Loyola of Los Angeles Law Review

Volume 55 | Number 3 Article 5

7-24-2022

# California's AB 979: An Argument to Apply Intermediate Scrutiny to Race-Based Classifications for the Purpose of Inclusion

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# CALIFORNIA'S AB 979: AN ARGUMENT TO APPLY INTERMEDIATE SCRUTINY TO RACE-BASED CLASSIFICATIONS FOR THE PURPOSE OF INCLUSION

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*This Note uses California's Assembly Bill 979 as context for an argument to apply intermediate scrutiny to laws that classify on the basis of race for the purpose of inclusion. Standards of review are meant to reasonably address the threat level posed by specific government action. However, the Court's current doctrine as applied to race considers all race-based government action, whether for the purpose of inclusion or exclusion, as equally suspect. This prevents the Court and the government from acknowledging the impacts of historical discrimination against people of color. This Note explores the development of current doctrine, which calls for strict scrutiny for all race-based laws regardless of intent, and argues that the Court's position over the years has been far from absolute. By studying the Justices' various opinions, concurrences, and dissents, this Note argues that intermediate scrutiny is the proper standard of review for challenges to race-based action for the purpose of inclusion. Action for the purpose of inclusion is not suspect in the way action for the purpose of exclusion is. Equal protection doctrine must be able to recognize the difference between laws that discriminate for the purpose of exclusion and laws that discriminate for the purpose of inclusion. Applying intermediate scrutiny to government action that classifies on the basis of race for the purpose of inclusion is supported by scholarly discourse as well as the Supreme Court's analysis over the years and would produce more just results that fulfill the purpose of the Equal Protection Clause itself.*

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## I. INTRODUCTION

On September 30, 2020, California Governor Gavin Newsom signed Assembly Bill 979 (AB 979), which required that publicly held corporations headquartered in the state increase the presence of members of "underrepresented communities" on their boards by the end of 2022.[1] At that time, more than 35 percent of California's public company boards were all white.[2] The legislation immediately faced challenges from activist groups who alleged that it violated the Equal Protection Clause of the United States and California Constitutions.[3] In their opposition, these groups asserted that the legislation's requirements based on "race, ethnicity, sexual preference, and transgender status" were "immediately suspect and presumptively invalid and trigger[ed] strict scrutiny review by the court."[4]

AB 979 is now California Corporations Code section 301.4.[5] The statute requires that any publicly held domestic or foreign corporation[6] whose principal executive office[7] is located in California have a minimum of one director from an underrepresented community on its board by the end of 2021.[8] A corporation subject to the statute "may

1. Dave Simpson, *Calif. Gov. Signs Law Requiring Corporate Board Diversity*, LAW360 (Sept. 30, 2020, 11:59 PM); CAL. CORP. CODE § 301.4 (2022); Assemb. B. 979, 2019–2020 Leg., Reg. Sess. (Cal. 2020).

2. Anne Steele, *California Rolls Out Diversity Quotas for Corporate Boards*, WALL ST. J. (Oct. 1, 2020, 12:01 AM), https://www.wsj.com/articles/california-rolls-out-diversity-quotas-for-corporate-boards-11601507471 [https://perma.cc/5GGZ-2A2R].

3. Brian Melley, *Group Sues to Block California Boardroom Diversity Law*, AP NEWS (Oct. 5, 2020), https://apnews.com/article/race-and-ethnicity-los-angeles-legislation-california-gavin-newsom-4b1b76e9d49c34a7fa88d68c4330ef48.

4. *Id.*

5. CAL. CORP. CODE § 301.4.

6. A publicly held corporation is "a corporation with outstanding shares listed on a major United States stock exchange." *Id.* § 301.4(e)(2). The California Secretary of State's web site contrasts publicly held corporations with publicly traded corporations; the former are "corporations with shares listed on the New York Stock Exchange (NYSE), the National Association of Securities Dealers Automated Quotation (NASDAQ), or the NYSE American," while the latter also include "corporations with securities listed on the . . . [Over-the-Counter (OTC)] Bulletin Board, or on the electronic service operated by OTC Markets Group Inc." *See General FAQs*, CAL. SEC'Y OF STATE, https://www.sos.ca.gov/business-programs/diversity-boards/general-faqs [https://perma.cc/JF7Z-VQSN]. Therefore, the subset of publicly held corporations is narrower than publicly traded corporations.

7. A corporation's principal executive office is designated on its SEC 10-K form. CAL. SEC'Y OF STATE, WOMEN ON BOARDS: MARCH 2021 REPORT 2 (Mar. 2021), https://bpd.cdn.sos.ca.gov/women-on-boards/wob-report-2021-02.pdf [https://perma.cc/8Q7E-J35P]. The 2021 report compiled by the Secretary of State of California recorded 647 publicly held corporations with a California principal executive officer on their 2020 SEC 10-K filing. *Id.* at 3.

8. CAL. CORP. CODE § 301.4(a).

increase the number of directors on its board to comply with this section."[9] By the end of 2022, the requirements become more specific; as the size of the board increases, the number of required members from underrepresented communities increases as well.[10] The statute defines a member of an underrepresented community as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender."[11]

Prior to AB 979's passage in 2020, California passed Senate Bill 826 (SB 826)[12] in 2018—now California Corporations Code section 301.3.[13] AB 979's language is nearly identical to SB 826's,

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9. *Id*.

10. *Id.* § 301.4(b). Section 301.4(b) states:

> (b) No later than the close of the 2022 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall comply with the following:
>
> (1) If its number of directors is nine or more, the corporation shall have a minimum of three directors from underrepresented communities.
>
> (2) If its number of directors is more than four but fewer than nine, the corporation shall have a minimum of two directors from underrepresented communities.
>
> (3) If its number of directors is four or fewer, the corporation shall have a minimum of one director from an underrepresented community.

*Id.*

11. *Id*. § 301.4(e)(1). Interestingly, sexual orientation (gender identification is included in this group) is considered a non-suspect class; therefore, laws that classify on this basis receive rational basis review—a very low threshold for the government to overcome. *See* Erwin Chemerinsky, *Chemerinsky: Gorsuch Wrote His 'Most Important Opinion' in SCOTUS Ruling Protecting LGBTQ Workers*, ABA JOURNAL (July 1, 2020, 8:00 AM), https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-just-wrote-his-most-important-opinion [https://perma.cc/YPW4-SYEH] (However, Chemerinsky notes that *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), may have "interesting implications for the level of scrutiny to be used for sexual orientation and gender identity discrimination under equal protection. . . . If discrimination based on sexual orientation and gender identity are seen as sex discrimination, then it would seem that intermediate scrutiny should be used under the Constitution when there is a challenge to government discrimination against gay, lesbian and transgender individuals.").

The differing treatment of these classes creates a microcosm of the overarching argument of this Note. Because sexual orientation is not considered suspect, laws that classify on its basis receive a mere speed bump standard of review, and therefore such laws will almost always stand. *See id.* Courts have acknowledged that race is a historically more discriminated against class than sexual orientation, due to the immutable and immediately visible traits associated with race. However, the "less-discriminated against class" (sexual orientation) will likely enjoy the benefits of laws like AB 979 because the evidentiary hurdle is so much lower. For this reason, I focus on the race-based aspect of AB 979.

12. S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018). In this Note, I will generally continue to refer to California Corporations Code section 301.4 as AB 979 and California Corporations Code section 301.3 as SB 826 for ease of use and to prevent possible confusion.

13. Patrick McGreevy, *Newsom Signs Law Mandating More Diversity in California Corporate Boardrooms*, L.A. TIMES (Sept. 30, 2020, 2:55 PM), https://www.latimes.com/california/story

substituting "member of an underrepresented community" for "female" where applicable.[14] Both texts grant the Secretary of State discretion to impose fines for failure to comply, ranging from $100,000 for a first violation to $300,000 for subsequent violations.[15] Both require annual reporting by the Secretary of State detailing the number of corporations in compliance with the statute, the number of corporations that moved in or out of California, and the number of corporations that were subject to the statute, but are no longer publicly traded.[16]

SB 826's impact on the number of women on corporate boards in California is already evident.[17] As of June 2017, men held 84.5 percent of all director positions.[18] Twenty-five percent of California's public companies in the Russell 3000 index[19] had all-male boards of directors.[20] By July of 2019, after SB 826's passing, this figure had shrunk to 10 percent.[21] In 2020, less than two years after SB 826 was enacted, nearly half of all new board seats in California were filled by women.[22] Women accounted for 45 percent of new board seats among Russell 3000 companies in California, contrasted with 31 percent of such seats

/2020-09-30/california-law-requires-diversity-corporate-boardrooms-gavin-newsom [https://perma.cc/KP26-LWEY]; CAL. CORP. CODE § 301.3.

14. *Compare* CAL. CORP. CODE § 301.4, *with id.* § 301.3. California Corporations Code section 301.3(f)(1) defines a "female" as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth." *Id.* § 301.3(f)(1).

15. CAL. CORP. CODE §§ 301.3(e)(1), 301.4(d)(1).

16. CAL. CORP. CODE §§ 301.4(c), 301.3(d).

17. Jeff Green, *Diversity Quotas Aren't Popular, but California Shows They Work*, BLOOMBERG (Feb. 29, 2020, 5:00 AM), https://www.bloomberg.com/news/articles/2020-02-29/california-diversity-law-shows-quotas-work.

18. S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

19. The Russell 3000 Index is a "market-capitalization-weighted equity index" that "tracks the performance of the 3,000 largest U.S.-traded stocks, which collectively account for roughly 97% of all U.S-incorporated equities." Adam Hayes, *Russell 3000 Index*, INVESTOPEDIA (Nov. 26, 2021), https://www.investopedia.com/terms/r/russell_3000.asp [https://perma.cc/ZNQ9-YPTL]. As of October 2020, more than 500 of the Russell 3000 companies are based in California. Amit Batish, *Nearly 40% of Companies Would Not Meet California's New Diversity Requirement*, EQUILAR (Oct. 1, 2020), https://www.equilar.com/blogs/481-nearly-40-percent-of-companies-do-not-meet-ca-diversity-requirement.html [https://perma.cc/G6ZU-DQA9].

20. Cal. S.B. 826.

21. *See* Martha Groves, *How California's 'Woman Quota' Is Already Changing Corporate Boards*, CAL MATTERS (Dec. 19, 2019), https://calmatters.org/economy/2019/12/california-woman-quota-corporate-board-gender-diversity/ [https://perma.cc/88RA-AWFW].

22. Greg Gautam et al., *California Is First State to Mandate Public Company Board Diversity*, JDSUPRA (Oct. 15, 2020), https://www.jdsupra.com/legalnews/california-is-first-state-to-mandate-60655/ [https://perma.cc/Y6D2-HFF7].

nationwide.[23] However, these gains have largely been limited to white women.[24] Of the 511 public board seats filled by women in reaction to SB 826's passing as of March 2020, white women accounted for 77.9 percent, followed by Asian women at 11.5 percent, and Black women at 5.3 percent.[25] When AB 979 passed in 2020, more than 35 percent of California's public company boards were all white.[26] Proponents of AB 979 hope to see gains similar to those experienced by (mostly white) women replicated within underrepresented groups in the coming years.

Despite a growing call for diversity in the corporate world,[27] AB 979 is already facing legal challenges. In July 2021, a non-profit organization formed by Edward Blum called "Alliance For Fair Board Recruitment" filed a complaint in federal court against California Secretary of State, Shirley Weber, in an attempt to invalidate both AB 979 and SB 826.[28] The organization consists of several white males with experience that qualifies them to serve on corporate boards, and the complaint alleges that both statutes violate the Equal Protection Clause.[29]

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23. Green, *supra* note 17.

24. *See* Kim Bojórquez, *'Women of Color Are Left Out': California Corporations Lack Diversity, Study Finds*, SACRAMENTO BEE (July 14, 2020, 8:54 AM), https://www.sacbee.com/news/politics-government/capitol-alert/article244156672.html.

25. *See id.*

26. Steele, *supra* note 2. Considering that this is even higher than the 25 percent of boards that were all male when SB 826 passed, race discrimination appears to be even more pervasive at the corporate executive level than sex discrimination is.

27. *See* discussion *infra* Part V.

28. Jody Godoy, *Activist Behind Harvard Race Case Takes Aim at Calif. Board Laws*, REUTERS (July 13, 2021, 2:56 PM), https://www.reuters.com/legal/legalindustry/activist-behind-harvard-race-case-takes-aim-calif-board-laws-2021-07-13/. Edward Blum is the "affirmative action opponent behind the lawsuit challenging Harvard University's consideration of race in student admissions." *See id.* Secretary of State Weber filed a motion for dismissal, and a hearing was scheduled for Nov. 1, 2021. *See* Keith Bishop, *State Seeks Dismissal of Federal Court Challenge to California Quota Laws*, JDSUPRA (Oct. 14, 2021), https://www.jdsupra.com/legalnews/state-seeks-dismissal-of-federal-court-1092303/ [https://perma.cc/JML2-HQFX]. The result of the motion was not available at the time of writing.

29. Godoy, *supra* note 28. The complaint also contends that AB 979 violates the Civil Rights Act, and that both statutes "illegally supersede the laws of the states in which companies are incorporated." *See id*. *Meland v. Padilla* was the first litigated opposition to requiring women on California corporate boards. *See* Meland v. Padilla, No. 19-CV-02288, 2020 WL 1911545, *1 (E.D. Cal. Apr. 20, 2020), *rev'd sub nom.* Meland v. Weber, 2 F.4th 838 (9th Cir. 2021). Meland, a voting shareholder on the board of a California-based publicly held corporation, stated that the "Woman Quotas" as he called it, forced shareholders to "perpetuate sex-based discrimination" and violated his rights under the Equal Protection Clause of the Fourteenth Amendment. Complaint ¶ 1, at 1, ¶ 26, at 5, Meland v. Padilla, No. 19-CV-02288 (E.D. Cal. Nov. 13, 2019). Meland failed initially due to lack of standing; however, the Ninth Circuit reversed in June 2021, holding that Meland did

Although the doctrinal claims leveraged against AB 979 and SB 826 are identical,[30] the standard of review applied will likely differ. If courts follow current doctrine, SB 826 will receive intermediate scrutiny because it classifies on the basis of gender, while AB 979 will receive strict scrutiny because it classifies on the basis of race.[31] Because they will likely face two different standards of review, it is possible that these two nearly identical statutes will experience different outcomes. The result could be that women—the class that is considered to be historically less-discriminated against[32] and is statistically better represented on corporate boards[33]—will still benefit from the statute, while underrepresented racial groups—the class that suffers from more discrimination and is far less represented on corporate boards[34]—will lose that protection. Addressing and rectifying this inequitable and illogical difference in treatment is the purpose of this Note.

Part II briefly summarizes the Supreme Court's equal protection analysis, and then offers a thorough examination of the development of strict scrutiny for all race-based classifications over the past several decades. It concludes by comparing race-based doctrine to gender-based doctrine, contrasting gender-based doctrine's ability to consider the effects of a long history of bias and discrimination with race-based doctrine's inability to do so.

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have standing because he "plausibly alleged that SB 826 require[d] or encourage[d] him to discriminate on the basis of sex." *Weber*, 2 F.4th at 842.

30. *See* Godoy, *supra* note 28 (citing equal protection challenges to both AB 979 and SB 826). There is another potential argument to be made:

> Theories have also been advanced that the laws violate the Internal Affairs Doctrine (a doctrine that says the laws of the state of a corporation's incorporation should govern issues relating to the internal affairs of a corporation) insofar as they purport to apply to California-headquartered corporations that were incorporated in another state.

Greg Gautam et al., *supra* note 22. This argument would not apply to every corporation that falls under the requirements of AB 979, but only to companies that incorporated outside of California but have their principal place of business in California. For the purposes of this Note, I focus on the equal protection argument. The Internal Affairs Doctrine argument would not involve a discussion of the protected class-based discrimination, so the standard of review argument would not apply there. However, this is a possible avenue of opposition for proponents of the two statutes to remain aware of.

31. *See* discussion *infra* Part II.

32. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978) ("More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.").

33. *See* Assemb. B. 979, 2019–2020 Leg., Reg. Sess. (Cal. 2020); Steele, *supra* note 2.

34. *See* Cal. Assemb. B. 979; Steele, *supra* note 2.

Part III critiques current race-based equal protection doctrine, arguing that applying strict scrutiny to government action like AB 979 is not consistent with the purpose of the Equal Protection Clause. The first section focuses on the "intent double standard" created by conflicting doctrine as applied to facially neutral and facially explicit laws, and explains how inherent bias and unconscious racism exacerbate this double standard. The second section delves into the purpose of the Equal Protection Clause itself and offers examples of how current doctrine does not support this purpose.

Part IV proposes a new standard of review for government action that classifies on the basis of race for the purposes of inclusion—intermediate scrutiny—and applies it to AB 979. Basing standard of review solely on whether a law classifies on the basis of race leaves out an important piece of analysis that is required in order to correctly apply the Equal Protection Clause: intent. The question courts ask should not only be whether the law classifies on the basis of race, but whether the law is racially exclusionary. This Note argues that the correct application of standard of review depends on the answer to that question.

Part V presents a policy argument in favor of upholding AB 979 and laws like it that attempt to correct a historical imbalance resulting from a long history of discrimination. This section argues that upholding legislation like AB 979 and SB 826 is especially important in the corporate context by citing statistics on employment in the United States. Changing the composition of leaders at the top will bring more diversity to every level of the corporation.[35] Therefore, if it is allowed to function as intended, AB 979 will likely become a gateway to a more diverse and inclusive workplace overall—the achievement of which constitutes an important government interest. Such inclusionary action should withstand intermediate scrutiny, and the decision to undertake such action should be left to the discretion of the California voters.

Part VI concludes. The Equal Protection Clause exists to prevent government action that oppresses underrepresented and marginalized groups.[36] Therefore, voluntary government action undertaken with the intent to include underrepresented and historically oppressed groups does not violate the Equal Protection Clause. Action for the purpose

35. *See* discussion *infra* Part V.

36. *See* discussion *infra* Section III.B.

of inclusion is not suspect in the way action for the purpose of exclusion is, and, consequently, the former should be left to the discretion of the voters and the legislature. Applying strict scrutiny to this type of government action is misguided—a misinterpretation of the Equal Protection Clause at best, and an abandonment of interpretation in favor of ideology at worst. Equal protection doctrine must be able to recognize the difference between laws that discriminate for the purpose of exclusion and laws that discriminate for the purpose of inclusion. Applying intermediate scrutiny to government action that classifies on the basis of race for the purpose of inclusion is supported by scholarly discourse as well as the Supreme Court's analysis over the years and would produce more just results that fulfill the purpose of the Equal Protection Clause itself.

## II. CURRENT DOCTRINE: BACKGROUND OF EQUAL PROTECTION ANALYSIS

The Fourteenth Amendment states, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[37] The notion that government action may merit different levels of scrutiny depending on the class at issue was first introduced in 1938 in footnote four of *United States v. Carolene Products Co*.[38] Today, Equal Protection challenges to government action are subject to different standards of review depending on how they classify.[39] These court-created standards are an attempt to

37. U.S. CONST. amend. XIV.

38. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id*. (citations omitted); *see* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 143 (2011).

39. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 726 (5th ed., 2017).

accurately respond to the level of the threat posed by the government action based on the nature of the specific class targeted.[40]

Equal protection analysis can be broken down into three questions: (1) How does the law classify? (2) What level of scrutiny does that classification require? (3) Is the government action justified under that level of scrutiny?[41] Laws that discriminate on the basis of classes that are considered "suspect" receive strict scrutiny and impose the highest evidentiary burden on the government; classifications that are "quasi-suspect" or not suspect at all impose increasingly lower burdens and receive intermediate scrutiny and rational basis review, respectively.[42]

Current doctrine considers race "suspect" and therefore subject to strict scrutiny, while gender is "quasi-suspect" and subject to intermediate scrutiny.[43] To withstand strict scrutiny, the government must prove that the challenged action is *narrowly tailored* to achieve a *compelling* government purpose.[44] Intermediate scrutiny requires that the challenged action have a *substantial relationship* to an *important* government interest.[45] Rational basis review is "enormously deferential" and will be satisfied if the law is *rationally related* to a *legitimate* government purpose.[46]

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40. *See id.*

41. *Id.*

42. Strauss, *supra* note 38, at 135–37.

43. *Id.* at 146. Suspect classifications include those based on race, religion, national origin, and alienage (non-citizenship). *See id.* These suspect classes receive strict scrutiny. *Id.* Gender and legitimacy of birth are considered quasi-suspect classifications, meaning they are slightly less concerning than suspect classifications and receive intermediate scrutiny. *See id.* Other classifications, such as age and sexual orientation, are not considered suspect by the Supreme Court and receive rational basis review. *See id.*

44. CHEMERINSKY, *supra* note 39, at 727. The means to achieve the government purpose in question can be underinclusive or overinclusive. *See id.* at 729–30. "Fit" refers to how under or overinclusive the law is. *See id.* If the standard requires a tight fit, like strict scrutiny does, courts will accept a much lower range of over- and under-inclusiveness than they do when evaluating intermediate scrutiny or rational basis review. *See id.* To prove a tight fit, the government must demonstrate that the means used was close to, if not the only way, to achieve the ends sought. *See id*.

45. *Id.* at 727.

46. *Id.* at 728. "[O]nly rarely have laws been declared unconstitutional for failing to meet this level of review." *Id.* This explanation applies to laws that classify facially. See discussion *infra* Section III.A. for an explanation regarding laws that are facially neutral and a discussion of discriminatory purpose doctrine.

### *A. The Winding Path to Strict Scrutiny for All Racial Classifications*

Strict scrutiny triggers a presumption of unconstitutionality; only the most essential and narrowly tailored laws should be able to withstand it.[47] According to current doctrine, strict scrutiny is always the correct standard of review for laws that facially classify on the basis of race.[48] The simple explanation is that this doctrine was definitively established in *City of Richmond v. J.A. Croson, Co.*,[49] and has been settled ever since.[50] However, a close reading of the Court's decisions as strict scrutiny was emerging as the de facto standard of review for race-based classifications shows that consensus was (and is) far from absolute. As this section illustrates, the appropriate standard of review for race-based government action for the purposes of inclusion has often been a point of contention among Justices and was rarely agreed upon by a majority. An analysis of the various majority and plurality opinions, concurrences, and dissents shows a Court repeatedly divided and reveals a recurring desire for a more nuanced approach.

Since strict scrutiny was established in 1944 in *Korematsu v. United States*,[51] the Court's application of strict scrutiny to race-based classifications has been varied and inconsistent. In 1978, Allan Bakke, a white man, challenged the University of California's affirmative action practice of reserving sixteen spots for designated minority groups.[52] Justice Powell, writing for the plurality, held that while the University's interest in promoting diversity was substantial, the

47. *See* CHEMERINSKY, *supra* note 39, at 727.

48. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222 (1995).

49. 488 U.S. 469 (1989).

50. *Id.* at 493.

51. 323 U.S. 214 (1944). Ironically, in *Korematsu*, the Court upheld the government action and determined that a facially discriminatory law based on Japanese ethnicity was justified. *Id*. at 219. The Executive Order at issue in that case allowed the government to imprison Japanese-Americans in concentration camps in reaction to an unfounded fear that these people would aid their home country of Japan in the war effort. *See id.* at 216–17. In its decision to uphold the Executive Order, the Court stated that "[t]here was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified." *Id.* at 223–34. In dissent, Justice Murphy concluded that the act went "over 'the very brink of constitutional power' and [fell] into the ugly abyss of racism." *Id.* at 233 (Murphy, J., dissenting).

52. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269, 275 (1978).

"quota" was not a constitutional method of obtaining that goal.[53] Justice Brennan, in a concurrence with Justices White, Marshall, and Blackmun, reasoned that intermediate scrutiny was the appropriate standard to apply to "racial classifications designed to further remedial purposes," such as those in *Bakke*.[54] Under that standard, Justice Brennan concluded that the university's articulated purpose of remedying past-effects of race discrimination was sufficiently important to justify the use of race-conscious admissions programs.[55] He argued that because racial classifications established for "ostensibly benign" purposes may nevertheless be invidious if misused, rational basis review was not appropriate.[56] Nevertheless, Justice Brennan concluded that strict scrutiny should be relegated to those statutes that stigmatize groups or "single[] out those least well represented in the political process to bear the brunt of a benign program."[57]

In 1980, Justices Marshall, Brennan, and Blackmun again argued for intermediate scrutiny in a case involving federal funds set aside for minority-owned businesses in public works projects.[58] Justice Marshall found the government action "plainly constitutional" when analyzed under this standard.[59] In 1987, the Court asserted that while it had consistently held that "some elevated level of scrutiny" is required for race-based classifications made for remedial purposes, consensus had not yet been reached.[60]

Particularly noteworthy in the discussion of AB 979 is *Wygant v. Jackson Board of Education*,[61] in which the Court found unconstitutional a layoff provision that prioritized retaining minority faculty.[62]

53. *Id.* at 320.

54. *Id*. at 359 (Brennan, J., concurring). "[A] number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)).

55. *Id*. at 362.

56. *Id*. at 361.

57. *Id*. at 361–62.

58. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

59. *Id*.

60. United States v. Paradise, 480 U.S. 149, 166 (1987). Notably, the Justices did not need to come to the questions of which standard was appropriate in this case, because they held that the government action withstood even strict scrutiny. *Id.* at 166–67. The government action in question was an Alabama Department of Safety mandate that for every white person hired or promoted, a qualified Black person had to also be hired or promoted. *See id.* at 153.

61. 476 U.S. 267 (1986).

62. *Id.* at 283.

The Court held that although the provision's purpose may have been legitimate, the layoff plan was not sufficiently narrowly tailored because layoffs impose too intrusive a burden on individuals.[63] Notably, the *Wygant* Court specifically distinguished layoffs from "hiring goals," stating that the latter impose a more diffuse burden and suggesting that race-conscious hiring may be an appropriate remedy.[64]

Not until 1989 did a majority of the Court agree on applying strict scrutiny to race-conscious action for the purpose of inclusion. The *Croson* majority in *City of Richmond v. J.A. Croson Co.*[65] invalidated a city plan that required 30 percent of construction contract budgets to go to minority businesses under strict scrutiny, citing the "danger of stigmatic harm" that race-based classifications create.[66] *Croson*'s holding hinged on the Court's assertion that "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics," absent "searching judicial inquiry into the justification for such race-based measures."[67]

Although the common conception is that *Croson* established strict scrutiny as the de facto standard for race-based classifications, the Court actually reversed course the following year. In *Metro Broadcasting, Inc. v. Federal Communications Commission*,[68] the Court upheld two race-conscious policies under intermediate scrutiny, holding that they served the important governmental objective of broadening diversity and were substantially related to achieving that objective.[69] The *Metro* Court did not ignore the holding in *Croson*, but interpreted it as having left open the question of what standard should apply to "benign" racial classifications.[70] Because the race-conscious action at issue in *Metro* was remedial, the Court held that intermediate scrutiny

63. *Id*.

64. *Id.* at 283–84. "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." *Id.* at 282.

65. 488 U.S. 469 (1989).

66. *Id.* at 493, 511.

67. *Id.* at 493.

68. 497 U.S. 547 (1990).

69. *Id.* at 566.

70. *Id.* at 565.

was appropriate and purported to establish the definitive stance on the issue.[71]

However, the Court reversed course once again in 1994. In a five-to-four decision in *Adarand Constructors, Inc. v. Pena*,[72] the Court held that all racial classifications, regardless of purpose, are automatically subject to strict scrutiny.[73] In doing so, *Adarand* overruled *Metro*'s holding that racial classifications for remedial purposes should receive intermediate scrutiny.[74] Justice Scalia, concurring, asserted 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."[75] The *Adarand* majority emphasized the need for consistency in its reasoning.[76] Justice Stevens dissented: "An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in 'consistency' does not justify treating differences as though they were similarities."[77] This automatic application of strict scrutiny to all race-based classifications, regardless of their apparent or intended purpose, is where the doctrine remains today.

### *B. Contrast to Gender: How Intermediate Scrutiny as Applied to Gender-Based Classifications Recognizes and Addresses Effects of Discrimination*

Current equal protection doctrine requires intermediate scrutiny for government action that classifies on the basis of gender.[78] Although there is certainly a history of gender-based discrimination in the United States,[79] the Court has determined that gender is less suspect than race, deeming the classification "quasi-suspect."[80] Unlike race-

71. *Id.* at 564–66 (stating its holding as emanating from "the test we announce today").
72. 515 U.S. 200 (1995).
73. *Id.* at 227.
74. *Id.*
75. *Id.* at 239 (Scalia, J., concurring).
76. *Id.* at 224, 227 (majority opinion).
77. *Id.* at 245 (Stevens, J., dissenting).
78. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 316–17 (1977); United States v. Virginia, 518 U.S. 515, 533–34 (1996).
79. *See, e.g.*, CHEMERINSKY, *supra* note 39, at 882–83; Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973).
80. *See* Strauss, *supra* note 38, at 145.

based doctrine, gender-based doctrine can recognize and address imbalances resulting from historical gender-based discrimination.

The most relevant case to AB 979 is *Califano v. Webster*.[81] There, the challenged statute allowed women to eliminate low-earning years from a calculation of their retirement benefits to compensate for the societal discrimination that leads to lower salaries for women than men over the course of their respective careers.[82] The Court held that "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective."[83] Upholding the statute under intermediate scrutiny, the Court respected the government's assessment that the statutory scheme was an appropriate action aimed at remedying the impact of years of discrimination.[84] Justice Ginsburg employed similar reasoning in *United States v. Virginia*,[85] citing *Califano* in holding that "[s]ex classifications may be used to compensate women for 'particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' [and] to advance full development of the talent and capacities of our Nation's people."[86]

Comparing equal protection doctrine for race-based classifications and gender-based classifications reveals a disconnect. While the Court may consider remedial intent behind gender classifications, it has cut itself off from considering the same intent as applied to racial classifications. The Court's application of strict scrutiny to the class considered more suspect—race—has all but eliminated legislatures' ability to address historical discrimination's impact on that class.

## III. ANALYSIS AND CRITIQUE: SCHOLARLY CRITICISM OF CURRENT DOCTRINE AND AN ARGUMENT FOR CHANGE

Along with the Supreme Court Justices cited above,[87] many legal scholars also argue that strict scrutiny is not the appropriate standard

81. 430 U.S. 313 (1977).
82. *Id*. at 318.
83. *Id.* at 317.
84. *See id.* at 317–18.
85. 518 U.S. 515 (1996).
86. *Id*. at 533–34 (second and third alterations in original).
87. *See* discussion *supra* Section II.A.

of review for all race-based classifications.[88] The purpose requirement for facially neutral laws, combined with unconscious and inherent biases, creates a contradictory application of doctrine and a double standard that favors reverse-discrimination cases. The current state of equal protection doctrine does not conform to the purpose of the Equal Protection Clause itself and produces unjust results. The following sections analyze the problems in current race-based doctrine and present an overall argument for change.

### *A. The Intent Double Standard: Discriminatory Purpose Doctrine and Inherent Bias*

The basis for current doctrine regarding facially explicit race-based classifications is the Court's assertion that judges cannot satisfactorily tell the difference between remedial government action for the purpose of inclusion and action based on a malicious intent to exclude.[89] Based on that claim, all race-based classifications must receive strict scrutiny regardless of intent.[90] However, when the challenged action is facially neutral (i.e., it does not explicitly classify on the basis of a protected class), the Court's stance is exactly opposite.[91] This opposing doctrine creates a double standard that all but ensures the success of "reverse-discrimination" claims, while erecting a "nearly impenetrable barrier to traditional race discrimination claims."[92]

88. *See, e.g.*, Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection*, 129 YALE L.J.F. 108, 129 (2019) ("One concern is whether, under existing doctrine, remedial projects that intersectionally target race and gender should be subject to intermediate scrutiny rather than strict scrutiny, as we argue they should."); Strauss, *supra* note 38, at 169 ("Yet, whether a court applies strict scrutiny or intermediate scrutiny does not really turn on ascertaining the 'real' group that is harmed by the law. . . . [N]ot all laws that discriminate against whites also harm African-Americans, but strict scrutiny is applied to both groups."); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 484, 487 (2004) ("[T]he problems with the three-tiered framework for judicial scrutiny are sufficient to warrant immediate consideration of an alternative standard for review . . . .").

89. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

90. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

91. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273–74 (1979); Washington v. Davis, 426 U.S. 229, 242 (1976).

92. *See* Kimberly West-Faulcon, *Reversed Protection: A Discrimination Claim Gone Wild in* Fisher v. Texas, 7 U.C. IRVINE L. REV 133, 158 (2017).

In cases where a facially neutral law has a disparate impact on a protected class, the Court will inquire as to the legislative intent behind the law to determine whether there was a "discriminatory purpose."[93] Current doctrine requires both disparate impact and discriminatory purpose to justify strict scrutiny;[94] in the absence of discriminatory purpose or intent, courts apply rational basis review.[95] Two cases, *Personnel Administrator of Massachusetts v. Feeney*[96] and *Washington v. Davis*,[97] are credited with solidifying purpose requirement doctrine. In both cases, the Court held that plaintiffs challenging facially neutral laws with disparate exclusionary impacts had to prove that the legislature had a discriminatory purpose or intent in enacting the legislation.[98] The disparate impact itself was not enough; only legislative action "taken with a conscious desire to actively harm a vulnerable group" could be deemed unconstitutional.[99]

Proving facially neutral laws result from discriminatory purpose is an arduous task.[100] Not only is much of modern race discrimination due to implicit bias and unconscious racism,[101] even when governments have racially discriminatory purposes, it is fairly easy to come up with non-discriminatory legitimate-purpose explanations for their actions.[102] As long as government can articulate a legitimate purpose,

93. *See Feeney*, 442 U.S. at 274; *Davis*, 426 U.S. at 242.

94. *See, e.g.*, *Feeney*, 442 U.S. at 273–74; *Davis*, 426 U.S. at 239, 242.

95. *See, e.g.*, *Feeney*, 442 U.S. at 273–74; *Davis*, 426 U.S. at 242.

96. 442 U.S. 256 (1979).

97. 426 U.S. 229 (1976).

98. *See Feeney*, 442 U.S. at 272; *Davis*, 426 U.S. at 239. *Feeney* and *Davis* dealt with disparate impacts on women and racial groups, respectively. *Feeney*, 442 U.S. at 259; *Davis*, 426 U.S. at 232–33.

99. *See* Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J.F. 343, 348 (2019). "In the [*Davis*] Court's view, an overwhelmingly disparate injury inflicted on a disadvantaged racial group was not enough to trigger equal protection concern even in the face of utterly predictable and proven outcomes." *Id*.

100. *See id.*; West-Faulcon, *supra* note 92, at 158.

101. *See infra* notes 112–116 and accompanying text.

102. *See* West-Faulcon, *supra* note 92, at 158 (citing reasons it is difficult to prove racially discriminatory purpose as including "the fact that perpetrators of purposeful race discrimination are increasingly sophisticated in camouflaging it with facially race neutral explanations," and "that much of modern race discrimination is the product of implicit or unconscious racial bias"); MacKinnon & Crenshaw, *supra* note 99, at 348 ("Discriminatory intent, so defined, is subjective. Evidence of it is thus largely within the control of accused discriminators, making it easy to exercise, easy to deny, and almost impossible to prove.").

it can act in ways that foreseeably and actually harm specific racial groups.[103]

Contrast the Court's reasoning in *Feeney*[104] with its reasoning in *Croson*.[105] *Feeney* requires the Court to determine legislative purpose;[106] *Croson* asserts the Court cannot do so.[107] The Court must uncover a malicious purpose in order to end the exclusionary impact of the government action in *Feeney*,[108] but it cannot take the legislature's explicitly stated purpose of inclusion into consideration in *Croson*.[109] As a result of this double standard, "prevailing constitutional doctrine effectively insulates countless decisions that actively harm structurally subordinated populations."[110] In cases involving the death penalty, federal sentencing guidelines, and disenfranchisement of felons, the Court has invoked *Feeney* to uphold the government action in question despite severe disparate impact along racial lines.[111]

Directly implicated in the purpose requirement are the concepts of unconscious racism and inherent bias. Historically, laws that

103. *See* Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 47 (2013). The high evidentiary hurdle to proving discriminatory purpose is arguably intended. In *Davis*, the Court admitted that without the purpose requirement, far more regulatory schemes may be open to equal protection challenges. *See* Washington v. Davis, 426 U.S. 229, 248 (1976) (stating that subjecting facially neutral but disparately impactful government action to strict scrutiny would be "far reaching" and "perhaps invalidate" a range of statutes). The Court created a requirement in *Davis* and *Feeney* that it knew "plaintiffs could rarely muster the evidence to prove." *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1138 & n.134 (1997).

104. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272–74 (1979) ("When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.").

105. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

106. *See Feeney*, 442 U.S. at 276 ("The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation.").

107. *See Croson*, 488 U.S. at 493.

108. *See Feeney*, 442 U.S. at 274 ("If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.").

109. *See Croson*, 488 U.S. at 500 ("The District Court accorded great weight to the fact that the city council designated the Plan as 'remedial.' But the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight.").

110. MacKinnon & Crenshaw, *supra* note 99, at 348.

111. Siegel, *Equality Divided*, *supra* note 103, at 50–51.

facially classified on the basis of race did so to oppress racial groups.[112] Although modern legislation is generally free of such invidious intentions, it can still have detrimental disparate impacts.[113] In his seminal work on the topic, Professor Charles Lawrence states, "racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes"—a distinction he says is not reflected in "[t]raditional notions of intent."[114] This recognition makes the discriminatory purpose requirement all the more illogical. As Lawrence states, "[R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent . . . disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious."[115]

Consequently, most manifestations of racism in twenty-first-century America are not facially identifiable.[116] To actually eliminate systemic effects of racism from modern society, courts must apply a doctrine that accounts for unconscious biases, instead of solely explicit ones.[117] Government actors are not immune to the kind of unconscious bias that pervades the populace as a whole; therefore, it is inevitable that this bias will influence lawmaking. Inherent bias only exacerbates the intent double standard; as Catherine MacKinnon and Kimberlé Crenshaw aptly state, "No one need intend to perpetuate discrimination for it to persist."[118]

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112. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 184 (1964) (concerning a Florida law that prohibited co-habitation between unmarried Blacks and whites); Brown v. Bd. of Educ., 347 U.S. 483, 486 n.1 (1954) (concerning a Kansas law that segregated children in public schools solely on the basis of race).

113. Siegel, *Equality Divided*, *supra* note 103, at 50–51.

114. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

115. *Id.* at 323.

116. *See, e.g.*, David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361, 409–10 (2016) (stating that since 1967, the Supreme Court has only dealt with one case in which a racial minority challenged an explicit racial classification, and that all other racial classification cases were non-minorities protesting affirmative action-type programs).

117. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting) ("Bias both conscious and unconscious . . . keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.").

118. MacKinnon & Crenshaw, *supra* note 99, at 361.

The problem for laws like AB 979 that do facially discriminate is that, based on current doctrine, intent is no longer in question. The purpose requirement (which would, ironically, be easy to prove in such cases) morphs into the "compelling purpose" prong, and, as the last several decades of precedent demonstrate, hardly any government purpose is "compelling" enough to survive the analysis.[119] The evidentiary hurdle to prove either a compelling interest or discriminatory purpose on behalf of the government is exceedingly high by design.[120] Consequently, modern jurisprudence upholds laws that are discreetly racially exclusionary, while it eliminates laws that facially classify on the basis of race with the purpose of including historically excluded individuals and creating more equitable society. The purpose requirement for facially neutral laws, combined with strict scrutiny for racially explicit remedial laws, "together stabilize rather than dismantle the raced and gendered social order."[121]

This double standard of intent has shifted equal protection from a limitation on oppressive government action to a shield against laws crafted to include marginalized groups.[122] As Reva Siegel notes, "The Court never revised doctrines of heightened scrutiny so that judicial review could detect latent bias . . . . Thus, today, especially in the area of race, doctrines of heightened scrutiny are functioning primarily as a check on affirmative action programs."[123] Ian Haney-Lopez poignantly summarizes this double standard:

> [C]olorblindness applies to affirmative action; intent doctrine sweeps up allegations of discriminatory treatment against non-Whites. Colorblindness denies that the state's purposes can be discerned; intent doctrine demands proof of malicious purpose. Colorblindness consistently imposes the

119. *See, e.g.*, Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1150 (2009).

120. *See supra* note 103 and accompanying text.

121. MacKinnon & Crenshaw, *supra* note 99, at 350.

122. *See* Schraub, *supra* note 116, at 418 ("Suspect classification doctrine is a vestigial artifact that only comes into play when racial minorities appear to be winning the political game."); Goldberg, *supra* note 88, at 487–88 (instead of ensuring "freedom from race-based discrimination," current doctrine operates as a "barrier to programs designed to redress race discrimination"); Siegel, *Why Equal Protection No Longer Protects*, *supra* note 103, at 1142 ("[T]oday, especially in the area of race, doctrines of heightened scrutiny are functioning primarily as a check on affirmative action programs."); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783 (2012) ("Colorblindness today applies when a government actor explicitly employs a racial classification. In practice, this covers affirmative action policies and little else.").

123. Siegel, *Why Equal Protection No Longer Protects*, *supra* note 103, at 1142.

> most stringent form of scrutiny; intent cases always default to the most lenient form of constitutional review. Plaintiffs challenging affirmative action under colorblindness virtually always win; parties challenging discrimination under intent doctrine almost invariably lose.[124]

The Court's professed inability to determine the difference between governmental intent to include and intent to exclude in facial classifications is not persuasive. It is not persuasive because of the Court's own analysis in facially neutral cases, which hinges specifically on the purpose requirement and the Court's ability to determine governmental intent. Because of the intent double-standard, true heightened scrutiny only applies to assertions of "reverse-discrimination" brought by white plaintiffs challenging programs created to combat ongoing racial inequality.[125] In effect, modern equal protection doctrine largely operates to protect the status quo of the white majority.[126] As the following section argues, this is contrary to the true purpose of the Equal Protection Clause.

### *B. Current Doctrine Is Contrary to the Purpose of the Equal Protection Clause*

In her dissent in *Schuette v. Coalition to Defend Affirmative Action*,[127] Justice Sotomayor stated that by applying strict scrutiny to actions "designed to benefit rather than burden the minority," the Court has "departed from the mandate of the Equal Protection Clause in the

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124. Haney-Lopez, *supra* note 122, at 1784.

125. *See* West-Faulcon, *supra* note 92, at 158 ("The purpose requirement imposed on such traditional discrimination plaintiffs, but not reverse discrimination plaintiffs, is a nearly impenetrable barrier to traditional race discrimination claims.").

126. *See* MacKinnon & Crenshaw, *supra* note 99, at 350 ("The difficult doctrinal barriers the Court imposed on racially subordinated groups are virtually absent in the jurisprudence developed in response to white grievances against remedial measures. Legal standing, causation, presumptions, and burdens of proof reveal not only a lightened burden for white plaintiffs; they also expose the stubborn baselines against which corrective remedies are repackaged as illegitimate preferences that discriminate against white people."); Haney-Lopez, *supra* note 122, at 1781 ("Since the end of the civil rights era in the early 1970s, the emancipatory potential of the Fourteenth Amendment has been thoroughly undone. Today, its guarantee of 'equal protection' no longer promotes reform but rather protects the racial status quo."); Siegel, *Why Equal Protection No Longer Protects*, *supra* note 103, at 1141("Today, when legislatures employ race-based criteria primarily for the purpose of remedying past discrimination, the Court applies strict scrutiny to such programs, intervening in the legislative process to protect the interests of whites in ways that it will not when plaintiffs challenge legislation having a disparate impact on minorities or women.").

127. 572 U.S. 291 (2014).

first place."[128] In support of this assertion, Justice Sotomayor cites several of the cases mentioned in this Note,[129] in which numerous Justices have articulated the belief that there is a discernable difference between government actions for the purpose of exclusion and those for the purpose of inclusion.[130] She cites the values expressed in *Carolene Products* footnote four—that prejudice against "discrete and insular minorities" may "call for a correspondingly more searching judicial inquiry"—as "central tenants" of equal protection jurisprudence.[131] This section argues that such an interpretation supports the true purpose of the Equal Protection Clause—a purpose that is not fulfilled by current equal protection doctrine as applied to race.

Congress passed the Fourteenth Amendment in response to widespread and unfettered discrimination against formerly enslaved Black Americans after the Civil War.[132] The Equal Protection Clause was intended to prohibit government action that further oppressed and subordinated groups that had endured a history of oppression and subordination.[133] This is the basis of *Carolene Products* footnote four, which is generally understood to indicate that the judiciary will defer to the legislature unless it suspects discrimination against a "discrete and insular" group.[134] Current doctrine has turned this reasoning inside out. Now, equal protection is applied equally to groups who have

128. *Id.* at 373 (Sotomayor, J., dissenting).

129. *Id.* at 373–74 (first citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting); then citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301 (1986) (Marshall, J., dissenting); then citing Fullilove v. Klutznick, 448 U.S. 448, 518–19 (1980) (Marshall, J., concurring); and then citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 255, 359 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part)).

130. *See Adarand Constructors, Inc.*, 515 U. S. at 243 (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society."); *Wygant*, 476 U.S. at 301 (Marshall, J., dissenting) (when dealing with an action to eliminate "pernicious vestiges of past discrimination," a "less exacting standard of review is appropriate"); *Fullilove*, 448 U. S. at 518–19 (Marshall, J., concurring in judgment) (race-based governmental action designed to "remed[y] the continuing effects of past racial discrimination . . . should not be subjected to conventional 'strict scrutiny'"); *Bakke*, 438 U.S. at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part) ("[R]acial classifications designed to further remedial purposes" should be subjected only to intermediate scrutiny.).

131. *See Schuette*, 572 U.S. at 367–68 (Sotomayor, J., dissenting).

132. *E.g.*, CHEMERINSKY, *supra* note 39, at 725.

133. *See id.*

134. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see* CHEMERINSKY, *supra* note 39, at 725; *Schuette*, 572 U.S. at 366–67 (Sotomayor, J., dissenting).

suffered oppression and groups who have always been the dominant majority;[135] however, because of the intent double standard described above, the "protection" the Clause currently provides is almost entirely limited to majority groups claiming reverse discrimination.[136]

Ideology may be to blame for this shift away from equal protection's true purpose. Siegel notes that neither Justice O'Connor in the *Croson* majority opinion, nor Justice Scalia in his concurring opinion, support their conclusions with the "legislative history or original meaning of the Fourteenth Amendment."[137] An observation, she adds, that Justice Marshall made in his *Croson* dissent.[138] Siegel continues her critique:

> Instead of appealing to original meaning, the Justices President Reagan appointed to the Court formed a majority to apply strict scrutiny to affirmative action in opinions that fused appeals to precedent and principle with beliefs about affirmative action that were contemporaneously expressed by the Reagan Administration . . . .[139]

These views conform with neoconservative ideology of the time, which "[e]mphasiz[ed] the need for strictly color-blind policies," and called for repeal of affirmative action and other race-conscious remedial policies.[140] Kimberly West-Faulcon proposes that this line of interpretation has led to a conviction that "race-blindness," as opposed

135. *See, e.g.*, Siegel, *Why Equal Protection No Longer Protects*, *supra* note 103, at 1142. For example, by focusing on the classification of "race" or "gender", as opposed to the marginalized group within that classification (*e.g.*, Black people and women), the Court in effect applies heightened scrutiny to classes that have never been oppressed (*e.g.*, white people and men). *See* Strauss, *supra* note 38, at 140.

136. *See, e.g.*, West-Faulcon, *supra* note 92, at 158; MacKinnon & Crenshaw, *supra* note 99, at 350.

137. Siegel, *Equality Divided*, *supra* note 103, at 32.

138. *Id.*; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 560 n.13 (1989) (Marshall, J., dissenting) ("Tellingly, the sole support the majority offers for its view that the Framers of the Fourteenth Amendment intended such a result are two law review articles analyzing this Court's recent affirmative-action decisions, and a Court of Appeals decision which relies upon statements by James Madison. Madison, of course, had been dead for 32 years when the Fourteenth Amendment was enacted." (citation omitted)).

139. Siegel, *Equality Divided*, *supra* note 103, at 32.

140. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1337 (1988). Crenshaw notes that neoconservative doctrine "singles out race-specific civil rights policies as one of the most significant threats to the democratic political system." *Id*.

to fair treatment, is required to guarantee equal protection.[141] This "race-blindness entitlement" does not hinge on actual injury to a plaintiff due to his race, but simply that the plaintiff is entitled to race-blindness in principle.[142] A segment of the Court has embraced this belief that racially attentive actions are inherently suspect, a "doctrinal move" that has "effectively constrained the operation of antidiscrimination law and remedies . . . turning the remedies into racial injuries and further legitimizing a narrative in which whites are (or are at risk of being) repeatedly victimized because of their race."[143]

When ideology colors analysis, doctrine may come to reflect who is and has been on the Court, rather than authentic interpretation of law.[144] Currently, there is a jurisprudential divide between "Justices employing a race-based discrimination analysis focusing on racial classifications" and "Justices employing a racism-based discrimination analysis grounded in racial realities and emphasizing the harmful effects of subordinating discrimination on racial minorities."[145] Kimberlé Crenshaw describes these opposing forces as belonging to a "restrictive view" that "treats equality as process," and an "expansive

141. *See* Kimberly West-Faulcon, *Forsaking Claims of Merit: The Advance of Race-Blindness Entitlement in* Fisher v. Texas, *in* 29 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 335, 358–59 (Steven Saltzman ed., 2013).

142. *Id.* at 362–63.

143. Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 81–82 (2010).

144. *See id.* at 116 ("This redefinition of disparate impact as virtual affirmative action and as a form of disparate treatment is part of the conservative project of redefining discrimination more broadly. Heretofore, this has been particularly evident in the arena of equal protection doctrine where, in cases involving race-based remediation, conservative majorities on the Court have reshaped the terrain. It initially seemed that the conservative consensus under the Rehnquist Court—where Justices Powell and then O'Connor were the moderate voices—was mainly concerned about the proper constitutional framework for affirmative action. Yet the Court assailed the idea of race attentiveness when affirmative action in schools and government contracting were placed under heightened scrutiny.").

145. *See* Ronald Turner, *"The Way to Stop Discrimination on the Basis of Race . . . ,"* 11 STAN. J. C.R. & C.L. 45, 76 (2015). The most direct example of this divide is in Justice Sotomayor's dissenting response in *Schuette* to Justice Roberts's majority opinion in *Parents Involved in Community Schools v. Seattle School District*. Justice Sotomayor responded to Justice Roberts's *Parents Involved* assertion that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 748 (2007), with her own version in her *Schuette* dissent: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination," Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

view" that "stresses equality as a result."[146] Justices who subscribe to the former approach express concerns about the dangers of stigmatic harm, seek to prevent future injustice rather than remedy past harms, espouse the belief that race classifications harm all races equally, and ignore the lived experience of marginalized groups.[147] In treating the Equal Protection Clause as colorblind, theses Justices ignore both our history and our present reality.

For example, in *Parents Involved in Community Schools v. Seattle School District*,[148] a 2007 case about racial integration of Seattle schools, Justice Roberts quoted a lawyer for the plaintiffs in *Brown v. Board of Education*[149] in his majority opinion, stating, "[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."[150] However, the lawyer who made that statement, Robert L. Carter, responded: "All that race was used for at [the time of *Brown*] was to deny equal opportunity to Black people . . . . It's to stand that argument on its head to use race the way [Roberts used it] now."[151] Another attorney for the plaintiffs in *Brown*, William T. Coleman Jr., was more candid, calling it "dirty pool" to "say that the people *Brown* was supposed to protect are the people it's now not going to protect."[152] Justice Stevens echoed these sentiments in dissent, pointing out Justice Roberts's failure to acknowledge that only Black children were told where they could not go to school, remarking that "the history books do not tell stories of white children struggling to attend black schools."[153] Ronald Turner refers to the majority's approach in *Parents Involved* as an "incorrect and revisionist description of *Brown* [that] . . . elides the reality of white supremacy and the manifestation thereof in the form of the separate but supposedly equal public schools . . . ."[154]

As Justice Breyer stated in dissent in *Parents Involved*, "[T]he Equal Protection Clause outlaws invidious discrimination, but does

146. *See* Crenshaw, *supra* note 140, at 1341–42.
147. *See* Turner, *supra* note 145, at 73; Crenshaw, *supra* note 140, at 1342.
148. 551 U.S. 701 (2007).
149. 347 U.S. 483 (1954).
150. *Parents Involved*, 551 U.S. at 747.
151. Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (June 29, 2007), https://www.nytimes.com/2007/06/29/us/29assess.html [https://perma.cc/G6R6-F9X3].
152. *Id.* (emphasis added).
153. *Parents Involved*, 551 U.S. at 799 (Stevens, J., dissenting).
154. Turner, *supra* note 145, at 84.

not similarly forbid all use of race-conscious criteria."[155] This argument is an antisubordination approach to equal protection, which Siegel describes as an analysis "concerned with practices that disproportionately harm members of marginalized groups" and one that "can tell the difference between benign and invidious discrimination."[156] This is the same approach Justice Sotomayor generally espouses in equal protection cases and specifically embodies in her dissent in *Schuette*.[157] It is the approach Kimberlé Crenshaw describes as "expansive," and Cheryl Harris refers to as "distributive justice."[158] And it is the approach advocated for in this Note.

In his *Adarand* concurrence, Justice Scalia asserted that in the eyes of government, "we are just one race here. It is American."[159] While this sentiment is admirable in theory, it is devoid of basis in reality. Although race is a construct, it is a construct that has pervasive effects in American life and has led to the very real problem of racism that continues to plague the lives of people of color. Inquiries into the validity of equal protection challenges should not be conducted by a judiciary "hermetically sealed from and indifferent to the past and present, from lived realities and racial inequality."[160]

If the Court chooses to follow Justice Scalia's pronouncement 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,"[161] inevitably, it will find that civil rights laws violate equal protection.[162] The fact that current doctrine mandates that all

155. *Parents Involved*, 551 U.S. at 862–63 (Breyer, J., dissenting).

156. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1288–89 (2011).

157. Turner, *supra* note 145, at 85-86 ("[Justice Sotomayor's] *Schuette* opinion expressly pointed to and grounded the constitutional analysis in history and the experiences of racialized persons. . . . Unlike Chief Justice Roberts, she focused on contextual/historical racism, the 'social practice' and 'theory and practice of applying a social, civic, or legal double standard' and operationalizing 'the ideology surrounding such a double standard.' Her antisubordination approach is cognizant of the ways in which the fiction of race has been used to classify, marginalize, and subordinate racial minorities." (footnotes omitted)).

158. *See* Crenshaw, *supra* note 140, at 1341–42; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1783 (1993).

159. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

160. *See* Turner, *supra* note 145, at 87.

161. *Adarand Constructors, Inc.*, 515 U.S. at 239 (Scalia, J., concurring).

162. *See* Harris & West-Faulcon, *supra* note 143, at 108–09 ("Because all remedial measures on behalf of racial minorities can at some level be characterized as racially attentive, treating racial attentiveness—attending to the racial consequences of one's actions—as a form of discriminatory

race-based classifications receive strict scrutiny does not mean that this is the correct interpretation of the Equal Protection Clause. Doctrine has been wrong before;[163] sometimes, doctrine requires change. This Note has argued that current equal protection doctrine needs such change, and now it proposes how to proceed.

## IV. PROPOSAL: APPLY INTERMEDIATE SCRUTINY TO GOVERNMENT ACTION THAT CLASSIFIES ON THE BASIS OF RACE FOR THE PURPOSE OF INCLUSION

Now, this Note proposes a different standard of review for laws like AB 979 that classify on the basis of race for the purpose of inclusion: intermediate scrutiny. This proposal is based on current discriminatory purpose doctrine; namely, the Court's assertions in *Feeney* and *Davis* that not only is legislative intent determinable, but that courts must assess it when reviewing a facially neutral action.[164] Inclusionary actions necessitate a different level of scrutiny than exclusionary ones.[165] The applicable standard of review must be nuanced enough to adequately compensate for this difference in intent. Laws that are facially neutral and laws that classify on the basis of race can have the same effect; they may include or exclude certain racial groups regardless of whether the language of the law explicitly references race. Accordingly, courts must review laws based on their real-world impact, not on the *Croson*-based fiction[166] that judges are incapable of determining whether a racially classifying law is inclusive or exclusive. The question should not be whether the law classifies on the basis of race, but whether the law is ultimately racially exclusionary.[167]

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motivation destabilizes virtually all remedial options, even those expressly authorized by settled doctrine and federal statutory law.").

163. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); Korematsu v. United States, 323 U.S. 214 (1944).

164. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273–74 (1979); Washington v. Davis, 426 U.S. 229, 242 (1976).

165. *See, e.g.*, John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) ("When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking.").

166. *See* discussion *supra* Section III.A.

167. Scholars have posited numerous solutions to the issues with current equal protection doctrine, including eliminating the suspect classification of race, reconsidering classifications in general, and eliminating the tiered system. *See, e.g.*, Schraub, *supra* note 116, at 371 (advocating to eliminate race's suspect classification); Strauss, *supra* note 38, at 147 (questioning the factors that go into determining suspect status); Goldberg, *supra* note 88, at 482 (advocating to eliminate the

Strict scrutiny carries a presumption of unconstitutionality;[168] it is an "extraordinary" remedy that imposes the heaviest burden on government action, and is supposedly reserved for only "the gravest patterns of unconstitutional discrimination."[169] Government action that classifies on the basis of race for the purpose of inclusion should not be automatically presumed unconstitutional.[170] Professor John Hart Ely notably observed, "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and consequently, employing a stringent brand of review, are lacking."[171] Therefore, for laws that classify for the purpose of inclusion, the heavy burden of strict scrutiny and the presumption of malice it carries is inappropriate and yields unjust results.

This Note's proposition is simple: after a court determines that a law classifies facially on the basis of race, it should make an additional inquiry before immediately applying strict scrutiny. That inquiry is: "Does this government action classify for the purpose of inclusion or exclusion?"[172] If the answer is exclusion, then strict scrutiny applies. Laws that classify on the basis of race for the purpose of exclusion fall squarely under the concerns of *Carolene Products* footnote four, and the highest and strictest of scrutiny is appropriate. However, when a law classifies on the basis of race for purposes of inclusion, that is a different scenario, and should be treated as such. Such laws, like AB 979, are arguably the opposite of the former. They are actively combatting past, present, conscious, and unconscious effects of racism and sexism in our society and attempting to correct the resulting

current tiered system and proposing a single tier instead). Here, I have attempted to suggest an alteration that does not require a monumental re-working of the system itself but could easily and immediately be worked into current doctrine to shift analysis to produce a more just result.

168. *See* CHEMERINSKY, *supra* note 39, at 727.

169. Schraub, *supra* note 116, at 389.

170. Professors Mario Barnes, Erwin Chemerinsky, and Trina Jones note the "obvious truth that favoring one group may create disfavor for another group," but "contest the inference that all choices between groups should be viewed with equal skepticism." Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 994 n.138 (2010).

171. *See id.* (citing Ely, *supra* note 165, at 735).

172. In her dissent in *Schuette*, Justice Sotomayor referenced a standard for what constitutes a racial issue pulled from two previous cases: "Does the public policy at issue 'inur[e] primarily to the benefit of the minority, and [was it] designed for that purpose'?" Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291, 379 (2014) (Sotomayor, J., dissenting) (alterations in original) (citations omitted). As Justice Sotomayor states, "Surely this is the kind of factual inquiry that judges are capable of making." *Id.*

imbalances. Such laws are not suspect in the same way that laws classifying in order to exclude are. Thus, when a court determines that a classification is for the purpose of inclusion, intermediate scrutiny should apply.

This argument is not to say that any law that classifies for the purpose of inclusion should automatically stand; intermediate scrutiny is not rational basis review. In applying intermediate scrutiny, the Court has stated that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[173] Intermediate scrutiny provides the correct balance of judicial oversight and deference to a beneficent legislature and the voters that elected it. For gender classifications, intermediate scrutiny has effectively guarded against "paternalistic and patronizing laws predicated on sexual stereotyping, while still recognizing the endurance of structural barriers to women's advancement."[174] Applying this same level of scrutiny to race-based classifications should yield the same positive and just results. Under the proposed framework, courts will likely uphold AB 979 and other laws like it.[175]

### *A. Application of Proposed Doctrine to AB 979 (and SB 826)*

AB 979 explicitly classifies on the basis of race. Thus, we must move to step two and ask, "Does this government action classify for the purpose of inclusion or exclusion?" The answer is straightforward: AB 979 was created to include more members of underrepresented groups on corporate boards.[176] The statute allows companies to expand the number of members on the board to comply,[177] thereby avoiding possible removal of already-present non-underrepresented members.

173. Califano v. Webster, 430 U.S. 313, 317 (1977) (citation removed).

174. Schraub, *supra* note 116, at 408.

175. Although this Note has focused on race-based classifications, it is important to note that certain groups argue that gender-based classifications should receive strict scrutiny as well. If these groups are successful in convincing judges and especially members of the Supreme Court that their interpretation is correct, we may soon see gender-inclusive laws like SB 826 immediately facing strict scrutiny, just as race-based laws like AB 979 do. This proposed framework would successfully ensure that SB 826 also receives intermediate scrutiny, even if gender is heightened to a suspect classification in the near future. SB 826 also classifies for the purpose of inclusion, so intermediate scrutiny would apply and the analysis would mirror that of AB 979.

176. *See* Assemb. B. 979, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (citing inequities present on corporate boards and in corporations in general and benefits that accompany diversifying such boards and companies).

177. *See* CAL. CORP. CODE § 301.4(a) (2022).

Therefore, the purpose is one of inclusion. Next, the court will apply intermediate scrutiny, and ask whether the law has a substantial relationship to an important government interest.[178]

Here, the government interest is important; people of color are underrepresented on corporate boards, depriving them of opportunities for present and future success in society.[179] Also, increasing diversity in corporations has been shown to improve overall performance.[180] This interest is therefore important to a government concerned with improving the lives of its citizens, as well as the strength and productivity of its economy.[181] Furthermore, AB 979 has a substantial relationship to achieving this important interest. By mandating the presence of members of underrepresented groups on corporate boards, AB 979 achieves its goal. Society is not rectifying this imbalance on its own, as evidenced by the overwhelming lack of people of color on corporate boards.[182] Therefore, AB 979 is substantially related to an important government interest and should be upheld.

Upholding AB 979 under intermediate scrutiny conforms with precedential applications of intermediate scrutiny. *Metro Broadcasting*, the last Supreme Court opinion that applied intermediate scrutiny to a race-based classification, is illuminating. The *Metro* Court upheld a race-conscious policy regarding minority-owned businesses in broadcast licensing, stating that benign classifications, even if not explicitly remedial, are constitutional as long as they serve important governmental objectives and are substantially related to achieving those objectives.[183] Applying intermediate scrutiny in *Califano*, the Court recognized "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women" as an important governmental objective.[184] In *United States v. Virginia*, Justice Ginsburg wrote in the majority opinion that in order to be a close fit, a remedial law must be tailored to place the group that was "unconstitutionally denied an opportunity or advantage" in "the position they would have occupied in the absence of

178. *See* CHEMERINSKY, *supra* note 39, at 727–28.
179. *See* discussion *infra* Part V; Cal. Assemb. B. 979.
180. *See* discussion *infra* Part V; Cal. Assemb. B. 979.
181. *See* policy considerations discussed *infra* Part V.
182. *See* discussion *supra* Part I; Cal. Assemb. B. 979; S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018); *infra* Part V.
183. Metro Broad., Inc. v. Fed. Commc'ns Comm'n, 497 U.S. 547, 564–65 (1990).
184. *See* Califano v. Webster, 430 U.S. 313, 314–15, 317, 321 (1977).

[discrimination]."[185] Accordingly, AB 979 is the California Legislature's attempt to correct the present imbalance caused by historic racism and current inherent bias, thereby allowing the labor market to reflect what could have existed if these biases were never present.

## V. JUSTIFICATION: A POLICY ARGUMENT IN FAVOR OF UPHOLDING AB 979 (AND OTHER INCLUSIONARY LAWS LIKE IT)

Laws that classify on the basis of a protected class for the purpose of inclusion, like AB 979, can be an effective way to remedy present imbalances and inequities in today's society. This part offers policy arguments in favor of upholding AB 979 by offering statistics on the current underrepresentation of people of color on corporate boards and in the workforce overall.

The need for laws like AB 979 is especially crucial in the corporate context. The past year has seen a national trend toward diversity and inclusion in many arenas, but in the corporate world, so far that apparent desire has not translated into widespread, tangible changes.[186] The amplified calls for racial justice and reckoning with our long history of racism that occurred over the summer of 2020, as well as general industry trends toward promoting diversity within the corporate context, are encouraging signs that California's new law may be embraced by businesses.[187] Even prior to the summer of 2020, the Harvard Law School Forum on Corporate Governance stated that "investor sentiment favoring board diversity and accumulating financial research confirming its value indicate that mounting pressure for board inclusiveness should be expected and welcomed."[188] In August

185. United States v. Virginia, 518 U.S. 515, 547 (1996) (alteration in original) (citations omitted). In that case, Virginia's decision to create a separate but equal facility for women and remain committed to their exclusion at Virginia Military Institute was not constitutional. *See id*.

186. *See, e.g.*, Phillip Bantz, *Study Shows Disconnect Between Corporate Speak and Action on Diversity*, LAW.COM (Oct. 20, 2020, 3:29 PM), https://www.law.com/corpcounsel/2020/10/20/study-shows-disconnect-between-corporate-speak-and-action-on-diversity/ [https://perma.cc/V2A5-EWQM]. Bantz cites a 2020 study conducted by Diligent and the New York Stock Exchange that surveyed 251 corporate executives that found that "[w]hile more than 80% of the respondents said their boards have diversity plans or will have one soon, 45% said their boards didn't have a specific time frame to implement their diversity goals." *See id*. In 2021, there were only four Black CEOs of Fortune 500 companies. Phil Wahba, *Only 19: The Lack of Black CEOs in the History of the Fortune 500*, FORTUNE (Feb. 1 2021, 4:00 AM), https://fortune.com/longform/fortune-500-black-ceos-business-history/ [https://perma.cc/44CQ-J7DE].

187. *See* Steele, *supra* note 2.

188. William Savitt et al., *Federal District Court Dismissal of Challenge to Board Diversity Statute*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 24, 2020), https://corpgov.law.harvard

2021, the Securities and Exchange Commission (SEC) approved a Board Diversity Rule proposed by NASDAQ, which is not a mandate, but a requirement that listed companies have at least two diverse board members or provide a written explanation as to why they failed to meet the requirement.[189] Based on these developments, it is apparent that public and corporate sentiment alike are calling for meaningful change.

An examination of the current state of employment demonstrates why this change is so necessary. A prominent study from 2004 found that white-perceived names received 50 percent more callbacks for job interviews than Black-perceived names.[190] This fact has become so widely recognized that a phenomenon has emerged: members of underrepresented racial groups "whitening" their resumes.[191] A study conducted in 2016 found that when identical resumes of Black and Asian candidates were "scrubbed of racial cues," both groups fared better in the interview call-back process.[192] Another study similarly sent out identical resumes, the only differences being the race of the candidate (Black or white) and the presence of a criminal record.[193] That study found that the presence of a criminal record doubled the likelihood that the white candidates would not get the job, but tripled the likelihood that the Black candidates would not get the job.[194] Overall, the study revealed that Black candidates with no criminal records were less likely to get jobs than white candidates with criminal

.edu/2020/04/24/federal-district-court-dismissal-of-challenge-to-board-diversity-statute/ [https://perma.cc/E6J5-KBH5].

189. *See* Sarah E. Aberg & Matthew T. Lin, *SEC Approves Nasdaq Diversity Rule*, NAT'L L. REV. (Aug. 20, 2021), https://www.natlawreview.com/article/sec-approves-nasdaq-diversity-rule [https://perma.cc/DPH7-XRXN].

190. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–98 (2004).

191. Dina Gerdeman, *Minorities Who 'Whiten' Job Resumes Get More Interviews*, HARV. BUS. SCH.: WORKING KNOWLEDGE (May 17, 2017), https://hbswk.hbs.edu/item/minorities-who-whiten-job-resumes-get-more-interviews [https://perma.cc/X5GX-6KQX].

192. *Id.* (citing a 2016 study by Sonia K. Kang, András Tilcsik, and Sora Jun). Twenty-five percent of the "scrubbed" Black resumes received callbacks as opposed to 10 percent of their identical "Black" counterparts; 21 percent of "scrubbed" Asian resumes received callbacks as opposed to 11.5 percent of the identical "Asian" resumes. *See id*.

193. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 164 (2018).

194. *Id.*

records.[195] The study's author noted that "[b]eing Black in America today is just about the same as having a felony conviction in terms of one's chances of finding a job."[196] Even when members of underrepresented racial groups secure jobs, they are often denied opportunities to advance.[197] Black women specifically are promoted more slowly than other groups and are significantly underrepresented in leadership roles.[198] Of all groups, Black women report feeling the least supported by management, and feel least strongly that their manager advocates for opportunities for them.[199]

It is particularly important to diversify top leadership roles in corporations to create equity in the workforce as a whole. As Michael Verchot, director of the Consulting and Business Development Center at the University of Washington Michael G. Foster School of Business, urges, "The solution has to be requiring diversity at a senior leadership level. . . . It has to come from the CEO and, if it's a publicly traded corporation, it needs to come from the board of directors."[200] Verchot explains that people tend to hire others who share their own characteristics.[201] Hence, the makeup of the board is a good predictor of the makeup of the corporation as a whole. In the current environment, the overwhelming presence of white men at the top can be understood as the result of a "vicious cycle."[202] Due to basic human instincts, as well as unconscious biases,[203] managers are inclined to hire people who are like them; they are also likely to choose to mentor people like them and help propel those people up the corporate

195. *Id.*

196. *Id.* ("Despite the fact that the white applicant revealed evidence of a felony drug conviction, and despite the fact that he reported having recently returned from a year and half in prison, employers seemed to view this applicant as no more risky than a young black man with no history of criminal involvement.")

197. *See Women in the Workplace 2021*, MCKINSEY & CO. (Sept. 27, 2021), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace [https://perma.cc/FZE6-5TT7].

198. *Id.*

199. *Id.*

200. UW Foster School of Business, *The Importance of Workplace Diversity at the Leadership Level*, SEATTLE TIMES (May 7, 2019, 9:13 AM), https://www.seattletimes.com/sponsored/the-importance-of-workplace-diversity-at-the-leadership-level/ [https://perma.cc/8EX6-AKGH].

201. *Id.* ("Most people hire people who have similar characteristics to themselves. Most leaders in large corporations and midsized companies are white and male . . . . So you hire and promote folks who are like you. It replicates that set of leadership.").

202. *Id.*

203. *See* discussion *supra* Section III.A.

ladder.[204] Without change at the top, it is unlikely that corporate diversity overall will improve.

Largely-unconscious racism, along with the systemic impacts of a history of racist laws and institutions in this country, has created our current scenario: a dearth of underrepresented communities on corporate boards. In 1997, Reva Siegel wrote that while "many white Americans now view overt racism as socially unacceptable," there is also a "significant difference between the principles that white Americans espouse . . . and their actual attitudes in matters of race," and that "white Americans who embrace principles of racial equality manifest *unconscious* forms of racial bias in diverse spheres of social life."[205] The following year, Angela Davis stated that "most racist behavior is not openly expressed," and that more prevalent unconscious racism often manifests in people who would be "appalled by the notion that they would be seen as behaving in a racist or discriminatory manner."[206] The reason that a large portion of corporate boards skew white and male is generally not because of overt, intentional racism and sexism. People of color and women vying for executive positions today are often boxed out due to nepotism, cronyism, and unconscious racism and sexism—all of which are inherently more difficult to affirmatively prove on paper than facially explicit discrimination. Regardless of whether employers' actions are consciously or subconsciously motivated, the effect is the same, as people of color remain underrepresented on corporate boards.

A key point in advocating for AB 979's necessity harkens back to the introduction of this Note. As mentioned, SB 826 has succeeded at increasing the presence of women on corporate boards despite general opposition to diversity-based requirements.[207] However, the benefits have been largely contained to white women.[208] An intersectional analysis of AB 979 and SB 826 helps explain why this is not surprising

204. UW Foster School of Business, *supra* note 200.

205. Siegel, *Why Equal Protection No Longer Protects*, *supra* note 103, at 1136 (emphasis in original).

206. Angela J. Davis, *Prosecution and Race: The Power of Privilege and Discretion*, 67 FORDHAM L. REV. 13, 33 (1998).

207. *See* Green, *supra* note 17 (citing 2019 PricewaterhouseCoopers report that found 83 percent of corporate directors, including more than 50 percent of female corporate directors, opposed diversity quotas.); discussion *supra* Part I.

208. *See* Bojórquez, *supra* note 24; discussion *supra* Part I.

from a doctrinal or societal perspective.[209] Beyond the simple fact that women of color experience additional societal discrimination that white women do not, women of color exist in a doctrinally complex area.[210] Black women, for example, do not benefit from the intermediate scrutiny applied to gender classifications, because when race intersects with any other identity, it triggers strict scrutiny.[211] This inherently makes "Black women's remedial status in equal-protection law more suspect than white women's."[212] Not only does societal racism effectively privilege white women when it comes to companies complying with laws like SB 826, but also when courts apply intermediate scrutiny to such laws, the baseline for gender is whiteness.[213] In practice, SB 826 does not equally apply to women of color as it does to white women. Devon Carbado and Kimberlé Crenshaw explain, "Black women are not as well-positioned as white women to take advantage of the employment opportunities that colorblind gender-based affirmative-action policies afford. In this respect, colorblind gender-based affirmative-action policies are not racially neutral; they are more likely to benefit white women."[214] This means that in order to achieve remedial gains for women of color in the corporate context, we need race-conscious as well as gender-based affirmative action to "offset that advantage and level the gender-equality remedial landscape."[215] Therefore, it is all the more important to ensure that intermediate scrutiny is not only applied to gender-based laws like SB 826, but also to race-based laws for the purpose of inclusion like AB 979.

209. Intersectionality is a theory introduced by Kimberlé Crenshaw in 1989 that describes how race, class, and gender intersect. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139, 166–67.

210. *See* Carbado & Crenshaw, *supra* note 88, at 111, 113.

211. *Id.* Carbado and Crenshaw also describe "colorblind intersectionality," which occurs in "instances in which whiteness helps to produce and is part of a cognizable social category but is invisible or unarticulated as an intersectional subject position." *Id.* at 118. They state that colorblind intersectionality "makes whiteness an unstated baseline for gender, rather than a modifier of it. Thus, anytime a court speaks in terms of women but is really referring to *white* women, it is engaging in colorblind intersectionality." *Id.* at 118.

212. *Id.* at 111.

213. *Id.* at 124. Carbado and Crenshaw suggest that intermediate scrutiny should be applied to "remedial projects that intersectionally target race and gender." *See id*. at 129.

214. *Id.* at 124.

215. *Id.*

Finally, instituting laws like AB 979 should be left to the discretion of the voters and the legislature, not the judiciary.[216] Heightened scrutiny exists to protect marginalized groups who cannot effectively protect themselves from invidious action taken by the majority.[217] Race-based action taken for the purpose of inclusion does not merit that same level of heightened scrutiny because it does not implicate the same concerns.[218] If the voters of California support an electorate that enacts such an inclusion-based law, it should not be up to the judiciary to thwart their discretion.

Diversity in the workforce has proven beneficial to companies in the long run.[219] Companies with high racial and gender diversity have financial returns that outpace their national industry medians.[220] However, beyond these productivity and problem-solving benefits, ensuring diversity and inclusion in the corporate context is good policy. Starting from the top is a proven method to ensure that diversity in corporations becomes a fact, rather than a talking point. Inclusive legislation like AB 979 can help us finally get there.

## VI. CONCLUSION

Justice Roberts succinctly summarized the sentiment behind current equal protection doctrine as applied to race when he stated that

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216. *See, e.g.*, Schraub, *supra* note 116, at 362; *id* at 366 ("When democratic actors elect to openly pursue the cause of racial integration and inclusion, the Court applies strict scrutiny with ever-increasing skepticism. But when democratic actors instead move in opposition to such inclusive measures, the Court reverses course and extols deference to the will of the voters. *Schuette* is a stark example of the Court upholding an obviously race-conscious law while disclaiming any authority to engage in the sort of searching inquiry strict scrutiny purports to demand."); *id* at 396 ("Of course, there is nothing inherently problematic about the federal judiciary striking down laws as unconstitutional. But it is generally believed that this power should be the exception, not the rule.").

217. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (reasoning that "discrete and insular minorities" who are generally not protected in the usual political process may "call for a correspondingly more searching judicial inquiry"); Strauss, *supra* note 38, at 143.

218. *See* Ely, *supra* note 165, at 735 ("When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking.").

219. *See* Vivian Hunt et al., *Why Diversity Matters*, MCKINSEY & CO. (Jan. 1, 2015), https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/why-diversity-matters [https://perma.cc/25UU-RGEN].

220. *See id.* (citing McKinsey's Diversity Matters report, which found that companies in the top quartile for racial and ethnic diversity are 35 percent more likely to have financial returns above their respective national industry medians, and that companies in the top quartile for gender diversity are 15 percent more likely to have financial returns above their respective national industry medians).

"[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[221] This Note has argued that this interpretation is at odds with the purpose of the Equal Protection Clause itself by presenting criticism offered by numerous Justices and scholars. Justice Sotomayor's counter to Justice Roberts's statement articulated an application of the Equal Protection Clause in line with its purpose: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[222]

As evidenced by a detailed analysis of the development of equal protection doctrine, strict scrutiny is categorically applied to race today largely because of ideological influences and the composition of the Court. As history has shown, just because doctrine is settled does not mean it is correct. We must continue to probe the reasoning that supports the application of strict scrutiny to race-based government action for the purposes of inclusion, and question whether those reasons are based in equal protection interpretation or ideology. As this Note has argued, proper analysis of precedent, as well as of the purpose of the Equal Protection Clause itself, leads to the conclusion that the correct standard of review for such government action is intermediate scrutiny. Intermediate scrutiny would allow courts to take a critical eye to action based on a historically oppressed group while giving due deference to government action for the purpose of inclusion.

221. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 748 (2007) (plurality opinion).

222. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291, 381 (2014) (Sotomayor, J. dissenting).