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## Gender Curve: An Analysis of Colleges' Use of Affirmative Action Policies to Benefit Male Applicants

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# Gender Curve: An Analysis of Colleges' Use of Affirmative Action Policies to Benefit Male Applicants

## **Abstract**

This comment evaluates the constitutionality of affirmative action policies that benefit male students. Part I sets out background information about potential causes of action and remedies for female students who challenge affirmative action policies that benefit male students. Section A discusses the Equal Protection Clause of the Fourteenth Amendment and the development of the law regarding universities' use of racial affirmative action policies. Section B discusses potential remedies under Title IX of the Education Amendments of 1972 ("Title IX") and the similarity between Title IX and Title VI of the Civil Rights Act ("Title VI"). Section C discusses state remedies available to students under educational equity statutes, human rights laws, and state equal rights amendments. Part II begins with a discussion of the relevant distinctions between racial affirmative action policies and affirmative action policies benefiting male applicants and sets forth a proposed framework to analyze male affirmative action policies. This Comment concludes that affirmative action policies benefiting males are unconstitutional because of colleges' reliance on gender stereotypes when implementing them and because there is a lack of evidence to support a legitimate pedagogical objective for the use of such programs.

## **Keywords**

Male affirmative action, Title IX, Equal Protection, remedies

# THE GENDER CURVE: AN ANALYSIS OF COLLEGES' USE OF AFFIRMATIVE ACTION POLICIES TO BENEFIT MALE APPLICANTS

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#### INTRODUCTION

Saving Our Sons,<sup>1</sup> Raising Boys' Achievement,<sup>2</sup> The Male Minority,<sup>3</sup> and Where the Boys Aren't:<sup>4</sup> a look in a newspaper, magazine, or local bookstore reveals these titles and more.<sup>5</sup> Females currently constitute approximately fifty-seven percent of students on college campuses nationwide,<sup>6</sup> and the Department of Education predicts that this gender gap will increase to nearly sixty percent female by 2010.<sup>7</sup> Instead of cause for celebration, this lack of proportionality

1. MICHAEL GURIAN & KATHY STEVENS, *THE MINDS OF BOYS: SAVING OUR SONS FROM FALLING BEHIND IN SCHOOL AND LIFE* (2005).

2. *RAISING BOYS' ACHIEVEMENT IN SCHOOLS* (Kevan Bleach ed., 1998).

3. Daren Fonda, *The Male Minority*, TIME.COM, Dec. 2, 2000, <http://www.time.com/time/education/article/0,8599,90446,00.html>.

4. Melana Zyla Vickers, *Where the Boys Aren't: The Gender Gap on College Campuses*, THE WEEKLY STANDARD, Jan. 1, 2006.

5. See Sarah Karnasiewicz, *The Campus Crusade for Guys*, SALON.COM, Feb. 15, 2006, [http://www.salon.com/mwt/feature/2006/02/15/affirmative\\_action/index\\_np.html](http://www.salon.com/mwt/feature/2006/02/15/affirmative_action/index_np.html) (explaining the wave of recent commentary about the war on boys, where commentators criticize the education system's ability to educate boys effectively).

6. Mary Beth Marklein, *College Gender Gap Widens: 57% Are Women*, USA TODAY, Oct. 20, 2005, at 1A; see U.S. DEP'T OF EDUC.: NAT'L CENTER FOR EDUC. STAT., *GENDER DIFFERENCES IN PARTICIPATION AND COMPLETION OF UNDERGRADUATE EDUCATION AND HOW THEY HAVE CHANGED OVER TIME* iii (2005), available at <http://nces.ed.gov/pubs2005/2005169.pdf> (explaining that the percentage of female undergraduates increased from forty-two percent to fifty-six percent from 1970 to 2001).

7. See U.S. DEP'T OF EDUC., *THE CONDITION OF EDUCATION* 36, 125 (2006), available at <http://nces.ed.gov/pubs2006/2006071.pdf> (stating that the gender gap among undergraduate college students is expected to continue increasing through 2015).

has become a source of concern for admissions officers<sup>8</sup> and news commentators.<sup>9</sup>

Growing concern over this gender gap has led some colleges to give male students an edge in the admissions process.<sup>10</sup> For example, the University of Georgia (“UGA”) implemented an affirmative action policy that awarded additional points to male applicants.<sup>11</sup> However, when challenged, UGA’s policy was declared unconstitutional.<sup>12</sup> Additionally, in March 2006, an admissions officer from Kenyon College published an op-ed article in the New York Times about the impact the gender gap has on the admissions process.<sup>13</sup> She declared that because of demographic concerns, admissions committees consider males more valuable candidates than

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8. See Jennifer Delahunty Britz, Op-Ed., *To All the Girls I’ve Rejected*, N.Y. TIMES, Mar. 23, 2006, at A25 (describing how the admissions committee’s concerns about the gender gap led to the determination that male candidates are more valuable than female candidates).

9. See, e.g., Karnasiewicz, *supra* note 5 (“On the one hand, you want to embrace the success of women . . . . Yet, as more and more women substitute careers for having babies, I’ve come to see that we’re looking at a population crisis.”); Jennifer Olney, *Concern Grows Over College Gender Gap*, ABC7NEWS.COM, Apr. 3, 2006, [http://abclocal.go.com/kgo/story?section=assignment\\_7&id=4036900](http://abclocal.go.com/kgo/story?section=assignment_7&id=4036900) (arguing that boys start to fall behind in elementary school and that those who do go to college do not receive the assistance given to their female peers). But see Tamar Lewin, *A More Nuanced Look at Men, Women and College*, N.Y. TIMES, July 12, 2006, at B8 (noting that the gender gap disappears among applicants from the highest income levels, and that the size of the gap may be due to the increased representation of women among older college students where women outnumber men two to one).

10. See Tamar Lewin, *At Colleges, Women Are Leaving Men in the Dust*, N.Y. TIMES, July 9, 2006, at A1 (quoting the Vice President for Enrollment at Dickinson College who explained “The secret of getting some gender balance is that once men apply, you’ve got to admit them. So did we bend a little? Yeah, at the margin, we did . . . .”). But see Sandy Baum & Eban Goodstein, *Gender Imbalance in College Applications: Does it Lead to a Preference for Men in the Admissions Process?*, 24 ECON. OF EDUC. REV. 665, 674 (2005) (concluding that the preference for male students becomes statistically significant only when the applicant pool is extremely unbalanced). See generally Delahunty Britz, *supra* note 8, at A25 (concluding that “in this day and age of swollen applicant pools that are decidedly female . . . [t]he fat acceptance envelope is simply more elusive for today’s accomplished young women”).

11. See *Johnson v. Bd. of Regents of Univ. of Ga. (Johnson I)*, 106 F. Supp. 2d 1362, 1365 (S.D. Ga. 2000) (describing UGA’s admissions policy that awarded each male applicant an additional 0.25 points to his admission index), *aff’d*, 263 F.3d 1234 (11th Cir. 2001).

12. See *Johnson I*, 106 F. Supp. 2d at 1363 (holding that the affirmative action policy that awarded preferences based on gender and race violated both Title VI and Title IX); see also *Johnson v. Bd. of Regents of Univ. of Ga. (Johnson II)*, 263 F.3d 1234, 1242 n.8 (11th Cir. 2001) (affirming the decision of the district court; however, since the parties only appealed on the basis of the racial preference, the court did not discuss the gender-based affirmative action plan).

13. See Delahunty Britz, *supra* note 8, at A25 (stating that one of the unintended consequences of the women’s movement is increased competition for women in undergraduate admissions).

females.<sup>14</sup> While many college administrators do not openly admit to implementing male affirmative action policies, evidence suggests that, in certain circumstances, admissions officers give males an edge in the admissions process.<sup>15</sup> In addition, many colleges have begun targeted campaigns to lure more males to campus.<sup>16</sup>

This comment evaluates the constitutionality of affirmative action policies that benefit male students. Part I sets out background information about potential causes of action and remedies for female students who challenge affirmative action policies that benefit male students.<sup>17</sup> Section A discusses the Equal Protection Clause of the Fourteenth Amendment and the development of the law regarding universities' use of racial affirmative action policies. Section B discusses potential remedies under Title IX of the Education Amendments of 1972 ("Title IX") and the similarity between Title IX and Title VI of the Civil Rights Act ("Title VI"). Section C discusses state remedies available to students under educational equity statutes, human rights laws, and state equal rights amendments.

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14. See *id.* (apologizing for the "demographic realities" that result in more rejection letters being sent to female students).

15. See Mark Clayton, *Admissions Officers Walk a Fine Line in Gender-Balancing Act*, CHRISTIAN SCI. MONITOR, May 22, 2001, at 11 (stating that in recent years the Office for Civil Rights of the Department of Education has received about twenty complaints each year about gender discrimination in the admissions process); Alex Kingsbury, *Admit It: Women Have a Man Problem*, U.S. NEWS & WORLD REP., Aug. 28, 2006 (explaining that some colleges have skewed acceptance rates for male and female students, including William and Mary where the acceptance rate for males was forty-three percent while the acceptance rate for females was thirty-one percent).

16. See, e.g., Clayton, *supra* note 15 (explaining that admissions officers aggressively pursue interviews with male candidates); Karnasiewicz, *supra* note 5 (noting that someone speaks about male recruitment efforts at the National Association of College Admission Counseling's national conference each year).

17. Because of the standing requirement, women who applied for admission to a college with an affirmative action plan benefiting males and were subsequently rejected, would have the requisite "personal injury fairly traceable to the defendant's allegedly unlawful conduct [that is] likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

## I. BACKGROUND

A. *The Equal Protection Clause of the Fourteenth Amendment and Affirmative Action Policies*

The Equal Protection Clause provides one method of redress for female students to challenge affirmative action policies that benefit male students.<sup>18</sup> While the Supreme Court has addressed the constitutionality of race-based affirmative action programs, the Court has not yet ruled on the issue of gender-based affirmative action policies.<sup>19</sup> This Section first provides an overview of the Supreme Court decisions analyzing racial affirmative action policies. It then reviews the Court's gender jurisprudence under the Equal Protection Clause because these cases provide a more appropriate framework to analyze the gender affirmative action programs benefiting male students.

1. *The Equal Protection Clause and race-based affirmative action cases*

The Equal Protection Clause of the Fourteenth Amendment declares that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>20</sup> The Supreme Court interprets the Fourteenth Amendment to regulate only state action, which places private discrimination beyond its reach.<sup>21</sup> Therefore, under the Equal Protection Clause females can only challenge public colleges' affirmative action policies that benefit male students.

The Supreme Court applies different standards of review to analyze policies that discriminate against individuals based on certain characteristics.<sup>22</sup> The Court recognizes race as a suspect

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18. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that classifications based on gender violate the Equal Protection Clause unless they are substantially related to an important government objective).

19. See Scott Jaschik, *Affirmative Action for Men*, INSIDE HIGHER ED., Mar. 27, 2006, <http://insidehighered.com/news/2006/03/27/admit> (noting that the Supreme Court has not yet ruled on the constitutionality of gender-based affirmative action policies in higher education institutions).

20. U.S. CONST. amend. XIV, § 1.

21. See, e.g., *United States v. Morrison*, 529 U.S. 598, 621 (2000) (stating that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 n.12 (1948))); *Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

22. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (using strict scrutiny to evaluate state policies that discriminate against individuals on the basis of race); *Craig*, 429 U.S. at 197 (using intermediate scrutiny to analyze challenges based on gender discrimination).

classification<sup>23</sup> and applies strict scrutiny to evaluate policies that discriminate against individuals based on this immutable characteristic.<sup>24</sup> Strict scrutiny is also used to evaluate programs that benefit racial minorities, including racial affirmative action policies.<sup>25</sup> To be constitutional, a policy that discriminates against individuals on the basis of race must be narrowly tailored to further a compelling government interest.<sup>26</sup>

The Supreme Court has addressed universities' use of racial affirmative action policies on numerous occasions.<sup>27</sup> The Court first addressed this issue in *Regents of the University of California v. Bakke*.<sup>28</sup> In that case, the Court held that it was unconstitutional for the university to reserve a fixed number of seats in the incoming class for racial minorities;<sup>29</sup> however, the Court expressed approval for the use of race as *one* factor that admissions officers could consider when evaluating applicants.<sup>30</sup> The Court recognized that offering admission to students with different racial backgrounds constitutes only part of achieving diversity and that using racial quotas to achieve diversity could undermine this goal.<sup>31</sup>

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23. See *Carolene Prods.*, 304 U.S. at 153 n.4 (suggesting that there may be a need for a more searching judicial inquiry when statutes disadvantage discrete and insular minorities).

24. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (concluding that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

25. See *Richmond v. J.A. Croson*, 488 U.S. 469, 493-94 (1989) (holding that the standard of review does not change based on whether the policy harms or benefits racial minorities since without such judicial scrutiny it is impossible to determine which classifications are "remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority").

26. See *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (holding that the university's asserted goal of diversity must constitute a compelling state interest and that the affirmative action plan must be narrowly tailored to achieve that objective).

27. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter*, 539 U.S. at 306; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

28. 438 U.S. at 276-78 (explaining that the University of California Davis Medical School rejected Bakke, a white male, and that Bakke then alleged that the school's affirmative action policy violated the Equal Protection Clause).

29. See *id.* at 319 (rejecting the use of racial quotas because students who do not belong to the class of racial minorities are "never afforded the chance to compete with applicants from the preferred groups for the special admissions seats").

30. See *id.* at 316-17 (expressing approval for the admissions programs at Harvard and Princeton, which allowed an applicant's race to be used as a "plus" in his or her admissions file); *id.* at 314 (noting that while universities have wide discretion in deciding which students to admit, individual rights may not be disregarded).

31. See *id.* at 315 (explaining that the state's compelling interest in diversity includes admitting students with a range of talents, interests, and qualifications rather than admitting students based solely on their race).



More recently, the Court addressed the issue of racial affirmative action programs in *Grutter v. Bollinger*<sup>32</sup> and *Gratz v. Bollinger*.<sup>33</sup> In *Grutter*, the Court considered the constitutionality of the University of Michigan Law School's affirmative action policy to enroll a "critical mass" of racial minorities in order to foster diversity in the incoming class.<sup>34</sup> The Court held that diversity in a law school setting constituted a compelling state interest,<sup>35</sup> and that the affirmative action policy was narrowly tailored because it conducted an individualized evaluation of each student's application.<sup>36</sup>

While the Court upheld the law school's affirmative action policy in *Grutter*, in *Gratz* it found the program used by the undergraduate institution unconstitutional.<sup>37</sup> The Court accepted the goal of diversity as a compelling state interest;<sup>38</sup> however, the program failed the narrowly tailored prong because the policy awarded twenty points to every minority applicant based solely on his or her race.<sup>39</sup> Both *Grutter* and *Gratz* emphasize the need for colleges to conduct individualized evaluations of each applicant.<sup>40</sup> While schools may use

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32. 539 U.S. 306 (2003). The University of Michigan Law School rejected Grutter, a white female; although a racial minority with a similar LSAT score and GPA would have been admitted. *Id.* at 316-17.

33. 539 U.S. 244 (2003). Gratz and Hamacher both applied to the University of Michigan's College of Literature, Science, and the Arts. *Id.* at 244. The university rejected them even though the admissions committee found Gratz to be well-qualified and Hamacher to be qualified for admission. *Id.*

34. See *Grutter*, 539 U.S. at 315-16 (explaining that the law school seeks to enroll a critical mass of students who belong to an ethnic group subject to a history of discrimination because these students make unique contributions to the law school environment).

35. See *id.* at 328-29 (according great deference to the law school's determination that diversity contributed to the accomplishment of the school's mission by creating livelier classroom discussions). But cf. Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1070 (2006) (explaining that there is some controversy regarding whether diversity is actually a compelling state interest in educational institutions).

36. See *Grutter*, 539 U.S. at 335-36 (holding that even though the school tried to enroll a critical mass of minority students, this did not constitute a quota because "[s]ome attention to numbers," without more, does not transform a flexible admissions system into a rigid quota" (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1989))).

37. See *Gratz*, 539 U.S. at 275-76 (holding that the rigid point system used by the university violated the Equal Protection Clause).

38. See *id.* at 268-69 (referencing the Court's analysis in *Grutter*, which deferred to the school's educational judgment).

39. *Id.* at 273-74; see also *id.* at 279 (O'Connor, J., concurring) (explaining that the number of points awarded to minority applicants was disproportionate to the number of points awarded to students who contributed to the diversity of the school based on other characteristics, like leadership and community service).

40. See Mark W. Cordes, Symposium, *Affirmative Action After Grutter and Gratz*, 24 N. ILL. U. L. REV. 691, 693, 729-39 (2004) (arguing that the *Grutter* and *Gratz* opinions prohibited the use of rigid admissions systems that award each racial minority a predetermined number of points based on race).

race as a factor, race cannot be the decisive factor in the admissions decision.<sup>41</sup>

## 2. *The Equal Protection Clause and the Court's gender jurisprudence*

The Equal Protection Clause also prohibits gender discrimination, although the Supreme Court analyzes gender-based policies under intermediate scrutiny.<sup>42</sup> While the Court has not yet addressed the issue of gender-based affirmative action policies that benefit male applicants, the Court's opinions in *United States v. Virginia*<sup>43</sup> ("VMI") and *Mississippi University for Women v. Hogan*<sup>44</sup> provide a framework to analyze colleges' use of gender in admissions decisions.<sup>45</sup> These opinions emphasize the need to conduct a searching judicial inquiry of the school's asserted goal to ensure that the rationale does not rely on stereotypes about the capabilities of males and females.<sup>46</sup>

A gender-based affirmative action policy would likely be evaluated under a lesser standard of scrutiny than race-based affirmative action because a majority of the Court has never identified gender as a suspect classification.<sup>47</sup> As mentioned above, the Court analyzes gender classifications under intermediate scrutiny, which requires that the policy be substantially related to an important government interest.<sup>48</sup> In *VMI*, the Court held that the government must have an "exceedingly persuasive justification" for a policy that distinguishes among individuals based solely on their gender.<sup>49</sup> Some commentators have argued that this standard of review is more demanding than traditional intermediate scrutiny, but this issue remains an open question until the Court next decides another

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41. See *id.* at 724-25 (noting that each student's application must be read as a whole, and although race can be weighed more heavily than other factors, it must be evaluated in light of the applicant's overall qualifications).

42. See *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (holding that gender discrimination is unconstitutional unless the gender classifications are substantially related to an important governmental objective, and that administrative convenience is not an important governmental objective for gender-based classifications).

43. 518 U.S. 515 (1996).

44. 458 U.S. 718 (1982).

45. See Jaschik, *supra* note 19 (stating that although the Supreme Court has not addressed the constitutionality of an affirmative action policy that benefits male students, in *VMI*, the Court held that VMI needed an exceedingly persuasive justification to deny admission to female students based solely on their gender).

46. See *infra* note 136 (noting that it is not enough to simply rely on proffered benign justifications).

47. See *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (recognizing that only a plurality of the court identified sex as a suspect classification).

48. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

49. 518 U.S. 515, 524 (1996).

gender discrimination case.<sup>50</sup> Based on the Court's recent gender discrimination jurisprudence, colleges would need to have an exceedingly persuasive justification to implement an affirmative action program that benefited male students and prove that the plan was substantially related to its asserted goal.<sup>51</sup>

In *VMI*, the Court held that Virginia Military Institute's policy that denied admission to female students violated the Equal Protection Clause.<sup>52</sup> *VMI* asserted that the institution contributed to educational diversity by offering students the option to attend a single-sex university.<sup>53</sup> The Court, however, rejected *VMI*'s justification because at the time of the university's inception, single-sex education for male students was the primary model of higher education in the United States.<sup>54</sup> In addition, the Court held that *VMI*'s assertion that the admission of women would destroy its reliance on its adversative teaching method did not constitute an exceedingly persuasive justification because the school's rationale for retaining the male-only admissions policy was based upon stereotypes about women's abilities.<sup>55</sup>

The Court's holding in *VMI* reaffirmed its decision in *Mississippi University for Women v. Hogan* that individuals cannot be excluded from educational institutions based solely on their gender.<sup>56</sup> In *Hogan*, the Court held that the Mississippi University for Women's policy of excluding male students from its nursing school violated the

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50. See Deborah L. Brake, *Reflections on the VMI Decision*, 6 AM. U. J. GENDER SOC. POL'Y & L. 35, 39-40 (1997) (arguing that the Court's opinion in *VMI* moved the standard of review for gender classifications closer to strict scrutiny).

51. See Jaschik, *supra* note 19 (explaining that it is unlikely that Justice Ruth Bader Ginsburg, the author of *VMI*, would consider the inability to find a dance partner, one of the justifications for a gender affirmative action policy, an exceedingly persuasive justification).

52. See *VMI*, 518 U.S. at 519, 545-46 (holding that *VMI*'s admissions policy, which limited its enrollment to male students, violated the Equal Protection Clause because it relied on stereotypes about the capabilities of male and female applicants).

53. See *id.* at 524 (explaining that the district court agreed with *VMI* that the university fostered the state's goal of educational diversity by offering a single-sex option where a majority of the public universities were co-educational).

54. See *id.* at 537 (arguing that at *VMI*'s inception equal educational opportunities were not available to men and women since scholars considered higher education to be dangerous for women).

55. See *id.* at 540 (rejecting *VMI*'s assertion that changes to accommodate women would be so radical that the school's use of the adversative method would be destroyed because the school based its conclusion on stereotypes about the capabilities of the average woman rather than the individual capacities of a particular female applicant). The adversative model of education is one that "features '[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.'" *Id.* at 522 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421-22 (W.D.Va. 1991)).

56. See *id.* at 519 (holding that *VMI* cannot exclude qualified female applicants based on sex alone).

Equal Protection Clause.<sup>57</sup> The Court rejected the university's asserted goal of affirmative action for women because nursing is an occupation traditionally dominated by females.<sup>58</sup> The university's policy also failed the second prong of the inquiry; it did not substantially relate to the preservation of the school's educational mission because the school failed to provide evidence that male students' presence in the classroom would adversely affect female students' performance.<sup>59</sup>

*B. Affirmative Action Policies under Title IX of the Education Amendments of 1972*

In addition to the Equal Protection Clause, Title IX of the Education Amendments of 1972 provides a statutory framework for female students to challenge affirmative action policies that benefit male applicants. Title IX claims are often brought in conjunction with Equal Protection claims and could potentially provide a higher level of scrutiny.<sup>60</sup> This Section includes an overview of Title IX's statutory language and describes case law construing this statute.

Title IX prohibits sex discrimination in all educational institutions that receive federal funding.<sup>61</sup> Although Title IX contains absolute language about the prohibition on sex discrimination in all educational institutions, there are eight exceptions to this broad coverage.<sup>62</sup> One of these exceptions relates to discriminatory admissions policies and limits the statute's coverage, at the undergraduate level, to public coeducational institutions.<sup>63</sup>

57. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982).

58. *See id.* at 729 n.14 (explaining that "[i]n 1980, women received more than 94 percent of the baccalaureate [nursing] degrees conferred nationwide . . . and constituted 96.5 percent of the registered nurses in the labor force").

59. *See id.* at 731 ("The uncontroverted record reveals that admitting men to nursing classes does not affect teaching style . . . [and] that the presence of men in the classroom would not affect the performance of the female nursing students . . ."); *see also id.* at 730 (explaining that the school's assertion that males' presence in the classroom would adversely affect women is undermined by the fact that it allows male students to audit nursing classes).

60. *See infra* notes 65-68 and accompanying text (noting that several federal courts have applied strict scrutiny to evaluate gender discrimination claims brought under Title IX).

61. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2000) ("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 . . .").

62. 20 U.S.C. § 1681; *see Allison Herren Lee, Title IX, Equal Protection, and the Richter Scale: Will VMI's Vibrations Topple Single-Sex Education*, 7 TEX. J. WOMEN & L. 37, 56 (1997) (describing the eight exceptions to Title IX's broad prohibition against gender discrimination).

63. *See* 20 U.S.C. § 1681(a)(1) ("[I]n regard to admissions to educational institutions, this section shall apply only to institutions of vocational education,

Consequently, Title IX, which usually provides greater protection than the Equal Protection Clause,<sup>64</sup> provides a limited remedy in the context of discriminatory admissions policies.

Some federal courts have granted female students greater protection under Title IX by applying strict scrutiny to evaluate schools' discriminatory policies.<sup>65</sup> These courts have interpreted Title IX to provide greater protection than the Equal Protection Clause by analogizing it to Title VI of the Civil Rights Act, which prohibits the use of race discrimination by any program that receives monetary assistance from the federal government.<sup>66</sup> Since Title IX and Title VI have nearly identical wording except for the designation of the protected class,<sup>67</sup> many courts look to legal opinions analyzing Title VI when interpreting Title IX.<sup>68</sup> These courts have concluded that Title IX's legislative history supports the proposition that Congress assumed the statutory interpretation of Title IX would follow Title VI.<sup>69</sup> For example, in *Jeldness v. Pearce*,<sup>70</sup> the United States Court of Appeals for the Ninth Circuit held that since the statutes contained

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professional education, and graduate higher education, and to public institutions of undergraduate higher education.”).

64. See David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 271 (2005) (“Textually, doctrinally, and theoretically, Title IX paints a more complete version of equality than the Equal Protection Clause.”).

65. See *Klinger v. Dep’t of Corr.*, 107 F.3d 609, 614 (8th Cir. 1997); *Jeldness v. Pearce*, 30 F.3d 1220, 1227 (9th Cir. 1994); *Cannon v. Univ. of Chi.*, 648 F.2d 1104, 1106 (7th Cir. 1981); *Johnson v. Bd. of Regents of Univ. Sys. of Ga.* (*Johnson I*), 106 F. Supp. 2d 1362, 1367 (S.D. Ga. 2000), *aff’d*, 263 F.3d 1234 (11th Cir. 2001). See *generally Cannon v. Univ. of Chi.*, 441 U.S. 677, 695-96 (1979) (concluding that Congress modeled Title IX after Title VI and assumed that Title IX would be interpreted by analogy to Title VI).

66. 42 U.S.C. § 2000d (2000).

67. Compare Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2000) (“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.”), with 42 U.S.C. § 2000(d) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

68. See Cohen, *supra* note 64, at 222 (“[T]he most common way courts and commentators compare Title IX and the Equal Protection Clause is indirectly, by comparing Title IX to Title VI.”); 117 CONG. REC. 28453, 30407 (1971) (explaining during congressional debate that some of Title IX’s language was taken directly from Title VI).

69. See *Cannon*, 441 U.S. at 696 n.16 (stating that the congressional debate concluded that the passage of Title IX only added the word “sex” to a current law [Title VI]); 118 CONG. REC. 5111, 5803 (1972) (explaining that “[e]nforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in Title VI of the 1964 Civil Rights Act”).

70. 30 F.3d 1220, 1227 (9th Cir. 1994).

nearly identical language, the same level of protection should be accorded to both protected classes—race and gender.<sup>71</sup>

Recently, in *Johnson v. Board of Regents of University System of Georgia* (“*Johnson I*”)<sup>72</sup> the United States District Court for the Southern District of Georgia used strict scrutiny to evaluate a gender discrimination claim challenging the University of Georgia’s (“UGA”) affirmative action policy.<sup>73</sup> UGA awarded an additional quarter point to all male students’ academic indices and a half point to all minority students’ academic indices.<sup>74</sup> The court held that this affirmative action policy that favored males violated Title IX.<sup>75</sup> This decision, which predates *Grutter* and *Gratz*, declined to recognize diversity in education as a compelling state interest because the university failed to provide quantitative or qualitative evidence to support its program.<sup>76</sup> The district court did not address whether the plan was narrowly tailored because the court concluded that the goal of diversity was “so inherently formless and malleable that *no* plan can be narrowly tailored to fit it.”<sup>77</sup>

Since UGA’s affirmative action plan provided a bonus to minority and male applicants, the district court’s opinion addressed both issues.<sup>78</sup> The district court used strict scrutiny to evaluate both the racial and gender preferences.<sup>79</sup> The court found that UGA’s admissions director could not articulate any need for gender diversity other than a basic assertion that “the state of Georgia is 49th in the

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71. Compare *Jeldness*, 30 F.3d at 1227-28 (noting that in the absence of contrary authority gender discrimination challenged under Title IX should be evaluated under strict scrutiny, like race discrimination), with *Cohen*, *supra* note 64, at 244 (“The meaning and applicability of Title VI are useful guides in construing Title IX . . . only to the extent that the language and history of Title IX do not suggest a contrary interpretation. . . . For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them.”).

72. 106 F. Supp. 2d 1362, 1365 (S.D. Ga. 2000), *aff’d*, 263 F.3d 1234 (11th Cir. 2001).

73. See *id.* at 1365 (explaining that a female student challenged the school’s affirmative action policy that awarded a preference based on an applicant’s gender and race).

74. *Id.*

75. *Id.*

76. See *id.* at 1372 (finding that UGA relied on stereotypes and generalized statements to justify its assertion that diversity in education constituted a compelling interest, rather than providing concrete, quantifiable evidence).

77. *Id.* at 1374. The court’s conclusion was grounded in the reasoning that “[t]o base racial preferences upon an amorphous, unquantifiable, and temporally unlimited goal is to engage in naked racial balancing . . .” *Id.* at 1373.

78. See *id.* at 1375 (evaluating the gender affirmative action plan using the same analysis as racial affirmative action plans because the school did not proffer a different rationale for that plan).

79. See *id.* at 1367 (explaining that since Title IX and Title VI use the same statutory language, “the standard for finding gender discrimination under Title IX is the same as Title VI’s standard for racial discrimination . . . i.e., strict scrutiny”).

country in the percentage of baccalaureate degrees going to males.”<sup>80</sup> The district court further explained that “gender preferencing would not even survive the less rigorous intermediate scrutiny [because] . . . [t]he desire to ‘help out’ men who are not earning baccalaureate degrees in the same numbers as women . . . is far from persuasive.”<sup>81</sup> Since the parties did not raise the gender issue on appeal, the United States Court of Appeals for the Eleventh Circuit focused on the constitutionality of the race-based preference,<sup>82</sup> whereas the district court’s opinion provides a preliminary analysis of the danger of using affirmative action policies to benefit male students.<sup>83</sup> The Eleventh Circuit declined to address the issue of whether diversity constituted a compelling interest and instead evaluated whether the plan was narrowly tailored.<sup>84</sup>

The circuit court implemented a four-factor test to evaluate whether the plan satisfied the narrowly tailored requirement.<sup>85</sup> The opinion emphasized the importance of flexibility in the admissions program and explained that the goal of diversity should not constitute an end in itself, but rather a means for achieving the broad mix of cultures and ideas represented in society.<sup>86</sup> The Eleventh Circuit held that the policy was not narrowly tailored since it provided a rigid set of points to minority applicants without an individual determination of their contribution to the school’s goal of diversity.<sup>87</sup>

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80. See *id.* at 1375 (concluding that “UGA’s asserted need for ‘gender diversity,’ then, obviously is a front for its gender-balancing desire”); see also *id.* (quoting UGA’s admissions director who asserted that there is a problem “[b]ecause our men are not completing college degrees at the same rate as our females are”).

81. *Id.* at 1376 n.10.

82. See *Johnson v. Bd. of Regents of Univ. of Ga. (Johnson II)*, 263 F.3d 1234, 1242 n.8 (11th Cir. 2001) (noting that the defendants did not appeal the district court’s holding that the gender discrimination violated Title IX).

83. See *Johnson I*, 106 F. Supp. 2d at 1375 (concluding that “UGA’s gender bonus points, despite being cloaked in the language of ‘diversity-fostering,’ represent nothing more than inartfully veiled gender balancing”).

84. See *Johnson II*, 263 F.3d at 1244 (refusing to consider “whether or when student body diversity may be a compelling interest” because the university “plainly failed to show its policy is narrowly tailored to serve that interest”).

85. See *id.* at 1253 (concluding that the four factors should be: “(1) whether the policy uses race in a rigid or mechanical way . . . (2) whether the policy fully and fairly takes account of race-neutral factors . . . (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered . . . race-neutral alternatives . . .”).

86. See *id.* (explaining that a white applicant could, in some circumstances, provide a greater contribution to diversity than a non-white applicant based on his or her background).

87. See *id.* at 1254 (determining that the plan mechanically distributed a pre-determined number of points to each minority applicant, which allowed minority students to be admitted at the expense of other students who could contribute more in terms of diversity).

*C. Affirmative Action Policies and State Equality Statutes*

The Equal Protection Clause and Title IX provide limited remedies to female students because they are only applicable to public undergraduate institutions.<sup>88</sup> However, in several states these students could also challenge private colleges' affirmative action policies under state educational equity statutes. This Section provides an overview of the relevant state statutes and distinguishes them from the federal remedies.

Many states have enacted comprehensive educational equity statutes or human rights acts that prohibit sex discrimination in educational institutions.<sup>89</sup> While some of these statutes track the language of Title IX and apply admissions gender equality requirements only to public institutions, several states have statutes that prohibit such discrimination in both private and public undergraduate institutions.<sup>90</sup>

When interpreting human rights acts and educational equity statutes, state and federal courts find analysis of analogous federal statutes instructive.<sup>91</sup> However, courts have consistently emphasized that while analysis of federal law may be applied in appropriate circumstances, it does not constitute binding precedent.<sup>92</sup> Therefore, courts can use the broad educational equity statutes to provide greater protection for individuals by allowing remedies against private colleges.

The Minnesota Human Rights Act is one statute where the language differs from Title IX and could allow discriminatory admissions policies to be challenged at private colleges.<sup>93</sup> The Act provides: "It is an unfair discriminatory practice to discriminate in

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88. See *supra* note 21 (explaining that the Fourteenth Amendment has a state action requirement); see also *supra* notes 62-63 and accompanying text (describing Title IX's admissions exception that excludes private undergraduate universities).

89. E.g., CAL. EDUC. CODE § 6625 (West 2002); COLO. REV. STAT. § 22-7-403 (2005); D.C. CODE § 2-1402.41 (2001); ME. REV. STAT. ANN. tit. 5, § 4602(1) (2001); MINN. STAT. §§ 363A.03, 363A.13, 363A.23 (2001); MONT. CODE ANN. § 49-2-307 (2006); S.D. CODIFIED LAWS § 20-13-22 (2002).

90. E.g., MINN. STAT. § 363A.13 (2001); MONT. CODE ANN. § 49-2-307 (2006); 24 PA. STAT. ANN. § 5004 (West 2001); S.D. CODIFIED LAWS § 20-13-22 (2002).

91. See *Jacobsen v. Tillman*, 17 F. Supp. 2d 1018, 1024 (D. Minn. 1998) (construing the Minnesota Human Rights Act ("MHRA") using the same analysis as federal law claims); *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (holding that Title VII case law applies when courts construe the MHRA).

92. See *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 599 (8th Cir. 1999) (holding that courts apply the plain language meaning of the state statute where the language differs from developments in federal case law); *Fahey v. Avnet, Inc.*, 525 N.W.2d 568, 572 (Minn. 1994) (asserting that principles of Title VII law are merely instructive precedent for courts evaluating the MHRA).

93. See MINN. STAT. § 363A.13 (2001) (prohibiting educational institutions from excluding students based on gender).



any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of . . . sex . . . .”<sup>94</sup> The statute further explicitly prohibits sex discrimination in educational institutions’ admissions’ policies.<sup>95</sup> The MHRA defines the term “educational institution” to include colleges generally,<sup>96</sup> and the statute contains no exception limiting its coverage to state universities.<sup>97</sup>

For example, in *Montgomery v. Independent School District No. 709*, when a student alleged, under this Act, that he was a victim of same-sex sexual harassment at school, the district court looked to the statutory language of the Act to evaluate the claim.<sup>98</sup> The court construed the term “sexual harassment” to allow claims by students for same-sex harassment since the statutory language did not contain a requirement that the harassment be motivated by “sexual interest,” but rather that the harassment be “verbal or physical conduct of a sexual nature.”<sup>99</sup> The court reached this decision even though the issue of whether same-sex harassment is actionable under Title IX had not been conclusively decided.<sup>100</sup>

In addition to the educational equity statutes, students could also challenge these affirmative action policies under state equal rights amendments. Although the Federal Equal Rights Amendment has not been enacted,<sup>101</sup> twenty-two states have state equal rights amendments that guarantee equal rights for female citizens of their respective states.<sup>102</sup> These amendments provide greater protection for

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94. MINN. STAT. § 363A.13(1) (2001).

95. MINN. STAT. § 363A.13(2) (2001) (“It is an unfair discriminatory practice to exclude . . . a person seeking admission as a student . . . because of . . . sex . . .”).

96. For purposes of the MHRA, educational institution is defined as “a public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system and a business, nursing, professional, secretarial, technical, vocational school; and includes an agent of an educational institution.” MINN. STAT. § 363A.03(14).

97. See MINN. STAT. § 363A.23(1) (stating that while there is no general exception for private colleges, there is an admissions exception for private colleges that have been traditionally single-sex institutions).

98. See *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1087-88, 1090 n.9 (D. Minn. 2000) (looking to the plain statutory language to determine the definition of sexual harassment rather than relying on federal courts’ Title IX analysis).

99. *Id.* at 1087-88.

100. See *id.* at 1089-90 (holding that the language of the MHRA controls where there are differences between the statutory language of the MHRA and Title IX).

101. See Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202 n.7 (2005) (explaining that although Congress passed the Federal Equal Rights Amendment (“ERA”) in 1972, the necessary three-fourths of the states failed to ratify it).

102. *Id.* at 1202.

female students than the Equal Protection Clause because often these amendments do not have a state action requirement and therefore their reach can be extended to private actors.<sup>103</sup> The state equal rights amendments also raise the level of scrutiny beyond intermediate to strict scrutiny,<sup>104</sup> requiring a party to assert that its plan is narrowly tailored to achieve a compelling government interest.

While litigants often focus on federal remedies, state statutes and constitutions often offer broader protection of civil rights.<sup>105</sup> In the context of affirmative action policies that benefit male students, the objectives of the state and federal statutes are the same—the eradication of gender discrimination.<sup>106</sup> However, often the state statutes are broadly worded and can therefore encompass a greater variety of discriminatory acts than the federal statutes.<sup>107</sup>

## II. ANALYSIS

### *A. Affirmative Action Policies that Benefit Male Students Require a Different Framework of Analysis than Racial Affirmative Action Policies*

This Section will delineate the differences between racial affirmative action policies and affirmative action policies that benefit male students to demonstrate why the racial affirmative action cases do not adequately resolve the issue of the constitutionality of gender-based affirmative action policies. Various characteristics distinguish male affirmative action programs from racial affirmative action policies. The racial affirmative action cases are based on the premise of historical discrimination against minorities and their subsequent underrepresentation in colleges and universities, yet these issues are

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103. See *id.* at 1229-30 (discussing how some states' ERAs, like those of Montana and Rhode Island, expressly extend the prohibitions to private actors while other states, like Maryland and Pennsylvania, have broader language that could be interpreted to include private individuals).

104. See *id.* at 1240 (concluding that most state courts used their state ERAs to provide greater protection against gender discrimination by forcing states to meet the strict scrutiny standard rather than the intermediate scrutiny standard that federal courts use to evaluate claims of gender discrimination).

105. See *id.* at 1203 (explaining that "many state courts are interpreting state constitutions as independent, and often broader, sources of protection for individual liberties").

106. See, e.g., MINN. STAT. § 363A.02(a)(5) (2001) ("It is the public policy of this state to secure for persons in this state, freedom from discrimination: . . . in education because of . . . sex . . .").

107. See *infra* Part II.3 (describing that the broad language of the MHRA could allow students to challenge colleges' targeted recruitment campaigns for male students).

not applicable to male students.<sup>108</sup> Additionally, racial affirmative action policies were designed to assist a disadvantaged class of applicants and disavowed the use of stereotypes about the abilities of minority applicants.<sup>109</sup> However, colleges' enactments of targeted recruitment policies to attract male candidates rely on impermissible stereotypes regarding the traditional gender roles of males and females.<sup>110</sup>

The Court's analyses of racial affirmative action policies have been based on the premise that African Americans historically lacked opportunities to attend institutions of higher education in the United States.<sup>111</sup> Males as a group have never been the victims of discrimination in institutions of higher education.<sup>112</sup> To the contrary, many universities in the United States limited their enrollment to male students until the early 1970s.<sup>113</sup>

While the *Grutter* and *Gratz* opinions demonstrate a movement in affirmative action jurisprudence from a goal of diversity-as-difference toward a goal of diversity-as-integration,<sup>114</sup> the need for an affirmative

108. See, e.g., WOMEN IN HIGHER EDUCATION: AN ENCYCLOPEDIA, 3 (Ana M. Martínez Alemán & Kristen A. Renn eds., 2002) (stating that Harvard College, the first American college, was founded in 1663 to "train young men for the ministry and for future leadership positions within colonial government"); Jaschik, *supra* note 19 (explaining that the purpose of affirmative action policies is to remedy past discrimination, and males did not suffer from historical discrimination); Lewin, *supra* note 9 (finding that in the highest income groups men of all races were more likely than women to attend college and that the largest gender gap was among non-traditional college students, where women outnumbered men two to one).

109. See *Grutter v. Bollinger*, 539 U.S. 306, 319-20 (2003) (noting the testimony of educational experts who explained that the enrollment of a "critical mass" of minority students is designed to eliminate racial stereotypes).

110. See *infra* notes 150-151 and accompanying text (describing colleges' targeted recruitment efforts to increase male enrollment, including improving science and math programs since males traditionally dominate these majors); see also Bill Pennington, *Small Colleges, Short of Men, Embrace Football*, N.Y. TIMES, July 10, 2006, at A1 (explaining that the addition of a football team would increase male enrollment, not only because of the addition of the male players, but because more male than female students consider the addition attractive).

111. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.").

112. See WOMEN IN HIGHER EDUCATION, *supra* note 108, at 3-4 (describing that institutions of higher education were created for men and limited their enrollment to male students for decades).

113. See *id.* at 4 (noting that only a few institutions taught women before the Civil War, and the first college to offer co-education was Oberlin College in 1837, almost 200 years after the founding of Harvard College); see also Kingsbury, *supra* note 15 (explaining that Boston College, Johns Hopkins University, Brown, the University of Notre Dame, Dartmouth College, and Harvard did not become co-educational universities until the 1970s).

114. Jessica Bulman-Pozen, Note, *Grutter at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1414-16 (2006) (explaining that the goal of diversity-as-integration contemplates a forward looking focus to end racial

action plan to achieve diversity correlates to the historic discrimination against racial minorities.<sup>115</sup> The diversity-as-integration concept seeks to reduce racial segregation in the workplace and society.<sup>116</sup> Court opinions suggest that creating an environment that allows students to interact with diverse individuals fosters tolerance and a sense of community that extends to the workplace.<sup>117</sup> However, colleges cannot support male affirmative action policies based on this theory since although women currently constitute a majority of college students, they continue to lag behind men in earning capacity,<sup>118</sup> and males occupy the majority of the leadership positions in corporations, large law firms, and politics.<sup>119</sup> On average, women earn only seventy-seven cents for every dollar earned by their male counterparts, and only six females hold the CEO positions at Fortune 500 companies.<sup>120</sup> Additionally, while females comprise nearly half of the population at the nation's law schools, only 17.3% of the partners at large law firms are female.<sup>121</sup> Therefore, a remedial rationale for an affirmative action policy benefiting male students would not constitute an exceedingly persuasive justification.<sup>122</sup>

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segregation by using universities to breed tolerance and acceptance of individuals from different cultural and racial backgrounds).

115. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (upholding racial segregation in places of public accommodation).

116. See Bulman-Pozen, *supra* note 113, at 1415 (arguing that "diverse universities are instrumental to realizing extrinsic social goals" and that "[i]ntegration signals that institutions and paths to leadership are open to members of all races").

117. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (indicating that integration facilitates success in increasingly diverse workplace environments).

118. Marklein, *supra* note 6, at 1A; see also Ben Feller, *Women Are Passing or Catching Men in College Areas Once Dominated by Men*, MSN ENCARTA, <http://encarta.msn.com/encnet/departments/adultlearning/?article=womenpassingmen> (last visited Sept. 7, 2006) (explaining that even though women receive most of the diplomas conferred in fields like business and biology, women are still paid less than their male counterparts).

119. See, e.g., CRS Report for Congress, *Membership of the 109th Congress* 1, June 13, 2006, available at <http://www.senate.gov/reference/resources/pdf/RS22007.pdf> (revealing that only eighty-four of the five hundred thirty-five members of Congress are female); Del Jones, *Few Women Hold Top Executive Jobs, Even When CEOs are Females*, USA TODAY, Jan. 27, 2003, at 1B (indicating that there are only six female CEOs at Fortune 500 companies).

120. Jake Ellison, *Gender Gap Puzzles Colleges*, SEATTLE POST-INTELLIGENCER REP., Dec. 23, 2002, at A1 (reporting that "women make up only 15.7 percent of the corporate officers in the United States' 500 largest companies" and that women constitute only twenty-one percent of presidents at four-year colleges and universities).

121. Timothy L. O'Brien, *Up the Down Staircase*, N.Y. TIMES, Mar. 19, 2006, at C1 (describing that while women and men graduate from law school in equal numbers, women disappear at the highest tier of most large law firms).

122. Cf. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982) (rejecting Mississippi University for Women's asserted remedial goal of compensating women for historical discrimination since nursing is predominantly a female occupation).

Additionally, male students represent a substantial proportion of the student population on college campuses. Colleges assert the need for racial diversity based on the premise that students from diverse backgrounds bring different viewpoints to class discussions and the overall college environment.<sup>123</sup> The diversity-as-integration doctrine envisions a sufficiently large number of minority students, so that students do not feel like representatives of their race.<sup>124</sup> However, while females constitute the majority of undergraduate students, it is unlikely that male students feel the need to act as spokesmen for their gender when nationwide they constitute forty-three percent of college students.<sup>125</sup> Contrastingly, African American and Hispanic students represent only thirteen percent and eleven percent of the college population, respectively.<sup>126</sup>

While the *Grutter* opinion embraced diversity-as-integration, the narrowly tailored plan for implementation focuses on an individualized determination of each applicant's qualifications, thus presenting an internal contradiction.<sup>127</sup> The contradiction exists because for society to realize the benefits of diversity-as-integration there must be a significant number of racially diverse individuals on college campuses, yet a narrowly tailored program prohibits schools from focusing on numbers.<sup>128</sup> One commentator argues, "[e]ven as *Grutter's* narrow-tailoring discussion resists defining race in terms of a 'specific and identifiable' contribution to diversity, it demands an inquiry linked to a static view of racial identity."<sup>129</sup> If courts applied the same analysis to evaluate a gender-based affirmative action program, a narrowly tailored plan would similarly assume that male and female students act in accordance with their socially constructed

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123. See *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003) (explaining that the University of Michigan Law School enacted a racial affirmative action policy to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts").

124. See Bulman-Pozen, *supra* note 114, at 1433-34 (explaining that the concept of diversity-as-integration requires universities to consider the total percentage of minority students on the campus because a higher percentage of minority students reduces discrimination).

125. THE CONDITION OF EDUCATION, *supra* note 7, at 36, 125.

126. U.S. Dep't of Educ.: Nat'l Ctr. for Educ. Statistics, *Fast Facts*, Sept. 1, 2005, <http://nces.ed.gov/fastfacts/display.asp?id=98>.

127. See Bulman-Pozen, *supra* note 114, at 1417-18 (explaining that individualized consideration of applicants' contributions to diversity in *Grutter* illustrates the diversity-as-difference rationale because that rationale justifies the admission of students of different races based on the proposition that their race led to different experiences).

128. See *id.* at 1419 (arguing that to achieve the meaningful minority representation on campus that will further the goal of diversity-as-integration, schools need to focus on numbers).

129. *Id.* at 1418.

gender roles.<sup>130</sup> The concept of diversity-as-difference inherent in gender affirmative action policies provides problems for the eradication of stereotypes about the roles of men and women, while the diversity-as-integration theme does not apply to males since they occupy society's leadership roles.<sup>131</sup> Therefore, affirmative action programs that benefit male students must be analyzed differently than race-based classifications.

*B. Proposed Framework to Evaluate Affirmative Action Programs that Benefit Male Students*

This Section delineates and applies a proposed framework to review the constitutionality of gender-based affirmative action policies benefiting male students and concludes that such policies would fail intermediate scrutiny. Then, this Section highlights the importance of state statutes prohibiting discrimination in educational institutions.

The proposed framework to evaluate affirmative action plans that benefit male students must scrutinize whether such a plan constitutes an important government interest since males do not belong to a historically disadvantaged class. The proposed framework evaluates affirmative action policies that benefit male students based on two main criteria: (1) whether the plan relies on gender stereotypes<sup>132</sup> and (2) whether the purpose of the plan is truly gender diversity rather than a mere attempt at gender balancing.<sup>133</sup> These criteria are based on the elements necessary to satisfy the requirements of intermediate scrutiny, which the court developed in *Mississippi University for Women v. Hogan* and *VMI*. These elements are central to the analysis since a rationale supporting the necessity of a male affirmative action policy cannot rely on assumptions about the

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130. See *United States v. Virginia (VMI)*, 518 U.S. 515, 541-42 (1996) (rejecting the use of stereotypes about the experiences of males and females based on socially-constructed gender roles); cf. Bulman-Pozen, *supra* note 114, at 1418 (describing how the narrowly tailored requirement assumes that racial minorities have different experiences because they are racial minorities).

131. See *supra* notes 117-20 and accompanying text (describing males' dominant role in business, law, and politics).

132. Cf. *VMI*, 518 U.S. at 540-41 (holding that although VMI may not have been the ideal school for all females, female students who sought such an adversative environment should have had the opportunity to attend the institution); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.").

133. See *Johnson v. Bd. of Regents of Univ. Sys. of Ga. (Johnson I)*, 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000) (refusing to defer to the school's mere assertion of the need for diversity on campus where the administrators stated that they wanted to enroll an equal proportion of male and female students), *aff'd*, 263 F.3d 1234 (11th Cir. 2001).

capabilities of males and females,<sup>134</sup> and a plan that merely seeks to achieve an equal proportion of male and female students is not substantially related to the achievement of diversity.<sup>135</sup> To determine whether the plan satisfies these criteria, it is necessary to conduct a searching inquiry of the asserted justification of the need for such a policy, rather than rely on the “mere recitation of a benign . . . purpose.”<sup>136</sup>

*1. Affirmative action policies implemented to benefit males do not constitute an important government interest*

Because of the differences between race-based affirmative action policies and affirmative action policies benefiting male students, courts must require colleges to provide substantive evidence that the college’s interest in gender diversity constitutes an exceedingly persuasive justification.<sup>137</sup> As in *VMI* and *Hogan*, the college must support the asserted justification with evidence that is based on legitimate educational objectives.<sup>138</sup> This evidence cannot rely on stereotypes or assumptions about the capabilities of male or female students or their likely interests.<sup>139</sup> Additionally, “[a] policy of diversity which aims to provide an array of educational opportunities . . . must do more than favor one gender.”<sup>140</sup>

To sustain a male affirmative action policy, the college would need to provide evidence regarding the need for a greater percentage of male students on campus based on a lack of diversity. In *Johnson I*, the University of Georgia was unable to articulate a legitimate

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134. See *infra* notes 165, 177, 179 and accompanying text (concluding that the Supreme Court prohibits reliance on stereotypes regarding the relative abilities of males and females).

135. See *infra* note 160 and accompanying text (explaining that a college’s attempt at gender balancing does not evidence a plan substantially related to achieving a diverse college class).

136. *Hogan*, 458 U.S. at 728; see *VMI*, 518 U.S. at 535-36 (“In cases of this genre, our precedent instructs that ‘benign’ justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.”).

137. See *Johnson I*, 106 F. Supp. 2d at 1371 (S.D. Ga. 2000) (explaining that the university’s inability to explain how racial diversity advances the school’s educational objectives “bespeaks the inherently amorphous nature of this concept”).

138. See *VMI*, 518 U.S. at 535 (maintaining that Virginia did not show that VMI meant to diversify educational opportunities); *Hogan*, 458 U.S. at 730 (concluding that the state “failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification”).

139. See *infra* note 148 (rejecting the use of stereotypes as a justification for distinctions based on gender).

140. *Id.* at 525.

rationale for the need to have gender diversity on campus.<sup>141</sup> Administrators at other colleges around the nation have proffered justifications such as social concerns about girls' ability to find suitable marriage partners with a comparable educational level and unequal proportions of male and female students at dances.<sup>142</sup> One administrator used circular reasoning to support a program that favored males in the admissions process by noting that since "men were so highly prized . . . some of them bec[a]me sexual predators," implying that the school needed to increase the number of males on campus to make it safer for women.<sup>143</sup>

While the University of Georgia asserted diversity as its goal once litigation began, none of the administrators articulated any academic need to have more males in the student body.<sup>144</sup> The administrators did not suggest that greater gender diversity would present more lively class discussions or that a diverse college environment would help students prepare for the workforce and reduce prejudice.<sup>145</sup> Since the administrators did not articulate a genuine need for diversity, it seems that this justification was merely a pretext for the policy unsupported by any substantive data.<sup>146</sup> Therefore, these

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141. Cf. *Johnson I*, 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000) (acknowledging Director McDuff's affirmative response in his deposition when questioned as to whether the school hoped the affirmative action policy would "produce a crafted class that is more proportionate in terms of male and female representation"), *aff'd*, 263 F.3d 1234 (11th Cir. 2001).

142. See Vickers, *supra* note 4 (relaying that administrators find a 50/50 split desirable in terms of social atmosphere). But cf. Lewin, *supra* note 10 (explaining that colleges desire gender proportionality not only for social reasons but to attract a diverse mix of students to the campus); Vickers, *supra* note 4 ("The consequences go far beyond a lousy social life and the longer-term reality that many women won't find educated male peers to marry. There are also academic consequences, and economic ones.").

143. Lewin, *supra* note 10.

144. See *Johnson I*, 106 F. Supp. 2d at 1375 (describing the testimony of the admissions director who was unable to articulate an academic need for a diverse class and explained that the discussion centered on enrolling a more proportionate number of male students); cf. Jaschik, *supra* note 19 (Jocelyn Samuels of the National Women's Law Center explained that administrators did not provide educational justifications for the affirmative action programs but rather focused on social concerns based on stereotypes of the kind that Title IX sought to eliminate).

145. See *Johnson I*, 106 F. Supp. 2d at 1375 (revealing that UGA's administrators only expressed concerns about enrolling a class that contained an equal proportion of male and female students); cf. *id.* at 1372 (explaining that the university administrators merely relied on a "truism that relationships between people of different backgrounds are based on something other than a shared background" and that "people from racially homogenous environments cannot 'fully work cooperatively' with individuals of a different race when they finally encounter them").

146. Cf. *United States v. Virginia (VMJ)*, 518 U.S. 515, 535-36 (1996) (asserting that colleges cannot advance benign rationales during the course of litigation that are unsupported by substantive evidence).



rationales do not assert a legitimate pedagogical goal for the need of gender diversity on campus.

For diversity to constitute an exceedingly persuasive justification, it must be based on more than stereotypes and generalizations about the roles of men and women.<sup>147</sup> Concerns about women's inability to find a similarly educated husband or partner at a dance are the very types of traditional gender stereotypes that have trapped women for generations.<sup>148</sup>

In addition to relying primarily on social and safety concerns, which stereotype women as the weaker sex, therefore needing protection,<sup>149</sup> other schools concerned about gender imbalances on their campuses engaged in targeted recruitment campaigns based on stereotypical ideas regarding gender roles.<sup>150</sup> These schools improved their engineering curriculum, highlighted math and science programs in admissions brochures, added more pictures of male students to school publications, and added football teams.<sup>151</sup> Like VMI, which believed that its adversative method was inappropriate for female students, these schools used stereotypes to generalize about the programs and majors that would attract more males to their college campuses.<sup>152</sup> However, Supreme Court jurisprudence dating back to the 1970s has rejected the idea of gender stereotypes, and programs that use such generalizations to increase diversity on

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147. *See id.* at 533 (holding that the justification advanced by the university cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").

148. *Cf. id.* at 542-44 (labeling the gender stereotypes preventing women from entering VMI as "self-fulfilling prophecies" and likening them to the stereotypes that once prevented women access to legal and medical educations).

149. *See Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (relaying that such notions of romantic paternalism "in practical effect, put women, not on a pedestal, but in a cage").

150. *See Fonda, supra* note 3 (detailing a recruiting technique at the University of North Carolina that touts the school's math and science programs to increase male enrollment since these majors traditionally appeal to male students); Karnasiewicz, *supra* note 5 (describing how some institutions use admission-oriented blogs to attract more male students, based on the stereotype that male students are more technology-savvy than female students).

151. *See Karnasiewicz, supra* note 5 (explaining the pointed recruitment campaigns that schools use to attract more male students, including "masculine" colors in admissions brochures and "pictures of smiling, confident young men"); Pennington, *supra* note 110 (describing how some small colleges are attracting male students by adding football teams). The president of Shenandoah University explained that "[f]ootball is the best draw of qualified male applicants that there is anywhere." *Id.*

152. *See VMI*, 518 U.S. at 524 (describing VMI's insistence that its distinctive, adversative method would need to undergo such radical alterations to accommodate women that it would be destroyed).

campus cannot meet the exceedingly persuasive justification standard.<sup>153</sup>

The objective of assisting a disproportionately burdened class would also fail under this framework because males have not been subject to discrimination in education.<sup>154</sup> In *Hogan*, the university stated that its goal was affirmative action for women.<sup>155</sup> However, since nursing was a traditionally female occupation, the Court concluded that this justification could not support the school's policy of denying admission to men.<sup>156</sup> A similar argument was advanced in *VMI*, where the school asserted that single sex education for males created diverse educational opportunities for students.<sup>157</sup> However, the Court rejected this justification because single-sex education institutions for men existed since the dawn of higher education in the United States and men had ample educational opportunities.<sup>158</sup>

Colleges cannot merely rely on the fact that men constitute forty-three percent of the student population on college campuses as a justification for these affirmative action policies. Rather than increase diversity and tolerance in society, policies that promote the advancement of men to the detriment of women reinforce stereotypes about gender roles in society.<sup>159</sup>

2. *Colleges' affirmative action policies that benefit male students are not substantially related to the goal of achieving diversity*

For a college's affirmative action policy to be substantially related to achieving the asserted goal of diversity, the school must implement a plan truly designed to increase the diversity of the class rather than

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153. Cf. *id.* at 532 (“[N]either federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”).

154. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (contending that white males are not a “discrete and insular minority”).

155. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727 (1982) (iterating the State's argument that the exclusion of men constituted affirmative action for women, compensating for discrimination against females).

156. See *supra* note 60 (describing the demographics of the nursing labor force).

157. See *VMI*, 518 U.S. at 535 (acknowledging Virginia's claim that single-sex education affords diversity, a pedagogical benefit, to some students).

158. See *id.* at 536 (“Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the Commonwealth established VMI, a range of educational opportunities for men and women was scarcely contemplated.”).

159. Cf. *Hogan*, 458 U.S. at 729 (“MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.”).

simply enroll an equal proportion of male and female students.<sup>160</sup> To determine whether this relationship exists, courts should evaluate the flexibility of the program, its consideration of gender-neutral factors, the disproportionate benefits to the favored class, and the existence of gender-neutral alternatives.<sup>161</sup>

These factors comport with this Comment's proposed gender-equality framework because they ensure that colleges can articulate support for the asserted justification of diversity by relying on substantive pedagogical objectives rather than assumptions about the inherent capabilities of males and females.<sup>162</sup> The Supreme Court has consistently rejected the argument that colleges and universities can simply assert their justification for a policy that distinguishes between individuals based on gender without subsequent judicial scrutiny.<sup>163</sup> Colleges need to provide substantive evidence that the plan includes an individual evaluation of all applicants and considers the diverse contributions that the student brings to the campus, other than his gender.<sup>164</sup>

*a. Rigid point systems do not constitute flexible affirmative action policies*

Systems that award points based on an applicant's gender constitute rigid and mechanized determinations that do not fully evaluate the applicant's talents and abilities to enrich the student experience on campus.<sup>165</sup> A court would likely find an attempt to equalize the number of male and female students on campus for the sake of proportionality unconstitutional because of its similarity to a

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160. Cf. *Johnson v. Bd. of Regents of Univ. of Ga. (Johnson I)*, 106 F. Supp. 2d 1362, 1375-76 (S.D. Ga. 2000) (rejecting a school's admissions plan because the school's asserted goal of diversity was more likely an attempt at gender balancing), *aff'd*, 263 F.3d 1234 (11th Cir. 2001).

161. Cf. *Johnson v. Bd. of Regents of Univ. of Ga. (Johnson II)*, 263 F.3d 1234, 1253 (11th Cir. 2001) (explaining four factors that should be used to evaluate whether an affirmative action plan is narrowly tailored to achieve the asserted objective).

162. See *VMI*, 518 U.S. at 550 (mandating that colleges cannot rely on generalizations about the supposed tendencies of the female gender and cannot deny opportunities to women "whose talent and capacity place them outside the average description").

163. See *Hogan*, 458 U.S. at 728 (concluding that the school's mere articulation of a benign objective does not prevent the Court from conducting its own inquiry of the policy's real purpose).

164. Cf. *Gratz v. Bollinger*, 539 U.S. 244, 273-74 (2003) (holding that colleges' affirmative action policies must conduct individualized analyses of each applicant and cannot use a rigid point system to advantage one class of applicants).

165. See Cordes, *supra* note 40, at 724-25 (concluding that *Grutter* and *Gratz* mandate individualized evaluations of each applicant's contribution to the campus' diversity); see also *VMI*, 518 U.S. at 540-41 (concluding that VMI must conduct an individual analysis of a female applicant's qualifications that may enrich the student body rather than excluding her based on gender stereotypes about her ability to succeed in an adversative environment).

quota system and the lack of individual evaluation of all applicants.<sup>166</sup> Rigid admissions standards that do not take account of the individual's fit with the educational institution are similar to VMI's admissions criteria that rejected female applicants based solely on their sex.<sup>167</sup>

To be constitutional, the affirmative action plan needs to include an individualized determination regarding the fitness of each applicant and his or her contribution to the diversity of the incoming class.<sup>168</sup> The evaluation of each student's background would require the admissions committee to look beyond the student's gender to see the contribution that he or she would make to the school rather than relying on stereotypes about the inherent abilities, experiences, and interests of male and female students.

*b. Admissions officers must conduct an individualized evaluation of each applicant including the consideration of gender neutral factors*

To be substantially related to the college's asserted objective, the school's affirmative action policy must consider all of an applicant's qualifications that could contribute to campus diversity.<sup>170</sup> The consideration of gender-neutral factors, including potential major, leadership experience, extracurricular activities, community service, hardships, and other factors that provide a comparable "plus" to a student's application would increase the likelihood of a constitutional program.<sup>171</sup> Examining gender-neutral factors of each applicant ensures that students are evaluated based on their actual

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166. *Cf. Johnson I*, 106 F. Supp. 2d at 1371 ("[M]ere racial balancing (i.e. proportional racial representation for its own sake) is clearly unconstitutional." (citing *Metro Broad., Inc. v. Fed. Commc'ns Comm'n*, 497 U.S. 547, 614 (1990) (O'Connor, J., dissenting))).

167. *See VMI*, 518 U.S. at 541-42 (asserting that VMI cannot exclude all female applicants simply because the average female might not meet VMI's rigorous physical standards).

168. *Cf. Gratz*, 539 U.S. at 273-74 (requiring colleges to evaluate each individual's ability to contribute to the school's diversity rather than assuming that a student will make certain contributions based on an innate characteristic).

169. *Cf. VMI*, 518 U.S. at 541 (asserting that "[s]tate actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females'" (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982))).

170. *Cf. Gratz*, 539 U.S. at 271 (describing that all of a student's attributes should be considered in the admissions process and the presence of one single characteristic does not automatically guarantee that the student will make that particular college campus more diverse).

171. *Cf. id.* at 279 (O'Connor, J., concurring) (explaining that the number of points awarded to minority applicants was disproportionate to the number of points awarded to students who contributed to the diversity of the school based on other characteristics, like leadership).

qualifications rather than assumptions based on their perceived contribution because of their gender.<sup>172</sup> Admissions programs that consider gender-neutral factors to add diversity to the class are more legitimate in their goal of truly seeking diversity rather than trying to achieve gender proportionality.

*c. Affirmative action policies must not disproportionately benefit male applicants*

An affirmative action policy disproportionately benefits male students when male applicants are awarded points based solely on their gender. This factor correlates to the flexibility of the affirmative action policy since a flexible plan that individually evaluates candidates decreases the likelihood that a policy would disproportionately benefit male students.<sup>173</sup> A mechanized process that awards points to all male students based solely on their gender, on the other hand, would fail this prong of the test.<sup>174</sup> A plan that considered only an applicant's gender would put females at an unfair advantage in applying for admission. Though an affirmative action policy benefiting males may only affect a small number of students, the impact is substantial for those individuals. While many females would not choose the adversative method of instruction used at VMI, the impact for those individuals denied admission based solely on their gender is enormous.<sup>175</sup> Similarly, a disproportionate point advantage for male students based solely on their gender would prevent qualified females from being offered admission solely because they were born a certain gender.<sup>176</sup> By using gender as a decisive factor in a student's application, the college would deny

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172. See *VMI*, 518 U.S. at 550 (explaining that some women are qualified and would seek out the adversative method employed by VMI, yet they are denied this opportunity based solely on assumptions made about their gender).

173. See *id.* at 540-41 (asserting that colleges' individual analysis of each student's application takes account of their personal strengths and weaknesses and consequently allows the admissions committee to admit the most qualified applicants).

174. Cf. *Gratz*, 539 U.S. at 273-74 (holding that colleges' affirmative action policies must evaluate each applicant based on their individual contribution to diversity).

175. See *VMI*, 518 U.S. at 542 (concluding that the question should be "not whether 'women or men should be forced to attend VMI'; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords").

176. Cf. *id.* at 550-51 (arguing that female students must be evaluated according to the same criteria as male applicants).

more qualified applicants the chance to attend the institution to satisfy an amorphous goal of gender proportionality.<sup>177</sup>

*d. Colleges must consider and reject gender neutral alternatives before adopting an affirmative action policy that benefits male applicants*

Many colleges and universities have used alternatives to formal affirmative action policies, including targeted recruitment programs, changes in advertising materials, and the addition of sports teams to attract male students.<sup>178</sup> While colleges should employ gender-neutral alternatives before implementing a formal affirmative action policy, the targeted recruitment policies that schools use are often based on stereotypes and cannot be considered neutral alternatives.

Colleges' reliance on gender stereotypes leads to a skewed perception of gender roles, potentially exacerbating gender discrimination in society.<sup>179</sup> The University of Michigan Law School attempted to eliminate similar discrimination by adopting an admissions policy that fosters diversity-as-integration.<sup>180</sup> However, instead of facilitating integration, colleges' reliance on stereotypes in the implementation of recruitment policies, hampers progress by constructing individuals' roles in society based solely on their gender without regard to their abilities.<sup>181</sup> The Supreme Court declared reliance on gender stereotypes unconstitutional because each individual should be evaluated based on his or her own qualifications.<sup>182</sup> Therefore, in targeting admissions materials to attract more male students, the college should not rely solely on stereotypes; rather, these attempts should focus on providing educational opportunities to all students.

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177. *Cf. id.* (concluding that VMI could not deny admission to female applicants based on gender stereotypes about their abilities when some female applicants may be better qualified than the average male).

178. *See supra* notes 150-151 and accompanying text (describing colleges' targeted recruitment campaigns aimed at increasing the enrollment of male students).

179. *Cf. VMI*, 518 U.S. at 543 n.12 (explaining that stereotypes about women's abilities led to discriminatory policies that excluded women from various prestigious professions, including law and medicine); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982) (asserting that denying males admission to the nursing school perpetuates the view that nursing is a female occupation, which leads to the denial of other opportunities for women).

180. *Grutter v. Bollinger*, 539 U.S. 306, 327-28 (2003); *see also Bulman-Pozen, supra* note 114, at 1415 (arguing that diverse universities will encourage diversity in society by "preparing students to work in 'an increasingly diverse workforce'" and participate in the community as informed American citizens).

181. *See VMI*, 518 U.S. at 541-42 (noting that judgments about people based on overbroad generalizations are likely to "perpetuate historical patterns of discrimination").

182. *See id.* at 541 (holding that states must avoid the use of fixed notions about gender roles when making classifications based on sex).

To implement a plan that is substantially related to the goal of diversity, the admissions committee must include flexible admissions criteria that evaluate each individual's unique contribution to the class and the college community.<sup>183</sup> The Court required VMI to evaluate each female applicant to determine her fitness for its unique adversative environment and did not allow the school to reject all female applicants simply because most would find the environment unsuitable.<sup>184</sup> Reliance on stereotypes about the proper role of men and women or the perceived strengths and interests of the male sex leads to segregation rather than the integrated community that colleges should seek to foster.<sup>185</sup> Since colleges administrators have not asserted a rationale for the affirmative action policy, other than gender proportionality, and have relied on gender stereotypes, the policies do not meet the requirements of intermediate scrutiny.

3. *Applicability of the gender equality framework to challenges brought under state anti-discrimination statutes*

In addition to the federal remedies previously discussed, state statutes that prohibit gender discrimination in educational institutions provide a remedy for female students to challenge affirmative action policies that benefit male students.<sup>186</sup> Although courts often use analogous federal case law as instructive precedent,<sup>187</sup> state statutes can offer broader remedies to students to the extent that the statutory language differs from Title IX.<sup>188</sup> For purposes of analysis, this Section will look at the language of the Minnesota Human Rights Act ("MHRA"),<sup>189</sup> although the analysis would be

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183. See *supra* notes 153, 165 and accompanying text (describing the need for admissions criteria to evaluate each applicant based on his or her individual qualifications).

184. See *VMI*, 518 U.S. at 550-51 (holding that VMI must admit qualified female students).

185. See *Bulman-Pozen*, *supra* note 114, at 1415-16 (explaining that the diversity-as-integration doctrine fosters community and eliminates discrimination in contrast to the diversity-as-difference doctrine that relies on stereotypes about the backgrounds of certain students).

186. See *supra* note 90 and accompanying text (arguing that state remedies are important because some state statutes contain language that will allow private rights of action against private colleges).

187. See *Fahey v. Avnet Inc.*, 525 N.W.2d 568, 572 (Minn. 1994) (explaining that state courts often use federal precedent of analogous federal statutes to analyze claims under the MHRA).

188. Cf. *Todd v. Ortho Biotech Inc.*, 175 F.3d 595, 599 (8th Cir. 1999) (holding that although the courts often look to Title VII case law, in the context of sex discrimination in the employment setting, when construing the MHRA, the court will apply the plain language of the statute when it differs from developments in federal case law).

189. The author uses the MHRA for purposes of analysis since this Act had the largest body of case law construing the scope of the Act.

similar under other state statutes with prohibitions against sex discrimination in educational institutions.<sup>190</sup>

Because state statutes were enacted to offer additional protection for students,<sup>191</sup> it is likely that courts would conduct a searching inquiry to examine whether the school had a compelling state interest in diversity rather than an interest in merely attempting to balance the colleges' proportion of male and female students.<sup>192</sup> A mere attempt at gender balancing would clearly fail under strict scrutiny, especially if a court forced a college to articulate support for its assertion that gender diversity constitutes a compelling state interest.<sup>193</sup> To pass constitutional muster, a court would require colleges to assert a particular need to implement an affirmative action policy for male students that was free from gender stereotypes about the capabilities of men and women.<sup>194</sup>

Additionally, a college would need to articulate that this plan was narrowly tailored to achieve its goal of gender diversity.<sup>195</sup> While a plan that awards points to male applicants based solely on their gender would clearly fail this prong of the test, other practices may also violate state statutes.<sup>196</sup> For example, some colleges have instituted a policy that extends a phone call to all admitted male students, but school representatives do not call all of the accepted female students.<sup>197</sup> The MHRA articulates that it is "an unfair

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190. See, e.g., MONT. CODE ANN. § 49-2-307 (2006) (prohibiting educational institutions from excluding, expelling, limiting, or otherwise discriminating against prospective students or current students on the basis of sex); S.D. CODIFIED LAWS § 20-13-22 (2001) (declaring that it is unfair and discriminatory for educational institutions to include or expel students on the basis of sex).

191. See MINN. STAT. § 363A.02 (2001) (stating that "[i]t is the public policy of this state to secure for persons in this state, freedom from discrimination . . . in education because of . . . sex . . .").

192. See *supra* note 136 and accompanying text (describing the Supreme Court's reluctance to accept a school's asserted objective for a policy that distinguishes among applicants based on sex).

193. Cf. *Johnson v. Bd. of Regents of Univ. of Ga.* (*Johnson I*), 106 F. Supp. 2d 1362, 1376 n.10 (S.D. Ga. 2000) (rejecting a gender affirmative action policy where the school could not support its asserted objective of the need for an affirmative action policy with substantive educational data), *aff'd*, 263 F.3d 1234 (11th Cir. 2001).

194. Cf. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (holding that although the school may articulate a benign purpose for the policy, courts must evaluate the plan to see if "the alleged objective is the actual purpose underlying the discriminatory classification").

195. See *supra* note 91 and accompanying text (describing that state courts often look to federal precedent analyzing analogous federal statutes; therefore, the state court would likely apply the same level of scrutiny as the federal courts).

196. Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1989) (rejecting the University of California's use of a quota system to achieve racial diversity).

197. See Peter Y. Hong, *Gender Gap Growing on College Campuses*, THE SEATTLE TIMES, Dec. 1, 2004, A11 (quoting the Vice President of Admissions at Santa Clara University stating that "[w]e make a special pitch to [males] to talk about the benefits of Santa



discriminatory practice to exclude, expel, or otherwise discriminate against a person seeking admission as a student . . . because of . . . sex.”<sup>198</sup> Thus, this type of preferential treatment to a particular class of applicants based solely on their sex could constitute the “other” type of discrimination that the statute expressly prohibits. While such an admissions practice might not violate Title IX, it would likely violate the MHRA, and similar state statutes, because of the additional level of protection that these statutes provide.

State statutes, like the MHRA, can accomplish the goals of *VMI* and *Hogan* by creating educational environments that allow all students to achieve their potential. State courts can achieve the underlying purpose of the decisions in *VMI* and *Hogan*—individualized analysis of students based on their actual qualifications regardless of stereotypes—by interpreting their state statutes and constitutions to provide greater protection from gender discrimination.

#### CONCLUSION

Due to the differences between racial affirmative action policies and affirmative action programs that benefit male students, courts must use a different framework to evaluate affirmative action policies benefiting male students. Courts must analyze this issue differently because males have not historically suffered from discrimination, and the Supreme Court has not identified males as a discrete and insular minority who should receive a greater level of protection. Therefore, while the opinions of *Grutter* and *Gratz* provide some guidance to courts in confronting the issue of gender affirmative action programs, the analysis of these opinions should not be wholly adopted and instead the Court’s gender discrimination cases should govern the analysis.

The opinions of *VMI* and *Hogan* provide a framework that requires schools to articulate a specific justification for policies that discriminate based on sex and that will not defer to colleges’ mere assertion that the school needs gender proportionality. The proposed framework evaluates the affirmative action policies based on (1) whether the college relies on gender stereotypes and (2) whether the aim of the school’s policy is diversity rather than gender proportionality. College administrators have not articulated substantive pedagogical justifications for the need to use affirmative

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Clara, as we do for other underrepresented groups” due to “fear that lopsided male-female ratios will hurt the social life and diverse classrooms [used] as selling points”).

198. MINN. STAT. § 363A.13 (2001).

action to increase the percentage of males on campus. Undergraduate institutions have instead used targeted recruitment programs that rely on gender stereotypes to enroll a class with equal proportions of male and female students.<sup>199</sup> While colleges should encourage innovative thought and progress, institutions with affirmative action policies benefiting males are charting a course toward the past by promoting gender stereotypes and inequality.

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199. *See supra* notes 141-143 and accompanying text (explaining that college administrators relied on social concerns about the gender imbalance rather than asserting a legitimate pedagogical objective for the policy).