Creating Chaos In The Name Of Consistency: Affirmative Action And The Odd Legacy Of Adarand Constructors, Inc. v. Pena

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Introduction

Adarand Constructors, Inc. v. Pena1 is a strange decision. Civil rights advocates will likely express outrage at the inconsistencies in logic and disregard for historical context that resonate throughout the majority opinion, concerns addressed by Justice Stevens in his poignant dissent.2 Over time, however, Adarand could become more problematic for those who support its reasoning and result than for civil rights advocates. For in its attempt to create clarity, Adarand has instead created anomalies within the tiered equal protection framework regarding both invidious discrimination and benign measures that benefit protected classes. This article explores the anomalies created when the conceptual framework developed in Adarand is considered in light of affirmative action based on gender and disability. In addition, this article addresses the options that Adarand has left us in this regard.

However, the Adarand decision is not solely responsible for creating this odd state of affairs. City of Richmond v. J.A. Croson Co.3 also contributed to the conceptual framework and set the stage for the anomalies discussed in this article.

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2. Id. at 2120 (Stevens, J., dissenting).
The primary focus of this article is neither the inconsistencies presented by the *Adarand* decision, nor the fact that the opinion views benign race based measures in a completely ahistorical and decontextualized fashion. Rather, this article looks at a potentially bigger concern arising from the *Adarand* Court's quest for consistency. In the wake of *Adarand* and *Croson* different standards would seem applicable to benign measures based on race, gender and disability. This difference in standards is likely to cause a great deal of confusion since these three classes

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4. However, these inconsistencies, particularly the Majority's failure to see the dichotomy between Congressional action enforcing the Fourteenth Amendment and state action subject to it to the extent they are relevant to this article, will be discussed infra Parts I and II.D. *See Adarand*, 115 S. Ct. at 2123-26 (Stevens, J., dissenting) (pointing out this problem); *Leading Cases: Affirmative Action—Federal Minority Preference Programs*, 109 Harv. L. Rev. 111, 156-57 (1995).

5. This same criticism has been eloquently discussed in regard to *Croson*. *See* Michel Rosenfeld, *Decoding Richmond: Affirmative Action And The Elusive Meaning Of Constitutional Equality*, 87 Mich. L. Rev. 1729 (1989). It could be said that *Adarand* simply took the ahistorical, decontextualized approach utilized in *Croson* and applied it to Congressional action as well.

6. Pursuant to *Adarand* and *Croson*, strict scrutiny is applicable to benign racial measures. *Adarand*, 115 S. Ct. 2097; *Croson*, 488 U.S. 469.

7. Since *Croson*, many of the courts which have considered gender and race based programs have applied strict scrutiny to race while applying intermediate scrutiny to gender. *See* Concrete Works of Colorado v. City & County of Denver, 36 F.3d 1513, 1519 (10th Cir. 1994) (applying strict scrutiny to racial aspects of program and intermediate scrutiny to gender aspects); Contractors Ass' n v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993), on remand, 893 F. Supp. 419 (E.D. Pa. 1995), aff'd, 91 F.3d 586 (3d Cir. 1996); Coral Const. Co. v. King County, 941 F.2d 910 (9th Cir. 1991); Michigan Road Builders Ass'n, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987), aff'd mem., 489 U.S. 1061 (1989) (pre-*Croson* case coming to the same conclusion); Associated Gen. Contr. of Cal. v. City & County of San Francisco, 813 F.2d 922 (9th Cir. 1987). *See also* Peter Lurie, Comment, *The Law as They Found It: Disentangling Gender-Based Affirmative Action Programs From Croson*, 59 U. Chi. L. Rev. 1563 (1992) (specifically arguing that intermediate scrutiny is the appropriate mode of analysis for equal protection challenges to gender based programs after *Croson*); *Cf. Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990) (applying strict scrutiny to both gender and racial classifications, but reversing trial court's grant of summary judgement invalidating the law); Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989) (applying strict scrutiny to gender and racial classifications); American Subcontractors Ass'n v. City of Atlanta, 376 S.E.2d 662 (1989). Significantly, the cases that have applied strict scrutiny to benign gender based programs do not explain why they do so. See Lurie, *supra* at 1582-83. However, courts which have looked at this issue in depth have generally applied intermediate scrutiny to gender classifications. *See* Contractors Ass'n, 6 F.3d 990; *Coral Construction*, 941 F.2d 910; *Michigan Road Builders*, 834 F.2d 583; Associated Gen. Contractors, 813 F.2d 922.

8. *See, e.g.*, Contractors Ass'n, 6 F.3d 990 (applying strict scrutiny to race, intermediate scrutiny to gender and rational basis to disability related aspects of a Philadelphia ordinance which provided for set-asides).
are often the focus of the same kinds of affirmative action programs.  

Significantly, several courts have already had to deal with programs that address both gender and race since *Croson*.  

These courts have not agreed on how to apply *Croson* in determining the appropriate standard for gender based programs.  

Adding consideration of disability to this mix only increases the confusion. These concerns can lead to odd results, especially in light of this country’s history of discrimination.  

This article proposes that *Adarand* essentially leaves four mutually exclusive options in regard to this situation. First, depending upon the class involved, three different standards would apply to benign programs. These three standards would make it harder to enact benign race based programs than programs based on gender, and harder still to enact benign gender based programs than those based on disability. This first option creates what I call a vertical anomaly, and it is this troubling anomaly *Adarand* seems to have wrought.  

Second, all benign measures based on any protected classification would receive strict scrutiny while leaving the current three tiered scheme in place in all other situations. This option would make it easier to enact laws that invidiously discriminate based on gender or disability than to enact laws which attempt to remedy the current effects of past discrimination against those classes. This second option, while solving the vertical anomaly created by option number one, creates what I term a horizontal anomaly.  

The third option would require all gender, disability and race based measures to receive strict scrutiny in regard to equal protec-

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9. *Id.*  
10. See supra note 7 (listing cases which have dealt with both race-based and gender-based programs).  
11. *Id.*  
12. For example, in *Associated Gen. Contr.* , 813 F.2d 922, the court, using a strict scrutiny analysis, found the race based aspects of an affirmative action program designed to increase minority and female participation in city contracting unconstitutional. However, the gender based aspects of the program were found to be constitutional under the intermediate scrutiny test. See also *Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting) (noting the anomalous result created by the application of strict scrutiny to benign race based measures in light of the differing levels of scrutiny applicable to other classes of individuals).  
13. See infra Part II.A.  
14. See infra Part II.B.
tion challenges. This option solves both the vertical and horizontal anomalies. Given the current makeup of the Court, however, and considering the concerns raised over giving gender and disability suspect class status, this option may be difficult to achieve.

The fourth, and perhaps best option, is to recognize that *Adarand* was wrongly decided, and to apply a lower level of scrutiny to benign measures aimed at remedying the current effects of past discrimination. How realistic this option actually is, is difficult to ascertain given the current make up of the Court. However, as will be discussed below, the *Adarand* majority actually provides, in an attempt to justify its treatment of *Metro Broadcasting v. FCC*, the analytical framework which could be used to overturn its own opinion. Of course, even if *Adarand* is overturned, *Croson* would still remain. Thus, at least with regard to state and local programs, the first three options would remain.

Moreover, I assert in this article that even if strict scrutiny were applied to benign class based measures, many such programs can survive that scrutiny in light of the language used to describe strict scrutiny in *Adarand*, and the cases applying similar lan-

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15. This option has been proposed for gender and race in light of *Croson*. See John Galotto, Note, *Strict Scrutiny For Gender, Via Croson*, 93 COLUM. L. REV. 508 (1993). An opposite proposal also exists. See Lurie, *supra* note 7 (suggesting that intermediate scrutiny is still applicable to gender claims after *Croson*). The reasoning and the rationale behind each of these proposals differ.

16. See *infra* Part II.C.

17. Another appealing possibility would be to take affirmative action programs subject to constitutional standards out of the traditional three tiered analytical framework applied in equal protection cases and apply a different standard to them. See *infra* Part II.D. See also Holly Dyer, Comment, *Gender-Based Affirmative Action: Where Does It Fit in the Tiered Scheme of Equal Protection Scrutiny?* 41 KAN. L. REV. 591, 612-13 (1993) (suggesting that Justice Stevens has already laid the groundwork for such a standard in his opinions which often express distaste for the three tiered standards, and setting forth a test grounded in his opinions).

18. See *infra* Part II.D.


20. The court might also overturn *Croson*. However, to the extent that the bases for doing so are different than those for overturning *Adarand*, they are beyond the scope of this article. Significantly, however, *Adarand* itself overturned the earlier precedent *Metro Broadcasting* and at least aspects of *Fullilove v. Klutznick*, 448 U.S. 448 (1980). See *Adarand*, 115 S. Ct. 2097, 2113 (these decisions were overturned to the extent they do not comport with *Adarand*).

21. In *Adarand*, 115 S. Ct. at 2117, the majority asserts:

Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' (citation omitted). The unhappy persistence of both the practical
guage in *Croson* to affirmative action programs.\textsuperscript{22} The real issue lies in meeting the necessary evidentiary burden, and not in the feasibility of such programs in general.\textsuperscript{23} Thus, while Congress and local governments may have to go to great expense to jump through the evidentiary hoops that the Court now requires in order to justify beneficial programs (which could actually be supported by less costly yet quite probative evidence),\textsuperscript{24} such programs can indeed survive strict scrutiny when the proper requirements are met.

Part I of this article discusses the *Adarand* decision in light of several earlier decisions considering the appropriate analytical framework for constitutional challenges to affirmative action programs. Part II addresses the four possible results of *Adarand* in regard to the appropriate level of equal protection scrutiny for race, gender and disability and suggests that the third and fourth options mentioned above are the most appropriate possibilities.\textsuperscript{25} This Part also introduces the concepts of horizontal and vertical

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\textsuperscript{22} Several cases utilizing the strict scrutiny test set forth in *Croson* have addressed the circumstances under which state and local race based affirmative action programs can be constitutional. See, e.g., *Concrete Works*, 36 F.3d 1513; *Contractors Ass'n*, 6 F.3d at 1008 (holding that the city of Philadelphia presented sufficient evidence to survive summary judgment in regard to race based program but ultimately affirming order on remand after bench trial enjoining race based program under strict scrutiny standard); *Cone Corp.*, 908 F.2d at 916 (holding that Hillsborough County presented sufficient evidence on the question of prior discrimination and the need for racial classification to justify denial of summary judgement).

\textsuperscript{23} After *Croson*, courts and commentators alike have agreed upon the importance of meeting the necessary evidentiary burden. See *Contractors Ass'n*, 6 F.3d at 1001-09 (reversing order granting summary judgement against Philadelphia in regard to race based aspects of set-aside program after engaging in an in-depth analysis of the evidence presented by the city to justify the program in light of the evidentiary burden set forth in *Croson*); *Cone Corp.*, 908 F.2d at 913-16 (stating that *Croson* did not preclude local governments from enacting race based affirmative action programs, but rather established a "stringent burden of proof for proponents of MBE laws to meet" and holding that the evidence presented by the government entity involved was sufficient to withstand summary judgement). See also *Joint Statement: Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711, 1712 (1989) ("The Supreme Court has insisted that affirmative action programs be carefully designed-not dismantled.").

\textsuperscript{24} This observation will be discussed further. See infra Part III. Unfortunately the ability to compile evidence to meet the evidentiary burden may not convince government entities that it is worth the expense.

\textsuperscript{25} See infra notes 16-19 and accompanying text.
anomaly, asserting that one or the other will occur unless options three or four are utilized. Part III draws a connection between judicial scrutiny of state and local affirmative action programs after Croson and the likely result in regard to federal programs after Adarand. Finally, Part III, concludes that such programs can indeed survive strict scrutiny as it is described in both Croson and Adarand.

Ultimately, this article proposes that the most viable option is to overturn Adarand; an option which the decision's own language, as well as it's inconsistencies would strongly support. By overturning Adarand, the vertical and horizontal anomalies potentially created by the Court’s approach could be eliminated. The other option this Article suggests as palatable would be to apply Adarand to gender and disability based affirmative action programs, thus subjecting invidious measures aimed at those classes to strict scrutiny (which is generally fatal),26 while subjecting benign measures based on those classifications to a version of strict scrutiny that might not be fatal if the enacting body can meet the necessary evidentiary burden.27

I. The Adarand Decision

Before addressing the issues raised in Parts II and III of this Article, it is essential to discuss the Adarand case itself and some of the concerns caused by its reasoning. In Adarand, the Supreme Court applied strict scrutiny analysis to a benign race based program created by Congress.28 Until Adarand, the Court had not yet applied strict scrutiny to such a federal program. In fact, in Metro Broadcasting, Inc. v. FCC,29 the most recent decision to address the issue at the time Adarand was decided, a majority of the Court applied a more lenient standard to the benign race based program promulgated by the Federal Communications Commission.30

In Metro Broadcasting, the Court held that intermediate scrutiny applied to benign race based measures, and required that

26. See Adarand, 115 S. Ct. at 2136 (Ginsburg, J., dissenting) (noting that after Adarand strict scrutiny analysis of invidious discrimination is still likely to be fatal, while benign measures can survive under proper circumstances).
27. Id. at 2117.
28. Id.
30. Id.
such programs be substantially related to an important governmental objective.\textsuperscript{31} Likewise, in \textit{Fullilove v. Klutznick},\textsuperscript{32} a case decided ten years prior to \textit{Metro Broadcasting}, a plurality of the Justices had applied an amorphous, but potentially more lenient standard than strict scrutiny,\textsuperscript{33} to a program very similar to the one involved in \textit{Adarand}.\textsuperscript{34}

Between \textit{Fullilove} and \textit{Metro Broadcasting}, the Court decided \textit{City of Richmond v. J.A. Croson Co.}\textsuperscript{35} \textit{Croson} applied strict scrutiny review to a benign race-based program enacted by a local government, and ultimately found the program unconstitutional.\textsuperscript{36} However, \textit{Croson} did not present a federal affirmative action program; rather, the program attacked had been enacted by a local government.\textsuperscript{37} Indeed, Justice O'Connor, writing for the majority, and Justice Scalia in a concurring opinion, both acknowledged that Congress has a specific mandate to enforce the dictates of the

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\item \textsuperscript{31} \textit{Metro Broadcasting}, 497 U.S. at 564-65.
\item \textsuperscript{32} 448 U.S. 448 (1980).
\item \textsuperscript{33} In \textit{Fullilove}, the plurality did not directly apply any of the three levels of scrutiny commonly used in equal protection analysis. Instead, the court looked to "whether the objectives of the legislation are within the power of Congress" and to whether the use "of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the Congressional objectives." \textit{Id.} at 473 (emphasis in the original). Justice Powell, in his concurrence, stated his belief that the plurality opinion was generally in accord with his view that strict scrutiny should apply to racial classifications. \textit{Id.} at 496 (Powell, J., concurring). However, the opinion has been interpreted to provide a more lenient standard than strict scrutiny because a majority of the court in \textit{Fullilove} did not apply strict scrutiny. \textit{See} \textit{Metro Broadcasting}, 497 U.S. at 564-66. \textit{See also} \textit{Fullilove}, 448 U.S. at 472, 492; \textit{id.} at 519 (Marshall, J., concurring in the judgement) (Marshall's concurrence, which applied intermediate scrutiny to the program, was joined by two other Justices).
\item \textsuperscript{34} \textit{Fullilove}, 448 U.S. 448; \textit{but see id.} at 496 (Powell, J., concurring) (stating that he believed the opinion should have placed greater emphasis on the articulation of a standard to review such claims, but despite that fact the plurality opinion was generally in accord with his view that strict scrutiny should apply to all race based classifications). The \textit{Fullilove} plurality upheld a program that was strikingly similar to the one at issue in \textit{Adarand}. In fact, in his dissenting opinion in \textit{Adarand}, Justice Souter stated that \textit{Fullilove} should have controlled the constitutionality of the programs at question in \textit{Adarand}, which seemed better tailored than the programs at issue in \textit{Fullilove}. \textit{Adarand}, 115 S. Ct. at 2131-34 (Souter, J., dissenting). Justice Souter also seemed to question the wisdom of even considering the scrutiny standard issue, since he understood the appropriate issue on appeal to be whether a federal agency needs to make specific findings of discrimination before it could "exceed the goals adopted by Congress in implementing a race-based remedial program." \textit{Id.} at 2131.
\item \textsuperscript{35} 488 U.S. 469 (1989).
\item \textit{Id.}
\item \textsuperscript{37} \textit{Id.} at 491.
\end{itemize}
Fourteenth Amendment, whereas state conduct is specifically subject to that Amendment.\textsuperscript{38}

This position is consistent with that presented by the \textit{Fullilove} plurality\textsuperscript{39} and the \textit{Metro Broadcasting} majority\textsuperscript{40}—a fact not lost on Justice Stevens in his dissenting opinion in \textit{Adarand}.\textsuperscript{41} It is against this backdrop that the Supreme Court decided \textit{Adarand}. However, the Court inexplicably held in \textit{Adarand} that Congressional action aimed at remedying the effects of past discrimination in the several states should be analyzed under the same standard as state action, using strict scrutiny.\textsuperscript{42} To the extent that \textit{Metro Broadcasting} and \textit{Fullilove} are inconsistent with \textit{Adarand}, the Supreme Court overruled those decisions.\textsuperscript{43}

The \textit{Adarand} majority, including Justices O’Connor and Scalia, seemingly ignored their earlier position, providing no justification beyond a new analytical approach which embraced the concepts of

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  \item \textsuperscript{38} In \textit{Croson}, Justice O’Connor wrote:
    \begin{quote}
      Congress, unlike any state or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to ‘enforce’ may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state powers over matters of race.
    \end{quote}
    \textit{Id.} at 490. Similarly, Justice Scalia wrote:
    \begin{quote}
      \textbf{[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, See U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed. See Amdt. 14, § 1.}
    \end{quote}
    \textit{Id.} at 521-22 (Scalia, J., concurring in the judgment).
  \item \textsuperscript{39} \textit{Fullilove}, 448 U.S. at 472.
  \item \textsuperscript{40} \textit{Metro Broadcasting}, 497 U.S. at 563.
  \item \textsuperscript{41} \textit{Adarand}, 115 S. Ct. at 2123-25 (Stevens, J., dissenting).
  \item \textsuperscript{42} \textit{Id.} at 2097.
  \item \textsuperscript{43} \textit{Id.} at 2113, 2117.
\end{itemize}

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skepticism, congruence and consistency.⁴⁴ The majority relies heavily upon these three concepts in justifying its decision.⁴⁵

In short, as envisioned by the Adarand majority, skepticism refers to the idea that race based preferences should receive a

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⁴⁴. Id.; Id. at 2125 (Stevens, J., dissenting). For a discussion of the practical implication of this approach, see infra Part II.D. Justice O'Connor denies that this is a change of position, stating:

It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority . . . (citations omitted) . . . We need not, and do not, address these differences today. For now, it is enough to observe that Justice Stevens' suggestion that any Member of this Court has repudiated his or her previously expressed views on the subject, post, at 2123-2125, 2127, is incorrect.

Adarand, 115 S. Ct. at 2114.

However, it is hard to believe, given the language cited supra note 38, and the language in Metro Broadcasting and Fullilove, that Adarand does not represent a significant change of position by several Justices and the Court as a whole. To say that an opinion addressing the issue of the constitutionality of benign race-based measures created by the federal government and enforceable in the states, need not address Congress' special power to deal with racial issues and enforce the Equal Protection clause of the Fourteenth Amendment is shocking.

It is possible the majority means to imply that deference to Congress in this regard should be a factor considered in strict scrutiny analysis of such programs. However, this would result in a tiered version of strict scrutiny, and Adarand will have doubly confused an already confusing area of law. It would also be a hollow deference paid to Congress' special power to enforce the Equal Protection Clause of the Fourteenth Amendment, because any concept of strict scrutiny does not seem to fit well with special deference to the Legislature.

⁴⁵. Adarand, 115 S. Ct. at 2114. These three concepts are grounded in the principle that the promise of equal protection contained in the Fifth and Fourteenth Amendments protects individuals, not groups. As Justice O'Connor writes:

The three propositions undermined by Metro Broadcasting all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as in “most circumstances irrelevant and therefore prohibited,” Hirabayashi, supra, at 100, 63 S. Ct. at 1385—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court’s understanding of equal protection, and holding “benign” state and federal racial classification to different standards does not square with them.

Id. at 2112-13 (emphasis added in the original). This method of reasoning leads the majority directly to the conclusion that, in a free society based on the doctrine of equality, strict scrutiny should apply to all race-based measures because government may treat people differently because of their race only for the most compelling reasons. Id. Significantly, however, the majority cites nothing in support of the idea that strict scrutiny is the only level of scrutiny consistent with these principles in the context of benign measures created by Congress in response to the effects of discrimination aimed at particular racial classifications.

Id.
searching examination.\textsuperscript{46} Consistency refers to the idea that the standard to be applied to race based classifications under the Equal Protection Clause should not depend on the race of those effected by the classification.\textsuperscript{47} Congruence refers to the idea that equal protection analysis of federal action under the Fifth Amendment should be the same as that applied to state action under the Fourteenth Amendment.\textsuperscript{48}

Essentially, the concepts of skepticism and consistency amount to a "what's good for the goose is good for the gander" philosophy. In other words, race based classifications should be viewed skeptically and consistently regardless of whether it is the majority or a minority which is burdened by the classification and regardless of the historical context from which that classification arose. Under this approach, if you cannot have a preference which favors the majority, you cannot have one that favors the minority unless you subject it to the same standard.\textsuperscript{49}

Congruence is a similarly simplistic concept. If the states are held to a particular standard under the Equal Protection Clause of the Fourteenth Amendment, the concept of congruence requires that the federal government be held to no less of a standard under the Fifth Amendment.\textsuperscript{50} At first glance, this result seems to be supported by simple logic. Any other result would suggest that the federal government be able to discriminate more than the states.\textsuperscript{51}

But for the unfortunate fact that the majority's idea of congruence ignores the difference between Congress' power to enforce the Fourteenth Amendment and the states' role as subservient to that Amendment,\textsuperscript{52} as well as some of the explanatory language of the Justices themselves,\textsuperscript{53} the Court's theory of congruence might be a persuasive one. However, the majority fails to recognize the fact that its opinion compares apples and oranges. Arguably Congress should be no more able to perpetuate invidious discrimination than a state would be,\textsuperscript{54} but it cannot be ignored that, in passing benign

\begin{itemize}
  \item 46. \textit{Id.} at 2111.
  \item 47. \textit{Id.}
  \item 48. \textit{Id.}
  \item 49. \textit{Id.} at 2111-13.
  \item 50. \textit{Adarand}, 115 S. Ct. 2097.
  \item 51. \textit{Id.} at 2113, 2115.
  \item 52. \textit{See supra} notes 38-45 and accompanying text.
  \item 53. \textit{Id.}
  \item 54. Justice Stevens addresses this concern in his dissenting opinion, but explains why there is no conflict with Congress' receiving greater deference than a state government when
\end{itemize}
race based measures applicable to the states, Congress is acting to enforce the Fourteenth Amendment; an act that Congress is specifically empowered to perform.55

The majority accounts for this argument in part with the other two principles—skepticism and consistency. The Court argues that one cannot know whether a measure is truly invidious or benign without subjecting it to the most exacting of scrutiny.56 Implicitly then, when Congress passes an apparently remedial race-based measure, one cannot know whether Congress is acting to discriminate or simply to enforce its power under the Fourteenth Amendment. Only by subjecting the measure to strict scrutiny, and thus a higher evidentiary burden, can a determination be made as to the validity of Congressional action.57

Of course application of these two principles creates an odd situation: in order to determine whether remedial action by

it enacts a benign race-based program:

Presumably, the majority is now satisfied that its theory of "congruence" between the substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based on divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress' institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster equality than the deference due a state legislature. The latter is an extraordinary proposition; and, as the foregoing discussion demonstrates, our precedents have rejected it explicitly and repeatedly.

Adarand, 115 S. Ct. at 2125 (Stevens, J., dissenting) (footnotes omitted).

55. Id. Justice Stevens writes a few pages later:

The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.

In my judgement, the Court's novel doctrine of "congruence" is seriously misguided. Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.

Id. at 2126 (footnotes omitted). Significantly, if the basis for the court's approach is the lack of clarity regarding whether Congress is acting pursuant to the Fifth or Fourteenth Amendments when it passes benign measures applicable in the states, context would seem to provide an answer. Of course, if this were really the issue, Congress could simply state in the legislation that it is acting pursuant to Section 5 of the Fourteenth Amendment.

56. Id. at 2113-14.

57. Id.
Congress is proper it must be subject to the same strict scrutiny standard as the invidious discrimination that it was meant to remedy. Thus, Congress' power to enforce the Fourteenth Amendment is treated the same as state action subject to that amendment and Congress' own duty not to violate the Fifth Amendment.\textsuperscript{58}

Congruence aside,\textsuperscript{59} the other two concepts appear, at least at first glance, to make sense. After all, why should one or two racial groups have an advantage in an equal, color-blind society? The simple answer is that our society is neither equal nor color-blind.\textsuperscript{60} Beyond that reality, however, to treat legislation aimed at remedying the effects of past or present discrimination directed at racial minorities and legislation meant to discriminate against those minorities as the same, one must completely divorce the legislation from its historical context and turn the debate into an ahistorical analysis of racial categorization.\textsuperscript{61} In fact, one must

\textsuperscript{58} Id. at 2123-26 (Stevens, J., dissenting).

\textsuperscript{59} This concept of congruence will be discussed in greater depth. See infra Part II.D.

\textsuperscript{60} Studies, many of which have been done by the Urban Institute, demonstrate the differential treatment accorded minority and white candidates for the same jobs, houses, etc. They are compelling and suggest that we do not yet live in an equal or colorblind society. See e.g., Margery A. Turner, et al., \textit{Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring IX}, URBAN INST. REP. (1991) (overall, white job applicants fared better in the hiring process than equally qualified black applicants who applied for the same job); Margery A. Turner, et al., \textit{Housing and Urban Development, Housing Discrimination Study: Synthesis VI} (Dep't of Housing & Urban Dev. 1991) (more than fifty percent of black and hispanic subjects seeking to buy or rent a home were treated less favorably than paired white subjects); Peter J. Leahy, \textit{Are Racial Factors Important for the Allocation of Mortgage Money?}, 44 AM. J. ECON. & SOC. 185 (1985) (study controlling for socioeconomic factors between neighborhoods which were similar in all major mortgage-lending criterion except for race, and finding that mortgage lending outcomes are unequal). Additionally, legal scholars using social science data to support their conclusions have recognized that our society is not yet colorblind. See, e.g. Charles R. Lawrence, III, \textit{The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism}, 39 STAN. L. REV. 317 (1987); Kimberle Williams Crenshaw, \textit{Race, Reform, And Retrenchment: Transformation and Legitimation in Antidiscrimination Law}, 101 HARV. L. REV. 1331 (1988).

\textsuperscript{61} In her dissenting opinion in \textit{Adarand}, Justice Ginsburg aptly sums up this point with a quote from Steven L. Carter:

\textit{[W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend \ldots{} that the issue presented in Bakke was the same as the issue in \textit{Brown} is to pretend that history never happened and that the present doesn't exist.}

substantively ignore the history of this nation; an odd approach to issues that arise precisely because of that history. This is the primary concern raised by the concept of consistency as augmented by the concept of skepticism.

Of course, that is not to say that the concept of skepticism standing alone must be used in an ahistorical fashion. As Justice O'Connor points out in the majority decision, any government developed race based classification should be viewed skeptically because of the dangers inherent in treating people differently based on race. In fact, the concept of skepticism towards racial classifications, well established in Supreme Court precedent, can be applied consistently not only with strict scrutiny, but also with more lenient standards of equal protection review. Standing alone, skepticism is not a concept that necessarily requires benign

62. It is particularly interesting that in his concurrence, Justice Thomas states:
There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness”).

Id. at 2119 (Thomas, J., concurring in part and concurring in the judgement). Thomas's use of this quote epitomizes the Court's ahistorical approach. The words of the Declaration of Independence make perfect sense and seem to embrace a certain universality. However, the same Constitution to which Justice Thomas refers recognized slavery as legal and counted African-Americans as three fifths of a person. U.S. Const. Art. 1, § 2(3). Until thirty years ago the Constitution, as interpreted by the Court, permitted the continued existence of segregation and the separate but equal doctrine. Lofty principles sound wonderful as universal rules when divorced from their historical contexts. However, placed in that context, benign race based measures would appear necessary to make the universal application of those principles a reality.

64. Id. at 2111.
65. See id. (applying the concept of skepticism with strict scrutiny).
66. Skepticism of race-based classifications does not, by itself, mandate strict scrutiny. One can be skeptical and apply a lower standard, such as intermediate scrutiny, to benign measures because they are justified both by this nation's sad history of race relations and Congress' enumerated powers under § 5 of the Fourteenth Amendment. See Metro Broadcasting, 497 U.S. 547; Adarand, 115 S. Ct. at 2120 (Stevens, J., dissenting). Skepticism would be healthy in this context because it would keep courts on guard as they apply the standard. Skepticism is already embodied in the application of the heightened scrutiny inherent in the intermediate level standard. In fact, one could turn the Adarand opinion on its head—instead of using strict scrutiny to determine what measures are benign or invidious (and watering it down in some contexts) courts could apply rational basis scrutiny with skepticism to apparently benign measures, thereby requiring a court to ask whether the legislature's motives were invidious or benign. If benign, rational basis scrutiny would apply; strict scrutiny would apply if the motivation was invidious.
measures to be treated in the same fashion as invidious ones. Skepticism is by far, the least troubling aspect of the tripartite conceptual framework proposed by the Adarand Court; at least until it is plugged into the other two concepts of consistency and congruence.

A major force underlying the majority approach in Adarand is the need for clarity in an area of law fraught with confusion. On its face, the majority decision would seem to provide this clarity. However, Adarand, along with Croson, has created a new kind of confusion; confusion which has far greater practical implications than the confusion the Adarand majority sought to clear up. For, in applying its strict scrutiny standard based on the concepts of skepticism, consistency and congruence, the Adarand majority does not address the level of scrutiny to be accorded benign measures based on gender and disability. Similarly, Croson does not deal with these concerns.

Since affirmative action programs often involve gender and disability in addition to race, the Adarand decision has created serious anomalies in the tiered equal protection framework. The remainder of this article is devoted to addressing what options the Court has left us in regard to this situation, which of these options are appropriate and why. The foregoing discussion of Adarand and its predecessors provides the background against which this discussion must take place.

67. Adarand, 115 S. Ct. at 2120.
68. Id.; See also id. at 2120-23 (Stevens, J., dissenting) (implying that the majority glosses over real differences between benign and invidious measures in an attempt to promote its concept of “consistency”).
69. As Part I and III of this Article point out, however, this “clarity” has come at a high price. Moreover, the clarity purportedly offered in Adarand might not be any more clear in application than the previous standards. A large portion of the remainder of this article is devoted to assessing the new confusion created in the Adarand majority’s quest for clarity.
70. See Adarand, 115 S. Ct. 2097.
71. See Croson, 488 U.S. 469.
72. See infra Part II.
II. The Practical Legacy Of *Adarand* And *Croson*: What To Do About Gender And Disability In Light Of The "New" Treatment Of Race

Neither *Adarand* nor *Croson* dealt with the appropriate standard for addressing benign gender or disability based programs. In those cases, the court applied strict scrutiny to benign racial classifications because strict scrutiny was applicable to invidious racial classifications, without providing an explanation as to the impact of those decisions on gender and disability based classifications subject to lower levels of equal protection scrutiny. *Adarand* in particular utilized the terms "skepticism" and "consistency." As noted above, together these two concepts require that the same level of equal protection scrutiny be applied to all racial classifications whether benign or invidious.

This overall approach creates a problem. Many affirmative action programs involve race, gender and disability. Since invidious classifications based on gender are subject to intermediate scrutiny, and those based on disability are generally subject to rational basis scrutiny, it appears that *Adarand* has created what amounts to a tiered approach to affirmative action based on its

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73. *See supra* notes 6-12 and accompanying text. *See also Adarand*, 115 S. Ct. 2097; *Id. at 2122* (Stevens, J., dissenting); *Croson*, 488 U.S. 469; T. Alexander Alienkoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1095 n.168 (1991) (recognizing confusion over gender based classifications following *Croson*: "[i]f in following *Croson*, all lines drawn on the basis of gender will be judged by the same standard, then gender based affirmative action programs, which have been subjected to mid-level scrutiny, would seemingly be subjected to a lower level scrutiny than race-based plans. This conundrum cannot go unaddressed").


76. *Adarand*, 115 S. Ct. at 2111.

77. *See supra* Part I.

78. *See, e.g.*, Contractors Ass'n, 6 F.3d 990 (reviewing a Philadelphia set aside ordinance applying to race, gender and disability); GEORGE STEFANOPOLIS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT 76-80 (July 19, 1995) (noting that several programs of the Department of Education and Health and Human Services "are targeted on the basis of race, gender or disability").

79. Craig v. Boren, 429 U.S. 190 (1976); Contractors Ass'n, 6 F.3d at 999-1001; Associated Gen. Contractors of Cal. v. City & County of San Francisco, 813 F.2d 922, 942 (9th Cir. 1987).

reliance on the concept of "consistency." Justice Stevens noted this concern, at least in regard to gender, in his dissent when he wrote:

[T]he court may find that its new "consistency" approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply "intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the government can more easily enact affirmative action programs to remedy discrimination against women than it can enact affirmative action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves. (citation omitted). When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.

Courts have already had to grapple with this concern under Croson, and Adarand significantly compounds the problem. So what options does Adarand leave us to resolve this significant confusion created by the Court's quest for "consistency"?

This article asserts that Adarand leaves only four possibilities: (1) subject benign measures based on race, gender and disability to different standards of equal protection review, thus making it harder to enact benign race based programs than to enact programs based on gender and disability; (2) require that all benign measures based on any protected classification be subject to strict review; (3) require that all benign measures based on any protected classification be subject to "intermediate scrutiny"; (4) require that all benign measures based on any protected classification be subject to "strict scrutiny".

81. Adarand, 115 S. Ct. at 2111.
82. Id. at 2122 (Stevens, J., dissenting).
83. See supra notes 6-12 and accompanying text.
84. The federal government has created affirmative action programs based on race, gender and disability. See STEPHANOPOLIS & EDLEY, supra note 78 at 76-80 (noting several social programs administered by the Departments of Education and Health and Human Services); Rehabilitation Act of 1973, 29 U.S.C. § 791 (1988 & Supp. I-V) (requiring affirmative action regarding handicapped individuals in federal agencies and those contracting with federal agencies and departments). Thus, in the wake of Adarand, courts reviewing programs that involve classifications other than race, gender and disability will encounter great confusion as to the appropriate applicable standards.
85. See infra Part II.A.
scrutiny while maintaining the current three tiered scheme for all other situations, thus making it easier to enact laws which invidiously discriminate based on gender and disability than to enact laws meant to remedy the effects of discrimination; (3) subject all classifications based on race, gender and disability to strict scrutiny, thus requiring that both invidious and benign measures based on gender and disability be subject to strict scrutiny; or, (4) overturn Adarand (and possibly Croson), applying instead a lower level of scrutiny to those benign measures created to remedy the effects of discrimination as was done in Metro Broadcasting, or undo the three tiered equal protection scrutiny scheme in regard to benign measures and adopt some new approach.

In the pages that follow each of these options is discussed. Ultimately I will explain why options three and four provide the best alternatives. In discussing these options, I will also explain what I have termed “the vertical anomalies” created by option one and the “horizontal anomaly” created by option two. In reading the discussion that follows, it is important to consider that “strict scrutiny,” as characterized in Adarand, is not necessarily fatal to affirmative action programs. I will explore this idea in greater detail in Part III.

A. The First Option: Maintaining the Current Three Tiered System and the Creation of Vertical Anomalies

The first option left in the wake of Adarand in regard to gender and disability based affirmative action is to maintain the integrity of the three tiered equal protection scrutiny system. This would result in tiered affirmative action. The concept of “consistency” as set forth in Adarand would require that both

86. See infra Part II.B.
87. See infra Part II.C.
89. See infra Part II.D. See also supra note 17 and sources cited therein.
90. See infra Part II.A.
91. See infra Part II.B.
92. Adarand, 115 S. Ct. at 2117; Id. at 2134-36 (Ginsburg, J., dissenting).
93. Id. at 2117. See also supra notes 21-24 and accompanying text.
94. See infra Part III.
95. I do not mean to imply that the Adarand decision specifically addressed gender or disability based affirmative action. It did not. Adarand, 115 S. Ct. 2097. However, the opinion did create an apparent anomaly in regard to affirmative action aimed at helping classes other than race.
96. See infra Figures 1 and 2 and accompanying text.
invidious and benign measures be accorded the same treatment within each tier of the equal protection scheme.\textsuperscript{97} This is the logical result of the “what’s good for the goose is good for the gander” approach spelled out in \textit{Adarand.}\textsuperscript{98} However, as has been suggested in regard to \textit{Croson,}\textsuperscript{99} this creates an anomaly.\textsuperscript{100} This anomaly, which I term a “vertical anomaly” is represented by Figure 1.

97. Of course, the \textit{Adarand} majority would likely say that one must apply strict scrutiny to determine whether a measure is benign or invidious in the first place. \textit{Adarand}, 115 S. Ct. at 2113. However, when strict scrutiny is viewed in the tiered system such a requirement makes no sense. If one “must” subject a measure to strict scrutiny to determine its purpose, then how can a gender based program ever be properly analyzed within the current tiered system given the concept of “consistency?” Or would it be adequate to simply accept a legislature’s description of a program as benign under intermediate scrutiny? If so, the problems addressed \textit{infra} at notes 100-04, arise. Additionally, if after \textit{Adarand}, Congress’ stated purpose for legislation (i.e. benign race-based measures) is not to be accepted absent strict scrutiny, the problem of giving proper deference to Congress’ power to enforce the Fourteenth Amendment under § 5 of that Amendment arises. \textit{See supra} notes 50-55 and accompanying text. The additional concern that benign measures will be struck down in the process of determining whether they are benign unless they meet an extremely high evidentiary burden also arises. \textit{See supra} notes 50-55 and accompanying text.

98. \textit{Adarand}, 115 S. Ct. at 2111. It is possible that “consistency” was meant only to apply to race. However, this makes little sense in light of how the concept is presented in \textit{Adarand}. If the race of those benefitted by a program should not determine the level of scrutiny, neither should the gender or disability status of those similarly benefitted or burdened. Otherwise, the vertical anomaly will be even more pronounced. If this were not the case, then the horizontal anomaly discussed \textit{infra} Part II.B might occur.

99. Alienkoff, \textit{supra} note 73, at 1095 n.168; \textit{infra} note 170 and accompanying text; \textit{see also} \textit{Adarand}, 115 S. Ct. at 2122 (Stevens, J., dissenting) (mentioning \textit{Adarand} causes the same problem in regard to federal programs).

100. The fact that the Court has created an anomaly or inconsistency does not mean that the Court will necessarily see fit to remedy the situation. However, as is explained in this Part, the anomalies created by Adarand when gender and disability based affirmative action are considered are quite severe, and ultimately it is likely that the Court will be forced to deal with them.

Additionally, someone siding with the position taken by Justice Scalia in \textit{Adarand}, might argue that no anomaly is presented by this situation since government can never have a compelling reason to discriminate on the basis of race to make up for past discrimination. \textit{Id.} at 2118-19 (Scalia J., concurring). Therefore, the fact that gender and disability based affirmative action are subject to lower standards than race based affirmative action does not create an anomaly since race based affirmative action is always unacceptable. However, this is more an argument against affirmative action, or at least against race based affirmative action, than it is an argument against the existence of vertical anomaly. If as \textit{Adarand} specifically states, race based affirmative action is viable in appropriate circumstances, then the anomalies discussed in this article do exist. \textit{Id.} at 2117. If not, then the anomaly is even greater because while there can be no race based affirmative action, there could be affirmative action for classes which receive less protection from invidious discrimination. \textit{See infra} Figure 2 and accompanying text.
FIGURE 1

Essentially, this anomaly means that it will be much harder to enact race-based affirmative action than to enact gender based affirmative action,\textsuperscript{101} and harder still to enact race based affirmative action than to enact disability based affirmative action.\textsuperscript{102} While all of these groups have suffered severe discrimination in this nation,\textsuperscript{103} it seems odd that, under the Equal Protection Clause, it would be harder to take affirmative action to remedy the effects of racial discrimination. This is especially troubling considering that the Equal Protection Clause was initially created as a means to end discrimination against the slaves,\textsuperscript{104} and that affirmative action was first adopted primarily to help African-Americans.\textsuperscript{105}

Moreover, making the enactment of race based affirmative action programs the most difficult does not seem to fit well when one considers the reasons these classifications are situated as they are within the relevant tiers of scrutiny. Under traditional equal

\begin{table}
\centering
\begin{tabular}{|l|l|l|}
\hline
Classification & Scrutiny & Grounds for Invidiousness \hline
Race (Strict Scrutiny) & Invidious \rightarrow Benign & I \rightarrow A \hline
Gender (Intermediate Scrutiny) & Invidious \rightarrow Benign & I \rightarrow A \hline
Disability (Rational Basis Scrutiny) & Invidious \rightarrow Benign & I \hline
\end{tabular}
\end{table}

\textsuperscript{101} Adarand, 115 S. Ct. at 2097.
\textsuperscript{102} Contractors Ass’n, 6 F.3d 990 (applying the rational basis test to the disability based portion of a program, while applying strict scrutiny to the race based portion).
\textsuperscript{103} Adarand, 115 S. Ct. at 2117 (recognizing discrimination based on race); Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (recognizing discrimination based on gender); Americans with Disabilities Act, 42 U.S.C. § 12101 (1990) (recognizing discrimination based on disability).
\textsuperscript{104} Adarand, 115 S. Ct. at 2122 (Stevens, J., dissenting).
\textsuperscript{105} The concept of affirmative action first appeared officially in executive orders issued in the 1960s as part of anti-discrimination measures dealing with race, creed, color and national origin in the arena of government contracts. See Exec. Order No. 10,925, 3 C.F.R. 448 (1959-63); Exec. Order No. 11,246, 3 C.F.R. 339 (Sept. 24, 1965). Ironically, invidious discrimination aimed at all of the groups (i.e. race, creed, color and national origin) mentioned in these early affirmative action attempts currently receives strict scrutiny. Yet, under Adarand, federal affirmative action aimed at remedying the effects of discrimination towards these groups continues to be scrutinized the most.
protection analysis, race is considered a suspect class, and thus receives the highest level of scrutiny. Gender, however, is considered a quasi-suspect class, and thus receives more protection than most classifications but less than race. This is because gender can be relevant in some, though very few, circumstances. According to the Supreme Court, disability is not a suspect or quasi-suspect class and thus it receives far less protection under the Equal Protection Clause. Whether or not the status of disability as a suspect or quasi-suspect class might change in light of the passage of the Americans With Disabilities Act, will be discussed later in this article.

Since as among race, gender, and disability, race is the class entitled to the greatest protection from discrimination, it would seem logical that measures aimed at remedying the effects of racial discrimination would be given the greatest latitude. Yet, the vertical anomaly created by Adarand/Croson makes it harder to engage in affirmative action to remedy race discrimination, even though under the Equal Protection Clause, that type of discrimination is considered the most pernicious kind.

Essentially, the Court’s concept of “consistency” can work within a tier. However, when that tier is placed on the road with the other tiers and with the groups falling within them, it is not logical that it be a two way street. When dealing with invidious discrimination the tiers make some sense; race has a unique history in this nation and is virtually never a relevant factor for legislative purposes, while disability and gender can be relevant under some circumstances. Thus, there is justification for making it

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110. See infra Part II.C.
111. That racial discrimination is the most pernicious kind of discrimination is inherent in the history of applying strict scrutiny to invidious racial classifications. Adarand, 115 S. Ct. at 2106-08. Id. at 2122 (Stevens, J., dissenting) (recognizing that it is anomalous to make it harder to remedy discrimination against African Americans through affirmative action plans since the primary purpose of the Equal Protection Clause was to avoid discrimination against the former slaves).
112. Id. at 2112-13. See also City of Cleburne, 473 U.S. at 440.
113. For example, consider a statute requiring separate restroom facilities for men and women or a law requiring that one be able to see in order to drive. See Galotto, supra note
harder to discriminate on the basis of race. Since however, the purpose of affirmative action is to help remedy the effects of past discrimination, it makes no sense to make it harder to enact programs meant to remedy the effects of racial discrimination than to enact programs aimed at remedying the effects of discrimination against classifications which are entitled to less protection in regard to invidious discrimination.\textsuperscript{114} Figure 2 depicts this conundrum:

\begin{figure}
\begin{center}
\begin{tabular}{|c|c|c|}
\hline
 & More Protection From Invidious Discrimination & Harder to Enact Remedial Legislation \\
\hline
Race & $\uparrow$ Invidious $\longleftrightarrow$ Benign & $\downarrow$ consistency \\
(Strict Scrutiny) & & \\
\hline
Gender & $\uparrow$ Invidious $\longleftrightarrow$ Benign & $\downarrow$ consistency \\
(Intermediate Scrutiny) & & \\
\hline
Disability & $\uparrow$ Invidious $\longleftrightarrow$ Benign & $\downarrow$ consistency \\
(Rational Basis Scrutiny) & & \\
\hline
\end{tabular}
\end{center}
\caption{FIGURE 2}
\end{figure}

After \textit{Croson}, several courts have had to deal with these concerns in regard to local government programs. The results are a mixed bag which demonstrate the effects of vertical anomaly in action.

In \textit{Contractors Association v. City of Philadelphia},\textsuperscript{115} the Third Circuit Court of Appeals considered a Philadelphia program which established set-asides on the basis of race, gender and disability.\textsuperscript{116} The district court had invalidated the ordinance in regard to all of the classes covered.\textsuperscript{117} In the light of the decision in \textit{Croson}, which required that strict scrutiny be applied to all race-based programs created by state and local governments,\textsuperscript{118} the court of appeals applied strict scrutiny to the race based aspects of the program.\textsuperscript{119}

\textsuperscript{15} at 518 (setting forth the restroom example in the context of a discussion about the Court's treatment of gender discrimination under the equal protection doctrine).

\textsuperscript{114} This is likely why Justice Stevens referred to this situation in regard to gender and race as an anomaly. \textit{Adarand}, 115 S. Ct. at 2122 (Stevens, J., dissenting).


\textsuperscript{116} \textit{Id}.

\textsuperscript{117} \textit{Id.} at 993.

\textsuperscript{118} \textit{Croson}, 488 U.S. 469.

\textsuperscript{119} \textit{Contractors Ass'n}, 6 F.3d at 999-1000.
Citing Mississippi University for Women v. Hogan, which had held a gender based classification favoring women to that standard, the court then applied intermediate scrutiny to the gender based aspects of the program. The court also held that based on Croson it was logical to apply intermediate scrutiny to gender classifications since Croson had applied the same standard to benign race based programs as to other racial classifications. The Third Circuit thus implied that the concept of “consistency” was inherent in Croson and applicable to gender.

Rational basis scrutiny was applied to the disability based aspects of the program under the standards set forth in City of Cleburne v. Cleburne Living Center, Inc. The court rejected the argument that the Americans With Disabilities Act altered Cleburne. In so ruling, the court cited only to a footnote in More v. Farrier, a case providing only a cursory explanation as to why the ADA could not serve as a basis to alter the level of scrutiny applicable to disability. The court’s cursory treatment of this argument is a bit puzzling in light of Congressional language contained in the ADA which declares disabled individuals to be a “discreet and insular minority,” and explains that disabled individuals have been subject to a history of discrimination based on immutable characteristics. These considerations are all relevant to the determination of suspect classification.

Ultimately, the Third Circuit in Contractors Association had to apply three different tests to the same program to assess the program’s constitutionality as it applied to the three different classes. In doing so, the court of appeals found that the district court had erred in granting summary judgement against the city with regard to the race and disability aspects of the program, but

120. 458 U.S. 718 (1982).
121. Contractors Ass’n, 6 F.3d at 1000-01.
122. Id. at 1001.
123. Id.
126. Contractor’s Ass’n, 6 F.3d at 1001 (citing More v. Farrier, 984 F.2d 269, 271 n.4 (8th Cir. 1993)).
127. More, 984 F.2d 269. See also Contractors Ass’n, 6 F.3d at 1001.
129. Frontiero v. Richardson, 411 U.S. 677 (1973); infra Part II.C.
130. Contractors Ass’n, 6 F.3d at 999-1001.
that it had correctly dismissed the gender preference. At the
summary judgement stage, the city of Philadelphia had presented
detailed statistical and anecdotal evidence regarding the race-based
aspects of the program, virtually no evidence in regard to the
gender based aspects, and simply anecdotal evidence for the
disability based aspects of the program.

Thus in Contractors Association, the racial preference was
subjected to the greatest scrutiny, and the nature and level of
evidence required was significant. By contrast, the disability
preference was barely scrutinized and survived the equal protection
analysis with minimal evidence. Moreover, while the court
struck down the gender preference, it did hold that: "Logically a
city must be able to rely on less evidence in enacting a gender
preference than a racial preference because applying Croson's
evidentiary standard to a gender preference would eviscerate
the difference between strict and intermediate scrutiny." Thus,
while the race based portion of the program in Contractors
Association survived summary judgment, it is apparent that the
evidentiary hurdles required to do so are significant and make it
much harder to defend the race based portions of a program than
those based on gender or disability.

In another case, Coral Construction Co. v. King County, the
Ninth Circuit Court of Appeals considered a challenge to King
County, Washington's minority and women's business enterprise
set-aside program. The district court had granted the county's
motion for summary judgement. However, the Court of
Appeals reversed as to the race-based aspects of the program,
holding that strict scrutiny requires detailed statistical proof in
addition to the strong anecdotal evidence that King County had

131. Id.
132. Id. at 1002-08.
133. Id. at 1009-11.
134. Id. at 1011-12. On remand, the district court invalidated the race based aspects of
the program under strict scrutiny analysis. Contractors Ass'n v. City of Philadelphia, 893 F.
135. Contractors Ass'n, 6 F.3d at 999-1009.
136. Id. at 1011-12.
137. Id. at 1010.
138. 941 F.2d 910 (9th Cir. 1991).
139. Id.
140. Id. at 915. See also Coral Constr. Co. v. King County, 729 F. Supp. 734 (W.D. Wash.
1989).
presented,\textsuperscript{141} and that the program was not narrowly tailored because it was geographically overbroad.\textsuperscript{142}

At the same time, the Ninth Circuit upheld the gender based preference under intermediate scrutiny,\textsuperscript{143} noting that "\textsuperscript{144} unlike the strict standard of review applied to race-conscious programs, intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy."\textsuperscript{144} In upholding the gender based preference, the court relied heavily on the type of anecdotal evidence considered inadequate to support the race-based set-aside.\textsuperscript{145}

In a third case, \textit{Concrete Works of Colorado v. City & County of Denver},\textsuperscript{146} the Tenth Circuit Court of Appeals considered a Denver ordinance which provided a preference for minority and women's businesses.\textsuperscript{147} The district court had granted Denver's motion for summary judgement and \textit{Concrete Works of Colorado} appealed.\textsuperscript{148} The Court of Appeals applied strict scrutiny to the race-based aspects of the program and intermediate scrutiny to the gender-based aspects.\textsuperscript{149} However, after completing a detailed examination of the evidence required by \textit{Croson}, the court found that Denver's evidence in support of the program raised issues of material fact and thus summary judgment should not have been granted.\textsuperscript{150} The court acknowledged that Denver had compiled "substantial evidence" that was "particularized and geographically targeted."\textsuperscript{151}

The Tenth Circuit in \textit{Concrete Works} did not differentiate its analysis as between the race and gender aspects of Denver's

\begin{itemize}
  \item \textit{Coral Constr. Co.}, 941 F.2d at 916-22. King County had produced statistical proof for the district court in the form of two detailed studies. However, the district court did not consider that evidence in granting summary judgement because it was presented a few days before the motions were heard. \textit{Id}. The Court of Appeals acknowledged that this evidence could be sufficient, but further held that the Coral Construction Company should have an opportunity to refute that statistical evidence because "statistics are not irrefutable, and may be rebutted." \textit{Id}. at 921.
  \item \textit{Id}. at 925-26.
  \item \textit{Id}. at 928-33.
  \item \textit{Id}. at 932.
  \item \textit{Id}. at 933.
  \item \textit{Concrete Works}, 36 F.3d at 1530.
\end{itemize}
program;\textsuperscript{152} the court seemed to require the same evidence in support of both. Thus, when the evidence was held to be insufficient, it was held to be insufficient for both the race and gender aspects of the program.\textsuperscript{153} No explanation exists as to why the court proceeded in this manner, but given that the court was primarily concerned with plaintiff's challenge to the accuracy of Denver's data in light of the strict evidentiary standard set forth in \textit{Croson},\textsuperscript{154} the court may simply have believed that an appeal from a grant of summary judgment did not present an appropriate opportunity to hold such evidence sufficient under either standard.\textsuperscript{155}

Finally, in \textit{Associated General Contractors of California v. City & County of San Francisco},\textsuperscript{156} a pre-\textit{Croson} case, the Ninth Circuit Court of Appeals applied intermediate scrutiny and held the gender-based aspects of a San Francisco ordinance providing preferences for minority and women owned businesses to be facially valid.\textsuperscript{157} The court then proceeded to strike down the preference favoring minority owned businesses under a strict scrutiny standard.\textsuperscript{158}

However, citing \textit{Regents of the University of California v. Bakke},\textsuperscript{159} \textit{United States v. Paradise}\textsuperscript{160} and Justice O'Connor's concurrence in \textit{Wygant v. Jackson School Board},\textsuperscript{161} the court stated that it was not applying the "old strict scrutiny that was 'strict' in theory but fatal in fact."\textsuperscript{162} Instead, the court applied a form of strict scrutiny that resembles what would become the \textit{Adarand/Croson} version of strict scrutiny.\textsuperscript{163} Yet, in upholding the gender preference while at the same time striking down the

\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{See id.} at 1531 (implying that appeal from summary judgement did not provide an appropriate opportunity).
\textsuperscript{156} 813 F.2d 922 (9th Cir. 1987).
\textsuperscript{157} \textit{Id.} at 939-42. Some aspects of the program as a whole were struck down as violative of the city charter. \textit{Id.} at 924-28. It is the aspects of the program that survived examination of the city charter which were subjected to the equal protection analysis. \textit{Id.}
\textsuperscript{158} \textit{Id.} at 928-39.
\textsuperscript{159} 480 U.S. 149 (1987)(plurality opinion).
\textsuperscript{162} \textit{Associated Gen. Contractors}, 813 F.2d at 928.
\textsuperscript{163} \textit{Id.}
racial preference, the court acknowledged that intermediate scrutiny is still more permissive than strict scrutiny.\textsuperscript{164}

These four cases demonstrate that the application of strict scrutiny to all racial classifications (whether invidious or benign), does not result in consistent analysis of affirmative action programs under the Equal Protection Clause. The vertical anomaly created by \textit{Adarand/Croson} is apparent in cases like \textit{Contractors Association},\textsuperscript{165} and \textit{Coral Const. Co.}\textsuperscript{166} Even cases like \textit{Concrete Works},\textsuperscript{167} where the court utilizes different levels of scrutiny for different classes but continues to analyze the evidence from a strict scrutiny perspective, are problematic. \textit{Concrete Works} is especially troubling because the court provides no rationale for its approach.\textsuperscript{168} Furthermore, as the Third Circuit Court of Appeals acknowledged in \textit{Contractors Association}: "logically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying \textit{Croson}'s [and \textit{Adarand}'s] evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny."\textsuperscript{169}

Perhaps the district court in \textit{Contractors Association} summed up this vertical anomaly best when it noted that while the tiered scrutiny works as intended when invidious discrimination is involved, those same tiers, when applied to affirmative action create an anomaly which makes it harder to remedy race discrimination than sex discrimination even though blacks "as a class" have been subjected to the most "egregious discrimination."\textsuperscript{170} The

\textsuperscript{164} \textit{Id.} at 941-42.
\textsuperscript{165} \textit{See supra} notes 115-137 and accompanying text.
\textsuperscript{166} \textit{See supra} notes 138-145 and accompanying text.
\textsuperscript{167} \textit{See supra} notes 146-155 and accompanying text.
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Contractors Ass'n}, 6 F.3d at 1010.

\textit{[T]he use of intermediate scrutiny to analyze gender-based classifications in the affirmative action context produces an anomalous result. In the non-affirmative action context the use of a three-tiered analysis for ordinances disadvantaging blacks, women or non-suspect classifications creates the result intended by the Supreme Court—it is most difficult to uphold a classification disadvantaging blacks, less difficult to uphold a classification disadvantaging women, and easiest to uphold a classification disadvantaging a non-suspect class. However, in the affirmative action setting the use of this three-tiered scheme means that laws disadvantaging whites (MBEs) will be held to a stricter standard.
district court questioned whether this approach was the intended result of *Croson*. If it was, the court questioned the logic of that result.\textsuperscript{171}

Another option to avoid the vertical anomaly would be to apply strict scrutiny to all benign measures while leaving the tiers otherwise intact.\textsuperscript{172} Several courts have already utilized this approach when examining programs involving gender and race.\textsuperscript{173} This approach, however, creates yet another anomaly.

**B. The Second Option: Subjecting All Affirmative Action to Strict Scrutiny While Maintaining the Current Three Tiered Scheme for Invidious Discrimination—The Creation of Horizontal Anomalies**

One way to solve the problem of vertical anomaly is to subject all government created affirmative action programs to the same level of scrutiny. Under the current scheme developed by the *Adarand/Croson* holdings, that level of scrutiny would be strict scrutiny.\textsuperscript{174} Under *Adarand/Croson* race-based affirmative action

than laws disadvantaging men (FBEs). The flip-side of this is that under the sliding scale analysis, it becomes easier for a state legislature or a city council to pass an FBE than an MBE, because the former will be held to a lesser standard of scrutiny by the courts.

This court questions whether this result was intended. The anomaly lies in the fact that the three-tiered scheme sprung from the judicial determination that, as a class blacks have been subjected to the most egregious discrimination over time. (Citation omitted) . . . The very existence of the Thirteenth and Fourteenth Amendments to the United States Constitution evinces a Congressional intent to give itself the power to redress past discrimination against blacks. (Footnote omitted).

However, a look at Supreme Court decisions holding that laws disadvantaging blacks and whites should be held to the same strict standard, *see Croson*, *supra*, and that laws disadvantaging women and men should be held to the same intermediate standard, *see Craig v. Boren*, *supra*, may explain or justify this anomalous result. Perhaps by determining that discrimination against whites and discrimination against blacks is equally abhorrent and that the criteria of race is "more suspect" than gender discrimination, the Supreme Court has accepted the result that it is now more difficult to remedy race discrimination than sex discrimination. Whether it has or not, this court questions the logic of such a result.

*Id.* at 1302-03. Although the case was partially reversed on appeal, the above language was not questioned on appeal. *See Contractors Ass’n*, 6 F.3d 990. *See also* notes 115-37 and accompanying text.

171. *Contractors Ass’n*, 735 F. Supp. at 1302-03.
172. *See infra* Part II.B.
173. *Id.*
has to be subject to strict scrutiny.\textsuperscript{175} Thus, in order to get rid of the vertical anomaly, strict scrutiny would have to apply to the other groups included in affirmative action programs unless \textit{Adarand/Croson} were overturned.\textsuperscript{176} However, this option is problematic since, under the current three tiered scheme, invidious classifications based on gender and disability are subject to levels of scrutiny that are lower than strict scrutiny.\textsuperscript{177} This creates the "horizontal anomaly" depicted in figure 3.

\begin{center}
\begin{tabular}{ l | c | c | c | c | c | c |}
 & Race & Gender & Disability \\
& (Strict Scrutiny) & (Intermediate Scrutiny) & (Rational Basis Scrutiny) \\
\hline
Invidious & <---------&<---------&<---------> & Benign-Race & Benign-Gender & Benign-Disability \\
\hline
Invidious & consistency & <---------&<---------> & Benign-Gender & \hline
(Race Only) & & & \\
\hline
Invidious & consistency & <---------&<---------> & Benign-Disability & \hline
Inconsistency & & & \\
\hline
More Protection From Invidious Discrimination
Easier to Enact Remedial Legislation
\end{tabular}
\end{center}

\textbf{FIGURE 3}

This option, to subject all benign classifications to strict scrutiny, may seem too illogical for anyone to actually consider using in equal protection analysis. Essentially this option would make it easier to perpetrate invidious discrimination based on gender and disability than to enact benign measures meant to remedy the effects of discrimination. Since \textit{Croson}, however, some courts have done exactly that.

In \textit{Cone Corp. v. Hillsborough County},\textsuperscript{178} \textit{Conlin v. Blanchard},\textsuperscript{179} and \textit{American Subcontractors Association v. City of Atlanta},\textsuperscript{180} strict scrutiny was applied to both race and gender based affirmative action programs. However, the courts in these three cases did not provide any explanation as to why strict scrutiny

\textsuperscript{175} See generally, \textit{Adarand}, 115 S. Ct. 2097; \textit{Croson}, 488 U.S. 469.

\textsuperscript{176} For discussion of the possibility of overturning \textit{Adarand} and \textit{Croson}, see infra Part II.D.

\textsuperscript{177} Craig v. Boren, 429 U.S. 190 (1976); City of Cleburne, 473 U.S. at 440-41; \textit{Contractors Ass'n}, 6 F.3d at 999-1001.

\textsuperscript{178} 908 F.2d 908 (11th Cir. 1990). It is significant that \textit{Cone Corp.} held that both preferences (race and gender) could survive strict scrutiny. \textit{Id.}

\textsuperscript{179} 890 F.2d 811 (6th Cir. 1989).

\textsuperscript{180} 376 S.E.2d 662 (Ga. 1989).
was applied to the gender aspects of the programs. Nor did the opinions cite any language from *Croson* which would support application of strict scrutiny to gender. Significantly, every court that has explained its choice of scrutiny levels in this context has applied levels of scrutiny lower than strict scrutiny to gender or disability based preferences. Sometimes, however, those courts have bemoaned the vertical anomaly thus created.

The essence of the horizontal anomaly created by exercise of this option, as demonstrated in the cases that have utilized it, is the fact that the option fails to address the level of scrutiny to be applied to invidious discrimination based on gender and disability. This failure would seem to violate the concept of "consistency" as set forth in *Adarand*, since consistency requires that the standard applied not be dependant upon the group benefitted or burdened by a classification. However, since *Adarand* specifically dealt with race, it is possible that "consistency" as defined in *Adarand* is limited to race thus supporting this result. Of course, this explanation still leaves the anomalous result shown in Figure 3—it would be harder to justify the enactment of benign measures aimed at remedying the effects of discrimination based on gender or disability than it would be to perpetuate intentional discrimination. Such a result makes little sense even in the ahistorical, decontextualized world of *Adarand*. Thus, in solving the vertical anomaly, this option creates a horizontal anomaly; a result which is unacceptable based on the concept of "consistency" and on simple logic.

**C. The Third Option: Strict Scrutiny for Benign and Invidious Classifications**

One way to solve both the vertical and horizontal anomalies examined above is to subject all classes traditionally included in government developed affirmative action programs to strict scrutiny, both for invidious and benign classifications. This option,
however, is similarly fraught with difficulty. Fortunately, as will be explained in this Part, the Adarand Court might actually have provided the solution to those difficulties, albeit unintentionally. Exercise of this option leads to the result depicted in Figure 4 as discussed in this Part.

More Flexible Strict Scrutiny

<table>
<thead>
<tr>
<th>Invidious (Race, Gender, Disability)</th>
<th>&lt;-----------------&gt;</th>
<th>Benign (Race, Gender, Disability)</th>
</tr>
</thead>
<tbody>
<tr>
<td>consistency</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**FIGURE 4**

The primary concern raised by this option is based on the recognition that gender and disability, two of the three groups commonly included in affirmative action programs, are not considered suspect classes for purposes of strict scrutiny analysis. Gender is a quasi-suspect class, and disability is a non-suspect class. Under current jurisprudence, only classifications based on race, alienage and national origin are considered “suspect” and are thus subject to strict scrutiny.

The other concern raised by this option is the possibility that the floodgates to heightened scrutiny could be opened. This would depend, in part, on how affirmative action is defined under this option. For example, many social services programs could arguably be considered a form of affirmative action for certain classes like children or the poor. Would application of this third option subject

188. See infra notes 194-200 and accompanying text.
189. Contractors Ass'n, 6 F.3d at 999-1001.
191. City of Cleburne, 473 U.S. 432; Contractors Ass'n, 6 F.3d at 1001.
192. City of Cleburne, 473 U.S. at 440-41.
the classifications created in social service programs to strict scrutiny? Both of these concerns will be addressed below.

I wish to be clear at the outset that this discussion is not meant to resolve or provide an in-depth examination of the issues raised by applying strict scrutiny to gender and disability. Scholars and judges have spent much time debating these complex issues; an in-depth analysis is thus beyond the scope of this article as is any speculation on whether the current Court would adopt this option. The discussion presented in this article focuses instead on the way in which Adarand's vision of strict scrutiny may have added a new perspective to this debate, and may have provided the current Court, or some future one, a means with which to implement this option. As this Part explains, in light of Adarand, application of this option is supportable and would provide greater consistency.

The answer to the first concern set forth above may actually lie in the way in which Adarand and Croson define strict scrutiny. A major factor preventing gender and disability from being considered "suspect classes" (thus subjecting measures which discriminate based on those classifications to strict scrutiny) is the fact that in some circumstances gender and disability are relevant considerations. This reality was highly problematic in the

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193. Another possible concern with characterizing gender and disability as suspect classes is that the concept of equal protection was primarily developed in relation to the oppression of African-Americans. Adarand, 115 S. Ct. at 2122 (Stevens, J., dissenting); Galotto, supra note 15, at 536. In Croson, however, the Court ignored the legislative history of the Fourteenth Amendment, holding that it afforded the same protection to whites as to blacks. Croson, 488 U.S. 469. Thus, the court seemed to be moving towards "a broader notion of the Equal Protection Clause as an egalitarian principle." See Galatto, supra note 15, at 536 (concluding that this "broadening of equal protection to include whites, however, unwittingly includes gender groups"). Applying Adarand's concept of "congruence," Adarand, 115 S. Ct. at 2111, the same would apparently apply to the equal protection aspects inherent in the Fifth Amendment. See Adarand, 115 S. Ct. at 2111. See also, supra notes 50-55 and accompanying text.

194. See supra notes 107, 112-13 and accompanying text. Ironically, in Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion), a plurality of the Court applied strict scrutiny to a gender classification, noting that what makes gender (as opposed to characteristics like intelligence or physical disability) more similar to suspect classifications, is that gender is so rarely relevant to the ability to perform or contribute to society. Id. at 686-87. Ultimately, however, Frontiero would not govern treatment of gender classifications under the Equal Protection Clause. Perhaps because of a fear that women would be drafted or that single sex bathrooms and locker rooms would be imposed, the relevant differences between the sexes precluded the universal application of strict scrutiny, which at the time was
context of applying strict scrutiny, when that level of scrutiny was considered "fatal in fact." However, under the Adarand/Croson vision of strict scrutiny, which appears more flexible than earlier conceptions of that standard, such differences can simply be considered relevant factors in analyzing gender and disability based classifications under strict scrutiny. In fact, Justice O'Connor, writing for the Adarand majority, specifically states in response to Justice Stevens:

He [Justice Stevens] also allows that nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. . . . What he fails to recognize is that strict scrutiny does take "relevant differences" into account—indeed, that is its fundamental purpose.

Of course, the relevance of the characteristic/classification to legislative decision making is not the only factor which the Supreme Court has utilized to define which groups should be considered "suspect" for equal protection purposes. Other factors important to such a determination are whether the classification is based on an "immutable characteristic," or a highly visible trait; whether the classification has been a basis for historical oppression; and whether the classified group is a discrete and insular minority in regard to political representation.

Gender is undoubtedly an immutable characteristic. One is born with and cannot change one's gender without undergoing major surgery. Gender is also highly visible; one can generally tell immediately the gender of an individual upon seeing her or him.

"fatal in fact." Galotto, supra note 15, at 521-22. Thus, the intermediate scrutiny standard essentially embodies the reality that gender may sometimes be relevant. Id. See also City of Cleburne, 473 U.S. at 440-41. The fact that Frontiero draws a distinction between gender and disability is not problematic to the argument favoring the application of heightened scrutiny to disability, in light of the change in perception and legislative treatment regarding disability since the early 1970s. See infra notes 207-13 and accompanying text.


196. Adarand, 115 S. Ct. at 2117; Croson, 488 U.S. at 509-11.

197. Adarand, 115 S. Ct. at 2117; Croson, 488 U.S. at 509-11.

198. Adarand, 115 S. Ct. at 2113.

199. Adarand, 115 S. Ct. at 2113 (citations omitted).

200. Frontiero, 411 U.S. 677 (plurality opinion); See also Galotto, supra note 15, at 519-21. The term "discrete and insular minority," was coined in the famous footnote 4 from United States v. Carolene Products, Co., 304 U.S. 144, 152 n.4 (1938).
and can often determine gender from voice alone. The latter two factors (i.e. basis of historical oppression and discrete and insular minority) are arguably more problematic in the context of classifying gender. Yet, even after the Court repudiated its decision to apply strict scrutiny to gender in *Frontiero v. Richardson*, a case where the Court also held that women have been subject to historical oppression in this nation and are a "discrete and insular minority," many courts have continued to acknowledge the serious discrimination that women face in society while applying the intermediate scrutiny standard.

Likewise, disability is an immutable characteristic. One generally cannot change the fact that he or she is disabled absent some sort of cure or significant treatment. If the disabled individual were cured, or the disabling effects of the condition totally alleviated through treatment, then the individual would no longer be disabled and would not be entitled to receive the same level of scrutiny. Additionally, disability is frequently highly visible. Of course, this is not always the case; it may be impossible to determine visually whether someone has a particular disability such as epilepsy or cancer. However, since characteristics such as alienage and national origin which are not always highly visible are afforded strict scrutiny, the visibility factor alone is apparently not dispositive on the issue of equal protection classification.

As with gender, it is the last two factors (i.e. basis of historical oppression and discrete and insular minority) that are most problematic in the context of classifying disability. In *City of Cleburne*, the Court rejected arguments that the mentally retarded have been subject to a history of oppression or relegated to a position of political powerlessness sufficient to meet these two factors. Since *City of Cleburne*, however, Congress passed the Americans With Disabilities Act ("ADA"). Among the

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202. Id. at 684-87.
204. Graham v. Richardson, 403 U.S. 365 (1971) (classification based on alienage); *City of Cleburne*, 473 U.S. at 440 (classifications based on race, alienage or national origin receive strict scrutiny).
205. 473 U.S. at 432.
206. Id. at 442-47.
Congressional findings incorporated into the ADA are the following:

(2) [H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be serious and pervasive social problems; . . .

(6) [C]ensus data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; . . .

(7) [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful and unequal treatment, and relegated to a position political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society; . . .

The language that Congress utilized in the ADA is virtually identical to the language typically associated with suspect classifications. Such treatment of a class by Congress, although not dispositive, is certainly relevant to the status of the class within the tiered equal protection analytical framework. The few cases which have held that the ADA does not alter the standard set forth in City of Cleburne have done so with only a cursory explanation and without analyzing the rather clear language of the statute.

Additionally, the form of strict scrutiny espoused in Adarand and Croson lends itself better to analysis of a broad class of individuals since that standard takes relevant differences into account. For example, a law requiring that individuals be able

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208. 42 U.S.C. § 12101(a)(2),(6) and (7) (emphasis added).
211. Contractors Ass’n, 6 F.3d at 1001; More v. Farrier, 984 F.2d 269, 271 n.4 (8th Cir. 1993).
212. Adarand, 115 S. Ct. at 2113.
to see in order to obtain a driver’s license is likely to survive this kind of strict scrutiny. 213

Disability itself is a diverse and broad characteristic, and an in depth analysis of how best to analyze disability under strict scrutiny is beyond the scope of this article. However, since strict scrutiny now considers relevant differences, and can supposedly weed out valid from invalid legislative purposes, 214 this view of strict scrutiny can itself accommodate some of the technical problems resulting from its application to disability.

Thus, a primary factor preventing gender and disability from being considered “suspect” for strict scrutiny purposes is that those classifications are relevant more frequently than race (although in regard to gender, this is rarely so). Justice O’Connor’s version of strict scrutiny in Adarand seems to vitiate this concern since its very purpose “is to account for relevant differences.” 215 This does not mean that the Court will necessarily find gender and disability to be discrete and insular minorities subject to a history of oppression, but it does suggest that recent developments could support such a holding.

The second concern regarding the application of strict scrutiny to gender and disability, that this could open the floodgates to increased use of strict scrutiny, is essentially solved by the above analysis. 216 Those classifications involve immutable characteristics and possess the other traits (i.e. basis of historical oppression and discrete and insular minority) which support suspect classification. Most other classes do not. 217

Since, opting not to apply strict scrutiny to invidious and benign gender and disability based measures creates horizontal or vertical anomalies and potentially threatens the Court’s vision of

213. However, a similar law based on the race of an applicant for a driver’s license could never be upheld under the strict scrutiny espoused in Adarand. Id. at 2136 (Ginsburg, J., dissenting).
214. Id. at 2113.
215. Id.
216. In fact, this fear was one of the primary concerns in the City of Cleburne decision. See City of Cleburne, 473 U.S. 432.
217. For example, one might say that the elderly are not a discrete and insular minority who as a group have faced a history of oppression. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (holding that the elderly are not a suspect class). Of course, if appropriate evidence could support the application of strict scrutiny to the elderly, or any other group, perhaps the Court would apply strict scrutiny to such a group. However, few group classifications are likely to garner the level of evidence which supports the application of strict scrutiny to gender and disability.
"consistency," application of Adarand's more forgiving formulation of strict scrutiny is the best solution short of overturning Adarand and potentially Croson. Thus while this third option as discussed in this Part is not the only remaining option, it is a consistent and supportable approach to analyzing affirmative action programs under the Equal Protection Clause.

D. The Fourth Option: Overturning Adarand, Perhaps the Best Option of All?

The fourth and final option is to overturn Adarand. Since Adarand's approach is at the core of the anomalies discussed above, exercise of this option could also prevent both the vertical and horizontal anomalies. Significantly, Adarand itself provides the rope with which it can be hung.

As was pointed out earlier in this article, the three concepts underlying the Adarand decision are problematic. Skepticism by itself is not inconsistent with a lower level of scrutiny, but it is problematic when combined with the other two concepts of consistency and congruence. "Consistency" creates major inconsistencies when classifications other than race are considered. Furthermore, the concept of consistency requires an ahistorical, decontextualized approach to issues arising specifically in and from a historical and social context. Ironically, it is the third concept, congruence, which can act as a key to overturning the Adarand decision itself.

Interestingly, the Adarand court engaged in a detailed analysis of the principle of stare decisis in order to conclude that it was appropriate to overturn Metro Broadcasting. The Court essentially held that Metro Broadcasting was an aberration which significantly departed from an "intrinsically sounder" doctrine as established in prior cases. Citing Justice Frankfurter's discussion of stare decisis in Helvering v. Hallock, the Court deter-

218. See infra Parts II.A.; II.B. and II.D.
219. See supra Parts II.A. and II.B.
220. See supra Part I.
221. See supra Parts II.A and II.B.
222. See supra Part I.
223. Adarand, 115 S. Ct. at 2114-17.
224. Id. at 2114-15.
225. 309 U.S. 106 (1940). The Court refers to Justice Frankfurter's admonition regarding stare decisis set forth in Helvering. Id. Justice Frankfurter declared that stare decisis involves more than simply adhering to the most recent decision when such adherence goes
mined that *Metro Broadcasting* departed from the three principles underlying *Adarand*. In so ruling, the Court explained that those principles had been consistently applied for over fifty years.\textsuperscript{226}

However, as was previously explained,\textsuperscript{227} the *Adarand* Court’s concept of “congruence” was itself a significant departure from established precedent.\textsuperscript{228} *Metro Broadcasting*, *Croson*, *Fullilove* and a long line of cases prior to *Adarand* had established that there is an inherent difference between Congress’ power to enforce the Fourteenth Amendment and the states’ role as bound by that Amendment.\textsuperscript{229} Justice Stevens, in his *Adarand* dissent, summarizes the Majority’s departure:

> The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the states. This is no accident. It represents our Nation’s consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the states, some of which may be inclined to oppress such minorities. A rule of “congruence” that ignores a purposeful “incongruity” so fundamental to our system of government is unacceptable.\textsuperscript{230}

Similarly, *Adarand’s* application of strict scrutiny and use of the “consistency” concept are themselves inconsistent with the only precedent to deal with federal affirmative action programs, *Metro Broadcasting* and *Fullilove*. Neither of those decisions applied strict scrutiny to such programs, nor did they hold that such scrutiny was appropriate in the affirmative action context even though strict scrutiny was applicable when invidious discrimination was aimed at the same racial minorities who were benefitted by the programs.\textsuperscript{231} Significantly, without the concept of “congruence,” cases such as *Croson* and *Wygant* which involved local government affirmative action programs, would be inapposite since Congress

\textsuperscript{226}. Id.

\textsuperscript{227}. See supra Part I.

\textsuperscript{228}. See supra notes 38-43 and accompanying text.

\textsuperscript{229}. Id.

\textsuperscript{230}. *Adarand*, 115 S. Ct. at 2126 (Stevens, J., dissenting).

\textsuperscript{231}. See supra notes 29-34 and accompanying text. Justice Powell’s interpretation of *Fullilove*, upon which the *Adarand* court relies so heavily, implies that strict scrutiny is appropriate. Five other Justices, however, did not so hold. See supra notes 33-34 and accompanying text.
has broader powers than local governments to enact such programs.\footnote{See supra Part I.}

It is \textit{Adarand}, not \textit{Metro Broadcasting}, which represents the significant departure from precedent; a departure which creates anomalies that could wreak havoc on the tiered equal protection system that \textit{Adarand} purported to apply. Thus, \textit{Adarand} can be overturned based on the very reasoning that it used to justify its own treatment of \textit{Metro Broadcasting}.\footnote{Adarand, 115 S. Ct. at 2114-17.}

Of course, the question would still remain; what to do then? Essentially two possibilities arise. Either go back to the equal protection doctrine as it stood prior to \textit{Adarand} (i.e. apply the standard used in \textit{Metro Broadcasting}), or, alternatively, apply a different standard to affirmative action; one that may operate outside the traditional three tiered system. Although I do not discuss these options in detail, I would like to provide a few observations about their feasibility based on the foregoing discussion of \textit{Adarand}.

First, since \textit{Metro Broadcasting} applied a form of intermediate scrutiny to race based affirmative action,\footnote{Metro Broadcasting, 497 U.S. 547.} even if \textit{Metro Broadcasting} were to be the law, a vertical anomaly between race and gender on the one hand, and disability on the other would still exist. However, such an anomaly would not be as severe as that created by application of the \textit{Adarand} approach.\footnote{See supra Part II.A.} Moreover, the same factors that militate in favor of applying strict scrutiny to disability based classifications could support the application of intermediate scrutiny to such classifications.\footnote{See supra Part II.C.} The findings of social and economic disadvantage in regard to disabled individuals as set forth in the ADA support the argument that subjecting disability based affirmative action to a lower level of scrutiny is desirable.\footnote{42 U.S.C. § 12101; Contractors Ass'n, 6 F.3d at 1001. However, this approach could create a horizontal anomaly if a higher level of scrutiny were applied to invidious discrimination based on disability. Significantly, however, such horizontal anomaly seems acceptable under \textit{Metro Broadcasting}, which itself allowed for a similar anomaly in regard to race. See \textit{Metro Broadcasting}, 497 U.S. 547. Such an anomaly makes more sense in the \textit{Metro Broadcasting} context because it would make it easier to remedy discrimination than it does to discriminate in the first place.}

\footnotesize{
\begin{itemize}
\item 232. See supra Part I.
\item 233. Adarand, 115 S. Ct. at 2114-17.
\item 234. Metro Broadcasting, 497 U.S. 547.
\item 235. See supra Part II.A.
\item 236. See supra Part II.C.
\item 237. 42 U.S.C. § 12101; Contractors Ass'n, 6 F.3d at 1001. However, this approach could create a horizontal anomaly if a higher level of scrutiny were applied to invidious discrimination based on disability. Significantly, however, such horizontal anomaly seems acceptable under \textit{Metro Broadcasting}, which itself allowed for a similar anomaly in regard to race. See \textit{Metro Broadcasting}, 497 U.S. 547. Such an anomaly makes more sense in the \textit{Metro Broadcasting} context because it would make it easier to remedy discrimination than it does to discriminate in the first place.
\end{itemize}
}
Second, it has been suggested that true tiers in equal protection analysis really do not exist, and that what the Court really does is apply variations of the same standard.\footnote{Craig, 429 U.S. at 211-12 (Stevens, J., concurring).} For example, Justice Stevens has implied that a flexible standard of review, grounded in rationality, that calls for heightened evidentiary burdens depending on the classification involved could provide a realistic and workable approach.\footnote{Id. at 211-14 (Stevens, J., concurring) (seemingly applying a heightened form of rational basis review).} The primary advantage to this type of approach in the affirmative action context is that it is contextual and acknowledges history.

This type of approach could be effectuated through a "rational basis with teeth" approach. In other words, a rational basis approach which requires a more detailed examination of evidence and context. It would be logical to place affirmative action programs in the rational basis tier since doing so would eradicate all vertical anomalies in regard to affirmative action, and the resulting horizontal anomalies make more sense in the affirmative action context. Additionally, application of the rational basis test need not lead to predetermined results. As Justice O'Connor has acknowledged, even the rigid strict scrutiny test can be flexible.\footnote{Adarand, 115 S. Ct. at 2111, 2117.}

Moreover, at least two Justices in Fullilove applied a test that did not utilize the traditional concept of a tiered equal protection doctrine.\footnote{See supra note 33 and accompanying text.} Thus, it would not be too great a leap to develop a test which would enable courts to analyze government developed affirmative action programs consistently with equal protection without getting caught in the anomalous morass which is created when courts attempt to apply the three tiered scheme. Since the Court has consistently struggled to reach a consensus that would have a lasting effect under the three tiered equal protection scheme,\footnote{Adarand, 115 S. Ct. at 2109 (noting that for over eight years, the Court was unable to produce a majority on the issue of race-based remedial government action in Bakke, Fullilove, and Wygant). How long the Adarand/Croson doctrine will survive is still an open question. As this article demonstrates, the problems which arise under the Adarand approach could ultimately prompt a later Court to discard or reformulate the Adarand/Croson doctrine.} developing a new test could be an excellent option.

Finally, even if Adarand were overturned, Croson would remain. Like Adarand, Croson creates the same anomalies, only
in regard to state and local affirmative action programs. *Adarand* is most susceptible to being overruled based on its reading of the "congruence" concept;243 *Croson* however, would likely survive such action. Yet, since *Croson* creates the same anomalies as *Adarand* and is subject to some of the same infirmities,244 *Croson* should also be overruled.245 Suffice it to say that if *Croson* is left untouched, courts would be limited to exercising the other options outlined above as they struggle to address similar anomalies in regard to state and local affirmative action programs.246

III. Strict Scrutiny As Applied To Affirmative Action Is Not Fatal In Fact Under *Adarand/Croson*

All of the options set forth in Part II, with the exception of the option to overrule *Adarand*, would require strict scrutiny be applied at least to race-based affirmative action.247 Significantly, this does not mean that affirmative action programs cannot survive that level of scrutiny. *Adarand* specifically dispelled the notion that strict scrutiny is "strict in theory but fatal in fact,"248 although it would appear that strict scrutiny is indeed "fatal in fact" for most invidious classifications.249

Essentially, these options shift the focus from the level of scrutiny to the level of evidence required to support a benign program. This is exactly what *Croson* did in regard to state and local affirmative action programs.250 Evidence of broad societal discrimination is no longer sufficient.251 Evidence of discrimin-

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243. *See supra* notes 222-30 and accompanying text.
244. Most significantly, the "what's good for the goose, is good for the gander" approach (labeled "consistency" in *Adarand*) leads to vertical anomaly. *See infra* Part II.A.
245. Exactly how or why *Croson* should be overruled is beyond the scope of this article. For an excellent discussion of why *Croson* is a problematic opinion that ultimately should not survive, see Rosenfeld, *supra* note 5; *See also* Nicole Duncan, *Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679 (1995) (pointing out inherent weaknesses in the *Croson* decision and some of the problems applying *Croson*).
246. *See supra* Parts II.A., II.B. and II.C. Ultimately, the Supreme Court would have to address the constitutionality of option three, if it was adopted.
247. *See supra* Part II.A. (strict scrutiny would apply to race); Part II.B. (strict scrutiny would apply to all benign measures based on race, gender or disability) and Part II.C. (strict scrutiny would apply to all classifications based on race, gender or disability).
249. *Id.* at 2136 (Ginsburg, J., dissenting) (explaining that she reads the opinions in *Adarand* to mean a Korematsu-type invidious classification will never again survive scrutiny).
250. *See generally* *Croson*, 488 U.S. 469.
251. *Id.* at 486-93.
tion by the governmental entity involved, whether active or passive, is apparently required.\footnote{252}{Id. at 493. Whether this will ultimately be required for Congressional action was not clearly addressed in \textit{Adarand}. \textit{Adarand}, 115 S. Ct. 2097.}

Significantly, after \textit{Croson}, several federal appellate courts have held that programs could survive strict scrutiny.\footnote{253}{\textit{See generally Contractors Ass'n}, 6 F.3d 990; \textit{Coral Const. Co.}, 941 F.2d 910; \textit{Cone Corp.}, 908 F.2d 908. Ultimately, however, at least in \textit{Contractors Ass'n}, the program was struck down. \textit{See Contractors Ass'n}, 893 F. Supp. 419 (E.D. Pa. 1995), aff'd, 91 F.3d 586 (3d Cir. 1996).} While most of these cases were appealed after a grant of summary judgement, and thus only held that an issue of material fact existed as to the validity of the programs involved,\footnote{254}{Contractor's Ass'n, 6 F.3d at 1012; \textit{Coral Const. Co.}, 941 F.2d at 933; \textit{Cone Corp.}, 908 F.2d at 817.} each of these courts acknowledged that sufficient evidence could be present in those cases,\footnote{255}{\textit{Contractors Ass'n}, 6 F.3d at 1001-09. Though, as noted supra at note 253, on remand it was determined the race based aspects of the program in question did not meet this level of scrutiny. \textit{See also Concrete Works}, 36 F.3d at 1519-30 (also giving a detailed analysis of the nature of evidence required to meet strict scrutiny after \textit{Croson}).} and at least one court was quite specific about the type of evidence required to meet strict scrutiny.\footnote{256}{\textit{See also Concrete Works}, 36 F.3d at 1513.} The key is that the \textit{Adarand} Court, like the Court in \textit{Croson}, specifically acknowledged that some benign measures could survive strict scrutiny.\footnote{257}{\textit{Adarand}, 115 S. Ct. at 2113-14, 2117. \textit{See also Kathryn Lee, Note, Surviving Strict Scrutiny: Upholding Federal Affirmative Action After Adarand Constructors, Inc. v. Pena, 44 BUFF. L. REV. 929 (1996) (discussing why federal affirmative action programs can survive strict scrutiny as spelled out in \textit{Adarand}).}}

Therefore, Congress and state legislatures alike can craft benign race, gender and disability based measures which are constitutional as long as these programs are supported by appropriate data. Unfortunately, like \textit{Croson}, the \textit{Adarand} decision is not very clear about what type of evidence is required to meet this test.\footnote{258}{\textit{Adarand}, 115 S. Ct. 2097, 2117-18; \textit{See also Duncan}, supra note 246 (noting the uncertainty as to the exact evidentiary standards required to meet the strict scrutiny test set forth in \textit{Croson}).} Perhaps the best guidance for courts grappling with this evidentiary morass will come from cases like \textit{Concrete Works}\footnote{259}{36 F.3d 1513.} and \textit{Contractors Association}\footnote{260}{6 F.3d 990.} which seek to interpret the evidentiary burdens set forth in \textit{Croson}. Significantly, these cases
acknowledge that programs can survive strict scrutiny if they are supported by proper evidence.261

Moreover, the necessary evidence can be post-enactment evidence; even if such evidence was not in existence when a program was initiated, a government entity can still utilize it to support the program against constitutional challenge.262 Thus, even if evidence adequate to meet the evidentiary burden associated with strict scrutiny was not utilized when creating the federal programs, these programs need not be repealed in light of Adarand so long as the government can produce such evidence in response to a constitutional challenge. Of course, use of post-enactment evidence might become less acceptable as the passage of time gives the government an opportunity to respond to Adarand and Croson.

Given the great deal of evidence that discrimination is socially embedded in our nation,263 it is unfortunate that the Court has required such a costly evidentiary burden. Still, while compiling the studies and statistical analysis apparently required by Croson/Adarand will be costly, the burden can be met.264 What is less clear after Adarand is how the fact that Congress, unlike local legislatures, is not geographically limited in its ability to pass legislation in this country will play into the nature of the evidence required to support a federal program. Nor is it clear what role Congress' enforcement power under the Fourteenth Amendment might play in assessing, under the strict scrutiny standard, the validity of any remedial measures that it passes. It is possible that the Court envisions a scenario where Congress has more latitude in regard to aspects of the evidentiary burden linked to strict scrutiny.265 Unfortunately, the Adarand Court is not very clear on this issue.266

Two statements from Justice O'Connor's opinion in Adarand, however, demonstrate that government developed affirmative action is not yet dead:

261. Concrete Works, 36 F.3d 1513; See also Contractors Ass'n, 6 F.3d 990.
262. See generally Concrete Works, 36 F.3d 1513; Contractors Ass'n, 6 F.3d 990.
263. See generally Crenshaw, supra note 60; Lawrence supra note 60. See also, supra note 60 and accompanying text.
264. See generally Concrete Works, supra note 44 and accompanying text.
265. See supra note 44 and accompanying text.
266. Adarand, 115 S. Ct. 2097. This is another problem created by the Court's concept of congruence—i.e. exactly how much congruity is required? Furthermore, does not any difference in the level of congruence vitiate the entire concept as spelled out by the Court? See supra note 44 and accompanying text.
[W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." (Citation omitted). The unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it;\textsuperscript{267} [and.]

When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this court has set out in previous cases.\textsuperscript{268}

Thus, if option three as proposed in this article (i.e. strict scrutiny for benign and invidious classifications) were utilized,\textsuperscript{269} it is possible that gender and disability would receive strict scrutiny along with race, but that benign measures based on all of those classifications could survive constitutional scrutiny. Regardless of which option is ultimately chosen, strict scrutiny as applied to benign measures is no longer "fatal in fact."\textsuperscript{270}

IV. Conclusion

The \textit{Adarand} decision, like \textit{Croson} before it, created a great deal of confusion in its quest for consistency. While some of that confusion is tied to inconsistencies within the decision itself, and to the lack of clear guidance regarding the evidence required to survive the now survivable strict scrutiny test, the greatest confusion is likely to arise from the chaotic anomalies which now exist within the tiered equal protection system when affirmative action programs based on gender and disability are added to the mix. These anomalies, combined with the lack of a clear evidentiary standard for analyzing affirmative action under strict scrutiny will likely lead to a confusion that will dwarf the confusion created by earlier decisions in this area. Whether the court intended this result is unclear. What is clear, however, is that courts dealing with the plethora of affirmative action programs based on race, gender and disability, legislatures attempting to enact measures that deal with the effects of discrimination in our society, and the individuals

\textsuperscript{267}. \textit{Adarand}, 115 S. Ct. at 2117.
\textsuperscript{268}. \textit{Id}.
\textsuperscript{269}. \textit{See supra} Part II.C (strict scrutiny would apply to all classifications based on race, gender or disability).
\textsuperscript{270}. \textit{Adarand}, 115 S. Ct. at 2117.
affected by that discrimination will be left to clean up and pay the price for the mess.