimination a transcendent government goal. This standard will normally allow the government to remedy only a small fraction of private discrimination. If the govern-

---

183. A slightly less conservative target would he to measure minority underutilization not in the overall market but in the private market alone, and then to use the degree of private underutilization as the standard for government overutilization. In our example, since the private market minority underutilization was 5 percentage points, the government under this alternative measure would be able to overutilize by 5 percentage points—setting a 15 percent minority procurement goal.

184. The gross percentage of underutilization can never be more than the availability estimate. If minority firm availability is 10 percent, then the most underutilization could be is 10 percentage points. Therefore, as a theoretical matter, limiting the amount of government overutilization to the gross percentage of underutilization in the overall market will cap the government's goal at some amount less than or equal to twice the minority availability estimate.

185. Local governments defending affirmative action plans after *Croson* have generally reported MBE availability figures below 15 percent. See, e.g., Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1524 (10th Cir. 1994) (11 percent availability); Contractors Ass'n, Inc. v. City of Philadelphia, 6 F.3d 990, 1009 (3d Cir. 1993) (2.4 percent availability); Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 (11th Cir. 1990) (12 percent availability); Associated Gen. Contractors v. City of Columbus, 936 F. Supp. 1363, 1372 (S.D. Ohio 1996) (2.27 percent availability). But see O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 426 (D.C. Cir. 1992) (34 percent availability); Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity, 950 F.2d 1401, 1414 (9th Cir. 1991) (availabilities ranging from 36 percent to 49.5 percent). The lower figures are not surprising given that only 8.9 percent of all businesses nationwide were minority-owned in 1992. See Stephanopoulos & Edley, supra note 22, at 62–63. This figure is close to the 10 percent goal of the federal program upheld in *Fullilove*. Fullilove v. Klutznick, 448 U.S. 448, 454 (1980).

186. United States v. Paradise, 480 U.S. 149, 199 (1987) (O'Connor, J., dissenting).

In light of the evidence of federal overutilization in some markets we presented in Part I, some federal affirmative action programs may not meet this standard. At the same time, private discrimination may justify current levels of affirmative action in other markets and suggest areas for constitutionally permissible expansion.

ment, as in *Fullilove*, purchases only a small percentage of the country's construction services, then it will only be able to remedy a small percentage of the private underutilization. If there are expressive harms "when race concerns appear to submerge all other legitimate [governmental] values,"[187] then the proportional underutilization approach should withstand expressive harm scrutiny.

Indeed, proportional underutilization may concede too much. Justice O'Connor's suggestion in *Paradise* that a government's utilization goal could not substantially exceed minority availability, was qualified by the phrase "absent compelling justification."[188] Since *Croson* ordains remedying private discrimination as a compelling government interest, the proportional overutilization standard may throw away too much of the remedial baby with the "expressive harms" bath water.[189]

A more aggressive approach for calculating the government's utilization target would estimate minority availability assuming that the underutilized capacity in the private sector was shifted to the public sector. Returning to our previous example, if government purchases represent 20 percent of the overall market, and if private minority utilization is half of minority overall availability (5 percent versus 10 percent), then these assumptions imply that minority firms could supply 25 percent of the capacity needed for the government contracts.[190] Even though, by assump-

---

187. Pildes & Niemi, supra note 171, at 526–27.

188. *Paradise*, 480 U.S. at 199 (O'Connor, J., dissenting).

189. If one accepts our assertion that the critical constitutional defect of a 100 percent goal in the procurement context is the resulting expressive harm, then it follows that the highest percentage goal that does not generate expressive harms is constitutional. Thus, the logical inquiry is: What is the maximum minority utilization goal that avoids expressive harm? The most satisfactory answer would approximate the results of a hypothetical survey of public opinion with respect to a spectrum of utilization goals. Perhaps expressive harm results whenever the goal "substantially exceed[s]" availability. Id. at 199 (O'Connor, J., dissenting). At the other extreme, perhaps mere token nonminority participation is sufficient to demonstrate that the government has not allowed "race concerns . . . to submerge all other legitimate [governmental] values," Pildes & Niemi, supra note 171, at 527, or at least that the government has not maintained "a racially segregated . . . market." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989). These examples demonstrate that the phrase "expressive harms" is not self-defining. Outlining the upper limit of a procurement goal seems to be as arbitrary as deciding when irregular voting districts are unconstitutional. But while selecting the maximum percentage goal that avoids expressive harms may seem somewhat arbitrary, at least the rationale is clear. In contrast, the proposals discussed in the text offer precise methodologies to calculate minority procurement goals, but are not narrowly tailored to avoid expressive harms. Nonetheless, these methodologies yield goals narrowly tailored to remedy private discrimination, since any goal up to 100 percent could survive this prong of strict scrutiny. And because these proposals will generally produce goals well below 100 percent, we believe they avoid "expressive harms" under any plausible definition of that phrase. They are designed to yield nonarbitrary goals, not to push the envelope of constitutionality.

190. Again, since government and private total widget purchases are assumed to be 20 and 80 respectively, minority enterprises sell 2 to the government (20 x .1) and 4 to the private market (80 x .05), which amounts to 6 out of 100 sales. See supra note 182. Private discrimination would free up an additional 4 widgets that minorities might supply to the

tion, minority firms represent only 10 percent of overall capacity, private discrimination frees up some of this capacity to compete for government contracts. This "shifting availability" approach still avoids the 100 percent problem because even taking into account the shift of minority capacity toward vying for government contracts (because of private discrimination), the minority percentage of firms competing for government procurement deals will always be less than 100 percent.

The "shifting availability" approach, however, calls into question why we even need to use affirmative action to remedy private discrimination at all. If the minority capacity freed by private discrimination is truly available—in the sense of being qualified, willing, and able—to compete for government contracts, then this disproportionately large group of minority bidders should be able to garner a disproportionate share of the public contracts even without affirmative action.[191] As long as we are

---

government. Minority sellers would offer 6 (2 + 4) and nonminority sellers would offer 18 for a total widget capacity from minority and nonminority firms of 24. Minority availability under this approach would be 6/24 or 25 percent.

An even more aggressive approach would also estimate how much less nonminority firms were available to supply the government given the overutilization of nonminority capacity in the private market. Applied to our example, private overutilization of nonminorities would reduce nonminorities' capacity to supply the public market from 18 to 14. Minority sellers would offer 6 of 20 widgets offered to the government for an estimated minority availability of 30 percent. For a more rigorous example of the general equilibrium effect of racial overutilization in a two sector model, see John J. Donohue III & James Heckman, Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks, 29 J. Econ. Literature 1603 (1991). We discuss further ramifications of this approach below. See infra text accompanying notes 192–195.

191. This criticism is related to even more fundamental arguments about whether free market competition can drive out discrimination or its effects. See, e.g., Gary S. Becker, The Economics of Discrimination (2d ed. 1971); Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 9 (1992) ("Competitive markets with free entry offer better and more certain protection against invidious discrimination than any anti-discrimination law."); Ian Ayres, Price and Prejudice, New Republic, July 6, 1992, at 30 ("[Epstein's] argument is not that bigots don't exist. But he believes that in an unregulated market, it would be *as if* bigotry didn't exist."). Under this theory, discrimination by a few private buyers would not have any effect on overall minority utilization because the affected minority sellers would just turn around and sell their capacity to the non-discriminating portion of buyers—including public purchasers.

Policymakers should be attuned to whether the nondiscriminating portion of the private market itself has the ability to soak up the excess minority capacity created by the discriminatory portion of the private market—or whether race-neutral policies might generate a more competitive industry structure which would allow private market forces to mitigate the effects of private discrimination. Affirmative action in government procurement at times could crowd out a private response by nondiscriminators. See also supra note 106 (discussing the possibility that government affirmative action could exacerbate private discrimination). In other contexts, government affirmative action can promote enhanced private purchases—for example, by demonstrating to the private market the viability of minority enterprises. See supra note 5 (discussing how the government's affirmative action with regard to Marian Anderson ultimately led the private market to stop discriminating). As a matter of prudent policy, the government's attempts to remedy private discrimination stand on strongest ground to the extent that such policies

confident that government agents are not continuing to discriminate covertly against minority bidders, then the government's competitive bidding process by itself would have the effect of remedying a substantial part of private discrimination.

One answer of course is that we may not be confident that government agents are not finding ways to discriminate covertly against a disproportionately large group of minority bidders.[192] But as an empirical matter, we believe that a more satisfying answer to this objection combines elements of both the but-for and single-market justifications. Private discrimination in all likelihood not only causes minority capacity to shift toward a less discriminatory government sector but also reduces minority capacity. As discussed above, minority firms subjected to upstream discrimination by their suppliers will have higher costs of doing business and have more difficulty winning low-bid procurement competitions.[193] A but-for adjustment that estimates how much capacity minority firms would have for government service in the absence of private discrimination thus could potentially go a long way toward implementing a "shifting availability" approach.[194] But-for adjustments not only can reduce the skewing effect of private discrimination on government purchasing, but by estimating shifting minority availability this approach can also indirectly compensate for private underutilization itself. Bidding data in particular can provide rich statistical evidence to make this availability adjustment.[195]

Whether the government opts for the more aggressive "shifting availability" approach or the more conservative "proportional overutilization" strategy, the foregoing discussion shows that the 100 percent problem is not insurmountable. Indeed, if a government were truly serious about remedying the effects of private discrimination without setting a 100 percent minority procurement goal, the government might instead en-

---

promote (or at least do not retard) the ability of the private market to compensate for the effects of private discrimination.

192. If we estimate that 25 percent of the capacity available for government purchases comes from minority businesses, then the fact that the government achieves only a 17 percent minority utilization rate, for example, might be evidence of government discrimination as well.

193. See supra note 130.

194. Here, the but-for adjustment would not simply ask how much larger minority firms would be on average, but, holding private sales constant, how much more capacity would be available for government service.

195. Using a limited dependent variable regression (such as logit or probit), it would be possible to estimate the probability of a firm winning a government contract given a variety of capacity-related variables (age, capital, employment) and whether or not the firm is minority-owned. If regressions estimated that minority firms win 20 percent fewer contracts than nonminority firms with the same capacity characteristics, it would suggest that, but for discrimination, MBEs would win 20 percent more contracts. If MBEs currently win 5 percent of government contracts, this analysis would suggest that they have the capacity to win 20 percent more, so an affirmative action plan could reasonably set a 6 percent (=1.2 x .05) utilization goal.

courage more private purchases from affected minority firms. Instead of buying 100 percent of its pencils from minority firms, the government might use a variety of means to encourage private purchasers to buy, say, 10 percent of their pencils from minority firms.[196] Setting a goal that private firms do not underutilize minority sellers would most directly remedy private discrimination without creating the expressive harm associated with an all-minority government contracting corps. Another advantage of this approach is its potential to provide a complete remedy in markets where government spending is insufficient to compensate for private underutilization.[197]

V. Public Remedies For Private Discrimination in Employment

While this Article has focused on racial[198] affirmative action in government procurement,[199] the single-market justification can also be used

---

196. For instance, the government could impose a "tax" on firms that do not meet industry-specific minority utilization goals. This tax might be deemed more fair because the cost of underutilization would be borne more directly by putative discriminators than by the general public.

197. Even though the federal government has attempted an analogous employment regulation with regard to government contractors, we are under no illusion that this direct solution to the 100 percent problem is likely to be adopted in the current political climate.

198. Our analysis might also be useful in assessing whether the government can constitutionally remedy other types of private discrimination—such as discrimination based on religion. The government remedies private religious discrimination because religion, like race, is a suspect classification for government regulation. There are no religious preference programs in government procurement, but the government does take religion-conscious action in other areas. Most commonly, the government is required on free exercise grounds to accommodate certain religious practices of its employees (e.g., not working on the Sabbath). The justification for religious accommodations, however, is to alleviate the burdens on religious minority groups resulting from government actions or policies, so private discrimination seems largely irrelevant.

A more interesting question is whether the government could choose to display publicly particular religious symbols to remedy private discrimination. In *Allegheny County v. Greater Pittsburgh ACLU*, Justice O'Connor upheld against an Establishment Clause challenge a display on public property including a Jewish menorah and a Christmas tree. 492 U.S. 573, 632 (1989) (O'Connor, J., concurring in part and concurring in judgment). While O'Connor admitted that the menorah was a clearly religious symbol, she nonetheless concluded "that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season." Id. at 635. As one commentator concluded, "[r]eligious displays of faiths which have clearly been the subject of past and present discrimination by a particular community would be less likely to raise endorsement problems than religious displays of sects that cannot point to such a background." Tseming Yang, Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion, 73 Ind. L.J. 119, 183 (1997). This inquiry into the particular community is consistent with our single-market justification for race-conscious government action, and the more general principle that the message conveyed by government action matters, supports our "expressive harm" restriction on public affirmative action.

199. Focusing on procurement is somewhat unusual even though more than 10 billion dollars is allocated annually by race-conscious federal and state procurement. Legal academics show a disproportionate interest in assessing whether affirmative action in

to validate remedial race consciousness in public employment where the government at times competes with the private market.[200] It would be perverse to argue that the state or federal government "can use its spending powers to remedy private discrimination"[201] when paying for urinals but not when paying for secretarial services. Surely, the government's interest in remedying private discrimination in employment is just as compelling as in wholesale commercial markets—if not more so. This Part sketches how the government might go about estimating these forms of private discrimination "with the particularity required by the Fourteenth Amendment."[202]

---

education is constitutional. For example, a LEXIS search of law reviews (LAWREV Library, ALLREV File (Sept. 29, 1998)) found 593 articles with "affirmative action" w/10 education, but only 204 articles with "affirmative action" w/10 (procurement or contracting).

200. Private discrimination might also serve as a new basis for affirmative action in higher education admission. The University of Texas in the recent *Hopwood* litigation tried to defend its affirmative action program with both diversity and remedial rationales. Hopwood v. Texas, 78 F.3d 932, 948 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996). But as is all too often the case, the appellate court concluded that the state had the power to remedy only its own past discrimination. Quoting *Wygant*, the Fifth Circuit found, as in *Taxman*, that:

> The Supreme Court has "insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." . . . Accordingly, the state's use of remedial racial classifications is limited to the harm caused by a specific state actor.

Hopwood, 78 F.3d at 949–50 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality opinion of Powell, J.) (citing Hazelwood School Dist. v. United States, 433 U.S. 299 (1977))); see also Taxman v. Bd. of Educ. of Piscataway, 91 F.3d 1547, 1563 (3d Cir. 1996) (en banc) ("[A] non-remedial affirmative action plan cannot form the basis for deviating from the antidiscrimination mandate of Title VII . . . the Board's adoption of its affirmative action policy . . . was not intended to remedy the results of any prior discrimination or identified underrepresentation of Blacks within the Piscataway School District's teacher work force as a whole."), cert. granted, 117 S. Ct. 2506 (June 27, 1997), cert. dismissed, 118 S. Ct. 595 (Dec. 2, 1997). Once again, the appellate courts are mired in a *Wygant* world.

Private discrimination against minorities in higher education is—as an empirical matter—probably not nearly as significant as in many job markets. But there are still undoubtedly some private educational institutions that discriminate against minorities. Bob Jones University completely excluded African Americans from enrollment until 1971. And to this day the University "continues to deny admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating." Bob Jones Univ. v. United States, 461 U.S. 574, 581 (1983) (holding that nonprofit private schools that prescribe and enforce racially discriminatory admission standards do not qualify as tax-exempt organizations). Even though affirmative action in favor of minorities may be the order of the day in most United States law schools, there is a possibility that the University of Texas competes with private law schools that discriminate against minorities in admission. If a government school could show minority underutilization in private law schools in the same geographic market, it should be constitutionally allowed to favor minority applicants to counteract the effect of the private discrimination.

201. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

202. Id.

The analogy to employment is direct. Among the many services that the government routinely procures are labor services from employees. Given the pervasive evidence of private discrimination in employment[203]—notwithstanding the threat of Title VII liability—private discrimination, as an empirical matter, has the potential to justify broad programs of affirmative action in government employment.

If, for example, qualified minority accountants were being discriminated against—and therefore underutilized—by private employers, the government would be justified in favoring minorities in its hiring to counteract the effects of the private discrimination. Because both public and private employers hire accountants, a race-conscious hiring preference can be consistent with the unjust enrichment principle. Nonminority accountants who are disadvantaged by the government's affirmative action are not unduly burdened if they are being overutilized in the private sector by garnering a disproportionate share of jobs.

As in the procurement context, the single-market rationale is limited. Government affirmative action in hiring would be justified only if the disadvantaged nonminority applicants had the opportunity to compete instead for private jobs where they were given an unjust advantage. The government could not, for example, premise affirmative action in hiring firefighters on private discrimination, because there are no private markets for firefighters.[204] But upon a showing that both the government and private firms compete for a certain group of employees, the government—consistent with the narrow tailoring requirements—should be able to favor minority employees to counteract the effects of private hiring discrimination.

The potential impact of the single-market rationale on affirmative action in government employment can be vividly illustrated by the much publicized *Taxman* case.[205] While the case directly presented the ques-

---

203. See Clear and Convincing Evidence: Measurement of Discrimination in America (Michael Fix & Raymond J. Struyk eds., 1993); Stephanopoulos & Edley, supra note 22, at 20–25; John J. Donahue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983 (1991); Roger Waldinger & Thomas Bailey, The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction, 19 Pol. & Soc'y 291 (1991) (a case study of racial discrimination in the New York construction industry); PrimeTime Live, supra note 19.

204. However, supply-side substitutability would still be relevant. Firefighting may be more reasonably described as physical/semi-skilled labor. If so, the government as an employer of firefighters may in reality be competing with a number of private employers—including construction companies, for example. The government might then be justified in increasing its minority hiring of physical/semi-skilled employees to compensate for minority underutilization in this broader market. Recall the discussion of Alabama state troopers, supra note 165.

205. *Taxman*, 91 F.3d at 1547. In 1989, the Piscataway, New Jersey, Board of Education decided for budgetary reasons

> to reduce the teaching staff in the Business Department at Piscataway High School by one. At that time, two of the teachers in the department were of equal seniority, both having begnn their employment with the Board on the same day

tion of whether a diversity justification for a race-conscious employment decision violated Title VII, the Third Circuit in deciding the matter went out of its way to explain why a remedial theory could not validate the school board's race-conscious action:

> [In *Wygant*], the Court determined that under the Constitution a public employer's remedial affirmative action initiatives are valid only if crafted to remedy its own past or present discrimination; that is, societal discrimination is an insufficient basis for "imposing discretionary *legal* remedies against innocent people."[205]

Here we see the Third Circuit en banc continuing to cleave to *Wygant* notwithstanding *Croson*'s explicit and repeated conclusion that a state "has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction."[207] The Third Circuit quotation is also revealing because of slippage between the first and second clauses. We agree that "societal discrimination is an insufficient basis for 'imposing discretionary legal remedies against innocent people,'" but we do not believe that this implies "a public employer's remedial affirmative action initiatives are valid only if crafted to remedy its own past or present discrimination." A public employer should not be able to favor minority lawyers to remedy discrimination against minorities in society generally, but a public employer should be able constitutionally to remedy private discrimination against minority lawyers *qua minority lawyers*. Once again, the nonminority lawyers who would be disadvantaged by such a public program may be "innocent" of discriminating themselves, but they also would have been unjustly enriched—unfairly advantaged—by private employment discrimination.

We are not arguing that evidence of private discrimination could have changed the outcome of *Taxman*. It is unclear whether a high school business department competes with private employers for applicants.[208] But when private employers for substitute jobs discriminate against minorities, the unjust enrichment principle is consonant with Supreme Court jurisprudence distinguishing between race-conscious

---

> nine years earlier. One of those teachers was . . . Sharon Taxman, who is White, and the other was Debra Williams, who is Black. Williams was the only minority teacher among the faculty of the Business Department. . . . In prior decisions involving the layoff of employees with equal seniority, the Board had broken the tie through "a random process . . . ."

91 F.3d at 1551. Instead of flipping a coin, the Board laid off Taxman to preserve some racial diversity in the school's business department. See id. at 1552. Taxman sued claiming that her layoff violated Title VII. See id. The Third Circuit (en banc) agreed. See id. at 1565.

206. *Taxman*, 91 F.3d at 1560 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274–76 (1986)).

207. *Croson*, 488 U.S. at 491–92.

208. See our discussions of supply substitutability, supra text accompanying notes 145–148, 165.

decisionmaking in hiring and layoffs.[209] The government employees disadvantaged by race-conscious layoffs are not unjustly enriched by the private discrimination—or at least not in the same way as nonminority applicants who, by hypothesis, are advantaged in competing for private jobs. Despite the argument's logic and consistency with doctrine, remedying private discrimination remains an important and largely unexplored rationale for justifying public affirmative action in employment.

An affirmative action program in public employment designed to remedy private discrimination can also survive Title VII scrutiny. The constitutional hurdle is higher than the statutory one,[210] so we could argue that such a result follows a fortiori. Because the Court has developed separate constitutional and statutory doctrines, however, we examine Title VII explicitly.

Applying the legal standard announced in *United Steelworkers of America v. Weber*,[211] the Third Circuit in *Taxman* justified its holding that the diversity rationale violated Title VII on the grounds that such a rationale failed to "'have purposes that mirror those of the [Civil Rights Act of 1964]' and second, . . . 'unnecessarily trammel[ed] the interests of the [nonminority] employees.'"[212] In contrast to diversity, remedying discrimination was the overarching goal of the Civil Rights Act of 1964,[213] so a program with this end satisfies the first prong of *Weber*.

On the second prong, the *Weber* Court noted three aspects of the plan it upheld: (1) The plan did not require the discharge of white workers and their replacement with new black hirees; (2) the plan did not create an absolute bar to the advancement of white employees; and (3) the plan was temporary, designed to eliminate a manifest racial imbalance, not to maintain racial balance.[214] A constitutional affirmative action program in public hiring or promotion would avoid all of these vices,

---

209. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Wygant*, 476 U.S. at 283 (plurality opinion) (footnote omitted).

210. "[T]he *statutory* prohibition with which [a public] employer must contend was not intended to extend as far as that of the Constitution." Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 628 n.6 (1987).

One result of this lower statutory hurdle is that a private affirmative action program could withstand a Title VII disparate treatment challenge, even though the statistical evidence of discrimination justifying the program would not be sufficient to defend an analogous government program against a constitutional challenge. See id. at 633 n.10 (distinguishing between the "manifest imbalance" Title VII standard and the "prima facie" constitutional standard).

211. 443 U.S. 193 (1979).

212. Taxman v. Bd. of Educ. of Piscataway, 91 F.3d 1547, 1550 (3d Cir. 1996) (en banc) (quoting *Weber*, 443 U.S. at 208), cert. granted, 117 S. Ct. 2506 (June 27, 1997), cert. dismissed, 118 S. Ct. 595 (Dec. 2, 1997).

213. The Court has explicitly referred to "Title VII's purpose of eliminating the effects of discrimination in the workplace." *Johnson*, 480 U.S. at 630.

214. *Weber*, 443 U.S. at 208.

and thereby satisfy the second prong of *Weber*. A program based on a private discrimination rationale would not create an "absolute bar" for nonminorities because it is premised on the existence of discrimination in favor of nonminorities in the private labor market. In the private market, at least, opportunities for nonminorities are in (over-)abundance. And, as discussed above,[215] the affirmative action goals that we recommend to remedy private discrimination would create racial preferences for less than 25 percent of the public jobs. In addition, such a program is temporary in the sense that it will last only as long as the effects of the private discrimination it seeks to counteract.[216]

CONCLUSION

Marian Anderson's voice should still be heard today. The basic notion that the government should be able to correct for private discrimination resonates in the echoes of that Easter morning concert almost 60 years ago. Constitutional law has gone badly wrong if its principles would bar a repeat performance. But many courts, legal commentators, and even the Clinton Justice Department would do exactly that. Indeed, the National Park Service's invitation to Anderson would have been unconstitutional under the widely accepted interpretation of *Wygant* that the government can use affirmative action only to remedy its own discrimination.[217] Anderson's invitation is an example of the pure single-market justification. The government did not cause the DAR's refusal to deal (as would be required by the causal justification); nor did private discrimination cause the government's invitation process to have a discriminatory effect (as would be required by the but-for justification). Instead, the National Park Service in making the invitation favored Anderson because of her race in order to counteract the effects of private discrimination.

Contrary to the *Wygant* approach, we believe Eleanor Roosevelt was right. The moral intuition that government resources can be used to remedy private discrimination can withstand strict scrutiny. Nonminority singers were admittedly disadvantaged by Anderson's invitation. But the government's invitation was narrowly tailored to remedy private discrimi-

---

215. See supra notes 181–197 and accompanying text.

216. If the public program demonstrates to private employers the viability of nondiscriminatory employment practices, then the program is temporary in the sense of aiming at eliminating discrimination, rather than maintaining a permanent preference. See supra note 191 (discussing possible impacts of public affirmative action on private behavior). Alternatively, one could simply assume provision for expiration or regular review. See supra note 64 and accompanying text; see also infra note 221 (discussing why a "sunset" requirement is inappropriate).

217. Even those—like Justice Scalia—who would reject most affirmative action plan validations for failing to provide individualized proof of discrimination would be hard pressed to deny that Anderson was the victim of identifiable discrimination. To be sure, the federal government engaged in a large variety of discrimination. But the Equal Protection clause does not allow the government to favor minority singers to make up for the government's discrimination against, say, black soldiers.

nation. Nonminority singers could hardly claim an undue burden when they had such disproportionate access to private venues.

Justice O'Connor's opinion in *Croson* has constitutionalized this intuition, but to date government actors have only rarely attempted to ground public affirmative action on the basis of private discrimination.[218] Even more shockingly, the Clinton Justice Department has explicitly rejected the single-market justification.[219] Proponents of affirmative action ignore private discrimination at their own peril. Private markets are larger and discriminate more than public markets. Even a limited ability to remedy private discrimination might provide a broad basis for affirmative action in government procurement.[220]

This Article has attempted to articulate when private discrimination can be used to justify a governmental race-conscious goal for utilizing minority-owned enterprises. We have not addressed the difficult issues of what quantum of evidence is necessary to establish private discrimination or what means would be appropriate to implement the government's goal.[221] Instead, given the hegemonic force of *Wygant* for the proposition that the government can only use racial preferences to remedy its own discrimination, we have merely tried to identify when private discrimination, standing alone, can justify government affirmative action.

Our causal and but-for justifications—as expressions of Justice O'Connor's passive participant theory—stand on the firmest constitutional footing. The government is a passive participant either when its spending causes private discrimination or when private discrimination causes otherwise neutral government procurement rules to unfairly ex-

---

218. The combined market statistics cited in *Fullilove* may implicitly be an attempt to justify public affirmative action on the basis of private discrimination. See supra text accompanying note 158. An exceptional case in which the government relied directly on evidence of private discrimination is Concrete Works of Colo. v. City and County of Denver, 36 F.3d 1513, 1529–30 (10th Cir. 1994).

219. See supra text accompanying note 9.

220. Indeed, a primary "problem" with taking the single-market rationale seriously is that it can lead toward affirmative action goals as high as 100 percent. See supra Part IV.D.

221. As to the evidentiary issue, we believe that whatever types of evidence are sufficient to prove public discrimination should be sufficient if found in analogous private data to prove private discrimination. If Justice Scalia prevails in limiting remedies of identifiable discrimination to instances of individualized proof, then it may be difficult for the government to establish either public or private discrimination. Under this evidentiary standard, strict scrutiny would become fatal in fact. As to the issue of the appropriate means, we favor declining credit schedules as discussed at length in Ayres, Narrow Tailoring, supra note 32, at 1808–22.

We have also not addressed at what point a remedy aimed at counteracting private discrimination must end because of some "sunset" requirement. We do not believe that public affirmative action needs to deter future private discrimination in order to be narrowly tailored. Justice O'Connor's language in *Croson* that the government "has the authority to eradicate *the effects* of private discrimination" properly emphasizes that removing the effects of discrimination is a compelling government interest—even if eradicating future discrimination itself is not possible. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491–92 (1989) (emphasis added).

clude minority enterprises. Thus, when prime contractors discriminate against minority subcontractors on government jobs, the government, under the causal justification, can require minority subcontractors to be favored. And when private contractor associations refuse to accredit minority contractors, the government, under the but-for justification, can adjust its bidding requirements to counteract the effects of the private discrimination.

While the appropriateness of making but-for adjustments to minority availability estimates is widely accepted,[222] scholars have not appreciated that the but-for rationale might readily justify the government's deviating from simply awarding contracts to the lowest bidder. If private suppliers (of, say, credit or steel) systematically charge higher prices to minority firms, then a government's awarding contracts to the low-cost bidder would make the government a passive participant in the private discrimination (just as much as in the contractor accreditation example). Removing the effect of private discrimination on government procurement might require a government to estimate which firms would be available to place winning bids in the absence of private discrimination and then to award such firms bidding credits to recreate their ability to compete.

Finally, we have argued in favor of a single-market justification. When minority and nonminority firms compete for government sales, the government may prefer minority contractors in its purchases in order to remedy private discrimination in the same market. While Justice O'Connor in *Croson* gave passive participant examples of the causal and but-for justifications, neither her reasoning nor her conclusion limits the government's remedial power to private discrimination that it has caused or to private discrimination that distorts the government's own procurement process. Instead, the government has a compelling interest "to eradicate the effects of private discrimination within its own legislative jurisdiction . . . [and it] can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment."[223] The crucial issues are whether the remedy can be non-arbitrary and not unduly burdensome. We believe that limiting government preference to remedying private discrimination in the same market provides an adequate nexus between the remedy and the harm to fulfill these requirements. Nonminority firms disfavored by the government's affirmative action are not unduly bur-

---

222. While the benchmark will be based in large part on the existing capacity and availability of minority-owned firms, consideration will also be given to the extent to which the effects of racial discrimination have impeded the ability of minority individuals to become entrepreneurs, and the ability of minority-owned firms to grow.

Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648, 25,650 (1997); see also Participation by Disadvantaged Business Enterprise in Department of Transportation Programs, 62 Fed. Reg. 29,548, 29,557–58 (1997) (to be codified at 49 C.F.R. pt. 26.41) (endorsing but-for adjustment). But see La Noue & Sullivan, supra note 110; Rosen, supra note 12.

223. *Croson*, 488 U.S. at 491–92.

dened, if they are overutilized because of their race by private purchasers of the same product.

Building on a few hundred words in *Croson*, we have tried to construct a full theory of how the government might constitutionally act to remedy private discrimination. We are not unmindful that—especially in the civil rights arena—the Supreme Court of late has been willing to interpret away far more settled precedents.[224] But private discrimination is empirically so salient that governments defending against *Croson*-type claims need to develop explicit evidence of private underutilization to validate public affirmative action. This is not a subterfuge. Discrimination is predominantly practiced in private markets. As Eleanor Roosevelt realized long ago, it is only natural to use government power to remedy its effects.

224. See, e.g., Missouri v. Jenkins, 515 U.S. 70 (1995) (closing the door on interdistrict school desegregation remedies previously left open by Milliken v. Bradley, 418 U.S. 717, 745 (1974), and Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976)); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 660–61 (1989) (effectively overruling the long-standing *Griggs* rule that an employer can only justify by "business necessity" an employment practice with a disparate impact).