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THE FORGOTTEN REMEDY: A LEGAL AND THEORETICAL DEFENSE OF INTERMEDIATE SCRUTINY FOR GENDER-BASED AFFIRMATIVE ACTION PROGRAMS

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INTRODUCTION

Although Caucasian males constitute a minority of the total and, likewise, college-educated workforce, they dominate the upper echelons of virtually every job sector. Males comprise 85.7% of executive officership positions and 82% of directorship positions at Fortune 500 companies.[1] Men hold over 90% of leadership positions in the news media and over 90% of all reporters are white.[2] Caucasian men constitute over 86% of partnership positions in major law firms. They hold 85% of tenured

1. *Updated Datasheet: Alliance for Board Diversity Report*, ALLIANCE FOR BOARD DIVERSITY (July 21, 2011), *available at* http://Theabd.Org/Abd_Datasheet.pdf; *Women Executive Officers in the Fortune 500*, CATALYST (Last updated Dec. 14, 2011), http://www.catalyst.org/knowledge/women-executive-officers-fortune-500.

2. *Id*.

college professorships[3] and occupy over 80% of managerial positions in advertising, marketing, and public relations.[4] In 1992, in the midst of the Supreme Court's dismantling of state and federal affirmative action programs, the median weekly earnings of white males were 33% higher than those of any group in America.[5]

Despite significant factual evidence of continued inequality in various employment fields, the last fifteen years have witnessed a remarkable decline in the use of gender-based affirmative action.[6] The decision to abandon such programs has been spurred in large part by the Supreme Court's decision to apply strict scrutiny to all federal and state race-based affirmative action programs in the employment context regardless of existing racial disparity.[7] While the Court's jurisprudence has been confined to race-based programs, lower courts have expanded the approach, without basis in precedent, to gender-based programs. Spurred in large part by the Supreme Court's decision in *Richmond v. Croson*,[8] federal appeals courts have developed a tripartite split over the appropriate level of scrutiny for gender-based affirmative action programs. In addition to the majority of lower courts that have split between strict scrutiny and intermediate scrutiny, a minority of courts have developed a third approach which, while calling itself intermediate scrutiny, requires a factual predicate demonstrating a history of discrimination on par with that required under strict scrutiny.[9] The attack on intermediate scrutiny and, accordingly, gender-based affirmative action, has been buttressed by a subtle theoretical critique of the effectiveness of the standard to guard against discriminatory statutes. The result of this regression has not only been confusion among courts, but an abandonment of gender-based affirmative action programs as various municipalities have chosen to avoid subjecting their programs to sure defeat under strict scrutiny review.[10]

This paper will serve the dual purposes of defending intermediate scrutiny as the appropriate standard under the Court's jurisprudence and

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3. *Id*.

4. *Id*.

5. *Id*.

6. Patricia Ireland, President, National Organization of Women, Keynote Address at the Florida National Organization of Women Conference (January 15, 2000) (transcript on file with the National Organization for Women) [hereinafter Ireland, Keynote Address].

7. *Id*.

8. Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

9. *See, e.g.*, Danskine v. Metro Dade Cnty. Fire Dep't, 59 F. Supp. 2d 1252, 1256-57 (S.D. Fla. 1999) *aff'd sub nom.* Danskine v. Miami Dade Fire Dep't, 253 F.3d 1288 (11th Cir. 2001).

10. *See* Ireland Keynote Address, *supra* note 6.

answering some of the theoretical criticisms of the effectiveness of intermediate scrutiny as a means to protect women from discriminatory statutes. The first half of the paper will survey the progression of the Court's jurisprudence with regards to statutes that differentiate on the basis of gender, focusing specifically on: (a) the development of the Supreme Court's gender-based equal protection jurisprudence;[11] (b) the Supreme Court's decision in *Richmond v. Croson*, which dramatically altered the approaches of a number of lower courts toward gender-based affirmative action;[12] and (c) the struggles of lower courts to determine the appropriate standard of review for gender-based affirmative action programs post-*Croson*, including influential jurisprudence involving racially differential statutes.[13] The second half of the paper will present a legal and theoretical defense of intermediate scrutiny as the proper standard of review for gender-based affirmative action programs including: (a) the fallacies inherent in lower court decisions applying increased scrutiny based on the Supreme Court's jurisprudence pre and post-*Croson*,[14] and (b) responses to theoretical criticisms of intermediate scrutiny, including the presentation of alternatives to strict scrutiny which, while they may not conclusively answer all criticisms, will provide a sound basis from which to defend the legitimacy of the approach.[15]

I. THE RISE AND FALL OF GENDER-BASED AFFIRMATIVE ACTION: AN EXAMINATION OF THE DEVELOPMENT AND DECLINE OF INTERMEDIATE SCRUTINY

Although the Supreme Court has never specifically addressed a case involving a challenge to a gender-based affirmative action employment program under the Equal Protection Clause of the Fourteenth Amendment, the Court's and, likewise, lower courts' jurisprudence is rich with decisions upon which to formulate the appropriate standard were such a decision to reach the Court.[16] However, because the issue has never been addressed specifically, a comprehensive review of the Court's treatment of gender-based classifications and, likewise, affirmative action programs, is necessary. The court's jurisprudence regarding these areas can be divided into the two general periods: (a) a time of development, during which the Court formulated much of its equal protection jurisprudence, dealing

11. *See infra* Part I.A and accompanying notes.

12. *See infra* Part I.B and accompanying notes.

13. *See infra* Part I.C and accompanying notes.

14. *See infra* Part II.A and accompanying notes.

15. *See infra* Part II.B and accompanying notes.

16. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-26 (1982); Brunet v. City of Columbus, 1 F.3d 390, 403-04 (6th Cir. 1993).

skeptically with statutes that discriminated on the basis of gender but favorably towards those with a remedial purpose; and (b) a time of retrenchment, during which the Court and lower courts, while remaining vigilant with regards to statutes that discriminated on the basis of gender, have demonstrated increased hostility towards remedial programs. Sandwiched between the periods was the Supreme Court's seminal decision in *Richmond v. Croson*. While *Croson* dealt with a racially based program, the decision has served as the basis for increased attacks, both legal and theoretical, on the use of intermediate scrutiny for affirmative action in the gender context by several lower courts.

A. The Rise of Intermediate Scrutiny: The Development of the Court's Jurisprudence with Regard to Statutes That Differentiate on the Basis of Gender

For nearly a century after the Fourteenth Amendment's ratification, statutes that differentiated on the basis of gender were readily approved under the Supreme Court's most cursory level of review—rational basis scrutiny. Beginning with *Reed v. Reed*,[17] the Supreme Court began to develop a more rigid standard for such statutes. However, the crafting of a definition of intermediate scrutiny proved rather difficult. First, in large part influenced by the Equal Rights Amendment, the Supreme Court fluctuated as to whether strict scrutiny should be applied to statutes that differentiated on the basis of gender. Second, in addition to statutes that specifically created barriers for females, the Supreme Court expressed special concern about statutes that, while appearing to benefit women, in fact did the opposite by reinforcing superficial stereotypes about their functions in society. Third, because of what it saw as accepted biological differences between men and women, the Supreme Court developed a "biological differences" jurisprudence under which statutes that differentiated on the basis of gender would, on rare occasion, be approved.[18]

The Equal Protection Clause of the Fourteenth Amendment requires that the state not "deny to any person within its jurisdiction the equal protection of the laws."[19] Though broad in its proscription, the effect of the clause remained rather limited in its effect for nearly a century after its ratification. During this period, the Court regularly upheld statutes that not only differentiated, but actively discriminated, on the basis of gender by

17. *See* Reed v. Reed, 404 U.S. 71, 71 (1971) (finding discriminatory a statute that favored men over women in determining the administrator of a decedent's estate).

18. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

19. U.S. CONST. amend. XIV, § 1.

utilizing a test of "pure rational basis" scrutiny.[20] If the state could demonstrate any possible reason for enacting the statute, the Court would uphold the statute.[21]

Beginning with *Reed*, the Supreme Court increasingly expressed skepticism when examining such laws. Though the Court maintained that rational basis remained the appropriate standard of review,[22] the Court struck down an Idaho statute preferring males over females when calculating inheritance, finding the state's interest in reducing the judiciary's workload insufficient to justify the statute.[23]

Within two years, the Court was again presented with a statute that allegedly discriminated on the basis of gender. However, in this instance, the statute's effect on women was more nebulous. In *Frontiero v. Richardson*,[24] the statute at issue provided that "spouses of male members of the uniformed services [were] dependents for purposes of obtaining increased [severance and benefits], but that spouses of female members [were] not dependents unless they [were] in fact dependent for over one-half of their support."[25] The statute thereby created a presumption that wives receive benefits upon their husband's death, but required that husbands surpass an additional evidentiary hurdle before receiving the same benefits after their wives' deaths. The Court framed the statute from the perspective of the deceased female spouse, concluding that the statute worked an invidious discrimination against female members of the military and, accordingly, was unconstitutional under "strict judicial scrutiny."[26]

In justifying its decision, the Court emphasized three significant points. First, the Court explicitly distinguished the case from one in which a remedial program on the basis of gender was at issue, stating explicitly:

> It should be noted that these statutes are not in any sense designed to rectify the effects of past discrimination against women. On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages.[27]

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20. *See* Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955).

21. *See e.g.*, Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1033 (9th Cir. 1999) (defining this test as whether "the Legislature rationally could have believed Act 257 would substantially advance a legitimate purpose").

22. *Reed*, 404 U.S. at 76.

23. *Id*. at 76-77.

24. Frontiero v. Richardson, 411 U.S. 677 (1973).

25. *Id*.

26. *Id*. at 688.

27. *Id*. at 689 n.22 (citations omitted).

Second, in favor of its position, the state asserted merely administrative convenience as the basis for its decision and presented no evidence in support of its interest.[28] This suggested to the Court that the statute, instead of being passed upon sound reasoning and research, was in fact the product of an archaic gender stereotype. Finally, while its decision that women were now constitutionally a "suspect class" was based on precedent, its decision to apply strict scrutiny was in large part influenced by congressional passage of the Equal Rights Amendment (ERA)—which explicitly guaranteed women equal treatment—and, secondarily, Title VII of the Civil Rights Act.[29] Despite the belief then that the ERA would receive sufficient approval, it subsequently failed to achieve the necessary state support.[30]

In *Craig v. Boren*,[31] the Court finally settled upon "intermediate scrutiny" as the appropriate standard under which to review gender-based classifications. As stated by the Court, for a statute that differentiates on the basis of gender to be sustained, it "must serve important governmental objectives and must be substantially related to the achievement of those objectives."[32] At issue in *Craig* was an Oklahoma statute that prohibited males under the age of twenty-one and females under the age of eighteen from purchasing beer with an alcoholic content of 3.2%.[33] Though the Court accepted the state's interest in "public health and safety,"[34] it found gender to "not be substantially related to the achievement of the statutory objective."[35] The state showed that 2% of eighteen to twenty-year old men, but only 0.18% of women of that age, were arrested for driving under the influence.[36] Although the Court did question the statistical evidence

28. *Id.* at 688-89 (noting that the Government's argument rested on a contention that reaching the threshold to prove that a husband was financially dependent on his wife would not be worth the time and money).

29. *Id*. at 687 (explaining that the shift to strict scrutiny was based on Congress's intention of eliminating invidious classifications).

30. *See* Deborah Rhode, *Equal Rights in Retrospect*, 1 LAW AND INEQUALITY 1, 10 (1983) (discussing the reasons for the failure of the amendment).

31. Craig v. Boren, 429 U.S. 190 (1976).

32. *Id*. at 197 (asserting that such classifications must be based on intermediate scrutiny).

33. *Id*. at 192 (explaining that this distinction could deny equal protection under the law to males between the ages of 18-20 years).

34. *Id*. at 199-200 (finding a state's interest in public health and safety to be an important government objective).

35. *Id*. at 204 (explaining that the use of statistics alone was insufficient to uphold the statute under an intermediate scrutiny analysis).

36. *Id*. at 201 (framing the arrest rates as a "weak answer" to the equal protection question posed in the Court's analysis).

presented, its decision emphasized, above any statistical insufficiencies,[37] the problematic nature of a law based on "social stereotypes."[38] "The question," as Justice Stevens' concurrence explained, "[was] whether the traffic safety justification put forward by the State [was] sufficient to make an *otherwise offensive* classification acceptable."[39] While, the statute in *Craig* invidiously discriminated against men, in subsequent cases, the Court regularly applied the same standard to statutes that invidiously discriminated against women.

Having determined that intermediate scrutiny was appropriate for all gender classifications, the Court had yet to cement whether the test mandated—substantially related to an important governmental interest—had the same or a similar meaning when applied in varying circumstances. How would the test affect a statute that, for instance, benefited females as opposed to males? What if a law respected "real differences between the genders" as opposed to archaic stereotypes? The Supreme Court spent much of the next decade answering these questions.

Shortly after *Craig*, the Court was confronted with a series of cases in which women were immediately benefited by the challenged statutory scheme. In addition to disadvantaging men, "benign gender classifications" benefited women economically. However, the programs differed from modern day affirmative action programs in two significant ways. First, in contrast to the affirmative action programs at issue in this paper, the statutes did not create whole scale remedial schemes aimed at increasing female presence in an employment field, but rather merely created a series of judicial presumptions upon the occasion of a death or divorce.[40] Second, because many of the statutes focused on the assets of a deceased spouse, it was not clear whether women were benefited by the challenged statute because the deceased female spouse received an economic benefit, or were disadvantaged by the statute because it reduced the value of the work of a female employee.[41]

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37. While the Court did delve into the statistics presented, the Court cautioned against the dangers of conducting statistical analyses: "It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id*. at 204.

38. *Id*. at 203 n.14 (relaying the perception that young men are reckless and irresponsible while similarly-aged women are "chivalrously escorted home" instead of drinking and driving).

39. *Id*. at 213 (Stevens, J., concurring) (emphasis added).

40. Weinberger v. Wiesenfeld, 420 U.S. 636, 652-53 (1975).

41. *See id.* at 653 (framing the gender-based distinction as gratuitous because it would only impact women who matched the basis of the statute specifically).

Two decisions issued prior to *Craig* suggested the importance of the specific factual nature of the case; in particular, whether the challenged law was motivated by a desire to equalize women's place in society or driven by an archaic gender-based stereotype. In *Kahn v. Shevin*,[42] the Court upheld a Florida statute that granted widows an annual five hundred dollar property tax exemption.[43] Appellant, a widower, challenged the exemption because the statute offered no analogous benefit to widowers.[44] The Court, however, rejected petitioner's claim, and distinguished the case from *Reed* as the state's interest was more than mere "administrative convenience": "We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[45] The Court explicitly stated: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."[46]

In contrast, in *Weinberger* v. *Weisenfeld*,[47] the Court held unconstitutional a provision of the Social Security Act that granted survivors' benefits, based on the earnings of a deceased husband and father covered by the Act, both to his widow and to the couple's minor children in her care, but that granted benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower.[48] While the Court found the state's interest in providing for the female spouse "not entirely without empirical support,"[49] it distinguished *Kahn*:

> [T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme. Here, it is apparent both from the statutory scheme itself and from the legislative history of 402 (g) *that Congress' purpose in providing benefits to young widows with children was not to provide an income to women who were, because of economic discrimination, unable to provide for themselves*. Rather, 402 (g), linked as it is directly to responsibility for minor children, *was intended to permit women to elect not to work and to devote themselves to the care*

42. Kahn v. Shevin, 416 U.S. 351, 352 (1974).

43. *Id*. at 352 (noting that in 1885 Florida began providing property tax exemptions to widows).

44. *Id*.

45. *Id*. at 355.

46. *Id*. at 353.

47. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

48. *Id*. at 637-39.

49. *See id*. at 645 (acknowledging that men were more likely than women to be the primary supporters of their households).

of children.[50]

In *Califano v. Goldfarb*,[51] the Court affirmed the vitality of the *Kahn-Weinberger* distinction post-*Craig*. Relying heavily on *Weinberger*, the Court held unconstitutional a provision of the Social Security Act under which survivors' benefits, based on the earnings of a deceased husband, were payable to his widow regardless of dependency, but such benefits on the basis of the earnings of a deceased wife covered by the Act were payable to her widower only if he was receiving at least half of his support from her at the time of her death.[52] As opposed to overruling *Kahn*, the Court explicitly distinguished it, reaffirming its holding.[53] Relying on the focus of the statutory scheme and the Act's legislative history, the Court reasoned that "differential treatment of nondependent widows and widowers result[ed] not from a deliberate congressional intention to remedy the arguably greater needs of the former, but rather from an intention to aid the dependent spouses of deceased wage earners, coupled with the presumption that wives are usually dependent."[54] The Court emphasized that the latter was the type of archaic and overbroad generalization it had eschewed in its past cases.[55] In addition, the Court added that, viewed from the earner's perspective, the statute discriminated against women workers.[56]

In *Orr v. Orr*,[57] the Supreme Court struck down a similar statute under which husbands, but not wives, were required to pay alimony upon divorce.[58] The Court acknowledged that "it could be argued that the Alabama statutory scheme was designed to provide help for needy spouses, using sex as a proxy for need, and to compensate women for past discrimination during marriage, which assertedly had left them unprepared to fend for themselves in the working world following divorce."[59] However, it found "these considerations would not justify [the] scheme, because, under the Alabama statutes, individualized hearings at which the

50. *Id*. at 648 (emphasis added).

51. Califano v. Goldfarb, 430 U.S. 199 (1977).

52. *Id*. at 201-02.

53. *See id*. at 209 n.8 (identifying the difference in the *Kahn* ruling as arising from the *Kahn* statute's sole purpose in redressing the societal disparate treatment of women).

54. *Id*. at 216-17.

55. *Id*.

56. *See id*. at 209 (reasoning that because Social Security is designed for the protection of entire the family, its gender-based distinction is illogical).

57. Orr v. Orr, 440 U.S. 268 (1979).

58. *Id*. at 270-71.

59. *Id*. at 269.

parties relative financial circumstances [were] considered already occur[ed]."[60] Accordingly, there was no reason to operate by generalization.[61]

In contrast, in *Califano v. Webster*,[62] the Court affirmed the vitality of *Kahn*, upholding a separate provision of the Social Security Act that had the effect of granting higher monthly old age benefits to retired female workers as compared to those received by similarly situated male workers.[63] The act provided that benefits were to be computed dependent upon the average monthly wage of the worker during certain statutorily defined "benefit computation years."[64] Rather than tying their earnings to those of a male spouse or children, the statutory scheme simply permitted women to exclude an additional three lower earning years than men.[65]

However, the Court soon made clear that its archaic and overbroad generalization jurisprudence was not limited merely to statutes which assumed a women's financial dependency upon a male or her role as child-bearer, but in fact also included statutes which relied upon assumptions about the limited occupational capacity of females. In *Mississippi University for Women v. Hogan*,[66] the Court held that a college practice of preferring females for entrance into a nursing school, over equally qualified males, violated the Equal Protection Clause.[67] Though the Court again required that the statute serve important governmental interests and the means employed be substantially related to their accomplishment, it characterized this combined burden as one requiring proof of an "exceedingly persuasive justification."[68] Nevertheless, the Court found that the statute failed both prongs of the aforementioned intermediate scrutiny test.[69] Though the state asserted an interest in remedying societal discrimination against women, the Court recognized that women, rather than being discriminated against in the field of nursing, were overrepresented.[70] Accordingly, the state failed to establish that the

60. *Id*. at 281.

61. *Id*. (arguing that because these proceedings so heavily impact compensation to families, generalizations can be especially harmful).

62. Califano v. Webster, 430 U.S. 313 (1977).

63. *Id*. at 314-16.

64. *Id*. at 314.

65. *Id*. at 314-16.

66. Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

67. *Id*. at 719, 733.

68. *Id*. at 724.

69. *Id*. at 731.

70. *See id.* at 729 (noting that in 1970, women represented more than 98% of total nursing degrees earned nationwide).

"alleged objective [was] the actual purpose underlying the discriminatory classification," as opposed to an archaic and overbroad generalization.[71]

Concurrently, the Supreme Court developed a third category for statutes which did not "remedy past discrimination" or reflect "archaic and overbroad generalizations," but instead accounted for alleged "biological differences" between the genders. Despite the term's implication, the differences recognized were not limited to merely those that were strictly biological. In *Rostker v. Goldberg*,[72] the Court upheld a statute requiring men, but not women, to register for the draft.[73] The court reasoned, "women as a group, unlike men as a group, are not eligible for combat" and that the "President expressed his intent to continue the current military policy."[74] In *Michael M. v. Sonoma County Superior Court*,[75] the Court upheld a statute defining statutory rape as "an act of sexual intercourse accomplished with a female . . . under the age of eighteen years."[76] The Court reasoned that while the risk of pregnancy served as a natural deterrent to young females from sexual intercourse, which may ultimately lead to teenage pregnancy, no similar deterrent existed for males.[77] Accordingly, "a criminal sanction imposed solely on males thus served to roughly equalize the deterrents on the sexes."[78]

In drawing the contours of this category of cases, the Court drew an especially tenuous line when characterizing statutes, which differentiated on matters related to parent-child relationships. In *Parham v. Hughes*,[79] the Court upheld, against constitutional challenge, a Georgia statute permitting the mother, but not the father, of a child born to non-married patents to sue for the wrongful death of the child when the father had not formally "legitimated" the child.[80] However, in *Caban v. Mohammed*,[81] the Court struck down a statute that required the consent of the mother, but not the

71. *Id*. at 730.

72. Rostker v. Goldberg, 453 U.S. 57 (1981).

73. *Id*. at 59, 83.

74. *Id*. at 76-77.

75. Michael M. v. Sonoma Cnty. Super. Ct., 450 U.S. 464 (1981).

76. *Id*. at 466, 481.

77. *Id*. at 473.

78. *Id*.

79. Parham v. Hughes, 441 U.S. 347 (1979).

80. *Id*. at 348-49, 358. In the eyes of the Court, "the fact [was] that mothers and fathers of illegitimate children are not similarly situated. Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown." *Id*. at 355.

81. Caban v. Mohammed, 441 U.S. 380 (1979).

father, for the adoption of a child born out of wedlock.[82]

B. The First Step Backwards: The Supreme Court's Decision in Richmond v. Croson

While the Supreme Court was struggling to determine the proper standard of review for statutes that differentiate on the basis of gender, it was also developing its jurisprudence regarding statutes that differentiate on the basis of race. The Supreme Court's decision in *Croson* resolved two conflicting lines of cases—those involving statutes that benefited minorities and all other statutes that differentiated on the basis of race—determining that regardless of intent, the statute would have to survive the Supreme Court's most rigid level of review: strict scrutiny.

*1. The Court's Pre-*Croson *Jurisprudence with Regards to Statutes That Differentiate on the Basis of Race*

Beginning in the 1970s, the Court repeatedly divided over the appropriate standard of review for race-based affirmative action programs without formulating a single approach. Meanwhile, a second line of cases emerged involving statutes that discriminated on the basis of race without any remedial purpose. The Court subjected the latter to its "most rigid scrutiny," and except in the most extreme circumstances, found them unconstitutional.[83]

Following *Brown v. Board of Education*,[84] the vast majority of statutes that discriminated on the basis of race were subjected to a rigid level of review by the Court and as a result were found unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Between *Brown* in 1954, and *Croson* in 1989, the Court struck down a variety of statutes including, among others, those that banned interracial cohabitation[85] and marriage,[86] eliminated integrated public pools,[87] or rewarded custody of children based in part on the race of the potential stepfather.[88] Meanwhile, the Court explicitly endorsed remedial schemes, in particular those in the

82. *Id*. at 381-82. Instead of focusing on the parents' presence, the court's decision centered around the parents' interest: "This impediment to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children." *Id*. at 391-92.

83. Loving v. Virginia, 388 U.S. 1, 11 (1967).

84. Brown v. Bd. of Educ., 349 U.S. 294 (1954).

85. McLaughlin v. Florida, 379 U.S. 184 (1964).

86. *Loving*, 388 U.S. at 11.

87. Palmer v. Thompson, 403 U.S. 217 (1971).

88. Palmore v. Sidoti, 466 U.S. 429 (1984).

context of elementary and secondary education.[89]

The Court's first encounter with an affirmative action program outside of this context came in *Regents of the University of California v. Bakke*,[90] involving a program that reserved a specific number of seats for minorities at the University of California-Davis medical school.[91] The Court's judgment was controlled by Justice Powell who, writing only for himself, concluded that all racial classifications were subject to the same heightened review, and under which he found the program unconstitutional.[92] The remaining eight justices split equally between those who would have applied intermediate scrutiny and upheld the statute[93] and those who would have struck it down as violating the Civil Rights Act of 1964.[94] Only two years later in *Fullilove v. Klutznick*,[95] the Court upheld a federal program that required a proportion of federal funds granted to state and local governments to be used to procure services or supplies from Minority Business Enterprises. Mirroring his opinion in *Bakke*, Justice Powell subjected the scheme to the "most stringent level of review."[96] However, in contrast to *Bakke*, he found that the remedy justified the "compelling governmental interest."[97]

Between 1980, when it decided *Fullilove*, and 1989, when it decided *Croson*, the Court remained closely divided on which affirmative action measures could be utilized to remedy employment discrimination. At a minimum, the Court agreed that race conscious goals designed to alleviate past discrimination were not *per se* unconstitutional.[98] Nonetheless, the court routinely struck down provisions that it found loosely drafted or

89. In Brown v. Bd. of Educ. II, 349 U.S. 294 (1955), the Supreme Court explicitly empowered local courts, as well as local school boards, to implement remedial schemes to address the history of school segregation in each locality. Though the Court provided broad guidelines for local authorities to follow, it also invested localities with broad authority, including, but not limited to "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." *Id.* at 300-01.

90. Regents of Univ. of Cal. v Bakke, 438 U.S. 265 (1978) (plurality opinion).

91. *Id*. at 269-70.

92. *Id*. at 291.

93. *Id*. at 324, 379 (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring).

94. *Id*. at 420-21 (Stevens, J., Burger, J., Stewart, J., and Rehnquist, J., dissenting).

95. Fullilove v. Klutznick, 448 U.S. 448 (1980).

96. *Id*. at 496.

97. *Id*.

98. *See e.g.*, Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 475 (1986) (upholding the municipalities affirmative action plan).

unconnected to the remediation of past wrongs.[99] Similarly, while the Court made clear that such statutes posed serious constitutional problems and must therefore be closely scrutinized, it was unable to formulate either a verbal standard or describe a series of characteristics upon which it would base its analysis.[100]

2. Richmond v. Croson

At issue in *Croson* was a "Minority Business Utilization Plan" (Plan) adopted by the City of Richmond requiring general contractors awarded city construction contracts to subcontract at least thirty percent of the total dollar value of each contract to one or more "Minority Business Enterprises" (MBE's). The Plan defined a MBE as a business from anywhere in the country in which at least fifty-one percent of the enterprise was owned and controlled by "black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleutian citizens."[101] Waivers from such requirements were available only upon a showing that either an insufficient number of MBE's existed or were willing to participate.[102] Although the Plan characterized itself as "remedial,"[103] it was passed without the presentation of any empirical evidence that the city of Richmond had discriminated in awarding contracts or that prime contractors had discriminated in awarding subcontracts.[104] In support of the Plan, the city council primarily considered evidence of current minority under-representation in the field, specifically:

> [A] statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE members; the city's counsel's conclusion that the Plan was constitutional under *Fullilove v. Klutznick*, and the statements of Plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries.[105]

Croson, the sole bidder, upon denial of a waiver and subsequently the

99. *See e.g.*, United States v. Paradise, 480 U.S. 149, 199 (1987) (O'Connor, J., dissenting) ("But protection 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.").

100. *See e.g.*, Winston Riddick, *Overview of U.S. Supreme Court Affirmative Action Decisions in Race and Gender Cases*, 23 S.U. L. REV. 107, 111-13 (1996).

101. Richmond v. J. A. Croson Co., 488 U.S. 469, 477-78 (1989).

102. *Id*. at 478-79.

103. *Id*. at 478.

104. *Id*.

105. *Id*. at 479-80.

prime contract, filed suit alleging that the Plan was unconstitutional under the Equal Protection Clause.[106]

For the first time, five members of the Court agreed that strict scrutiny was the appropriate standard for statutes that differentiated on the basis of race, regardless of any benign or discriminatory legislative intent.[107] In doing so, the Court explicitly rejected an intermediate standard of review as insufficient. It explained:

> Absent searching judicial inquiry into the justification for such race-based measures, *there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics*. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool . . . . [Using intermediate review] [o]nce the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender.[108]

The Court additionally suggested that because it did not require specific evidence of discrimination in the locality, the intermediate scrutiny standard would allow a historically disadvantaged group currently in the majority essentially limitless scope and duration to utilize race-based schemes—potentially to a degree beyond that necessary to redress any discrimination suffered.[109] Finally, the Court suggested that without the factual basis requirement imposed by strict scrutiny, the fact finder may not be able to determine whether the problem the state seeks to remedy actually exists.[110] That is, the problem may not be that African-Americans are not being selected because of their race but rather "because of deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, or disability caused by an inadequate track record"—problems which, in the eyes of the court, afflict all ethnic groups equally.[111]

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106. *Id*. at 483.

107. *Id*. at 493.

108. *Id*. at 493, 495.

109. *See id*. at 495-96 ("In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.").

110. *Id.* at 498.

111. *Id*. at 499.

Applying strict scrutiny, the Court held that the Plan failed both prongs of the test—the state was unable to show that the statutory scheme served a compelling governmental interest or was narrowly tailored to accomplish such.[112] The Court rejected the state's asserted interest in remedying prior race-based discrimination, not because such an interest would never be sufficient, but because the state's interest was merely a generalized remedial assertion. In the eyes of the Court, because no specific history of discrimination was proven or considered, "[the evidence] provided no guidance for the city's legislative body to determine the precise scope of the injury it [sought] to remedy."[113] Therefore, after *Croson*, to survive strict scrutiny, "judicial, legislative, or administrative findings of constitutional or statutory violations must be made" in the specific field the program affects, and which occurred in the specific locality passing the legislation.[114]

C. The Decline of Intermediate Scrutiny: The Supreme Court's and Lower Courts' Equal Protection Jurisprudence After Croson

Though the Supreme Court has not decided another case involving a "benign" gender classification after *Hogan*, lower courts' jurisprudence with regard to gender-based affirmative action programs has significantly shifted after *Croson*. While the majority of circuits continue to apply intermediate scrutiny, a minority have split over whether to apply strict scrutiny, or alternatively intermediate scrutiny, with *Croson*'s strict factual predicate.[115] Meanwhile, the Supreme Court's equal protection jurisprudence has largely been limited to race-based affirmative action programs and gender-based discriminatory schemes. However, a number of scholars aware of the circuit split and the Supreme Court's increased scrutiny of race-based affirmative action programs have entered the discussion in favor of strict scrutiny for all gender classifications.

1. The Varied Standards Lower Courts After Croson *Have Applied to Gender-Based Affirmative Action Programs*

Despite the fact that the Supreme Court in *Croson* confined its decision to race-based classifications, a limited number of circuits have adopted strict scrutiny as the appropriate standard of review for gender-based affirmative action programs. A second group of circuit courts, while continuing to espouse intermediate scrutiny as the appropriate standard of

112. *Id*. at 505-507.

113. *Id*. at 498.

114. *Id*. at 497.

115. Concrete Works of Colo. v. City & Cnty. of Denver, 321 F.3d 950, 958 (10th Cir. 2003).

review, have interpreted the Equal Protection Clause as requiring *Croson*'s strict factual predicate before a remedial program can be undertaken. However, the majority of circuit courts after *Croson* have continued to apply intermediate scrutiny when examining such programs.

i. Strict Scrutiny

Only the Sixth Circuit and the Federal Circuit Court of Appeals have consistently applied strict scrutiny when reviewing gender-based affirmative action programs. The Seventh Circuit has also applied strict scrutiny in each of the gender-based affirmative action cases it has decided. However, its decisions have not been constitutionally based.

In *Conlin v. Blanchard*,[116] the Sixth Circuit invalidated a gender and race-based affirmative action program after applying strict scrutiny uniformly to both aspects of the program.[117] The court provided no explanation as to why strict scrutiny was appropriate to the gender-based classification beyond citing the United States Supreme Court's decision in *Wygant v. Jackson Bd. of Ed.*[118] In *Wygant*, decided during the period between *Bakke* and *Croson*, a plurality of the Court concluded that strict scrutiny was the appropriate standard for race-based affirmative action programs.[119]

The Federal Circuit invalidated a similar program that instructed Air Force personnel to consider the discrimination that a woman or minority may have endured before determining whether an individual employed by the military should be involuntarily terminated.[120] The court without citation or explanation stated that both classifications were subject to strict scrutiny and invalidated both.[121] Curiously, the court, in a footnote, cited *United States v. Virginia*'s "exceedingly persuasive justification"[122] language, though it ignored entirely the Court's explicit admission that it was applying intermediate scrutiny.

Likewise, the Seventh Circuit has also applied a single strict scrutiny standard when analyzing affirmative action plans that differentiate on the basis of race and gender. However, the court in each case has done so only because the state failed to argue that each classification merited a different standard. Furthermore, in two of the cases, the court did so only after

116. Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989).

117. *Id*. at 812.

118. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

119. *Id*. at 283-84 (plurality opinion); *see also* supra note 115 and accompanying text.

120. Berkley v. United States, 287 F.3d 1076, 1082 (2002).

121. *Id.*

122. *Id.* at n.1.

explicitly stating that the issue remained an open one in the Seventh Circuit. In *Milwaukee Pavers Ass'n v. Fiedler*,[123] after acknowledging that the Supreme Court did "not consider discrimination against women to be as invidious" and thus, "maybe the state's program, insofar as it favors women, [was] not controlled by *Croson*," Judge Posner concluded that "the state [had] waived the argument by failing to make it, and by its silence [had] thus conceded that *Croson* applies to affirmative action in favor of women just as it does to affirmative action in favor of blacks and other racial and ethnic minorities."[124] The court has since twice used identical reasoning to strike down similar statutes.[125]

ii. Intermediate Scrutiny "Plus"

Meanwhile, the Fourth, Eleventh, and D.C. Circuits, after *Croson*, have maintained the characterization of the scrutiny applied to gender-based affirmative action programs as "intermediate"; however, in application, each circuit has required a factual predicate equivalent to that required by the Supreme Court in *Croson*.

In *Lamprecht v. FCC*,[126] then-Judge Clarence Thomas, writing for the D.C. Circuit, found unconstitutional the FCC's adoption of three programs that would cumulatively have had the effect of increasing female ownership of broadcast stations: the awarding of tax certificates, the holding of distress sales, and the giving of preferences in the comparative-licensing process.[127] While the court, relying upon *Craig*, declared intermediate scrutiny to be the appropriate standard, it analyzed the factual basis presented by the state in a manner reminiscent of *Croson*. Though the court accepted the state's interest in furthering the diversity of

123. Milwaukee Pavers Ass'n v. Fiedler**,** 922 F.2d 419 (7th Cir. 1991), *cert. denied*, 500 U.S. 954 (1991).

124. *Id*. at 422.

125. *See* N. Contr., Inc. v. Illinois, 473 F.3d 715, 720 n.3 (7th Cir. 2007) ("As we have previously discussed, the Supreme Court has not made clear whether a more permissive standard applies to programs, such as this one, which also involve gender classifications, but IDOT does not argue for a more permissive standard for its gender-based initiatives and therefore we will apply strict scrutiny to the entire program."); *see also* Builders Ass'n of Greater Chi. v. Cnty. of Cook, 123 F. Supp. 2d 1087, 1093 (N.D. Ill. 2000) ("The parties in this case do not argue that there could be different results as between the preferences for minorities and the preference for women. Plaintiff argues that there is no justifiable basis for either of the preferences, and defendants contend that both preferences are amply justified by the evidence. Therefore, while recognizing that there are different levels of scrutiny for the two groups, it will not be necessary to make a separate analysis of the evidence applicable to minorities and to women.").

126. Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992).

127. *Id*. at 383-84.

programming,[128] it disputed whether the evidence presented proved that the means utilized—increasing female ownership of media stations—accomplished this goal.[129] The FCC among other things presented evidence that: (1) "of the recipients of the 1986 "National Commendation Awards" for presenting women in a "positive and realistic light," women made up 58.5% of the producers, 84.2% of the writers, and 92.9% of the reporter/hosts;"[130] (2) women are majority owners of only 8.6% of AM stations, 9% of FM stations, and 2.8% of television stations;[131] and (3) stations owned by women are "twenty percent more likely than stations owned by men to broadcast "women's programming," and about thirty percent more likely than stations owned by non-minorities to broadcast "minority programming."[132] In rejecting the FCC's claim, the court presented a series of counter statistics, which in its view proved the negligible effects of the program.[133]

Similarly, in *Danskine v. Miami Dade Fire Department*,[134] the Eleventh Circuit, though applying intermediate scrutiny, required that the local government prove that it had specifically discriminated against women "in the economic sphere at which the affirmative action program is directed."[135] However, in contrast to *Lamprecht*, the *Danskine* court upheld the state's preferential program aimed at the increased employment of female firefighters.[136] Among other things, it emphasized the history of discrimination within the particular department on which the program focused:

> The Fire Department excluded women from its workforce up until the early 1980s; that as recently as 1983 the Department's workforce was only one percent female while the general population of Dade County

128. *See id*. at 384 ("We hold that merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance.").

129. *Id*. at 398.

130. *Id*. at 396.

131. *Id*. at 409 (Mikva, J., dissenting).

132. *Id*. at 404 (Mikva, J., dissenting).

133. *Id*. at 397; *see also* H.B. Rowe Co., Inc. v. Tippett, 615 F.3d 233 (4th Cir. 2010) (rejecting a state program that set goals for the number of females receiving state construction contracts, because even though women on average earned contracts that were worth only one-third of the contracts afforded men, the state failed to present evidence that private and public employers discriminated against women and that women personally felt discriminated against; thus, the disparity may have been the result of "mere chance").

134. Danskine v. Miami Dade Fire Dep't, 253 F.3d 1288 (11th Cir. 2001).

135. *Id*. at 1294.

136. *Id*. at 1289.

was fifty-two percent female.[137]

iii. Intermediate Scrutiny

However, the Second,[138] Third,[139] Fifth,[140] Ninth,[141] and Tenth Circuits[142] have continued to apply the intermediate scrutiny standard initially formulated in *Craig* and described later as "exceedingly persuasive" in *Hogan*.[143] Emblematic of this approach is the Tenth Circuit's decision in *Concrete Works of Colorado v. Denver*, in which it upheld Denver's established participation goals for racial minorities and women on certain city construction and professional design projects.[144] As opposed to requiring a strict factual predicate, the court accepted as sufficient evidence that the state's decision was the result of "reasoned analysis rather than . . .

137. *Id*. at 1290.

138. United States v. Brennan, 650 F.3d 65, 136 n.76 (2011).

139. *See* Contractors Ass'n v. City of Phila., 6 F.3d 990, 1001 (3d Cir. 1993) ("We agree with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference.").

140. The sole case from the Fifth Circuit to involve an equal protection challenge to a gender-based affirmative action program is *Dallas Fire Fighters Ass'n v. City of Dallas*, 150 F.3d 438 (5th Cir. 1998). At issue was an affirmative action program that allegedly resulted in the promotion of "black, hispanic [sic], and female firefighters ahead of male, nonminority firefighters who had scored higher on the promotion examinations." *Id*. at 440. According to the decision, the city failed to present any evidence in support of the gender-based classification. *Id.* at 441-42. Accordingly, the court invalidated the statute using intermediate scrutiny. *Id.* Given the absolute lack of empirical evidence in support of the statute, it is not clear whether the Court was applying a standard more akin to intermediate scrutiny or intermediate "plus."

141. *See* Coral Constr. Co. v. King Cnty., 941 F.2d 910, 932 (9th Cir. 1991) ("[W]e shall employ intermediate scrutiny to review King County's [Women-Owned Business Enterprise] program."), *cert. denied*, 502 U.S. 1033 (1992).

142. *See* KT&G Corp. v. AG of Okla., 535 F.3d 1114, 1137 (10th Cir. 2008) ("In addition, there is an intermediate scrutiny which applies, for example, to gender-based classifications."); *see also* Concrete Works of Colo. v. City & Cnty. of Denver, 321 F.3d 950, 959 (10th Cir. 2003) ("Denver can meet its burden by demonstrating that the gender-based preferences 'serve[] important governmental objectives' and are 'substantially related to achievement of those objectives'."), *cert. denied*, 540 U.S. 1027 (2003).

143. *Concrete Works of Colo.*, 321 F.3d at 959. As stated by the Court: "To withstand CWC's challenge, Denver must establish an "exceedingly persuasive justification" for those measures. Denver can meet its burden by demonstrating that the gender-based preferences "serve[] important governmental objectives" and are "substantially related to achievement of those objectives." *Id.* While the Second Circuit has yet to decide the issue, recently the district court for the Eastern District of New York suggested that it may also adhere to the same standard. *Id.*

144. *Id*. at 954.

the mechanical application of traditional, often inaccurate, assumptions."[145] Accordingly, the court reasoned that the city was under no burden to identify any specific practice or policy that resulted in discrimination.[146] The city's only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and that it linked its spending to that discrimination.[147] According to the court, such an inference could arise from statistical disparities presented.[148]

2. Relevant Supreme Court Jurisprudence After Croson

The Supreme Court's equal protection jurisprudence has been rather limited since *Croson* in the context of statutes that differentiate on the basis of gender. The Court, in applying the *Craig* standard, has considered three gender-based statutes, approving only the most recent on the grounds that it represented a "biological difference" between men and women.[149] Meanwhile, the Supreme Court has considered four racial affirmative action programs in the educational and employment context, approving only one on the narrowest of grounds.

i. Gender Classification Jurisprudence

In *J.E.B. v. Alabama*,[150] the Supreme Court held that a state's use of peremptory challenges to exclude male jurors on the basis of their gender violated the Equal Protection Clause of the Fourteenth Amendment.[151] Utilizing the Court's language from *Hogan*, the Court required that the state advance an exceedingly persuasive justification, i.e., a demonstration that the statute is substantially related to a legitimate state interest.[152] The state, presenting a single report in support of its claim, argued that persons of each gender were more likely to support claims of someone of their own gender.[153] Finding that the authors of the report themselves had disavowed such a conclusion,[154] the Court concluded that the state's argument in actuality masked an unconstitutional, archaic, and overbroad stereotype.[155]

145. *Id*. at 959.
146. *Id.* at 970.
147. *Id.*
148. *Id*. at 971.
149. *See* Michael M. v. Sonoma Cnty. Sup. Ct., 450 U.S. 464, 478 (1981).
150. J.E.B. v. Alabama, 511 U.S. 127 (1994).
151. *Id*. at 128.
152. *Id*. at 136-37.
153. *Id*. at 138 n.9.
154. *Id*.
155. *Id*. at 137-38.

The Court emphasized that even if sufficient data had been presented, the stereotype would have been fatal to the practice.[156] The message sent by the policy "to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."[157]

Two years later, the Court again struck down a statute based on unfounded characterizations. In *United States v. Virginia*,[158] the Supreme Court held unconstitutional a Virginia policy that barred women from admission to the Virginia Military Institute.[159] Characterizing the *Hogan* language as requiring an "exceedingly persuasive justification",[160] the Court rejected as illegitimate the state interest asserted—namely that "the adversative method of training [provided by VMI] provided educational benefits that [could not] be made available, unmodified, to women" and that any alterations would destroy the model.[161] The Court relied heavily on the history of exclusion of women from various educational fields, and disregarded the expert testimony presented by the state, concluding that the policy, in light of the nation's history, qualified as an unconstitutional and archaic generalization.[162] While not central to her decision, Justice Ruth Bader Ginsburg, who argued many of the gender classification cases before the Court during the 1970s,[163] explicitly emphasized that despite the Court's increasing skepticism of gender-based classifications, gender-based classifications could be used to compensate women for particular economic disabilities suffered as a result of their gender,[164] to promote equal

156. *See id*. at 140 (explaining that discrimination in jury selection has harmful effects on the litigants, the community, and the individual jurors who are "wrongfully excluded from the judicial process").

157. *Id*. at 142.

158. 518 U.S. 515 (1996).

159. *See id*. at 541 (finding that Virginia failed to provide persuasive evidence that a school's male-only entrance policy was in furtherance of a state policy of diversity).

160. *Id*. at 531.

161. *Id*. at 540, 544-45.

162. *See id*. at 541-44 ("The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophec[ies],' once routinely used to deny rights or opportunities . . . .") (footnotes omitted).

163. Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829-30 (1990).

164. *Virginia*, 518 U.S. at 533 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)) (per curiam).

employment opportunities,[165] and to advance the full development of the talent and capacities of citizens.[166]

Despite its growing criticism of gender-based classifications, the Court in *Nguyen v. INS*,[167] suggested that biological differences existed between the genders, and thus, could justify such a classification even when the state failed to provide evidentiary support. In *Nguyen*, the statute, 8 U.S.C. § 1409,[168] under an equal protection challenge, was upheld by the Supreme Court despite its imposition of differing requirements for an immigrant child's acquisition of citizenship depending upon whether the citizen parent was the mother or the father.[169] Applying the language from *Hogan*,[170] the Court accepted, among other things, the government's interest in assuring a legitimate parent-child connection in such matters and found the gender-based presumption to be substantially related to its interests.[171] Though five justices sided with the majority, the Court's female justices dissented, emphasizing that the stereotypical assumption behind the statute—that women were the primary caretakers of children—was of the type the Court had consistently rejected after *Hogan*.[172]

ii. Racial Classification Jurisprudence

In contrast, the Supreme Court has consistently applied strict scrutiny to racial classifications, while, in most instances, also demanding increasingly more of the government. In *Adarand Constructors v. Peña*,[173] the Supreme Court extended *Croson* to federal affirmative action programs, reasoning that strict scrutiny was the appropriate standard under which to examine a federal program giving prime contractors financial incentives to hire subcontractors certified as "small businesses controlled by socially and economically disadvantaged individuals," under the presumption that such

165. *Id.* (quoting California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 289 (1987)).

166. *Id.* at 533-34.

167. Nguyen v. INS, 533 U.S. 53, 64 (2001).

168. 8 U.S.C. § 1409 (2013).

169. A child born abroad and out of wedlock acquires at birth the nationality status of a citizen mother who meets a specified residency requirement. § 1409(c). However, when the father is the citizen parent, *inter alia*, one of three affirmative steps must be taken before the child turns eighteen: legitimization, a declaration of paternity under oath by the father, or a court order of paternity. § 1409(a)(4). The failure to satisfy this section renders Nguyen ineligible for citizenship.

170. *Nguyen*, 533 U.S. at 70.

171. *See id*. at 73 (noting that this presumption was gained from the fact that every woman must necessarily be present at her child's birth).

172. *Id.* at 88-90 (O'Connor, J., dissenting).

173. 515 U.S. 200 (1995).

a group included an increased number of minorities.[174] Though the Court denied that strict scrutiny was "fatal in fact,"[175] the Court cited a single case, decided before *Croson*, in which a racial classification survived strict scrutiny.[176]

Despite its prior pronouncements, the Court drew a narrow exception for racial classifications in the context of higher education. In *Grutter v. Bollinger*[177] and *Gratz v. Bollinger*,[178] the Court split over a series of affirmative action cases concerning the University of Michigan's undergraduate program and its law school. While the court struck down a program which used a mathematical bonus system for minorities,[179] the Court, in a five to four decision, upheld the Law School's preference program as narrowly tailored to the state's compelling interest in achieving a diverse educational environment.[180] Importantly, the Court noted that while strict scrutiny applies to "all governmental uses of race . . . not all are invalidated by it."[181] Rather, "context matters."[182] In *Parents Involved in Community Schools v. Seattle School District No. 1*,[183] the Court struck down two secondary school plans that considered race as a factor when determining whether a minority or non-minority student would be allowed to transfer from one secondary school to another.[184] While the majority decision emphasized, in part, the computational nature of the plan,[185] the Court also emphasized that any deference afforded in the context in higher education was not applicable to plans enacted by elementary and secondary schools.[186] Additionally, the Court's recent acceptance of certiorari in

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174. *See id*. at 204-05, 226 (discussing *Croson's* explanation of why "strict scrutiny of all governmental racial classifications is essential").

175. *Id*. at 237.

176. *See id*. at 226-27 (referencing *Metro Broadcasting*'s unique ruling that certain racial classifications should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply).

177. 539 U.S. 306 (2003).

178. 539 U.S. 244 (2003).

179. *See id.* at 255, 275-76 (finding that the admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, Title VI, and 42 U.S.C. § 1981).

180. *Grutter*, 539 U.S. at 343.

181. *Id*. at 326-27.

182. *Id*. at 327.

183. 551 U.S. 701 (2007).

184. *Id*. at 709-711, 783.

185. *See id*. at 723 (stating that the method employed in this case does not provide for a meaningful individualized review of applicants, but instead rely on racial classifications in a non-individualized, mechanical way).

186. *See id.* at 770-71 (arguing that the *Grutter* decision was dependent upon "features unique to higher education" that were not present in elementary and

Fisher v. University of Texas,[187] which involved a scheme nearly identical to the one the Court approved in *Grutter*[188] and invited harsh questioning from several of the justices during the hearings of the case,[189] has caused concern that strict scrutiny in the context of racial classifications may indeed be fatal in fact.

3. Scholarly Criticism of Intermediate Scrutiny

Buttressed by the Court's increasing scrutiny of race-based affirmative action programs and a number of lower courts' increased scrutiny of such programs in the gender context, a number of scholars have weighed in and criticized the application of intermediate scrutiny to gender-based classifications. Their criticisms can be classified into four categories: (a) doctrinal arguments that strict scrutiny is the correct approach based on the Supreme Court's jurisprudence;[190] (b) insufficient protection arguments that intermediate scrutiny is insufficient to guard against invidious or discriminatory statutes;[191] (c) stigmatic arguments that a lower level of scrutiny implicitly delivers a message that women are less important than other minority groups;[192] and (d) inconsistency arguments that the Court's

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secondary education, such as "the expansive freedoms of speech and thought associated with the university environment, the special niche in the constitutional tradition occupied by universities, and the freedom of a university to make its own judgments as to education and selection of its student body") (citations omitted).

187. 132 S. Ct. 1536 (2012).

188. *See Fisher*, 631 F.3d at 216-17 (describing University of Texas at Austin's system of guaranteeing admission to Texas students in the top ten percent of their class).

189. *See* Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, Oct. 10, 2012, at A1 (stating the Justice Roberts, Alito, Scalia, and Thomas shared a skepticism of government programs that take race into account).

190. *See* Dale A. Riedel, *By Way of the Dodo: The Unconstitutionality of the Selective Service Act Male-Only Registration Requirement Under Modern Gender-Based Equal Protection*, 29 U. DAYTON L. REV. 135, 148 (2003) (arguing that the intermediate scrutiny plus test is the appropriate test after *VMI*); *see also* Jason Skaggs, *Justifying Gender-Based Affirmative Action Under* United States v. Virginia*'s "Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169, 1193 (1998) (arguing that there has been a progression in the level of scrutiny required for gender-based affirmative action programs).

191. *See e.g.*, John Galotto, *Strict Scrutiny for Gender, Via* Croson, 93 COLUM. L. REV. 508, 538 (1993) (discussing the special dangers of racial and sex stereotyping).

192. *See* Collin O'Connor Udell, *Signaling A New Direction In Gender Classification Scrutiny:* United States v. Virginia, 29 CONN. L. REV. 521, 557 (1996) ("[I]t would be difficult, indeed, to justify applying strict scrutiny to racial affirmative action programs without applying it to gender-based affirmative action programs as well. The rationale behind *Croson* and *Adarand* stressed the individual's right to equal treatment, regardless of the group to which she belonged, and it is equally applicable to

jurisprudence with regard to racial and gender-based affirmative action is theoretically inconsistent based on the Equal Protection Clause's original intention to aid African-Americans.[193]

II. A SECOND CHANCE: THE CONTINUED LEGAL AND THEORETICAL VIABILITY OF INTERMEDIATE SCRUTINY AFTER *CROSON*

Despite the criticisms from circuit courts and legal scholars, intermediate scrutiny remains the appropriate standard under which to review gender-based affirmative action programs. Considering that the Supreme Court generally applies intermediate scrutiny when analyzing gender-based claims and is especially lenient when considering benign classifications, the strict scrutiny argument is not persuasive from a doctrinal perspective. Arguments stressing the theoretical inconsistency of a more lenient standard for gender-based remedial schemes as opposed to race-based programs, while compelling, assume that *Croson*, which in fact created the discrepancy, was correctly decided. More compelling are the stigmatic and insufficient protection arguments. While they each present significant concerns, viable alternatives are available that, in contrast to strict scrutiny, will not have the practical effect of eliminating affirmative action programs for women.

A. The Legal Basis: Why Intermediate Scrutiny Remains the Appropriate Standard for Gender-Based Affirmative Action Under the Court's Precedent

Despite the fact that the Supreme Court has never addressed the constitutionality of a gender-based affirmative action program in the employment context, three doctrinal considerations suggest that intermediate scrutiny would be the appropriate standard under which to review such programs. First, the Supreme Court's jurisprudence dictates that intermediate scrutiny is the appropriate standard for all benign gender classifications.[194] Second, often when lower courts apply strict scrutiny,

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gender-based affirmative action.").

193. *See* Skaggs, *supra* note 190, at 1175 (arguing that use of intermediate scrutiny for sex based classifications yields results that are at odds with the Court's emphasis on historic discrimination against protected groups as justification for invoking heightened scrutiny).

194. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that for a statute that differentiates on the basis of gender to be sustained, it "must serve important governmental objectives and must be substantially related to the achievement of those objectives"); *see also* Udell, *supra* note 192, at 527-28 (stating that *Craig* created a new standard of intermediate scrutiny).

they do so while considering race-based and gender-based programs jointly.[195] Third, while "intermediate plus" may seem to be a suitable compromise, the Supreme Court, when applying intermediate scrutiny, has focused on the purpose and legislative history of the statute, as opposed to strength of the empirical evidence presented in support of the asserted interest.[196]

1. The Supreme Court's Gender-Based Jurisprudence Makes Clear That Intermediate Scrutiny is the Appropriate Standard.

A review of the Supreme Court's jurisprudence makes clear that intermediate scrutiny is the appropriate standard for gender-based affirmative action schemes. The Sixth Circuit in *Long* incorrectly adopted strict scrutiny as the appropriate standard under which to judge gender-based affirmative action claims and ignored significant Supreme Court jurisprudence to the contrary. Specifically, in making its decision, the Sixth Circuit relied exclusively on the Supreme Court's decisions in *Croson* and *Frontiero*.[197]

Citing *Croson*, the court concluded that affirmative action programs are appropriately judged under a strict scrutiny standard.[198] The court in its analysis made no mention of the fact that the statute at issue in *Croson* involved solely a racial classification.[199] None of the justices in any of their separate opinions suggested that their ruling extended beyond racial classifications.[200]

Likewise, the court's reliance on *Frontiero* was similarly misguided. First, *Frontiero* was followed by a series of cases, including the Supreme Court's seminal decision in *Craig*, which established intermediate scrutiny as the appropriate standard of review for all gender classifications.[201] Notably, the *Frontiero* decision was the sole decision to use strict scrutiny when reviewing a gender-based classification. The court's decision in

195. *See e.g.*, Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989) (considering a case where the Michigan Department of Transportation used a hiring criteria based on race or gender when the applicant's race or gender was underrepresented in the relevant labor market).

196. *See e.g.*, J.E.B. v. Alabama, 511 U.S. 127, 136-40 (1994).

197. *See* Long v. Saginaw, 911 F.2d 1192, 1196 (6th Cir. 1990).

198. *Id*.

199. *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 478 (1989) (assessing a contracting arrangement where prime contractors were required to issue a certain percentage of subcontracts to businesses controlled and owned by racial minorities).

200. *Cf. id.*

201. *See* Udell, *supra* note 192, at 527-28 (stating that the intermediate scrutiny standard was established for gender discrimination purposes in *Craig* and has been consistently employed ever since).

Long did not mention the nearly thirty years of cases since, in which the Supreme Court has continually applied the intermediate scrutiny standard.[202] Second, even if we were to ignore decades of jurisprudence, *Frontiero* occurred after congressional passage of the Equal Rights Amendment.[203] Even if the court considered applying strict scrutiny to all gender-based classifications, its approach was heavily influenced by the context of the times. Third, while the Supreme Court suggested in *Frontiero* that "strict judicial review" may be appropriate, it was evaluating a statute that disadvantaged the value of the work of the female employee.[204] Accordingly, there was a reasonable basis to argue that the statute, instead of benefiting female spouses, had a detrimental effect on a significant portion of females. In contrast, gender-based affirmative action programs have no similar adverse effect on a significant portion of the female population.[205] Rather, females enjoy the benefit of these programs across the board. The Supreme Court stated as much, noting that the analysis would have differed had a benign classification been at issue.[206]

The arguments of scholars in support of strict scrutiny are no more persuasive. Their arguments suggest that the Court has in fact been gradually heightening the standard of review for gender classifications. The argument takes one of two versions. First, some scholars suggest that the Supreme Court's use of the terminology "exceedingly persuasive justification" in a number of cases subsequent to *Hogan* indicates a stricter level of review.[207] Second, other scholars suggest that while repeating the intermediate scrutiny test, the Court actually has been conducting a more stringent review.[208]

As to the semantic argument, while the Court describes intermediate

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202. *See* Long v. City of Saginaw, 911 F.2d 1192, 1192 (6th Cir. 1990).

203. *See supra* notes 29 and accompanying text.

204. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) ("With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

205. *Cf.* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (examining a nursing school's policy of excluding all male applicants and allowing admission only for female students); *supra* note 127 and accompanying text.

206. *See supra* note 27 and accompanying text (stating that the Supreme Court in *Frontiero* made sure to point out that this was not a statute designed to rectify the history of discrimination against women, but a statute which was to their detriment).

207. *See e.g.*, Skaggs, *supra* note 190, at 1183 (writing that the "exceedingly persuasive justification" standard established in *Hogan* was a more demanding level of scrutiny than intermediate scrutiny).

208. *See e.g.*, Reidel, *supra* note 190, at 137 (stating that the Supreme Court implemented a "new version of the intermediate scrutiny test" in the cases after its establishment by adding a third prong to the original two prong test).

scrutiny as requiring an "exceedingly persuasive justification," it defines this test as merely the intermediate scrutiny standard from *Craig*—that a measure be substantially related to an important governmental interest.[209] Furthermore, none of the cases in which the Court used this verbal formulation involved benign gender classifications.[210]

While the substantive argument is more compelling, it is similarly problematic. Though the Supreme Court, while utilizing the "exceedingly persuasive justification" language invalidated a greater number of cases, this was largely due to the comparable simplicity of these cases. In *J.E.B*, the Court considered a practice that allowed men to be barred from juries on the basis of gender.[211] Similarly, in *VMI*, the court invalidated a policy that barred women from an all-male military school solely on the basis of their gender.[212] Each of these cases stunk of the type of discrimination the Supreme Court struck down when dismantling segregation in the post-*Brown* period.[213] In *Nguyen*, where the issue was somewhat closer—whether admitted biological differences between women and men justified a presumption of citizenship in favor of the child of an American citizen mother and a non-citizen father as opposed to the converse—the Court upheld the statute.[214]

In contrast, many of the statutes the Court considered and invalidated prior to the formulation of the intermediate scrutiny standard involved statutes where the discrimination was much more subtle and, accordingly, required closer attention from the Court. The Court in *Weinberger* concluded, after only a cursory examination of the legislative history, that a statute that gave a financial bonus to women, and thus seemed to be on its face benign, actually demeaned the value of their work and furthered a "homemaker" stereotype.[215] Similarly in *Orr*, the Court examined a statute that created a presumption of alimony for the female divorcee. Though the Court acknowledged the purely benign purpose behind the statute, the Court nonetheless advised guarding against stereotypes and reasoned that

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209. See *supra* notes 150-52 and accompanying text (using the case of *J.E.B. v. Alabama* to demonstrate that the standard of "exceedingly persuasive justification" required the same test used under the intermediate scrutiny test).

210. *See supra* notes 66-68, 150, 158 and accompanying text (referring to the *Hogan* case's exclusion of males from nursing schools, the *J.E.B.* case's use of peremptory challenges to exclude male jurors, and the *VMI* case's prohibition on admitting women to the Virginia Military Institute).

211. *See* J.E.B. v. Alabama, 511 U.S. 127, 129 (1994).

212. *See* United States v. Virginia, 518 U.S. 515, 555-56 (1996).

213. *See supra* text accompanying notes 85 (recounting several race-based cases the Court struck down after its decision in *Brown*).

214. *See* Nguyen v. INS, 533 U.S. 53, 73 (2001).

215. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975).

when one was available, a narrower remedial scheme should have been utilized.[216]

2. When Lower Courts Utilize Strict Scrutiny, It Has Been the Result of Confusion.

The decisions of the lower courts to apply strict scrutiny, rather than being based on sound precedent, have been the result of confusion and mistake. In particular, decisions adopting a standard of review more stringent than intermediate scrutiny have often been complicated by the fact that they involved challenges to statutes that granted benefits to racial minorities, as well as women.

In many of these cases, as opposed to recognizing the Supreme Court's varying jurisprudence with regard to each type of suspect classification, these courts have analyzed the racial provisions under strict scrutiny, while at the same time ignoring that distinct gender-conscious provisions were also at issue. In *Conlin*, the Sixth Circuit completely failed to distinguish between discrimination aimed at race-based minorities and discrimination against women.[217] The court looked to *Wygant* despite the fact that only a plurality of the Court[218] adopted a strict scrutiny standard of review for race-based classifications.[219] What the *Conlin* court failed to articulate, however, was that the gender-based set-aside programs were subject to a more lenient standard of review. Instead, the court erroneously grouped the gender-based set-aside provisions with the race-based portions of the act during its review.[220]

Similarly, the Seventh Circuit, in *Milwaukee Pavers*, rather than deciding the issue on its merits, simply deemed the argument waived, as Plaintiffs' counsel failed to argue that the gender-based portion of the statute was subject to a lesser degree of scrutiny.[221] The limited constitutional significance of the decision was highlighted when the court was faced with a similar statute nine years later in *Builders Association of Chicago*, in which the court avoided relying on the *Milwaukee Pavers* precedent and instead again concluded that the argument was waived

216. *See* Orr v. Orr, 440 U.S. 268, 283 (1979).

217. Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989).

218. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986) (stating that strict scrutiny is to be used in assessing racial classifications).

219. *See* Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989) (looking to *Wygant* and holding that "any remedy which uses sex or race must be narrowly tailored to survive scrutiny under the fourteenth amendment").

220. *See id*.

221. *See supra* note 123-124 and accompanying text.

because it was not presented.[222]

3. Intermediate Scrutiny "Plus" Focuses Incorrectly on a History of Discrimination and Not Legislative History and Statutory Scheme.

Recognizing the Supreme Court's continuous application of the intermediate scrutiny standard to all gender-based classifications, while also acknowledging the Court's increased scrutiny of racial-based affirmative action programs, a minority of scholars suggest that the Court adopt intermediate scrutiny "plus" as the appropriate standard under which to review gender-based affirmative action programs.[223] However, intermediate scrutiny "plus," which focuses on empirical support as opposed to the statute's text and history, is fundamentally incompatible with the Supreme Court's gender jurisprudence under the Fourteenth Amendment.

Intermediate scrutiny "plus," while not requiring that the means used by the remedial program be narrowly tailored, does mandate the presentation of a sufficient factual predicate that can demonstrate discrimination by the specific locality in the specific industry covered by the remedial program.[224] For example, in *Danskine*, the Eleventh Circuit required the presentation of specific evidence that the Miami-Dade County Fire Department discriminated against women in the past.[225] Despite the fact that the Commission in *Lamprecht* presented detailed reports describing disparity in station ownership and the effectiveness of the proposed remedy, the court, utilizing its own counter evidence, held the policy unconstitutional.[226]

However, the Supreme Court, when assessing the legitimacy of a gender-based affirmative action scheme, has not required extensive proof of a specific factual predicate, but rather has focused on whether reliance on a stereotype could be discerned from the statute's language and legislative history. In *Weinberger*, the Court found unconstitutional a statute creating a presumption of social security benefits for widows with children because its text specifically linked women to the stereotypical role of homemaker.[227] Likewise, in *Goldfarb*, the Court struck down a similar

222. *See supra* note 125 and accompanying text.

223. *See* Builders Ass'n of Greater Chicago v. Cnty. of Cook, 256 F.3d 642, 647 (7th Cir. 2001); Dale A. Riedel, *By Way of the Dodo: The Unconstitutionality of the Selective Service Act Male-Only Registration Requirement Under Modern Gender-Based Equal Protection*, 29 U. DAYTON L. REV. 135, 137 (2003).

224. *See* Lamprecht v. FCC, 958 F.2d 382, 408 (D.C. Cir. 1992).

225. *See* Danskine v. Miami Dade Fire Dep't, 253 F.3d 1288, 1294 (11th Cir. 2001).

226. *See Lamprecht*, 958 F.2d at 397, 399.

227. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975).

statute that created a presumption of benefits for widows as opposed to widowers regardless of any dependent children.[228] The Court reasoned that based on its legislative history and statutory scheme, it resulted not from a deliberate congressional intention to remedy the greater needs of widows, but rather from an intention to aid the *dependent* spouses of deceased wage earners.[229]

In fact, when the Court has found a discriminatory purpose, it has ignored statistical data presented in support of a scheme. In *Craig*, despite the state's presentation of statistical studies supporting the belief that eighteen year old men were more likely to drive intoxicated than eighteen year old women, the Court disregarded such presentations and focused instead on the legislature's reliance on stereotypes.[230] In *J.E.B.*, the Court found insufficient the state's statistical presentation in support of a state policy allowing males to be excluded from juries on the basis of gender where the policy reinforced prejudicial views of the relative abilities of men and women.[231] Accordingly, an appropriate compromise, rather than requiring additional data, would involve more rigorous scrutiny of a scheme's statutory structure and purpose.

This approach is further buttressed by the institutional limitations of the courts. Appellate courts do not have the resources or fact-finding capabilities possessed by the legislatures.[232] Accordingly, it is more likely that the evidence considered will often suit a deciding judge's own personal biases, something that the multi-member nature of the legislature prevents. Even assuming the availability of sufficient evidence, it is debatable whether available data justifies a particular policy decision, especially when made by a single person or small group of individuals.

B. The Theoretical Foundation: Responses to Criticisms Concerning the Wisdom of an Intermediate Scrutiny Approach

Regardless of the lack of doctrinal support for the intermediate standard, scholars have presented a number of theoretical criticisms of intermediate scrutiny. Chief among these are the insufficiency and stigmatic arguments; specifically, that the use of intermediate scrutiny for gender-based statutes demeans women by concurrently failing to adequately protect them and sending the larger message that they are deserving of less protection than racial minorities.[233] While these arguments present serious concerns, they

228. *See* Califano v. Goldfarb, 430 U.S. 199, 217 (1977).

229. *Id*. at 216-17 (emphasis added).

230. Craig v. Boren, 429 U.S. 190, 208-09 (1976).

231. J.E.B. v. Alabama, 511 U.S. 127, 140 (1994).

232. Stenberg v. Carhart 530 U.S. 914, 968 (2000) (Kennedy, J., dissenting).

233. *See, e.g.*, Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying*

fail to consider (a) that there are viable alternative jurisprudential means of protecting women than resorting to the almost universally fatal strict scrutiny doctrine; and (b) that intermediate scrutiny for gender-based affirmative action programs may be framed in such a way that its use represents society's commitment to alleviating its discriminatory history rather than continuing it. Finally, arguments suggesting that a standard of review for gender-based affirmative action programs should be more lenient than that for race-based programs is inconsistent with the purpose of the Fourteenth Amendment, assume that *Croson* was correctly decided.

1. There are Significant Reasons to Believe that Intermediate Scrutiny Can Adequately Protect Women While Remedying Past Discrimination.

Central to the *Croson* court's decision to apply strict scrutiny to all statutes that differentiate on the basis of gender was the supposed insufficiency of "intermediate scrutiny" to differentiate between those statutes that are genuinely aimed at remedying societal problems, and those statutes aimed at perpetuating the subordinate role of women through the use of overbroad stereotypes. While the Court's jurisprudence suggests this is a serious concern, alternate approaches exist that, unlike strict scrutiny, are not fatal in fact and that may sufficiently protect women without the risk of dismantling all gender-based affirmative action programs.

While strict scrutiny does effectively protect women from discriminatory statutes masked as benign, the practical effect of the strict scrutiny standard would be the virtual elimination of almost all affirmative action programs. Though the Supreme Court denied that strict scrutiny is fatal in fact, its application in the context of racially differential statutes proves that this is invariably always the case. Applying strict scrutiny, the Court has held unconstitutional every affirmative action employment scheme that has come before it, regardless of whether a federal or state statute has been at issue.[234] Although the Court recently upheld a preference program in the educational admissions context at the University of Michigan,[235] there are questions regarding the vitality of even the limited program approved in *Grutter*. Justice Sandra Day O'Connor, who provided the crucial swing vote in the Court's decision in *Grutter*, has been replaced by Justice Samuel Alito, who has expressed disdain for affirmative action programs.[236] Likewise, Justice Kennedy, widely recognized as the current

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Strict Scrutiny to Gender Discrimination, 6 SETON HALL CONST. L.J. 953, 962 (1996); Donna Meredith Matthews, *Avoiding Gender Equality*, 19 WOMEN'S RTS. L. REP. 127, 145 (1998).

234. *See* Adarand Constructors v. Peña, 515 U.S. 200, 237 (1995).

235. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

"swing vote" on the Court, recently voted to invalidate a high school transfer program that considered race as one of many factors.[237]

The *Croson* majority specifically alleged that once the supporters of intermediate scrutiny recognized a benign purpose, their review was singularly deferential.[238] While this may be the case, the *Croson* majority's analysis incorrectly ignores the level of scrutiny applied by the supporters of the intermediate scrutiny standard in *discerning* whether there is a benign purpose in the statute. In this analysis, the Court is less than deferential. In *Hogan*, despite the statute "benefiting" women by reserving each of the nursing school's seats for women, the Court recognized that the scheme perpetuated the stereotypical role of women as assistants and more practically served a need that did not exist.[239] In *Orr*, where the state's scheme unnecessarily relied on gender to determine perceived inequalities, as the possibility of individual hearings for benefits was available, the Court found the statutory provision unconstitutional.[240]

Admittedly, women are not protected in every circumstance by intermediate scrutiny. Specifically, in the context of its "biological differences" jurisprudence, the Court's decisions in *Michael M.*, which assumed that women would be discouraged from sexual activity by the possibility of pregnancy,[241] and *Rostker*, which deferred to Congress' decision to exclude women from the military, are especially troubling as they rely on the very types of stereotypes about women's capacities and decision-making that earlier cases rejected.[242]

While these cases suggest the danger of an intermediate standard, their effect and relevance may be limited as there is some evidence that the Court has since narrowed its "biological differences" jurisprudence. Though the Court accepted the government's argument in *Rostker*,[243] it rejected VMI's argument fifteen years later in *Virginia* that women could be excluded from a military school, despite the fact that an alternate school

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236. *See* Charles Babington & Jo Becker, *1985 Memo by Alito Has Legal Weight, Senators Say*, WASH. POST (Nov. 17, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602093.html (discussing a controversial memo composed by Alito while working in the Solicitor General's office).

237. *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (indicting that Justice Kennedy concurred in part, concurred in the judgment, and filed the majority opinion).

238. *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 494-95 (1989).

239. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982).

240. *See* Orr v. Orr, 440 U.S. 268, 281-82 (1979).

241. *See* Michael M. v. Sonoma Cnty. Super. Ct, 450 U.S. 464, 473 (1981).

242. *See* Rostker v. Goldberg, 453 U.S. 57, 82-83 (1981).

243. *See id.*

had been opened for women.[244] The viability of the Court's biological differences jurisprudence in the parental context is troubling given the acceptance of the INS' argument in *Nguyen* in favor of a presumption of citizenship for children of citizen mothers as opposed to citizen fathers.[245]

Nonetheless, a focus on these cases misinterprets the limited scope of this paper's argument. While I suggest that courts should adopt intermediate scrutiny when reviewing gender-based affirmative action programs, they may certainly adopt a stricter standard for statutory provisions that do not have a remedial purpose.

Admittedly, a split approach for remedial and non-remedial gender-based statutes would invite legislative attempts to mask programs motivated by non-remedial intentions as being remedial in nature. Despite the clear remedial purposes of some programs, such as those at issue in *Danskine* or *Long*, other schemes, such as those in *Hogan*, may be more problematic. While the Court's narrowing of its real differences jurisprudence and its ability to effectively distinguish schemes, like *Hogan*, caution against such dangers, more scrutiny may indeed be required.

Intermediate scrutiny "plus" does heighten the standard; however, by requiring a strict factual predicate, it, like strict scrutiny, effectively eliminates gender-based affirmative action programs. While the Eleventh Circuit upheld the program at issue in *Danskine*, it is rare that localities will have available the evidence of specific discrimination available to Miami-Dade County. More often localities, such as those whose programs were at issue in *Long*, *Lamprecht*, and *Concrete Works of Colorado*, will only have evidence of disparity and not discriminatory intent.[246] Following the court's jurisprudence, an alternate approach that may adequately protect women while not eliminating the majority of affirmative action schemes would be to require evidence of disparity between males and females in the field, along with an increased focus on the schemes' statutory language and legislative history. Like the Court in *Weinberger*, courts could specifically look for benefits that are tied to a woman performing a role historically reserved for females.[247] Like the Court in *Orr*, courts could more closely scrutinize statutes that rely on gender as a proxy when a non-gender-based

244. *See* United States v. Virginia, 518 U.S. 515, 555-56 (1996).

245. *See* Nguyen v. INS, 533 U.S. 53, 63-64 (2001) (relying on the necessary presence of the mother and not the father at the child's birth); *see also supra* notes 79-82 and accompanying text (recounting early "real differences" cases in the parental context).

246. *See* Long v. City of Saginaw, 911 F.2d 1192, 1197 (6th Cir. 1990); *supra* notes 126-33, 144-48 and accompanying text (recounting the evidence presented in varied gender-based affirmative action cases).

247. *See supra* note 50 and accompanying text.

formula would just as effectively provide deserving women benefits.[248] Like the Court in *Goldfarb*, courts could closely scrutinize a statute where its legislative history belied a motivation other than a need to remedy past discrimination against women, for example, the desire to devalue the work of women earners as opposed to men.[249]

In addition, the Court could continue to narrow its "biological differences" jurisprudence while expanding the category of statutes representing archaic and overbroad stereotypes. Feminist scholars have proposed a number of means by which to reformulate these standards to eliminate cases such as *Nguyen* in which the Court, even under its narrowed "biological differences" jurisprudence, approved a constitutionally questionable gender-based statute. One alternative could be a version of Catherine MacKinnon's "dominance approach" which would ask whether a statute tended to facilitate women's subordination to men or alleviated it.[250] If the latter, it would be regarded as representing a "real difference," the history of discrimination women have faced, and if the former, an unacceptable stereotype.[251]

However, feminist scholars have also buttressed the *Croson* rationale by accurately pointing out that the strict scrutiny standard not only protects women from legislatures masking discriminatory statutes as benign, but also protects women from discriminatory judges who may at once apply a more lenient standard of intermediate scrutiny toward discriminatory statutes.[252] The Court's decision in *Nguyen*, upholding a gender-based statute written by a five male majority with then-both female justices dissenting, confirms the real dangers of this claim.[253] Admittedly, there is no complete means by which to eliminate such a danger. However, four considerations suggest the limitations of this argument. First, as discussed, the price of this alleged safety would be the crippling of legislative action as a means of remedying the history of gender discrimination in

248. *See supra* notes 57-61 and accompanying text.

249. *See supra* notes 54-55 and accompanying text.

250. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 40 (1987) ("In this approach, an equality question is a question of the distribution of power.").

251. *See id.* at 40-45. While MacKinnon presents a compelling argument for abandoning the scrutiny analysis all together, our approach may present a compromise means of incorporating their approaches without waiting for the unlikely abandonment of the courts approach to gender and racial based statutes for over forty years.

252. *See* David L. Kirp et al., *Gender Justice and Its Critics*, 76 CALIF. L. REV. 1377, 1401 (1988) (citing Taub, *Book Review*, 80 COLUM. L. REV. 1686, 1691-92 (1980)) ("Moreover, Taub has suggested, and MacKinnon must recognize, that it is exceedingly unlikely that a supposedly male-dominated court system can successfully apply MacKinnon's suggested standard of review.").

253. *See supra* notes 165-170 and accompanying text.

employment. Second, there is no guarantee that judges may not formulate new legal theorems, which would incorporate the discrimination employed through the utilization of intermediate scrutiny. Third, as noted by feminists,[254] if the law inherently represents male norms, a safety in equality under these male norms may not be safety at all. Fourth, the increasing presence of women in the law and the judiciary provides hope that this danger may be slowly alleviated. As stated, perhaps optimistically, by Martha Fineman:

> [F]eminists are no longer dependent on the Frankfurters of the world for the translation of our ideas. Women now occupy professorships, are members of the bar, and make up almost half of all law school classes. A few of us are even legislators and judges. While full integration of the professorship is far from complete (especially at the most powerful levels), feminist voices can at least give our own voices to our ideas.[255]

Finally, the *Croson* court suggested that intermediate scrutiny would be unable to distinguish those statutes, which, even though allegedly supported by benign purposes, were unnecessary as a result of the elimination of the needs requiring the particular remediation initiative in the first place or which at their core were not based on the differential characteristic.[256] As to the first, the Court's decision in *Hogan* suggests the contrary. In the context of a nursing school, where women dominated the field, the Court recognized the distinct lack of necessity for a statute preferring female applicants.[257] Admittedly, a closer case involving a field where women were equally represented may require closer scrutiny by the Court of the statutes' legislative history. In addition, lower courts that applied intermediate scrutiny after *Croson* have also required a demonstrated disparity in the employment field.[258] As to the second, the Court demonstrated an ability in *Orr* to reject a gender-based distinction where a narrower program aimed specifically at the problem, in that case, insolvency, would have sufficed.[259]

Though the *Croson* majority framed its argument as legal, there is reason to think that its arguments belied skepticism of the need for affirmative

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254. *See e.g.*, Catherine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 658 (1983) (indicating that this pervasiveness of male domination makes the application of rules impossible, for when the state "is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied").

255. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 39 (1995) (citations omitted).

256. *See supra* notes 109-111 and accompanying text.

257. *See supra* note 67 and accompanying text.

258. *See supra* note 148 and accompanying text.

259. *See supra* notes 57-61, 107- 08 and accompanying text.

action and the effect of a history of discrimination in general. Whereas a full scale examination of opportunities available to women in society and any resulting disparity is well beyond the scope of this paper, evidence gathered by the federal government suggests that women are underrepresented, specifically in leadership positions in a variety of fields and that this disparity is the result of a history of intentional exclusion.[260]

2. The Stigma Communicated by Subjecting Gender-Based Affirmative Action Programs to Intermediate Scrutiny Would Be Offset Were the Court to Adopt Increased Scrutiny for Non-Benign Gender-Based Statutes.

The argument that subjecting gender-based statutes to intermediate scrutiny while subjecting racially differential statutes to strict scrutiny disperses a larger societal message demeaning the value of women is not only troubling to my argument, but also flawed as it depends upon a particular societal framing of the issue. Rather, the use of intermediate scrutiny in reviewing gender-based affirmative action programs might suggest society's greater commitment to alleviating its history of discrimination against women, especially if combined with strict scrutiny for non-remedial statutes.

As discussed, the limited argument presented by this paper is that intermediate scrutiny should be used specifically to review gender-based affirmative action programs. A split approach subjecting non-remedial gender-based statutes to increased scrutiny finds support in some of the Court's jurisprudence and writings. The *Croson* court correctly observed that once the Court determines that a statutory scheme serves a benign or remedial purpose, its analysis becomes particularly deferential.[261] However, in *J.E.B.* and *Craig*, the Court rejected statistical support,[262] and in the former, specifically rejected the jury preemption scheme despite the convincing nature of the empirical data presented.[263] Furthermore, the split approach is supported by dicta in Justice Ginsburg's *VMI* majority opinion. While requiring that gender-based statutes normally satisfy an "exceedingly persuasive justification,"[264] she specifically exempted from this scrutiny those statutes that compensate women "for particular economic disabilities [they have] suffered" and to "promote equal employment opportunit[ies]."[265] Admittedly, dictum is normally of little precedential consequence. However, that the words are of Justice

260. *See supra* notes 1-5 and accompanying text.

261. *See supra* note 108 and accompanying text.

262. *See supra* notes 36-38, 153 and accompanying text.

263. *See supra* note 156 and accompanying text.

264. *See supra* note 160 and accompanying text.

265. *See supra* note 166 and accompanying text.

Ginsburg, who filed many of the cases establishing gender as a protected class, including *Frontiero*, is of significance.[266]

3. Arguments Stressing the Inconsistency Between the Application of Intermediate Scrutiny for Gender-Based Affirmative Action and Strict Scrutiny for Similar Race-Based Statutes Assume the Correctness of Croson.

An argument stressing the perceived inconsistency that would result from the utilization of strict scrutiny in reviewing affirmative action programs benefiting African-Americans, a minority that acted as an impetus for the enactment of the Equal Protection Clause, and the use of intermediate scrutiny for programs benefiting women, are flawed in that they assume *Croson* was correctly decided.

The reality is that constitutional scholars criticize *Croson* as the case that abandoned the original purpose behind the amendment. Fearing that *Croson* would cause localities to abandon race-based remedial programs, Laurence Tribe organized a "Constitutional Scholars' Conference" to create guidelines for local governments that would assist in the development of standards for programs that would fulfill *Croson*'s requirements.[267] For Michael Rosenfeld, *Croson* was astonishing because it provided a "stark contrast between the apparent simplicity and clarity of the legal test that the Court embraced and that test's inability to account coherently for the complexities inherent in the controversy that it purport[ed] to resolve."[268] Russell Galloway similarly responded: "*Croson* stood the Equal Protection Clause on its head, converting it from a bulwark of equality to a guarantee of inequality and holding, for the first time ever, that governmental affirmative action programs containing remedial racial classification as unconstitutional unless strict scrutiny is satisfied."[269] Kathleen Sullivan interpreted *Croson* as the Court's response to a perceived societal backlash against affirmative action by addressing the dismay of displaced whites.[270] However, it was paradoxically flawed to consider white resentment in the judicial review of affirmative action legislation while simultaneously ignoring black resentment of laws with

266. *See supra* note 163 and accompanying text.

267. *See* Laurence H. Tribe, *Joint Statement: Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J. A. Croson Co., 98 YALE L.J. 679, 711 (1989).

268. Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1793 (1989).

269. *See* RUSSELL W. GALLOWAY, JUSTICE FOR ALL? THE RICH AND THE POOR IN SUPREME COURT HISTORY, 1790-1990 177 (1991).

270. *See* Kathleen M. Sullivan, City of Richmond v. J. A. Croson Co.: *The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1622-23 (1990).

racially disproportionate effects.[271]

CONCLUSION

The arguments for applying strict scrutiny to gender-based statutes are certainly compelling. Feminist legal scholars have long criticized not only the subtle attempts by legislatures to codify stereotypes about women's roles and capacities, but also the Court's refusal to sniff out these adverse motives. Adding insult to injury is the symbolic message communicated by the application of reduced scrutiny to gender-based statutes when compared to the strict scrutiny applied to similar race-based schemes. While these arguments are compelling, they do not mandate that courts adopt or legal scholars advocate for any means available to solve these problems. Rather, legal scholars and courts should recognize the viability of alternative means of solving these problems that would at once preserve the viability of gender-based affirmative action programs. The alternative would be to severely limit the power of legislatures to address over 200 years of gender-based discrimination in the United States, and as a result, freeze the limited opportunities available to women in a variety of employment fields.

271. *See id*. at 1623.