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Reversal of Fortune: The Inapposite Standards Applied to Remedial Race-, Gender-, and Orientation- Based Classifications

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I. INTRODUCTION

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.[1]

"The majority's concept of 'consistency' ignores a difference, fundamental to the idea of equal protection, between oppression and assistance."[2]

In the famed *In re Marriage Cases*, former chief justice of the California Supreme Court Ronald George had to address whether "the failure to designate the official relationship of same-sex couples as marriage violate[d] the California Constitution."[3] Central to his determination was whether to apply rational basis review, the traditional standard applied in sexual orientation-based discrimination cases,[4] or a heightened, more exacting form of scrutiny. The level of scrutiny was important because, as Judge Dolores Sloviter opined, "it is often how the question is framed that determines [how] the answer . . . is received."[5]

1. United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966), *reh'g granted*, 380 F.2d 385 (5th Cir. 1967).
2. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 264 (1995) (Stevens, J., dissenting).
3. *In re* Marriage Cases, 183 P.3d 384, 398 (Cal. 2008).
4. *See infra* section III.C.
5. Taxman v. Bd. of Educ., 91 F.3d 1547, 1567 (3d Cir. 1996) (Sloviter, C.J., dissenting).

Justice George's decision to apply strict scrutiny to sexual orientation-based classifications[6] left a temporary though certainly indelible mark on equal protection challenges going forward. The decision has lasting and readily apparent consequences. While the lesbian, gay, bisexual, and transgender (LGBT) community can temporarily rejoice at its new-found status as an inherently suspect class within the confines of the Equal Protection Clause (and its attendant protections), as the law stands, this community is now at a serious disadvantage should California seek to implement any sort of remedial legislation to rectify past discrimination, to further integrate the community into historically off-limits positions, or to consider a prospective student's LGBT status as a positive factor in the university admissions process.

This is because courts almost uniformly apply the same level of scrutiny to legislation that makes racial, gender, or sexual orientation-based classifications regardless of the legislation's benign or invidious purpose.[7] Thus, the same court scrutinizing odious legislation (blacks may not gain admittance to state universities) would be equally as skeptical toward legislation that sought to rectify that discrimination (schools may consider race as a positive factor in university admissions on the basis of, inter alia, historical disadvantage, obtaining a critical mass, diversity, etc.). The level of the scrutiny—rational basis, intermediate scrutiny, or strict scrutiny—would apply based on the type of classification and would apply consistently in spite of the legislation's purpose.

The import of the jurisprudential consistency is a system through which it is theoretically easier to pass affirmative action policies for the LGBT community and women than for ethnic minorities under the Fourteenth Amendment. This oddity is particularly striking in light of the Fourteenth Amendment's stated purpose to "ameliorat[e] . . . the condition of the freedmen," the ethnic minorities the Fourteenth Amendment sought to protect.[8] While this author takes the position that the LGBT community and women deserve *full* protection under the Equal Protection Clause—including as the beneficiaries of remedial legislation—it is wholly unsuitable that the current framework discriminates against the class of people the Amendment originally intended to protect.

Thus, should most states (notably, excluding California) seek to implement legislation aimed at increasing educational or employment opportunities for the LGBT community, legislators should find repose in the current framework, which applies rational basis review. However, should California seek to implement an employment or educational affirmative action plan, under the current and historically fatal

6. *In re* Marriage Cases, 183 P.3d at 444.
7. *See infra* section II.C.
8. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens).

strict scrutiny standard, legislators would face a near-impossible battle.[9]

Part II of this Article will canvass the societal ills, injustices, and discriminatory policies that remedial legislation is meant to combat. This country's long-standing inequities against racial minorities, women, and gays and lesbians are well-documented and have frequently served as the basis for upholding a compelling or substantial governmental interest in remedying the injustices or striking down invidious legislation.[10] As most challenges to remedial legislation are grounded in the Equal Protection Clause, Part II will also briefly canvass the Fourteenth Amendment's history, giving specific credence to its role as a Reconstruction-era remunerative measure and Section Five's affirmative grant of power. Part II will then scan both federal and state law as applied to remedial legislation for race, gender, and sexual orientation-based classifications, respectively. Circuit splits and state–federal splits will be addressed. Lastly, in Part II, Justice Thurgood Marshall's "sliding-scale" alternative to the three-tiered level of scrutiny will be explored.

Next, Part III will offer substantial critiques of the levels of scrutiny applied in those cases, noting the vehement and passionate dissents by, among others, Justices Marshall and Stevens. Section III.B will highlight the current framework's logical inconsistencies. To illustrate this inconsistency, the Article explores the anomaly that under federal law the current framework makes it easier for Congress to enact affirmative action policies for gays and lesbians and women than for ethnic minorities. The Article goes on to criticize the use of strict scrutiny in remedial contexts. As one scholar noted, "[T]his framework has evolved to a point where suspect classification analysis has become the Court's 'chief instrument' for invalidating measures intended to *remedy* rather than *perpetuate* past race discrimination."[11] Indeed, Justice Marshall found that "it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible."[12]

The Article argues that applying near-fatal scrutiny to race-based remedial legislation while applying lesser scrutiny to gender and sexual orientation-based remedial legislation is incongruent to the proposition that the level of scrutiny is designed to comport with the level

9. For a full explanation of the hypothetical, see *infra* section III.B.

10. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 557–58 (1996); Fullilove v. Klutznick, 448 U.S. 448, 497–98 (1980) (Powell, J., concurring).

11. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. 481, 494 (2004) (emphasis added).

12. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting).

of protection the class deserves. Section III.C will dispel the notion that strict scrutiny is needed to "smoke out" illegitimate uses of race, gender, or sexual orientation-based measures, pointing out that strict scrutiny provides no search function, but rather rings a near-automatic death knell. Finally, the Article concludes that Justice Marshall's sliding-scale scrutiny approach[13] is the appropriate calculus by which to assess the constitutionality of remedial legislation. Justice Marshall emphasizes that the calculus should focus on the *invidiousness* of the legislation at issue, as opposed to the type of classification made.

II. BACKGROUND

A. A Discussion of the Injustices Remedial Legislation Is Meant to Combat

Remedial legislation encompasses oft-critiqued "affirmative action" policies that reflect positive legislative steps to either rectify or ameliorate past injustices[14] or inclusionary policies that seek to increase diversity.[15] This section will examine the specific injustices these policies seek to combat. A history of our county's unfortunate and lasting discriminatory policies and attitudes toward blacks, women, and gays and lesbians will now be discussed in turn.

1. Race

In justifying the need for remedial legislation, Justice Marshall started at the beginning: A slave was "thrust into bondage for forced labor, . . . deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime."[16] Antebellum law, ranging from the Missouri Compromise[17] to the *Dred Scott* decision,[18] exacerbated the plight. The onset of the Civil War and its promises of freedom portended no cure-all palliative either. As observed by the Court in the *Slaughter-House Cases*,[19] "When the armies of freedom found themselves upon the soil of slavery they could

13. This approach is proposed in Justice Marshall's dissents in *Dandridge v. Williams*, 397 U.S. 471 (1970), *and San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).
14. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
15. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); *Bakke*, 438 U.S. 265.
16. *Bakke*, 438 U.S. at 387–88.
17. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545 (repealed 1854).
18. Dred Scott v. Sandford, 60 U.S. 393 (1856).
19. 83 U.S. 36 (1872).

do *nothing less* than free the poor victims whose enforced servitude was the foundation of the quarrel."[20]

While the Civil War-era amendments set the foundation for future legal battles and served as the justification for the remedial legislative measures at issue, their impact on subsequent case law was negligible.[21] Justice Marshall noted that, following the infamous *Plessy v. Ferguson*,[22] "segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms . . . even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other."[23] This segregation was not "limited to public facilities, moreover, but was enforced by criminal penalties against private action as well. . . ."[24] Jim Crow's pervasive psychological effects generated a culture of "[b]ias[,] both conscious and unconscious, reflecting traditional and unexamined habits of thought."[25]

The effects of "a system of racial caste" compelled Justice Ginsburg to urge the *Adarand* Court to recognize "Congress' [sic] authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects."[26] Ginsburg reasoned that, given the Fourteenth Amendment's history, Congress was well within its power to "conclude that a carefully designed affirmative action program may help to [finally] realize . . . the 'equal protection of the laws' the Fourteenth Amendment has promised since 1868."[27]

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20. *Id.* at 68 (emphasis added).
21. "The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy v. Ferguson,* 163 U.S. 537 (1896)." *Bakke*, 438 U.S. at 392 (Marshall, J., dissenting). For a discussion on the Civil War Amendments, see *infra* section II.B.
22. 163 U.S. 537 (1896).
23. *Bakke*, 438 U.S. at 393 (Marshall, J., dissenting).
24. *Id.* at 371 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part).
25. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting).
26. *See id.* at 273. Justice Ginsburg cited several manifestations of discrimination's long-lasting effects: "Job applicants with identical résumés, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts." *Id.*
27. *Id.* at 274.

2. Gender

Nearly forty years ago, the Supreme Court publicly acknowledged "our Nation has had a long and unfortunate history of sex discrimination."[28] Women were not allowed a right to vote until 1920, and for the next half-century, courts "could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination."[29] Justice Ginsburg, in providing evidence to support the unfortunate discrimination, looked to a publication from that time,[30] which read:

> The faculty . . . never maintained that women could not master legal learning. . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School![31]

As further evidence, Justice Ginsburg also affirmed that "[m]ore recently, women seeking careers in policing encountered resistance based on fears that their presence would 'undermine male solidarity,' deprive male partners of adequate assistance, and lead to sexual misconduct."[32] With this background, some states and state entities have sought to give women preference in employment and business settings.[33]

3. Sexual Orientation

Judge Richard Posner described the prevailing attitude toward gays and lesbians as "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment."[34] One court noted that "homosexuality was long considered a mental illness—a notion since discarded by the medical community—amenable to aversion therapy, and other 'treatments' now considered ineffective and unethical."[35] Further, gays have been characterized as

28. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).
29. *See* United States v. Virginia, 518 U.S. 515, 531 (1996).
30. *Id.* at 543–44.
31. 120 THE NATION 173 (Oswald Garrison Villard ed., 1925) (originally published in No. 31111, Feb. 18, 1925).
32. *Virginia*, 518 U.S. at 544 (citation omitted).
33. *See, e.g.*, Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity, 950 F.2d 1401 (9th Cir. 1991); Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989).
34. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008) (quoting RICHARD A. POSNER, SEX AND REASON 291 (1994); *see also* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification,* 98 HARV. L. REV. 1285, 1302 (1985) ("It is . . . uncontroversial that gays as a group suffer from stigmatization in all spheres of life. The stigma has persisted throughout history, across cultures, and in the United States.").
35. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994), *rev'd and vacated*, 54 F.3d 261 (6th Cir. 1995), *cert. granted,*

having "effeminate mental defects with a proclivity towards pedophilia, and a host of other deviant sexual practices."[36]

The Supreme Court of Connecticut offered evidence that, "'when compared to other social groups, homosexuals are still among the most stigmatized groups in the nation. Hate crimes are prevalent. . . . Gay and lesbian adolescents are often taunted and humiliated in their school settings.'"[37] New York Court of Appeals Chief Justice Judith Kaye, in dissent, stated that the prejudice against homosexuals "has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual."[38] While one court ruled that "gays, lesbians and bisexuals have suffered a history of discrimination based on inaccurate, stereotyped notions of their sexual orientation,"[39] other courts have gone as far as stating that "gay persons share a history of persecution comparable to that of blacks and women."[40] Regardless of comparison, it is evident that gays, lesbians, and bisexuals, like ethnic minorities and women, have suffered through a history steeped in discrimination sufficient to merit remedial and ameliorative legislation.

B. An Introduction to Remedial Legislation

In light of our discriminatory history, some legislatures have felt it incumbent upon themselves to remedially legislate. As a prelude to this analysis, it is salient to note that while remedial legislation is not always affirmative action, the overall gist is the same: legislation is aimed either to compensate or to integrate.[41] Compensatory legislation compensates past discrimination—a wrong must have occurred to justify such legislation.[42] Integrative legislation "aims to bring [the disadvantaged] into the mainstream by dismantling *current* barriers to their advancement . . . by proactively using [characteristic-conscious] means to undo the continuing causes of unjust [race-, gender-, or sexual orientation-based] disadvantage."[43]

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judgment vacated, 518 U.S. 1001 (1996), and *rev'd and vacated*, 128 F.3d 289 (6th Cir. 1997).

36. *Id.* at 436.
37. *Kerrigan*, 957 A.2d at 432–33 (alteration in original) (quoting Snetsinger v. Mont. Univ. Sys., 104 P.3d 445, 456 (2004) (Nelson, J., concurring)).
38. Hernandez v. Robles, 855 N.E.2d 1, 28 (N.Y. 2006).
39. *See Equal. Found. of Greater Cincinnati, Inc.*, 860 F. Supp. at 437.
40. *Snetsinger*, 104 P.3d at 456 (Nelson, J., Concurring) (citing People v. Garcia, 77 Cal. App. 4th 1269, 1276 (2000)); *see also Kerrigan*, 957 A.2d at 432–33 (incorporating the quotation in *Snetsinger*).
41. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1196 (2002). For example, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
42. Anderson, *supra* note 41, at 1197. For example, see *Grutter v. Bollinger*, 539 U.S. 306, 371 (2003) (Thomas, J., concurring in part and dissenting in part).
43. Anderson, *supra* note 41, at 1197.

Examining the beginnings of remedial legislation is particularly apt in light of certain judicial intractability in this arena. In the affirmative action context, courts have remained hesitant to hold that the Equal Protection Clause empowers legislatures to remunerate those aggrieved or rectify those ills suffered.[44] Nevertheless, based on the historical underpinnings and legislative intent behind the Fourteenth Amendment, there is significant evidence that it does. This section will examine the very beginnings of race-based remedial legislation, beginning with the short-lived but impactful Freedman's Bureau.

1. The Freedman's Bureau

The brainchild of a small but important group of legislators, remedial legislation aimed at recompensing African-Americans sprung out of the post-Civil War era Freedman's Bureau and the corresponding Freedman's Bureau Bill. The Bureau was charged with administering various race-conscious measures to assist recently freed slaves in the post-Civil War American landscape.[45] Congressional consideration of Freedmen's Bureau legislation contained arguments for and against remedial race-based legislation remarkably similar to the arguments made in the current affirmative action debate.[46] "The various statutes that accorded special protection to African-Americans [in the era] gave them provisions, clothing, and fuel, as well as the opportunity to lease or purchase certain land."[47] After failed attempts in 1864 and 1865, the Bureau proposed legislation in 1866 that would have empowered the President to reserve up to three million acres of land to disseminate to the freed slaves in "parcels not exceeding forty acres."[48] It is extremely important to note that the idea behind the relevant legislation, indeed its specific purpose, was to *compensate* those aggrieved.

Bearing a striking resemblance to a current affirmative action objection, an opponent, Senator Wiley, complained that the bill made "a [facial] distinction on account of color between the two races."[49] The

44. *See, e.g.*, *Adarand*, 515 U.S. at 269; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).
45. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–55 (1985).
46. *See id.* at 755.
47. Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 681–82 (2000).
48. Schnapper, *supra* note 45, at 762; *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976) ("[T]he 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."). This is the origin of "reparations" as used in everyday parlance. *Id.*
49. Schnapper, *supra* note 45, at 763. Congressman Taylor stated that "[s]uch partial legislation . . . cannot be lasting; it seems to me to be in opposition to the

opposition objected to the pleas for equality on the basis of the facial discrimination. Despite strong desire to elevate and ameliorate the condition of the freed slaves, many Congressmen, in the name of "equality before the law," nevertheless lodged their complaints, arguing "not to allow this bill to pass regardless of the great principle, equality before the law."[50] Presented before the Thirty-Ninth Congress, the bill passed—though eventually, President Andrew Johnson vetoed the bill.[51] Notably, in vetoing the bill, President Johnson "urged that Congress limit federal protection to whatever relief might be provided *by the federal courts*."[52] This recommendation is of particular importance in this analysis, especially in light of some Justices' refusal to use the power of the federal courts to uphold affirmative action plans.[53]

2. The Fourteenth Amendment

Despite the eventual failure of the Freedman's Bureau, and its disbandment in 1869, its importance should not be overlooked. The 1866 Freedmen's Bureau Act was described as the "most far-reaching, racially restricted and vigorously contested" of the Civil War-era programs, and was enacted *by the same* Thirty-Ninth Congress that adopted the Fourteenth Amendment.[54]

Introductorily, Section 1 of the Fourteenth Amendment is a *restraint* on a State's ability to legislate[55]: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[56] Section 5, on the other hand, *enables* Congress to legislate: "a *positive* grant of legislative power."[57] It mandates, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[58] Specifically, Senator Howard of the Thirty-Ninth Congress described Section 5 of the Fourteenth Amendment as "a direct *affirmative* delegation of power to Congress to carry out all the principles of all [the] guarantees" of Section 1 of the Amendment.[59] Thus, the authority to afford equal protection of laws by affirmative legisla-

plain spirit pervading nearly every section of the Constitution that congressional legislation should in its operation affect all alike." *Id.* at 763–64.

50. *Id.* at 764.
51. *See id.* at 769.
52. *Id.* at 770 (emphasis added).
53. *See* Grutter v. Bollinger, 539 U.S. 306, 371 (2003) (Thomas, J., concurring).
54. *See* Schnapper, *supra* note 45, at 784.
55. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).
56. U.S. CONST. amend. XIV, § 1.
57. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).
58. U.S. CONST. amend. XIV, § 5.
59. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (emphasis added). He further stated that Section 5 "casts upon the Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property." *Id.* at 2768.

tion is well within the ambit of Section 5. As to what kind of legislation should be implemented, we should refer to the Fourteenth Amendment's objective: "the amelioration of the condition of the freedman," as articulated by the very same congressmen who passed the 1866 Freedman's Bureau Act.[60]

Simply put, aggrieved former slaves were to be actively compensated for the injustices suffered through remedial legislation enabled by the Fourteenth Amendment. Multiple Justices have rejected this line of thinking.[61] In invalidating remedial legislation, multiple Justices have focused on the Clause's *negative* quality as a strict anti-discrimination mandate.[62] The argument derives from the statutory interpretation obligation that, "[a] limitation on power, declared in negative terms, is more apt to be given a mandatory construction and applied as *an absolute with no exceptions or deviations* tolerated than directives written in affirmative terms."[63] However, this argument is flawed. Whether a statute is framed in affirmative or negative terms is often only superficially helpful, as often "there is no real substance to the distinction."[64] Rather, the important inquiry leads us to the legislative history, which shows "how draftsmen of a provision understood it . . . and has been held to be entitled to greater weight than subsequent . . . interpretation."[65]

The draftsmen understood the Amendment to be an affirmative grant to legislate.[66] In fact, "[a]ll three of the Civil War Amendments empowered Congress to [subsequently act] 'by appropriate legisla-

60. Schnapper, *supra* note 45, at 785 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866)). The amelioration language is almost identical to that of Congressman Moulton's only three months before to describe the object of the Freedmen's Bureau bill. "Stevens' choice of language reflects the identity of purpose underlying the two measures." *Id.* at 785.

61. *See* Grutter v. Bollinger, 539 U.S. 306, 349–51 (2003) (Thomas, J., concurring); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290–91 (1978).

62. In an 1879 decision, *Strauder v. West Virginia*, the Supreme Court sweepingly proclaimed that the purpose of the Equal Protection Clause was to ensure that "no discrimination shall be made against [blacks] by law because of their color." Strauder v. West Virginia, 100 U.S. 303, 307 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

63. 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 24:2 (7th ed. 2007) (emphasis added).

64. *Id*.

65. *Id.* at § 48:12 n.12.

66. The Congress that enacted the Fourteenth Amendment was the same Congress that validated the Freedman's Bureau. *See* Schnapper, *supra* note 45, at 784. The Freedman's Bureau understood the object of this genre of legislation should be to rectify past harms by future action. *See supra* notes 47–48 and accompanying text. Of course, supporting this conclusion is Section 5 of the Fourteenth Amendment, stating that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

tion.'"[67] The Amendment's power as predicate authority to legislate is buttressed by a separate statutory construction canon: that remedial statutes have a distinctly *prospective* attribute.[68] In other words, the Equal Protection Clause's stated remedial purpose intended to *prospectively* empower Congress to continue to remedy the condition of freed slaves and their descendants. Courts have also reached this conclusion; the power to enforce the provisions of the Fourteenth Amendment under Section 5 was affirmed in *City of Boerne v. Flores*,[69] and the ability to do so *remedially* was confirmed in *South Carolina v. Katzenbach*.[70]

The drafters of the Fourteenth Amendment certainly did not expect it to be used "to strike down the special protection legislation that it considered desirable for African-Americans."[71] Rather, "Congress's solution was to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority" to act affirmatively.[72] This result is also compelled by a canon of construction which holds that "[c]ourts should not read into a remedial statute an exception *that would impose obstacles* to the achievement of its purpose."[73]

With this background, the Fourteenth Amendment has frequently served as the power needed for Congress to affirmatively rectify past discrimination.[74] In *City of Richmond v. J.A. Croson Co.*,[75] Justice O'Connor made it very clear that,

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race.[76]

Justice Thurgood Marshall, a feverish advocate for remedial legislation, recognized the extent to which opportunities had been fore-

67. 3B SINGER & SINGER, *supra* note 63, § 76:2.
68. 3 *id.* at § 60:1.
69. 521 U.S. 507 (1997).
70. 383 U.S. 301 (1966).
71. Colker, *supra* note 47, at 682. The distinction extends to states' ability to enact remedial legislation. One scholar concluded, "Congress, fully aware of the racial limitations in the Freedmen's Bureau programs, cannot have intended the amendment to forbid the adoption of such remedies by itself or the states." Schnapper, *supra* note 45, at 785.
72. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 336 (1978).
73. 3 SINGER & SINGER, *supra* note 63, § 60:1 (emphasis added).
74. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990); Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994).
75. 488 U.S. 469 (1980).
76. *Id.* at 490 (citations omitted).

closed to black people and the necessity for proactive solutions.[77] Indeed, citing our nation's turbulent race relations, Marshall stated that it was the "legacy of unequal treatment that . . . must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America."[78] In fact, the Supreme Court "has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those *effects* that would otherwise persist and skew the operation of public systems . . . ."[79] Despite the palpable authority granting Congress wide latitude to remedy the effects of past harm, the Court's demonstrated approach has been eminently restrictive.[80]

C. An Examination of the Tiered Framework that Applies in Reviewing Both Invidious and Remedial Legislation

1. Scrutiny for Race-Based Classifications: Developing Strict Scrutiny

The Equal Protection Clause's stated purpose fell upon deaf judicial ears toward the turn of the century. Indeed, after *Plessy*, the Court did not explicitly consider whether legislation premised on a race-based classification should be treated differently until 1938. In footnote four of *United States v. Carolene Products Co.*,[81] the Court posited, but did not resolve, "whether prejudice against discrete and insular minorities may be a special condition, . . . which may call for a correspondingly more searching judicial inquiry."[82] However, its mere mention is eminently significant, as one scholar deemed it the "genesis of the Court's modern three-tiered approach to equal protection analysis."[83]

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77. *See Bakke*, 438 U.S. at 401 (Marshall, J., concurring).
78. *Id*.
79. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 269 (1995) (Souter, J., dissenting) (emphasis added). In fact, in *Adarand*, "a majority of the Court [reiterated] that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination." *Id.* at 270.
80. The post-*Metro Broadcasting* caselaw has eliminated almost every avenue for remedial race-based legislation. At the time this article was written, the Supreme Court was weighing whether or not to extend *Grutter*'s critical-mass theory. *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012), *vacated*, 133 S. Ct. 2411 (2013).
81. 304 U.S. 144 (1938).
82. *Id.* at 152 n.4.
83. Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 74 (1996). *But see* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1267 (2007) ("Historically, the modern strict scrutiny formula did not emerge until the 1960s, when it took root simultaneously in a number of doctrinal areas. It did not clearly originate in race discrimination

The Court confirmed a more searching judicial inquiry in the infamous *Korematsu v. United States*,[84] which upheld the legality of the domestic World War II Japanese Internment camps.[85] A later case, *Bolling v. Sharpe*,[86] stated that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[87]

The level of scrutiny applies if the law burdens a fundamental right or targets a *suspect class*.[88] In developing the suspect class standard and searching for what kinds of people are subject to the "most exacting scrutiny," Justice Powell delineated the "traditional indicia of suspectness"—whether a group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[89] The standard evolved into common-day strict scrutiny, which requires that racial classifications serve a compelling governmental interest and that the classification be narrowly tailored to further that interest.[90] Forward thinking, the indicia has been used to uphold strict scrutiny's application to other (non-racial) types of classifications.[91] With the exception of a few cases, including *Metro Broadcasting, Inc. v. FCC*,[92] the Court has categorically applied strict scrutiny to assess the constitutionality of race-based classifications, regardless of the statute's purpose, be it invidious or remedial.[93]

The first Supreme Court challenge to an unequivocally race-based remedial state program was *Bakke*, in which a white male who was denied admission to a state medical school challenged the legality of the school's special admissions program, which reserved sixteen slots for "disadvantaged" minority students.[94] In finding that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for

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cases, as some have suggested, nor in free speech jurisprudence, as Justice Harlan once claimed.").

84. 323 U.S. 214, 216 (1944) (noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and courts must subject them to the "most rigid scrutiny").
85. *Id.* at 223–24.
86. 347 U.S. 497 (1954).
87. *Id.* at 499.
88. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).
89. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).
90. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995).
91. Homosexuality is one example. *See infra* subsection II.C.3.b.iii.
92. 497 U.S. 547 (1990).
93. *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); *Adarand Constructors*, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
94. *Bakke*, 438 U.S. at 265.

the most exacting judicial examination," the Court held that the special admissions program was unconstitutional.[95]

The Court struggled with justifying the remedial aspect of the program. It stated that "it may not always be clear that a so-called preference is in fact benign," noting an absence of constitutional support for "the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups."[96] Further, the Court objected to the classification on the grounds that preferential programs may only reinforce common stereotypes that certain groups are unable to achieve success without special protection.[97]

The Court relented on its stance in *Fullilove v. Klutznick*[98] and recognized Congress's ability under Section 5 to act remedially.[99] There, Congress, recognizing a dearth of opportunity for minorities within the construction industry, "embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities."[100] In stark contrast to the nearly unconditional anti-racial classification stance advocated in *Bakke*, the Court specifically affirmed that Congress retained the "necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives."[101]

The Court's deference to Congressional power demarcated a clear shift from *Bakke*. The *Fullilove* decision was nearly bereft of the lengthy concerns and hesitations replete in *Bakke*. Rather, the deci-

95. *Id.* at 291. Justice Powell went on to note, "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id.* at 307.

96. *Id.* at 298.

97. *See id.* For an interesting perspective on stereotype enforcement, see Justice Thomas's concurrence in *Grutter*, 539 U.S. at 349–87 (Thomas, J., concurring). Justice Powell reasoned that if he were to consider the remedial nature of the program in effecting the level of scrutiny, the classifications touching on racial and ethnic background would "vary with the ebb and flow of political force." *Bakke*, 438 U.S. at 298.

98. 448 U.S. 448 (1980).

99. *Id.* at 482 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18–21 (1971)); *see also* United Steelworkers v. Weber, 443 U.S. 193 (1979) (holding a modified standard of review should be applied to race-based affirmative action plans, noting that traditional racial classifications are distinct from benign racial classifications and thus demand a modified form of inquiry).

100. *Fullilove*, 448 U.S. at 485–86.

101. *Id.* at 490. *Bakke* allowed a program where race was "simply one element—to be weighed fairly against other elements—in the selection process." *Bakke*, 438 U.S. at 318. Despite the court's admission that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination," the court explicitly refused to adopt, "either expressly or implicitly, the formulas of analysis articulated in [*Bakke*]." *Fullilove*, 448 U.S. at 491–92.

sion focused on *Congress's* ability to remedy past harms,[102] impliedly recalling the principle that "[Section 5 of the Fourteenth Amendment] is a direct affirmative delegation of power to Congress to carry out all the principles of all [the] guarantees of the Amendment."[103] In the decade following *Fullilove*, the Court continued to stray from automatically invalidating affirmative action policies, though it did not go so far as to give "automatic approval to race-conscious remedies."[104]

This was not the case in *Croson*. There, the Court was asked to assess Richmond, Virginia's decision to require prime contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to "Minority Business Enterprises."[105] The Court invalidated the plan for being overly broad, asserting that since the plan provided no guidance for Richmond to determine the precise scope of the injury it sought to remedy, the race-based decision making was essentially limitless in scope and duration.[106] Justice O'Connor was very clear about the standard to be applied and the permissible uses of racial classification; this has been described as "strict scrutiny plus."[107] One scholar explained: "First, a court must use strict scrutiny to eliminate all government interests that are not compelling or not narrowly tailored. Second, from any remaining interests, the court must eliminate all government interests except the mandatory interest in remedying the acting government agent's past discrimination."[108]

Justice Marshall issued a careful, yet caustic dissent in *Croson*, opining: "Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general."[109] On the heels of this dissent, he authored *Metro Broadcasting*. There, the Court upheld the FCC's decision to award limited preference to minorities in determining licenses for new radio or tele-

102. *Fullilove*, 448 U.S. at 483 (noting Congress's "broad remedial powers" of enforcement of the Equal Protection Clause and the propriety of using racial classifications for remedying violations of antidiscrimination statutes).

103. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (quotation omitted).

104. Sameer M. Ashar & Lisa F. Opoku, *Justice O'Connor's Blind Rationalization of Affirmative Action Jurisprudence*—Adarand Constructors, Inc. v. Pena, *115 S. Ct. 2097 (1995)*, 31 HARV. C.R.-C.L. L. REV. 223, 227–28 (1996) (referencing Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); and United States v. Paradise, 480 U.S. 149 (1987)).

105. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477 (1989).

106. *See id.* at 497–98.

107. Roger Craig Green, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L. J. 439, 465 (1998).

108. *Id.*

109. *Croson*, 488 U.S at 529 (Marshall, J., dissenting).

vision broadcast stations.[110] In finding that the policy did not violate the Equal Protection Clause, the Court afforded Congress *Fullilove*-esque deference, affirming that because the policy bore "the *imprimatur* of longstanding congressional support and direction," the legislation was substantially related to the achievement of the important governmental objective of broadcast diversity.[111] The court further relied on *Fullilove* for its justification to apply intermediate scrutiny rather than strict scrutiny.[112]

The window of hope for a lesser standard slammed closed in 1995 with *Adarand*. Despite Justice Stevens's eventually unequivocal support for a more lenient affirmative action standard,[113] Justice O' Connor used his own words against him. Relying on Stevens's *Fullilove* dissent, the Court affirmed that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,"[114] rejuvenating the strict scrutiny standard and providing it with the lasting fortification it needed. Justice Scalia, in concurrence, went even further, declaring that the "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[115]

The Supreme Court continued using strict scrutiny in race-based affirmative action cases in *Grutter*[116] and *Gratz*.[117] Both cases assessed the University of Michigan's[118] respective practices to increase the amount of minority students enrolled. In *Gratz*, the Court rejected Michigan's policy of awarding minority students additional "points"

110. Metro Broad., Inc. v. FCC, 497 U.S. 547, 548 (1990).

111. *Id.* at 600–01.

112. *See id.* at 564 (citing Fullilove v. Klutznick, 448 U.S. 448, 473 (1980)). Surprisingly, in upholding the interest as *compelling*, the Court cited *Bakke* for the proposition that, "[j]ust as a diverse student body contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values." *Metro Broad.*, 497 U.S. at 568 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–13 (1978)) (internal quotations omitted).

113. *See generally* Christopher L. Eisgruber, *How the Maverick Became a Lion: Affirmative Action in the Jurisprudence of John Paul Stevens*, 99 GEO. L.J. 1279 (2011).

114. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995) (citing *Fullilove*, 448 U.S. at 533–35, 537 (Stevens, J., dissenting)).

115. *Id.* at 239 (Scalia, J., concurring) (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring)). Scalia utilized a familiar argument, emphasizing that "under our Constitution there can be no such thing as either a creditor or a debtor race." *Id.*

116. Grutter v. Bollinger, 539 U.S. 306 (2003).

117. Gratz v. Bollinger, 539 U.S. 244 (2003).

118. In *Grutter*, the case involved the University of Michigan Law School; in *Gratz*, the case focused on the University of Michigan undergraduate program.

toward acceptance of their application, as the policy was not sufficiently narrowly tailored.[119] In *Grutter*, however, the Court upheld the university's interest in achieving a diverse classroom as *compelling* and their "highly individualized, holistic review of each applicant's file" as sufficiently *narrowly tailored*.[120] However, the Court made specific reference to the fact that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."[121]

In affirming how limited the affirmative action program must be, the Court warned that "racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."[122] Scalia went on to chastise the Court's lack of "commit[ment] to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications," despite their implementation of the throttling strict scrutiny standard, still applied today.[123]

2. Scrutiny for Gender-Based Classifications: Quasi-Suspect Classification

While the framework has not seen the vicissitudes associated with race-based classifications, gender-based classifications have not always had a set level of scrutiny. The first fight for constitutional gender equality was recognized in *Reed v. Reed*,[124] which surrounded a gender preference (men over women) in deciding who should administer estate claims. There, the Court used rational basis review, framing the question as "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation . . . ."[125] Rational basis was short-lived, however, with the onset of *Frontiero v. Richardson*,[126] described as "the high-water mark in the Court's treatment of sex discrimination."[127] In that case, the Court identified sex as a suspect class.[128] There, a female armed ser-

119. *Gratz*, 539 U.S. at 275.
120. *Grutter*, 539 U.S. at 337.
121. *Id.* at 341 (citation omitted).
122. *Id.* at 342. The Court went on to note that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 343.
123. *Id.* at 371 (Scalia, J., concurring).
124. 404 U.S. 71 (1971).
125. *Id.* at 76.
126. 411 U.S. 677 (1973) (plurality opinion).
127. John Galotto, Note, *Strict Scrutiny for Gender, via* Croson, 93 COLUM. L. REV. 508, 520 (1993).
128. *Frontiero*, 411 U.S. at 682.

vices member challenged a parcel of federal statutes that made it more difficult for women to claim their spouses as dependents when applying for benefits.[129] The classifications were invalidated, inexorably assisted by the Court's adoption of the formidable strict scrutiny standard.[130]

Strict scrutiny's lifespan was equally ephemeral, yielding to the more durable, if not "malleable, uncertain, highly flexible, unpredictable, contrived, inconsistent, and inadequate" intermediate scrutiny standard.[131] In *Craig v. Boren*,[132] the Supreme Court faced a challenge to a gender-based classification in Oklahoma statutes prohibiting the sale of a type of beer to males under the age of twenty-one and females under the age of eighteen. In articulating the intermediate scrutiny standard, the Court stated that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."[133]

Justice O'Connor gave intermediate scrutiny more bite in *Mississippi University for Women v. Hogan*,[134] requiring that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification."[135] According to one scholar, "several courts have demanded increasingly stringent factual demonstrations to support a gender-based classification" premised precisely on the "exceedingly persuasive justification" advent.[136] The Court further memorialized the standard in the famous Virginia Military Institute (VMI) case, where Justice Ginsburg affirmed the Court would carefully inspect classifications, noting the "demanding" burden of justification needed.[137] There, Justice Ginsburg made it very apparent that gender-based discrimination fell within the protections of the Equal Protection Clause by noting that "[n]either federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[138]

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129. *Id.* at 678.
130. *See id.* at 690–91.
131. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 301 (1998) (internal quotations omitted).
132. 429 U.S. 190 (1976).
133. *Id.* at 197.
134. 458 U.S. 718 (1982).
135. *Id.* at 724 (citation omitted).
136. Peter Lurie, Comment, *The Law as They Found It: Disentangling Gender-Based Affirmative Action Programs from* Croson, 59 U. CHI. L. REV. 1563, 1568 (1992).
137. United States v. Virginia, 518 U.S. 515, 532–33 (1996).
138. *Id.* at 532.

3. Scrutiny for Sexual Orientation-Based Classifications: A Three-Way Split

a. Federal Law

i. Rational Basis

In light of the relative dearth of cases presented before the Supreme Court, this subsection will examine both federal and state constitutional discussion of sexual orientation-based legislation. The Court first considered a sexual orientation-based classification in *Romer v. Evans*[139] in 1996, which involved a Colorado voter-approved referendum that precluded "all legislative, executive, or judicial action at any level of state or local government designed to protect the [LGBT community]."[140] In balancing the competing state interest with the underlying purpose of the Fourteenth Amendment, the Court concluded if a law neither burdened a fundamental right nor *targeted a suspect class*, the Court would uphold the legislative classification so long as it would bear a *rational relation* to some legitimate end.[141] Nevertheless, despite the lax level of scrutiny, the Court still invalidated the referendum, labeling it too narrow and too broad at the same time.[142] In rejecting the referendum, the Court critiqued its truly unusual and exclusive nature, holding that the resulting disqualification of a class of persons from the right to seek specific protection from the law is "unprecedented in our jurisprudence."[143]

Lawrence v. Texas[144] similarly involved a sexual orientation-based classification in which two same-sex Texas residents were arrested and convicted of "deviate sexual intercourse" in violation of a Texas statute forbidding same-sex intimate sexual conduct.[145] While the case used rational basis review, and despite the fact that the case was

139. 517 U.S. 620 (1996).

140. *Id.* at 623. The court considered a sexual orientation-based claim in Bowers v. Hardwick, 478 U.S. 186 (1986), but relied on due process, not equal protection, to the dissent of Justice Blackmun: "I disagree with the Court's refusal to consider whether § 16-6-2 runs afoul of the . . . Equal Protection Clause of the Fourteenth Amendment." *Id.* at 201 (Blackmun, J., dissenting). Notably, *Romer* preempted even "DOMA" (Defense of Marriage Act of 1996, Pub. L. No. 104–199, 110 Stat. 2419 (codified in relevant part at 1 U.S.C. § 7 (2006))) as the first case in a line of many State-sponsored laws limiting the federal definition of marriage to relationships between one man and one woman. *See* Andrew Koppelman, *The Difference the Mini–DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265–66 (2007).

141. *Romer*, 517 U.S. at 631.

142. *Id.* at 633.

143. *Id.* "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.* (internal quotation omitted).

144. 539 U.S. 558 (2003).

145. *Id.* at 562–63. The Court held that the Texas law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578.

virtually invalidated on due process grounds, one academic identifies "textual morsels in the Court's opinion in *Lawrence* that hint that there is something more than minimal scrutiny at work in its decision."[146]

Compelled by *Romer*, and to a certain extent *Lawrence*, the federal courts of appeal have so far adhered to rational basis review in examining equal protection claims on the basis of sexual orientation.[147] On a direct challenge to the Defense of Marriage Act's (DOMA) constitutionality, the First Circuit, in *Massachusetts*, weighed whether the statute denied federal economic benefits to people of one sexual orientation, but not the other.[148] In determining which level of scrutiny to apply, the court relied on *Cook v. Gates*,[149] a challenge to the (now-defunct) "Don't Ask Don't Tell," military policy.[150] In a display of appropriate fealty, *Cook* followed *Romer*,[151] and *Massachusetts* followed *Cook*.[152] The court declined to "create such a new suspect classification for same-sex relationships[, as it] would have far-reaching implications."[153] The court recognized that adopting a new level of scrutiny could "overturn marriage laws in a huge majority of individual states."[154] Undeterred, the court was able to affirm DOMA's unconstitutionality under rational-basis review, holding that the denial of benefits was inadequately supported by any permissible federal interest.[155] However, like the "textual morsels" of a more rigorous review unearthed in *Lawrence*,[156] *Massachusetts* also imparted a more exacting standard—a "more careful assessment."[157]

146. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 959 (2004); *accord* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012). There, the court noted that "[t]he Court has in these cases undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *Id.* at 11. Elaborating, the Court stated that "[i]n a set of equal protection decisions, the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification. In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible." *Id.* at 10.

147. *See infra* notes 148–60 and accompanying text.

148. *Massachusetts*, 682 F.3d at 5.

149. 528 F.3d 42 (1st Cir. 2008).

150. *Id.*

151. *Id.* at 61–62 (citing Romer v. Evans, 517 U.S. 620 (1996)).

152. *Massachusetts*, 682 F.3d at 9 (citing *Cook*, 528 F.3d at 42).

153. *Id.*

154. *Id.* at 9–10.

155. *Id.* at 15.

156. *See* Lawrence v. Texas, 539 U.S. 558, 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

157. *Massachusetts*, 682 F.3d at 11.

Likewise, the Ninth Circuit administered rational basis review in invalidating the much-publicized Proposition 8 legislation in *Perry v. Brown*.[158] In a procedurally complex affair, the court affirmed the Northern District of California, which ruled against Proposition 8 on both due process and equal protection grounds.[159] In doing so, it unequivocally followed *Romer*, stating that "[t]he question here, then, is whether California had any more legitimate justification for withdrawing from gays and lesbians its constitutional protection with respect to the official designation of 'marriage' than Colorado did for withdrawing from that group all protection against discrimination generally."[160]

ii. Intermediate Scrutiny

Recently, the Second Circuit became the first federal appellate court to apply intermediate scrutiny to sexual orientation-based classifications in *Windsor v. United States*.[161] There, the plaintiff was denied a spousal deduction from federal estate taxes because DOMA precluded a same-sex marriage from falling within its accepted definition of marriage.[162] Unlike *Massachusetts* and *Perry*, the Second Circuit did *not* feel bound by *Romer*'s decision not to impart quasi-suspect status on the LGBT community.[163] Instead, the court articulated the four predicate factors in deciding whether to grant quasi-suspect classification:

> A) whether the class has been historically subjected to discrimination; B) whether the class has a defining characteristic that frequently bears a relation to ability to perform or contribute to society; C) whether the class exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and D) whether the class is a minority or politically powerless.[164]

Citing their history of discrimination[165] and their progressing-but-still-unequal representation in the political arena, the court drew a parallel to discrimination faced by women when it likewise provided homosexuals quasi-suspect status.[166] However, the court noted,

158. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012), *vacated*, 133 S. Ct. 2652 (2013).
159. *Id.* at 1069.
160. *Id*. at 1082.
161. 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012), *aff'd*, 133 S. Ct. 2675 (2013).
162. *Id.* at 175.
163. *Id.* at 179 ("The litigants in *Romer* had abandoned their quasi-suspect argument after the trial court decision."); *see also* Romer v. Evans 517 U.S. 620, 640 n.1 (1996) (noting the decision by the trial court to apply a rational basis standard had not been appealed).
164. *Windsor*, 699 F.3d at 181 (citations omitted).
165. *See supra* subsection II.A.1.
166. *Windsor*, 699 F.3d at 182, 184–85.

"While homosexuals have been the target of significant and long-standing discrimination in public and private spheres, this mistreatment is not sufficient to require our most exacting scrutiny."[167] Nevertheless, able to dispense with all arguments in support of DOMA, the court easily found for the plaintiff under the intermediate scrutiny standard.[168]

b. State Law

i. Rational Basis

The split is equally apparent for state law claims. Massachusetts held denying same-sex couples the right to marry ran afoul of its constitution in *Goodridge v. Department of Public Health*.[169] The defendants in the case, the Department of Public Health, argued, inter alia, that sexual orientation was *not* a suspect class and that rational basis applied.[170] In finding that the marriage ban did not even pass rational basis review, the court did not consider the plaintiffs' arguments that the case merited strict judicial scrutiny.[171]

The plaintiffs were not so fortunate in the New York same-sex marriage case, *Hernandez v. Robles*.[172] The plaintiffs argued that a prior Court of Appeals of New York decision, *Under 21 v. City of New York*,[173] had left open the question of whether some level of heightened scrutiny could be applied in some situations of discrimination based on sexual preference.[174] The court disagreed and relied on *Cleburne v. Cleburne Living Center, Inc.*[175] in determining that rational basis should be applied "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement."[176] The court, in a logically puzzling move, weighed not the history of discrimination, the political powerlessness, or the immutability of the characteristic, but rather the state's authority to govern over matters of the family in concluding that gays and lesbians do not merit suspect status.[177] Armed with a

167. *Id.* at 185 (citations omitted).
168. *Id.* at 188.
169. 798 N.E.2d 941 (Mass. 2003).
170. *Id.* at 961.
171. *Id.*
172. 855 N.E.2d 1 (N.Y. 2006).
173. 482 N.E.2d 1 (N.Y. 1985).
174. *Hernandez*, 855 N.E.2d at 10.
175. 473 U.S. 432 (1985).
176. *Hernandez*, 855 N.E.2d at 11 (quoting *Cleburne*, 473 U.S. at 441).
177. *Id.* at 11. Recall that when deciding what level of scrutiny to apply, the Supreme Court had to determine whether the law burdens a fundamental right or targets a suspect class. *See supra* note 88 and accompanying text.

lax standard of review, the court upheld the ban on same-sex marriage, finding that a legislature had a rational basis for doing so.[178]

ii. Intermediate Scrutiny

The Supreme Court of Connecticut, in an ostensibly remedial legislation case,[179] considered the constitutionality of Connecticut's decision to disallow same-sex marriage in favor of a civil union law.[180] The court, "in light of the history of pernicious discrimination faced by gay men and lesbians" and considering that the civil union framework essentially segregated "heterosexual and homosexual couples into separate institutions," held that the framework constituted a cognizable harm.[181] In affirming that the law violated the state constitution, the court held that sexual orientation based discrimination garnered intermediate scrutiny as a quasi-suspect classification for the same reasons gender-based discrimination generated intermediate scrutiny.[182] The court held as such despite the fact that sexual orientation was *not* an enumerated classification on which to make such a finding pursuant to the relevant state statute.[183] The court ultimately found that "[g]ay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimination that continues to manifest itself in society," justifying the conclusion that laws singling them out for disparate treatment are subject to heightened judicial scrutiny and ensuring that those laws are not the product of such historical prejudice and stereotyping.[184]

178. *Hernandez*, 855 N.E.2d at 6–7. The court identified two reasons: First, the legislature could rationally decide that it is more important to promote stability in opposite-sex relationships than in same-sex relationships because of the risk that [putatively] unstable opposite-sex relationships could lead to the birth of a child; and second, the legislature could believe children would be better off with a mother-father dynamic. *Id*.

179. The State asserted that its "civil union" law effected a wholly sufficient alternative to gay marriage, providing rights previously not available to same-sex couples. While the court did "not doubt that the civil union law was designed to benefit same-sex couples," it found that if "the intended effect of a law is to treat politically unpopular or historically disfavored minorities differently from persons in the majority or favored class, that law cannot evade constitutional review under the separate but equal doctrine." Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 418 (Conn. 2008).

180. *Id.*

181. *Id.* at 412.

182. *See id.*

183. *Id.* at 448–49.

184. *Id.* at 431–32.

iii. Strict Scrutiny

In the mid-1970s, several California same-sex couples applied for marriage licenses.[185] In 1977, at the behest of the County Clerks' Association of California, California enacted legislation that clarified the province of marriage as solely between a man and a woman.[186] Its progeny, "Family Code Section 300," currently provides in relevant part that "[m]arriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."[187] Its sister statute, Family Code Section 308.5, provides similar language: "Only marriage between a man and a woman is valid or recognized in California."[188] The statute was interpreted to apply both to marriages performed in California and those performed in other jurisdictions.[189]

The court recognized a "number of distinct and significant issues" in determining whether the current California statutory scheme relating to marriage and to registered domestic partnership was constitutionally valid.[190] The initial inquiry was to determine the level of scrutiny to apply, which hinged first on whether the statute itself differentiated between classes of people, and if so, whether the sexual orientation classification merited "suspect classification," and thus a higher level of scrutiny.[191]

The initial "differentiation" inquiry was an easy one. The court swiftly held, "By limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation."[192] However, the court was quick to concede that "in most instances the deferential 'rational basis' standard of review is applicable in determining whether different[ial] treatment [is merited] . . . ."[193] Again, the court had to determine whether sexual orientation was considered a suspect classification; however, under California's equal protection jurisprudence, the court's alternative was *strict*, rather than *intermediate*, scrutiny.[194]

185. *See In re* Marriage Cases, 183 P.3d 384, 409 (Cal. 2008).
186. *See id.* at 409. The legislative intent was quite clear. "The purpose of the bill was to prohibit persons of the same-sex from entering lawful marriage." *See id.* (citing SEN. COMM. ON THE JUDICIARY, ANALYSIS OF ASSEM. BILL NO. 607, at 1 (1977) (amended 1977).
187. *Id.*
188. *Id.*
189. *Id.* at 410.
190. *Id.* at 398–99.
191. *Id.* at 401.
192. *Id.* at 440.
193. *Id.* at 401.
194. *See id.* at 443–44 (emphasis added).

In making such a determination, the court first assented that "the great majority of out-of-state decisions that have addressed this issue have concluded that . . . [unlike] race, sex, religion or national origin, statutes that treat persons differently because of their sexual orientation should not be viewed as constitutionally suspect and thus should not be subjected to strict scrutiny."[195] Undeterred, the court identified three factors that, if satisfied, would support an application of strict scrutiny: "The defining characteristic must (1) be based upon an immutable trait; (2) bear no relation to a person's ability to perform or contribute to society; and (3) be associated with a stigma of inferiority and second class citizenship."[196]

Finding that one's sexual orientation had no relation to a person's ability to perform or contribute to society, and refusing to even consider the proposition that gays had not suffered stigmatism,[197] the court turned to whether homosexuality was an immutable trait—something that gave the court unmistakable pause.[198] Drawing a parallel to religious classifications, where strict scrutiny was upheld pursuant to their "integral" position in forming a person's identity, the court upheld the usage of strict scrutiny for sexual orientation on the same grounds.[199]

In a sweeping decision, the court used strict scrutiny to invalidate the statutes, noting that:

> [J]ust as this court recognized in *Perez* that it was not constitutionally permissible to continue to treat racial or ethnic minorities as inferior . . . and in *Sail'er Inn* that it was not constitutionally acceptable to continue to treat women as less capable than and unequal to men, we now similarly recognize that an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights.[200]

The court, in explaining its searching inquiry, stated that "even the most familiar and generally accepted social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions."[201]

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195. *Id.* at 441.

196. *See id.* at 442 (internal quotations omitted).

197. *See supra* subsection II.A.3.

198. *See In re Marriage Cases*, 183 P.3d at 441.

199. *Id.* at 442. The court refused to answer whether homosexuality was indeed an immutable trait, stating: "Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment." *Id.*

200. *Id.* at 429. (citing Perez v. Lippold, 198 P.2d 17, 20–27 (Cal. 1948); Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539–42 & n.15 (Cal. 1971)).

201. *Id*. at 451.

D. Justice Marshall: A Sliding Scale

Dissatisfied with the formalistic tiers of scrutiny, Justice Marshall created a flexible, "sliding-scale" scrutiny standard of review.[202] Arguing that the "Court's equal protection decisions defy . . . easy categorization into the pigeonholes of tiered scrutiny," Marshall's test, explained in *Dandridge v. Williams*[203] and *San Antonio Independent School District v. Rodriguez*,[204] is relatively simple. The right or interest affected is measured by its constitutional or societal importance and is contrasted against the invidiousness of the classification upon which the legislation is premised.[205] Specifically, the test measures whether "an appropriate governmental interest [is] suitably furthered by the differential treatment."[206]

Justice Marshall's dissent in *San Antonio Independent School District* illustrates the test well. There, the plaintiffs brought a class action lawsuit on behalf of poor, mostly Mexican-American schoolchildren in an underfunded Texas school district.[207] The plaintiffs alleged that the state of Texas was discriminating against the children on the basis of access to equal education.[208] Justice Powell, writing for the majority, found that education was not a fundamental right nor were "the poor" a suspect class.[209] Of course, the Court was then free to employ rational basis review and correspondingly dismissed the plaintiff's claim with ease.[210]

Justice Marshall made it very clear he wanted to "voice [his] disagreement with the Court's rigidified approach to equal protection analysis."[211] He opined that the decision allowed states to "constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside."[212] He accused the court of cherry-picking which rights they deemed "fundamental," impliedly arguing that the Court can offer the protections to whichever classification and interests it deems fit.[213] It is under this theory that the Court en-

202. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting). However, according to one scholar, this type of scrutiny was never termed as such by Justice Marshall. *See* Rebecca Brown, *Deep and Wide: Justice Marshall's Contributions to Constitutional Law*, 52 HOW. L.J. 637, 645 (2009).
203. 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).
204. 411 U.S. at 98–99 (Marshall, J., dissenting).
205. *Id.* at 99.
206. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).
207. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 8.
208. *Id.* at 8–9.
209. *Id.* at 33–37.
210. *Id.* at 37.
211. *Id.* at 98.
212. *Id.* at 70.
213. *See id.* at 100–02.

gages only rational basis review for classifications based on sexual orientation,[214] but heightened scrutiny for alienage,[215] the right to procreate,[216] and the right to appeal a criminal conviction.[217]

Under Justice Marshall's approach, the societal and constitutional importance of the interest adversely affected would be contrasted against the recognized invidiousness of the classification.[218] Thus, societally important interests, such as the right to vote or the right to marry a person of the same sex, and constitutionally protected rights, such as the right to privacy, would automatically be protected against invidious legislation. However, in remedial legislation, specifically in the province of race, the Court would be forced to consider first, whether fulfilling the objectives of the Fourteenth Amendment was an important government interest; and second, whether the affirmative action policy was substantially related to achieving the interest—all while recognizing the invidiousness upon which the classification was drawn.[219]

The test is especially apt considering the serious balancing test remedial legislation often induces. Congress's ability to act benevolently should be carefully considered against possible veiled motives based on stereotypes or odious objectives.[220]

In dealing with traditional rational-basis review matters like sexual orientation or disability, even members of the judiciary who decline to see the great societal importance in protecting the right to be with a consenting adult of the same sex[221] or the right to be treated equally under protection of laws on the basis of sexual orientation,[222] would have a difficult time ignoring the invidiousness of the legislation.[223] Whereas currently, all that is incumbent upon a state is to

214. *See* Romer v. Evans, 517 U.S. 620 (1996).
215. *See* Plyler v. Doe, 457 U.S. 202 (1982).
216. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).
217. *See* Griffin v. Illinois, 35 U.S. 12 (1956).
218. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 98–99. (Marshall, J., dissenting).
219. *See id.* at 110.
220. The skepticism is especially merited provided Congress's less than charitable history (e.g., the Naturalization Act of 1790, The Alien and Sedition Acts, the Indian Removal Act, the Missouri Compromise, the Johnson-Reed Act, etc.).
221. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).
222. *See id.*
223. As the *Perry* court noted, a "civil union" just doesn't have the same ring. *See* Perry v. Brown, 671 F.3d 1052, 1078 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012), *vacated*, 133 S. Ct. 2652 (2013) ("[W]e emphasize the extraordinary significance of the official designation of 'marriage.' That designation is important because 'marriage' is the name that society gives to the relationship that matters most between two adults. A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not. The word 'marriage' is singular in connoting 'a harmony in living,' 'a bilateral loyalty,' and 'a coming together for better or for worse, hopefully endur-

generate some rational explanation for the purported legislation, "when interests of constitutional importance are at stake, the Court does not stand ready to credit the State's classification with any conceivable legitimate purpose, but demands a clear showing that there are legitimate state interests which the classification was in fact intended to serve."[224]

Indeed this was a contentious point with Justice Marshall, indicative of his dissatisfaction with the framework in general.[225] Justice Marshall took particular issue with rational basis review by stating:

> The extremes to which the Court has gone in dreaming up rational bases for state regulation . . . may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls.[226]

However, no longer would gays and lesbians receive the minimal protections available. Under this approach, classifications based on sexual orientation,[227] disability,[228] and poverty-stricken youth,[229] would now receive greater scrutiny and require more legitimate justifications than under the current, more deferential approach.

III. ARGUMENT

A. Conflict: Critiques and Censure for the Current Framework

As a preface, it is apparent that the current framework possesses holes, gaps, and inconsistencies. Subsection 1, supplied by powerful dissents and thoughtful analysis, will discuss how strict scrutiny does not and cannot comport with the aims of the Fourteenth Amendment. Subsection 2 will discuss how, in the realm of gender-based classifications, a circuit split has arisen as to how to deal with gender-based affirmative action plans. Lastly, subsection 3 will examine how the current framework has led to a federal–state split in applying a consistent level of scrutiny in sexual orientation-based cases.

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ing, and intimate to the degree of being sacred.'") (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

224. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 125 (Marshall, J., dissenting).

225. *See* Dandridge v. Williams, 397 U.S. 471, 508 (1970) ("[T]he Court holds today that regardless of the arbitrariness of a classification it must be sustained if any state goal can be imagined that is arguably furthered by its effects.").

226. *Id*. at 520.

227. *See* Romer v. Evans, 517 U.S. 620, 630 (1996).

228. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985).

229. *See Dandridge*, 397 U.S. at 508.

1. Race

No longer has "[a]greement upon a means for applying the Equal Protection Clause to an affirmative-action program" eluded the Supreme Court.[230] The Court applies strict scrutiny to race-based classifications, regardless of invidious or remedial purpose. The standard, as applied, is almost always fatal to race-based affirmative action plans.[231] According to Justice Scalia, this is impelled by the fundamental tenet that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[232] Scalia lambasts congressional race-based remediation, affirming that Congress can never have "compelling" justification in discriminating on the basis of race, regardless of remedial intent.[233] One of Scalia's main objections is the corollary impact the legislation has on nonminorities.[234] He asserts that "almost no amount of benefit in the eye of the beholder can justify such classifications" and implores his colleagues to affirm that all racial classifications are *per se* harmful.[235]

To quote Justice Marshall, "[t]his is an unwelcome development."[236] The Fourteenth Amendment was never intended to impose a categorical ban on legislative racial distinction, but rather was aimed to remedy the effects of slavery.[237] According to a study conducted by the U.S. Civil Rights Commission, color-blindness is wholly

230. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301 (1986) (Marshall, J., dissenting).

231. *See* Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1758 (1989). The serious nature of the developing strict scrutiny standard was noted in *Fullilove*, where Justice Powell asserted that the failure of legislative action to survive strict scrutiny has "led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact." Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring).

232. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

233. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

234. *See* Grutter v. Bollinger, 539 U.S. 306, 348 (2003) (Scalia, J., concurring) ("The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.").

235. *Id.* at 371 (Thomas, J., concurring).

236. *Croson*, 488 U.S. at 552 (Marshall, J., dissenting).

237. *See supra* subsection II.B.2.; *see also* Aiken v. City of Memphis, 37 F.3d 1155, 1172 (6th Cir. 1994) (Jones, J., dissenting) (arguing the Fourteenth Amendment does not impose such a strict standard of "color blindness" that it would block congressional action that remedies past discrimination). The subscription to functional color-blindness has had drastic effects. Following the *Croson* decision, state and local governments scaled back or eliminated affirmative action programs thereby losing much of the progress they had made in the amount of minority participation in procurement. Simmons, *supra* note 83, at 56.

ineffective to combat existing discriminatory environments.[238] In such circumstances, the Commission noted that the only effective remedy would be to confront the discrimination directly, to provide direct opportunity for those harmed, and to recognize the discrimination as a self-sustaining process and dismantle it accordingly.[239] Justice Blackmun was equally skeptical of the majority's position. In finding it impossible to combat discrimination through race-neutral means, he concluded: "In order to get beyond racism, we must first take account of race . . . . And in order to treat some persons equally, we must treat them differently."[240]

The principle critique of the current framework reproves the majority's inability to discern the polarized differences between remedial and invidious statutory purposes. Justice Stevens provided that the "consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat."[241] The majority concerns themselves with the possibility that remedial legislation could be implemented as a veiled attempt to set minorities back even further, reinforcing pre-existing stereotypes.[242] Justice Thomas's dissent in *Grutter* is instructive of the point: "The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students."[243]

However, Justice Marshall understood the difference between a truly remedial statute and one that served as a veiled discriminatory instrument. He opined that "a profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism."[244] Justice Marshall discerned racial classifications that were drawn on the presumption that one race was inferior from those which aim to erase or ameliorate the "tragic and indelible" mark the nation has left on its racial minorities.[245] In *Fullilove*, Justice Marshall recognized that the legal principle that forbade "irrelevant or pernicious use of race" was wholly "inapposite to racial classifications that provide benefits to minorities

238. *See* Simmons, *supra* note 83, at 62–63.

239. *Id.*

240. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting). "We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."

241. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

242. *See* Grutter v. Bollinger, 539 U.S. 306, 364 (2003); *Adarand*, 515 U.S. 200, 240–41 (Thomas, J., concurring).

243. *Grutter*, 539 U.S. at 364 (2003) (Thomas, J., concurring).

244. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 552 (1989) (Marshall, J., dissenting).

245. *See id.*

for the purpose of remedying the present effects of past racial discrimination."[246]

Moreover, in today's political landscape, entities and governments make clear their intent to rectify past harm.[247] As such, Justice Stevens was able to differentiate the purposes with ease, noting that the term "affirmative action" was well understood in "everyday parlance."[248] Stevens firmly opposed the Court's "aggressive supervision" over remedial legislation, particularly the conflation of legislation intended to exclude and inhibit with that which explicitly intends to ameliorate the conditions of historically disadvantaged minority groups.[249]

Justice Stevens offered dual analogies to support the inapposite framework. Stevens revisited the tragic and unfortunate *Korematsu v. United States*,[250] which upheld the imposition of curfews, exclusion, and internment camps for Japanese-American citizens during World War II.[251] In order to have effected such a policy, Congress clearly had to make race-based classifications. Stevens hypothesized that, in light of Japanese-Americans' heroism, Congress would be well within their means to reward those same citizens with preference in federal employment hiring.[252] He argued that the consistency the Supreme Court has applied in invalidating both invidious and remedial legislation would require the Court to prevent Congress from recognizing our nation's heroes.[253] Stevens rejected the comparison and chastised the "consistency," which in theory equates the "special preferences that the National Government has provided to Native Americans since 1834 . . . [with] the official discrimination against African-Americans that was prevalent for much of our history."[254] Justice Marshall summarized the sentiment best in *Croson*, where he censured the court for concluding that "remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of . . . racism."[255]

246. Fullilove v. Klutznick, 448 U.S. 448, 518 (1980) (Marshall, J., concurring).

247. *See, e.g.*, *Grutter*, 539 U.S. at 306; Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012), *vacated*, 133 S. Ct. 2411 (2013); Coral Const. Co. v. King Cnty., 941 F.2d 910 (9th Cir. 1991).

248. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) ("Its presence in everyday parlance shows that people understand the difference between good intentions and bad.").

249. *See* Shaw v. Hunt, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting).

250. 323 U.S. 214 (1944).

251. *See id.*

252. *Adarand*, 515 U.S. at 244 (Stevens, J., dissenting).

253. *See id.*

254. *Id.* at 244–45.

255. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 552 (1989) (Marshall, J., dissenting).

2. Gender

The Supreme Court has not examined a gender-based affirmative action program and has examined few benign classifications since 1977.[256] Without recent higher authority to the contrary, federal circuit courts have been free to apply divergent levels of scrutiny to equal protection challenges.[257] The Third, Ninth, Tenth, and Eleventh Circuits have applied intermediate scrutiny to remedial gender-based classifications, whereas the Sixth Circuit has applied strict scrutiny.[258] Those courts applying the traditional intermediate scrutiny have adhered to the Supreme Court's consistency methodology, applying the same level of scrutiny regardless of remedial or invidious intent.

Those applying strict scrutiny have been persuaded by the *Croson* Court's inherent suspicion over affirmative action programs. According to one article written in Croson's wake, the decision has had a "mesmeric effect on conservative judges"—though the decision was specifically directed at programs for racial minorities, certain judges have interpreted the opinion to require the strict scrutiny standard for gender-based remedial legislation.[259] While one scholar posited several reasons why the Court could move in this direction,[260] the Court's current consistency framework would preclude it from adopting anything but intermediate scrutiny in gender-based affirmative action cases.[261]

Nevertheless, the Northern District of California applied strict scrutiny to examine both a race- and gender-based affirmative action

256. *See, e.g.*, Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001) (Congressional decision to impose easier requirements on unmarried mothers than fathers in conferring citizenship to the child born abroad and out of wedlock); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (single-sex admissions policy of MUW's School of Nursing was not upheld as a legitimate classification on the asserted ground that it compensates for discrimination against women and, therefore, constitutes educational affirmative action); Califano v. Webster, 430 U.S. 313 (1977) (whereby a scheme resulted in slightly higher average monthly wage and a correspondingly higher level of monthly old-age benefits for the retired female wage earner than male wage earner).

257. *See* Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under* United States v. Virginia's *"Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169, 1169 (1998) (citation omitted).

258. *Id.* at 1174–75 (citation omitted).

259. *See* Lurie, *supra* note 136, at 1563.

260. *See* Galotto, *supra* note 127, at 535–36 (stating the following rationales: (1) moving further away from a view of the Equal Protection Clause as a primarily race-based prohibition; (2) rejecting the *Carolene Products* rationale impugns all manner of affirmative action programs; (3) noting the potential for "arm-twisting" by preponderant gender groups; and (4) that legislative reliance on racial stereotypes applies with equal force to gender stereotypes).

261. For a further discussion on the anomalous result of making it easier to enact affirmative action for women than racial minorities, *see infra* section III.B.

plan enacted by the San Francisco Fire Department.[262] Likewise, the Sixth Circuit, relying on *Wygant*[263] and *Croson*,[264] used strict scrutiny in *Conlin v. Blanchard*[265] in assessing the constitutionality of Michigan's gender-based affirmative action plan. The court stated that in order for a race- *or* sex-based remedial measure to withstand scrutiny, "the remedy adopted by the state must be tailored narrowly to achieve the goal of righting the prior discrimination."[266] Strict scrutiny's usage was upheld in *Brunet v. Columbus*,[267] in which male fire department applicants brought an action challenging an affirmative action plan for hiring female applicants. Despite acknowledging that the Supreme Court applied an intermediate standard of review in *Mississippi University for Women v. Hogan*, the circuit court, bound by *Blanchard*, invalidated the affirmative action plan under the strict scrutiny standard.[268]

The majority of circuit courts have adhered to a consistent application of intermediate scrutiny in assessing gender-based classifications regardless of invidious or remedial purpose. On January 4, 1974, the eponymous Ensley Branch of the National Association for the Advancement of Colored People filed a complaint against the City of Birmingham challenging its fire department's hiring practices.[269] After Birmingham adopted consent decrees, through which Birmingham was to initiate both race- and gender-based affirmative action policies, a class of male non-black employees intervened.[270] The Court directly recognized the theory that "*Croson* changed the rule established by *Craig*, *Califano*, and *Hogan*, so that gender-based affirmative action is now subject to strict scrutiny just like race-based affirmative action."[271] The court found the argument readily unpersuasive despite the "odd[ity] that it is now easier to uphold affirmative action programs for women *than for racial minorities*."[272] Nevertheless, under the eased burden the court was able to uphold the plan as a "sufficiently important government interest," noting that "[o]ne of the distinguishing features of intermediate scrutiny is that, unlike strict scrutiny, the government interest prong of the inquiry can be satisfied

262. United States v. City & Cnty. of S.F., 696 F. Supp. 1287, 1293 (N.D. Cal. 1988), *aff'd as modified sub nom.* Davis v. City & Cnty. of S.F., 890 F.2d 1438 (9th Cir. 1989).
263. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
264. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
265. 890 F.2d 811 (6th Cir. 1989).
266. *Id.* at 816.
267. 1 F.3d 390 (6th Cir. 1993).
268. *Id*. at 403–04.
269. Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994).
270. *See id.*
271. *Id.* at 1579.
272. *Id*. at 1579–80 (emphasis added). For a discussion of the oddity, *see infra* section III.B.

by a showing of societal discrimination in the relevant economic sector."[273]

Associated General Contractors of California, Inc. v. City and County of San Francisco[274] surrounded an ordinance giving minority-owned, women-owned, and locally owned business enterprises five percent bidding preference for contracts over $50,000. In using intermediate scrutiny, the court adopted a lengthy and searching inquiry into the constitutionality of the program.[275] The court unearthed and examined the measures and justifications for the affirmative action, weighing carefully its advantages and disadvantages.[276] In conceding that laws which "afford special privileges to women raise some of the most difficult and sensitive questions about the permissible bounds of governmental action within the confines of the Equal Protection Clause," the court nevertheless upheld the provisions, specifically enabled by the comparatively lax standard of review.[277]

In *Coral Construction Co. v. King County*,[278] the Ninth Circuit likewise upheld the usage of intermediate scrutiny for gender-based affirmative action in validating part of the King County, Washington program that established a preference for the use of minority- and women-owned businesses.[279] The court was predictably urged to adopt strict scrutiny, using *Croson* (by proxy of *Blanchard*).[280] However, despite the court's "cognizance" of the "litany of problems courts found with intermediate scrutiny," the court found that the gender-based affirmative action program survived a facial challenge.[281] What was *most* telling about the case, however, was that the court invalidated the nearly identical program for minority-owned businesses, under strict scrutiny, despite having just upheld a similar gender-based program under intermediate scrutiny.[282]

3. Sexual Orientation

The Supreme Court has not addressed a sexual-orientation affirmative action case, though it is certainly plausible that, under *Grut-*

273. *Id.* at 1580 (citation omitted).
274. 813 F.2d 922 (9th Cir. 1987).
275. *See id.* at 939–41.
276. *See id.*
277. *Id.* at 939–42 (noting that "[u]nlike racial classifications which must be 'narrowly' tailored to the government's objective . . . there is no requirement that gender-based statutes be 'drawn as precisely as [they] might have been,'" and emphasizing that the program was "*substantially* related to the city to the city's important goal of compensating women for the disparate treatment they have suffered in the marketplace.").
278. 941 F.2d 910 (9th Cir. 1991).
279. *See id.* at 931.
280. *Id.* at 915–16.
281. *Id*. at 931.
282. *See id*. at 932.

ter[283] or *Bakke*,[284] a school could consider sexual orientation as a "diversity boost." Importantly, although no cases addressed here make the distinction between remedial and invidious legislation, there is nothing to suggest, even in dicta, that should courts make such a distinction that a *different* level of scrutiny should apply. The consistency advocated by a majority of the Supreme Court appears to have been adopted *sub silentio* by the respective state supreme courts dealing with same-sex marriage.

We begin with the assumption that someone, in engineering the "civil union," thought that they were granting rights previously not had to same-sex couples. Debatably, this may be understood as remedial legislation. In the *In re Marriage Cases*, California's prohibition on same-sex marriage (a scheme, as defined by the court) included a companion domestic partnership legislation which "afford[ed] same-sex couples the opportunity, by entering into a domestic partnership, to obtain virtually all of the legal benefits, privileges, responsibilities, and duties that California law affords to and imposes upon married couples."[285] Likewise, in *Kerrigan*, Connecticut had provided same-sex couples with a "civil union law [that] was designed to benefit [the] couples by providing them with legal rights that they previously did not have."[286]

Perry v. Brown is instructive.[287] There, the court weighed the differences, both ontological and semantic, between the "domestic partnership" designation and marriage.[288] In finding a "meaningful" difference between the terms, the court refused to discount the stigma attached to a lesser-grade classification.[289] Conjuring memories of "separate but equal" and its spurious and objectionable justification, the court incised right through the ostensibly "equal" statuses. Powerfully, the court held:

> The current statutes—by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of "marriage" exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership—pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.[290]

283. Grutter v. Bollinger, 539 U.S. 306 (2003).

284. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 368 (1978).

285. *In re* Marriage Cases, 183 P.3d 384, 413 (Cal. 2008).

286. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 418 (Conn. 2008).

287. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012), *vacated*, 133 S. Ct. 2652 (2013).

288. *Id.*

289. *Id.* at 1075.

290. *Id.* at 1066 (quoting *In re Marriage Cases*, 183 P.3d at 434–35).

Facially, the statutes appear to *affirmatively* grant rights upon same-sex couples, despite their inexorable modality as a subordinating mandate. That the current statutory scheme assigned "different names for the official family relationships of opposite-sex couples on the one hand, and of same-sex couples on the other," was enough of a red flag to raise constitutional suspicion with the California Supreme Court.[291] The sexual orientation-based classification, despite its facially right-*granting* nature, was read through as "a constitutionally suspect basis upon which to impose differential treatment" and generated the formidable strict scrutiny standard.[292] The court held that the state's interest in retaining a picturesque idea of marriage was *not* a compelling interest and excluding same-sex couples from the portrait was not necessary to serve such an interest.[293]

The court approached the scheme as transparent and pre-textual.[294] In invalidating the scheme, the court found that "the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation."[295] The court reasoned that by placing marriage specifically outside the reach of same-sex couples, the scheme "unquestionably" imposed differential treatment on the basis of sexual orientation.[296] Thus, despite the ostensibly endowing power of the statute, which conferred rights on same-sex couples that they did not previously have, the court was unable to view its beneficial aspects as sufficient to withstand strict scrutiny.[297]

B. Anomalies

A startling anomaly was addressed by the Eleventh Circuit, where the court acknowledged that "[w]hile it may seem odd that it is now easier to uphold affirmative action programs for women than for racial minorities, Supreme Court precedent compels that result."[298] The Equal Protection Clause, obviously, demands that all citizens be

291. *See In re Marriage Cases*, 183 P.3d at 435.
292. *Id.* at 401.
293. *Id.* at 401–02.
294. *Id.* at 440–41.
295. *Id*.
296. *Id.* at 441.
297. *See id.* at 451.
298. Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1579 (11th Cir. 1994); *accord* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) (noting that the framework "will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves").

treated equally.[299] As a matter of constitutional jurisprudence, it is apparent the Court believes the level of scrutiny should comport with the level of protection that the class deserves.[300] Thus, theoretically, the Court should be *more* willing to grant Congress leeway in rectifying the past harms done those enslaved, beaten, subjugated, and indelibly stamped as inferior.[301] The current framework thus leaves Congress significantly more latitude and a higher presumption of validity to rectify harms for those who have historically suffered less.

Simply put, it is easier to enact affirmative action programs based on gender or sexual orientation than for race. If the Equal Protection Clause is meant to ensure that all citizens are placed on equal footing, the Court's current framework impedes that goal. As one scholar concluded, "[i]nstead of serving primarily to ensure freedom from race-based discrimination, the Court's categorical use of rigorous review for all suspect classifications regardless of context, functions today as a barrier to programs designed to redress race discrimination," leaving minorities without equal protection of laws.[302]

The judicial formalism at issue does not work. As Justice Stevens noted, "When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency."[303] As it stands, the Court's adherence to consistency would mandate an *even more* anomalous result in remedial sexual orientation cases. Currently, with the exception of *Windsor*,[304] sexual orientation has not been granted suspect classification under federal law and has been examined under rational basis review. Under this standard, if a law neither burdens a fundamental right nor targets a suspect class, a court will uphold a sexual orientation classification so long as it bears

299. U.S. CONST. amend. XIV, § 1.

300. United States v. Virginia, 518 U.S. 515, 575 (1996) (citation omitted) (applying intermediate scrutiny based on gender: "It is hard to consider women a 'discrete and insular minorit[y]' unable to employ the 'political processes ordinarily to be relied upon,' when they constitute a majority of the electorate."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to classifications discriminating against discrete and insular minorities: "Classifications based on race carry a danger of stigmatic harm."); Perry v. Brown, 671 F.3d 1052, 1100 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012), *vacated*, 133 S. Ct. 2652 (2013) ("I also do not address intermediate scrutiny because Supreme Court precedent thus far has never held that sexual orientation is a 'quasi-suspect classification.'").

301. The history of discrimination against women in our country has been systemic, unfortunate, and lasting. The discrimination has manifested itself in several walks of life and persists today. However, given the stated history of the Equal Protection Clause, this Article takes the position that racial minorities as a *class*, particularly blacks, are at least as deserving of leeway in affirmative action legislation.

302. Goldberg, *supra* note 11, at 487–88.

303. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 247 (1995).

304. Windsor v. United States, 699 F.3d 169 (2d Cir. 2012).

a rational relation to some legitimate end.[305] The burden of persuasion is on the challenger, who must disprove "every conceivable basis which might support it."[306] The classification will be upheld even if the law seems unwise or works to the disadvantage of a particular group.[307]

Thus, if Congress wanted to pass remedial legislation for gays and lesbians under *Romer*, *Perry*, or *U.S. Department of Health and Human Services*, it would have a *much* easier time passing such a bill than one which sought to help women or minorities under the current framework. While women and gays and lesbians have had a torrid history of discrimination,[308] this result runs counter to the purpose of the Fourteenth Amendment. While this author still advocates that women and gays and lesbians be the recipients of remedial legislation, it does not make any sense to make it *more* difficult to enact remedial legislation for ethnic minorities.

Even more curious is the split regarding which scrutiny level applies in orientation-based cases. Particularly fascinating is the import of California's decision to apply strict scrutiny to sexual orientation-based classifications. California made the decision to apply the level of scrutiny that has been described as "fatal,"[309] "independently detrimental,"[310] and a "chief instrument" to invalidate, rather than choosing to apply the intermediate scrutiny standard favored by the Connecticut Supreme Court.[311] Were California to apply the Supreme Court's "consistency" doctrine to sexual orientation-based remedial legislation cases, the legislation would face a serious uphill battle. For instance, suppose California, noting the extensive history of discrimination against gays and lesbians in all walks of life,[312] chose to implement a limited affirmative action policy that gave certain preferences to business enterprises owned by racial minorities, women, and homosexuals.[313] Under this hypothetical, assuming California adhered to a three-tiered scrutiny framework, it would be *significantly* more difficult for this legislation to withstand an equal protection challenge under the near-fatal strict scrutiny standard. However, had California maintained that the classification did *not* merit anything but rational basis review (as numerous states and the

305. *See* Romer v. Evans, 517 U.S. 620, 631 (1996).
306. Heller v. Doe, 509 U.S. 312, 320 (1993) (citation omitted).
307. *Romer*, 517 U.S. at 632.
308. *See supra* subsections II.A.2–3.
309. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting).
310. Goldberg, *supra* note 11, at 509.
311. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).
312. *See supra* section II.A.3.
313. These are loosely the facts of *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

Supreme Court have), the legislation would pass quite easily.[314] Thus, while perhaps it is not accurate to say gays and lesbians are *worse* off because of the standard, they would be *better* off with a different standard—a standard that weighs the implied benefits of remedial legislation with the palpable dangers of prejudice.

C. Strict Scrutiny Cannot Work for Race-Based Remedial Legislation

Anomalies aside, strict scrutiny's application in race-based cases does not make much sense. While admittedly, the consistency approach adhered to by a majority of the Supreme Court has a certain appeal in its simplicity, the approach is replete with resultant anomalies. The Court begins by presuming that all race-based classifications are invalid, biased, and undesirable because they stamp a race as inferior. This approach runs directly counter to most affirmative action plans, whose stated purposes seek to remedy long-standing policies of discrimination and exclusion.

The application of strict scrutiny to Equal Protection Clause challenges, by impeding programs that seek to rectify and ameliorate the damage done to racial minorities, is actually preventing the Equal Protection Clause from achieving its primary purpose.[315] Again, this result is compelled by the canon of construction requiring that "[c]ourts should not read into a remedial statute an exception *that would impose obstacles* to the achievement of its purpose."[316]

Applying the same level of scrutiny for classifications that segregate, subjugate, or burden racial minorities to classifications that seek to remedy their long-standing battle against institutional racism is classically inapposite. Aside from the logical inconsistencies, the framework essentially results in Congressional emasculation,[317] stripping its ability to effect the purpose of the Fourteenth Amendment to "ameliorat[e] the condition of the freedmen."[318] Strict scrutiny, as it is applied to remedial race-based classifications, ignores several key arguments that, as a matter of jurisprudence, support Congress's power to remedy the harm suffered by racial minorities under the Equal Protection Clause.

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314. *Cf.* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990 (3d Cir. 1993) (upholding a similar business statute for the disabled under rational basis review).

315. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976) ("[T]he 39th Congress [that enacted the Fourteenth Amendment] was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.").

316. 3 SINGER & SINGER, *supra* note 63, § 60:1 (emphasis added).

317. Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

318. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens).

The Court's adherence to constitutional color blindness, in the face of the extensive history behind the Fourteenth Amendment, violates many of the statutory construction principles articulated in section II.B. In fact, in *Bakke*, Justice Brennan himself noted that "[n]othing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts *even remotely suggests* that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed."[319] Rather, as one court put it, "[T]he amendment sought to ensure that the law would no longer turn a blind eye to the indignities that Black Americans were forced to endure as a result of their race."[320] It is implausible, if not absurd, to suggest that the Thirty-Ninth Congress intended the Amendment to be used to prevent racial minorities from obtaining ameliorative support.

Strict scrutiny's impact as the affirmative action death knell does a disservice to its stated purpose—to "smoke out illegitimate uses of race."[321] Strict scrutiny, masquerading as "searching judicial inquiry," attempts to ensure that the legislative body is pursuing a goal important enough to warrant the use of the racial classification.[322] The Court's hesitance to uphold any racial classification is grounded in concerns that the legislation has some hidden purpose to perpetuate racial inferiority or effect illegitimate racial prejudice.[323]

However, the stark reality is that the Court's decision to use strict scrutiny effectively forecloses any meaningful examination. The unyielding standard begins with such a presumption of bias and illegitimacy that the Court is unable to make a truly neutral and searching analysis. It specifically bemused Justice Marshall, who thought it "made no sense for the Court to reject, a priori, any serious effort to smoke out invidious motive in the non-paradigm cases."[324] The Court's conclusion that "racial characteristics so seldom provide a relevant basis for disparate treatment" necessarily compels the point.[325]

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319. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 368 (1978) (Brennan, J., concurring in part and dissenting in part) (emphasis added). Even the majority concluded that "[n]one of these sources lends support to the proposition that Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life." *Id.* at 336.

320. Aiken v. City of Memphis, 37 F.3d 1155, 1172 (6th Cir. 1994) (Jones, J., dissenting).

321. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 436 (1997).

322. *Id.* at 438–40.

323. *Id.* at 445–48.

324. Brown, *supra* note 202, at 646–47 (2009).

325. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995) (citation omitted); *see also* Goldberg, *supra* note 11, at 575–76 (noting the language used to strike down race-based classifications often more closely reflects rational basis review than strict scrutiny).

The Court's insistence on beginning the inquiry with such a skewed predisposition eliminates the ability to really determine whether or not the classification truly perpetuates prejudice. A lesser, more compliant standard of review would allow the Court to consider the illogical results of its consistent framework, as well as the stated remedial purposes of the Fourteenth Amendment.

D. Justice Marshall's Flexible and Searching Sliding-Scale Standard Should Replace the Traditional Three-Tiered Review

This argument's vitality and success depend on an important predicate assumption: the reader recognizes that affirmative action and similar remedial legislative programs are *not* invidious. To some, distinguishing between remedial and invidious racial classifications does not require a rigorous review or an abstract calculus.[326] Affirmative action programs are labeled as such and seek to rectify past harms or generate a more inclusive work or educational environment. This was the Freedman Bureau's objective[327] and is the objective of the Equal Protection Clause as it has been interpreted by several justices.[328]

The test balances the importance of the interest against the invidiousness of the legislation.[329] Here, race, gender, and sexual orientation all merit significantly *close* scrutiny because of the interests affected and the history of discrimination,[330] but that would be counteracted or mediated by the stated remedial purpose of the legislation.

The Court would have an uphill battle explaining the invidiousness of an explicitly remedial statute but could make strong arguments regarding the "societal importance of the interest adversely affected,"[331] specifically in reverse affirmative action cases, whereby people from social classes who have traditionally evaded discrimination seek to invalidate affirmative action mandates.[332] Justice Scalia has repeatedly cited the unfavorable effects on those outside the scope

326. *See, e.g., Adarand*, 515 U.S. at 244–46 (Stevens, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 530 (1989) (Marshall, J., dissenting). *Contra Adarand*, 515 U.S. at 239 (Scalia, J., concurring).

327. Schnapper, *supra* note 45, at 785 (citation omitted).

328. *See supra* note 74 and accompanying text.

329. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

330. See *supra* section II.A.

331. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 99 (Marshall, J., dissenting).

332. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012), *vacated*, 133 S. Ct. 2411 (2013); Brunet v. City of Columbus, 1 F.3d 390, 404 (6th Cir. 1993).

of affirmative action statutes.[333] Thus, for example, legislators would have to tailor the statute in the following ways:

> The terms of the decree cannot require the discharge of non-minority workers and their replacement with minorities. The decree's provisions cannot bar absolutely the advancement of opportunities of non-minorities . . . . [T]he decree must be a temporary remedy designed to terminate when it has eliminated the racial imbalance. The decree cannot mandate the hiring or promotion of unqualified individuals.[334]

Naturally, the sliding-scale standard would work extremely well for gender-based remedial legislation cases and would settle the aforementioned circuit split between intermediate scrutiny and strict scrutiny.[335] The balancing test inherent in the standard would work well to "smoke out" illegitimate classifications based on stereotypes, specifically those which "exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females."[336] As mentioned previously, laws which discriminate on the basis of gender "raise some of the most difficult and sensitive questions about the permissible bounds of governmental action within the confines of the [E]qual [P]rotection [C]lause."[337] The Court could weigh the remedial interests being served against the possibility that legislation would actually reinforce gender stereotypes. Further, the framework would not produce the anomalous result in which it is *easier* to enact affirmative action policies for women rather than blacks. Courts could no longer hide behind pre-textual conclusions and could no longer "avoid the telling task of searching for a substantial state interest."[338]

Lastly, a balancing, sliding-scale approach would give LGBT persons protection under the Fourteenth Amendment without jeopardizing the Legislature's ability to enact statutes that serve to rectify past harm. The approach would recognize the serious and unfortunate history and persecution gays and lesbians have faced in this country[339] and could accordingly offer protection commensurate to suspect or quasi-suspect status. Further, it would eliminate the need to discern

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333. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 348 (2003) (Scalia, J., concurring); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

334. Stotts v. Memphis Fire Dept., 679 F.2d 541, 553 (6th Cir. 1982) (citations omitted), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

335. *Compare* Coral Const. Co. v. King Cnty., 941 F.2d 910, 931 (9th Cir. 1991) (applying intermediate scrutiny), *with* Brunet, 1 F.3d at 404 (applying strict scrutiny).

336. United States v. Virginia, 518 U.S. 515, 517 (1996) (citation omitted). *Contra* Nguyen v. INS, 533 U.S. 53 (2001) (recognizing that real biological differences between the sexes sometimes can justify differential treatment without running afoul of the Equal Protection Clause).

337. Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994).

338. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

339. *See supra* subsection II.A.3.

between regular rational basis review, rational basis with bite, and rational basis plus. Justice Marshall expressed particular distaste with the different forms of rational basis, articulating in *Cleburne*:

> [B]y failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.[340]

Under the sliding-scale framework the LGBT community would receive suspect or quasi-suspect class status in light of its relative political powerlessness and unfortunate history of discrimination and could benefit from legislation or policies aimed at recompensing those aggrieved.

The classification would raise red flags (akin to gender classifications) and would allow the Court to "smoke out" illegitimate schemes based on sexual orientation-based discrimination. The Court would be free to recognize that schemes like civil union statutes that appear remedial on their face "operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation."[341] Plaintiffs would no longer have to bear the onus of having to disprove "every conceivable basis which might support it" as required under traditional rational basis review.[342]

The difficulty with the three-tiered system is most evident at the poles. While it would be possible for an LGBT plaintiff to withstand strict scrutiny in a case concerning remedial legislation, the Supreme Court's consistency framework would mandate rational basis review, which has traditionally led to government-favored results.[343] Conversely, if California followed the Supreme Court's "consistency" approach—as most courts have—and applied strict scrutiny to truly remedial and beneficial statutes based on sexual orientation, the statutes would likely be invalidated given the strict bias presumption attached to strict scrutiny. Herein lies another anomaly: under the consistency approach, it seems almost impossible to have a framework that would protect the LGBT community from invidious legislation but at the same time support legislation that would remedy the iniquitous effects past legislation has caused.

Under the sliding-scale framework, California would be free to enact truly remedial legislation. By not sounding strict scrutiny's "death knell," states would be free to enact the sorts of remedial legislation

340. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 460 (1985) (Marshall, J., concurring in part and dissenting in part).
341. *In re* Marriage Cases, 183 P.3d 384, 440–41 (Cal. 2008).
342. Heller v. Doe, 509 U.S. 312, 320–21 (1993) (citation omitted).
343. Recall "[t]he extremes to which the Court has gone in dreaming up rational bases for state regulation." Dandridge v. Williams, 397 U.S. 471, 520 (1970).

that some believe desirable. This is consistent with *Perry*'s statement that "states should be free 'to experiment' with social policy, without fear of being locked in to 'legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place.'"[344] Thus, should state universities wish to include gays and lesbians in their "critical mass," they would be free to do so.[345]

Likewise, Justice Marshall's framework would resolve the current split between federal appellate review[346] applying rational basis review, and state appellate review[347] applying heightened scrutiny. Regardless, it will be incumbent upon the court to determine whether an invidious motive exists, and if so, it would not matter whether the aggrieved were part of a "suspect class"—they would receive their commensurate equal protection under law.

IV. CONCLUSION

In this case, judicial formalism has reached its limits. The Court's current approach to remedial legislation that makes race, gender, or sexual orientation-based classifications is unsustainable. The Court has made it virtually impossible for Congress or states to effect the purposes of the Fourteenth Amendment and is doing so in the face of strong canonical mandates to the contrary. The framework has resulted in absurdities and ignores the tenet that the level of scrutiny is designed to comport with the level of protection the class deserves. The Court should abandon its current framework and instead weigh the level of protection the class deserves and the potential good the legislation can serve against any veiled motives or inimical intent.

344. Perry v. Brown, 671 F.3d 1052, 1085 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012), *vacated*, 133 S. Ct. 2652 (2013) (citation omitted).

345. Grutter v. Bollinger, 539 U.S. 306 (2003).

346. *Compare* Mass. v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012), *and* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012), *vacated*, 133 S. Ct. 2652 (2013), *with* Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012), *aff'd*, 133 S. Ct. 2675 (2013).

347. *See In re* Marriage Cases, 183 P.3d 384, 399–401 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 423 (Conn. 2008).