GENDER-BASED AFFIRMATIVE ACTION AND REVERSE GENDER BIAS: BEYOND *GRATZ*, *PARENTS INVOLVED*, AND *RICCI*

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I. INTRODUCTION

The blockbuster race discrimination cases in recent years have all involved affirmative action and reverse discrimination. The Supreme Court has made it clear that race classifications, whether benign or invidious, will trigger rigid strict scrutiny analysis, which requires that the government prove its program is narrowly tailored to serve a compelling interest. In 2003, the Court, in *Gratz v. Bollinger*,[1] ruled that while student diversity in educational institutions may be a compelling interest, an affirmative action program that assigned points to applicants of minority races was unconstitutional.[2] In 2007, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[3] it held that two public school district plans that used race-based enrollment targets for student assignments failed strict scrutiny because the districts neither proved a compelling interest, nor demonstrated that the plans were narrowly tailored to serve the interest.[4] In 2009, in *Ricci v. DeStefano*,[5] the Court determined that New Haven, Connecticut could not ignore the results of a promotion examination administered to city firefighters, despite its concern that use of the test would have excluded almost all

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[1] 539 U.S. 244 (2003).
[2] *Id.* at 275.
[3] 551 U.S. 701 (2007).
[4] *Id.* at 710–11.
[5] 129 S. Ct. 2658 (2009).

minority candidates.[6] A five-Justice majority reasoned that avoiding disparate impact liability under Title VII did not justify what otherwise would be prohibited reverse race discrimination.[7] Borrowing from its constitutional affirmative action jurisprudence, the Court held that because the City could not establish a "strong basis in evidence" for believing its use of the promotion test would actually expose it to disparate impact liability, its "racially motivated" action in disregarding the test scores violated Title VII.[8]

These cases demonstrate that the majority of Supreme Court Justices today believe that affirmative action (or "reverse" discrimination) is no longer justified under a remedial rationale, which sanctions government programs that favor racial minorities to make up for past discrimination. Further, it is clear that race-based classifications that merely "promote diversity" will be viewed with greater skepticism by the Roberts Court.[9] The "anticlassification" interpretation of the Fourteenth Amendment is now dominant.[10] As explained by Chief Justice Roberts in *Parents Involved*: "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[11] He proclaimed that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race"—that is, using race as a criterion for decision making.[12]

Does this mark the death knell for gender-based affirmative action? For example, if the New Haven Fire Department had given a physical strength and agility test and then decided to ignore the results of that test because it excluded all or most women, would its decision have been viewed as imper-

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[6] *Id.* at 2664–66.

[7] *Id.* at 2676. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006), prohibits race and sex discrimination by private and public employers. It bars both intentional discrimination as well as facially neutral practices that have a disparate impact on a protected group unless the employer can prove that its practice is job related and consistent with business necessity. *Id.*

[8] *Ricci*, 129 S. Ct. at 2664.

[9] In the companion case to *Gratz*, *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice O'Connor, writing for a five Justice majority, upheld the University of Michigan Law School's program that used race as a factor to achieve the compelling interest in creating a diverse student body. *Id.* at 343. After she stepped down from the bench, five Justices narrowly construed *Grutter*'s diversity justification as limited to higher education, reasoning that the *Grutter* Court "relied upon considerations unique to institutions of higher education." *Parents Involved*, 551 U.S. at 724–25. In his concurring opinion, Justice Kennedy acknowledges that "[a] compelling interest exists in avoiding racial isolation," and that school districts should continue "the important work of bringing together students of different racial, ethnic, and economic backgrounds." *Id.* at 797–98 (Kennedy, J., concurring). However, even if Justice Kennedy does not see strict scrutiny as necessarily fatal, he has thus far never voted to uphold a racial preference, and he voted to invalidate the two school plans in *Parents Involved*.

[10] Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1711 (2005).

[11] *Parents Involved*, 551 U.S. at 730 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

[12] *Id.* at 748.

missible gender discrimination? Although *Ricci* addressed only the Title VII statutory question, it supported its finding of reverse race discrimination by borrowing the constitutional "strong-basis-in-evidence" test,[13] which has never been applied to gender bias. More fundamentally, unlike race discrimination, gender discrimination, whether benign or invidious, has never triggered strict scrutiny, but rather, only the less rigorous intermediate scrutiny test, which requires only that the government prove that the classification is substantially related to the achievement of an important interest.[14] However, the Supreme Court has not directly confronted an equal protection challenge to a gender-based affirmative action plan since the 1980s. It has never done so in the employment context. Further, it has not addressed the anomaly that, under current doctrine, affirmative action for women is easier to justify than race-based affirmative action. Not surprisingly, this has led to a circuit split as to whether strict or intermediate scrutiny should govern challenges to gender-based preferences.[15]

Part II of this Article explicates the development of the Supreme Court's jurisprudence on gender discrimination and the resulting race/gender anomaly. Part III discusses the circuit split regarding the proper analysis of gender-based affirmative action. Part IV examines the arguments for and against race-based affirmative action and reverse discrimination and their applicability to gender bias. It also compares how the European Union and other non-EU countries have used and validated gender-based affirmative action, particularly in the areas of corporate governance and political representation where the need appears to be most acute. Part V concludes that, even if the race/gender anomaly cannot be legally or logically justified, the solution is not to subject gender-based affirmative action to strict scrutiny. Rather, because the Court's gender jurisprudence recognizes the transformative potential of affirmative action and best advances the antisubordination goal of the equal protection guarantee, it should also provide the framework for assessing the constitutionality of race-based affirmative action.

II. History Behind the Affirmative Action Race/Gender Anomaly

This Part traces the development of sex discrimination law and the parallel evolution of race-based affirmative action, which has culminated in the current anomaly that gender-based affirmative action is subject to less scrutiny than race-based affirmative action and, therefore, is more likely to survive a constitutional challenge.

A prohibition against sex discrimination is not found in the Constitution, and the Equal Rights Amendment, which would have filled this gap,

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[13] *See supra* note 8 and accompanying text.
[14] *See infra* notes 53–55 and accompanying text.
[15] *See infra* notes 96–131 and accompanying text.

never came to fruition.[16] Justice Ruth Bader Ginsburg explained that, until 1971, the Supreme Court "consistently affirmed governmental authority to classify by gender."[17] Two themes dominated the case law: "First, women's place in a world controlled by men is divinely ordained; second, the law's differential treatment of the sexes operates benignly in women's favor."[18] In contrast to race-based laws, many gender-based laws ostensibly were enacted to protect or favor women because women were "divinely" created differently from men.[19]

A classic example of "benign" gender discrimination is found in *Muller v. Oregon*.[20] In 1908, the Supreme Court upheld a state statute prohibiting employment of women in industrial jobs for more than ten hours per day by relying on the famous Brandeis brief, which purportedly established through scientific data the "unique vulnerability" of the female sex.[21] As Justice Ginsburg explained, "[i]n *Muller*'s wake, states enacted a raft of women-only protective legislation: maximum hours and minimum wage laws, health and safety regulations, laws barring women from night work, mandating break time for them, limiting the loads they could carry, and excluding them from certain occupations altogether."[22] Ginsburg lamented that these laws were "protecting" women from better paying jobs and preventing them from competing with men.[23] They also reinforced traditional sex roles. Indeed, as recently as 1961, the Supreme Court upheld a law that precluded women from compulsory jury service based on the theory

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[16] Although the proposed Equal Rights Amendment received strong support in Congress, winning approval in the House of Representatives by a vote of 354 to twenty-four, 117 Cong. Rec. H35815 (1971), and in the Senate by a vote of eighty-four to four, 118 Cong. Rec. S9598 (1972), only thirty-five out of the necessary thirty-eight states ratified it. *See* Jane Mansbridge, Why We Lost the ERA 1 (1986); Andrew B. Coan, *Talking Originalism*, 2009 BYU L. Rev. 847, 853–54 (2009); *see also* Serena Mayeri, *A New E.R.A. or a New ERA? Amendment Advocacy and the Reconstitution of Feminism*, 103 Nw. U. L. Rev. 1223 (2009) [hereinafter Mayeri, *New E.R.A.*] (tracing the history and defeat of ERA II, which was proposed in the mid-1980s, as well as the effects of the ERA II debate on legal feminism).

[17] Ruth Bader Ginsburg, *Sex, Equality and the Constitution: The State of the Art*, 4 Women's Rts. L. Rep. 143, 143 (1978). Justice Ginsburg explained that many of these laws challenged before 1971 were justified as "preferential" to women and that this history "has made many feminists suspicious of purportedly preferential treatment." *Id.*

[18] Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 2 (1975) [hereinafter Ginsburg, *Gender*]; *see also* Ruth Bader Ginsburg, *From No Rights, to Half Rights, to Confusing Rights*, 7 Hum. Rts. 12, 13 (1978) (describing how the judicial opinions express paternalistic concern for the "ladies" and notions of "chivalry").

[19] *See* Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (reasoning that Illinois could bar women from the practice of law because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.").

[20] 208 U.S. 412 (1908).

[21] *Id.* at 419–20 n.1.

[22] Ruth Bader Ginsburg, Muller v. Oregon*: One Hundred Years Later*, 45 Willamette L. Rev. 359, 366 (2009) [hereinafter Ginsburg, *One Hundred Years Later*].

[23] *Id.* at 370.

that the predominant role of women is to remain in the home and care for children.[24]

The modern law of gender bias stems from the Court's rethinking of its understanding of the Equal Protection Clause, and Ruth Bader Ginsburg was instrumental in bringing about the change. In 1971, the ACLU established the Women's Rights Project (WRP) and appointed then-Professor Ginsburg as its first director.[25] Her task was to convince an all-male Supreme Court that the Equal Protection Clause, the historical purpose of which was the elimination of racial bias, should be expanded to ensure equality for women.[26] Ginsburg was part of the second-wave feminist movement, which embraced a rigid formality approach to equality.[27] Feminists of this era believed that if women were treated the same as men, most barriers would fall.[28] They specifically targeted "benign" laws that favored women, i.e., protective labor laws that, although designed to benefit women, often, perversely, had the opposite effect.[29] Ironically, their strategy mirrors current anticlassification doctrine—the WRP sought to persuade the Court to abandon any distinction between sex classifications that harmed women and those that protected them and to apply strict scrutiny across the board.[30]

Ginsburg firmly believed that all "preferential" laws perpetuated stereotypical thinking about the place of women in our society. She argued before the Supreme Court that "virtually every gender discrimination is a two-edged sword,"[31] and she urged courts not to look "to see whether a [sex] classification is benign or invidious," because she had never found a sex classification that genuinely helped women.[32] She purposefully selected male victims of gender bias in order to persuade the Supreme Court that

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[24] Hoyt v. Florida, 368 U.S. 57, 62, 69 (1961).

[25] Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 Women's Rts. L. Rep. 73, 75 (1989).

[26] *See infra* note 133 and accompanying text.

[27] Markowitz, *supra* note 25, at 76; *see also* Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 Wm. & Mary L. Rev. 1789, 1793 (2008) [hereinafter Mayeri, *Race-Sex Analogy*]. Mayeri points to the wave of criticism of this formal equality approach. *Id.* at 1853–54. *See, e.g.*, Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 26–27 & n.53 (2001) ("For nearly two decades, critics of formal equality have questioned its capacity to secure meaningful equality for women, and have expressed concern that, in light of the different social and economic power of men and women, formal equality may legitimate or even exacerbate existing inequalities."); Markowitz, *supra* note 25, at 76 (explaining how many commentators challenged Ginsburg's suggestion that sexism would be eliminated if the Court was convinced that men and women are actually similarly situated because this presumes a false reality of gender and ignores that real differences between men and women must be accommodated).

[28] Markowitz, *supra* note 25, at 75–76.

[29] Amy Leigh Campbell, Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project 51–58 (2003).

[30] *Id.*

[31] Oral Argument at 30:05, Califano v. Goldfarb, 430 U.S. 199 (1977) (No. 75–699), *available at* http://www.oyez.org/cases/1970-1979/1976/1976_75_699/argument.

[32] *Id.* at 32:45; *see also* Kahn v. Shevin, 416 U.S. 384 (1974).

even laws that preferred women should be invalidated.[33] Her ultimate goal was to convince the Court to adopt the same strict scrutiny approach used for impermissible race classifications.[34]

In *Frontiero v. Richardson*, the first case that Ginsburg argued before the Supreme Court, a four-Justice plurality came within one vote of accepting her argument, acknowledging that gender bias shared many of the attributes of race bias—it involved an immutable trait, it engendered stereotypes, and it was based on paternalism.[35] Justice Brennan asserted in a forceful, oft-repeated statement that the pedestal on which protective labor laws had placed women was often, upon closer inspection, really a "cage."[36] Because women servicepersons were denied benefits for their husbands that wives of male servicemen automatically received,[37] this was a classic example of a statute that on its face appeared to favor women—wives of men in military service. However, upon closer inspection, it became clear that the preference resulted in invidious, rather than benign, discrimination against women in the military.[38]

Because these laws were in a sense "affirmative action" measures designed to help women, the clash between benign and invidious discrimination and race and gender was inevitable, and in 1974 Ginsburg was forced to confront it. In *Kahn v. Shevin*, she represented a Florida widower who challenged a state law that provided widows, but not widowers, with a small property tax exemption.[39] Unlike the policy challenged in *Frontiero*, the Florida law did not clearly disadvantage women. It could be called an "affirmative action" program for older women who owned real property in Florida. Nonetheless, Ginsburg argued that this gender-based preferential program should be struck down because it reinforced stereotypes.[40]

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[33] A classic example is *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). The plaintiff challenged the "mother's insurance benefits" provision of the Social Security Act, which allowed widows with dependent children to receive benefits in order to enable them to stay home and personally provide childcare after the death of a spouse. *Id.* Although the plaintiff was male, Ginsburg argued that the law discriminated against female workers who pay social security taxes at full rates but whose widowers do not receive the same benefit. *Id.* at 644–45.

[34] Markowitz, *supra* note 25, at 78; *see also* Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER, 251, 271–72 (2009) (recounting that Justice Ginsburg's "most difficult challenge in the 1970s was probably convincing elderly male judges of the insidious consequences of sex classifications," whereas it was clear that race classifications were harmful).

[35] 411 U.S. 677, 682 (1973) (plurality opinion).

[36] *Id.* at 684. This language stems from an earlier California Supreme Court decision, which was the first high court to declare sex a suspect classification. Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 541 (Cal. 1971).

[37] *Frontiero*, 411 U.S. at 680.

[38] *Id.* at 688–91.

[39] Kahn v. Shevin, 416 U.S. 351 (1974).

[40] The *Kahn* brief argued that the Florida statute "perpetuates the myth that widows cannot, without assistance, make financial ends meet, but widowers can . . . . One-eyed sex-role thinking of this kind no longer accords with reality for a substantial and growing

In *DeFunis v. Odegaard*, which was set for argument the same day as *Kahn*, a white applicant to the University of Washington Law School challenged the institution's race-based admissions policy.[41] At her oral argument, Ginsburg was asked by Justice Harry Blackmun what implications a ruling in *Kahn*, striking down the gender-based preference, would have on the race-based affirmative action program in the *DeFunis* case.[42] She explained that with regard to *both* race and gender bias, the critical question should be whether the discrimination stems from stereotypical notions, which is impermissible, or from a genuine desire to combat proven patterns of discrimination, which is constitutional.[43] She conceded that subjecting race-based affirmative action to something less than strict scrutiny might be justified, but she cautioned that this approach was dangerous for sex classifications because of "the historic tendency of jurists to rationalize any special treatment of women as benignly in their favor."[44] Applying these principles, she believed the Court should strike down the Florida law, which identified all women as needy when a gender-neutral "need" test was readily available.[45] However, Ginsburg further argued, the Court should uphold the Law School's race-based program, which was "designed to open doors to equal opportunity . . . and to rectify the conspicuous absence of minority groups."[46]

Unfortunately, the argument did not persuade the Court. Ginsburg lost her claim that Florida's law was unconstitutional because it reinforced the needy widow stereotype.[47] Writing the majority opinion, Justice William O. Douglas concluded that the widows' tax exemption rested on a permissible desire to compensate women for the economic disadvantages they suffered, particularly after losing a spouse.[48] He explained that "[g]ender has never been rejected as an impermissible classification in all instances."[49] In the

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portion of the population." Brief for Appellant at 24–25, *Kahn*, 416 U.S. 351 (No. 73–78). Ginsburg conceded, however, that the facts were not compelling because the law involved a tax classification, which has traditionally triggered great deference, and it was a case where it was more difficult to argue that "benign" discrimination ultimately harmed women. Markowitz, *supra* note 25, at 85.

[41] 416 U.S. 312 (1974).

[42] *See* Mayeri, *Race-Sex Analogy*, *supra* note 27, at 1805.

[43] *Id.* at 1802–05.

[44] Transcript of Oral Argument at 6–7, *Kahn*, 416 U.S. 351 (No. 73–78).

[45] *Id.*

[46] Ruth Bader Ginsburg & Wendy Webster Williams, *Court Architect of Gender Equality: Setting a Firm Foundation for the Equal Stature of Men and Women*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 185, 192 (E. Joshua Rosenkranz & Bernard Schwartz, eds., 1997).

[47] This was the only Supreme Court case (out of six) argued by Ginsburg that she lost. CAMPBELL, *supra* note 29, at 64. In dissent, Justice Byron White agreed with Ginsburg that this law presumed that all widows were more economically disadvantaged than all widowers, thus reinforcing an impermissible gender stereotype. *Kahn*, 416 U.S. at 361 (White, J., dissenting).

[48] *Kahn*, 416 U.S. at 355.

[49] *Id.* at 356 n.10 (citation omitted). Indeed, Justice Douglas cited the original "Brandeis brief" in *Muller v. Oregon,* 208 U.S. 412, 419–420 n.1 (1908), as having acknowl-

meantime, the challenge to the race-based affirmative action program in *DeFunis* was dismissed as moot.[50] Justice Douglas, however, dissented from the finding of mootness and argued that race was *not* a permissible criterion for differentiating between applicants for university admission.[51] Read together, Douglas' views in these two cases foreshadowed the current jurisprudence that women may more readily be seen as appropriate objects of "benign" discrimination, whereas all race-based preferences are viewed as invidious.

The *Kahn*/*DeFunis* race/sex confrontation led Ginsburg to acknowledge that while the goal of both race- and gender-based remedial legislation should be "genuine neutrality," "deeply entrenched discriminatory patterns . . . entail[ ] recognition that generators of race and sex discrimination are different," and thus neither group is "well served by lumping their problems together."[52]

Two years later, in 1976, the Supreme Court officially rejected the race analogy and settled on a less rigorous standard for assessing claims of gender bias. The Court held in *Craig v. Boren* that gender classifications would be subject to intermediate, not strict, scrutiny.[53] Thus, to uphold race-based discrimination, whether benign or invidious, the government must prove a compelling justification and narrowly tailored means.[54] In contrast, sex-based classifications require only proof that the law is fairly and substantially related to the achievement of an important government interest.[55] The significance of this distinction and its ramifications for gender-based affirmative action became apparent one year later.

In 1977, in *Califano v. Webster*,[56] the Court addressed a challenge to a social security provision, in effect from 1956 to 1972, under which female wage earners, for purposes of calculating retirement benefits, could exclude from the computation of their average monthly wage three more lower-earning years than a male wage earner.[57] Unlike laws that penalized women, the Court explained that this provision "was not 'the accidental byproduct of a traditional way of thinking about females,' but rather was deliberately enacted to compensate for particular economic disabilities suffered by women."[58] Applying intermediate scrutiny, the decision emphasized that "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been

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edged the differences between men and women that justify their disparate treatment. *Kahn*, 416 U.S. at 356 n.10.

[50] DeFunis v. Odegaard, 416 U.S. 312, 319–20 (1974). DeFunis was in his last trimester of law school by the time the case reached the Supreme Court. *Id.*

[51] *Id.* at 344 (Douglas, J., dissenting).

[52] Ginsburg, *Gender*, *supra* note 18, at 29.

[53] 429 U.S. 190, 208, 218 (1976).

[54] Richmond v. J.A. Croson, 488 U.S. 469, 486 (1989).

[55] *Craig*, 429 U.S. at 197.

[56] 430 U.S. 313 (1977) (per curiam).

[57] *Id.* at 313–14.

[58] *Id.* at 320 (citation omitted).

recognized as . . . an important governmental objective," thus meeting the intermediate scrutiny standard.[59] Significantly, the Court explained that:

> [w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the women seeking any but the lowest paid jobs. Thus, allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some part of the effect of past discrimination.[60]

The *Webster* decision was critical for two reasons. First, it instructed courts to distinguish between invidious gender discrimination and genuinely remedial action.[61] Second, it held that generalized societal discrimination provided a sufficient justification for gender-based affirmative action.[62] These conclusions were announced by a unanimous Court and have never been repudiated. One year later, four *dissenting* Justices in *Regents of the University of California v. Bakke* contended that these two principles should be applied to uphold a race-based preference for admission to a California medical school.[63] The five Justice majority in *Bakke*, however, voted to strike down the affirmative action program, and Justice Powell explicitly rejected the sex/race parallel, concluding instead that all race-based classifications, whether invidious or benign, must be subject to strict scrutiny analysis.[64] He distinguished gender-based classifications as "less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria," because "[w]ith respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear."[65] Further, he argued that "the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share."[66] Thus, unlike gender-based affirmative action, Justice Powell wrote that societal discrimination, without more, is "too amorphous" a basis for imposing a racially classified remedy.[67]

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[59] *Id.* at 317.

[60] *Id.* at 318 (internal quotation marks and citation omitted). Two years earlier, the Supreme Court upheld a Navy regulation requiring the discharge of men after nine years without a promotion, but allowing women to serve for thirteen years without facing discharge. The Court similarly reasoned that because women had less opportunity for advancement, it was permissible to give them an extended period to achieve the same benchmark. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

[61] *Webster*, 430 U.S. at 317.

[62] *Id.* at 318.

[63] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978) (Brennan, J., dissenting).

[64] *Id.* at 294–99.

[65] *Id.* at 302–03.

[66] *Id.* at 303.

[67] *Id.* at 307 (citation omitted).

Although Justice Powell's opinion in *Bakke* did not muster a majority,[68] the Supreme Court's subsequent decisions solidified the use of strict scrutiny for race-based affirmative action programs and the rejection of societal discrimination as a justification for such programs.[69] In the Court's most recent foray into the affirmative action battle, Chief Justice Roberts asserted in *Parents Involved* that the only way to get past race discrimination is to stop using race as a factor,[70] thus making it apparent that the majority of the Court today has no tolerance for such programs. Further, he emphasized that equal protection mandates that individuals not be treated as members of a racial "or sexual" class.[71]

Where does this leave gender-based affirmative action? Fifteen years ago Justice Stevens criticized the "anomalous result" that affirmative action for women is easier to enact than affirmative action for African-Americans, for whom the equal protection guarantee originally was intended.[72] On the other hand, Ginsburg has questioned why "courts should tolerate official discrimination against women to a greater extent than they tolerate such discrimination against racial and ethnic minorities."[73] Other feminists have argued that heightened analysis of gender preferences may actually be more critical because sex discrimination is more subtle and more elusive than race discrimination.[74] They argue that the difficulty of distinguishing real physical differences from paternalistic classifications that stereotype women mandate greater, not lesser, scrutiny for gender-based affirmative action.[75]

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[68] Four Justices concurred in the judgment only, asserting that the affirmative action program violated Title VI of the Civil Rights Act of 1964, which bars race discrimination by recipients of federal financial assistance; thus, the constitutional question could be avoided. *Bakke*, 438 U.S. at 325–26 (Stevens, J., concurring). The four dissenting Justices argued that intermediate scrutiny provided the proper analysis for "benign" discrimination and that the program survived this standard. *Id.* at 359 (Brennan, J., dissenting).

[69] In *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court invalidated a Richmond, Virginia, set-aside program of public works monies for minority owned businesses. For the first time, a majority of the Court adopted strict scrutiny as the standard for reviewing race-conscious remedial measures. *Id.* at 551 (Marshall, J., dissenting). In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Supreme Court overturned case precedent that subjected congressionally enacted affirmative action to intermediate scrutiny, instead holding that "[a]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 227.

[70] He stated that, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[71] *Id.*; *see also supra* note 11 and accompanying text.

[72] *Adarand*, 515 U.S. at 247 (Stevens, J., dissenting).

[73] *See* Mayeri, *Race-Sex Analogy*, *supra* note 27, at 1842–43 (quoting Justice Ginsburg) (citations omitted); *see also supra* note 44 and accompanying text. However, Ginsburg has also acknowledged the problem of "lumping" the race/gender issues together. *See supra* note 52 and accompanying text.

[74] *See, e.g.,* Nancy Gertner, Bakke *on Affirmative Action for Women: Pedestal or Cage?*, 14 Harv. C.R.-C.L. L. Rev. 173, 179–80 (1979).

[75] *Id.* at 195–96 ("The arguments which Justice Powell uses to justify a less exacting standard of review for sex-based classifications seem rather to justify the opposite result."); Mayeri, *New E.R.A.*, *supra* note 16, at 1251 ("Feminist lawyers had long empha-

Nonetheless, while strict scrutiny has become entrenched as the standard for all racial classifications, the Supreme Court has continued to apply the less rigid intermediate scrutiny standard for gender bias claims.

The Supreme Court's analysis of gender preferences is set out in two cases challenging sex-segregated educational programs. In *Mississippi University for Women v. Hogan*,[76] a male nurse attempted to gain admission to the all-female Mississippi University for Women. The University defended on grounds that the all-female school was intended to remedy past discrimination and, therefore, constituted "educational affirmative action."[77] The Court responded that an all-female nursing school was based on "archaic and stereotypic notions" about "the roles and abilities of males and females" and thus was unconstitutional.[78] The enrollment restriction simply "perpetuate[d] the stereotyped view of nursing as an exclusively woman's job."[79] Significantly, however, the Court recognized that there may be instances where gender-based affirmative action is justified by a truly remedial purpose: "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."[80]

Similarly, in *United States v. Virginia*, Justice Ginsburg asserted that only an "exceedingly persuasive" justification can validate gender bias under an intermediate scrutiny analysis, and thus the male-only policy at the Virginia Military Institute was unconstitutional.[81] However, she reiterated

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sized that as difficult as it was to prove discriminatory intent in the context of racial discrimination, it was virtually impossible to find such evidence in cases of sex discrimination.").

[76] 458 U.S. 718 (1981).

[77] *Id.* at 727.

[78] *Id.* at 725.

[79] *Id.* at 729.

[80] *Id.* at 728.

[81] 518 U.S. 515, 533–34 (1996). Justice Ginsburg used the phrase "exceedingly persuasive justification" several times in the opinion, leading Justice Scalia in dissent to accuse the majority of having ratcheted up the test for gender classifications. *Id.* at 571–72 (Scalia, J., dissenting). However, concurring in *VMI*, Chief Justice Rehnquist suggested that this phrase "is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself." *Id.* at 559 (Rehnquist, C.J., concurring). In actuality, in *VMI*, the Court did not create a new test; rather, the language "exceedingly persuasive justification" had been used to describe intermediate scrutiny in previous decisions. *See, e.g.*, *Hogan*, 458 U.S. at 723–24. Most appellate courts have not read *VMI* as altering the test, as the Court recited the intermediate scrutiny standard while it stated that courts must evaluate whether the proffered justification for a gender classification is "exceedingly persuasive." *See, e.g.*, Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty., 122 F.3d 895, 907–08 (11th Cir. 1997) (reasoning that the Court would not have "overruled *sub silentio* its long line of precedents applying intermediate scrutiny" and thus, "until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective"). *But cf.* Monterey Mech. Co. v. Wilson, 125 F.3d 702, 712 (9th Cir. 1997) (suggesting that *VMI* added a new criterion and thus "[c]lassifications based on sex must be justified by an 'exceedingly persuasive justification,' serve 'important governmental objectives' and the means must be 'substantially

that promoting women's advancement and equal participation in education and the workplace would constitute an "exceedingly persuasive justification."[82] Sex classifications, therefore, are permissible to "compensate women for particular economic disabilities [they have] suffered . . . [that] promot[e] equal employment opportunity . . . [and that] advance full development of the talent and capacities of our Nation's people."[83] However, judges must be careful to distinguish between valid remedial purposes and classifications that "create or perpetuate the legal, social, and economic inferiority of women."[84]

Unlike gender-based educational programs, the Supreme Court has never addressed the constitutional validity of a gender-based affirmative action program in the workplace, although it has confronted a Title VII challenge to such a program. The official text of Title VII does not distinguish gender from race discrimination.[85] In fact, the prohibition on gender discrimination was added when Congressman (and "staunch opponent of all civil rights legislation") Howard Smith suggested the addition, which "stimulated several hours of humorous debate."[86] Because there is no congressional history or statutory text suggesting a different analysis for challenges to race- or gender-based discrimination, it is not surprising that the Court borrowed from a race-based affirmative action case to adjudicate a male's Title VII challenge to the preferential hiring of women.

In the Supreme Court's first Title VII "reverse" race discrimination case, *United Steelworkers v. Weber*,[87] non-minorities challenged an affirma-

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related to the achievement of those objectives.'" (quoting *Virginia*, 518 U.S. at 531, 532)).

Although intermediate scrutiny remains the standard for assessing the validity of gender-based statutory classifications, in *Nguyen v. Immigration & Naturalization Service*, 533 U.S. 53 (2001), the Court, while purportedly imposing this standard, upheld a classification that mandated that U.S. citizen-fathers, but not similarly situated U.S. citizen-mothers, of children born abroad out of wedlock satisfy certain requirements, including legitimation, before the child could acquire citizenship. *Id.* at 59–60. Intermediate scrutiny normally requires an inquiry into the actual government interest and purposes but, as the dissent pointed out, the majority improperly "hypothesizes about the interests served by the statute," and "does not always explain adequately the importance of the interest that it claims to be served by the [statutory] provision." *Id.* at 78–79 (O'Connor, J., dissenting). The dissent also lamented the majority's casual dismissal of "the relevance of available sex-neutral alternatives," which again violated intermediate scrutiny analysis. *Id.* at 79 (O'Connor, J., dissenting). Finally, Justice O'Connor pointed out "the majority, rather than confronting the stereotypical notion that mothers must care for these [illegitimate] children and fathers may ignore them, quietly condones the 'very stereotype the law condemns.'" *Id.* at 92 (O'Connor, J., dissenting) (quoting J.E.B. v. Alabama *ex rel. T.B.*, 511 U.S. 127, 138 (1994)). Ironically, this somewhat watered-down intermediate scrutiny makes it more likely that gender-based affirmative action programs will be upheld.

[82] *Virginia*, 518 U.S. at 531–34.

[83] *Id.* at 533–34 (citations and internal quotation marks omitted).

[84] *Id.*

[85] *See supra* note 7 (discussing the text of Title VII).

[86] Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 Law & Ineq. 163, 163 (1991).

[87] 443 U.S. 193 (1979).

tive action program that set aside job-training slots for African-Americans (fifty percent).[88] Reasoning that Title VII should be interpreted in light of its historic purpose to create substantive race equality, it upheld the program because it was designed to remedy the intentional and systematic exclusion of blacks from traditionally segregated job categories.[89] Eight years later, in *Johnson v. Transportation Agency, Santa Clara, California*,[90] the Court upheld a sex-based affirmative action program using the same analysis.[91] Without distinguishing race from sex-based affirmative action, the Court held that, even though past discrimination by the Agency could not be proved, the program did not violate Title VII because it was intended to remedy the historic underrepresentation of women in roadwork positions.[92] Further, the program was flexible and temporary and did not "unnecessarily trammel male employees' rights," and thus the male challenger could not meet his burden of establishing its invalidity.[93]

Justice White, in dissent, contended that the Court in *Johnson* went beyond *Weber* in permitting remedial action simply because the job category had been traditionally segregated, without having shown any intentional exclusion of women.[94] Justice Scalia similarly asserted that the job categories at issue were not "segregated" as a result of "conscious, exclusionary discrimination;" rather, "because of longstanding social attitudes, it has not been regarded *by women themselves* as desirable work."[95] Both believed that the law should not condone "reverse" discrimination as a way to alter societal norms. Johnson could have also brought an equal protection challenge because his employer was a government agency, but he did not do so, and the Court did not seize this opportunity to clarify the constitutional race-sex anomaly.

III. The Circuit Split on the Race/Gender Conundrum

The incongruity in the Supreme Court's treatment of challenges to race-based and gender-based preference programs under the Constitution has cre-

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[88] *Id.* at 197.

[89] *Id.*

[90] 480 U.S. 616 (1987).

[91] *Id.* at 642.

[92] *Id.* at 637. Writing for a plurality, Justice Brennan maintained that voluntary affirmative action was justified to address a "manifest imbalance," *id.* at 632, whereas Justice Stevens, concurring, would give employers even greater leeway to achieve "forward-looking" diversity in the workplace. *Id.* at 647 (Stevens, J., concurring).

[93] *Id.* at 617.

[94] *Id.* at 657 (White, J., dissenting).

[95] *Id.* at 667–68 (Scalia, J., dissenting) (emphasis in original); *see also* E.E.O.C. v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1307 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (adopting a historian's evidence that the statistical underrepresentation of women in commission sales positions was due to women's traditional preferences, including their reluctance to work irregular hours and their discomfort with the stress of competitive pay structures, and not to discrimination attributable to Sears).

ated confusion and disagreement in the appellate courts. Some circuits have chosen to apply strict scrutiny across the board when assessing the validity of affirmative action programs enacted by government entities. Others hold that gender-based affirmative action is subject only to intermediate scrutiny, whereas a couple of circuits remain on the fence, awaiting Supreme Court guidance on the question. This Part examines and critiques the rationale of those circuits choosing strict, as opposed to intermediate, scrutiny and explores the significant differences between the application of these two standards in adjudicating the validity of affirmative action programs.

The Sixth Circuit and the Federal Circuit have adopted the strict scrutiny test for both race and gender-based affirmative action programs. The Sixth Circuit initially purported to follow the dual approach—a Michigan law setting aside a portion of state contracts for minority (MBE) and women (WBE) business enterprises was held unconstitutional because the state failed to establish a compelling interest in purging present effects of alleged past race discrimination *and* it failed to show that the gender preference was substantially related to an important government interest.[96] The court acknowledged that "a less stringent judicial standard of review" applied for gender-based classifications.[97] However, it also emphasized that "general assertions of societal discrimination are insufficient to satisfy [the government's] burden absent some indication that the 'members of the gender benefited by the classification actually suffer[ed] a disadvantage related to the classification.'"[98] The gender-based classification was invalid because the state presented no evidence that WBEs suffered a disadvantage in competing for state contracts.[99]

The Sixth Circuit, unlike the Supreme Court in *Johnson*,[100] failed to recognize that the stark statistical underrepresentation of women-owned businesses demonstrates "disadvantage," which stems from a long history of gender stereotyping that depicts women as incompetent.[101] Further, it ignored *Webster*'s admonition that remedying past societal discrimination is a sufficient justification under intermediate scrutiny.[102] The Supreme Court,

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[96] Mich. Rd. Builders Ass'n, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987), *summarily aff'd*, 489 U.S. 1061 (1989).

[97] *Id.* at 595.

[98] *Id.* (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1981)).

[99] *Id.*

[100] Johnson v. Transp. Agency, 480 U.S. 616 (1987).

[101] *See, e.g.*, Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 617–22 (2007) (exploring social science data demonstrating that subconscious or "cognitive" bias that women are less competent leads to women being held to higher standards, female resumes being evaluated less favorably, and women internalizing the stereotypes and viewing themselves as less qualified for promotions or leadership positions).

[102] Califano v. Webster, 430 U.S. 313, 317 (1977); *see supra* note 62 and accompanying text.

nonetheless, summarily affirmed the Sixth Circuit ruling,[103] leading one commentator to suggest that after this decision "only the foolhardy public entity would continue doing business as usual in the field of set-aside programs for WBEs."[104]

The comment proved to be prophetic, at least in the Sixth Circuit. After the Supreme Court solidified the strict scrutiny standard for race-based affirmative action in *Croson*,[105] the Sixth Circuit ruled that strict scrutiny was also the required test for assessing the constitutional validity of gender preferences.[106] Moreover, at least in Michigan, gender-based, as well as race-based, affirmative action programs are now prohibited by a state constitutional amendment.[107] Similarly, the Federal Circuit, in a 2002 case, held that gender- and minority-based preferential treatment by the U.S. Air Force in selecting officers for involuntary separation must be subject to strict scrutiny.[108]

In contrast, decisions from the Third,[109] Fifth,[110] Ninth,[111] Tenth,[112] and Eleventh Circuits[113] have specifically rejected the use of strict scrutiny for

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[103] Mich. Rd. Builders Ass'n, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987), *summarily aff'd*, 489 U.S. 1061 (1989).

[104] Ronald L. Taylor, *The Equal Protection Dilemma of Voluntary State and Local Set-Aside Programs for Minorities and Women*, 27 Hous. L. Rev. 45, 68 (1990).

[105] *See supra* note 69.

[106] *See* Brunet v. City of Columbus, 1 F.3d 390, 404 (6th Cir. 1993) (holding that after *Croson* all gender preferences are subject to strict scrutiny); Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989) ("In order for a race or sex based remedial measure to withstand scrutiny under the fourteenth amendment there must first be some showing of prior discrimination by the governmental entity involved, and second, the remedy adopted by the state must be narrowly tailored to achieve the goal of righting the prior discrimination.").

[107] Mich. Const., art. I, § 26. Other states adopting similar bans are discussed *infra* notes 223–26 and accompanying text.

[108] Berkley v. United States, 287 F.3d 1076, 1085 (Fed. Cir. 2002) (reasoning that if plaintiffs could show preferential treatment, strict scrutiny would apply to both the race and gender classifications).

[109] Contractors Ass'n of E. Pa. v. City of Phila., 6 F.3d 990, 1001 (3d Cir. 1993) ("[W]e agree with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference.").

[110] Dallas Fire Fighters Ass'n v. City of Dall., 150 F.3d 438, 441–42 (5th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999) ("Applying . . . intermediate scrutiny analysis applicable to gender-based affirmative action, we nonetheless find the gender-based promotions unconstitutional.").

[111] W. States Paving Co. v. Wash. Dep't of Transp., 407 F.3d 983, 990 n.6 (9th Cir. 2005) (indicating that "[s]ex-based classifications must be both supported by an 'exceedingly persuasive justification' and substantially related to the achievement of that underlying objective"); Monterey Mech. Co. v. Wilson, 125 F.3d 702, 712–13 (9th Cir. 1997) (stating that gender-based preferential programs must be justified by an "'exceedingly persuasive justification'" and must "serve 'important governmental objectives'" through means that are "'substantially related to the achievement of those objectives"').

[112] Concrete Works of Colo., Inc. v. City & Cnty. of Denver, 321 F.3d 950, 957–60 (10th Cir. 2003) (holding that whereas the Denver ordinance giving preference to minorities on construction and design contracts must be subject to strict scrutiny, the preference for women would be evaluated under intermediate scrutiny).

[113] Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty., 122 F.3d 895, 907–09 (11th Cir. 1997) (rejecting use of the strong basis in evidence test that governs

assessing challenges to gender-based affirmative action programs. These courts recognize that under intermediate scrutiny a lesser evidentiary burden is imposed. For example, the Ninth Circuit has invoked *Webster* for the principle that reducing disparity between the economic condition of men and women, caused by a long history of discrimination against women, is a sufficiently important government objective to justify preferential treatment.[114] Similarly, the Eleventh Circuit, while lamenting the Supreme Court's failure to provide guidance as to the appropriate evidentiary burden under intermediate scrutiny, as well as the "dearth of guidance in the reported decisions of other federal appellate courts," has concluded that the "strong basis in evidence" requirement for race-based affirmative action programs does not apply to gender-based programs.[115] The Tenth Circuit has made the same observation, acknowledging "the evidentiary basis necessary to demonstrate Denver's important government interest may be something less than the 'strong basis in evidence' required to justify race-based remedial measures."[116] Thus, although the government must point to some past discrimination against women, these circuits have all reasoned that affirmative action may be upheld even absent proof that the government entity adopting the program necessarily discriminated against women.[117] Instead, as the Eleventh Circuit explains, the "inquiry turns on whether there is evidence of past discrimination in the economic sphere at which the affirmative action program is directed."[118]

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race preferences and instead invoking *Webster* to justify use of an intermediate scrutiny analysis).

[114] Coral Constr. Co. v. King Cnty., 941 F.2d 910, 932 (9th Cir. 1991).

[115] *Eng'g Contractors Ass'n*, 122 F.3d at 908–11; *see also* Danskine v. Miami Dade Fire Dep't, 253 F.3d 1288, 1294 (11th Cir. 2001) (clarifying that a gender-conscious affirmative action program "can rest safely on something less than the 'strong basis in evidence' required" in race-conscious programs).

[116] *Concrete Works*, 321 F.3d at 959–60 (holding that Denver introduced evidence that sufficiently linked the City to gender discrimination in the local construction industry); *see also* Peter Lurie, Comment, *The Law as They Found It: Disentangling Gender-Based Affirmative Action from* Croson, 59 U. CHI. L. REV. 1563, 1584–89 (1999) (concluding that "[t]he factual predicate required cannot be equal to that needed to support a racial classification" because "[c]oupling a *Croson*-style factual requirement with intermediate scrutiny disingenuously transforms [intermediate scrutiny] into strict scrutiny").

[117] *See, e.g.*, Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1580 (11th Cir. 1994) ("Under the intermediate scrutiny test, a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself. One of the distinguishing features of intermediate scrutiny is that, unlike strict scrutiny, the government interest prong of the inquiry can be satisfied by a showing of societal discrimination in the relevant economic sector.")*; see also Coral Constr. Co.*, 941 F.2d at 932 ("Unlike the strict standard of review applied to race-conscious programs, intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy.").

[118] *Eng'g Contractors Ass'n*, 122 F.3d at 910 (quoting *Ensley Branch*, 31 F.3d at 1581); *see also* Fla. A.G.C. Council, Inc. v. Florida, 303 F. Supp. 2d 1307, 1316 n.9 (N.D. Fla. 2004) (quoting the standard from *Engineering Contractors* that gender-conscious affirmative action programs need only be based on "evidence of past discrimination in the economic sphere at which the affirmative action program is directed," but holding that the Council's program could not withstand even this more lenient standard).

In addition, under intermediate scrutiny, the program need only be "substantially related" to the goal of redressing the effects of prior discrimination, and, contrary to strict scrutiny, this does not require that the numerical goals be closely tied to the proportion of qualified women in the market.[119] Further, because there is no requirement that gender classifications be "narrowly tailored," the preference may extend to some fields where women were not disadvantaged, provided that, overall, the gender benefitted actually suffered a disadvantage.[120]

Other courts have observed that, although government should first look to gender-neutral alternatives, a gender-conscious affirmative action program need not be the "last resort"; rather, it suffices that the program is "a product of analysis rather than a stereotyped reaction based on habit."[121] Although conceding that this "makes it easier for a legislature to enact gender-based relief over race-based relief, even though blacks have suffered more egregious discrimination over time," the Ninth Circuit has acknowledged that intermediate scrutiny is the standard for the Ninth Circuit "if not of the land."[122]

The Seventh Circuit position is more enigmatic. One decision suggested that use of intermediate scrutiny was justified because "it can be argued that if sex discrimination is not so serious a wrong as racial discrimination we need not worry about confining its use to the remedial setting."[123] However, the county defendant in that case did not specifically argue for a different standard for minority and women's set-aside programs,[124] and, in subsequent cases, courts in the Seventh Circuit have applied strict scrutiny to both minority and gender preferences based on defendant's similar failure to request a different analysis of the two.[125] The district courts

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[119] *Eng'g Contractors Ass'n*, 122 F.3d at 929 (citations omitted).

[120] *Coral Constr. Co.*, 941 F.2d at 932 (holding that King County's preference for women was justified even if it included women in all industries contracting with the county); Associated Gen. Contractors of Cal. v. City & Cnty. of S. F., 813 F.2d 922, 941–42 (9th Cir. 1987) (holding that although broad preferences can reinforce harmful stereotypes, they may still be upheld because, unlike racial preferences, there is no requirement that they be "narrowly" tailored to the government's objective).

[121] *Eng'g Contractors Ass'n*, 122 F.3d at 910 (quoting *Contractors Ass'n of E. Pa.*, 6 F.3d at 1001).

[122] *Coral Constr. Co.*, 941 F.2d at 931; *see also* Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny for Gender Discrimination*, 6 SETON HALL CONST. L.J. 953, 961–62 (1996) (noting the further anomaly that if gender-based affirmative action programs are analyzed under strict scrutiny, "it will be easier for governments to discriminate against women than to remedy discrimination against them").

[123] Milwaukee Cnty. Pavers Ass'n v. Fiedler, 922 F.2d 419, 422 (7th Cir. 1991), *cert. denied*, 500 U.S. 954 (1991).

[124] *Id.* The Court assumed that *Croson* applied to gender-based affirmative action because the state failed to argue that it did not, but it acknowledged "*Croson* is about favoritism toward racial and ethnic groups, not about favoritism toward women." *Id.*

[125] N. Contracting, Inc. v. Illinois, 473 F.3d 715, 720 n.3 (7th Cir. 2007) (noting that "the Supreme Court has not made clear whether a more permissive standard applies to programs . . . which . . . involve gender classifications," but applying strict scrutiny to the

in the Seventh Court have gone both ways, and the issue remains unresolved.[126]

The Second Circuit has not weighed in on the issue. In *Harrison and Burrowes Bridge Constructors, Inc. v. Cuomo*,[127] the court recognized the circuit split and acknowledged that "*Croson* may not apply to women-based enterprise programs," but, ultimately, it stated that "the appropriate standard of review concerning gender-based set-asides remains unclear."[128] However, a district court in the Second Circuit held in 2006 that, because nothing in the Supreme Court's decision in *Croson* suggested an intent to alter its treatment of gender classifications, "intermediate scrutiny continues to apply to gender-based affirmative-action plans."[129] This was significant in this case because the court admitted that application of strict, as opposed to intermediate, scrutiny would be outcome determinative.[130] The preference involved increased layoff protection for women, including non-victims, which would not have survived strict scrutiny, but the court held that the program met intermediate scrutiny analysis.[131]

As these cases demonstrate, the differences between strict and intermediate scrutiny of affirmative action programs are significant. First, under intermediate scrutiny, the government need only show past societal or general discrimination "in an economic sphere"—not that it has engaged in discrimination itself. Second, there is no requirement of a "strong basis in evidence" that remedial action is warranted. Third, the program need not be a "last resort" measure or narrowly tailored in order to withstand intermediate scrutiny. It suffices that the preference is substantially related to an important government interest.[132]

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entire program because the county failed to argue for a different standard); *see also* Builders Ass'n of Greater Chi. v. Cnty. of Cook, 256 F.3d 642, 645 (7th Cir. 2001).

[126] *Compare* Builders Ass'n of Greater Chi. v. City of Chi., 298 F. Supp. 2d 725, 739–40 (N.D. Ill. 2005) (applying strict scrutiny to invalidate an affirmative action program benefiting both minorities and women because it was not "narrowly tailored to remedy past discrimination"), *with* Builders Ass'n of Greater Chi. v. Cnty. of Cook, 123 F. Supp. 2d 1087, 1092–93, 1116 (N.D. Ill. 2000) (invalidating county ordinance because it did not meet the "exceedingly persuasive" standard for a gender-based affirmative action program).

[127] 981 F.2d 50 (2d Cir. 1992).

[128] *Id.* at 62.

[129] United States v. N.Y. City Bd. of Educ., 448 F. Supp. 2d 397, 441–43 (E.D.N.Y. 2006).

[130] *Id.* at 442.

[131] *Id.* at 442–43.

[132] It should be noted that in many cases the gender-based affirmative action programs failed to meet even intermediate scrutiny. *See* W. States Paving Co. v. Wash. Dep't of Transp., 407 F.3d 983, 990 n.6 (9th Cir. 2005) (holding that, while intermediate, rather than strict, scrutiny applies to gender classifications, the gender-based preference expressed in the Transportation Equity Act for the Twenty-First Century violated even this lesser standard); Dall. Fire Fighters Ass'n v. City of Dall., 150 F.3d 438, 442 (5th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999) (reasoning that the government failed to present any evidence of discrimination either by the Fire Department or by the industry in general and thus failed to meet intermediate scrutiny); Monterey Mech. Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997) (holding that because the state made no attempt in its

IV. Analogy to Race-Based Affirmative Action

It is not surprising that the circuits are split on how to deal with the race/sex anomaly. Giving greater deference to gender-based over race-based remedial programs appears to be counterintuitive. The Equal Protection Clause was adopted and ratified in order to guarantee equal treatment of African-Americans, not women, and its goal was to fully emancipate and to elevate the newly-freed slaves to the same position as that occupied by whites.[133] Under an antisubordination interpretation of equality, race-based affirmative action that strives to eliminate the subordinate status of blacks advances the purposes of the Reconstruction Amendments.[134] Yet, the Court has adopted a strict anticlassification interpretation of the Equal Protection Clause for all race classifications, while permitting gender classifications that seek to reduce "the disparity in economic condition between men and

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legislative findings to justify either the ethnic or the sex discrimination imposed by its plan, "we do not reach the question whether a more tolerant constitutional regime for sex discrimination would permit the part of the statute favoring women owned businesses to survive constitutional analysis if the part favoring minority businesses does not"); *see also* Fla. A.G.C. Council, Inc. v. Florida, 303 F. Supp. 2d 1307, 1316 n.9 (N.D. Fla. 2004) (holding that the Council's gender preference could not withstand even the more lenient standard); Saunders v. White, 191 F. Supp. 95, 135–37 (D.D.C. 2002) (rejecting strong basis in evidence test, but ultimately holding that the Army's gender preference was not supported by sufficient "probative" evidence to demonstrate that it was "a product of analysis rather than a stereotyped reaction based on habit") (citations omitted). Nonetheless, it is well recognized that "[t]he choice between strict and intermediate scrutiny is quite significant in the context of affirmative action, as it is much easier to justify an affirmative action program under intermediate scrutiny than strict scrutiny." Jason M. Skaggs, Comment, *Justifying Gender-Based Affirmative Action Under* U.S. v. Virginia*'s "Exceedingly Persuasive Justification" Standard*, 86 Cal. L. Rev. 1169, 1176 (1998).

[133] *See* Pamela S. Karlan, *What Can* Brown *Do for You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 Duke L.J. 1049, 1055 (2009) (acknowledging that "the first opinions construing the Fourteenth Amendment had treated it as a prohibition on racial subordination and had recognized its aspiration that blacks become full members of civic society").

[134] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 830 (2007) (Breyer, J., dissenting) (asserting that the Equal Protection Clause is directed at laws that perpetuate the historical exclusion of racial groups and that there is a "constitutional asymmetry" between government action that "seeks to *exclude* and that which seeks to *include* members of minority races"); *see also* Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and* United Steelworkers v. Weber, 95 Ethics 86, 89 (1984) (emphasizing the difference between the long history of racism and discrimination against minorities and the similar absence of any history of persecution of whites, and noting that the achievement of social equality mandates affirmative action because of the huge continuing disparities between blacks and whites in education, employment, and public contracting); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470, 1472–73 (2004) (lamenting that "the anticlassification theory signifies [a] . . . repudiation of . . . the antisubordination principle: the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups").

women."[135] It is difficult to justify use of an antisubordination principle when addressing gender-based affirmative action, while subjecting race-based affirmative action to an anticlassification strict scrutiny analysis.

In addition to being contrary to history, there appears to be little justification for the race/gender anomaly. The legal and policy arguments for and against affirmative action, whether race- or gender-based, are quite similar; yet the classifications are treated very differently. The Supreme Court has recognized only two justifications as sufficiently compelling to uphold race-based affirmative action: the remedial purpose rationale and the diversity-in-education rationale.[136] This Part explores the application of these justifications to gender-based affirmative action. Then, it examines and compares the arguments advanced against the preferential treatment of racial minorities and women.

A. Remedial Purpose as a Justification for Affirmative Action

Although the Supreme Court has accepted the idea that remedying past discrimination may serve as a compelling justification for race-based affirmative action, in *Richmond v. J.A. Croson Company*[137] it made it clear that only past "identified" discrimination will suffice—if the entity adopting the affirmative action program has not participated directly or indirectly in past race discrimination, its program will be held invalid.[138] Further, as demonstrated in *Croson*, even stark statistical underrepresentation of a minority group in receiving government contracts does not provide the "strong basis in evidence" necessary to warrant remedial action.[139]

In sharp contrast, the Supreme Court in 1977 in *Califano v. Webster* reasoned that past societal discrimination provides a sufficient justification for gender-based preferences,[140] and, as discussed, many appellate courts continue to adhere to this principle.[141] If anything, the history of invidious discrimination against blacks renders the remedial rationale considerably stronger for race-based affirmative action than for gender-based affirmative action, and, yet, the Court permits only gender-based, not race-based, affirmative action as a remedy for societal discrimination.[142] Justice Ginsburg has highlighted this incongruence. In her dissent in *Adarand*, she cites the volu-

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[135] Califano v. Webster, 430 U.S. 313, 317–318 (1977); *see supra* notes 59–60 and accompanying text.

[136] *See infra* notes and text 137–139, 166–168.

[137] 488 U.S. 469 (1989).

[138] *Id.* at 505.

[139] *Id.* at 500. Data showed that although Richmond's population was fifty percent minority, only .67% of the city's prime construction contracts were awarded to minority-owned businesses. *Id.* at 499.

[140] 430 U.S. 313 (1977); *see supra* notes 56–62 and accompanying text.

[141] *See supra* notes 114–118 and accompanying text.

[142] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (holding that "societal discrimination alone is [in]sufficiently important to justify a racial classification").

minous evidence of continuing societal bias against people of color, including data indicating that racial discrimination today is more powerful than gender bias in many ways.[143]

On the other hand, there is considerable evidence that affirmative action may be necessary to remedy women's continued exclusion from many male-dominated spheres. Statistics confirm that, by the 1990s, jobs were actually more segregated by sex than by race.[144] According to U.S. Department of Labor statistics from the mid-1990s, "6 out of 10 women . . . [were] . . . employed in occupations that [were] at least 70% female, while 8 out of 10 men worked in jobs that [were] at least 70% male."[145] In 2008, women still accounted for ninety-five percent of workers in the childcare industry, 84.2% of those in the personal and home aide industry, 89.4% of nurses, and 77.8% of elementary and middle school teachers, all relatively low paying jobs.[146] In contrast, they accounted for only 10.7% of civil engineers, 8.2% of electrical engineers, and 4.6% of aircraft pilots, jobs that pay significantly more.[147] This occupational segregation, referred to as the "pink-collar ghetto," is a key reason for the persistent gender-based wage gap and the undervaluation of women's jobs.[148]

Further, even where women enter male-dominated spheres, the "glass ceiling" has proven to be impervious. As one broadcaster observed, "It's been over 20 years since the *Wall Street Journal* first coined the phrase 'glass ceiling,' yet today only 12 of all Fortune 500 companies are run by a female CEO and the average woman still makes 80 cents for every dollar a man makes."[149] Almost forty percent of corporations in Fortune 500 compa-

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[143] Adarand Contractors v. Pena, 515 U.S. 200, 273–275 n.4 (1995) (Ginsburg, J., dissenting) (citing a study where white women fared substantially worse than white men in negotiating a price for a car, but black male testers did significantly worse than women); *see also* Grutter v. Bollinger, 539 U.S. 306, 345 (Ginsburg, J., concurring) ("[i]t is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.").

[144] Deborah M. Figart & Peggy Kahn, Contesting the Market: Pay Equity and the Politics of Economic Restructuring 20 (1997); *see also* Samuel Cohn, Race and Gender Discrimination at Work 23–24 (2000) (acknowledging that in the 1980s occupational segregation was more prevalent between the sexes than between the races).

[145] *See* Figart & Kahn, *supra* note 144, at 20.

[146] Jennifer Cheesman Day and Jeffrey Rosenthal, U.S. Census Bureau, Detailed Occupations and Median Earnings: 2008 (2008), http://www.census.gov/hhes/www/ioindex/acs08_detailedoccupations.pdf.

[147] *Id.*

[148] Margaret Hallock, *Pay Equity: Did It Work?*, *in* Squaring Up: Policy Strategies To Raise Women's Incomes in the United States 136, 136–39 (Mary C. King ed., 2001). The concentration of women in low paying jobs appears to be an international phenomenon. *See, e.g.*, Rosalie B. Levinson, *The Meaning of Sexual Equality: A Comparison of the Soviet and American Definitions*, 10 N.Y.L. Sch. J. Int'l & Comp. L. 151, 161–162 (1990) (noting that even though women predominated in the medical profession in the Soviet Union, female physicians earned less than factory workers).

[149] *Want to Return to Your Career?,* MSNBC (May 18, 2007), http://www.msnbc.msn.com/id/18726931. Catalyst data from 2010 reveals that the gender wage gap has not improved and that the percentage of female CEOs hovers around three percent. *See* Cat-

nies have only one female director,[150] and the number of companies with no women board members increased from fifty-nine in 2007 to sixty-six in 2008.[151] Women in management account for only 6.2% of top earners,[152] 13.5% of executive officers, and 15.2% of board seats.[153] Similarly, "[w]omen hold only 24 percent of full professor positions in the U.S." even though "women are obtaining doctoral degrees at record rates."[154]

The question, of course, is whether this data proves discrimination that warrants "remedial" gender-based affirmative action. Justice Scalia and Justice White argued in *Johnson* that it is self-selection, not gender bias, that explains the statistical underrepresentation of women in traditional male jobs, and that, without evidence of "conscious, exclusionary discrimination," reverse gender discrimination cannot be legally justified.[155] Some studies have shown that, although affirmative action efforts of the 1980s and 1990s were successful in opening opportunities for women in professional or managerial jobs, working class women couldn't "envision themselves doing the more 'physically demanding' blue-collar work that the men in their lives did," and many women "preferred to stay in women's jobs due to lack of training or confidence, reluctance to do 'unfeminine' work as a result of years of 'socialization,' and current job satisfaction."[156] Many of these women feared that affirmative action "threaten[ed] their freedom to choose a 'women's job'" and "supported the message . . . that their jobs [were] not valued and that they should change jobs if they want[ed] to earn a decent income."[157]

But this ignores the reality that laws on the books for generations, as well as the policies at state colleges and universities that intentionally discriminated against women and kept them from advancing, are at least partially to blame for women's lack of self-confidence and their inability to envision themselves in higher paid and more prestigious male-dominated positions. The dramatic increase in the number of women in traditional male

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ALYST, INC., U.S. WOMEN IN BUSINESS (2008), http://www.catalyst.org/publication/132/us-women-in-business (last visited Sept. 23, 2010).

[150] DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 102 (2007). Branson notes that where there is only one female director, she is more vulnerable to pressures that inhibit her contribution on those boards. *Id.* at 102–03.

[151] CATALYST, INC., 2008 CATALYST CENSUS OF WOMEN BOARD DIRECTORS OF THE FORTUNE 500 (2008), http://www.catalyst.org/file/242/08_census_wbd_ jan.pdf (last visited Sept. 23, 2010).

[152] CATALYST INC., THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2007) [hereinafter CATALYST INC., THE BOTTOM LINE].

[153] CATALYST, INC., U.S. WOMEN IN BUSINESS, *supra* note 149.

[154] MARTHA S. WEST AND JOHN W. CURTIS, AAUP FACULTY GENDER EQUITY INDICATORS, 4 (2006), http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf.

[155] Johnson v. Transp. Agency, 480 U.S. 616, 638 (1987) (Scalia, J. dissenting); *see also supra* notes 94–95 and accompanying text.

[156] Sacha E. DeLange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement*, 31 N.Y.U. REV. L. & SOC. CHANGE 315, 340 (2007).

[157] *Id.* (internal citations and quotations omitted).

jobs, such as firefighting, police work, law, and medicine belies Justice Scalia's "lacks interest" rationale, as does the exponential growth in the numbers of female athletes, once barriers were eliminated.[158]

Further, there is significant evidence that affirmative action is necessary to get past lingering societal stereotypes, reflected in data that women are still ten times more likely to be responsible for housework and seven times more likely to be responsible for childcare—even among professional men and women.[159] Working mothers suffer most from these stereotypes. It has been documented that "with equal job experiences and resumes mothers are hired 79% less of the time than non-mothers,"[160] and the salary gap for working mothers remains at 78.4% that of men.[161]

The near absence of women in the board room and the proverbial glass ceiling demonstrate that intentional discriminatory attitudes persist,[162] and numerous studies confirm that deeply entrenched stereotypes and subconscious gender bias concerning female incompetence remain significant barriers to women obtaining high management and leadership positions.[163] Reliance on "societal discrimination" to justify gender-based affirmative action programs makes sense because it has been so difficult to identify and prove subconscious gender stereotyping.

However, there is also significant literature on subconscious racial bias, and psychological research, particularly in the employment context, demonstrates that "implicit bias" and racial stereotyping are pervasive.[164] Indeed,

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[158] *See, e.g.*, Danskine v. Miami Dade Fire Dep't, 253 F.3d 1288, 1297 n.6 (11th Cir. 2001) (rejecting the argument that the low number of female applicants was due to their lack of interest in becoming firefighters because the numbers rose dramatically from 1994 to 1997 when the Department began to reach out and demonstrate its "receptiveness to female applicants"); *see also* David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 178–79 (2009) ("Title IX has so transformed the sports and female disconnect that, absent a high level of proof, courts will no longer accept the position, advanced by many schools in the face of a Title IX challenge, that they do not have sports for girls or young women because girls and young women are simply not interested in athletics.").

[159] Paula A. Monopoli, *Why So Slow: A Comparative View of Women's Political Leadership*, 24 MD. J. INT'L L. 155, 162–63 (2009) (citing this data as a major barrier to women assuming leadership positions).

[160] Ruth Martin, *I Don't Want to Live in a Mad Men World!*, MOMSRISING.ORG (Aug. 6, 2010), http://www.momsrising.org/blog/i-dont-want-to-live-in-a-mad-men-world/; *see also* Joan C. Williams & Stephanie Bornstein, *The Jack Pemberton Lecture Series: Caregivers in the Courtroom: The Growing Trend of Family Responsibility Discrimination*, 21 U.S.F. L. REV. 171, 171–72 (2006) (noting the nearly 400% increase in cases involving employers who discriminate against employees based on stereotypes regarding caregiving responsibilities); Kristin Rowe-Finkbeiner, *Here's Why We're Mad*, MOMSRISING.ORG (July 9, 2010), http://www.momsrising.org/blog/heres-why-were-mad/.

[161] U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008 (July 2009), http://www.bls.gov/cps/cpswom2008.pdf.

[162] *See* Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703, 713–714 (2007) (arguing that "old-fashioned gender bias" remains a major obstacle to increasing the number of women in the boardroom).

[163] *See* Rhode, *supra* note 101.

[164] *See, e.g.*, Tristan K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.–C.L. L. REV. 91,

many scholars have argued that race-conscious plans with a "focused objective of decreasing implicit bias" serve a compelling government interest.[165] If there is a remedial justification for gender preferences based on statistical underrepresentation, stereotyping, and subconscious discrimination, surely the same holds true for race-based affirmative action.

B. The Diversity Rationale

The Supreme Court has recognized a diversity justification for race-based classifications in two distinct contexts. First, in higher education, the Court has ruled that student body diversity is a compelling government interest because it promotes better understanding and helps to break down racial stereotypes. Second, the Court has recognized that awarding preferential treatment to minority-owned businesses in licensing broadcast stations will help ensure that a diversity of viewpoints are heard. This section explores these Supreme Court cases and the applicability of these two diversity rationales to gender-based affirmative action.

The Supreme Court in *Grutter* recognized that student body diversity in higher education is a compelling government interest that justifies race-based affirmative action, provided the program does not operate as a strict quota.[166] In reaching her conclusion, Justice O'Connor relied upon amicus briefs submitted by Fortune 500 companies that documented the importance of diversity in developing skills needed in the employment sector.[167] The Court reasoned that diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[168] Diversity for the sake of diversity, however, is not a compelling, or even an important, government interest. Rather, the diversity rationale presupposes positive benefits.

The Supreme Court has never recognized the diversity rationale for gender-based affirmative action, and, in some ways, it may be more difficult to justify. The notion that exposing minority and nonminority students to each other will promote better understanding rings hollow in the context of

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96–97 (2003); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 947–50 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971 (2006); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1056 (2006).

[165] Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1111–12 (2006); *see also* Jolls & Sunstein, *supra* note 164 at 984–85 (arguing that affirmative action, if properly done, can decrease implicit bias).

[166] Grutter v. Bollinger, 539 U.S. 306, 330, 334 (2003).

[167] The Court stated that "[m]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330–31 (citing Brief for Amici Curiae General Motors Corp. at 3–4).

[168] *Id.* at 330.

gender because males have mothers, sisters, female cousins, aunts, and thus have numerous opportunities to interact with women. As to education, Justice Ginsburg conceded, after the *Kahn/Defunis* confrontation, that gender-based affirmative action in education, unlike race-based affirmative action, requires "altering recruitment patterns and eliminating institutional practices that limit or discourage female participation," rather than a *DeFunis*-type special admissions program.[169] Indeed, today there is a strong movement towards sex-segregated education in elementary and secondary public schools,[170] the antithesis of *Brown v. Board of Education*.[171] There is an ongoing debate as to whether sex-segregated public education reinforces gender stereotypes[172] or whether it produces positive results for both male and female students.[173]

On the other hand, the argument that racial diversity breaks down stereotypes and reduces implicit racial bias is equally applicable to gender di-

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[169] Ginsburg, *Gender*, *supra* note 18, at 30.

[170] The number of single-sex public high schools has grown from two in 1995 to ninety-five in 2009, and the number of single-sex classrooms has increased from about a dozen in 2002 to over 360 in 2008. Jennifer Medina, *Boys and Girls Together, Taught Separately in Public School*, N.Y. Times (Mar. 10, 2009), http://www.nytimes.com/2009/03/11/education/11gender.html; Elizabeth Weil, *Teaching to the Testosterone*, N.Y. Times Mag., 38–40 (Mar. 3, 2008), http://web.alfredstate.edu/library/English%20Comp%20Articles%20Spring%202008/Weil%20article.pdf.

[171] Isabelle Katz Pinzler, *Separate but Equal Education in the Context of Gender*, 49 N.Y.L. Sch. L. Rev. 785, 789 (2005) ("*Brown* is never cited by the Supreme Court in discussion of these issues, nor has 'separate but equal' ever been held constitutionally impermissible in the context of sex.").

[172] *See, e.g.*, Cohen, *supra* note 158, at 135–139 (arguing that there has been a rise in single-sex public education based on notions that young males learn differently, they are aggressive, they are distracted by the presence of women, they learn best through competition and sports, and that this movement perpetuates sex stereotyping and thus has negative repercussions); Bill Piatt, *Gender Segregation in the Public Schools: Opportunity, Inequality, or Both*, 11 Scholar 561, 576 (2009) (contending that the benefit of gender segregation in public schools is unclear and urging that the experiment should be rejected unless the benefits clearly outweigh the harm of gender stereotyping).

[173] Kimberley J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 Wm. & Mary L. Rev. 1953, 2034 (2006) ("Considerable deference should be given to the decision of a school district to offer dual, voluntary single-sex schools because these schools are less likely to harm either sex, and the structure of such schools achieves some of the work of intermediate scrutiny."); Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. Rev. 217, 229 (2008) (noting that research demonstrates that girls and boys may perform better in single-sex education classrooms). In response to these studies, the Department of Education enacted regulations to Title IX in October of 2006, which permit voluntary single-sex classes and activities, provided that a "substantially equal" classroom opportunity is available to both genders. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62, 530 (Oct. 25, 2006) (codified as amended at 34 C.F.R. § 106.34(b)(4) (2008)). Further, the No Child Left Behind Act specifically provides that funds "shall be used for innovative assistance programs, which may include . . . programs to provide same-gender schools and classrooms." Pub. L. No. 107-110, 115 Stat. 1425, § 5131 (Jan. 8, 2002).

versity.[174] Once more women are seen in male-dominated occupations and assume leadership positions, notions of lack of ability and incompetence tend to evaporate. The influx of large numbers of women arguably leads to acceptance, tolerance, and mutual respect.[175] The exponential growth in the number of female attorneys, for example, has dispelled the myth canonized by the Supreme Court in 1873, that "the natural and proper timidity and delicacy which belongs to the female sex unfits it" for the occupation of an attorney.[176] However, the disproportionately low number of women who make partnership in law firms demonstrates that implicit, if not explicit, bias still exists.[177] As with race, gender-based affirmative action remains an important tool for combating gender stereotypes and subconscious bias.

In addition, in *Metro Broadcasting, Inc. v. Federal Communications Commission*, the Supreme Court recognized another diversity argument.[178] The Court upheld a federal program that gave preferential treatment to minority-owned businesses in licensing broadcast stations.[179] Applying intermediate, as opposed to strict, scrutiny,[180] the Court accepted the government's argument that racial diversity in licensing creates diversity of viewpoints and programming—a positive value.[181] However, five years later, the Court rejected the more deferential intermediate scrutiny standard for assessing the validity of federal race-conscious programs,[182] and it is doubtful that the current Court would find its diversity rationale sufficiently "compelling" to meet strict scrutiny. Nonetheless, this diversity argument has significant implications for gender classifications.

Several studies by social psychologists and others have documented the importance of ensuring that a female voice is heard on corporate boards and

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[174] *See* Jolls & Sunstein, *supra* note 164, at 984–85 (arguing that increasing population diversity and "the display of positive exemplars" act directly to reduce implicit or subconscious bias, and thus race conscious programs that increase diversity will also reduce this bias).

[175] Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-examination*, 21 YALE J.L. & FEMINISM 297, 335 (2010) (noting that "exposure to individuals from a stigmatized group can have a substantial capacity to curtail implicit bias," and thus male attorneys who routinely see female judges are far less likely to show gender bias); Cynthia Estlund, *Work and Family: How Women's Progress at Work (And Employment Discrimination Law) May Be Transforming the Family*, 21 COMP. LAB. L. & POL'Y J. 467, 487–88 (2000) (arguing that increased inter-gender contact reduces prejudice and stereotyping over time).

[176] Bradwell v. Illinois, 83 U.S. 130, 141 (1873).

[177] Lauren Stiller Rikleen, *Evaluated to (Career) Death*, NAT'L L.J. 50 (Oct. 19, 2009), http://www.law.com/jsp/nlj/legaltimes/PubArticleLT.jsp?id=1202434636560.

[178] 497 U.S. 547 (1990).

[179] *Id.* at 552.

[180] *Id.* at 564–65 (holding that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives substantially related to the achievement of those objectives").

[181] *Id.* at 585.

[182] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that "[f]ederal racial classifications, like those of a State, must serve a compelling government interest, and must be narrowly tailored to further that interest.").

in politics where significant decision-making occurs and policy choices are made. Researchers have found that gender differences may be valuable in corporate governance, bringing a fresh approach to leadership as well as diverse life experiences, including knowledge about key constituencies that enhances the quality of discussion.[183] Social psychologists contend that "[w]omen communicate and make decisions differently than men in ways that may be more compatible with the complexity and uncertainty inherent in turbulent environments" and that "women demonstrate self-sacrificing behaviors more often than men and also are perceived to be more self-sacrificing and 'other-directed' than men."[184] Further, studies indicate that women lawmakers are more willing to work on and support women's issues than their male colleagues.[185]

All of this, of course, rests on the premise that women are different from men—the antithesis of the second wave feminists' argument of the 1960s and 1970s—and it raises the concern of a conservative backlash. Sonia Sotomayor was chastised during her nomination proceedings for having made the comment in a 2001 speech that a wise Latina woman "with the richness of her experiences" might reach a better legal conclusion than a white male, thereby suggesting that minority and/or female judges decide cases differently.[186] As to the gender aspect, Justice Ginsburg also observed after her Supreme Court inauguration that judges inevitably bring their own life experiences to the bench, including those experiences unique to one's

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[183] Joan MacLeod Heminway & Sarah White, *Wanted: Female Corporate Directors*, 29 PACE L. REV. 249, 288–89 (2009); Elizabeth A. Nowicki, *Economic Concerns, Beleaguered Corporations and Women in Corporate Boardrooms*, 30 HAMLINE J. PUB. L. & POL'Y 549, 551–52 n.9 (2009).

[184] Heminway & White, *supra* note 183, at 287 (citations omitted); *see also* CATALYST, INC., THE BOTTOM LINE, *supra* note 152 (asserting that companies with the most women directors outperformed companies with the fewest women directors by roughly fifty percent); Nowicki, *supra* note 183, at 551–52 n.9 (surveying the numerous studies on the impact of female board representation on corporate performance and the scholarly commentary on board diversity).

[185] Nancy Millar, *Envisioning a U.S. Government that Isn't 84% Male: What the United States Can Learn From Sweden, Rwanda, Burundi, and Other Nations*, 62 U. MIAMI L. REV. 129, 130–31 (2007) (citing studies that show that female politicians are more likely to introduce and vote for legislation of interest to women and to be more concerned with feminist issues, and that even non-feminist women in office are more likely to advocate for women's interests than "feminist" men).

[186] In a 2001 speech at the University of California (Berkeley), Sotomayor said: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKLEY LA RAZA L.J. 87, 92 (2002). She further asserted that "our gender and national origins may and will make a difference in our judging." *Id. But see* Dixon, *supra* note 175, at 299 (asserting that, unlike Justice O'Connor and Justice Ginsburg, "[m]ore recently appointed justices are much less likely to have experienced the same degree of discrimination and therefore are also less likely to approach gender discrimination in the same way."); Neil Munro, *Do Gender and Race Matter?*, NAT'L J. MAG., July 11, 2009 (arguing that studies by neuroscientists and political scientists see little evidence that race or gender play much of a role in how judges reach decisions).

gender.[187] This does not make female judges, corporate board members, or politicians more sympathetic to gender concerns, but more empathetic in the sense that they can relate to and better understand the issues being raised.[188]

The value of eliciting the viewpoints of females, with their unique life experiences, has been recognized by many foreign countries. In 2004, Norway instituted a quota to integrate women into corporate leadership.[189] The Corporate Board Quota mandated that all publicly-listed companies have a minimum of forty percent of either gender on their boards by January 1, 2008, or face the penalty of dissolution.[190] Further, the European Community's Amsterdam Treaty, adopted in 1997, specifically endorsed gender-based affirmative action in employment:

> [W]ith a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers.[191]

The purpose of this amendment was to clarify that affirmative action measures should not be viewed as contrary to the EU's gender antidiscrimination provision.[192] The Treaty allows affirmative, or positive (as it is called in Europe), action to facilitate the entry of men and women into jobs in which they are underrepresented and "to remove obstacles, e.g., stereotyping in job selection criteria, that disadvantage women seeking employment."[193]

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[187] *See* Munro, *supra* note 186, at 36 (citing the 1993 speech in which Justice Ginsburg stated, "I also have no doubt that women, like persons of different racial groups and ethnic origins, contribute what a fine jurist, the late Fifth Circuit Judge Alvin Reuben, describes as 'a distinctive medley of views influenced by differences in biology, cultural impact, and life experiences.'").

[188] Before President Obama nominated Sonia Sotomayor, he stated that he was looking for someone who understood that justice is about empathy and not just abstract legal theory, explaining that he viewed "that quality of empathy of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes." *Obama Begins Effort to Find Replacement for Justice Souter on U.S. Supreme Court*, 77 U.S. L. W. 2667, 2668 (May 5, 2009).

[189] Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 56–57 (2009).

[190] *Id.*

[191] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 141, Oct. 2, 1997, 1997 O.J. (C-340).

[192] Article 2(1) of Binding European Council Directive No. 76/207 bars all discrimination "whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status." Council Directive 76/207, art. 1, 2(1), 2002 O.J. (L. 269) 73 (EC) (latest amendment). The Amendment strives for substantive rather than formal equality by recognizing the need for governments to undertake positive efforts on behalf of women. The Treaty of Amsterdam took effect on May 1, 1999.

[193] Thomas Trelogan, Steve Mazurana & Paul Hodapp, *Can't We Enlarge the Blanket and the Bed? A Comparative Analysis of Positive/Affirmative Action in the European*

Although Norway appears to be the only country that has enacted an affirmative action program for corporate governance, many EU and non-EU countries have adopted measures promoting a higher level of political representation for women, and numerous studies indicate that this has made a difference in the kinds of laws that are enacted.[194] For example, in the early 1990s, "India launched a radical political experiment" whereby one-third of the seats in the village governing bodies would be reserved for women.[195] A study showed that female village leaders were more likely to invest public resources in community projects linked to women's concerns, such as education and health.[196] Other studies have similarly documented that female presidents lead differently than male leaders and that they pay greater attention to issues, such as poverty, maternal mortality, and rape and other brutalities of war, that disproportionately affect women.[197]

At the United Nations Fourth World Conference on Women, held in Beijing in 1995, the governments attending unanimously adopted the Beijing Declaration and Platform for Action that specified a minimum quota of thirty percent women in decision-making positions.[198] In response, 101 countries have passed measures that promote women's political representation, including quotas at the political-party and subnational levels, constitutional amendments, and national-election laws.[199] Portugal's Parliament enacted a gender-quota law in August 2006, which dictates that each party's election list for legislative, local, and European elections include at least 33.3% women.[200] Similarly, France passed a 2000 law called Parity, which mandates that political parties present candidate lists consisting of fifty-fifty female-male candidates.[201] This law has had a dramatic effect on local mu-

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Court of Justice and the United States Supreme Court, 28 HASTINGS INT'L & COMP. L. REV. 39, 53 (2004).

[194] Millar, *supra* note 185, at 130–31.

[195] Louise Harmon & Eileen Koufman, *Dazzling the World: A Study of India's Constitutional Amendment Mandating Reservations for Women on Rural Panchayats*, 19 BERKELEY WOMEN'S L.J. 32, 32–33 (2004).

[196] *Id.* at 84–89.

[197] Monopoli, *supra* note 159, at 166–67; *see also* LAURA A. LISWOOD, WOMEN WORLD LEADERS: GREAT POLITICIANS TELL THEIR STORIES 3 (2007) (asserting, based on interviews with women prime ministers and presidents of the world, that women political officials are "more likely than men to bring citizens into the political process, to favor government in public view rather than government behind closed doors, and to be responsive to groups previously denied full access to the policymaking process").

[198] *Security Council Resolution 1325 Annotated and Explained*, U.N. DEV. FUND FOR WOMEN, http://pacific.unifem.org/documents/annotated_1325.pdf (last visited Dec. 3, 2010).

[199] Global Database of Quotas for Women, http://www.quotaproject.org/country.cfm (last visited Sept. 23, 2010). Note that some of the quotas are nonbinding and that in some countries, like Somalia and Liberia, the quotas have been largely ignored. Millar, *supra* note 185, at 138–39.

[200] *Women to Make Up Third of Portugal Elections*, INDEP. ONLINE (Aug. 8, 2006), http://www.iol.co.za/news/world/women-to-make-up-third-of-portugal-elections-1.288611.

[201] Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1146–47 (2006).

nicipal elections where women have obtained near-parity in many positions, and it is hoped that this will result in a larger number of experienced female politicians running for higher office.[202] In Rwanda, where the 2003 constitution mandates a quota to ensure women's representation in their national parliament, women have been elected to 48.8% of the seats in the Rwandan Chamber of Deputies, the highest percentage of women in office in any country.[203] Iraq's constitution requires that twenty-five percent of national assembly members be women, and in the 2010 election, eighty-two female candidates were elected, exceeding the twenty-five percent quota.[204]

In the United States, such political affirmative action is unheard of, even though American women's political representation falls far below the Beijing thirty percent figure.[205] The number of women in U.S. government places the United States at seventy-third in the world.[206] In 2006, it ranked eighty-third in terms of electing women to national legislatures, and by 2008, it had dropped to eighty-fifth place.[207] Women constitute only 16.8% of those in the 111th Congress[208] and 24.3% of those in state legislatures.[209] At the city level, only 17.5% of U.S. cities with populations over 30,000 had female mayors in 2009.[210]

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[202] *Id.* (noting, however, that male politicians have somewhat thwarted the goals of this law by creating new parties or switching party affiliation so that additional men could run for office).

[203] Inter-Parliamentary Union, *Elections in Rwanda Produce Record Result for Women,* World of Parliaments (Dec. 2003), http://www.ipu.org/news-e/12-7.htm.

[204] U.N. Dev. Programme, Programme on Governance in the Arab Region, http://www.undp-pogar.org/countries/elections.asp?cid=6 (last visited Oct. 28, 2010).

[205] In the United States, the only effort at "affirmative action" has been in the charter and bylaws of the U.S. Democratic Party, which states that "the National Convention shall be composed of delegates equally divided between men and women." Democratic Nat'l Comm'n, The Charter & the By-Laws of the Democratic Party of the United States, art. II, § 4 (as amended Oct. 3, 2003), *available at* http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20060119_charter.pdf. When the new rule was added to the charter in 1980, a challenge was brought by a male voter who claimed his rights were violated by the requirement that he must vote for a maximum of four female and four male delegates. The Fourth Circuit rejected his claim in *Bachur v. Democratic National Party*, 836 F.2d 837, 838–39 (4th Cir. 1987), holding that encouraging women's political representation as party delegates served important goals.

[206] Inter-Parliamentary Union, Women in National Parliaments, http://www.ipu.org/wmn-e/classif.htm (last visited Nov. 8, 2009).

[207] Monopoli, *supra* note 159, at 160. This article is the introduction to a symposium that examines many of the reasons for this lag in women's political leadership in our country.

[208] Center for American Women and Politics, Facts on Women in Congress 2009, (Aug. 2010), http://www.cawp.rutgers.edu/fast_facts/levels_of_office/Congress-CurrentFacts.php.

[209] Center for American Women and Politics, Fact Sheet, Women in State Legislative Leadership Positions 2009 (Dec. 2009), http://www.cawp.rutgers.edu/fast_facts/levels_of_office/state_legislature.php.

[210] Center for American Women and Politics, Women Mayors in U.S. Cities 2009 (Aug. 2010), http://www.cawp.rutgers.edu/fast_facts/levels_of_office/LocalWomenMayors.php.

In short, unlike the United States, numerous countries have recognized that diversity in governing positions, whether in business or politics, makes a difference in women's lives. By increasing the female voice, political agendas change and policies that address women's concerns are more likely to be adopted.[211] Further, the courts in EU countries are more likely to uphold gender-based affirmative action programs. Summarizing the differences in affirmative action law in Europe and the United States, scholars suggest that U.S. law is burdened by the fact that it began with race-conscious classifications and suspicion for those classifications, whereas in the European Union the law began with an economic agreement against gender-based equal pay discrimination.[212] The European Court of Justice has "established a permissible goal for positive action based on EC legislation."[213] It does not impose any fault requirement; rather, it suffices that affirmative action serves a legitimate end through proportional means.[214] Thus, while the law in Europe has strengthened the argument for positive action, our country appears to be moving in the opposite direction, leading to the conclusion that compared to U.S. courts, the European court "has made it easier for women to benefit from voluntary gender-based affirmative action programs."[215]

C. The Arguments Against Affirmative Action

Thus far, I have examined the accepted justifications for racial preferences and their application to gender. This section engages in the same comparative analysis of the arguments against affirmative action, namely that it stigmatizes, that it creates hostility, and that it is ineffective and unnecessary, especially in light of the availability of alternative, neutral mechanisms to promote equality.

The core argument against race-based affirmative action is that race preferences stigmatize and create racial hostility. As Justice O'Connor succinctly put it in *Croson*, "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility."[216] The same arguments have been made with regard to gender-

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[211] *See supra* notes 194–197 and accompanying text.

[212] Trelogan, Mazurana & Hodapp, *supra* note 193, at 73–74.

[213] *Id.* at 74.

[214] *Id.*

[215] *Id.* (citations omitted).

[216] Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989). In his concurring opinion in *Adarand,* Justice Scalia similarly stated that: "[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past discrimination in the opposite direction . . . under our Constitution there can be no such thing as either a creditor or a debtor race . . . . To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); *see also* Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting)

based affirmative action. As discussed, Ruth Bader Ginsburg and second wave feminists initially attacked "affirmative action" as hazardous, arguing that laws that purportedly benefited women reinforced the stereotype that women are needier, weaker, and less competent.[217] Justice Ginsburg recently acknowledged that she remains "instinctively suspicious" about remedial legislation because of the long history of protective labor laws in this country, which, while presumably enacted to protect women, actually prevented them from securing higher paid work.[218]

Second, as with race, there is evidence that gender-based affirmative action creates hostility. Scholars have argued that the increase in sexual harassment in the workplace is at least partially attributable to affirmative action programs that mandated that women be allowed to enter male dominated professions.[219] By the late 1980s, at least thirty percent of women who entered previously male blue-collar jobs reported harassment, and the percentage was probably larger in light of the many women who "suffered silently."[220] It is not surprising that those males who believe that they are losing their jobs to women, especially women whom they view as less qualified and there only because of affirmative action, will feel resentment and anger. It is also argued that gender-based preferences have the destructive effect of pitting "the interests of wives against husbands and brothers against sisters."[221]

Third, as with race, there is the belief that gender-based affirmative action is unnecessary because of the large gains women have made in recent years. In particular, it is often lamented by second wave feminists that younger women, because of the successes of the women's movement, do not appreciate the continued pay inequity and glass ceilings, nor do they understand that gender still restricts opportunities.[222] Further, this may not simply be a "generational gap." Statistics show that large numbers of women, young and old, supported recent initiatives in three states that banned gender-based, as well as race-based, affirmative action. Fifty-eight percent of white women supported California's Proposition 209, which outlawed gender as well as race preferences in the state.[223] Similarly, despite NOW's ef-

("When blacks take positions in the highest positions of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement.").

[217] *See supra* Part II.

[218] Ginsburg, *One Hundred Years Later*, *supra* note 22, at 379.

[219] DeLange, *supra* note 156, at 354 (noting that "a serious setback to affirmative action's efforts to integrate the workplace was the hostility of male co-workers to women's presence on 'their turf' and the increased opportunity for sexual harassment.").

[220] *Id.*

[221] *Id.* at 332.

[222] Deborah Siegel, Sisterhood Interrupted: From Radical Women To Grrls Gone Wild (And Why Our Politics Are Still Personal) 162–66 (2007); *see also* Dixon, *supra* note 175, at 299 (arguing that newly appointed female judges who have not themselves been victims of discriminatory treatment are less likely to be sensitive to claims of gender bias).

[223] DeLange, *supra* note 156, at 336–37.

fort to inform women of the continuing need for affirmative action, Washington enacted an analogous initiative.[224] In 2004, women's groups in Michigan spread the word that "women are the most frequent beneficiaries of and will lose most if affirmative action is lost."[225] Nonetheless, their efforts did not stop women from voting for the Michigan Civil Rights Initiative, which banned race and gender-based affirmative action in Michigan education, contracting, and public employment.[226]

Fourth, as with race, many contend that affirmative action is unnecessary because the same goals can be achieved through neutral means.[227] The Supreme Court held in 1979 that "[w]here . . . the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."[228] Many feminists believe that the unique obstacles that prevent women from achieving equality in the workplace may be eliminated through gender-neutral laws, such as those mandating available childcare, prohibiting discrimination against those who take time off to care for children or senior adults, and promoting minimum wage and flex-time arrangements.[229]

A prime example of this gender-neutral approach is the Family and Medical Leave Act (FMLA),[230] which requires employers of fifty or more employees to provide up to twelve weeks of unpaid but job-protected leave to employees, male or female, who are parents of newborns or newly adopted children, or who need to care for a family member who has a seri-

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[224] *Id.* at 337.

[225] *Id.* (citations omitted).

[226] *Id.* at 337–38. It should be noted that some of the proponents of the Michigan Civil Rights Initiative used deceptive practices in order to convince people to vote for it. *Id.* at 338. DeLange contends that during the 1990s, feminists tried to identify women as the primary beneficiary of affirmative action in order to garner their support for race- as well as gender-based preference programs. *Id.* On the other hand, the Right sought to highlight the race aspects, hoping that white women might share a sense of victimization. *Id.* Thus, the approval of the ban on gender-based affirmative action may simply indicate that racism overpowers white women's concern for gender equity, rather than a belief that gender-based affirmative action is no longer necessary.

[227] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007) (arguing that the school districts improperly rejected or failed to show that they even considered race-neutral alternatives); Grutter v. Bollinger, 539 U.S. 306, 339 (2003) (asserting that "narrow tailoring" mandates "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the [institution] seeks.").

[228] Orr v. Orr, 440 U.S. 268, 283 (1979); *but see Nguyen*, discussed *supra* note 81, in which the dissent criticized the majority for casually dismissing the relevance of available sex-neutral alternatives. Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 79 (2001) (O'Connor, J., dissenting).

[229] *See, e.g.,* Mary Jo Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. Rev. 55, 95–102 (1979) (arguing that occupational segregation will not end unless laws address child support and "the way the labor market treats disruptions caused by child care responsibilities.").

[230] 29 U.S.C. § 2612 (2000).

ous health condition.[231] The Act's stated purpose is "to promote the goal of equal employment opportunity for women and men," and "to balance the demands of the workplace with the needs of families."[232] Because Congress recognized that gender stereotypes regarding family leave adversely affect men and women, (i.e., many states provided childcare leave only for women), the Act is written in gender-neutral terms.[233] Justice Ginsburg heralded the FMLA as an example of a fitting prophylactic measure, acknowledging that because her background makes her "instinctively suspicious of women-only protective legislation. Family-friendly legislation . . . is the sounder strategy."[234]

When weighing the costs against the benefits of affirmative action, there is also the controversial question of how effective it has been. Some scholars assert that women, not racial minorities, were the primary beneficiaries of affirmative action in employment.[235] Other commentators, however, have rejected this notion, arguing that "the actual results of affirmative action [for women] belie the rhetoric."[236] Once other variables are taken into account, it is difficult to measure the extent to which the position of women improved as a result of affirmative action, and it is more problematic to proclaim that women were "the biggest gainers" from affirmative action policies.[237] However, it is undeniable that affirmative action opened many doors to women in fields previously closed to them and that women have benefitted from the change in emphasis "from rhetoric to results."[238]

Title IX of the Civil Rights Act of 1972,[239] which was enacted to halt discrimination in vocational education admissions, provides a classic example of the value of affirmative action. Regulations state that "[i]n the ab-

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[231] *Id.* § 2612(a)(1).

[232] *Id.* § 2601(b). As Justice Rehnquist explained in upholding the constitutionality of the Act:

> Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination . . . . Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.

Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736-737 (2003).

[233] *Hibbs*, 538 U.S. at 736–737.

[234] Ginsburg, *One Hundred Years Later*, *supra* note 22, at 379.

[235] Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guess? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 589, 604–605 (2006) (concluding after an exhaustive study that affirmative action plans benefit women far more than black men and that affirmative action has proven to be much more effective than diversity training or mentoring programs in moving women into managerial positions).

[236] Linda M. Blum, Between Feminism and Labor: The Significance of the Comparable Worth Movement 34 (1991).

[237] DeLange, *supra* note 156, at 330 (citations omitted).

[238] *Id.* (citations omitted).

[239] 20 U.S.C. § 1681 *et seq* (2006).

sence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of the conditions which resulted in limited participation therein by persons of a particular sex."[240] Today women are close to outnumbering men in professional school enrollment,[241] and the number of women participating in leadership-building athletics has skyrocketed.[242] Title IX's mandate of substantive equality has opened doors to women and has dispelled the myth that women lack the interest or the ability to aggressively compete on athletic teams.[243] However, data also shows that the number of female head coaches of male teams has stagnated at less than three percent, that sixty-eight percent of the "new" head coaching jobs for women's teams have been taken by men, and that the number of programs led by a female athletic director has actually declined significantly since 1972 as departments merged and women were demoted to assistant or associate directors, thus indicating that biases and irrelevant myths persist.[244]

In short, the arguments against race-based affirmative action apply equally to gender-based affirmative action. There is evidence that affirmative action reinforces stereotypical thinking that women are weaker, less intelligent, and inferior. There is evidence that gender-based affirmative action triggers hostility towards women. Further, as with race-based discrimination, there are arguably gender-neutral alternatives that can eliminate some obstacles and achieve some of the same goals as affirmative action. However, there is also evidence that affirmative action, at least in some spheres, may be transformative, and that it remains an effective and necessary tool in overcoming stereotyping and subconscious bias.

V. Conclusion

Women have always been ambivalent as to how to strike the balance between the positive and negative effects of gender-based affirmative action. Second wave feminists feared that application of a lesser test for analyzing gender preferences would mean that gender discrimination would be taken

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[240] 34 C.F.R. § 106.3(b) (2007).

[241] *See, e.g.*, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Participation in Education in* The Conditions of Education 30 (2007) (showing that in 2005, 167,000 women enrolled in professional programs compared with 170,000 men, with female enrollment projected to exceed male enrollment for the first time in 2006).

[242] *See* Deborah Brake, *Revisiting Title IX's Legacy: Moving Beyond the Three-Part Test*, 12 Am U. J. Gender Soc. Pol'y & L. 453, 458 (2004) (noting that girls who participate in sports "have higher self-esteem, less risk of depression . . . and perform better in school"); Linda Jean Carpenter & R. Vivian Acosta, *Title IX Two for One: A Starter Kit of the Law and a Snapshot of Title IX's Impact*, 55 Clev. St. L. Rev. 503, 508–10 (2007) (noting that since passage of Title IX the number of female intercollegiate varsity athletes has increased from 16,000 to 180,000, and the number of women's teams has grown from 2.5 per school to 8.65, a four-fold increase).

[243] *See* Cohen, *supra* note 158.

[244] Carpenter & Acosta, *supra* note 242, at 510–11.

less seriously than race discrimination.[245] In her battle for gender equality, Ginsburg argued that laws that favor women should be closely scrutinized to ensure that they are not the result of and will not reify gender stereotypes.[246] After Justice Powell rejected the race/sex analogy in *Bakke*, Ginsburg criticized the resulting "anomaly" and expressed concern that gender-based preferential treatment may be more problematic than race-based preferences because judges are more likely to mislabel legal favors based on gender stereotypes as legitimate.[247] However, after the Supreme Court adopted a rigid strict scrutiny analysis for race-based affirmative action, which mandates evidence of intentional discrimination by identifiable wrongdoers, Ginsburg, like other feminists, understood that application of this stringent standard could be even more fatal to gender preferences because of the subtle, elusive nature of gender bias. Thus, arguing for the same treatment of race and gender became dangerous.

This Article contends that the race/gender anomaly is historically and logically unjustifiable, but also that the incongruity should not be resolved by subjecting gender-based affirmative action to the modern Court's rigid strict scrutiny analysis. This fails to recognize the continuing need for and the transformative potential of gender and race preferences in the struggle for real, substantive equality. Rather, the anomaly should be eliminated by rejecting strict scrutiny and instead applying the antisubordination principle, recognized in the Supreme Court's gender-preference cases, to race-based affirmative action. This would acknowledge, as Justice Ginsburg continues to forcefully argue, that carefully designed programs, which strive to ameliorate the subordinate status of women and racial minorities, do not violate the Equal Protection Clause.[248]

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[245] *See supra* notes 73–75 and accompanying text.
[246] *See supra* notes 31–32 and accompanying text.
[247] *See supra* note 73 and accompanying text.
[248] *See* Adarand Constructors v. Pena, 515 U.S. 200, 271–76 (1995) (Ginsburg, J., dissenting).