

# “Gender Balancing” as Sex Discrimination in College Admissions

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*As women continue to apply to college in greater numbers than men and, on average, put forth stronger applications, many colleges have been engaging in “gender balancing” to ensure relatively even representation of the sexes on their campuses. This Note aims to call attention to the practice of gender balancing and situate it in the context of the historic exclusion of women from higher education. Preference for male applicants is an open secret in the admissions world, but it remains relatively unknown to the majority of students and scholars alike. Those who have addressed the issue have often framed it as “affirmative action for men.” This Note takes issue with this characterization and proposes reconceptualizing “gender balancing” for what it really is — sex discrimination and an unspoken cap on female enrollment. Further, this Note argues that the “affirmative action for men” framework is detrimental both to the conception of race-based affirmative action and to sex discrimination. Affirmative action attempts to counterbalance systemic educational inequalities and biased metrics that favor white, upper- and middle-class men. “Gender balancing,” on the other hand, finds no basis in either of the two rationales traditionally recognized by the Supreme Court as legitimate interests for affirmative action programs: remedying identified discrimination and promoting educational diversity. Gender balancing cannot be legitimately grounded in either of these justifications, and thus should not be characterized as affirmative action at all. Rather, it is a cap on the enrollment of female applicants, reminiscent of the racial and religious quotas of the past.*

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## INTRODUCTION

This Note addresses the open, but relatively unknown, practice of sex discrimination in undergraduate admissions. As women are applying to college in greater numbers and with higher grade point averages than men, a majority of selective liberal arts institutions are engaging in so-called “gender balancing” or “affirmative action for men.”<sup>1</sup> In order to maintain gender parity on their campuses, many colleges are actively preferencing male applicants by lowering their admissions standards.

The practice has generated sparse media coverage, a failed investigation by the U.S. Commission on Civil Rights, little scholarship, and even less case law. There is only one case, brought in the Southern District of Georgia, that has challenged the practice of favoring male applicants at a co-ed institution, but the sex discrimination issue was dropped on appeal.<sup>2</sup> The primary scholarship on this issue is by Gail Heriot,<sup>3</sup> one of the Commissioners involved in the failed civil rights investigation into gender bias in college admissions, who vocally opposed the investigation’s cancellation.<sup>4</sup> Heriot

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<sup>1</sup> See, e.g., Scott Jaschik, *Affirmative Action for Men*, INSIDE HIGHER ED (Mar. 27, 2006), <https://www.insidehighered.com/news/2006/03/27/admit>, archived at <https://perma.cc/8MKY-988M>; Rob Mank, *Men Far More Likely to Benefit From Affirmative Action in College Admissions*, CBS NEWS (Sept. 26, 2011), <http://www.cbsnews.com/news/men-far-more-likely-to-benefit-from-affirmative-action-in-college-admissions/>, archived at <https://perma.cc/3GAV-VCPK>.

<sup>2</sup> See generally *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 263 F.3d 1234, 1237 (11th Cir. 2001); *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).

<sup>3</sup> See generally Gail Heriot & Alison Somin, *Affirmative Action for Men? Strange Silences and Strange Bedfellows in the Public Debate over Discrimination Against Women in College Admissions*, 12 ENGAGE: J. FEDERALIST SOC’Y PRAC. GRPS. 14 (2011).

<sup>4</sup> U.S. COMM’N ON CIVIL RIGHTS, TRANSCRIPT OF BUSINESS MEETING 114 (Mar. 11, 2011), available at [http://www.usccr.gov/calendar/transcript/transcript\\_03-11-11ccr.pdf](http://www.usccr.gov/calendar/transcript/transcript_03-11-11ccr.pdf), archived at <https://perma.cc/V4F4-LTW4>.

characterizes gender balancing as “affirmative action for men,” and her opposition to the practice comes from her general opposition to affirmative action.<sup>5</sup> This Note argues Heriot’s approach to affirmative action mischaracterizes the problem with gender balancing and, if applied in court, will lead to potentially dangerous results.<sup>6</sup> The better approach is to decouple the sex discrimination problem from the harmful reasoning associated with Heriot’s theory of affirmative action.

Gender balancing should be dissociated from affirmative action for several reasons. First, preference for male applicants is not grounded in any of the traditional interests in affirmative action recognized by the Supreme Court. It does not aim to combat current or past discrimination and does not further any legitimate diversity interests. Rather, colleges are concerned that their institutions will not be as attractive to applicants if they enroll more than 60% women. This practice should be characterized as what it really is — a cap on female enrollment. Accordingly, this Note advances the theory that the practice of gender balancing is more akin to the racial and religious quotas of the past, where certain groups were admitted to colleges but only up to a certain threshold. Beyond a limited cap for minority enrollment, schools feared that the dominant white, Christian, male character of higher education would be threatened.<sup>7</sup> While women are no longer prohibited as a class from accessing higher education, there remains a fear of and resistance to the idea that women are accessing higher education in greater numbers than men.

Part I begins by contextualizing the discrimination against women in the college admissions process in the historic exclusion of women from higher education. This Part then examines the failed investigation of sex discrimination in college admissions by the U.S. Commission on Civil Rights. It looks at the media coverage leading up to the investigation, the circumstances surrounding its cancellation, and the diminished interest that has continued since.

Part II analyzes the legal framework for sex discrimination and for sex- and race-based affirmative action as it stands in the Court’s current jurisprudence. The arguments put forth in this Note highlight that supporting race-conscious admissions programs and opposing sex discrimination are entirely

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<sup>5</sup> See Heriot & Somin, *supra* note 3, at 17. Just as some opponents of affirmative action argue that minority applicants receiving a “bump” in the application process will fall behind, Heriot suggests that perhaps affirmative action for men is “similarly backfiring for male students accepting a preference — and that preferences are thus leading to fewer rather than more male students fulfilling their ambition[s] to become a physician, scientist, or engineer.” *Id.*

<sup>6</sup> See, e.g., Brief for Gail Heriot, Peter Kirsanow & Todd Gaziano as Amici Curiae Supporting Petitioners, 2011 WL 5007903, at \*4, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013). Heriot is a vehement opponent of affirmative action. In several articles and briefs, she has argued for the “mismatch theory,” or the idea that race-based affirmative action harms minority students because they are not as successful in elite colleges as compared to colleges where they supposedly “belong” based on their academic credentials. *Id.*

<sup>7</sup> Lani Guinier, *Admissions Rituals As Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 127 n.58 (2003).

consistent, given their contrasting rationales. Sex discrimination in college admissions is distinct from race-based affirmative action and should be addressed through its own, separate line of precedent for a number of important reasons. Part II also addresses possible avenues for bringing claims against private institutions under Title IX<sup>8</sup> and calls attention to the little-known exemption for private undergraduate admissions, arguing for its modification or removal.

Raising cultural awareness about sex discrimination in college admissions is an important step in galvanizing legal avenues for change. Part III proposes several possible approaches. First, the U.S. Commission on Civil Rights should initiate a new civil rights investigation, which would have the potential to stimulate legislation and litigation in the courts. Second, civil rights organizations should bring litigation to create distinct precedent for sex discrimination in admissions. In these cases, lawyers and the media should frame the issue as a cap on female enrollment and decouple it from affirmative action suits challenging race-based policies. Finally, this Note proposes removing the Title IX exemption for private undergraduate admissions so that private universities may also be held accountable and have an incentive to change their practices. It also aims to dispel any concerns surrounding the removal of this exemption, particularly around the effects it may have on private women's colleges.

## I. HISTORY OF SEX DISCRIMINATION IN HIGHER EDUCATION

### A. *Women in Higher Education: An Overview*

Harvard University opened its doors in 1636 as the first college in the United States. It was not until Oberlin College admitted its first class of women in 1837, over two centuries later, that women gained admission to an institution of higher learning in this country.<sup>9</sup> Shortly thereafter, Mount Holyoke, then called Mount Holyoke Female Seminary, was founded in 1837 as the first of the Seven Sisters Colleges.<sup>10</sup> However, coeducational colleges were still far from the status quo, and women's colleges continued to spring up throughout the nineteenth century in response to women's continued exclusion from higher education and as counterparts to the elite institutions for men.<sup>11</sup> Despite the increase in the number of women attending college, the

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<sup>8</sup> 20 U.S.C. § 1681(a) (2012) (prohibiting discrimination on the basis of sex in educational programs and activities receiving federal funds).

<sup>9</sup> Patricia Albjerg Graham, *Expansion and Exclusion: A History of Women in Higher Education*, 3 SIGNS 759, 764 (1978).

<sup>10</sup> *History*, MOUNT HOLYOKE, available at <https://www.mtholyoke.edu/about/history>, archived at <https://perma.cc/P8SX-JWN7> (last visited Jan. 24, 2016).

<sup>11</sup> Vassar in 1861; Smith and Wellesley in 1875; Radcliffe in 1879; Bryn Mawr in 1885; Barnard in 1889. See *The Seven Sisters*, MOUNT HOLYOKE, [https://www.mtholyoke.edu/about/history/seven\\_sisters](https://www.mtholyoke.edu/about/history/seven_sisters), archived at <https://perma.cc/MB2Z-TMP5> (last visited Jan. 24, 2015).

most prestigious institutions resisted the longest, both in admitting female students and hiring female faculty.<sup>12</sup>

Women were excluded from education for a number of reasons reflecting societal views about a woman's place in the home, familial duties, and a fear of her economic independence.<sup>13</sup> Even medical professionals joined the discourse. Most notably, Dr. Edward H. Clarke of Harvard Medical School denounced higher education for women as a "crime before God and humanity, that physiology protests against," claiming it would cause infertility.<sup>14</sup>

Despite the growing presence of women in post-secondary education, antiquated notions of a woman's role in society were slow to change. In the years following their founding, women's colleges slowly began to move away from "perpetuating nineteenth-century gender norms" to more academic and intellectual missions aimed at providing equal opportunities for men and women.<sup>15</sup> However, opportunities remained limited and imbalanced for women seeking a college education. Many colleges responded to the growing number of female and minority applicants by instituting admissions quotas that capped the number of spots for these disfavored groups.<sup>16</sup> Even for those women able to obtain a college education, the jobs available to them in the nineteenth century were largely limited to domestic work or factories.<sup>17</sup> Women were still almost entirely excluded from professional employment, with the exception of teaching.<sup>18</sup>

The decades following World War I saw a large increase in the number of women and people of color entering college and is often viewed as a flourishing time for diversity in higher education.<sup>19</sup> When men returned from service in World War II, however, women were pushed out of the pro-

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These colleges, along with Mount Holyoke, became known as the "Seven Sisters" colleges and were seen as the female counterparts to the all male Ivy League institutions. *Id.*

<sup>12</sup> Graham, *supra* note 9, at 765–67. Princeton and Yale did not accept women until 1969. *Id.* Harvard and Radcliffe began a gradual merger in 1977. *Id.* No elite institution hired women as full time faculty until after World War II. *Id.*

<sup>13</sup> See Graham, *supra* note 9, at 767. The independence of college threatened the canons of piety and purity central to the nineteenth and early twentieth century expectations of womanhood, and threatened women's subordinated position in society. *Id.*

<sup>14</sup> United States v. Virginia, 518 U.S. 515, 536 n.9 (1996) (quoting EDWARD H. CLARKE, SEX IN EDUCATION 127 (1873)).

<sup>15</sup> Katherine Kraschel, *Trans-Cending Space in Women's Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 HARV. J.L. & GENDER 463, 474 (2012).

<sup>16</sup> See, e.g., Guinier, *supra* note 7, at 127. Colleges feared a "threat to the character of their institutions." *Id.* at 127 n.58. Namely, the threat was that colleges would no longer be majority white, Christian, and male. These quotas primarily affected women, Jews, and blacks, though other minorities were also negatively impacted. *Id.* at 127. For example, Ivy League institutions perceived a "Jewish problem" when Jewish enrollment began to steadily increase, reaching upwards of 40% at Columbia, and therefore began to cap and reduce the number of Jewish students admitted. *Id.* at n.58.

<sup>17</sup> See *Women's History in America*, WOMEN'S INT'L CTR. (1995), <http://www.wic.org/misc/history.htm>, archived at <https://perma.cc/229R-A8T4> (last visited Oct. 29, 2015).

<sup>18</sup> *Id.*

<sup>19</sup> See Kraschel, *supra* note 15, at 474–75.

fessional jobs they had recently entered.<sup>20</sup> Despite the advancements during this time, the educational barriers for women had far from disappeared.<sup>21</sup> Women were entering college at rates higher than ever before, yet caps at many institutions remained. In Virginia's public university system, for example, 21,000 women were rejected for admission in 1960, while not a single man was excluded.<sup>22</sup> Barriers also persisted for women entering management roles and certain professional disciplines.<sup>23</sup> As late as the 1960s, a female reporter for the *New York Times* wrote, "After four years studying everything from ancient art to modern psychology, the average college girl views her future through a wedding band."<sup>24</sup>

In spite of persisting obstacles, women's enrollment in college steadily increased throughout the twentieth century, finally comprising just over 50% of college enrollment in 1979.<sup>25</sup> The trend has continued. In 2013, women made up 56% of total undergraduate enrollment in the United States.<sup>26</sup> A 2014 study by the Bureau of Labor Statistics indicated 70% of women had attempted some college or received a bachelor's degree, compared to 61% of men.<sup>27</sup> Women are more likely to finish their degree once enrolled,<sup>28</sup> graduating at higher rates than men at both four-year and two-year institutions.<sup>29</sup> They also outperform men, finishing with higher grade point averages and

<sup>20</sup> JEREMY BRECHER & TIM COSTELLO, *COMMON SENSE FOR HARD TIMES* 177 (1979). The percent of women in the labor force increased nearly 50% between 1940 and 1944. *Id.* A poll toward the end of World War II indicated roughly two thirds of women wanted to keep their jobs, but many quit or were pushed out when men returned from the war. *Id.*

<sup>21</sup> *See, e.g.,* Guinier, *supra* note 7, at 127–28 ("During the 1950s and 1960s . . . legal challenges, social movements, and a participatory conception of individual rights helped pressure these institutions of higher education to open their doors — albeit only a crack — to those who had been shut out.").

<sup>22</sup> Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV. 473, 474 (2007).

<sup>23</sup> *See* Judith Warner, *Fact Sheet: The Women's Leadership Gap*, CTR. FOR AMERICAN PROGRESS (Mar. 7, 2014), <https://www.americanprogress.org/issues/women/report/2014/03/07/85457/fact-sheet-the-womens-leadership-gap>, archived at <https://perma.cc/V6CX-FMT8>. Women still remain severely underrepresented in management roles, especially women of color. *Id.*

<sup>24</sup> Graham, *supra* note 9, at 770 (quoting Marilyn Bender, *College Girl Often Sees No Future But Marriage*, N.Y. TIMES (Mar. 26, 1962)).

<sup>25</sup> Female enrollment in college in 1979 was 50.9%. U.S. Dep.'t of Educ., *Table 303.10*, NAT'L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_303.10.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_303.10.asp), archived at <https://perma.cc/PMK3-6UVP> (last visited Mar. 28, 2016).

<sup>26</sup> U.S. Dep.'t of Educ., *Undergraduate Enrollment*, NAT'L CTR. FOR EDUC. STATISTICS (May 2015), [http://nces.ed.gov/programs/coe/indicator\\_cha.asp](http://nces.ed.gov/programs/coe/indicator_cha.asp), archived at <https://perma.cc/RQA5-UXZU>.

<sup>27</sup> DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *AMERICA'S YOUNG ADULTS AT 27: LABOR MARKET ACTIVITY, EDUCATION, AND HOUSEHOLD COMPOSITION: RESULTS FROM A LONGITUDINAL SURVEY SUMMARY* (Mar. 26, 2014), <http://www.bls.gov/news.release/nlsyth.nr0.htm>, archived at <https://perma.cc/3FUF-UUZZ>.

<sup>28</sup> *Id.*

<sup>29</sup> In 2014, women graduated at higher rates than men at all public and private four-year and two-year institutions, with the exception of private, for-profit four-year schools. U.S. DEP'T OF EDUC., INST. OF THE EDUC. SCIS., *INSTITUTIONAL RETENTION AND GRADUATION RATES FOR UNDERGRADUATE STUDENTS* (2015), available at [https://nces.ed.gov/programs/coe/pdf/coe\\_cva.pdf](https://nces.ed.gov/programs/coe/pdf/coe_cva.pdf), archived at <https://perma.cc/9TDQ-D55P>.

receiving more honors.<sup>30</sup> According to the National Center for Education Statistics (NCES), the increasing gender gap is showing no signs of slowing down. By 2024, NCES projects female college enrollment will increase by 15%, while male enrollment is only projected to increase by 9%.<sup>31</sup>

Not only are women applying to and enrolling in post-secondary education in greater numbers than men, but they are also out-performing men in high school. Data indicate that, on average, female students graduate with a higher number of credits,<sup>32</sup> a more rigorous curriculum,<sup>33</sup> and higher grade point averages.<sup>34</sup> As most admissions staff at selective colleges advise, high school grades and curriculum rigor are the two most important factors in a student’s college application.<sup>35</sup>

A student’s standardized test scores are typically the third most important criteria to admissions offices.<sup>36</sup> Men and women perform similarly well on standardized tests, with men slightly outperforming women in the mathematics sections and women earning marginally higher scores in the writing sections.<sup>37</sup> In 2011, male students earned an average combined score of 1513 on the SAT, and female students earned an average of 1491.<sup>38</sup> ACT results are similar, with men slightly in the lead. In 2010, men averaged a 21.2 composite score and women a 20.9.<sup>39</sup> While men perform slightly better on the SAT and the ACT, there is general consensus at most top colleges that, when academic factors are combined, women put forth the stronger applications.<sup>40</sup> In a 2011 survey by the National Association of College Ad-

<sup>30</sup> Tamar Lewin, *At Colleges, Women Are Leaving Men in the Dust*, N.Y. TIMES (Jul. 9, 2006), <http://www.nytimes.com/2006/07/09/education/09college.html>.

<sup>31</sup> U.S. Dep’t of Educ., *supra* note 26.

<sup>32</sup> U.S. DEP’T OF EDUC., INST. OF THE EDUC. SCIS., NAT’L CTR. FOR EDUC. STATISTICS, NCES 2011-462, THE NATION’S REPORT CARD: AMERICA’S HIGH SCHOOL GRADUATES 24 (2009), available at <http://nces.ed.gov/nationsreportcard/pdf/studies/2011462.pdf>, archived at <https://perma.cc/ND9J-5AE7>.

<sup>33</sup> *Id.* at 26. In 2009, 14% of female graduates completed a rigorous curriculum, compared to 12% of males. *Id.* 49% of female graduates completed a midlevel curriculum, compared to 43% of males. *Id.*

<sup>34</sup> *Id.* at 28. In 2009, female students graduated with an average GPA of 3.10, compared to male students’ average of 2.90. *Id.*

<sup>35</sup> *Factors in the Admissions Decision*, THE NATIONAL ASSOCIATION FOR COLLEGE ADMISSIONS COUNSELING (2011), <http://www.nacacnet.org/studentinfo/articles/Pages/Factors-in-the-Admission-Decision.aspx>, archived at <https://perma.cc/P772-RWGZ>. Grades in college prep courses were rated the most important factor, with 84.3% of admissions offices surveyed categorizing grades as having “considerable importance” in the admissions decision. Strength of curriculum was the second highest factor. *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Higher Education: Gaps in Access and Persistence Study*, NATIONAL CENTER FOR EDUCATION STATISTICS (2011), [http://nces.ed.gov/pubs2012/2012046/figures/figure\\_24-2.asp](http://nces.ed.gov/pubs2012/2012046/figures/figure_24-2.asp), archived at <https://perma.cc/RK8M-M5F8>.

<sup>38</sup> *Id.*

<sup>39</sup> *Table 115*, NATIONAL CENTER FOR EDUCATION STATISTICS, [https://nces.ed.gov/programs/digest/d10/tables/dt10\\_155.asp](https://nces.ed.gov/programs/digest/d10/tables/dt10_155.asp), archived at <https://perma.cc/YHG4-95BJ> (last visited Mar. 28, 2016).

<sup>40</sup> See, e.g., Jennifer Delahunty Britz, *To All the Girls I’ve Rejected*, N.Y. TIMES (Mar. 23, 2006), <http://www.nytimes.com/2006/03/23/opinion/23britz.html>. Although this Note aims to criticize admissions practices within the current system used to evaluate merit, it also acknowl-

missions Counseling, the majority of colleges viewed grades and strength of curriculum as considerably more important than standardized test scores.<sup>41</sup>

These realities leave admissions offices with a choice: leave gender out of the equation and risk enrolling a disproportionately female class, or lower the bar of admissibility for male applicants.

### B. *The Response: A Steeper Standard for Women*

Faced with a larger number of applications from female students that are, on average, stronger than those of their male counterparts, colleges and universities across the country have engaged in “gender balancing” by instituting an unspoken policy capping female enrollment at 50–60% of the student body. The gender imbalance in college applications is more frequently found in selective liberal arts institutions, but also affects large public universities,<sup>42</sup> causing many types of institutions to alter their admissions practices. In their effort to maintain a relatively balanced gender distribution on their campuses, admissions offices are preferencing weaker male applicants over their more-qualified female counterparts. This preference for men is an open secret in college admissions.<sup>43</sup> In the past decade or so, there has been some media coverage of the practice, but it remains a widely unrecognized problem. Moreover, it has received limited legal attention.

#### 1. *Media Attention*

Conversations surrounding gender bias in college admissions began to surface around the turn of the twenty-first century. In 2000, *Johnson v. Board of Regents of the University System of Georgia*<sup>44</sup> became the first (and still only) federal challenge to gender-based “affirmative action” for men.<sup>45</sup> The plaintiffs, three white female applicants, challenged both gender- and raced-based admissions policies, arguing that the University of Georgia violated Title VI<sup>46</sup> and Title IX<sup>47</sup> by awarding an additional 0.5 points to men

edges those metrics are disputable for many reasons; most notably, that standardized test scores are closely correlated with socioeconomic status and tend to be a very poor predictor of college performance. See LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY* 20–21 (2015) (“The SAT’s most reliable value is its proxy for wealth.”).

<sup>41</sup> *Factors in the Admissions Decision*, *supra* note 35.

<sup>42</sup> See Mary Beth Marklein, *Colleges Remain Cautious in Handling Gender Diversity*, USA TODAY (Oct. 19, 2005), [http://usatoday30.usatoday.com/news/education/2005-10-19-male-college-side\\_x.htm](http://usatoday30.usatoday.com/news/education/2005-10-19-male-college-side_x.htm), archived at <https://perma.cc/WZ54-SJ3C>.

<sup>43</sup> See Richard Whitmire, *Soon-to-Be Open Secret*, INSIDE HIGHER ED (Dec. 22, 2009), <https://www.insidehighered.com/views/2009/12/22/whitmire>, archived at <https://perma.cc/R6LW-P8JR>.

<sup>44</sup> 106 F. Supp. 2d 1362 (S.D. Ga. 2000).

<sup>45</sup> See Heriot & Simon, *supra* note 3, at 14. Heriot and Simon were not aware of any other such cases at the time of their article in 2011, *id.*, nor has research for this Note produced any since that time.

<sup>46</sup> 42 U.S.C. § 2000(d) (2012) (prohibiting discrimination on the basis of race, color, or national origin in any program or activity receiving federal assistance).



and 0.25 points to non-whites in each applicant’s admissions score.<sup>48</sup> The district court found in their favor on both accounts, but only the race issue went up on appeal.<sup>49</sup> The University of Georgia dropped its practice of awarding more points to male applicants in the admissions scoring process after the plaintiffs filed their suit.<sup>50</sup> However, the practice of preferencing male applicants remains alive and well at many other universities, especially elite private colleges.<sup>51</sup> The lack of a numerical point system just makes it more difficult to identify.

The issue resurfaced in 2006 when *The New York Times* published an op-ed by Jennifer Delahunty Britz, the Dean of Admissions at Kenyon College. In an open letter titled “To All the Girls I’ve Rejected,” Delahunty candidly describes the “stiffer” admissions standards for women as compared to men.<sup>52</sup> For many admissions officers, the scene she paints is a familiar one: the staff sits around a conference table as one admissions officer presents the student’s file. In this case, the applicant is a 17-year-old girl with six Advanced Placement courses, over 300 hours of community service, a laundry list of extracurricular leadership positions, but mediocre test scores.<sup>53</sup> For this particular applicant, the committee yields a positive result.<sup>54</sup> Delahunty and her team decide to “swallow the middling test scores” and admit her to the class, knowing full well “[h]ad she been a male, there would have been little, if any, hesitation to admit.”<sup>55</sup>

Delahunty’s letter has an air of remorse. She describes being a parent herself to a daughter going through the college application process while, at the same time, sending waitlist offers to a pool of similarly talented, majority-female applicants, fully aware of the more rigorous standards they face.<sup>56</sup> However, Delahunty stops short of taking responsibility for her part in this outcome. Nor does she propose that colleges change their practices. Rather, she acknowledges the goal of maintaining a gender-balanced campus is rooted in what she seems to perceive as a genuine concern.<sup>57</sup> Many admissions officers believe schools with more than 60% women become less at-

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<sup>47</sup> 20 U.S.C. § 1681(a) (2012) (prohibiting sex discrimination in educational programs and activities receiving federal assistance).

<sup>48</sup> *Johnson*, 106 F. Supp. at 1365.

<sup>49</sup> *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 263 F.3d 1234, 1237 (11th Cir. 2001).

<sup>50</sup> Mark Clayton, *Admissions Officers Walk a Fine Line in Gender-Balancing Act*, THE CHRISTIAN SCIENCE MONITOR (May 22, 2001), <http://www.csmonitor.com/2001/0522/p11s1.html>, archived at <https://perma.cc/N8YP-3UV4>.

<sup>51</sup> See, e.g., Jon Birger, *Why Getting into Elite Colleges Is Harder for Women*, WASH. POST (Jul. 30, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/07/30/achieving-perfect-gender-balance-on-campus-isnt-that-important-ending-private-colleges-affirmative-action-for-men-is>, archived at <https://perma.cc/X3VR-HMPF>.

<sup>52</sup> Delahunty, *supra* note 40.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

tractive to both male and female applicants.<sup>58</sup> She concludes: “I admire the brilliant successes of our daughters. To parents and the students getting thin envelopes, I apologize for the demographic realities.”<sup>59</sup> In sum, Delahunty does not seem to enjoy denying more qualified women, but she perceives attracting prospective applicants with a gender-balanced enrollment as a legitimate interest she and her staff have the right to pursue.

Henry Broaddus, the Dean of Admissions at the College of William and Mary, is even less apologetic. In 2007, addressing the uneven admissions practices for men and women at the college, he made the now oft-quoted statement, “We are, after all, the College of William and Mary, not the college of Mary and Mary.”<sup>60</sup> He expounded on these statements (and the backlash they received) in a 2009 op-ed for *The Washington Post*, arguing that college-bound women prefer co-ed institutions and are turned off by overwhelmingly female campuses.<sup>61</sup> He compared the practice to the reverse situation at the Massachusetts Institute of Technology, where women are admitted at higher rates than men, given their lower representation in the applicant pool.<sup>62</sup> Regardless of the numbers, he argues, colleges have a “legitimate interest” in maintaining a gender balance on their campuses.<sup>63</sup>

The gender disparity in admissions at William and Mary remains. For the class of 2018, 25% of female applicants were accepted compared to over 40% of men.<sup>64</sup> However, Broaddus’s justifications are mistaken on a number of grounds. First, his support for the claim that applicants will be turned off by “overwhelming female campuses” is largely anecdotal.<sup>65</sup> Second, even if true, this perception does not justify gender-biased admissions practices. The traditional and constitutionally acceptable justifications for affirmative action do not support discriminatory efforts to maintain a campus that is 50% male, or any rigid quota for that matter,<sup>66</sup> and the Court is unlikely to

<sup>58</sup> Delahunty describes the industry fear of the 60% “tipping point” for female enrollment. *Id.* Grasgreen, writing for INSIDE HIGHER ED, similarly noted: “A 60–40 percentage is generally considered dangerous ground.” Allie Grasgreen, *Worries Over a 2-1 Ratio*, INSIDE HIGHER ED (Sept. 24, 2010), <https://www.insidehighered.com/news/2010/09/24/charleston>, archived at <https://perma.cc/4HKP-HADU>. An associate director at the American Association of Collegiate Registrars and Admissions Officers, Barmak Nassirian, observed, “[60-40 is] already too much of a gap.” *Id.*

<sup>59</sup> Delahunty, *supra* note 40.

<sup>60</sup> Henry Broaddus, *Gender and College Admissions: William and Mary Dean Talks Back*, WASH. POST (Nov. 17, 2009), <http://voices.washingtonpost.com/answer-sheet/gender-and-college-admissions.html>, archived at <https://perma.cc/N3MM-WJDJ>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Devin Logan, *Class of 2018 Sees 12 Point Gap In Acceptance Rates Between Gender*, THE FLAT HAT (Oct. 27, 2014), <http://flathatnews.com/2014/10/27/class-of-2018-sees-12-point-gap-in-acceptance-rates-between-genders>, archived at <https://perma.cc/2DJ4-FTFQ>.

<sup>65</sup> See Broaddus, *supra* note 60.

<sup>66</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (“[U]niversities cannot establish quotas for members of certain racial groups.”).

recognize a legally protectable interest in remaining attractive to prospective applicants.

## 2. *Civil Rights Investigation*

The most recent promise of legal accountability came in 2009 when the U.S. Commission on Civil Rights announced it would investigate nineteen schools, mostly within a 100-mile radius of Washington, D.C., for evidence of sex discrimination in undergraduate admissions practices.<sup>67</sup> The investigation would have documented and publicized the realities known in the admissions world. As Richard Whitmire wrote for *Inside Higher Ed*, "Among higher education insiders, there's not much mystery to the investigation: favoring men is an open secret at private, four-year colleges, where there's no legal penalty for helping men."<sup>68</sup> While the commission did not have the authority to take corrective action against the schools, the investigation would have drawn attention to the inequitable practices, potentially prompting action by Congress or the courts.<sup>69</sup>

However, no one was able to witness the benefits that the investigation's results could have produced. The commission quietly suspended its investigation early in the spring of 2011, citing data collection problems.<sup>70</sup> Gail Heriot, a Commissioner and law professor at the University of San Diego, perceived the problems to be political rather than empirical.<sup>71</sup> Heriot has been critical of affirmative action for racial minorities in the past<sup>72</sup> and seems to perceive the investigation's suspension as an effort by Democrats to preserve the practice.<sup>73</sup> While it is unclear whether other Commissioners thought the investigation on gender bias would negatively impact race-based affirmative action, the meeting transcripts seem to indicate the concerns about data collection were sincere.

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<sup>67</sup> Ben Terris, *Civil-Rights Panel Names 19 Colleges It Will Investigate for Gender Bias in Admissions*, THE CHRONICLE OF HIGHER EDUCATION (Dec. 16, 2009), <http://chronicle.com/article/Civil-Rights-Panel-Names-19/62613>, archived at <https://perma.cc/Y9WH-BM4T>. The subpoenaed institutions were: The University of Richmond, Georgetown University, Johns Hopkins University, Lincoln University, Shepard University, Virginia Union University, Gettysburg College, Goldey-Beacom College, Goucher College, Messiah College, Washington College, the Catholic University of America, Loyola University Maryland, Shippensburg University of Pennsylvania, York College of Pennsylvania, the University of Delaware, and the Baltimore County and Eastern Shore campuses of the University of Maryland. *Id.*

<sup>68</sup> Whitmire, *supra* note 43.

<sup>69</sup> See Terris, *supra* note 67.

<sup>70</sup> See Nancy Griesemer, *Civil Rights Commission Suspends Investigation into Admissions Discrimination*, EXAMINER (Mar. 16, 2011), <http://www.examiner.com/article/civil-rights-com-mission-suspends-investigation-into-admissions-discrimination>, archived at <https://perma.cc/QB8J-JLFY>.

<sup>71</sup> See Heriot & Somin, *supra* note 3, at 14; Daniel de Vise, *Feds End Probe of College Gender Bias*, WASH. POST (Mar. 16, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/16/AR2011031604464.html>, archived at <https://perma.cc/KH4R-7YJL>.

<sup>72</sup> See Gail Heriot, *Affirmative Action Backfires*, WALL ST. J. (Aug. 24, 2007), <http://www.wsj.com/articles/SB118792252575507571>.

<sup>73</sup> See Heriot & Somin, *supra* note 3, at 15.

Commissioner Dina Titus, U.S. Representative for Nevada's first congressional district, led the arguments to suspend the investigation, but emphasized that she perceived sex discrimination to be a real problem in college admissions in need of redress.<sup>74</sup> The transcript from the March 11, 2011, Commission meeting indicated three schools were holding out on providing the requested data, but that data compilation was "mostly complete" from fourteen schools and the Commission had completed analysis on eleven of them.<sup>75</sup> Despite being near completion, several commissioners expressed concerns about the quality and accuracy of the data. Commissioner Titus moved to suspend the investigation.<sup>76</sup> Heriot opposed the motion, calling it a "travesty."<sup>77</sup> Many of the details of the statistical flaws were not disclosed in order to maintain a public session, so we will probably never have the full picture of the Commission's concerns. However, Titus pointed to inconsistencies in data quality among the schools, missing or insufficient data, and the potential of misleading results.<sup>78</sup> "I'd be the last person to want to bury a study on sex discrimination. . . . I think it is very important. I think it still exists out there."<sup>79</sup> Ultimately, the Commission suspended the investigation by a 4–3 vote.<sup>80</sup>

### 3. *Continued Momentum?*

Since the collapse of the investigation, media coverage of sex discrimination in college admissions has been sparse and the issue has gained little traction with the public or in courts. In 2012, the *Brown Daily Herald* published an article highlighting the gender disparity in Brown University's most recent admissions cycle.<sup>81</sup> Over the past eight years, women were consistently admitted at lower rates than men, with the difference in acceptance rates between women and men fluctuating between 2.5% and 5.2%.<sup>82</sup> In line with sentiments from previous coverage of this issue, the article seems to express that not much could be done — that is, "[u]nless males can get their act together and be as mature as females," said Bev Taylor, founder of Ivy Coach, a private admissions coaching business.<sup>83</sup> The attitude that gender balancing is legitimized by the mere fact that girls are succeeding academically reinforces the notion that there must be a problem with our educational system if boys are underperforming as compared to girls. This theory of a

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<sup>74</sup> U.S. COMM'N ON CIVIL RIGHTS, *supra* note 4, at 112–16.

<sup>75</sup> *Id.* at 112.

<sup>76</sup> *Id.* at 114.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 112–14.

<sup>79</sup> *Id.* at 122.

<sup>80</sup> *Id.* at 125–26.

<sup>81</sup> See David Chung, *Female Applicants Face Lower Acceptance Rates*, THE BROWN DAILY HERALD (Apr. 26, 2012), <http://www.browndailyherald.com/2012/04/26/female-applicants-face-lower-acceptance-rates>, archived at <https://perma.cc/93CH-QCY9>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

“boys crisis” is highly criticized, however, as several studies have shown boys are graduating high school at comparable rates to girls, retain advantages on college entrance exams, and have greater opportunities for employment.<sup>84</sup>

The endurance of the sentiment that our educational system must be failing boys if girls are succeeding, despite lacking factual support, confirms that, while women have made enormous strides in their efforts for equal access to higher education, their efforts have hit a wall. Women may comprise up to (roughly) 50% of degree-seekers, but if their enrollment grows any larger, society perceives a problem. This outlook sends girls the message that, if they are outperforming boys, our education system must be failing because it is not adequately catering to the learning needs of male students. This glass ceiling, reminiscent of old quota systems for racial and religious minorities, keeps women from gaining truly equal access to higher education. Old quota systems allowed disfavored groups in, but only up to a certain threshold. In the 1920s, schools feared what they characterized as the “Jewish problem,”<sup>85</sup> and began capping enrollment for Jews, as well as women and other minority applicants.<sup>86</sup> Similarly, schools are now motivated by that same fear of a threat to the character of their institutions when the white, Christian, male majority is at risk of being out-numbered or outperformed by women. It is conceivable that groups historically excluded from higher education, especially those that now have access to economic power, can eventually become the majority of participants in higher education. Equal treatment does not involve capping their enrollment once they reach equal representation, but evaluating them based on equal standards.

Despite the scare of a federal investigation, discriminatory practices continue. In 2014, *The Washington Post* conducted a study of 128 colleges and universities that admit less than 35% of their applicants.<sup>87</sup> Of those schools, 48 admitted women at higher rates than men, 16 admitted men and women at equal rates, and 64 admitted men at a higher rate than women.<sup>88</sup>

Ideas about gender discrimination in undergraduate admissions have been publicly circulating now for about a decade. The efforts to open the public’s eyes to this widespread practice, however, have largely fallen flat. The lack of movement-building around this issue likely arises, at least in part, from how it is being framed. Affirmative action supporters may per-

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<sup>84</sup> See Christianne Corbett, et. al., *Where the Girls Are: The Facts About Gender Equity in Education*, AM. ASS’N OF UNIV. WOMEN, 8–9 (2008), available at <http://www.aauw.org/files/2013/02/Where-the-Girls-Are-The-Facts-About-Gender-Equity-in-Education.pdf>, archived at <https://perma.cc/P4FT-4AYX>.

<sup>85</sup> Guinier, *supra* note 40, at 14–15.

<sup>86</sup> Guinier, *supra* note 7, at 127.

<sup>87</sup> Nick Anderson, *The Gender Factor in College Admissions: Do Men or Women Have an Edge?*, WASH. POST (Mar. 26, 2014), [https://www.washingtonpost.com/local/education/the-gender-factor-in-college-admissions/2014/03/26/4996e988-b4e6-11e3-8020-b2d790b3c9e1\\_story.html](https://www.washingtonpost.com/local/education/the-gender-factor-in-college-admissions/2014/03/26/4996e988-b4e6-11e3-8020-b2d790b3c9e1_story.html), archived at <https://perma.cc/7CGG-L3QC>.

<sup>88</sup> *Id.*

ceive no urgency to act, or may be fearful to act, when gender balancing is couched in a term that, for most supporters, implies considerations of fairness, diversity, and systemic or historic discrimination. In a 2015 article for *Vox*, Libby Nelson astutely characterizes this labeling problem:

“Gender preferences in college admissions are frequently described as affirmative action for men. But that’s not really accurate — at least not the way affirmative action works for other groups. What colleges really have is a quota system for women.”<sup>89</sup>

As Nelson identifies, preference for male applicants is not an affirmative action issue because male applicants, particularly *white* male applicants, are not a historically disadvantaged group. To the contrary, white men have had access to higher education since the beginning of its existence. Lowering admissions standards in this context is not set against a backdrop of systemic oppression and limited opportunity. Gendered admissions practices represent a cap on female applicants, not a stopgap for counterbalancing the effects of an education system failing to support boys.

Further, interests in maintaining gender parity are not born of a genuine commitment to diversity. No genuine claims have been made that men are becoming isolated or inadequately represented, or that they are often diminished to acting as the sole representative for their point of view.<sup>90</sup> Rather, schools desire to promote their own self-interest in remaining attractive to prospective applicants. Perhaps the desirability of a college does drop when women comprise the majority of students, or perhaps this is just an irrational fear on the part of the admissions offices. Regardless, either possibility is immaterial to the discussion. Perceived attractiveness of a campus is not a sufficient legal justification for discrimination, and *post hoc* rationales about interests in diversity will not pass muster. The success of a movement to end sex discrimination in college admissions depends on bringing these realities to light. It requires journalists and litigators alike to drop the “affirmative action for men” language and situate current sex discrimination in the context of historic caps on women and minorities in higher education. Until then, public concern will likely remain stagnant, as media coverage largely continues to characterize sex discrimination as a legitimate use of affirmative action.

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<sup>89</sup> Libby Nelson, *Discrimination Against Women Is a Real Problem on College Admissions*, *Vox* (Feb. 17, 2015), <http://www.vox.com/2015/2/17/8050259/discrimination-against-women-is-a-real-problem-in-college-admissions>, archived at <https://perma.cc/YTW2-8W8Q>.

<sup>90</sup> Respondents in *Grutter* advocated for accepting a “critical mass” of minority students such that they did not feel isolated or like a spokesperson for their race in the classroom. *Grutter v. Bollinger*, 539 U.S. 306, 380 (2003) (Rehnquist, J., dissenting).

## II. LEGAL FRAMEWORK FOR DISCRIMINATION IN COLLEGE ADMISSIONS

There are several different avenues through which litigants can challenge sex discrimination in college admissions. Because public university admissions decisions constitute state action, discrimination claims brought by students at public schools are subject to constitutional analysis. Students at private universities, however, must find a statutory basis for their claims. Section A examines the Equal Protection doctrine as it has developed in the context of sex discrimination, particularly in higher education, and race-based affirmative action. Section B addresses claims made under Title IX, the most comprehensive statutory protection for sex discrimination by private actors. However, Title IX exempts private undergraduate admissions from the scope of its application, leaving a large hole in the ability to litigate cases against "gender balancing" at private universities.

### A. *Constitutional Claims*

Under the state action doctrine,<sup>91</sup> students at public universities may bring constitutional claims under the Equal Protection Clause of the Fourteenth Amendment<sup>92</sup> for discriminatory admissions practices.<sup>93</sup> While there is precedent regarding the complete exclusion of women and men from institutions of higher learning, the Supreme Court has never addressed the issue of "gender balancing" or sex discrimination in the context of admissions at co-educational institutions. If challenges to gender balancing are framed as caps on female enrollment, the violation of Equal Protection becomes clear even under the Court's intermediate level scrutiny for sex classifications. Furthermore, there is no conflict in supporting race-conscious admissions programs and challenging sex discrimination. This is because the efforts to boost the applications of male students do not share the same goals as the affirmative action practices aimed at benefiting students of underrepresented races, ethnicities, and socioeconomic statuses. Schools *do* have a legitimate interest in maintaining the latter policies for a number of important reasons recognized by the Court, described below. However, these interests are noticeably absent in so-called "affirmative action for men."

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<sup>91</sup> See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be that of the State.") (quoting *Blum v. Yaretsky*, 457 U.S. 911, 1004 (1982)).

<sup>92</sup> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

<sup>93</sup> See, e.g., *Grutter*, 539 U.S. 306.

*1. Sex Discrimination Doctrine and College Admissions*

The Supreme Court has yet to consider an “affirmative action” policy on the basis of sex at a coeducational college. Decisions from lower courts are equally scarce.<sup>94</sup> That said, the Court’s sex and race discrimination jurisprudence, especially in the college admissions context, sheds light on how courts might address the problem of gender balancing.

While it is not always clear what level of scrutiny the Court is applying in sex discrimination cases, it is apparent that classifications based on sex require a level of scrutiny more exacting than rational basis review. Early formulations referred to such scrutiny as “intermediate,”<sup>95</sup> but in recent years the Court has come to describe the standard for sex-based classifications as “heightened”<sup>96</sup> or “exacting”<sup>97</sup> scrutiny.

In *Craig v. Boren*,<sup>98</sup> petitioners challenged an Oklahoma statute prohibiting the sale of 3.2% beer to men under 21, while allowing women to buy such beer at 18, as a violation of equal protection.<sup>99</sup> The Court struck down the statute, finding it was not “substantially related” to “important governmental objectives.”<sup>100</sup> Justice Rehnquist, in dissent, called the Court’s analysis an “intermediate” level of scrutiny.<sup>101</sup>

The Court appeared to put forth an even stricter standard for evaluating sex discrimination in *Mississippi University for Women v. Hogan*,<sup>102</sup> in which it upheld male applicants’ equal protection challenge to the University’s single-sex admissions program.<sup>103</sup> Hogan was a male applicant seeking admission to the university’s school of nursing, but was denied because the school had a policy of only admitting women.<sup>104</sup> The Court held the university did not meet its burden of showing an “exceedingly persuasive justification” for this classification,<sup>105</sup> and rejected the school’s argument that denying admission to men constituted an affirmative action program to counterbalance discrimination against women.<sup>106</sup> This “heightened” or “exacting” scrutiny has become the standard in subsequent sex discrimination jurisprudence.<sup>107</sup>

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<sup>94</sup> *But see* *Johnson v. Bd. of Regents of the Univ. Sys of Ga.*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).

<sup>95</sup> *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting).

<sup>96</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994).

<sup>97</sup> *United States v. Virginia*, 518 U.S. 515, 555 (1996).

<sup>98</sup> 429 U.S. 190 (1976).

<sup>99</sup> *Id.* at 192.

<sup>100</sup> *Id.* at 197.

<sup>101</sup> *Id.* at 218 (Rehnquist, J., dissenting).

<sup>102</sup> 458 U.S. 718 (1982).

<sup>103</sup> *Id.* at 733.

<sup>104</sup> *Id.* at 720–21.

<sup>105</sup> *Id.* at 731.

<sup>106</sup> *Id.* at 727.

<sup>107</sup> Justice Powell’s *Hogan* dissent called the Court’s level of scrutiny “heightened” review. *Id.* at 736 (Powell, J., dissenting). Later sex discrimination decisions have incorporated this language. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 555 (1996); *see also* *J.E.B. v.*



In *Hogan*, the Court said that the school's proposed compensatory justification for classifying based on sex could only survive "if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."<sup>108</sup> The Court rejected Mississippi's argument that the all-female program was compensating for educational barriers faced by women.<sup>109</sup> Despite stating a "benign, compensatory purpose," the state failed to establish that such purpose reflected their actual motive for the sex classification.<sup>110</sup> First, the Court found the reasoning offered by the state unconvincing because the state did not show women faced any barriers in becoming nurses.<sup>111</sup> Further, it found the single-sex program served to exacerbate, rather than alleviate, sex stereotypes, in that it perpetuated the idea that nursing should remain only a woman's job.<sup>112</sup>

Following the *Hogan* decision, the Court in *United States v. Virginia*<sup>113</sup> dealt with a similar constitutional challenge to single-sex education, this time against the Virginia Military Institute ("VMI"), an all-male, state-supported military college.<sup>114</sup> The Court found nothing in the school's mission or implementation methodology that made it "inherently unsuitable" for women.<sup>115</sup> Further, the Court rejected the state's argument that the establishment of the Virginia Women's Institute for Leadership was a sufficient alternative, given that it did not provide equal academic or educational opportunities and received significantly less financial support.<sup>116</sup> The Court recognized that there were certain "inherent differences" between the sexes that could, in some circumstances, justify differential treatment, citing programs to compensate women for economic disability and to promote equal employment opportunity.<sup>117</sup> However, sex classifications could not be used to "perpetuate the legal, social, and economic inferiority of women."<sup>118</sup> As in *Hogan*, the Court rejected the state's alleged pursuit of diversity, and referenced the long history of discrimination women had faced in higher education and in Virginia's public school system in particular.<sup>119</sup> Finding no legitimate state policy or exceedingly persuasive justification for the exclu-

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Alabama ex rel. T.B., 511 U.S. 127, 136 (1994) ("It is necessary only to acknowledge that our Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today.") (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

<sup>108</sup> 458 U.S. at 728.

<sup>109</sup> *Id.* at 729–30.

<sup>110</sup> *Id.* at 730.

<sup>111</sup> *Id.* at 729.

<sup>112</sup> *Id.*

<sup>113</sup> 518 U.S. 515 (1996).

<sup>114</sup> *Id.* at 519.

<sup>115</sup> *Id.* at 520.

<sup>116</sup> *Id.* at 526–27.

<sup>117</sup> *Id.* at 533.

<sup>118</sup> *Id.* at 534.

<sup>119</sup> *Id.* at 536–38.

sion of women at VMI, the Court found the admissions program unconstitutional as a violation of equal protection.<sup>120</sup>

The Court's precedent indicates sex classifications require an "exceedingly persuasive justification" for an "important governmental interest," accomplished through means substantially related to these objectives.<sup>121</sup> Racial classifications, on the other hand, will survive only if they are "narrowly tailored" to serve "compelling governmental interests."<sup>122</sup> The next section examines the Court's affirmative action jurisprudence in the context of race.

## 2. *Race-Based Affirmative Action Doctrine*

As the Supreme Court has decided several race-based affirmative action cases, courts will likely borrow from this doctrine in deciding a gender balancing case. Consequently, understanding the Court's current framework for race-based affirmative action is important in order to predict its application to sex discrimination in admissions. In the 1960s, the Court began its quest to define when and how race-conscious admissions policies would be constitutional under the Equal Protection Clause of the Fourteenth Amendment. That process is still ongoing. The Court heard arguments for the *Fisher II* case,<sup>123</sup> which involves a challenge to the race-based admissions practices at the University of Texas at Austin, in December 2015.<sup>124</sup> While it is still difficult to determine the constitutionality of every race-conscious admissions procedure under the current affirmative action framework,<sup>125</sup> it is possible to tease out the justifications the Court has classified as legitimate state interests. These justifications are wholly absent in the context of sex discrimination. If a state were to put forth any of the traditional justifications for affirmative action in a gender balancing case, they would be *post hoc* and unconvincing.

In a landmark case in 1978, the Supreme Court heard challenges to race-based affirmative action practices in *Regents of the University of California v. Bakke*.<sup>126</sup> Petitioners alleged the special admissions procedures for minority students at the Medical School of the University of California at

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<sup>120</sup> *Id.* at 534.

<sup>121</sup> *Id.* at 524.

<sup>122</sup> *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

<sup>123</sup> *Fisher v. Univ. of Texas at Austin*, 135 S. Ct. 2888 (2015) [hereinafter *Fisher II*].

<sup>124</sup> The Court had earlier remanded the same case for additional consideration by the Fifth Circuit in *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2422 (2013) [hereinafter *Fisher I*].

<sup>125</sup> The Court has indicated the use of race in university admissions is almost certainly unconstitutional when it involves explicit quotas, racial balancing, or rigid point systems. See *Grutter*, 539 U.S. at 330; *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003); *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 317 (1978). However, the Court has struggled to clarify which forms of holistic review are allowed. Most recently, in *Fisher I*, the Court chose to remand instead of deciding the merits of a program that seemed to model a holistic approach in many ways. See 133 S. Ct. at 2413.

<sup>126</sup> 438 U.S. 265 (1978).

Davis violated both Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.<sup>127</sup>

Justice Powell’s controlling opinion in *Bakke* rejected petitioners’ argument for a more restrictive view of equal protection when the challenge was from a white student rather than a minority applicant. The opinion found the constitutional analysis, including the level of judicial scrutiny, should apply equally to all race classifications.<sup>128</sup> Because the use of race was always a “suspect classification,” the school could only prevail only if its interest was “constitutionally permissible and substantial” and if the classification was necessary to accomplish that interest.<sup>129</sup> California put forth several justifications for the school’s admissions policy, of which Justice Powell’s opinion accepted the diversity justification as a legitimate interest.<sup>130</sup> Justice Powell’s opinion also acknowledged the state had a legitimate interest in combating the “disabling effects of *identified* discrimination,” but remedying general “societal discrimination” was too amorphous.<sup>131</sup> This distinction has caused confusion in subsequent decisions about how particularized an interest must be in order to be legitimate. However, in terms of implementation, the *Bakke* decision clearly stipulated that race or ethnicity may only be a “plus” factor in the admissions process, and a university may not set aside a certain number of seats for minority students or compare applications from minority students in a system isolated from other applicants.<sup>132</sup>

In 2003, the Court decided two cases challenging admissions practices at the University of Michigan. In *Grutter v. Bollinger*, a white female applicant challenged her waitlist decision and subsequent denial from the law school, alleging her denial was based on the school’s use of race as a “pre-dominant” factor.<sup>133</sup> Applying the test for strict scrutiny,<sup>134</sup> the Court held the University of Michigan Law School’s affirmative action policy was narrowly tailored to serve the compelling interest of educational diversity.<sup>135</sup> Unlike the affirmative action plan in *Bakke*, the University of Michigan law school implemented a flexible assessment of talent, experience, and potential contributions in conjunction with academic criteria, and it did not restrict the

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<sup>127</sup> *Id.* at 269–70.

<sup>128</sup> *Id.* at 295. Justice Powell wrote, “[i]t is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.” *Id.* He made a slippery slope argument that this approach would soon split the white majority into different factions and that we would end up weighing the harms of one racial or ethnic group against another. *Id.* at 295–97.

<sup>129</sup> *Id.* at 305.

<sup>130</sup> *Id.* at 311–12. In *Grutter*, a majority of the Court endorsed Justice Powell’s opinion that educational diversity, achieved by evaluating numerous characteristics to yield a diverse student body, is a compelling state interest in the context of university admissions. 539 U.S. at 327–29.

<sup>131</sup> *Id.* at 307 (emphasis added).

<sup>132</sup> *Id.* at 317.

<sup>133</sup> *Id.* at 316–17.

<sup>134</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (holding that all racial classifications by a government actor trigger strict scrutiny analysis).

<sup>135</sup> See *Grutter*, 539 U.S. at 336.

type of diversity considered.<sup>136</sup> The dean of the law school testified that the admissions policies kept track of acceptances for the purpose of achieving a “critical mass” of minority students, which was meant to ensure that students felt adequately represented and did not feel isolated on campus or like the lone spokesperson for their race in the classroom.<sup>137</sup> The Court rejected the challenge to the admissions procedures, finding the school had sufficiently considered race-neutral alternatives and the current process did not unduly burden applicants who did not benefit from the program.<sup>138</sup>

The Court in *Grutter* stated that the merits of educational diversity include the dismantling of racial stereotypes and the promotion of cross-cultural understanding.<sup>139</sup> It highlighted the foundational nature of higher education in shaping society and future leaders, and asserted that therefore education “must be accessible to all individuals regardless of race or ethnicity.”<sup>140</sup> Justice Ginsburg in concurrence emphasized “conscious and unconscious race bias . . . remain alive in our land, impeding realization of our highest values and ideals.”<sup>141</sup>

In the same term, the Court invalidated the admissions program at the University of Michigan’s College of Literature, Science and the Arts in *Gratz v. Bollinger*.<sup>142</sup> The Court found that, unlike the law school’s policy, the admissions practices at the college were neither individualized nor holistic.<sup>143</sup> Specifically, the Court took issue with the school’s system of automatically awarding an additional 20 points to every minority applicant, which the Court found made race decisive for many minority applicants.<sup>144</sup>

The Supreme Court most recently addressed race-based affirmative action in 2013, when it first heard *Fisher v. University of Texas at Austin* (“*Fisher I*”).<sup>145</sup> Texas had enacted legislation granting automatic admission to any public state university to students graduating in the top ten percent of their class.<sup>146</sup> For the remaining applicants, admissions officers used race as a consideration for student diversity purposes.<sup>147</sup> Abigail Fisher, a white female applicant who did not gain admission through the top ten percent program, challenged her denial and the university’s use of race in filling the remainder of its class as a violation of equal protection.<sup>148</sup> Despite the pro-

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<sup>136</sup> *Id.* at 315–16.

<sup>137</sup> *Id.* at 318.

<sup>138</sup> *Id.* at 340–41.

<sup>139</sup> *Id.* at 330.

<sup>140</sup> *Id.* at 331.

<sup>141</sup> *Id.* at 345 (Ginsburg, J., concurring).

<sup>142</sup> 539 U.S. 244, 251 (2003).

<sup>143</sup> *Id.* at 271, 296.

<sup>144</sup> *Id.* at 271–72.

<sup>145</sup> 133 S. Ct. 2411 (2013).

<sup>146</sup> *Id.* at 2418.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2417.

gram’s similarity to the holistic review upheld in *Grutter*,<sup>149</sup> the Court remanded the case, finding the Court of Appeals for the Fifth Circuit did not adequately apply strict scrutiny and was too deferential to the University’s good faith use of racial classifications.<sup>150</sup> The Supreme Court reiterated that strict scrutiny analysis is required for all racial classifications, and emphasized that the “higher education dynamic does not change the narrow tailoring analysis,” nor does it entitle universities to any special deference.<sup>151</sup> On remand, the Fifth Circuit again upheld the admissions program, this time specifying that the classification was a narrowly tailored and necessary means to address the gap in the top ten percent program and served the university’s legitimate interest in educational diversity.<sup>152</sup>

To the surprise of many, on June 29, 2015, the Supreme Court again granted certiorari to review the Fifth Circuit’s decision.<sup>153</sup> Some fear that *Fisher II* could mean an end to affirmative action as we know it.<sup>154</sup> It is unclear whether *Fisher I* created a more rigorous standard for affirmative action or whether it merely reaffirmed the holding in *Grutter*,<sup>155</sup> and it is difficult to predict how the Court will characterize its holding in *Fisher I* the second time around.

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<sup>149</sup> The program in *Grutter* looked at “academic ability coupled with a flexible assessment of applicants’ talents, experiences, and potential ‘to contribute to the learning of those around them.’” *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003). Admissions officials reviewed personal statements, letters of recommendation, and a diversity statement, along with the applicant’s GPA and LSAT scores. *Id.* Like the program in *Grutter*, the program in *Fisher I* did not assign race a numerical value. *Fisher I*, 133 S. Ct. at 2416. Admissions officers considered race along with a number of other factors, including leadership, work experience, extracurricular activities, and community service, to create a “Personal Achievement Index,” which was weighted along with academic indicators. *Id.* at 2415–16.

<sup>150</sup> *Id.* at 2421.

<sup>151</sup> *Id.*

<sup>152</sup> *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 653 (5th Cir. 2014).

<sup>153</sup> *Fisher II*, 135 S. Ct. 2888 (2015). *But see Grutter*, 539 U.S. at 328 (“Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions.”).

<sup>154</sup> See Casey Quinlan, *This Move By The Supreme Court Probably Means The End Of Affirmative Action*, THINK PROGRESS (Jun. 29, 2015), <http://thinkprogress.org/education/2015/06/29/3675053/bad-news-affirmative-action-us-supreme-court-will-rehear-fisher-v-university-texas/>, archived at <https://perma.cc/WU8Y-4BHY>. Justice Kagan was involved in the case below as Solicitor General and thus will again recuse herself, which is also cause for concern that the Court will rule against affirmative action. *Id.*; see also, Deborah N. Archer, *Play the Long Game: Fisher v. University of Texas and the Future of Race-Conscious Admissions Programs*, THE HUFFINGTON POST (Oct. 5, 2015), [http://www.huffingtonpost.com/deborah-n-archer/playing-the-long-game-fis\\_b\\_8240998.html](http://www.huffingtonpost.com/deborah-n-archer/playing-the-long-game-fis_b_8240998.html), archived at <https://perma.cc/RU5M-P53J>. With the recent death of Justice Scalia in February, the case is slated to be decided by only 7 justices, meaning Justice Kennedy will likely hold the tiebreaking vote. See, e.g., Massimo Calibresi, *How Scalia’s Death Will Affect Pending Cases Before the Supreme Court*, TIME (Feb. 13, 2016), <http://time.com/4220733/antonin-scalia-dead-supreme-court-pending-cases>, archived at <https://perma.cc/EEM8-NRCW>.

<sup>155</sup> Melissa Hart, *Fisher Commentary: Everyone Wins, Everyone Loses*, SCOTUSBLOG (Jun. 25, 2013), <http://www.scotusblog.com/2013/06/fisher-commentary-everyone-wins-everyone-loses>, archived at <https://perma.cc/QL4K-KBGY>. Hart argues for a narrow view of *Fisher I*, that it merely rearticulates the strict scrutiny analysis. *Id.*

### 3. *The Application of Sex- and Race-Based Affirmative Action Jurisprudence to "Gender Balancing"*

Some may argue that an equal protection claim against a university's preference for male applicants would not succeed because the Court's assessment of sex classifications is not subject to the same strict scrutiny analysis as race-based classifications. Thus, it is arguably easier for institutions to defend their practice of preferencing applicants based on sex, rather than race, in admissions. Moreover, like the race-based program in *Grutter*, most schools are advantaging men in a holistic way. Absent a numerical point system, sex becomes one consideration among many aspects of diversity. Therefore, skeptics may argue, the Court would grant schools similarly wide latitude in considering sex as a plus factor, per the *Bakke* decision.

The two prongs of the *Hogan* test for sex classifications require an "important governmental interest" and a substantial relation between the gender classification and the government's legitimate end.<sup>156</sup> What will this mean for gender balancing cases as compared to race-based affirmative action cases, which require a "compelling" governmental interest and narrow tailoring?<sup>157</sup> Even applying the *Hogan* test, rather than the test in *Grutter*, university programs preferencing male applicants will likely fail both prongs.

First, unlike affirmative action for racial minorities, colleges cannot justify preferential treatment for male applicants with any important or genuine governmental interest. While the Court has not yet addressed the use of affirmative action in the context of sex classifications at coeducational institutions, it shed some light in *VMI* on what it views as an important governmental interest for excluding women from higher education. Specifically, schools may not rely on supposed "inherent differences" between the sexes or "overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>158</sup> A sex-based classification may survive heightened scrutiny if it "intentionally and directly assists members of the sex that is disproportionately burdened," but schools must be able to prove that this is their genuine motive.<sup>159</sup> The sex classifications at issue do not compare to any of the permissible examples outlined in *VMI*, such as advancing equal employment opportunities for women or countering economic disability.<sup>160</sup>

In its race-based affirmative action jurisprudence, the Court has recognized compelling state interests to include remedying identified discrimination<sup>161</sup> and a commitment to educational diversity, rooted in combating stereotypes and promoting understanding between students of different

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<sup>156</sup> *Mississippi University for Woman v. Hogan*, 458 U.S. 718, 724 (1982).

<sup>157</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

<sup>158</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>159</sup> *Hogan*, 458 U.S. at 728.

<sup>160</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>161</sup> *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 307 (1978).

backgrounds.<sup>162</sup> In applying these affirmative action rationales to “gender balancing,” neither justification can survive. Institutions are not motivated by a desire to remedy discrimination or promote commitments to diversity when they preference male applicants. Even if they were, these arguments would likely fail, for the reasons described below.

An argument that the purpose of gender balancing is to remedy identified discrimination or assist the disproportionately burdened sex has little basis in reality. While some groups of men certainly were excluded from college based on other characteristics, such as race or religion, men as a whole have not been historically excluded from accessing higher education on account of their sex alone. As the *Hogan* Court emphasized, the sex classification can only survive if the benefited sex suffers a disadvantage with respect to the classification.<sup>163</sup> Even an attempt to argue gender balancing is a response to a “boys’ crisis”<sup>164</sup> will likely fail given the Court’s high bar for identifying concrete discrimination. In stark contrast, race-based affirmative action falls against a backdrop of slavery, segregation, and decades of discrimination in the United States.

The diversity angle may seem more appealing as a place to ground justifications for gender balancing, but again this rationale falls short. First, the Supreme Court has repeatedly held that “outright racial balancing . . . is patently unconstitutional.”<sup>165</sup> While it is true that the Court has not been quite as strict when it comes to evaluating sex classifications, there is no reason to think the Court would turn around and legitimize gender balancing for its own sake. The Court’s college admissions jurisprudence has been decisively anti-quota.<sup>166</sup> Therefore, we can reasonably expect heightened scrutiny would require more than an interest in gender parity alone. The Court’s sex discrimination jurisprudence suggests that a diversity interest could possibly survive, but must be genuine.<sup>167</sup> In *VMI*, the Court rejected the state’s proffered diversity interest in maintaining different types of education models through a single-sex military school as disingenuous and unsupported by fact.<sup>168</sup> Even if a court adopts the “critical mass” idea from

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<sup>162</sup> *Id.* at 313–14; *see also Grutter*, 539 U.S. at 330.

<sup>163</sup> 458 U.S. 718, 728 (1982).

<sup>164</sup> The concept of a “boys’ crisis” in education is highly criticized. *See, e.g., Corbett, et al.*, *supra* note 84, at 7–9. The AAUW’s study refutes the notion of a “boys’ crisis,” highlighting many facts that indicate girls’ success in school has not come at the expense of the boys. For one, girls’ test scores on national high school exams have paralleled those of boys, and boys retain a small lead on college entrance exams. Boys and girls graduate from high school at similar rates, and men continue to out-earn women in the workplace by a significant margin. *Id.*

<sup>165</sup> *Grutter*, 539 U.S. at 330.

<sup>166</sup> *See, e.g., id.* at 334.

<sup>167</sup> *See United States v. Virginia*, 518 U.S. 515, 533–34, 539–40 (1996) (finding Virginia’s desire to preserve the male character of its military institution was based on illegitimate stereotypes about the differences between men and women and was not grounded in a legitimate diversity interest).

<sup>168</sup> *Id.* at 535–40.

*Grutter*,<sup>169</sup> men are at no risk now, or any time in the foreseeable future, of being perceived as the lone spokesperson for their gender in the classroom. While “critical mass” was not numerically defined, the district court in *VMI* noted that, based on the inquiries it had received from female applicants, the school could have achieved at least ten percent female enrollment, which would constitute a critical mass.<sup>170</sup> This numeric account of “critical mass” is certainly debatable, but it reflects the low percentages in the minds of judges when trying to conceptualize the idea. Similarly in the race-based affirmative action cases, the representation of racial minorities discussed in those opinions was (and is) well below the 30% to 40% mark to which male enrollment may drop. The concern in *Grutter* was that racial minorities were so underrepresented that they were at risk of becoming isolated on campus and being forced to act as a lone spokesperson for their race in classroom discussions.<sup>171</sup> Even if male enrollment dropped as low as 30% at some colleges, the concerns motivating the critical mass theory in *Grutter* would be not implicated.

Rather than a legitimate diversity interest, schools promote gender parity to remain attractive to prospective students.<sup>172</sup> Accordingly, any attempt to mask concerns about the gender makeup of their campuses as a diversity interest will likely fail in court. It is firmly established that, for a state interest to be legitimate, it “must be genuine, not hypothesized or invented *post hoc* in response to litigation.”<sup>173</sup> Furthermore, benign justifications do not prevent judicial inquiry into the actual purposes or motivations of sex-based classifications.<sup>174</sup> The Supreme Court has not been afraid to call out university’s proffered benign justifications as contrary to their true purpose in the context of sex discrimination in university admissions.<sup>175</sup> Rather than a legally acceptable diversity or compensatory interest, the prominent justification for gender balancing put forth by the admissions deans willing to speak on this issue is the anecdotal evidence that, beyond the 60% female mark, schools become less attractive to both male and female applicants.<sup>176</sup> While perhaps an unfortunate reflection of work yet to be done in the perception of gender equality, this does not constitute a legitimate interest on the part of the school. Being perceived by society as a less desirable educational environment is not a justification for discrimination. After the Court’s decision

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<sup>169</sup> *Grutter*, 539 U.S. at 318.

<sup>170</sup> See *Virginia*, 518 U.S. at 523; *United States v. Virginia*, 766 F. Supp. 1407, 1437 (W.D. Va. 1991).

<sup>171</sup> *Grutter*, 539 U.S. at 318–320.

<sup>172</sup> See, e.g., Delahunty, *supra* note 40.

<sup>173</sup> *Virginia*, 518 U.S. at 533.

<sup>174</sup> *Id.* at 535–36.

<sup>175</sup> See, e.g., *id.* at 536; see also *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729–30 (1982).

<sup>176</sup> See, e.g., Broaddus, *supra* note 60. Scott Jaschik, the founder of Inside Higher Ed, who conducts annual surveys of admissions directors, confirmed having more women than men is “not seen as desirable for the social environment of the colleges.” Mank, *supra* note 1.



in *Brown v. Board of Education*,<sup>177</sup> integrated schools were not only undesirable, but also often the sites of protests and riots. In *Cooper v. Aaron*,<sup>178</sup> an Arkansas school district attempted to subvert desegregation efforts on the ground that massive crowd demonstrations outside their high school made it impossible or impractical to enforce.<sup>179</sup> However, the Court held that even "extreme public hostility" was no excuse for violating for the rule of law.<sup>180</sup>

Thus, in order to succeed in court, schools would have to rest their justification on something else. This could prove a difficult task.<sup>181</sup> The fear that something must be awry if women are entering college at increasingly greater numbers than men causes colleges to vigorously defend discriminatory practices as a means to achieve "gender diversity." But what is "gender diversity," exactly? In the context of education, diversity as a general concept is important for a number of reasons; it exposes students to different perspectives from those with different cultural, religious, racial, and socio-economic backgrounds.<sup>182</sup> There may be a legitimate argument for gender diversity in other contexts, especially as our society becomes increasingly accepting of gender-fluid identities. Admitting trans or gender-nonconforming students could certainly contribute to classroom diversity, and there are legitimate concerns about combatting cultural stereotypes. Unfortunately, this is not the type of gender diversity colleges are currently seeking. In fact, it is quite the opposite. Colleges are reinforcing very traditional and binary notions of gender in their attempt to protect the dominant male character of their institutions, and are doing so by instituting an unspoken cap on female enrollment between 50% and 60 %.

The second prong of *Hogan* requires that the sex classification be substantially related to a legitimate goal.<sup>183</sup> Universities will argue sex is one consideration among many in their holistic review process. Most know now to avoid rigid point systems that give applicants a set bonus, regardless of other characteristics. Setting aside a specific number of seats is also prob-

<sup>177</sup> 347 U.S. 483 (1954).

<sup>178</sup> 358 U.S. 1 (1958).

<sup>179</sup> *Id.* at 12.

<sup>180</sup> *Id.* at 12, 16.

<sup>181</sup> When questioned about the gender balancing at the University of Georgia, then-director of admissions Nancy McDuff found herself in a circular pattern when trying to describe the "academic reason" more male students were needed. She described the phenomenon of more women becoming college-bound. When asked, "Why is that a problem?" she responded, "Because our men are not completing college degrees at the same rate as our females." *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000).

<sup>182</sup> Benefits of educational diversity extend to all students, in that cross-cultural interaction combats prejudice by showing that students from similar backgrounds do not all think alike. See Jonathan R. Alger, *The Educational Value of Diversity*, 83 *ACADEME* 20, 21-22 (1997). Gender and race certainly also intersect in ways that might contribute to diversity. Gender balancing, however, helps white men just as much as, if not more than, than men of color. See, e.g., Mank, *supra* note 1 ("A survey of admissions directors last week found that male applicants of all races are far more likely to benefit from affirmative action-like policies than female applicants.").

<sup>183</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

lematic in the Court's view.<sup>184</sup> Yet, this is essentially what colleges are doing when they institute an unspoken cap on female enrollment at just below 60%. Comments from admissions officials and enrollment data indicate that the consideration of sex is not as holistic as it first appears; upon closer consideration, it looks more and more like a rigid cap. Delahunty, the former dean of Kenyon College, acknowledges this number in her op-ed.<sup>185</sup> She calls this number "the tipping point," the number where "you'll hear a hint of desperation in the voices of admissions officers."<sup>186</sup> Despite receiving more applications from women with higher GPAs, many schools, especially selective liberal arts colleges, are admitting men at higher rates and keeping their female enrollment between 50 and 60%.<sup>187</sup> Had the U.S. Commission on Civil Rights completed their investigation, their findings likely would have supported Delahunty's claims.

### B. Title IX Claims

When it comes to sex discrimination in higher education, Title IX is the foundational statutory protection in the private sphere.<sup>188</sup> Claims may be brought against both private and public entities under the Education Amendments of 1972, in which Title IX is housed.<sup>189</sup> The core language of Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>190</sup> However, Title IX also includes an exception for private undergraduate admissions, and the Court has interpreted the state action doctrine to exclude private universities from liability under the Equal Protection Clause, even though almost all universities receive some federal

<sup>184</sup> *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 317–18 (1978).

<sup>185</sup> Delahunty, *supra* note 40.

<sup>186</sup> *Id.*

<sup>187</sup> Applications from women "far outnumbered" those from men at William and Mary, Vassar, Swarthmore, and Wesleyan, and all of these schools admitted men at higher rates than women, ranging from 5% to 14%. De Vise, *supra* note 71; Anderson, *supra* note 87. The most recent statistics indicate William and Mary enrolled a 2019 graduating class that is 55% women, Anderson, *supra* note 87; Vassar enrolled 56% women, *Prospective Student FAQs*, VASSAR ADMISSIONS, <https://admissions.vassar.edu/apply/answers/#ratio> archived at <https://perma.cc/N7T2-CS49> (last visited Jan. 3, 2016); Swarthmore enrolled 51% women, *Facts and Figures*, SWARTHMORE COLLEGE, <http://www.swarthmore.edu/about/facts-figures>, archived at <https://perma.cc/DPK6-YHDE> (last visited Jan. 3, 2016); and Wesleyan enrolled 56% women, *Class of 2019 Profile*, WESLEYAN UNIVERSITY, available at [https://www.wesleyan.edu/admission/facts\\_faces/Class%20of%202019%20Profile%20-%20August.pdf](https://www.wesleyan.edu/admission/facts_faces/Class%20of%202019%20Profile%20-%20August.pdf), archived at <https://perma.cc/RJ59-WGZ4> (last visited Jan. 3, 2016).

<sup>188</sup> 20 U.S.C. § 1681(a) (2012). When Bernice Sandler began working on the bill that would become Title IX, The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012), Title VI, 42 U.S.C. § 2000(d) (2012), and Title VII, 42 U.S.C. § 2000(e)(2) (2014), of the Civil Rights Act of 1964 all failed to cover women working in education. Sandler, *supra* note 22, at 475.

<sup>189</sup> Title IX applies to "any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

<sup>190</sup> *Id.*

funds.<sup>191</sup> Thus, despite its broad language, Title IX contains a wide gap when it comes to private university admissions, and the Fourteenth Amendment is unable to fill the void.

At the time of Title IX’s development, most universities were not concerned or did not perceive a problem with sex discrimination in education. Bernice Sandler was one of the key players in the development of Title IX, and she describes the circumstances surrounding its passage in her 2007 article, *Title IX: How We Got It and What Difference It Made*. She compiled data, statistics, and stories from women across the country, and filed complaints triggering the first federal investigations of sex discrimination at American universities.<sup>192</sup> Ironically, she credits a widespread lack of interest in the bill with its success. The lobbyist for the American Council on Education, for example, declined to testify at the legislative hearing stating, “There is no sex discrimination in higher education,” and “even if there was, it wasn’t a problem.”<sup>193</sup> Universities were not invested in fighting the bill because, as Sandler describes, they were largely unaware of the proposal or, if they were aware, they did not think it was any cause for concern.<sup>194</sup> Certainly, no universities predicted the reach Title IX would have today.<sup>195</sup>

### 1. Exemption for Private Undergraduate Admissions

Despite the many far-reaching effects Title IX had and continues to have in combating sex discrimination,<sup>196</sup> there are several notable exemptions from the statute. Most importantly for the purposes of this Note, nothing in the statute may be applied to admissions at private, undergraduate institutions.<sup>197</sup>

The precise reasoning for this exclusion is cloudy. Comments from some legislators indicate the purpose was to ensure Title IX would not “unnecessarily restrict the right of private schools to control the character of

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<sup>191</sup> See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 840–41 (1982) (holding a private school’s receipt of state funds did not mean state action was involved such that constitutional analysis would be triggered); *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 384 n.3 (1978) (White, J. concurring).

<sup>192</sup> Sandler, *supra* note 22, at 476.

<sup>193</sup> *Id.* at 477.

<sup>194</sup> *Id.*

<sup>195</sup> See *id.* at 478 (“Because the awareness of the extent of sex discrimination in education was limited at the time, there really was little understanding of what Title IX might do.”).

<sup>196</sup> Title IX’s first big impact was in university athletics, where it was used to provide greater funding and opportunities for women’s sports. *Id.* at 482. Later, the Court also interpreted Title IX to cover student-on-student sexual harassment. *Id.* at 485 (citing *Davis v. Monroe County Schools*, 526 U.S. 629, 633 (1999)).

<sup>197</sup> 20 U.S.C. § 1681(a)(1) (“[I]n regard to admissions to educational institutions, this section shall only apply to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.”).

their institutions.”<sup>198</sup> Sandler, however, suggests the adopted language in Title IX was the result of successful lobbying by several Ivy League institutions and women’s colleges who feared Title IX’s implications for their admissions procedures.<sup>199</sup> The result was a complete exemption for private undergraduate admissions from the reaches of Title IX. “[I]f Harvard or any other private [undergraduate] institution wanted to have no women students,” Sandler writes, “they could do so today, legally.”<sup>200</sup>

This startling conclusion is well masked by the seemingly broad text of Title IX. Of course, no elite, co-educational private institutions have attempted go to back to the days of entirely excluding women from their campuses, but this little-known and shockingly large loophole within Title IX means many more subtle instances of sex discrimination in private college admissions can fly safely under the radar with no legal recourse.

Most of the limited media attention regarding sex discrimination in college admissions fails to mention the Title IX exemption. Jon Birger attempted to change that in his recent article in *The Washington Post*, in which he explicitly and vigorously calls for application of Title IX to private college admissions.<sup>201</sup> The general lack of awareness around this issue, combined with the legal free pass under Title IX, means schools have no incentive to stop discriminating. Birger writes, “Barring a change to Title IX, my own belief is that private colleges won’t stop discriminating until employers realize that not all college credentials are earned equally.”<sup>202</sup>

Removing the exemption for private college admissions and applying Title IX to all universities would open the door for important litigation against private universities and would call attention to the growing problem of sex discrimination in selective undergraduate admissions. This Note argues that the concerns and hesitations to this change are unfounded and can be avoided with the appropriate statutory amendments. Part III describes these proposals in depth.

## 2. *Claims Against Public University Admissions Practices*

While Title IX bars suits against private undergraduate admissions practices, there is still an opportunity for litigation against public universities and public or private graduate schools. However, this opportunity has rarely been used.

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<sup>198</sup> Kim Rubin, *Disparate Impact Suits Under Title IX*, 33 STAN. L. REV. 737, 743 n.42 (1981) (citing 117 Cong. Rec. 39, 248–49 (1971) (remarks of Rep. Erlenborn); *id.* at 39, 253–54 (remarks of Rep. Conte); *id.* at 39, 255 (remarks of Rep. Cleveland)).

<sup>199</sup> Sandler suggests pressure from Dartmouth, Princeton, Yale, and Harvard — along with some women’s colleges — resulted in Title IX’s narrowly worded exemption for private undergraduate admissions. Sandler, *supra* note 22, at 477.

<sup>200</sup> *Id.*

<sup>201</sup> Birger, *supra* note 51.

<sup>202</sup> *Id.*

A case in the Southern District of Georgia in 2000 became the first to bring Title IX claims against a co-ed university for allegedly discriminatory admissions policies against women. Petitioners, three white female students, challenged the University of Georgia’s use of both race and sex in their undergraduate admissions program under Title VI and Title IX.<sup>203</sup> The University automatically admitted a portion of its class based on GPA alone, and then ranked the remaining applicants using a point system, which awarded an additional 0.5 points for non-whites and 0.25 points for men.<sup>204</sup>

The district court found that, despite the slight differences in constitutional analysis with respect to sex and race classifications, legislative history indicated Title VI and Title IX were meant to require the same protections; Title VI was intended to mirror equal protection strict scrutiny analysis, so Title IX must require the same.<sup>205</sup>

The court found a violation of Title VI because it considered diversity as a general concept too vague to be a compelling governmental interest.<sup>206</sup> The Court of Appeals affirmed the judgment, but on different grounds, choosing not to decide the issue of whether diversity was a compelling state interest for either race or gender,<sup>207</sup> and instead holding the program unconstitutional because the university failed to meet its burden showing its program was narrowly tailored.<sup>208</sup> The school did not assess each applicant as an individual, as required by the *Bakke* rule, but instead applied a rigid point system to applicants regardless of their other characteristics.<sup>209</sup>

With respect to the sex discrimination claim, the district court also found a violation of Title IX. The court rejected the University’s attempt to ground its policy in a need for “gender diversity,” saying it was “obviously . . . a front for its gender-balancing desire.”<sup>210</sup> On appeal, there was no

<sup>203</sup> *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1365–66 (S.D. Ga. 2000).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1367–68. The district court’s reasoning comes from the combination of two ideas. First, that Title IX was modeled after Title VI and therefore it was “assumed that it would be interpreted and enforced in the same manner as Title VI.” *Cannon v. Univ. of Chicago*, 441 U.S. 677, 678 (1979). Second, that a majority of the Court in *Bakke* found Title VI to be coextensive with the Constitution. *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 352 (1978) (Brennan, J., concurring); see also *Guardians Ass’n v. Civil Serv. Comm’n of City of New York*, 463 U.S. 582, 611 (1983). The Ninth Circuit used similar logic to decide Title IX required strict scrutiny analysis. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 224 (2005) (citing *Jeldness v. Pierce*, 30 F.3d 1220, 1227 (9th Cir. 1994)) (finding Title VI and Title IX should be read to require the same level of protection, which is strict scrutiny). However, there are a variety of approaches among the circuits with respect to Title IX and equal protection analysis, and disagreement about whether Title IX imposes a higher bar. *Id.* at 230–31.

<sup>206</sup> *Johnson*, 106 F. Supp. 2d. at 1374. The district court in *Gratz*, however, expressly disagreed. *Gratz v. Bollinger*, 122 F. Supp. 2d. 811, 820 (E.D. Mich. 2000).

<sup>207</sup> *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 263 F.3d 1234, 1237 (11th Cir. 2001).

<sup>208</sup> *Id.* at 1245.

<sup>209</sup> *Id.* at 1239–42.

<sup>210</sup> *Johnson*, 106 F. Supp. 2d at 1375.

discussion of this holding, as defendants did not challenge the ruling regarding the treatment of males, only decision regarding the treatment of non-whites.<sup>211</sup> The University of Georgia reportedly dropped the practice of awarding “plus points” to male applicants after the initial lawsuit.<sup>212</sup>

In some ways, the *Johnson* case can be seen as a success, in that the district court upheld the Title IX challenge and it has not been overruled. However, this Note argues the *Johnson* case is not the appropriate frame for future sex discrimination litigation in this context. By conflating sex discrimination with race-based affirmative action practices, courts are tempted to rule the same way on both claims. Part III further expands on the flaws of this particular litigation strategy and suggests proposals for the structure of future cases.

### III. PROPOSAL

We need not accept sex discrimination in college admissions as the new normal. There are a number of possible avenues for change, described in the sections below, beginning with framing gender balancing as sex discrimination and decoupling it from traditional affirmative action. Section A advocates for greater media attention with this framing and a renewed civil rights investigation. Section B describes the possible challenges to sex discrimination in college admissions within the current legal landscape and the important components of successful litigation in this area. Finally, Section C pushes for the removal of the Title IX exemption for private university admissions and alleviates concerns about the future of single-sex colleges.

#### A. *Generate Media Attention, Societal Awareness, and Concern*

The attempts to call attention to “gender balancing” in college admissions in the media have largely fallen flat. Sex discrimination may be an “open secret” in the admissions world,<sup>213</sup> but the problem remains unknown to the majority of students and scholars alike. The media plays a large part in how the issue is framed. Few articles are willing to characterize gender balancing as sex discrimination; instead most chalk it up to just another consideration within the college’s holistic review process aimed at creating a diverse class, as if gender were akin to the applicant’s hometown or community service hours. Many news sources have adopted the “affirmative action for men” language, downplaying the underlying sex discrimination against women and instead expressing concern for male underachievement.<sup>214</sup> The media should take a more critical look at these practices and adjust their framing, exposing many colleges’ real motives behind capping female en-

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<sup>211</sup> *Johnson*, 263 F.3d at 1237–38.

<sup>212</sup> Clayton, *supra* note 50.

<sup>213</sup> Whitmire, *supra* note 43.

<sup>214</sup> See, e.g., Mank, *supra* note 1.

rollment on their campuses, which tend to center on creating an appealing social environment.<sup>215</sup> Exposing the practice as a sex discrimination issue will likely gain more traction with the public and put pressure on colleges to change their practices.

Greater awareness on a national scale generated by the media will be a powerful tool in the hands of prospective college applicants. College applicants wield a large amount of bargaining power in selecting the schools to which they apply and ultimately attend. They can choose to cast their vote against sex discrimination by educating themselves on the practices employed by different universities. The desirability of a gender-balanced campus may be legally irrelevant, as discussed above, but it certainly may be relevant to cultural attitudes and the college selection process. College admissions officers often give high school seniors less credit than they deserve. While initially students may choose a gender-balanced campus for “social reasons,” many may push back if they knew it came at the price of sex discrimination.

Equally important is the initiation of a new investigation by the U.S. Commission on Civil Rights. Concrete data would draw more national attention to the issue under the sex discrimination frame, and an investigation has the potential to promote legislation at the state or federal level prohibiting sex discrimination in private college admissions. The sooner this happens, the better. The original investigation was suspended in 2011, and has seen no action since.<sup>216</sup> The initiation of a new investigation should begin as soon as possible, while the data collected from the original investigation is still relevant and useful. The primary difficulties to rectify from the original investigation involve deciding what information to collect from colleges and how to streamline analysis of the data, such as grade point averages, which are often calculated on different scales.<sup>217</sup> Now that the commissioners are aware of this hurdle, they can plan their approach to statistical analysis accordingly in order avoid the data collection problems plaguing the initial investigation.

### B. Strategic Litigation

Litigation has been an important and useful tool in the context of Title IX and can be equally effective in the college admissions context. Currently, litigants can bring suits against public universities or graduate schools under Title IX.<sup>218</sup> Litigants can also bring equal protection claims against public universities.<sup>219</sup>

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<sup>215</sup> See *id.*

<sup>216</sup> See Griesemer, *supra* note 70.

<sup>217</sup> See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 4, at 111–12.

<sup>218</sup> 20 U.S.C. § 1681(a)(1) (2012).

<sup>219</sup> See, e.g., *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 265 (1978).

Litigation on sex discrimination in college admissions is important but should also be strategic. Lawyers and advocates must be careful in framing their lawsuits, especially in this context. It is important that jurisprudence addressing sex discrimination in college admissions develops as distinct and separate from race-based affirmative action cases. As described above, sex discrimination should not be characterized as “affirmative action for men” for a number of important reasons. Heriot’s approach, which she advocates for in a brief for the pending *Fisher II* case, is an example of this conflation. Her thesis is that any recipients of preferential treatment in the admissions process are less successful when it comes to graduation rates and securing jobs; essentially, the practice is harming the very people it was meant to protect.<sup>220</sup> However, the empirical data supporting the “mismatch theory” have been vigorously debated and highly criticized.<sup>221</sup> Even putting aside the data reliability problems, what Heriot fails to address, of course, is that there are a number of shortcomings in our educational and professional society that stifle advancement for underrepresented minorities. To be sure, affirmative action has not resolved all of these problems, but that should not be the reason for its demise. Applying Heriot’s reasoning to the gender balancing context could have the negative effect of stifling sex discrimination claims, or even restricting or eliminating race-based affirmative action.

The *Johnson* case in Georgia is an example of this conflation in the litigation context. The plaintiffs were three white women challenging both race and gender practices, lumping the issues together as an “affirmative action” suit,<sup>222</sup> which is problematic for both movements. Many of the plaintiffs in race-based affirmative challenges have also been white women.<sup>223</sup> Instead, lawsuits with diverse plaintiffs should be brought that challenge sex discrimination alone to prevent the conflation of two practices with wildly different rationales.

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<sup>220</sup> Brief for Gail Heriot, Peter Kirsanow & Todd Gaziano as Amici Curiae Supporting Petitioners, 2011 WL 5007903, at \*2, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

<sup>221</sup> See, e.g., William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind “Mismatch”*, 92 TEX. L. REV. 895, 896–97 (2014) (arguing the originators of the mismatch theory cherry-picked their data to support unwarranted claims, and overall the social science data does not support the claim that affirmative action leads to lower graduation rates or earnings for African Americans or Latinos); William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 99–100 (2013) (directly challenging the claims in the amicus brief by Heriot and two other USCCR commissioners in that it misrepresents data and ignores numerous peer reviewed studies that show underrepresented minorities who benefit from affirmative action have higher graduation rates at selective colleges).

<sup>222</sup> *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1365–66 (S.D. Ga. 2000).

<sup>223</sup> See, e.g., *Fisher I*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003).



C. *Remove the Private Undergraduate Admissions Exemption from Title IX*

Title IX currently contains a little-known exemption for private undergraduate admissions,<sup>224</sup> likely a result of successful lobbying by elite private institutions.<sup>225</sup> Removing this exemption would open the possibility of litigation against private undergraduate universities for discrimination in admissions on the basis of sex. Under the current statutory scheme, schools have no legal incentive to change their policies. Nor has recent media coverage had an effect on their practices.<sup>226</sup> Litigation or the threat of litigation could have a tremendous impact.

One fear among scholars and college administrators, liberals and conservatives alike, is that the exemption’s removal could mean an end to all single-sex higher education. In *VMI*, Scalia in dissent declared, “the Court’s rationale . . . ensures that single-sex public education is functionally dead.”<sup>227</sup> While it is debatable whether Scalia’s warning has proven true in practice even for public schools, some fear Title IX could have the same effect on private single-sex education. Of particular concern is the potential effect on private women’s colleges. Many studies and scholarly articles advocate for the preservation of single-sex education for women and cite its numerous benefits.<sup>228</sup> Women tend to participate in class and in extracurricular activities at greater rates, receive more attention from faculty, and exhibit stronger leadership skills in single-sex environments.<sup>229</sup> One study of all-girls high schools showed attendees were more likely to express interests in math and English and had higher self-esteem than girls attending co-educational schools.<sup>230</sup> These benefits are important, but can be preserved without a sweeping exemption for all private undergraduate university admissions. Even without the exemption, there are avenues to defend women’s colleges. As Jennifer Cowan suggests, women’s colleges may be justified as remedial under intermediate scrutiny, given the historic exclusion and continued discrimination against women in higher education.<sup>231</sup> Or, as Katherine Kraschel argues, the meaning of “affirmative action” protected by Title IX “authorizes the use of gender-based classifications designed to assist

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<sup>224</sup> 20 U.S.C. § 1681(a)(1) (2012).

<sup>225</sup> See Sandler, *supra* note 22, at 477.

<sup>226</sup> The College of William and Mary, for example, continues to favor male applicants in spite of the negative publicity surrounding this practice and the associated statements by Dean Broadus. As recently as 2014, William and Mary admitted men at a rate fourteen percentage points higher than women. See Anderson, *supra* note 87.

<sup>227</sup> *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting).

<sup>228</sup> See, e.g., Jennifer R. Cowan, *Distinguishing Private Women’s Colleges from the VMI Decision*, 30 COLUM J.L. & SOC. PROBS. 137, 141 (1997).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* (citing Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCHOL. 381, 387 (1986)).

<sup>231</sup> See *id.* at 178–79.

the historically-disadvantaged gender,” which logically extends to the creation of women’s colleges.<sup>232</sup>

Alternatively, women’s colleges could advocate for a more narrow statutory protection to avoid litigation altogether. Title IX currently contains an exemption for public universities that have been historically single sex.<sup>233</sup> Similar text could be added that provides the same protection for historically single sex private institutions, if these schools fear the character of their institutions would be threatened by the exemption’s removal. While the aim of this Note is not to address the benefits or legality of women’s colleges in depth, it suggests that textual protection within Title IX may not be a necessary remedy or the best one. Even if women’s colleges could not legally turn away applicants solely because of their sex, they would likely retain their predominantly female character and educational benefits. After civil rights laws were passed and interpreted to apply equally to all races, historically black colleges began admitting white students, but “have not lost their focus on educating black students and culture.”<sup>234</sup> Like historically black colleges, women’s colleges can retain their value, historical significance, and culture of promoting women’s education without an explicit legal guarantee to exclude men.<sup>235</sup>

Finally, many women’s colleges are expanding their admissions policies with respect to gender on their own, especially in the context of transgender applicants. While most have gone in the direction of becoming more flexible with their definitions of gender, there are a number of differences among the policies. Smith, Barnard, and Wellesley accept applications from any student that identifies as female on their application.<sup>236</sup> Mount Holyoke accepts applications from all students “biologically born female” and all transgender students, only excluding “biologically born men” identifying as men.<sup>237</sup> Bryn Mawr considers all female-identifying students, intersex students not identifying as male, and students assigned female at birth who do not identify within the gender binary and/or have not taken medical or legal

<sup>232</sup> Kraschel, *supra* note 15, at 471 (quoting Fred Von Lohmann, Note, *Single-Sex Courses, Title IX, and Equal Protection: The Case for Self-Defense for Women*, 48 STAN. L. REV. 177, 185 (1995)).

<sup>233</sup> 20 U.S.C. § 1681(a)(5) (2012) (“[T]his section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.”).

<sup>234</sup> Cowan, *supra* note 228, at 181.

<sup>235</sup> *See id.* (“In 1994, only four of the 107 historically black colleges had a majority white student body.”).

<sup>236</sup> *Barnard Announces Transgender Admissions Policy*, BARNARD (Jun. 4, 2015), <https://barnard.edu/news/barnard-announces-transgender-admissions-policy>, archived at <https://perma.cc/7LB2-QB4D>; *Frequently Asked Questions*, WELLESLEY COLLEGE, <http://www.wellesley.edu/admission/faq#transgender>, archived at <https://perma.cc/33AH-UQZF> (last visited Dec. 3, 2015); *Gender Identity & Expression*, SMITH, <http://www.smith.edu/diversity/gender.php>, archived at <https://perma.cc/BZ5J-92WP> (last visited Dec. 3, 2015).

<sup>237</sup> *Admission of Transgender Students*, MOUNT HOLYOKE, <https://www.mtholyoke.edu/policies/admission-transgender-students>, archived at <https://perma.cc/MU5A-83J5> (last visited Dec. 3, 2015).

steps to identify as male.<sup>238</sup> Allowing colleges to be the arbiters of defining a student’s gender for admissions purposes quickly becomes problematic in that it opens the door for discriminatory practices and policies. The lack of an exemption for single-sex colleges under Title IX would be beneficial for transgender students as well as cisgender women, given the U.S. Department of Education’s recent guidance confirming that Title IX’s sex discrimination prohibition extends to discrimination against transgender students because of their gender identity or failure to conform with traditional notions of gender performance.<sup>239</sup> The female character and values of historically female colleges will not be threatened by the admission of transgender women or the few men who seek enrollment at these types of institutions. Title IX should provide a remedy to any applicant discriminated against on the basis of sex in the college admissions process, private or public, graduate or undergraduate.

#### IV. CONCLUSION

Sex discrimination in college admissions is a serious and present problem. An end to affirmative action is not the answer. The movement against gender balancing in admissions needs to abandon the “affirmative action for men” characterization. Incorrectly tying sex discrimination to affirmative action could be potentially disastrous for both sides; it could incorrectly justify a preference for male applicants under the affirmative action framework, or dismantle important and foundational race-conscious admissions programs. Litigation that solely challenges preferences for male applicants and frames sex discrimination as a cap on female enrollment should be brought to lay an appropriate doctrinal foundation for this issue. Furthermore, Congress should amend Title IX to remove the current exemption for private undergraduate admissions so private colleges will have an incentive to change their practices. The exemption, likely an attempt to cater to the demands of Ivy League institutions, serves no legitimate purpose that cannot be addressed by other means. Private and public universities alike should be held accountable for limiting female enrollment for the sole purpose of preserving their marketability.

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<sup>238</sup> *Transgender Applicants*, BRYN MAWR COLLEGE, <https://www.brynmawr.edu/admissions/transgender-applicants>, archived at <https://perma.cc/RG7A-T38B> (last visited Dec. 3, 2015).

<sup>239</sup> U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (April 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>, archived at <https://perma.cc/P3SR-KYVV>.

