
2011

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Recommended Citation

Lindsey Sacher, *From Stereotypes to Solid Ground: Reframing the Equal Protection Intermediate Scrutiny Standard and Its Application to Gender-Based College Admissions Policies*, 61 Case W. Rsv. L. Rev. 1411 (2011)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol61/iss4/13>

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COMMENT

FROM STEREOTYPES TO SOLID GROUND: REFRAMING THE EQUAL PROTECTION INTERMEDIATE SCRUTINY STANDARD AND ITS APPLICATION TO GENDER-BASED COLLEGE ADMISSIONS POLICIES

INTRODUCTION

In response to an increasingly female student population on campuses across the country, many undergraduate admissions committees at both public and private institutions now give preference to male applicants.¹ Despite the apparent conflict between such policies and the Constitution's guarantee of equal protection,² few have generated full-blown legal challenges.³ Aside from the difficulties associated with proving gender-based discrimination, perhaps one reason for the absence of equal-protection claims is the somewhat murky state of the law on gender-based discrimination

¹ See generally, Charlotte Allen, *The Quiet Preference for Men in Admissions*, MINDING THE CAMPUS, (June 7, 2010), http://www.mindingthecampus.com/originals/2010/06/the_quiet_preference_for_men.html; Jennifer Delahunty Britz, Op-Ed., *To All the Girls I've Rejected*, N.Y. TIMES, Mar. 23, 2006; Daniel DeVise, *Sex Bias Probe in Colleges' Selections*, WASH. POST, Dec. 14, 2009, at B1; Alex Kingsbury, *Admittedly Unequal*, U.S. NEWS & WORLD REP., June 25, 2007, at 50.

² Since 1971, the United States Supreme Court has held gender-based discrimination to a heightened standard of review under the Fourteenth Amendment's Equal Protection Clause. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (finding Idaho's objective in administrative convenience insufficient to justify gender discrimination). Since that turning point, the Court has not upheld the constitutionality of any law that facially discriminates against women.

³ Tellingly, the plaintiffs in the one challenge to reach the federal court system thus far brought the claim only under Title IX of the Civil Rights Act. See *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1365 (S.D. Ga. 2000) (reviewing plaintiffs' claims that the University of Georgia's gender and racial preferences in admissions violated Title's VI and IX of the Civil Rights Act), *aff'd*, 263 F.3d 1234 (11th Cir. 2001). The *Johnson* court found Georgia's gender preference policy unconstitutional, and noted that the "desire to help out men . . . is far from persuasive." *Id.* at 1376 n.10 (quotations omitted).

under the Equal Protection Clause. While it is generally accepted that gender-based classifications must be evaluated under intermediate scrutiny, the Supreme Court's precedent provides lower courts with little guidance in applying that standard.⁴

Part of the reason for this confusion lies in the dominant role the concept of "stereotype" plays in the Court's intermediate scrutiny analysis. As this Comment illustrates, the Court has articulated its intermediate scrutiny standard in a way that makes "stereotype," a concept that remains ill-defined in the Court's jurisprudence, the deciding factor in its analysis.⁵ While the Court has succeeded in articulating a relatively manageable intermediate scrutiny test in the First Amendment context for commercial speech,⁶ its focus on stereotype has impeded its ability to do the same in the context of equal protection. This leaves lower courts and litigants seeking to defend or challenge gender-based classifications with little guidance on how to address questions that often prove critical in the equal-protection intermediate scrutiny analysis.

This Comment demonstrates that the Supreme Court's equal-protection jurisprudence is in fact less muddled than it initially appears. Rather, the Court's equal-protection intermediate scrutiny decisions reflect a reasoned application of the very same principles the Court articulates in the First Amendment intermediate scrutiny context, where the judicial discourse has not been dominated by the unmanageable concept of gender group "stereotypes." Thus, reframing the equal-protection intermediate scrutiny analysis in a way that corresponds to its First Amendment counterpart would be entirely consistent with the Court's prior precedent. Moreover, an understanding of the parallels between the two analyses explains away some of the perceived inconsistencies in the Court's equal-protection jurisprudence.

Part I briefly discusses the evolution and operation of gender-based admissions policies in higher education. Part II illustrates the development of the Court's equal protection jurisprudence, including

⁴ See Brief of Amici Curiae National Women's Law Center American Civil Liberties Union, et al., in Support of Petitioner at 6-7, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941), 1995 WL 703392 at *6-7 ("There is serious confusion among the lower courts regarding the application of intermediate scrutiny to governmental classifications based on sex.").

⁵ See Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449-50 (2000) (discussing how stereotype factors into the Court's analysis).

⁶ See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980) (discussing the standard by which courts should review commercial speech regulations).

the “anti-stereotyping principle” that dominates the Court’s intermediate scrutiny analysis, and the problems associated with such reliance on “stereotypes” in judicial decision making. Part III demonstrates how the Court’s focus on stereotypes has prevented it from fully articulating the analysis it has employed in cases addressing gender discrimination, and why the Court often seems to contradict itself from one case to the next. Parts IV illustrates the parallels between the Court’s First Amendment and equal-protection intermediate scrutiny analyses, and demonstrate how viewing equal-protection intermediate scrutiny through the lens of First Amendment intermediate scrutiny explains many of the points of confusion and perceived inconsistencies in the Court’s equal protection jurisprudence. Part V discusses how courts and litigants addressing a challenge to a gender-based admissions policies can use the *Central Hudson* factors to frame their arguments and conduct their analysis in a way that both clarifies the law and ensures that the constitutional guarantee of equal protection does not play second fiddle to changing societal perceptions.

I. GENDER-BASED ADMISSIONS POLICIES IN HIGHER EDUCATION

Over the past four decades, women’s enrollment in higher education has increased at rapid-fire rates. In 1980, approximately 50% of college students were female.⁷ That percentage rose to 57% by 2006, and is expected to continue rising past 60%.⁸ This increase reflects social trends that have been building for some time. According to observers of the educational system: young women are outperforming their male counterparts in terms of academic achievement.⁹ At first glance, this increase in women’s academic achievement and resulting increase in female admissions rates would be cause for celebration. But many university administrators fear that an increasingly high percentage of female students will negatively impact the ability of a university to attract applicants, which in turn

⁷ Kingsbury, *supra* note 1, at 50, 51.

⁸ *Id.*

⁹ See generally Michelle Conlin, *The NEW Gender Gap: From Kindergarten to Grad School, Boys Are Becoming the Second Sex*, BUS. WK., May 26, 2003, at 75 (discussing the differing achievement levels of men and women); Michael Gurian, *Disappearing Act: Where Have the Men Gone? No Place Good*, THE WASH. POST, December 4, 2005, at B1 (discussing the trouble colleges have attracting and educating men); Tamar Lewin, *At Colleges, Women Are Leaving Men in the Dust*, N.Y. TIMES, July 9, 2006, at A1 (“[M]en . . . are less likely than women to get bachelor’s degrees – and among those who do, fewer complete their degrees in four or five years.”).

will negatively affect a university's prestige.¹⁰ The rationale for this belief is two-fold. On one hand, university admissions directors fear that males who perceive schools with a predominantly female population as "girls' schools," will be deterred from applying.¹¹ Conversely, school administrators fear that female applicants will be deterred by the lack of opportunities to interact with members of the opposite sex.¹²

Additionally, observers believe that the problems associated with an increasingly "female" student body go beyond a decline in prestige and university ranking. As editorialist Richard Whitmire observed when interviewing students at James Madison University—a school with 61% female population—gender imbalance can facilitate what has been described as a "hookup culture" on campus.¹³ College students report that in an environment where males are in the minority, women compete to attract male attention, while males take advantage of their "in demand" status, and in some cases even become sexual predators.¹⁴ Thus, many university admissions officers across the country must decide between continuing to admit only the most qualified applicants, and risk the dangers associated with an unbalanced student body, or taking affirmative steps to ensure that an equal number of males and females are admitted.

At University of North Carolina's Chapel Hill campus, for instance, trustees became alarmed upon learning that the school's incoming freshman class was comprised of 58% women, and suggested that the university create an "affirmative action" policy for male applicants.¹⁵ The Board of Trustees at the University of Richmond instructed the admissions office to keep the male-female ratio at or below 45/55, according to a senior associate director of

¹⁰ See Kingsbury, *supra* note 1, at 52 (discussing the desire of university administrators to admit roughly equal numbers of men and women); see also Britz, *supra* note 1, at A25 (noting that the unfortunate consequence of admitting more women is a drop in the total number of applicants).

¹¹ See Britz, *supra* note 1 (noting that fewer males find a campus that has more than 60% women attractive).

¹² See Ernest Holsendolph, *Grappling with the Gender Disparity Issue*, DIVERSE: ISSUES HIGHER EDUC., June 1, 2006, at 12 ("[S]tudents may prefer to attend schools where they'll have more opportunities to interact with the opposite sex."); Kingsbury, *supra* note 1, at 52 (noting a discussion with a sophomore female at the College of William and Mary in which the student joked about the shortage of men to take to dances).

¹³ Richard Whitmire, *A Tough Time to Be a Girl: Gender Imbalance on College Campuses*, CHRON. HIGHER EDUC., July 25, 2008, at A23.

¹⁴ See *id.* (discussing how males take advantage of the competition and sometimes the result is abuse).

¹⁵ Allen, *supra* note 1.

admissions at that school.¹⁶ The University of Georgia went one step further, implementing an affirmative action policy that awarded additional points to male applicants.¹⁷ Regardless of the specific methods utilized by schools instituting these policies, the results have become clear: universities are denying admission to female applicants in favor of less qualified males.¹⁸

In 2009, the U.S. Commission on Civil Rights launched an investigation of 19 public and private institutions of higher education across the country.¹⁹ The investigation aimed to determine the extent to which the named colleges and universities preferred male applicants in their admissions processes.²⁰ As the Commission can only make referrals and recommendations based on its findings, no legal consequences will flow directly from the Commission's investigation.²¹ Nevertheless, a very real possibility exists that public universities found to discriminate on the basis of gender in their admissions policies will face potential lawsuits under the Equal Protection Clause.²²

II. INTERMEDIATE SCRUTINY AND THE ANTISTEREOTYPING PRINCIPLE

In cases brought under the Fourteenth Amendment's Equal Protection Clause, the Supreme Court applies different levels of judicial scrutiny depending on the nature of the classification at issue.²³ For a number of years, the Court only applied two levels of scrutiny: strict scrutiny and rational basis review. Under strict

¹⁶ See Kingsbury, *supra* note 1, at 50 (discussing the University of Richmond's admissions policy).

¹⁷ See Johnson v. Bd. of Regents of the Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1365 (S.D. Ga. 2000) (noting that the University of Georgia provided males .25 of the requisite 4.92 "total student index" points to gain admission), *aff'd*, 263 F.3d 1234 (11th Cir. 2001).

¹⁸ See Britz, *supra* note 1, for the Dean of Admissions at Kenyon College's discussion of this unfortunate truth.

¹⁹ See Allen, *supra* note 1 (noting that the U.S. Civil Rights Commission launched an investigation "into the extent of male preferences in admissions decisions at 19 various institutions of higher learning"); DeVise, *supra* note 1, at B1 (discussing the Civil Rights commission's probe).

²⁰ See Allen, *supra* note 1 (discussing the investigation).

²¹ See DeVise, *supra* note 1, at B2 (noting that the commission has no authority to enforce complaints but can refer them to other agencies or recommend changes to federal law).

²² While gender discrimination may also give rise to legal proceedings under Title IX of the Civil Rights Act and state antidiscrimination statutes, a discussion of those remedies falls outside the scope of this Comment.

²³ See Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under United States v. Virginia's "Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169, 1172-73 (1998) (discussing the differing levels of scrutiny for equal protection challenges).

scrutiny, which the Court traditionally applied to classifications based on race, the classification must be “narrowly tailored” to serve a “compelling governmental interest.”²⁴ The Court applies rational-basis review to all other classifications, requiring only a rational relationship between the classification and a legitimate government interest.²⁵

Prior to 1971, the Supreme Court had never struck down instances of discrimination on the basis of gender.²⁶ As the movement for women’s rights gained speed, however, the Court began to recognize gender as a protected class. For several years, the Court equivocated over the proper level of scrutiny to apply in gender-discrimination cases. In *Reed v. Reed*,²⁷ the Court’s first decision striking down a gender-based classification, the Court applied rational-basis review to strike down a state statute granting preference to males as estate executors.²⁸ Several years later, the Court took the opposite approach in *Frontiero v. Richardson*,²⁹ striking down a gender-based policy under strict scrutiny.³⁰

Finally, in *Craig v. Boren*,³¹ the Court announced a new, intermediate scrutiny standard.³² The Court reasoned that intermediate scrutiny is more appropriate than strict scrutiny for gender-based classifications because differences between men and women may in some circumstances justify different treatment.³³ Unlike strict scrutiny, which recognizes that there are almost never “inherent differences” between different races to justify differential treatment,³⁴

²⁴ *Johnson v. California*, 543 U.S. 499, 508 (2005); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that courts must subject racially discriminatory laws to the “most rigid scrutiny”).

²⁵ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (noting that the “general rule” is that legislation must be “rationally related to a legitimate state interest”).

²⁶ See Skaggs, *supra* note 23, at 1172 (noting that until 1971 gender based classification were reviewed under a rational basis).

²⁷ 404 U.S. 71 (1971).

²⁸ *Id.* at 76.

²⁹ 411 U.S. 677 (1973).

³⁰ *Id.* at 689–90.

³¹ 429 U.S. 190 (1976).

³² See *id.* at 197 (holding that “previous cases establish that classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives”).

³³ See, e.g., *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (discussing the allowable bases for gender classifications).

³⁴ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (internal quotations and citation omitted) (“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—should be subjected to detailed judicial inquiry to ensure that the *personal* right to

the more lenient intermediate scrutiny standard leaves room for states to classify individuals based on gender when legitimate differences between the genders make it necessary to do so.³⁵ Intended to serve as a middle ground between strict scrutiny and rational basis, intermediate scrutiny requires that government demonstrate that a gender classification serves important government interests, and that the classification is substantially related to the achievement of those interests.³⁶ In its more recent jurisprudence, the Court announced that to survive this degree of scrutiny, proponents of a gender classification must demonstrate an “exceedingly persuasive” justification for a policy that discriminates on the basis of gender.³⁷

A. Stereotype in Intermediate Scrutiny

While the Court repeatedly recited the test for intermediate scrutiny as including an interest and tailoring component, these articulated components of intermediate scrutiny are rarely the deciding factors in a Supreme Court gender discrimination decision.³⁸ Rather, the Court’s inquiry focuses almost exclusively on whether the policy at issue reinforces a stereotype, or an overbroad generalization about men and women.³⁹ Although not all of the Court’s decisions use the term “stereotype,” the word is a term of art among commentators, referring to any number of overbroad, archaic, or irrational generalizations the Court finds insufficient to justify gender-based classifications.⁴⁰

For instance, in analyzing whether a governmental interest is sufficiently “important” to justify a gender classification, the Court rejects as “illegitimate” any interest that reflects “archaic and

equal protection of the laws has not been infringed.” (citation omitted) (internal quotation marks omitted)).

³⁵ See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))).

³⁶ *Virginia*, 518 U.S. at 533.

³⁷ *Id.* (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

³⁸ See *Case*, *supra* note 5, at 1449 (noting that the interest and tailoring prongs of intermediate scrutiny “have rarely been the moving parts” in the Court’s analysis of gender discrimination claims).

³⁹ See *id.* (noting that if a governmental action distinguishes between men and women the only remaining question is “[d]oes the sex-respecting rule rely on a stereotype?”).

⁴⁰ See, e.g., *id.* (noting that “‘stereotype’ has become a term of art”); see also *infra* Part II.B (discussing the Court’s various articulations of this concept).

stereotypic notions” about members of a gender group.⁴¹ The Court also uses the concept of stereotype in analyzing whether a gender-classification is substantially tailored to achieve that interest. The Court has expressly noted that the purpose of the “substantial relationship” requirement “is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”⁴²

When framed in this manner, the tailoring prong of intermediate scrutiny turns on the concept of stereotype just as much as the substantial-interest prong. In this respect, the Court’s intermediate scrutiny jurisprudence embodies what commentators have called the “anti-stereotyping principle.”⁴³ This focus on stereotype differentiates intermediate scrutiny from the other levels of judicial scrutiny that center more heavily on the nature of the interest to be served, and the connection between that interest and the means selected to achieve it. While this lack of jurisprudential cohesion may not in and of itself pose a problem, the Court’s reliance on “stereotype” presents difficulties for lower courts because the Court has failed to fully articulate exactly what “stereotype” means. Moreover, the Court has failed to account for the possibility that stereotypes vary from one generation to the next, such that ideas about men and women that are readily accepted as true today could become tomorrow’s “archaic” and “outmoded” generalizations.

B. Stereotype Is Ill-defined and Creates Difficulty for Lower Courts

Perhaps the most obvious problem inherent in the Court’s reliance on stereotypes to evaluate gender-based classifications lies in its failure to clearly define a term that plays such an important role in its analysis. In many of its early gender discrimination cases, the Court indicated that stereotypes are those generalizations that are “outmoded” or “archaic.”⁴⁴ The Court also made clear that

⁴¹ See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (noting that the “statutory objective” cannot reflect “archaic and stereotypic notions” (citing *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973) (plurality opinion))).

⁴² *Id.* at 725–26.

⁴³ See generally Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010) (discussing the anti-stereotyping principle).

⁴⁴ See *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975) (holding that a statute that provided that females reach age of majority at 18 and that males reach age of majority at 21 could not survive equal-protection analysis because it merely relied on “old notions” regarding the sexes); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (framing “stereotypes” as

“outmoded” ideas are those suggesting that the “proper place” of women is in the home and that women need “special protection.”⁴⁵

More recently, the Court characterized as “stereotypes” those assumptions that are unrelated to inherent differences between males and females.⁴⁶ Similarly, the Court has framed “different physical needs of men and women” as the opposite of stereotype,⁴⁷ indicating that any classification based on physical differences would not offend the equal protection clause under intermediate scrutiny. While this definition could offer an objective basis for distinguishing permissible from impermissible assumptions, the Court has never articulated the boundaries of the concept of “inherent” or “physical” differences. As Part IV illustrates, while the only “inherent” differences the Court has recognized are those related to reproduction; still, the Court has never expressly limited the concept to only reproductive differences.

In *United States v. Virginia*,⁴⁸ the Court used perhaps the broadest definition of stereotype when it referred to “overbroad generalizations about the different talents, capacities, or preferences of males and females.”⁴⁹ The Court then narrowed its definition in *Tuan Anh Nguyen v. I.N.S.*,⁵⁰ defining stereotype as the “frame of mind resulting from irrational or uncritical analysis.”⁵¹ This provides the narrowest definition articulated thus far; in fact, under the *Nguyen* standard, virtually any classification that is “rational” would pass constitutional muster. Notably, however, the Court has not used this definition of stereotype since its decision in *Nguyen*, and has since returned to the broad definition articulated in *Virginia*.⁵²

archaic and outdated misconceptions concerning role of women in home or work); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985) (referring to “outmoded notions” concerning women’s capabilities); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (noting that “‘old notions’ of role typing” were not valid governmental classifications).

⁴⁵ See, e.g., *Orr v. Orr*, 440 U.S. 268, 279–80 (1979) (striking down a statute providing alimony only to women because the state relied impermissibly on an assumption that women play a “dependent role” in the “allocation of family responsibilities”). Similarly, the Court in *Craig v. Boren* expressed concern for “outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.” *Craig*, 429 U.S. at 198–99 (quotation marks omitted).

⁴⁶ Cf. *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (referring to “assumptions about . . . men and women that are unrelated to any inherent differences between the sexes”); *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 733 n.6 (2003) (discussing the “different physical needs of men and women”).

⁴⁷ *Hibbs*, 538 U.S. at 733 n.6 (2003).

⁴⁸ 518 U.S. 515 (1996).

⁴⁹ *Id.* at 533.

⁵⁰ 533 U.S. 53 (2000).

⁵¹ *Id.* at 68.

⁵² See, e.g., *Hibbs*, 538 U.S. at 729 (“The State’s justification for such a classification

C. Stereotypes Change from Generation to Generation

While the Court's failure to define "stereotype" in a consistent manner creates obvious problems for litigants and lower courts seeking guidance, the more fundamental problem lies in the possibility that an important constitutional question, such as the permissibility of a gender-based policy, could turn on a transient concept that varies from one generation to the next. As Justice Scalia observed in *J.E.B. v. Alabama ex rel. T.B.*,⁵³ "times and trends do change,"⁵⁴ such that the constitutionality of a gender classification may depend solely on "the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of [gender] is reasonable."⁵⁵

A review of the Court's decisions demonstrates how one era's accepted truths may easily become another era's "stereotype." For instance, in an 1872 decision upholding a statute banning women from being admitted to the legal profession, three concurring justices relied heavily on the "wide difference in the respective spheres and destinies of man and woman."⁵⁶ These justices also noted that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."⁵⁷ In upholding a statute that prohibited women from working as bartenders, the Court accepted the government's contention that it needed to protect women from the "moral dangers" associated with the liquor industry.⁵⁸ But a mere three decades after its decision in *Goesart*, a plurality of the Court rejected these ideas as "romantic paternalism," which "put women, not on a pedestal, but in a cage."⁵⁹ As these decisions demonstrate, the line between accepted truths and "stereotypes" about genders can shift dramatically over a short period time.

'must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.'" (quoting *Virginia*, 518 U.S. at 533)).

⁵³ 511 U.S. 127 (1994).

⁵⁴ *Id.* at 158 (Scalia, J., dissenting).

⁵⁵ *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

⁵⁶ *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141 (1872) (Bradley, J., concurring).

⁵⁷ *Id.*

⁵⁸ *Goesart v. Cleary*, 355 U.S. 464, 466 (1948) ("Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition.").

⁵⁹ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion) (internal quotation marks omitted).

Additionally, the Justice Powell cautioned against “hitching the meaning of the Equal Protection Clause to . . . transitory considerations.”⁶⁰ While the “transitory considerations” Justice Powell spoke of in *Bakke* referred to the minority or majority position of various racial groups within society, the same principle applies to beliefs about the position of men and women in society. Like a particular racial group’s minority or majority status, the concept of a gender stereotype is subject to “shifting political and social judgments.”⁶¹ Because the Court has acknowledged many gender stereotypes reflect “archaic” ideas about the proper roles of men and women, it follows that present-day “stereotypes” were once well-accepted truths that could be invoked to justify gender-based discrimination.⁶²

The *Bakke* Court cautioned that such “mutability of a constitutional principle” undermines the Court’s ability to “discern ‘principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.’”⁶³ It remains a very real possibility that while some gender-based classifications, particularly those designed to compensate members of one gender group,⁶⁴ may be permissible at one time, the same classifications could be rendered impermissible in the future, particularly once gender “preferences beg[i]n to have their desired effect.”⁶⁵ This creates a problem for courts looking for

⁶⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.).

⁶¹ *Id.* at 299.

⁶² Commentators have even suggested that individual judges’ “personal perceptions of the reasonableness of allocating rights by gender” have influenced the Court’s decisions. 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.23(k) (4th ed. 2007); see also E.A. Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr*, 30 SYRACUSE L. REV. 639, 671 (1979) (“Unlike the lenient rational relationship, or the rigorous strict scrutiny test, the middle-tier has no predictable application. Whether or not a given classification furthers an ‘important governmental interest,’ or is ‘substantially related’ to this interest, are subjective determinations, and a conservative majority is as likely to conclude one way as a liberal majority is to conclude the other.”); John K. Vincent, Note, *Equal Protection and the “Middle-Tier”: The Impact on Women and Illegitimates*, 54 NOTRE DAME L. REV. 303, 321 (1978) (noting the highly subjective nature of the inquiry and “the confusion and inconsistency generated” by the intermediate scrutiny standard).

⁶³ *Bakke*, 438 U.S. at 299 (quoting A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976)).

⁶⁴ See, e.g., *Califano v. Webster*, 430 U.S. 313 (1977) (analyzing a provision allowing women to deduct low-income years for purposes of calculating social security retirement benefits); *Kahn v. Shevin*, 416 U.S. 351 (1974) (analyzing a statute providing property tax exemption to women).

⁶⁵ *Bakke*, 438 U.S. at 297.

guidance in the Supreme Court's early intermediate scrutiny jurisprudence; while certain assumptions about women may have reflected a well-documented truth in 1971, they may today reinforce "archaic notions" about males and females. Similarly, ideas about males and females unheard of forty years ago (for instance, the idea that males are less likely to achieve academically than their female counterparts) may now turn the concept of "stereotype" on its head.⁶⁶

III. PERCEIVED "UNWORKABILITY"⁶⁷ OF INTERMEDIATE SCRUTINY

In addition to the problems with relying on an ill-defined and ever-changing concept to decide constitutional questions, the Court's focus on stereotype in the equal-protection context has infringed on its ability to fully articulate the analysis it has conducted in evaluating whether a gender classification is sufficiently tailored to the asserted interest. As amici in *United States v. Virginia*, the National Women's Law Center and the ACLU noted that lower courts have experienced "great difficulty" in evaluating whether the means and ends are "substantially related."⁶⁸ In fact, lower courts have complained that, because the Supreme Court's intermediate scrutiny jurisprudence is "indeterminate,"⁶⁹ and fraught with "problems,"⁷⁰ it fails to provide lower courts with sufficient guidance for evaluating gender-based discrimination.⁷¹ Members of the Court themselves have even noted the potential problems with intermediate scrutiny poses for lower courts and litigants attempting to defend or challenge gender-based classifications.⁷²

⁶⁶ See Gurian, *supra* note 9 (describing documented trends of academic underachievement among boys and young men). While such trends do not reflect traditional "stereotypes," it does open the door for a new type of "overbroad generalization" that may in the future put males as a group at a disadvantage.

⁶⁷ See Brief of Amici Curiae National Women's Law Center American Civil Liberties Union, et al., in Support of Petitioner, *supra* note 4, at *2 (describing intermediate scrutiny as "unworkable").

⁶⁸ *Id.* at *6.

⁶⁹ *Lamprecht v. FCC*, 958 F.2d 382, 389 n.9 (D.C. Cir. 1992).

⁷⁰ *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 931 (9th Cir. 1991).

⁷¹ See, e.g., *Lamprecht*, 958 F.2d at 398 n.9 (referring to intermediate scrutiny as indeterminate); *Contractors Ass'n of E. Pa., Inc., v. City of Phila.*, 735 F. Supp. 1274, 1303 (E.D. Pa. 1990) (asserting that intermediate scrutiny provides little guidance to courts in decision making), *vacated on other grounds*, 945 F.2d 1260 (3d Cir. 1991); *Joseph v. City of Birmingham*, 510 F. Supp. 1319, 1335 n.22 (E.D. Mich. 1981) ("[Intermediate scrutiny does] not provide definite guidance. . . . [T]he consequent risk [is] that the decisions may appear inconsistent and unprincipled."); see also *Meloon v. Helgemoe*, 564 F.2d 602, 604 (1st Cir. 1977) (intermediate scrutiny is "hardly a precise standard"), *cert. denied*, 436 U.S. 950 (1978).

⁷² See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) ("[T]hough the intermediate scrutiny test we have applied may not provide a very clear standard in all instances, our case law does reveal a strong presumption that gender classifications are

Indeed, the Court's jurisprudence seems to contradict itself with regard to the important questions lower courts will have to decide in addressing gender-based classifications, especially concerning the amount of evidence needed to demonstrate that a classification is sufficiently tailored to the asserted interest, whether any amount of evidence is sufficient to overcome a charge of "stereotyping," and the required degree of "fit" between a classification and the ends it is designed to serve.

A. The Role of Evidence: How Much Is Enough?

The Court's decisions provide little express guidance with respect to the amount of evidence a proponent must present to demonstrate that a gender-based classification is properly tailored.⁷³ In many cases, the Court requires the proponent to present empirical evidence to justify its classification. For example, in *J.E.B. v. Alabama ex rel. T.B.*, the Court struck down the state's use of gender-based peremptory challenges where the state failed to provide sufficient evidentiary support for its argument that gender was an adequate predictor of jurors' attitudes.⁷⁴ The Court struck down an Oklahoma statute in *Craig v. Boren* for the same reason; although the state presented some statistical evidence that males were more likely than females to drive while intoxicated, the Court found the evidence insufficient to justify a statute allowing females to purchase 3.2% beer at a younger age than males.⁷⁵

While decisions like *Craig* and *J.E.B.* seem to stand for the idea that litigants must present meaningful evidence to satisfy the tailoring component of intermediate scrutiny, the Court has nevertheless upheld gender classifications on several occasions without requiring any evidence whatsoever to demonstrate the relationship between the classification and the interest.⁷⁶ In *Kahn v. Shevin*,⁷⁷ for instance, the

invalid." (citation omitted)); *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (criticizing the Court's announcement of intermediate scrutiny as the standard for gender classifications).

⁷³ See *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1010 (3d Cir. 1993) ("The Court has upheld gender preferences where no statistics were offered, struck down gender preferences despite the presence of statistics, and also decided cases both ways by relying in part on statistics." (internal citations omitted)).

⁷⁴ 511 U.S. 127, 137–38 (observing that Respondent's reliance on a single study to support a "quasi-empirical claim" is "[f]ar from . . . an exceptionally persuasive justification for its gender-based peremptory challenges").

⁷⁵ *Craig*, 429 U.S. at 199.

⁷⁶ See *Rostker v. Goldberg*, 453 U.S. 57, 58 (1981) (upholding statute requiring only men to register for the draft, despite absence of evidence); *Craig*, 429 U.S. at 203–04 (striking down

Court readily accepted that a property tax exemption for women was substantially tailored to the government's interest, despite the absence of evidence demonstrating that women were any more likely to need such an economic benefit.⁷⁸ Similarly, in *Schlesinger*, the Court upheld a gender-based classification that allowed women a longer period to achieve tenure in the Navy without requiring any evidentiary basis for the government's policy.⁷⁹ Instead, the Court summarily accepted that the classification was based on a "demonstrable fact," and not on archaic or overbroad generalizations.⁸⁰

B. Does "Stereotype" Trump Sound Evidence?

In addition to the confusion over if and how much evidence is required to sustain a gender classification, the Court's precedent leaves unanswered the question of when, if ever, factually demonstrated differences between males and females will suffice to rebut a charge of "stereotyping." Even where the Court finds the evidence sufficient to demonstrate a connection between gender and the interest to be served, the Court in some cases strikes down the classification as grounded in stereotype, while upholding other classifications that rely just as heavily on "overbroad generalizations" about the roles of men and women. For instance, in *Weinberger*, the Court agreed that the evidence presented was sufficient to demonstrate a connection between gender and the need for spousal survivor benefits.⁸¹ Nevertheless, the *Weinberger* Court struck down a provision of the Social Security Act that allowed only women to claim survivors' benefits, finding that the provision was based on a "stereotype"—the assumption that most women do not work outside the home.⁸² By striking down the classification as grounded in "stereotype" despite the ample evidence demonstrating the truth of the assumption, the Court seemed to refute the proposition that a

statute prohibiting men, but not women between ages 18 and 21 from purchasing 3.2% beer despite presentation of statistics); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (striking down statute allowing survivors' benefits for widows but not widowers, despite presentation of statistics); *Schlesinger v. Ballard*, 419 U.S. 498, 505–10 (1975) (upholding preferential employment treatment for women military officers despite an absence of evidence).

⁷⁷ *Kahn v. Shevin*, 416 U.S. 351 (1974).

⁷⁸ *Id.* at 355–56.

⁷⁹ *Schlesinger*, 419 U.S. at 505–10.

⁸⁰ *Id.* at 508.

⁸¹ *Weinberger*, 420 U.S. at 648.

⁸² *Id.* at 645.

demonstrable basis for a gender distinction could be sufficient to rebut a charge of stereotyping.⁸³

The Court reached the opposite result in *Califano v. Webster*,⁸⁴ where the Court addressed the constitutionality of a tax provision that allowed women to eliminate more low-earning years from the calculation of their retirement benefits than it allowed to men.⁸⁵ Despite the policy's reliance on the assumption that women typically earn lower wages than men, the Court found that the policy was not based on a stereotype, given the demonstrated economic differences between males and females underlying the policy.⁸⁶ Through this analysis, the Court indicated that when a proponent presents sufficient evidence of the dissimilarities between males and females, a policy will not fail on "stereotype" grounds. Thus, the Court's analysis *Webster* seems to directly contradict its holding in *Weinberger*, which suggested that even demonstrable differences between males and females would not suffice to justify a classification that relied on "stereotypes."

This contradiction leaves lower courts with little guidance on the proper analysis for classifications that have some demonstrable support, but also rely on an assumption or stereotypic generalization about a gender group.⁸⁷ Commentators have expressly noted that the Court's gender discrimination jurisprudence "begs the question of how exactly to distinguish" policies designed to accommodate legitimate differences between males and females, and those based on stereotypic beliefs about each gender.⁸⁸ This also places litigants in an even more precarious position, given the lack of certainty over which definition of "stereotype" the Court will employ. One possible explanation is that the Court simply employed a different definition of "stereotype" in *Webster* and *Kahn* than it did in *Weinberger*, enabling it to reach opposite results in factually similar cases. This possibility seems particularly likely given the variety of ways the Court has defined the concept.⁸⁹

As Part V below illustrates, however, the different outcomes reached in these cases can easily be explained. When read together, these cases demonstrate the Court's application of a more nuanced

⁸³ *Id.* at 648.

⁸⁴ 430 U.S. 313 (1977).

⁸⁵ *Id.*

⁸⁶ *Id.* at 318–20.

⁸⁷ See *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1010 (3d Cir. 1993).

⁸⁸ Juliet A. Williams, *Learning Differences: Sex-Role Stereotyping in Single-Sex Public Education*, 33 HARV. J. L. & GENDER 555, 566 (2010).

⁸⁹ See *supra* Part II.

definition of stereotype than the definition many critics have read into the Court's decisions.⁹⁰ Thus, the Court's apparent self-contradiction results not from arbitrary reliance on an amorphous and transient concept, but rather from the consistent application of principles that the Court only expressly articulates in its First Amendment intermediate scrutiny analysis.

C. Proper Level of Scrutiny:

Will Anything Less than "Exceedingly Persuasive" Suffice?

Finally, part of the confusion arising out of the Court's preoccupation with the concept of "stereotype" in equal-protection intermediate scrutiny cases involves a debate over the proper level of scrutiny courts should apply to gender classifications. While the Court has not expressly departed from its original articulation of the intermediate scrutiny standard, confusion abounds with regard to whether the Court's requirement of an "exceedingly persuasive justification"⁹¹ in recent cases raised the level of scrutiny applicable to gender classifications.⁹²

At least one commentator contends that the requirement of an "exceedingly persuasive justification" has transformed the intermediate scrutiny standard originally announced in *Craig* into a more demanding level of scrutiny than even strict scrutiny.⁹³ Others observe that this standard requires courts to strike down *any* classification that does not function as a "perfect proxy."⁹⁴ Under that formulation, "exceedingly persuasive" could raise intermediate scrutiny to a higher standard than even strict scrutiny.⁹⁵ Regardless of how the standard is articulated, the Court's decisions "shed[] little light on the relationship required between the goal and the means of

⁹⁰ See, e.g., Case, *supra* note 5, at 1449 ("In the constitutional, just as in the statutory, law of sex discrimination, 'stereotype' has become a term of art by which is simply meant any imperfect proxy, any overbroad generalization.").

⁹¹ See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (applying the exceedingly persuasive standard); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (same).

⁹² Skaggs, *supra* note 23, at 1170-74 (describing how the exceedingly persuasive standard has generated confusion regarding the level of scrutiny that is truly applied to gender classifications).

⁹³ See, e.g., *id.* at 1173 (contending that the Court's decisions in *Hogan*, *J.E.B.*, and *Virginia* "have transformed [intermediate scrutiny] into a more demanding inquiry").

⁹⁴ Case, *supra* note 5, at 1449-50 (stating that to constitute a "perfect proxy," a gender-based classification must apply to "either all women or no women, or all men or no men; there must be zero or a hundred on one side of the sex equation of the other").

⁹⁵ *Id.* at 1453 ("[S]ome rules that might fail the perfect proxy test could nevertheless survive strict scrutiny.").

accomplishing the goal under the ‘exceedingly persuasive justification’ standard.”⁹⁶

As Part V below illustrates that the Court has only had occasion to require a perfect proxy in cases where the classification serves an interest unrelated to “inherent differences,” the very reason behind allowing states more freedom to utilize gender classifications. This leaves open the possibility that a less exacting form of intermediate scrutiny may still be appropriate under certain circumstances.

IV. EQUAL-PROTECTION INTERMEDIATE SCRUTINY AS INFORMED BY FIRST AMENDMENT JURISPRUDENCE

As the forgoing discussion illustrates, the idea of stereotype overwhelms the Court’s intermediate scrutiny equal-protection jurisprudence. Because of the challenges that arise when dealing with such an ill-defined and ever-changing concept, the Court seems to contradict itself with regard to important issues that arise in the context of gender-based discrimination, including how much evidence a proponent must provide to satisfy the tailoring requirement, and whether evidence can ever overcome a charge of stereotyping.

Fortunately, however, equal protection is not the only context in which the Court engages in an intermediate scrutiny analysis. Since 1980, the Court has also applied intermediate scrutiny in the First Amendment context when addressing restrictions on commercial speech, and has developed a more clearly articulated framework for conducting an intermediate scrutiny analysis.⁹⁷ In *Central Hudson*, the Court announced a four-part “intermediate scrutiny” test for restrictions on commercial speech.⁹⁸ The first prong, which considers whether the speech is truthful and non-misleading, is traditionally treated as a threshold inquiry; if this prong is satisfied, the government must satisfy the remaining three prongs.⁹⁹ Under the second prong, courts must consider whether the government has asserted a “substantial interest.”¹⁰⁰ The third and fourth prongs measure the “fit” between an interest and the means selected to

⁹⁶ Skaggs, *supra* note 23, at 1208.

⁹⁷ See *Central Hudson Gas & Elec. Corp. v. Publ. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (applying a four-step intermediate scrutiny analysis in the context of commercial speech).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

further it.¹⁰¹ More specifically, the third prong considers whether the speech restriction “directly” advances the government’s interest, while the fourth prong ensures that the restriction “is not more extensive than is necessary” in terms of the speech it restricts.¹⁰²

As the following section will illustrate, the Court’s equal-protection intermediate scrutiny analyses employ these same inquiries, though in a less clearly articulated manner. Reframing the Court’s equal-protection jurisprudence in accordance with the framework announced in *Central Hudson* reveals a coherent pattern in the Court’s reasoning, and may provide lower courts with much-needed guidance regarding what the Court has found instructive when evaluating the constitutionality of gender-based classifications.

Because the Court’s First Amendment intermediate scrutiny analysis has not been overshadowed by references to stereotype, the Court has more clearly developed and explained the intermediate scrutiny analysis in that context. For instance, in the First Amendment context, the Court applies a tailoring analysis that involves two separate prongs.¹⁰³ The Court conducts a similar division of its analysis in the equal-protection context by considering first, whether a proponent has shown that males and females are dissimilarly situated with respect to an interest, and second, whether the gender-based policy reaches further than necessary by burdening “exceptional” members of the gender group.

The Court also explains that in the First Amendment context, a closer fit between the government’s means and its ends may be required when the interest to be served is unrelated to the purpose of affording less protection to commercial speech.¹⁰⁴ This provides some insight into why the Court employs a heightened “exceedingly persuasive justification” standard for some gender-based classifications, indicating that the traditional intermediate scrutiny standard still applies in some circumstances.

As the following subsections will illustrate, the Court’s equal-protection intermediate scrutiny analyses employ these same inquiries, though in a less clearly articulated manner. Reframing the Court’s equal-protection jurisprudence in accordance with the framework announced in *Central Hudson* may provide lower courts

¹⁰¹ *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989).

¹⁰² *Central Hudson*, 447 U.S. at 566.

¹⁰³ *Id.*

¹⁰⁴ *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (plurality opinion of Stevens, J.) (citing *Central Hudson*, 447 U.S. at 566, n.9) (noting that prohibitions with objectives unrelated to consumer protection “rarely survive constitutional review”).

with much-needed guidance regarding what the Court has found instructive when evaluating the constitutionality of gender-based classifications.

A. Evidence of Dissimilarity: Equal Protection's Analogue to the Third Central Hudson Prong

Under the third *Central Hudson* prong, the Court requires that a restriction on commercial speech must “directly advance” the government interest asserted.¹⁰⁵ In this respect, the Court requires the government to show that it has “carefully calculated”¹⁰⁶ the costs and benefits associated with its infringement on constitutional rights. In other words, the government must demonstrate that the restriction will actually further its purpose, and that it will do so in a material way. This usually requires the government to demonstrate a connection between the burdened speech and the harm to be remedied,¹⁰⁷ and in many cases the proponent must show that the speech it restricts contributes more heavily to the problem than forms of speech that are not affected by the restriction.¹⁰⁸ Where commercial speech is no more responsible for the problem than noncommercial speech, the Court does not allow the restriction to stand, particularly where a burden on noncommercial speech would serve the government’s interest just as much as a burden on commercial speech.¹⁰⁹

Though often buried in a discussion about stereotypes and generalizations, the Court conducts this same analysis when determining whether a gender-based classification is sufficiently tailored under the Equal Protection Clause, by inquiring whether a policy favoring one gender will advance the asserted interest more than a gender-neutral policy or a policy favoring the opposite gender.¹¹⁰ In conducting this analysis, the Court considers whether

¹⁰⁵ *Central Hudson*, 447 U.S. at 564.

¹⁰⁶ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

¹⁰⁷ *See, e.g., 44 Liquormart*, 517 U.S. at 504–05 (describing the required connection between the burdened speech and the harm that the regulation was meant to address); *Central Hudson*, 447 U.S. at 564 (same).

¹⁰⁸ *See, e.g., Cincinnati*, 507 U.S. at 418–19 (noting that a speech regulation is not reasonable if it affects speech that is less responsible for a governmental problem than other forms of unregulated speech).

¹⁰⁹ *See id.* (discussing the necessary degree of fit between the policy and the government’s interest to pass constitutional muster).

¹¹⁰ *See, e.g., Orr v. Orr*, 440 U.S. 268, 282 (1979) (“Progress toward fulfilling such a purpose would not be hampered, and it would cost the State nothing more, if it were to treat men and women equally by making alimony burdens independent of sex.”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (“[T]he gender-based distinction is gratuitous; without it,

males and females are dissimilarly situated with respect to the government's asserted interest.¹¹¹ In particular, the Court analyzes whether the burdened gender contributes to the alleged harm in a greater degree, or whether the favored gender feels the negative impact of that harm to a greater degree.¹¹²

As discussed in Part III, the Court seems to have equivocated over what, if any amount of evidence will suffice to demonstrate that males and females are dissimilarly situated. Yet the Court's treatment of this question is consistent with the analysis it conducts in the First Amendment context. While the Court has never expressly stated what evidence the proponent of a commercial speech restriction must present to establish the requisite connection under this prong, commentators have observed that the Court employs a sort of "sliding scale" analysis.¹¹³ Under this approach, the amount of evidence required varies depending on the obviousness of the connection between the burdened speech and the harm to be addressed. Where the connection is a matter of "common sense," the Court frequently upholds restrictions without considering the evidence, if any, presented by the government in support of its contention.¹¹⁴ But when the asserted connection between commercial speech and a particular social harm requires some explanation, the Court strikes down restrictions where the government has failed to present empirical or anecdotal evidence in support of its position.¹¹⁵

the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids.").

¹¹¹ See, e.g., *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001) (noting that fathers and mothers are not similarly situated); *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 471 (1981) (plurality opinion) (noting that adolescent boys and girls are dissimilarly situated in regard to the risks associated with teenage pregnancy).

¹¹² See, e.g., *Michael M.*, 450 U.S. at 471–72 (finding males and females to be dissimilarly situated with regard to the government's interest in preventing rape and teenage pregnancy; only males can cause the harms associated with rape and unintended pregnancy, while females suffer disproportionately from the effects).

¹¹³ Shannon M. Hinegardner, Note, *Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third Central Hudson Prong*, 43 NEW ENG. L. REV. 523, 545 (2009).

¹¹⁴ See *id.* (noting that defenders of logical speech restrictions only need to satisfy lower standards of proof); see also *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 555 (2001) (accepting that advertisements for certain brands of cigarettes increase consumers' consumption of those brands without requiring any empirical evidence to demonstrate a connection); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 509 (1981) (readily accepting that commercial billboards designed to catch drivers' attention pose a danger to highway safety).

¹¹⁵ See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (striking down a ban on alcohol price advertisements in the absence of any evidence that price advertisements contributed to greater consumption; connection between speech and harm was not a matter of common sense).

In many of the decisions upholding classifications without any consideration of evidence, the proffered dissimilarity is based on what the Court perceives to be an obvious distinction between males and females. Since its articulation of the intermediate scrutiny standard, the Court consistently treats only differences grounded in biology as matters of “common sense.”¹¹⁶ Moreover, many of the Court’s decisions upholding classifications without any consideration of evidence involve a biological dissimilarity related to what is perhaps the most obvious biological distinction between males and females: the ability to become pregnant and bear children.¹¹⁷

In contrast, in cases where Court required a more detailed showing of the connection between gender and the interest the state seeks to advance, the proffered distinctions were unrelated in any way to biological or physiological differences.¹¹⁸ Accordingly, many of the gender classifications failed based on a lack of evidence were grounded in a “dissimilarity” unrelated to physiological differences.¹¹⁹ Rather than equivocating with regard to the amount of evidence a proponent must provide in defending its gender-based classification, the Court has engaged in a consistent pattern of

¹¹⁶ See, e.g., *Nguyen*, 533 U.S. at 63 (noting that fathers and mothers are not similarly situated); *Michael M.*, 450 U.S. at 471 (noting that adolescent boys and girls are dissimilarly situated in regard to the risks associated with teenage pregnancy). The Court has also at least one other dissimilarity grounded in law to be a matter of common sense. See *Rostker v. Goldberg*, 453 U.S. 57, 75 (1981) (accepting, without any evidence, that males and females are dissimilarly situated with respect to the government’s interest in using a draft to gather combat-ready troops, because federal law excludes women from combat). In its pre-intermediate scrutiny jurisprudence, the Court also accepted social and economic differences between males and females as “obvious,” when it upheld the gender-based distinctions in *Kahn* and *Schlesinger* without any evidentiary showing that males and females were in fact dissimilarly situated with respect to the asserted interests in providing for needy spouses or compensating for a lack of opportunities for military career advancement. See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (“[T]he different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service.”); *Kahn v. Shevin*, 416 U.S. 351, 353 (1974) (“There can be no dispute that the financial difficulties confronting the lone woman in Florida or any other State exceed those facing the man.”).

¹¹⁷ See, e.g., *Nguyen*, 533 U.S. at 63 (noting that fathers and mothers are not similarly situated); *Michael M.*, 450 U.S. at 471 (noting that adolescent boys and girls are dissimilarly situated in regard to the risks associated with teenage pregnancy)

¹¹⁸ See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137–38 (1994) (difference related to potential for bias against criminal defendant); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (purported difference related to opinions and preferred topics of discussion); *Craig v. Boren*, 429 U.S. 190, 200 (1976) (difference related to drunk driving).

¹¹⁹ See, e.g., *J.E.B.*, 511 U.S. at 129 (invalidating use of gender as a basis for preemptory challenges to jurors); *Roberts*, 468 U.S. at 612 (upholding state law that forbid private groups from discriminating on the basis of gender); *Craig*, 429 U.S. at 192 (striking down statute creating different minimum ages for males and females to buy 3.2 percent alcohol content beer).

analysis that takes into account the type of dissimilarity the proponent relies on. When a distinction between genders is based on an observable fact, the distinction requires no evidentiary support. For instance, the Court required no evidence in *Michael M.* and *Nguyen* because the government relied on observable biological differences between males and females.¹²⁰ Similarly, the Court required no evidence in *Rostker* and *Schlesinger*, where the alleged dissimilarities were based on observable factors: federal laws expressly excluding women from combat. Thus, when dissimilarity is grounded in factors that courts can independently verify, courts can easily evaluate whether a preference for one gender will advance the government's interest more effectively than a neutral policy. Conversely, when a dissimilarity is less obvious, proponents of gender-based classifications must be prepared to demonstrate an evidentiary basis for any claims that males and females are dissimilarly situated. As the Court's decisions indicate, such evidence is essential to a court's ability to determine whether the classification is in fact tailored to the government's interest, or whether the government has simply invented a "post hoc" explanation for a constitutionally impermissible policy.¹²¹

B. Burden on Exceptional Members: Equal Protection's Analogue to the Fourth Central Hudson Prong

While the analogy between the third *Central Hudson* prong and the Court's analysis of whether males and females are "dissimilarly situated" may explain the Court's equivocation over the amount of evidence required to sustain a gender-based classification as sufficiently tailored, it does not explain why the Court strikes down gender classifications it deems to be based on "stereotypes" despite its recognition of a strong factual and evidentiary basis for a distinction.¹²²

The answer becomes clear when the Court's decisions are viewed once again through the lens of *Central Hudson*. Like the *Central Hudson* fit test, which is comprised of the third and fourth prongs,¹²³ the equal-protection tailoring analysis consists of two components. In addition to considering whether the genders are sufficiently

¹²⁰ *Nguyen*, 533 U.S. at 68; *Michael M.*, 450 U.S. at 471.

¹²¹ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (justifications cannot be invented post hoc or in response to litigation).

¹²² See *supra* Part III.

¹²³ *Central Hudson Gas & Elec. Corp. v. Publ. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

dissimilar, such that preferring one gender to the other will substantially advance the government's interest in solving or preventing a social problem, the Court also incorporates a concern for "exceptional" members of a gender group into its tailoring analysis.¹²⁴ This concern for members who either do not contribute to or who are not affected by the targeted problem in the same way as other members of their gender group reflects the analysis the Court conducts under the fourth *Central Hudson* prong, which considers whether a restriction burdens more speech than necessary to serve the state's interest.¹²⁵

This explains the result in cases like *Weinberger* and *Goldfarb*; despite the sufficiency of the evidence presented to satisfy the equal-protection equivalent of the third *Central Hudson* prong (dissimilarly situated with respect to an interest) the statute's failure to pass constitutional muster can be attributed to its overbreadth. In striking down the statutes at issue in both *Weinberger* and *Goldfarb*, the Court criticized the government's reliance on the "overbroad generalizations" that male workers' earnings are more vital to the support of their families than the earnings of similarly situated females,¹²⁶ or that widows are more "needy" than widowers.¹²⁷ It seems at first glance that because these cases hinged on "stereotype," the strength of the evidence presented made no difference to the Court. Further review reveals, however, that the Court's finding of a "stereotype" in those cases was based on the same overbreadth analysis it employs under the fourth *Central Hudson* prong. Specifically, the Court struck down the classifications because they burdened more members of a gender group than necessary to achieve the government's interest.

Tellingly, in striking down the provision in *Weinberger* as reflective of a "stereotype," the Court observed that it "denigrat[ed] . . . the efforts of women who do work and whose earnings contribute significantly to their families' support."¹²⁸ Thus, the Court acknowledged that while *most* men and women are

¹²⁴ See, e.g., *United States v. Virginia*, 518 U.S. 515, 542 (1996) (striking down VMI's male-only admissions policy based on the lower courts' finding that some women could benefit from VMI's adversative method).

¹²⁵ *Central Hudson*, 447 U.S. at 566.

¹²⁶ *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977).

¹²⁷ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 n.19 (1975) ("[I]f the society's aim is to further a socially desirable purpose . . . it should tailor any subsidy directly to the end desired, not indirectly and unequally by helping widows with dependent children and ignoring widowers in the same plight.").

¹²⁸ *Id.* at 645.

dissimilarly situated with respect to the government's interest in providing for widow's benefits, the statute's fatal flaw was its disadvantage to exceptional women. Similarly, in *Califano v. Goldfarb*, the Court struck down a provision of the Social Security Act that denied many female wage earners the opportunity to provide for their families through social security old age benefits.¹²⁹ Despite the overwhelming evidence that most primary wage earners were in fact male, the Court found it persuasive that the provision impacted those females who fell outside the gender norm, and were in fact the primary wage earners for their families.¹³⁰ The Court echoed this same sentiment in *Virginia*, when it struck down VMI's male-only admissions policy.¹³¹ Despite its observation that VMI's educational technique would not be suitable for most women, the Court could not overlook the policy's impact on exceptional women.¹³² Writing for the majority, Justice Ginsberg noted that if even one woman could benefit from VMI's adversative teaching method, VMI's gender-based policy could not pass intermediate scrutiny.¹³³

These decisions indicate that in conducting a tailoring analysis, the Court is not concerned with whether more individuals than necessary are merely *affected* by the classification, but rather whether more individuals than necessary are *burdened* by the classification. This helps to explain why the Court sustained the gender preferences in cases like *Kahn* and *Webster*, despite the undoubtedly overbroad impact of the provisions at issue. Indeed, the tax exemption in *Kahn* or the benefits at issue in *Webster* undoubtedly benefitted more women than necessary to serve the government's interest, as it would be difficult to argue that every woman who received the property tax deduction in *Kahn* suffered from the economic disadvantages the state sought to address. In this respect, the policies were no different than the "overbroad" policies struck down in *Goldfarb* and *Weinberger*. In all four cases, the policies extended to "exceptional" members of the gender group at issue. The difference in outcome, however, lies in the direction of the impact. In *Goldfarb* and *Weinberger*, the Court found that the policies served to disadvantage exceptional women, while the policies in *Kahn* and *Webster* provided a benefit to all women,

¹²⁹ *Goldfarb*, 430 U.S. at 199 (holding that the provision violates the Due Process Clause of the Fifth Amendment).

¹³⁰ *Id.* at 206.

¹³¹ *United States v. Virginia*, 518 U.S. 515, 546 (1996) (holding that Virginia did not meet the necessary exceedingly persuasive justification needed for any gender-based classification).

¹³² *Id.* at 542 (observing that Virginia could not "constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords").

¹³³ *Id.* at 546.

including those exceptional women who were unaffected by the problem the government sought to remedy. Thus, an impact on exceptional members of a gender group may not always prove fatal to a gender classification, so long as the impact is advantageous, or at least neutral.

When framed in this way, the Court's definition of "stereotype" is far narrower than its common usage might suggest.¹³⁴ Rather than referring to any gender-based assumption that does not apply to all members of a group,¹³⁵ the Court uses the concept of "stereotype" only to strike down policies that impose a burden on those members of the group to whom the generalization does not apply, and thus are not "dissimilarly" situated from members of the opposite gender.

*C. Exceedingly Persuasive and Perfect Proxy:
Equal Protection's "Special Care"*

While the application of *Central Hudson's* third and fourth prongs may clear up the some confusion over the Court's treatment of evidence and the relationship between evidence and stereotypes, the remaining question concerns whether the Court's requirement of an "exceedingly persuasive justification" in certain equal-protection cases creates a higher degree of scrutiny, and whether such a standard must apply to all gender-based classifications.¹³⁶

The answer to this question lies in the relationship of the second *Central Hudson* prong to the third and fourth prongs. Specifically, where the government asserts an interest under the second prong that is unrelated to preventing a commercial harm, the Court has observed that the reasons for affording a lower level of scrutiny disappear.¹³⁷ This is because the purpose of applying a lower level of scrutiny to restrictions on commercial speech is to allow for greater protection against the harm that commercial speech can potentially cause to consumers.¹³⁸ When the potential for such harm is not present, the

¹³⁴ See Case, *supra* note 5, at 1449 (broadly defining stereotype).

¹³⁵ *Id.* at 1450.

¹³⁶ See Skaggs, *supra* note 23, at 1173 (discussing the various interpretations of the "exceedingly persuasive justification" standard).

¹³⁷ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501–03 (1996) (plurality opinion of Stevens, J.) (observing that "there is far less reason to depart from the rigorous review that the First Amendment generally demands" where a government restriction on commercial speech is unrelated to commercial harm).

¹³⁸ The Court has characterized "commercial harm" as the detrimental effects that result when speech deprives consumers of a fair bargaining process by either restricting their ability to make contractual choices, or by misleading them about the relative costs and benefits of a proposed transaction. See *44 Liquormart*, 517 U.S. at 501 ("[C]ommercial harm" involves infringement on "a fair bargaining process."); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620

Court cautions that commercial-speech restrictions must be reviewed with “special care” to ensure a closer fit between the government’s interest and the means selected to achieve them.¹³⁹ This higher degree of scrutiny is parallel to the heightened standard the Court created in the equal-protection context by requiring an “exceedingly persuasive” justification in many of its cases.¹⁴⁰ More importantly, however, the survival of a less exacting form of intermediate scrutiny in the First Amendment context demonstrates that the Court still employs a standard less demanding than “exceedingly persuasive” in equal-protection cases where the interest asserted relates to the purpose of intermediate scrutiny.

In the equal-protection context, the Court reasoned that purpose of intermediate scrutiny is to account for “inherent differences” between the genders.¹⁴¹ In this respect, equal-protection intermediate scrutiny affords government actors more leeway in classifying on the basis of gender, just as First Amendment intermediate scrutiny allows more leeway in restricting commercial speech. In both contexts, intermediate scrutiny accounts for unique circumstances where government infringement on constitutional rights may be justified based on some countervailing need or interest.

Thus, where a gender classification is designed to serve an interest that is unrelated to addressing inherent differences, it logically follows that the Court should employ a more “exacting” review of the fit between the interest and the ends designed to serve it. It is not surprising, then, that in a majority of the cases where the Court struck down a classification that burdened exceptional members, the asserted

(1995) (finding a potential for commercial harm based on conclusion that attorney solicitations of accident were likely to unfairly coerce consumers during a vulnerable and highly emotional time).

¹³⁹ *44 Liquormart*, 517 U.S. at 504 (citing *Central Hudson Gas & Elec. Corp. v. Publ. Serv. Comm’n*, 447, 477 U.S. 557, 566 n.9 (1980)). Importantly, the Court has never suggested that a heightened standard should apply in the First Amendment context where the asserted interest is related to preventing commercial harms. *See, e.g., Fla. Bar*, 515 U.S. at 620 (finding an interest related to preventing commercial harm to consumers).

¹⁴⁰ *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that the reason for the gender discrimination must be “exceedingly persuasive”); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (holding that the exceedingly persuasive justification burden is met “only by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980))).

¹⁴¹ *See Craig v. Boren*, 429 U.S. 190, 208 (1976) (describing the reason for viewing gender classifications with less scrutiny than racial classifications); *see also Virginia*, 518 U.S. at 533 (“‘Inherent differences’ between men and women . . . remain cause for celebration . . .”).

government interest was in fact unrelated to inherent differences between males and females.¹⁴² Therefore, when an interest *is* related to inherent differences, it follows that the Court should not require as perfect a fit between the means and the ends, and would likely tolerate a modest burden on some exceptional members.

While the Court has not had occasion to expressly decide whether a less-perfect proxy would be permissible when a classification is related to inherent differences, its First Amendment jurisprudence indicates that a burden on some “exceptional members” of the gender group would not prove fatal to the classification. Additionally, it is no coincidence that the Court has never had an opportunity to demonstrate this principle, as the requirement of perfect fit has always been met in cases where the government interest addresses an “inherent difference.” This is because the only “inherent differences” the Court expressly recognized are those related to the reproductive functions of males and females, a characteristic for which gender is necessarily a perfect proxy.¹⁴³ Thus, the biologically based policies in cases like *Nguyen* and *Michael M* did not burden exceptional members, because no such members existed.

Still, this is not to say that a scenario could never arise where a classification based on biological factors such as brain chemistry or hormones does burden exceptional members. The Court never foreclosed the possibility that “inherent differences” may refer to differences that, while grounded in biological factors, are unrelated to reproduction. For instance, a growing body of research indicates that males and females are physiologically different with respect to brain functioning, brain chemistry, and hormonal levels, such that the different learning styles and methods of reasoning often attributed to each gender may in fact be grounded in measured physiological differences.¹⁴⁴ One potential problem with relying on neurological and hormonal differences to justify gender-based classifications is the difficulty inherent in line drawing. Unlike reproductive capabilities,

¹⁴² See *Virginia*, 518 U.S. at 518 (asserting interest in providing diverse educational opportunities); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 654 (1975) (asserting interest in providing for families upon the death of a wage-earner).

¹⁴³ See *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 54 (2001) (upholding a law that requires legitimization of paternity before a child born outside the United States whose father is a citizen may gain citizenship); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 465 (1981) (upholding California’s statutory rape law, relying in part on the fact that the law aimed to protect illegitimate teenage pregnancies); see also *Case*, *supra* note 5, at 1449 (defining “perfect proxy”).

¹⁴⁴ *Williams*, *supra* note 88, at 571. Such differences are often cited in support of single-sex education programs. *Id.*

which necessarily place individuals into one category or another, hormonal and neurological characteristics may not always create such a clear division. In this respect, a classification based on non-reproductive biological differences could have greater potential to affect and possibly burden those “exceptional” males and females who do not fall on the same side of the line as the majority of their gender group. Still, the Court has never foreclosed the possibility, and its First Amendment jurisprudence even supports the possibility that the Court would sustain a classification despite any burden imposed on exceptional members where the interest asserted relates to “inherent differences” between males and females.

In this respect, the role of biology in the intermediate scrutiny analysis is two-fold. First, described in Section III of this Comment, when an asserted dissimilarity between males and females is grounded in biology, the Court does not require that the proponents of a gender-based classification present any outside evidence of that dissimilarity. Rather, the Court readily accepts that men and women are dissimilarly situated in those cases. Second, when the proponent asserts an interest that addresses biological differences between males and females, the Court may tolerate a policy that burdens exceptional members of a gender group.

Additionally, depending on the outcome of a case currently under the Court’s consideration,¹⁴⁵ biological differences may soon be the *only* permissible basis for a gender-based classification. Indeed, the Court has not upheld a gender-based classification based on non-biological factors since 1981.¹⁴⁶ In *United States v. Flores-Villar*,¹⁴⁷ the petitioner challenged an immigration statute, which provides that citizen fathers who have not lived in the United States for at least five years after the age of fourteen are prohibited from transmitting citizenship to their illegitimate children born abroad.¹⁴⁸ Neither the alleged interest in preventing statelessness nor the alleged dissimilarity between males and females is grounded in biology; the Court granted certiorari to determine whether, as the petitioner

¹⁴⁵ *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1878 (2010).

¹⁴⁶ *Rostker v. Goldberg*, 453 U.S. 57, 58 (1981) (finding it constitutional to register only men for the draft because women are excluded from combat, men and women were dissimilarly situated with respect to the government’s interest in providing combat-ready troops during wartime).

¹⁴⁷ 536 F.3d 990.

¹⁴⁸ *Id.*

alleges, a gender-based classification must be based on biological factors.¹⁴⁹

If the Court in *Flores-Villar* finds in the petitioner's favor, it will signal to lower courts and litigants that differences that are not grounded in biological factors, such as the socioeconomic differences recognized in the Court's early intermediate scrutiny jurisprudence,¹⁵⁰ are no longer permissible grounds for distinguishing between males and females. But, until the Court indicates that nonbiological differences are no longer a permissible basis for distinguishing based on gender, nonbiological differences may suffice, so long as the proponent can demonstrate through evidence that males and females are dissimilarly situated, and that the classification does not impose a burden on "exceptional" members of a gender group.

V. APPLICATION: GENDER-BASED ADMISSIONS POLICIES IN HIGHER EDUCATION

As the following discussion illustrates, the *Central Hudson* test for intermediate scrutiny may inform the equal-protection equivalent in a way that gives courts and litigants addressing gender-based admissions policies a more manageable framework for applying intermediate scrutiny. Thus, the following sections discuss how courts and litigants can effectively address challenges to such policies in a manner that is both effective and consistent with the Supreme Court's equal protection jurisprudence.

Based on the concerns that both college admissions administrators and outside observers raise regarding the negative effects of a predominantly female student body, proponents of gender-based admissions policies may assert that the classification serves the following "important interests": (1) preserving the university's ability to attract qualified applicants, and (2) minimizing the opportunity for a "hookup" culture to develop on campus.¹⁵¹ When realigned within the *Central Hudson* framework, the Court's equal-protection

¹⁴⁹ *Id.* The Court heard oral arguments in November 2010, but has not yet rendered a decision. *Flores-Villar v. United States*, SCOTUSBLOG (May 11, 2011), <http://www.scotusblog.com/case-files/cases/flores-villar-v-united-states/>.

¹⁵⁰ *See, e.g.*, *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (holding that a law giving women more time than men to gain a promotion before mandatory discharge was constitutional because female officers do not have the opportunities for advancement that male officers have); *Kahn v. Shevin*, 416 U.S. 351 (1974) (holding that a tax law granting widows an annual \$500 tax exemption was constitutional because a woman faces a greater financial burden when she loses her husband than when a man loses his wife).

¹⁵¹ *See supra* Part I (discussing concerns regarding the effects of the increasingly female population on campuses).

jurisprudence demonstrates that courts must consider the following when evaluating whether gender-based admissions policies are substantially tailored to either interest: (1) whether an admissions policy favoring males will serve the government's interest to a greater degree than a gender-neutral policy or a policy favoring females; and (2) whether the classification burdens "exceptional" females.

Based on the Supreme Court's equal-protection jurisprudence as reframed under *Central Hudson's* framework, courts determining whether an admissions policy favoring males will further the government's interest to a greater degree than a gender-neutral or female-favoring policy, will consider whether males either (1) *contribute* to the problem in greater proportion, or (2) are *affected* by the problem to a greater degree than females.¹⁵² Proponents of gender-based policies may contend that males contribute to the problems associated with a hookup culture in greater proportion than females, and are therefore dissimilarly situated. Proponents may also argue that because females contribute to the decline in a university's appeal to applicants to a greater degree than males, females are dissimilarly situated from males with respect to that interest.

In its decisions evaluating dissimilar situation, the Court has only upheld classifications that benefit the gender that is more negatively affected by a problem.¹⁵³ Similarly, the Court has only upheld policies imposing a burden on the gender that contributes to a problem to a greater degree.¹⁵⁴ Never has the Court upheld a policy that burdens members of the gender group more severely affected by the problem the policy seeks to remedy. This likely forecloses universities from relying on precedent like *Michael M* and *Nguyen* to contend that males and females are dissimilarly situated. Because males contribute to the problems associated with a hookup culture, a policy favoring the gender that allegedly contributes to a problem would be anomalous under intermediate scrutiny jurisprudence. Moreover, to further burden members of the gender group more severely affected by a problem runs counter to the Court's insistence that "inherent

¹⁵² See *supra* Part V.

¹⁵³ See, e.g., *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464 (1981) (upholding a statute which afforded females greater protection from statutory rape, a problem that affects females more than males); *Schlesinger*, 419 U.S. 498 (upholding a policy that benefitted for female Navy officers where the problem associated with a lack of advancement opportunity for women in the Navy necessarily affected women more than men).

¹⁵⁴ *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (noting that problems involving lack of proof of parentage are more attributable to male than female parents); *Michael M.*, 450 U.S. at 475 (finding that the statute provides an additional deterrent for men who do not have the significant deterrents to sexual intercourse as females).

differences” cannot be used “for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”¹⁵⁵

Accordingly, the best argument for a university seeking to establish that males and females are dissimilarly situated with respect to both interests may be that female students, by their very presence on campus, are in fact the group with contributes to the harm(s) the university seeks to avoid. While this contention seems to unfairly fault females for a phenomenon that is outside their individual control, the Court endorsed a very similar contention in *Nguyen*. By acknowledging that the males contribute more than females to the problem of inconclusive proof of parentage, the Court seemed unconcerned with the fact that a male’s inability to conclusively prove parentage by his presence at birth falls outside his control.

Still, an argument that females’ presence on a college campus somehow changes the nature of the university as an institution runs dangerously close to the types of contentions the Court rejected in cases like *Virginia* and *Roberts v. U.S. Jaycees*.¹⁵⁶ In those cases, the proponents of male-only policies contended that the admission of women would somehow “alter” the nature of the institution; in both instances, the Court struck the classification down as insufficiently tailored because of their basis in “stereotypes” about “the way women are.”¹⁵⁷ As the foregoing analysis reveals, the more persuasive factors in those cases were the absence of evidence or common sense/inherent differences demonstrating the connection between femaleness and the overall nature of an institution, and the burden imposed on exceptional women where the basis for the policy was not grounded in an inherent difference.

Thus, if proponents of gender-based admissions policies could empirically demonstrate that males and females are dissimilarly situated in terms of their impact on a campus culture—or, in other words, that no male’s presence on campus would contribute to an environment where men are “in demand”¹⁵⁸—then a court might be more willing to accept that a preference for males will in fact further an interest in preventing a hookup culture. Similarly, if a proponent could successfully demonstrate through evidence that no male’s

¹⁵⁵ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

¹⁵⁶ 468 U.S. 609 (1984).

¹⁵⁷ *Virginia*, 518 U.S. at 542 (rejecting “[t]he notion that admission of women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school”); *Roberts*, 468 U.S. at 625 (rejecting Jaycees’ claim that admitting women to meetings would change the nature of the discussions held at meetings).

¹⁵⁸ See Case, *supra* note 5, at 1449–50 (defining “perfect proxy”).

presence on campus would reduce the school's ability to attract the most qualified applicants, this may be sufficient to establish that males and females are dissimilarly situated with respect to the proponent's interest.¹⁵⁹

As discussed above, evidence of dissimilarity with respect to an interest may be insufficient to establish that a gender-based classification is sufficiently tailored if a gender-based admissions policy burdens "exceptional" females. In the context of the interests a university is most likely to assert, such exceptional women would include those, if any, whose presence on campus could not (1) contribute to the creation of a social culture where men are in demand, or (2) inhibit the university's ability to attract applicants.¹⁶⁰

When the interest is framed as avoiding a social culture where males are in demand, the classification arguably imposes a burden on "exceptional" women who could not, by virtue of their sexual orientation, contribute to a culture where males are in demand.¹⁶¹ While an attraction to males may serve as a more perfect proxy than gender, it would be near impossible (and legally objectionable)¹⁶² for a university to accurately identify and grant preference to those women in the application process. Thus, a burden on exceptional members seems unavoidable when the interest centers on preserving the social environment.

Still, courts could accept that an interest in preventing a hookup culture addresses "inherent differences" between males and females, particularly if a proponent can demonstrate that biological factors, such as hormones and brain chemistry, are responsible for driving the behavior that occurs when one gender is in demand. In that case, the Court's First Amendment precedent supports, and its equal-protection cases do not foreclose, the possibility that a burden on exceptional members may not be fatal to a gender-based classification. Still, because the Court has yet to recognize an "inherent difference" unrelated to reproductive functions, questions remain over whether

¹⁵⁹ In addition to the challenges necessarily associated with demonstrating such a contention, it would be difficult to argue that a dissimilarity based on the impact that individual's presence has on the attractiveness of a university to other applicants falls within any of the categories of dissimilarities that the Court has previously recognized.

¹⁶⁰ See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that the state must demonstrate that preference for women would inhibit the state's ability to achieve its goals).

¹⁶¹ This does not assume that all women interested in men would in fact participate in a hookup culture. It only assumes that such women, by altering the gender ratio on campus, would foster an environment more conducive to such a culture by placing males in the minority.

¹⁶² See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down Colorado's Amendment Two because it discriminated on the basis of sexual orientation).

the different ways in which males and females both contribute to and are affected by a hookup culture fall within the Court's definition of "inherent differences." In one respect, courts could potentially find that gender-based admissions policies address the same type of inherent differences the Court has previously recognized. Alternatively, proponents may push courts to recognize that "inherent differences" encompass more than just reproductive differences, such that differences grounded in hormones and brain chemistry may suffice as evidence that males and females are dissimilarly situated.¹⁶³

Because an interest in attracting applicants is less easily framed as addressing "inherent" difference between males and females, courts evaluating such policies may very well require a "perfect proxy." A plausible argument exists that there would be no "exceptional" women, particularly if courts accept that all females, by their very admittance, pose a threat to the university's interest in attracting future applicants. In this respect, gender would serve as a perfect proxy for impact on a school's attractiveness to applicants. Thus, despite serving an interest unrelated to biological or inherent differences, a classification designed to preserve a university's ability to attract applicants could nevertheless satisfy equal-protection intermediate scrutiny.

CONCLUSION

One of the major difficulties facing lower courts and litigants in challenges to gender-based policies is the muddled state of gender-discrimination jurisprudence.¹⁶⁴ As this Comment demonstrates, the Supreme Court's gender-discrimination jurisprudence may be less murky than it seems at a surface level; the Court's commercial-speech decisions provide insight into the Court's analysis in reaching what appear to be contradictory decisions.

Just as the Court considers whether a commercial-speech restriction will directly and materially advance the government's interest, it analyzes whether, based on a dissimilarity between males and females, a gender-based classification will further the government's interest to a greater degree than a gender-neutral policy. While the Court seems to contradict itself with regard to the amount of evidence the proponent of a gender-based classification must

¹⁶³ See Williams, *supra* note 88, at 571 (discussing the emerging statistical evidence that hormones and brain physiology account for the differences between male and female learning and thinking patterns).

¹⁶⁴ Kingsbury, *supra* note 1.

present, this apparent contradiction can easily be explained by the sliding scale analysis the Court has employed in the First Amendment context; the more “common sense” (i.e., biologically based) dissimilarity, the less evidence the Court requires the proponent to present in demonstrating that its classification is substantially tailored.

Additionally, the Court’s apparent equivocation over the relationship between stereotype and evidence can be explained by analogy to the fourth *Central Hudson* prong’s overbreadth analysis. Rather than striking down any gender-based classification that generally affects more members of a gender group than is necessary to serve an interest, the Court only strikes down those classifications imposing a burden on exceptional members, just as it does when only considering whether a speech restriction burdens more speech than necessary under the fourth *Central Hudson* prong.

Finally, while the Court’s requirement of an “exceedingly persuasive justification” in recent equal-protection cases indicates that a heightened degree of scrutiny applies to all gender-based classifications, its First Amendment cases instruct that the proponent need not meet this higher burden when the asserted interest is unrelated to the justification for applying intermediate scrutiny in the first place. Consequently, a less-exacting version of intermediate scrutiny is still applicable to classifications serving an interest related to “inherent differences” between males and females. Because neither the Court’s equal-protection or First Amendment decisions under intermediate scrutiny offer any insight into what the Court views as “inherent differences,” the lingering question is whether a less-than-perfect proxy could ever be acceptable when the policy addresses biological differences unrelated to pregnancy and childbearing. Thus, while analogizing the Court’s equal-protection decisions to its First Amendment intermediate scrutiny framework may go a long way in guiding lower courts and litigants, only the Court itself can clarify this point. In the event that an equal-protection challenge to gender-based admissions policy reaches the Court, such a case would provide the Court with the perfect opportunity to provide the final bit of guidance necessary to place its equal-protection intermediate scrutiny jurisprudence back on solid ground.

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