

1-20-2010

## Scrutinize This!: The Questionable Constitutionality of Gender-Conscious Admissions Policies Utilized by Public Universities

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### Recommended Citation

Amy Hinkley *Scrutinize This!: The Questionable Constitutionality of Gender-Conscious Admissions Policies Utilized by Public Universities*, 37 Pepp. L. Rev. Iss. 1 (2010)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol37/iss1/4>

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# Scrutinize This!: The Questionable Constitutionality of Gender-Conscious Admissions Policies Utilized by Public Universities

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## I. INTRODUCTION

While most of us think of educational affirmative action policies as benefiting traditional victims of discrimination—racial minorities and women—there is evidence that it has become popular for universities to employ gender-conscious admissions policies that are designed to give men the advantage.<sup>1</sup> Since 1970, women’s enrollment in undergraduate universities has increased at a faster rate than men’s, and the trend is expected to continue through 2015.<sup>2</sup> Female enrollment has also experienced a faster increase than male enrollment in graduate programs.<sup>3</sup> The ratio of female to male college students went from rough parity in 1980, to 57/43 in 2006, and by 2010 the ratio is expected to be around 60/40.<sup>4</sup> These statistics have forced school administrators to confront the gender imbalance on campus, and decide what, if anything, they are going to do about it.<sup>5</sup>

One response has been to maintain a gender balance at the school by admitting men at a higher rate than women through the use of gender-conscious admissions policies.<sup>6</sup> While these policies do not share the original goals of affirmative action,<sup>7</sup> they are nonetheless referred to as gender-based affirmative action to benefit males.<sup>8</sup> Just as racial affirmative action

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1. See, e.g., Alex Kingsbury, *Admittedly Unequal*, U.S. NEWS & WORLD REP., June 25, 2007, at 50, available at <http://www.usnews.com/usnews/edu/articles/070617/25gender.htm>; Mark Clayton, *Overview: The Gender Equation*, CHRISTIAN SCI. MONITOR, May 22, 2001, at 11, available at <http://www.csmonitor.com/2001/0522/p11s2.html>; David R. Francis, Op-Ed., *Gender Bias in College Admissions*, CHRISTIAN SCI. MONITOR, July 24, 2007, at 8, available at <http://www.csmonitor.com/2007/0724/p08s01-comv.html>. Throughout this Comment the terms “college” and “university” will be used interchangeably. Unless otherwise specified, these terms refer to public institutions of higher education.

2. U.S. DEP’T OF EDUC., *THE CONDITION OF EDUCATION 2006* 36, 125 (2006), available at <http://nces.ed.gov/pubs2006/2006071.pdf> (projecting undergraduate enrollments).

3. *Id.* at 37 (explaining trends in graduate and first-professional programs). “Enrollment in graduate and first-professional programs increased from 1976 to 2004. Female enrollment experienced a larger increase than male enrollment during this time for both types of programs.” *Id.*

4. Kingsbury, *supra* note 1, at 51.

5. Francis, *supra* note 1 (“Admissions directors cite several reasons for wanting to keep the numbers as equal as possible. Balance makes social life easier. It also helps schools attract the best candidates of both sexes: When the gender balance tilts to a 60–40 ratio, favoring either gender, students are less interested in attending.”).

6. Kingsbury, *supra* note 1, at 53. However,

[i]t is difficult to gauge how much impact a college’s overall desire to maintain a balanced student body has on the decision to accept or reject any particular applicant. Schools are often loath to discuss the specifics of their selection process, and they’re especially sensitive when it comes to issues of preferential treatment for one group of students at the expense of another.

*Id.*

7. “Affirmative action” is defined as: “A set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.” BLACK’S LAW DICTIONARY 64 (8th ed. 2004).

8. See, e.g., Debra Franzese, Comment, *The Gender Curve: An Analysis of Colleges’ Use of Affirmative Action Policies to Benefit Male Applicants*, 56 AM. U. L. REV. 719 (2007); Scott Jaschik,

sparked much controversy, “maintaining gender balance by turning down well-qualified women to make room for men with less impressive qualifications has some critics crying foul.”<sup>9</sup> The “use of gender as a tip factor” may lead women to file lawsuits alleging gender discrimination,<sup>10</sup> but the potential success of these claims is difficult to predict because this area of the law is far from clear.<sup>11</sup>

While there has long been heated debate on the issue of affirmative action, the focus of the commentary and litigation has been on race-conscious policies.<sup>12</sup> In fact, the U.S. Supreme Court has not yet heard a gender-based educational affirmative action case to decide whether a gender-conscious admissions policy utilized by a public university could withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.<sup>13</sup> Thus, there is no established framework for deciding these cases.

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*Affirmative Action for Men*, INSIDE HIGHER ED., Mar. 27, 2006, <http://insidehighered.com/news/2006/03/27/admit>; 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). Throughout this Comment the terms “sex” and “gender” will be used interchangeably to refer to discrimination based on whether the person is a man or a woman. The terms “gender-conscious admissions policy” and “gender-based affirmative action” will be used interchangeably to refer to university admissions policies that take an applicant’s gender into consideration for preferential treatment.

9. Francis, *supra* note 1.

10. See Press Release, Am. Ass’n of Univ. Professors, Mark Clayton of the Christian Science Monitor Receives Award for Excellence in Coverage of Higher Education (June 10, 2002), <http://www.aaup.org/AAUP/newsroom/prarchives/2002/HEAward.htm> (“It wouldn’t surprise me if one day we see the use of gender as a tip factor in admissions debated in court just as race in admissions is being debated today.”); see also Mark Clayton, *Admissions Officers Walk a Fine Line in Gender-Balancing Act*, CHRISTIAN SCI. MONITOR, May 22, 2001, at 11, available at <http://www.csmonitor.com/2001/0522/p11s1.html> (“Unlike gender, the use of race as a factor in college admissions is under heavy legal fire. At least a half-dozen civil rights lawsuits against public universities or university systems nationwide allege race bias in admissions, according to the American Association of University Professors. Most involve graduate or law-school admissions. But one case at the University of Michigan charges race bias in undergraduate admissions. Could today’s race cases provide the template for future legal arguments against gender bias? . . . Admissions decisions that discriminate against women may have to become more egregious before many women start filing lawsuits. Right now, it is still a ‘stealth issue,’ some say.”).

11. Kingsbury, *supra* note 1, at 53 (“The law in this area is decidedly opaque and sometimes seemingly contradictory.”).

12. Jason M. Skaggs, Comment, *Justifying Gender-Based Affirmative Action Under United States v. Virginia’s “Exceedingly Persuasive Justification” Standard*, 86 CAL. L. REV. 1169, 1169 (1998).

13. Skaggs, *supra* note 12, at 1169 (“This lack of guidance has resulted in a split among the federal circuit courts of appeals with regard to the appropriate level of scrutiny to be applied to such programs.”).

The Court so far has only commented on gender-conscious admissions in the context of single-sex schools.<sup>14</sup> The Court has heard several race-based educational affirmative action cases, most recently *Grutter v. Bollinger*.<sup>15</sup> *Grutter* set forth a number of factors that courts should consider when faced with the question of whether a university's race-conscious admissions policy is constitutional under the Equal Protection Clause.<sup>16</sup> Because the classification in *Grutter* was based on race, the Court applied strict scrutiny, which has been the traditional standard of review for racial classifications.<sup>17</sup> Gender classifications traditionally have only merited an intermediate standard of review.<sup>18</sup> Assuming the Court will eventually hear a challenge to a gender-conscious admissions policy, one question that arises is whether the Court should apply strict scrutiny, keeping in line with the standard applied in all race-based educational affirmative action cases, or whether the Court should apply the lower intermediate scrutiny standard, because the classification is based on gender rather than race. Regardless of the level of scrutiny applied, the *Grutter* factors may provide a helpful framework for determining the constitutionality of a gender-conscious admissions policy.

Part II of this Comment provides an overview of the potential causes of action available to a party who wishes to challenge a university's gender-conscious admissions policy.<sup>19</sup> This part also traces the evolution of the standard of judicial review for equal protection claims, provides a brief history of Supreme Court cases involving equal protection challenges to educational affirmative action policies, and reviews the current practice of gender-based affirmative action in the context of higher education.<sup>20</sup> Part III discusses the various views on the appropriate standard of judicial review for the Court to apply when evaluating a challenged gender-conscious admissions policy.<sup>21</sup> Part IV begins by asserting that the standard of scrutiny should be the same whether the gender-conscious policy is benefiting or burdening males or females.<sup>22</sup> Part IV then suggests that the use of the *Grutter* factors may provide a helpful framework for the Court in deciding a future gender-based affirmative action case, as well as a helpful guide to

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14. See *United States v. Virginia*, 518 U.S. 515 (1996) (all-male military school); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (all-female nursing school).

15. 539 U.S. 306 (2003).

16. See *id.*; *Smith v. Univ. of Wash.*, 392 F.3d 367, 373 (9th Cir. 2004) (deriving five factors from the *Grutter* opinion).

17. *Grutter*, 539 U.S. at 326.

18. See *infra* notes 46–64, 92–101 and accompanying text.

19. See *infra* notes 25–33 and accompanying text.

20. See *infra* notes 34–119 and accompanying text.

21. See *infra* notes 120–42 and accompanying text.

22. See *infra* notes 143–55 and accompanying text.

universities in formulating a constitutional admissions policy.<sup>23</sup> Part V concludes this Comment.<sup>24</sup>

## II. EDUCATIONAL AFFIRMATIVE ACTION AND EQUAL PROTECTION

### A. *Potential Causes of Action for Claims of Gender-Based Discrimination*

A woman who believes she has been wrongly discriminated against as a result of a university's gender-conscious admissions policy has several possible causes of action. One option is to challenge the constitutionality of the admissions policy under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.<sup>25</sup> Another option is to challenge the legality of the admissions policy under Title IX of the Education Amendments of 1972.<sup>26</sup> Additionally, she may challenge a discriminatory

23. See *infra* notes 156–95 and accompanying text.

24. See *infra* notes 196–98 and accompanying text.

25. See *infra* notes 29–33 and accompanying text.

26. Jaschik, *supra* note 8 (“Title IX of the Education Amendments of 1972 bars gender discrimination in all education programs at institutions receiving federal funds (all but a handful of colleges).”); see also Franzese, *supra* note 8, at 728–29 (reviewing affirmative action policies under Title IX). Title IX provides that “[n]o 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 . . . .” 20 U.S.C. § 1681(a) (1994). Therefore, the plain language of Title IX effectively prohibits a college from considering an applicant’s gender in the admissions process. Jaschik, *supra* note 8 (“The Education Department’s Office for Civil Rights[,] . . . charged with enforcing Title IX, . . . said[] regulations ‘prohibit treating individuals differently on the basis of sex, including giving preferences on the basis of sex.’”). However, there is an important exemption to Title IX. The statute covers all graduate and professional programs, but it only applies to public undergraduate admissions programs. Jaschik, *supra* note 8; see also Franzese, *supra* note 8, at 728–29 (citing 20 U.S.C. § 1681(a)(1) (2000) (“[I]n regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.”)). Therefore, private undergraduate institutions are beyond Title IX’s reach. As far as the level of protection Title IX offers students applying to public colleges is concerned, courts analyze Title IX challenges under the highest standard of judicial review. See *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1367 (S.D. Ga. 2000). This is not because of the class being protected, but rather, because courts have interpreted the similarity in language to Title VI of the Civil Rights Act of 1964 to mean that both statutes require the same level of protection. *Id.* (“Except for the substitution of the word ‘sex’ in Title IX to replace the words ‘race, color, or national origin’ in Title VI, the two statutes use identical language to describe the benefited class. . . . And ‘because Title IX and Title VI use the same language, they should be read to require the same levels of protection and equality.’ Therefore, the standard for finding gender discrimination under Title IX is the same as Title VI’s standard for racial discrimination, which is identical to the Equal Protection Clause’s standard for racial classifications—i.e., strict scrutiny.” (quoting *Canon v. Univ. of Chi.*, 441 U.S. 667, 694–96 (1979); *Jeldness v. Pearce*, 30 F.3d 1220, 1227 (9th Cir. 1994)) (citations omitted)); see also *Jeldness*, 30 F.3d at 1227–28 (“[Titles IX and VI] should not be

admissions policy under State Equal Rights Amendments.<sup>27</sup> This Comment will focus on Fourteenth Amendment equal protection challenges.<sup>28</sup>

When a “challenged [admissions] policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.”<sup>29</sup> The Equal Protection Clause prohibits any state from “deny[ing] to any person . . . the equal pro-

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read to require different levels of protection because the Equal Protection Clause is interpreted differently for race than for gender. Research has disclosed no opinion holding that Title IX is coextensive with the Equal Protection Clause.”).

27. In 1972, the same year Title IX was enacted, a federal constitutional amendment was proposed with the purpose of eliminating all forms of sex discrimination. 16B AM. JUR. 2D *Constitutional Law* § 826 (1998). The proposed Federal Equal Rights Amendment read as follows:

Section 1. Equality of rights under the Law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. The Amendment shall take effect two years after the date of ratification.

JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 845 n.62 (6th ed. 2000). The Federal Equal Rights Amendment “would have prohibited the denial or abridgement of equal rights on the basis of sex.” 16B AM. JUR. 2D *Constitutional Law* § 826 (1998). The federal amendment was never adopted because it failed to be ratified by the requisite number of states. *Id.* However, nearly half the states have enacted state civil rights legislation, as well as more direct state constitutional and statutory provisions generally known as “Equal Rights Amendments,” which explicitly prohibit sex discrimination. *Id.* One example is the Minnesota Human Rights Act which provides: “It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of . . . sex . . . .” Franzese, *supra* note 8, at 732–33 (quoting MINN. STAT. § 363A.13(1) (2001)). “The statute further explicitly prohibits sex discrimination in educational institutions’ admissions’ policies.” *Id.* at 733. Unlike Title IX, these state amendments often are not limited to regulation of public undergraduate institutions. *Id.* at 734. The level of protection offered to applicants depends on the state, and “[c]onstruction of the [E]qual [R]ights [A]mendment has ranged from an absolute or literal interpretation, through a ‘strict’ standard interpretation, to what has been called a permissive interpretation.” 16B AM. JUR. 2D *Constitutional Law* § 837 (1998); *see also* 16B C.J.S. *Constitutional Law* § 1149 (2005) (“A state may expressly forbid gender-based discrimination by a constitutional equal rights amendment providing that equality of rights and responsibility under the law may not be denied or abridged on account of sex. . . . The protections provided by a state equal rights amendment may go beyond those provided by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Under an equal rights amendment, if equality is restricted or denied on the basis of sex, the classification is discriminatory, and state-sanctioned, sex-based classifications are suspect. Thus, a statutory classification based on sex may be subject to strict judicial scrutiny under a state equal rights amendment, in which case the classification will be upheld only if a compelling interest justifies it and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose.” (footnotes omitted)).

28. Though this Comment focuses on constitutional challenges under the Fourteenth Amendment, an equal protection cause of action is not limited to applicants of universities that receive state funds. An applicant of a university receiving federal funds may bring a challenge under the Due Process Clause of the Fifth Amendment. Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L.J. 953, 954 n.6 (1996) (“Constitutional challenges to sex discrimination by the United States are brought under the Fifth Amendment, which applies to the United States, as opposed to the Fourteenth Amendment Equal Protection Clause, which covers actions by states and their subdivisions. However, the same legal standards apply to equal protection actions under the Fifth and Fourteenth Amendments.”).

29. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (citing *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

tection of the laws.”<sup>30</sup> The Supreme Court interprets this clause to prohibit many forms of sex discrimination, including discrimination resulting from gender-conscious admissions policies.<sup>31</sup> Similar to Title IX, the Fourteenth Amendment regulates only state action, placing discrimination in private institutions beyond its reach.<sup>32</sup> Should an applicant wish to bring an equal protection claim, the applicant must allege that the university intentionally discriminated against her by classifying her on the basis of an impermissible characteristic—gender—for different treatment from similarly situated individuals.<sup>33</sup>

### B. *The Evolution of the Standard of Judicial Review for Equal Protection Claims*

Depending on the nature of the challenge under the Equal Protection Clause, the Supreme Court reviews the claims with a varying amount of deference to state legislators and other state actors, from allowing a large amount of discretion, to conducting a “searching review” of the challenged policy.<sup>34</sup> Whether an allegedly discriminatory admissions policy will withstand an equal protection challenge depends on the purpose attributed to the gender classification and the degree to which the classification is related to the asserted purpose.<sup>35</sup> Thus, the determination as to whether a policy meets the equal protection guarantee largely depends upon the standard of review applied by the Court.<sup>36</sup> This section will trace the evolution of the standard of judicial review, focusing on the standard typically applied with respect to gender classifications.

30. U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

31. 16B AM. JUR. 2D *Constitutional Law* § 826 (1998).

32. Franzese, *supra* note 8, at 723. While most colleges—including private universities—in the United States receive some sort of government funding, *see* Jaschik, *supra* note 8, the mere receipt of public funding does not create a state actor for purposes of alleging a constitutional violation. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 16.4(c) (3d ed. 1999).

33. 3 ROTUNDA & NOWAK, *supra* note 32, § 18.2. “In applying [the Equal Protection] [C]lause, [the Supreme] Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.” *Reed v. Reed*, 404 U.S. 71, 75 (1971). “The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.” *Id.* at 75–76.

34. Skaggs, *supra* note 12, at 1172 (“Equal Protection challenges can trigger different degrees of judicial scrutiny depending upon the nature of the statutory classification at issue.”).

35. *See* NOWAK & ROTUNDA, *supra* note 27, at 638.

36. *See id.*



## 1. The Traditional Two Tiers: Rational Basis and Strict Scrutiny

Traditionally, when the Court reviewed a claim brought under the Equal Protection Clause of the Fourteenth Amendment it had a two-tiered approach to judicial review: either it applied the “rational basis” or “strict scrutiny” standard.<sup>37</sup> The level of judicial review applied by a court significantly impacts the outcome of the case, because “[c]ourts rarely have sustained legislation subjected to the ‘strict scrutiny’ standard of review, while few statutes have failed to satisfy the traditional equal protection test of rationality.”<sup>38</sup> Strict scrutiny is the highest level of scrutiny, and it is applied when a party complains that a law or policy impinges upon a “fundamental right” or complains of discrimination based on a “suspect classification.”<sup>39</sup> The classifications most commonly held to be “suspect” are those based on race, alienage, or national origin.<sup>40</sup>

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37. “The reason for the difference in treatment . . . stems from Justice Stone’s reference to the existence of an important judicial function in protecting certain fundamental constitutional rights and ‘discrete and insular minorities.’” 3 ROTUNDA & NOWAK, *supra* note 32, § 18.3(a) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry . . . .” (alterations in original))).

38. 16B AM. JUR. 2D *Constitutional Law* § 817 (1998). This is because under strict scrutiny there is a presumption that the law is unconstitutional, whereas with rational basis review there is a presumption of constitutionality. See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993).

39. 16B AM. JUR. 2D *Constitutional Law* § 812 (1998). Examples of fundamental rights are: “marriage and procreation, voting, and the right to travel.” 16B C.J.S. *Constitutional Law* § 1118 (2005).

40. 3 ROTUNDA & NOWAK, *supra* note 32, § 18.3. “It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) (citing *Johnson v. California*, 543 U.S. 499 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)). “As the Court recently affirmed, ‘racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.’” *Id.* at 2752 (citations omitted). Indeed, the Court has held that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978); see 16B AM. JUR. 2D *Constitutional Law* § 817 (1998) (“In determining whether a class is [inherently] suspect, and thus is entitled to have applied to it the strict scrutiny test, a court traditionally looks for an indication that the class is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection from the majoritarian political process. The underlying rationale of the ‘suspect classification’ theory is that where legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down.”).

To survive strict scrutiny, a race-conscious admissions policy must be “narrowly tailored” to further a “compelling governmental interest.”<sup>41</sup> Strict scrutiny is applied to suspect classifications “to ‘smoke out’ illegitimate uses” of the classification in order to assure that the policy-maker “is pursuing a goal important enough to warrant use of a highly suspect tool.”<sup>42</sup> At the other end of the spectrum is the deferential “rational basis” standard, which requires only that the statute be rationally related to a legitimate governmental interest.<sup>43</sup> Since the late 1930s, the rational basis standard has been applied when a party challenges general economic and social classifications.<sup>44</sup>

## 2. The Development of the Intermediate Scrutiny Standard

Historically, gender discrimination was considered on par with economic classifications, and thus, was reviewed under a rational basis standard.<sup>45</sup> Today, however, gender classifications are generally subject to an “intermediate” standard of scrutiny.<sup>46</sup> To withstand an equal protection challenge under this standard, “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>47</sup>

41. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2751–52; *Grutter*, 539 U.S. at 326. Under this exacting standard, “when governmental decisions ‘touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.’” *Grutter*, 539 U.S. at 323 (citing *Bakke*, 438 U.S. at 299).

42. *Grutter*, 539 U.S. at 326 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

43. See 3 ROTUNDA & NOWAK, *supra* note 32, § 18.3 (“[T]he Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution.”).

44. See *id.*

45. See Brake, *supra* note 28, at 953; 3 ROTUNDA & NOWAK, *supra* note 32, § 18.3.

46. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also *Nguyen v. INS*, 533 U.S. 53, 75–77 (2001) (O’Connor, J., dissenting) (providing an overview and comparison of the differences between rational basis and heightened scrutiny with regard to gender classifications). Justification that has been offered to explain the lower standard of review for gender than for race, at least in the context of university admissions, is that “[g]ender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria” because with “gender there are only two possible classifications.” *Bakke*, 438 U.S. at 302–03. Perhaps a more controversial justification offered in the same opinion is that “the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.” *Id.* at 303. This justification appears to ignore the long history of discrimination against woman.

47. *Craig*, 429 U.S. at 197; see also *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

It was not until the 1971 *Reed v. Reed* decision that the Supreme Court ratcheted up the level of scrutiny applied to gender discrimination.<sup>48</sup> This was the first time the Court offered realistic protection against sex discrimination under the equal protection guarantee, and no longer treated sex classifications as economic classifications.<sup>49</sup> Though the Court did not explicitly adopt heightened scrutiny for gender classifications, the Court clearly applied “something more stringent than the traditionally lenient rational basis review . . . .”<sup>50</sup> After *Reed*, policies challenged on the basis of gender discrimination would be subjected to a higher level of scrutiny by requiring that the relationship between the classification and the policy’s objective be “fair and substantial” instead of merely rational.<sup>51</sup>

In 1973, the Court in *Frontiero v. Richardson* revisited the proper standard of review and came close to establishing gender classifications as suspect, and, therefore, deserving of strict scrutiny.<sup>52</sup> Justice Brennan found

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48. See Brake, *supra* note 28, at 954; see also *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (“As illustrated by the necessity for the Nineteenth Amendment in 1920, much time passed before the Equal Protection Clause was thought to reach beyond the purpose of prohibiting racial discrimination and to apply as well to discrimination based on sex. In over 20 cases beginning in 1971, however, we have subjected government classifications based on sex to heightened scrutiny.”). A unanimous Court in *Reed* held that an Idaho statute which preferred males to females in the administration of estates without regard to individual qualifications violated the Equal Protection Clause of the Fourteenth Amendment. *Reed v. Reed*, 404 U.S. 71, 74 (1971). In the opinion delivered by Chief Justice Burger, the Court stated that “this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.” *Id.* at 75. The opinion went on to state that “[t]he Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.” *Id.* at 75–76. The Court explained that “[a] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” *Id.* at 76.

49. See 3 ROTUNDA & NOWAK, *supra* note 32, § 18.22.

50. See Brake, *supra* note 28, at 954. This tougher rational basis standard applied by the Court in *Reed* has been called “rational basis with teeth.” See Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis*, in *with Romer v. Evans*, 30 LOY. L.A. L. REV. 1277, 1310 (1997) (citing David O. Stewart, *Supreme Court Report: A Growing Equal Protection Clause?*, A.B.A. J., Oct. 1985, at 108, 112; Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 794 (1987)). Instead of applying the “toothless” rational basis review previously applied to gender classifications, the Court in *Reed* took a realistic look at the asserted purpose of the classification rather than accepting any conceivable hypothetical purpose. See WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM AMAR, *CONSTITUTIONAL LAW* 710–11 (12th ed. 2005). It is significant that the Court here invalidated a statute using rational basis review, because statutes are generally presumed constitutional under the rational basis standard, and are rarely invalidated. See *id.*

51. *Reed*, 404 U.S. at 76.

52. See Brake, *supra* note 28, at 954. In *Frontiero*, the Court held that the purpose of “administrative convenience” was unconstitutional where the issue was whether women in uniformed services could claim their husband as a dependent on equal footing with what the men could claim of their wife. *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (plurality opinion). After considering the long history of sex discrimination, the fact that sex is an immutable characteristic, and the fact

implicit support for strict scrutiny in *Reed*, but only a plurality shared his view.<sup>53</sup> After *Frontiero*, the Court retreated from a strict scrutiny standard, and a majority of the Court has not yet held sex to be a suspect class.<sup>54</sup>

In 1976, in *Craig v. Boren*, the Court articulated for the first time a heightened standard of review for gender classifications which came to be known as middle tier, or intermediate scrutiny.<sup>55</sup> Under intermediate scrutiny, a state's "burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"<sup>56</sup> Intermediate scrutiny entails far less deference to the legislature

that sex had no relationship to an individual's ability to perform or contribute in this context, a plurality "conclude[d] that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.* at 684, 686, 688. A majority of the Court has yet to hold that gender-based classifications are "inherently suspect." See *infra* note 55 and accompanying text; see also Ann K. Wooster, Annotation, *Equal Protection and Due Process Clause Challenges Based on Sex Discrimination*, 178 A.L.R. FED. 25 (2002) ("Unlike the California Supreme Court . . . the United States Supreme Court has not held that gender-based classifications are 'inherently suspect' and thus the Court does not apply so-called 'strict scrutiny' to those classifications, but the Court has held that the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged."). Rather, gender tends to be considered a "quasi-suspect" classification, deserving more than rational basis standard, but less than strict scrutiny. 16B C.J.S. *Constitutional Law* § 1119 (2005) ("Quasi-suspect classifications are subject to an intermediate level of judicial scrutiny in the resolution of equal protection challenges."); Baroutjian, *supra* note 50, at 1292–93 ("Classifications involving quasi-suspect groups trigger intermediate scrutiny. Quasi-suspect groups are groups that share some characteristics of a suspect group; yet, because they do not qualify as 'discrete and insular minorities,' they only receive intermediate review instead of strict scrutiny. Currently, only two classifications have been accorded intermediate scrutiny: those based on gender and those based on the legitimacy of children." (footnotes omitted)).

53. See Brake, *supra* note 28, at 954; see also NOWAK & ROTUNDA, *supra* note 27, at 831 ("Justice Brennan, in a plurality opinion, stated that sex was a suspect class . . . . However, this view of sex as a suspect class never gained the support of a majority of Justices voting in a single case.").

54. *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting); see also *United States v. Virginia*, 518 U.S. 515, 532 (1996).

55. See Brake, *supra* note 28, at 955. In *Craig v. Boren*, the Court reviewed a statute that maintained a "gender-based differential" with regard to beer sales. *Craig*, 429 U.S. at 191–92 (majority opinion). The Court applied heightened or "intermediate" level scrutiny and determined that the statute was unconstitutional. *Id.* at 218 (Rehnquist, J., dissenting). Justice Brennan announced that "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197 (majority opinion). "A majority of the Justices now had agreed upon a specific definition for the intermediate level of review applied in gender discrimination cases." NOWAK & ROTUNDA, *supra* note 27, at 833–34. "Indeed, the Court's agreement on a standard of review was much more important than the holding in *Craig*." *Id.* at 834. Again, Brennan stated that "administrative ease and convenience" are not "sufficiently important objectives to justify gender-based classifications." *Craig*, 429 U.S. at 198.

56. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

than does rational basis review, but does not require as compelling an interest as does strict scrutiny.<sup>57</sup> Thus, individuals have more constitutional protection from arbitrary gender classifications than from economic and social classifications, but less protection than they have from racial discrimination. The Court had now clarified the proper standard of review for gender-based classifications, but had not provided lower courts with much guidance on how to evaluate whether a state's asserted interest is sufficiently "important," or whether the classification is "substantially related" to that interest.<sup>58</sup>

Following *Craig*, the Court has arguably articulated a stronger intermediate scrutiny test.<sup>59</sup> These later cases may suggest that a state must demonstrate an "exceedingly persuasive justification" for a gender-based classification.<sup>60</sup> Beginning in 1979, this "exceedingly persuasive" language appeared in at least two cases "to describe the difficulty of demonstrating that the challenged sex-based classification bore a substantial relationship to an important state interest."<sup>61</sup> In the 1996 *United States v. Virginia* (VMI) decision, however, Justice O'Connor used the "exceedingly persuasive justification" language in a way that was interpreted by some to be a "substantive standard in its own right, [which is] somewhat more stringent than the substantial relationship-important state interest test."<sup>62</sup> Others argue that, in fact, the exceedingly persuasive standard and the substantially related standard are the same thing.<sup>63</sup> Regardless of the standard applied, the Court's method of determining whether a challenged classification has violated the Equal Protection Clause involves a review of the asserted purpose for the classification and a review of the relationship between the purpose and the challenged classification.<sup>64</sup>

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57. 3 ROTUNDA & NOWAK, *supra* note 32, § 18.3.

58. See Brake, *supra* note 28, at 955. Examples of what has been found to be an "important governmental interest": *Miami Univ. Wrestling Club v. Miami Univ.*, 195 F. Supp. 2d 1010, 1015 (S.D. Ohio 2001) (elimination of sex discrimination in publicly funded educational institutions); *Craig*, 429 U.S. at 199–200 (public health and safety); *Buzzetti v. City of New York*, 140 F.3d 134, 142 (2d Cir. 1998) (preventing crime, maintaining property values, and preserving quality of life); *Wengler*, 446 U.S. at 151 (providing for needy spouses); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (providing a reduction in disparity in economic condition between men and women).

59. See Brake, *supra* note 28, at 957.

60. *Id.*

61. Deborah L. Brake, *Reflections on the VMI Decision*, 6 AM. U. J. GENDER & L. 35, 38–39 (1997) (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979); *Hogan*, 458 U.S. at 718).

62. Brake, *supra* note 61, at 39 ("The Court referred to the test as '[t]oday's skeptical scrutiny' . . . suggesting that the burden may in fact be higher."); see also Skaggs, *supra* note 12, at 1173 ("[T]he Court's decisions in *Mississippi University for Women v. Hogan*, *J.E.B. v. Alabama ex rel. T.B.*, and *United States v. Virginia* have transformed this standard into a more demanding inquiry.").

63. See *infra* notes 127–28 and accompanying text.

64. With rational basis review, the Court may not even look for a purpose asserted by the party defending the classification. Rather, the standard is so deferential that so long as the Court can conceive of any rational basis, the classification will be upheld. See *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993); *supra* note 43.

### C. *The Supreme Court's Take on Educational Affirmative Action and Equal Protection*

The Equal Protection Clause is likely violated when “laws favor the members of one class over another, or exclude one class but not another, in the course of providing educational opportunities for their citizens.”<sup>65</sup> However, in the educational affirmative action context, the Court has held that “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.”<sup>66</sup> This section will discuss the extent to which the Court has allowed universities to consider classifications based on race or gender in their admissions policies.

#### 1. Race-Conscious Admissions Policies

Educational affirmative action has generated a significant amount of case law and commentary, but the focus has primarily been on race-conscious admissions programs.<sup>67</sup> Although race has been considered an “inherently suspect” classification calling for the highest scrutiny,<sup>68</sup> the Supreme Court has ruled that college admissions policies may take race into account if the policy is sufficiently “narrowly tailored.”<sup>69</sup>

In the 1978 case *Regents of the University of California v. Bakke*, the Supreme Court for the first time addressed the issue of race-based affirmative action in the university context and held that race could be taken into consideration in college admissions.<sup>70</sup> Having been denied admission to a state medical school, a white male challenged the legality of the school’s admissions policy, which reserved sixteen of one hundred available positions for minority students.<sup>71</sup> Justice Powell held that while this particular race-conscious policy was illegal because it functioned more like a quota than individualized consideration, a “[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”<sup>72</sup> Justice Pow-

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65. 16B AM. JUR. 2D *Constitutional Law* § 832 (1998).

66. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

67. Skaggs, *supra* note 12, at 1173; Jaschik, *supra* note 8.

68. *Bakke*, 438 U.S. at 291 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).

69. *See, e.g., id.* at 265; *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

70. *Bakke*, 438 U.S. at 320.

71. *Id.* at 269–70, 279.

72. *Id.* at 320.

ell extolled Harvard College's admissions program, using it as an illustration of the proper way to consider race in university admissions, and stressed the need for individualized consideration of the applicants in the admissions process.<sup>73</sup>

Applying strict scrutiny, Justice Powell rejected several of the interests asserted by the university as justification for the race-conscious policy, including the goal of "remedying societal discrimination," and recognized only one state interest as compelling: "the attainment of a diverse student body."<sup>74</sup> This decision paved the way for universities to use race as one of a number of factors in the admissions process. According to Justice O'Connor, "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."<sup>75</sup> However, none of the six separate opinions produced in *Bakke* commanded a majority of the Court.<sup>76</sup> In fact, the only holding in *Bakke* was that the consideration of race in admissions may legitimately serve a substantial state interest.<sup>77</sup>

After *Bakke*, the use of race in university admissions policies was not addressed again by the Court until 2003 in *Grutter v. Bollinger*.<sup>78</sup> Following the rationale in *Bakke*, the Court upheld a race-conscious admissions policy, finding that the school had established a compelling state interest in diversity.<sup>79</sup> Justice O'Connor recognized that since *Bakke*, "Justice Powell's opinion . . . has served as the touchstone for constitutional analysis of race-conscious admissions policies."<sup>80</sup> In *Grutter*, a white female applicant who was denied admission to the University of Michigan Law School challenged the legality of the school's race-conscious admissions policy.<sup>81</sup> The university claimed that the goal of the policy was "to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body."<sup>82</sup> Because there was disa-

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73. *Id.* at 316–19. The Harvard Program did consider race as a factor in some of its admissions decisions in order to achieve its goal of diversity, but instead of "set target-quotas," it only ever considered race as a "plus" in a particular applicant's file." *Id.* at 316–17. The program's key feature was that it "treat[ed] each applicant as an individual in the admissions process." *Id.* at 318.

74. *Grutter*, 539 U.S. at 323–25 (quoting *Bakke*, 438 U.S. at 311).

75. *Id.* at 323.

76. *Id.* at 322.

77. *Id.* at 322–23.

78. *Id.* at 314, 322, 328.

79. *Id.* at 328–29.

80. *Id.* at 323.

81. *Id.* at 316–17.

82. *Id.* at 318. An admissions director "testified that 'critical mass' means 'meaningful numbers' or 'meaningful representation', which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Id.* The admissions director also "stated there is no number, percentage, or range of numbers or percentages that constitute critical mass," and that "she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily

agreement among the Courts of Appeals as to whether the holding in *Bakke* was binding precedent that established diversity as a compelling state interest, the Court granted certiorari to resolve the question of “[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race” as a factor in public universities’ admissions decisions.<sup>83</sup>

Justice O’Connor ultimately upheld the right of universities to consider race in admissions decisions.<sup>84</sup> According to Chief Justice Roberts in the recent *Parents Involved in Community Schools v. Seattle School District No. 1* case, “[t]he entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group.”<sup>85</sup> As Justice O’Connor stated, “The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”<sup>86</sup> The *Grutter* Court used the narrow tailoring analysis of strict scrutiny to make certain that the use of race in admissions was, in fact, “part of a broader assessment of diversity,” and not simply a “patently unconstitutional” attempt to achieve racial balance.<sup>87</sup>

*Gratz v. Bollinger*, which was decided the same day as *Grutter*, also involved an admissions policy that considered race, but the Court in *Gratz* found the policy was not narrowly tailored to accomplish its objective, and was, therefore, unconstitutional.<sup>88</sup> In *Gratz*, white applicants who had been denied admission to the University of Michigan alleged that the university’s race-conscious undergraduate admissions policy violated the Equal Protec-

on undergraduate GPAs and LSAT scores.” *Id.*

83. *Id.* at 321–22. Compare *Hopwood v. Texas* (*Hopwood I*), 78 F.3d 932 (5th Cir. 1995) (holding that diversity is not a compelling state interest), with *Smith v. Univ. of Wash., Law School*, 233 F.3d 1188 (9th Cir. 2000) (holding that it is).

84. *Grutter*, 539 U.S. at 343.

85. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753 (2007) (citing *Grutter*, 539 U.S. at 330).

86. *Grutter*, 539 U.S. at 337.

87. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2753 (quoting *Grutter*, 539 U.S. at 330). A number of factors have been distilled from *Grutter* as a framework for determining whether a race-conscious admissions policy is sufficiently narrowly-tailored to pass constitutional muster. See *Grutter*, 539 U.S. at 333–43. According to the *Smith v. University of Washington* case,

[T]he Supreme Court [in *Grutter*] discussed five hallmarks of a narrowly tailored affirmative action plan: (1) the absence of quotas; (2) individualized consideration of applicants; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point.

*Smith v. Univ. of Wash.*, 392 F.3d 367, 373 (9th Cir. 2004). Cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 377 F.3d 949, 968–69 (9th Cir. 2004) (deriving six “governing constraints” from *Grutter* and *Gratz*).

88. *Gratz v. Bollinger*, 539 U.S. 244, 251, 275 (2003).



tion Clause.<sup>89</sup> Unlike in *Grutter*, where the admissions policy considered race in a “limited way,” the policy in *Gratz* relied more heavily on race by automatically awarding points to every minority applicant prior to an individualized review.<sup>90</sup> Thus, *Grutter* and *Gratz* “ratified . . . that educational diversity constitutes a compelling state interest,”<sup>91</sup> which may justify the use of a race-conscious admissions policy, while emphasizing the importance of individualized evaluation of each applicant.

## 2. Gender-Conscious Admissions Policies

The Supreme Court has yet to consider a constitutional challenge to an admissions policy that prefers male applicants, but the Court has ruled on the constitutionality of gender-conscious admissions policies in the single-sex college context.<sup>92</sup> These cases provide some insight into the Supreme Court’s attitude toward the use of gender as a factor in university admissions decisions.

In *Mississippi University for Women v. Hogan*, a male nurse who had been denied admission to a state-supported all-female nursing school challenged the school’s single-sex admissions policy under the Equal Protection Clause.<sup>93</sup> The Court did not find the State’s asserted justification of compensation for past discrimination to be persuasive, finding instead that the policy of excluding males “tend[ed] to perpetuate the stereotyped view of

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89. *Id.* at 249–52.

90. *Id.* at 274. “It should be readily apparent that the availability of this review, which comes after the automatic distribution of points, is far more limited than the individualized review given to the ‘large middle group of applicants’ discussed by Justice Powell and described by the Harvard plan in *Bakke*.” *Id.* at 274 n.21.

91. *Smith*, 392 F.3d at 369.

92. See *United States v. Virginia (VMI)*, 518 U.S. 515, 515 (1996) (holding that all-male military college denied admission to females on the basis of gender). However, at least one court has held that public universities violate the law when they prefer men over women for the sake of gender balance. See *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1372–73 (S.D. Ga. 2000) (striking down a gender- and race-conscious admissions policy), *aff’d*, 263 F.3d 1234 (11th Cir. 2001). In *Johnson*, three white female applicants who were rejected for admission by the University of Georgia challenged the university’s admissions policy, which awarded additional points to both male and minority applicants. *Id.* at 1365–66. They alleged that the policy violated Titles VI and IX of the Civil Rights Act, respectively. *Id.* at 1366–67. The district court found that “[t]he record reveals that UGA’s gender bonus points, despite being cloaked in the language of ‘diversity-fostering,’ represent nothing more than inartfully veiled gender balancing” and that “[s]uch gender preferencing would not even survive the less rigorous intermediate scrutiny employed in sex-based equal protection claims.” *Id.* at 1375–76 n.10. The court did not find the university’s “desire to ‘help out’ men who are not earning baccalaureate degrees in the same numbers as women” to be persuasive. *Id.* at 1376 n.10. The defendants appealed the court’s ruling regarding the preferential treatment of minorities, but did not challenge the ruling on the legality of the gender preference. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1237 (11th Cir. 2001). As a result, the Eleventh Circuit analyzed the race but not the gender issue.

93. 458 U.S. 718, 720–21 (1982). The specific issue the Court decided was “whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at 719.

nursing as an exclusively woman's job."<sup>94</sup> Applying intermediate scrutiny, Justice O'Connor ultimately ruled that even if the State had convinced the Court that the "benign" purpose of "compensat[ion] for discriminatory barriers faced by women" was the actual purpose behind the single-sex admissions policy, the State failed to prove that the sex classification was substantially related to this purpose, and the admissions policy, therefore, was unconstitutional.<sup>95</sup> This opinion emphasized the need for the Court to conduct a "reasoned analysis" of the gender-based classification to make sure that the classification did not rest on outdated stereotypes.<sup>96</sup>

The 1996 *VMI* decision also stressed the importance of heightened judicial review of gender classifications as a response to the country's history of sex discrimination.<sup>97</sup> In *VMI*, prompted by a complaint filed by a female high-school student, the United States sued the Commonwealth of Virginia, which financially supported Virginia Military Institute (Institute), a single-sex public military college.<sup>98</sup> The United States alleged that barring women from access to the educational opportunities available at the Institute violated the applicant's constitutional right to equal protection.<sup>99</sup> Virginia attempted to justify the single-sex policy by arguing that "single-sex education provides important educational benefits," and that the Institute's unique "ad-

94. *Id.* at 729. Justice O'Connor explains the principles behind her analysis. *Id.* at 724–26 ("Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women. The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification[]' to establish a link between objective and classification." (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)) (citations and footnotes omitted)).

95. *Id.* at 729–30. However, the exclusion of males from nursing school was invalidated by only a five-to-four vote. Because the government failed to meet the intermediate standard of review, Justice O'Connor found it unnecessary to decide whether gender classifications should be subject to strict judicial scrutiny. *Id.* at 724 n.9.

96. See *supra* note 94 and accompanying text.

97. See *VMI*, 518 U.S. at 531 ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, 'our Nation has had a long and unfortunate history of sex discrimination.'" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973))).

98. *Id.* at 520, 523.

99. *Id.* at 523.

versative approach[] would have to be modified were [the Institute] to admit women.”<sup>100</sup> The Court ultimately struck down the Institute’s single-sex admissions policy, finding that the school’s purported interest was not genuine, and was created post hoc for purposes of litigation.<sup>101</sup> The failure of the admissions programs in *Hogan* and *Reed* to hold up under intermediate scrutiny demonstrates the substantial hurdle that states will face if forced to defend a gender-based affirmative action program.

#### D. Gender-Based Affirmative Action in College Admissions as a Response to the Growing Gender Imbalance

The statistics paint a clear picture of the growing gender imbalance colleges are experiencing.<sup>102</sup> The most controversial way that universities are responding to the inequality in representation between males and females is to favor males in the admissions process.<sup>103</sup> One way to advantage males is

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100. *Id.* at 535.

101. *Id.* at 535–36, 539–40. Justice Ginsburg began her analysis by noting that “the core instruction of this Court’s pathmarking decisions” was that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 531. Justice Ginsburg summarized what she thought to be “the Court’s current directions for cases” involving gender classifications:

Focusing on the differential treatment or denial of opportunity for which relief is sought, [a court reviewing an official classification based on gender under the equal protection analysis] must determine whether the proffered justification is “exceedingly persuasive.” The burden of justification is demanding and it rests entirely on the State. The State must show “at least that the challenged classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

*Id.* at 532–33 (citations omitted). Justice Ginsburg went on to state that “[t]he heightened review standard . . . does not make sex a proscribed classification,” because while “‘inherent differences’ are no longer accepted as a ground for race or national origin classifications,” by contrast, “[p]hysical differences between men and women . . . are enduring . . .” *Id.* at 533.

102. See Jennifer Delahunty Britz, Op-Ed., *To All the Girls I’ve Rejected*, N.Y. TIMES, Mar. 23, 2006, at A25, available at <http://www.nytimes.com/2006/03/23/opinion/23britz.htm> (“Today, two-thirds of colleges and universities report that they get more female than male applicants, and more than 56 percent of undergraduates nationwide are women. Demographers predict that by 2009, only 42 percent of all baccalaureate degrees awarded in the United States will be given to men.”); *supra* notes 2–5 and accompanying text. An analysis by the *Christian Science Monitor* “shows the gap falling across all types and sizes of institutions, with 83 percent of 1,006 coed schools having fewer undergraduate men than women.” Clayton, *supra* note 1. Various factors have been offered to explain why the percentage of women in higher education has been steadily growing. See, e.g., *id.* (“Some point a finger at a lack of male role models among teachers, or a K-12 ethos that is unaccommodating to boys. Others target an anti-intellectual culture among boys. A thriving economy and a wealth of computer-oriented jobs have also lured away males who otherwise might have attended to higher academic credentials.”); see also Kingsbury, *supra* note 1, at 51 (“Across the board, girls study more, score better, and are less likely to be placed in special education classes.”).

103. In 2006, the dean of admissions at Kenyon College, a private liberal-arts college, explained that in the Kenyon admissions process, “because young men are rarer, they’re more valued applicants.” Britz, *supra* note 102. The Kenyon dean was sharply criticized for disclosing this preference

for a university to employ a point-based admissions system, with the highest scoring students being offered a spot in the incoming class.<sup>104</sup> Under this system, an applicant might be required to meet a threshold score in order to further be considered for admission.<sup>105</sup> This threshold score might be based on factors such as high school grades and standardized test scores. Once a student overcomes this initial hurdle, the admissions officers may consider a variety of “soft factors,” including: (1) the quality of the applicant’s personal statement; (2) extracurricular activities; (3) community service; (4) strength of recommendations; and (5) alumni relationships.

One way a university might include the gender factor would be to assign extra points to a student just for being the desired sex. Another way would be to add up the initial point score and the points from the “soft factors” and to simply admit more males than females from the highest scoring group. In any scenario, giving men priority just for being men may mean that a less qualified male, in terms of grades, test scores, and “soft factors,” may beat out a more qualified female. Were a rejected female applicant to find out that this type of point-based system was the reason she was not accepted, it might incense her to the point of litigation. However, “any individual female student will have imperfect information about the reasons why she was rejected from an institution . . . .”<sup>106</sup> “[P]ublic universities, likely because of their obligations under Title IX and the Constitution, have been more circumspect about acknowledging any such preferences for males than have private undergraduate colleges (whose admissions policies are exempted from Title IX’s coverage).”<sup>107</sup> Indeed, there seems to be a general reluctance of colleges to admit a preference for males, as well as a “‘natural murkiness’ of the admissions process,”<sup>108</sup> which makes it difficult to determine how, or whether, gender is actually factored into admissions decisions. As one commentator said: “The elephant that looms large in the middle of the

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for males, and other admissions directors refused to speak out on the issue. Richard Whitmire, *The Latest Way to Discriminate Against Women*, CHRON. OF HIGHER EDUC., July 20, 2007, at B16, available at <http://chronicle.com/weekly/v53/i46/46b01601.htm>.

104. See, e.g., *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1239–42 (11th Cir. 2001) (describing a state university’s admissions program which calculated a “Total Student Index”).

105. This hypothetical admissions program appeared in the 2008 Chicago Bar Association Moot Court Competition. Karla L. Bell & Sonja C. Rice, 2008 Chicago Bar Association Moot Court Competition (2006) (on file with author).

106. E-mail from Emily J. Martin, Deputy Director of Women’s Rights Project, American Civil Liberties Union, to author (June 1, 2009) (on file with author).

107. *Id.*

108. Whitmire, *supra* note 103.

room is the importance of gender balance.”<sup>109</sup> Is the need for an equal number of male and female students so great that it should “trump the qualifications of talented young female applicants?”<sup>110</sup> To some, “[gender-balanced coeducation is] a key part of the learning environment . . . [which] is critical to academic discourse.”<sup>111</sup> Others feel the impact is neutral.<sup>112</sup> One of the main concerns about gender imbalance is a phenomenon called “tipping.” A university’s population “tips” when one gender makes up sixty percent or more of the overall enrollment.<sup>113</sup> Anecdotal evidence suggests that once a campus reaches the 60/40 “tipping point” in favor of either gender, the campus becomes less attractive to both male and female applicants,<sup>114</sup> thus making it more difficult to attract the highest quality applicants.<sup>115</sup>

Because the use of gender as a factor in admissions decisions is not something that schools tend to advertise, it is difficult to gauge the extent of the practice, and “there’s disagreement on how big or pervasive the problem is.”<sup>116</sup> Some believe that male affirmative action is a common practice, though it may often be so subtle that it flies below the legal radar.<sup>117</sup> Ac-

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109. Britz, *supra* note 102.

110. *Id.*

111. Mark Clayton, *Gender Gap Is Far from Academic for Colleges*, CHRISTIAN SCI. MONITOR, May 22, 2001, at 15, available at <http://www.csmonitor.com/2001/0522/p15sl.html> (statement of Nancy Meislahn, Wesleyan Admissions Director).

112. *Id.* (“I don’t think it affects the academic quality of my classes at all to have more women,” quoting Richard Hart, chair of the philosophy department at Bloomfield.)

113. Britz, *supra* note 102.

114. Kingsbury, *supra* note 1, at 52.

115. Clayton, *supra* note 1 (“First-tier universities generally have an abundance of both male and female applicants. But schools without big reputations may need a gender balance to attract quality applicants.”). Another concern is the societal impact of the gender imbalance. A policy analyst with the Center for the Study of Opportunity and Higher Education said that “[b]y the end of the decade, an estimated 200,000 college-educated women won’t find a college-educated man to marry.” *Id.*

116. *Id.* (“There is not a generalized educational crisis among men, but there are real pockets of problems,” writes Jacqueline King, a policy analyst at the American Council on Education in Washington.”); Mary Beth Marklein, *Colleges Remain Cautious in Handling Gender Diversity*, USA TODAY, Oct. 20, 2005, at 2A, available at [http://www.usatoday.com/news/education/2005-10-19-male-college-side\\_x.htm](http://www.usatoday.com/news/education/2005-10-19-male-college-side_x.htm) (“I don’t want to say people don’t notice,” says Sanford Ungar, president of Goucher College in Baltimore, where the male/female breakdown is roughly 32/68. “We’re just not hung up about it.” While the imbalances are most pronounced on liberal arts campuses, they also show up at large public flagship schools. The University of North Carolina at Chapel Hill has a male/female ratio of 42/58, while the ratio at the universities of Delaware, Georgia and New Mexico hover around 43/57. Echoing the words of other admissions officials, University of Delaware admissions director Louis Hirsh says, “We’re not about to take an unqualified male over a qualified woman.” But he would take notice of males showing interest in majors such as teaching or nursing, where they are underrepresented. Similarly, females applying to engineering programs would grab his attention. “I think people would say there really is a compelling social interest in having both genders equally represented in those disciplines,” he says.”)

117. Clayton, *supra* note 10 (“[A]round the United States, many colleges and universities are practicing ‘affirmative action for men,’ legal experts and others say. The practices may be more subtle than were Georgia’s [in the *Johnson* case], making it harder to charge that they are illegal. . . . ‘It’s wrong to put your thumb on the scale for a male applicant when you’ve got a better-qualified female, but I know the colleges are doing it because they’ve told me,’ says Thomas Mortenson, a

ording to the Deputy Director of the ACLU Women's Rights Project, "the practice is of concern and could well lead to additional litigation."<sup>118</sup> As one commentator noted: "Even if this issue is not about to parallel the recent wave of court challenges to racial affirmative action, it is nonetheless sparking debate in higher education."<sup>119</sup> Perhaps if the fire gets hot enough, the Supreme Court will be urged to rule on the constitutionality of gender-conscious admissions policies.

### III. THOUGHTS ON THE APPROPRIATE STANDARD OF REVIEW FOR GENDER CLASSIFICATIONS

For awhile it was fairly clear that gender classifications received intermediate scrutiny and race classifications received strict scrutiny.<sup>120</sup> The line has since become fuzzy.<sup>121</sup> What the Court will or should do regarding the appropriate standard of review for gender classifications has been subject to much speculation, with many different ideas about the future of the gender standard of review. This section will briefly summarize various issues the Court may take into consideration when deciding what standard to apply.

The *VMI* case and its "exceedingly persuasive justification" language is one of the most common sources of debate. In *VMI*, the United States asked the Supreme Court to rule that the Court must apply strict scrutiny to gender-based classifications.<sup>122</sup> In response, Justice Ginsburg stated that "[p]arties

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policy analyst at the Center for the Study of Opportunity and Higher Education in Washington.").

118. E-mail from Emily J. Martin, Deputy Director of Women's Rights Project, American Civil Liberties Union, to author (June 1, 2009) (on file with author).

119. Clayton, *supra* note 10.

120. See NOWAK & ROTUNDA, *supra* note 27, at 845 ("The adoption of the substantial relationship to an important governmental interest standard by a majority of the Justices has settled, at least formally, the issue of the proper definition of a middle level standard of review for gender classifications. However, that standard of review is such that it allows Justices to base their votes upon individual perceptions of the reasonableness of a gender classification and the governmental interest asserted in each case. Were our country to adopt a constitutional amendment prohibiting gender discrimination by governmental agencies, the Court would have to employ some form of strict scrutiny or compelling interest test under that amendment which would limit the ability of individual judges to argue for the legitimacy of gender classifications based upon their personal perceptions of the reasonableness of allocating rights by gender.").

121. Indeed, Justice Scalia has stated that the "rational basis," "intermediate scrutiny," and "strict scrutiny," tests are "no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to [the Justices] which test will be applied in each case." *United States v. Virginia (VMI)*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

122. Brake, *supra* note 28, at 953. "The time has come to decide that strict scrutiny applies." Brief for Nat'l Women's Law Ctr. et al. as Amici Curiae Supporting Petitioner at 2, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941), 1995 WL 703392. "The standard of intermediate scrutiny for gender classifications has proved an unworkable half-measure." *Id.* "Despite decisions of this Court strengthening the intermediate scrutiny standard, lower courts have had great difficulty

who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”<sup>123</sup> The outcome of this decision has been interpreted in a variety of ways, including: “(1) intermediate scrutiny continues to apply to gender-based classifications; (2) gender classifications are subject to strict scrutiny; and (3) gender classifications are now subject to a level of analysis which falls between strict and intermediate scrutiny.”<sup>124</sup> However, it is possible that Justice Ginsburg’s statement was not meant to alter the standard at all, but rather her choice of words had unintended consequences.

For those who question the appropriateness of intermediate scrutiny for gender classifications, a new fourth level of scrutiny, the “heightened” intermediate standard, may seem like an adequate compromise.<sup>125</sup> Chief Justice Rehnquist, who concurred only in judgment in *VMI* and had opposed even the use of the intermediate standard of review for gender in *Craig* and *Frontiero*, would have disagreed.<sup>126</sup> Others have argued that *VMI* did not actually create a new level of scrutiny, but rather the “exceedingly persuasive” language was just a description of the evidentiary burden required to meet the “substantially related” test.<sup>127</sup> Still others, like Justice Scalia in his

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assessing the importance of governmental interests and in calibrating whether the fit between the classification and the government’s purpose is ‘substantially related.’” *Id.* at 6. “The lower courts have complained repeatedly that the standard provides little guidance for decisionmaking [sic].” *Id.* “Clarification of the proper standard of review for gender-based classifications is also necessary to ensure consistency in this Court’s jurisprudence.” *Id.* at 12.

123. *VMI*, 518 U.S. at 531 (majority opinion). Interestingly, “Ruth Bader Ginsburg has long advocated heightened scrutiny for sex-based classifications and in fact drafted the ACLU brief in *Reed v. Reed*, which urged the Court to adopt strict scrutiny for sex-based classifications.” Steven A. Delchin, Comment, United States v. Virginia and *Our Evolving “Constitution”: Playing Peek-a-Boo with the Standard of Scrutiny for Sex-Based Classifications*, 47 CASE W. RES. L. REV. 1121, 1125 n.34 (1997) (citation omitted).

124. Skaggs, *supra* note 12, at 1182.

125. *See id.* at 1196 (“Applying the same level of ‘exceedingly persuasive justification’ scrutiny to all gender-based classifications, including affirmative action, correctly resolves the circuit split. Both affirmative action and gender-based classification case law support the conclusion that gender and race-based affirmative action programs should be treated differently, while gender classifications, whether they involve affirmative action or not, should be treated the same.”).

126. *VMI*, 518 U.S. at 559 (Rehnquist, C.J., concurring) (“While terms like ‘important governmental objective’ and ‘substantially related’ are hardly models of precision, they have more content and specificity than does the phrase ‘exceedingly persuasive justification.’”).

127. *See id.* (“That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.”). In *Nguyen v. INS*, the language of the Court’s opinion may suggest that it considers the “exceedingly persuasive justification” standard to mean the same thing as intermediate scrutiny. 533 U.S. 53 (2001). In *Nguyen*, a statute established different requirements a parent must meet for their child to acquire citizenship depending upon whether the citizen parent is the mother or father. *Id.* at 56–57. The Court stated that it has “explained that an exceedingly persuasive justification is established by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 70 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted). Further, it stated that “a party who seeks to defend a statute that classifies individuals on the basis of sex must carry the burden of showing an exceedingly persuasive justification for the classification.” *Id.* at 74

*VMI* dissent, argue that the rationale of the majority's decision redefined intermediate scrutiny to make it indistinguishable from strict scrutiny.<sup>128</sup> It has also been suggested that the *VMI* decision signaled a progression toward using strict scrutiny for gender classifications.<sup>129</sup>

Several commentators have analyzed Supreme Court decisions and gathered evidence they believe suggests that the Court has not shut the door to the possibility of applying strict scrutiny to gender classifications.<sup>130</sup> Specifically, two footnotes are claimed to be especially telling.<sup>131</sup> In *Hogan*, Justice O'Connor noted that the Court "need not decide whether classifications

(O'Connor, J., dissenting) (quoting *Hogan*, 458 U.S. at 724) (internal quotation marks omitted). Additionally, "[t]he defender of the classification meets this burden only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 75 (internal quotation marks omitted). However, *Nguyen* is an illegitimacy rather than gender discrimination case, and thus the Court has never explicitly stated that "exceedingly persuasive" is the same thing as intermediate review for gender discrimination.

128. *VMI*, 518 U.S. at 566–603 (Scalia, J., dissenting); see Delchin, *supra* note 123, at 1130 ("The peculiar wording in Justice Ginsburg's *VMI* opinion has generated much speculation over whether the Court is abandoning intermediate scrutiny in favor of strict scrutiny for sex-based classifications."); Brake, *supra* note 61, at 35–36 ("Although some commentators read the decision as a rebuff to the United States government's request that the Court adopt strict scrutiny for gender, the decision in fact strikes a careful balance in crafting a standard with the teeth, if not the name, of strict scrutiny. . . . While the Court stopped short of explicitly adopting strict scrutiny for sex-based classifications, the opinion includes a number of indicators suggesting that the standard applied in *VMI* is essentially as rigorous as today's strict scrutiny standard.")

129. Delchin, *supra* note 123, at 1134 ("The statements, formulations, and descriptions in the *VMI* majority opinion may presage the Court's final 'evolution' to strict scrutiny for sex-based classifications. . . . Thus, just as *Reed* was the esoteric instrument for establishing intermediate scrutiny, so *VMI* may be the instrument for establishing strict scrutiny.")

130. Brief for Nat'l Women's Law Ctr. et al. as Amici Curiae Supporting Petitioner at 4–5, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941), 1995 WL 703392 ("[A]mici urge that the Court take this opportunity in this case to hold that sex is a suspect class under the Equal Protection Clause—a question this Court has repeatedly left open.")

Justice Ginsburg's majority opinion in the *V.M.I.* case noted that the Supreme Court had not yet equated gender classifications "for all purposes, to classifications based on race or national origin." . . . Because the state case was unable to meet the intermediate standard in the *V.M.I.* case, the majority did not have to address the question of whether gender classifications in education should be reviewed with strict judicial scrutiny.

NOWAK & ROTUNDA, *supra* note 27, at 843. "In addition to applying strong formulations of intermediate scrutiny in recent years, the Court has also gone out of its way not to foreclose a future ruling adopting strict scrutiny for gender classifications." Brake, *supra* note 28, at 958. "Since establishing intermediate scrutiny in 1976, a majority of the Court has twice noted that the issue of whether gender classifications warrant strict scrutiny is an open question." *Id.* "Even before the decision in [*VMI*], there were indications that some members of the Court viewed the traditional intermediate scrutiny standard as a temporary measure." Skaggs, *supra* note 12, at 1190.

131. "[W]hile footnotes do not decide cases, they often contain clues about the future leanings of the Court." Skaggs, *supra* note 12, at 1190.



based upon gender are inherently suspect.”<sup>132</sup> The majority’s opinion in *J.E.B.* contained a nearly identical footnote: “Because we conclude that gender-based peremptory challenges are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect.”<sup>133</sup> The existence of these footnotes has been interpreted as an “explicit recognition that strict scrutiny remains a possibility for gender discrimination” in future Supreme Court cases.<sup>134</sup>

Another source of confusion about the appropriate level of scrutiny is the alleged paradoxes created by applying different levels of scrutiny.<sup>135</sup> One possible anomaly results from the fact that by applying intermediate scrutiny to gender-based affirmative action programs, race-based programs must meet a stricter legal test than gender-based programs. Because of this, “it is more likely that a race-based remedial program will be invalidated than an affirmative action program based on gender, even though racial minorities are meant to receive a higher level of protection from discrimination than women.”<sup>136</sup> A related anomaly is that women would have less constitutional protection from state-sponsored gender discrimination than white men would have from reverse discrimination by race-conscious affirmative action programs.<sup>137</sup> However, it is also argued that if gender-based classifications are analyzed under strict scrutiny, “it will be easier for governments to discriminate against women than to remedy discrimination against them.”<sup>138</sup> These anomalies will eventually need to be resolved within the Court’s equal protection doctrine.

Another phenomenon that the Court may take notice of is the fact that some state courts are already treating sex as a suspect class, and are applying strict scrutiny in gender cases even though federal courts require only intermediate scrutiny.<sup>139</sup> As noted before, nearly half the states have enacted civ-

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132. *Hogan*, 458 U.S. at 724 n.9 (citing *Stanton v. Stanton*, 421 U.S. 7, 13 (1975)).

133. *J.E.B. v. Alabama*, 511 U.S. 127, 137 n.6 (1994).

134. *Brake*, *supra* note 28, at 958.

135. See *Skaggs*, *supra* note 12, at 1175–76 (“A primary reason that the proper level of scrutiny for gender-based affirmative action programs is such a difficult issue is that there are troubling paradoxes associated with both approaches.”); *Brake*, *supra* note 28, at 961–62 (“New anomalies in equal protection doctrine created by the Supreme Court’s recent affirmative action decisions provide a further reason for the Court to adopt strict scrutiny for gender discrimination.”).

136. *Skaggs*, *supra* note 12, at 1175; see also *Brake*, *supra* note 28, at 961–62.

137. *Brake*, *supra* note 28, at 961–62. “If gender-based classifications continue to be evaluated under intermediate scrutiny, white males will have greater constitutional protection from race-conscious affirmative action, however benignly intended, than women will have from invidious sex discrimination.” Brief for Nat’l Women’s Law Ctr. et al. as Amici Curiae Supporting Petitioner at 12, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941), 1995 WL 703392 (outlining specific reasons why strict scrutiny should be adopted for gender classification).

138. *Brake*, *supra* note 28, at 961–62; see *Skaggs*, *supra* note 12, at 1175–76.

139. “In some states, courts have ruled that the state ERAs have elevated sex to a suspect class, thereby invoking a strict scrutiny review when a law differentiates on the basis of gender, even

il rights legislation, as well as constitutional and statutory provisions, which expressly prohibit sex discrimination.<sup>140</sup> Furthermore, the Supreme Court has many times compared gender discrimination to racial discrimination, which perhaps suggests that the Court may feel it appropriate to apply the same level of scrutiny to a gender-conscious admissions policy as it would to a race-conscious program.<sup>141</sup> On the other hand, the Court has also highlighted the differences between race and gender discrimination.<sup>142</sup> Considering the amount of debate over the appropriate standard, it seems time for the Court to hear a challenge to a gender-conscious admissions policy and settle the appropriate standard of review for gender classifications, at least in the context of educational affirmative action.

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though the federal equal protection clause requires only an intermediate scrutiny of such a classification.” 16B AM. JUR. 2D *Constitutional Law* § 837 (1998); see *supra* note 27 and accompanying text.

140. 16B AM. JUR. 2D *Constitutional Law* § 826 (1998); Franzese, *supra* note 8, at 734; see *supra* note 27 and accompanying text.

141. See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (“Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.” (citing *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting))); *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1994) (“While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, ‘overpower those differences.’” (citing Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992))); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (“Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility.’ And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.” (citation omitted)); Brake, *supra* note 28, at 957 (“Recognizing the parallels and similarities between race and sex discrimination in this country, the Court [in *J.E.B.*] applied wholesale a line of cases forbidding race discrimination in jury selection to the gender context. In answering the question of whether equal protection ‘forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race,’ the Court held that ‘gender, like race, is an unconstitutional proxy for juror competence and impartiality.’”); Skaggs, *supra* note 12, at 1186 (“Thus, by drawing parallels between gender and racial classifications, the *J.E.B.* opinion provided a firm basis for raising the standard of scrutiny to be applied to gender-based classifications in the future.”).

142. “That race and sex discrimination are different is acknowledged by our equal protection jurisprudence, which accords different levels of protection to the two groups.” *J.E.B.*, 511 U.S. at 154 (Rehnquist, C.J., dissenting). “Racial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women.” *Id.* at 154–55. “After all, it is difficult to maintain that women, as a majority of the electorate, are somehow a ‘discrete and insular minority’ entitled to heightened scrutiny under equal protection review.” Delchin, *supra* note 123, at 1154.

#### IV. APPLYING THE *GRUTTER* FRAMEWORK IN A GENDER CONTEXT

##### A. *Equal Protection, Equal Standard*

As should be clear by now, the Supreme Court has not yet spoken on gender-conscious admissions policies in coeducational institutions.<sup>143</sup> However, the Court has addressed race-based classifications in the university admissions context, and it set forth factors that courts can use to decide future race-based classification cases.<sup>144</sup> Regardless of what standard the Court ultimately decides is appropriate when analyzing a gender-conscious admissions policy, the Court should draw on its precedents in race-conscious admissions to decide this matter of first impression.

The *Grutter* factors have the potential to give structure to the difficult-to-define “narrowly tailored” or “substantially related” requirements.<sup>145</sup> These “hallmarks of a narrowly tailored affirmative action plan”<sup>146</sup> provide a solid framework for future race-based affirmative action cases. It is likely that these factors are appropriate in the gender context as well and would provide a helpful framework for analysis of gender cases.<sup>147</sup> Several commentators have already suggested using *Grutter*-like factors as a framework for gender-based affirmative action cases. One made “some educated guesses” about how the Court could define the requirements using the “exceedingly persuasive justification” standard, including consideration of neutral alternatives and an end date for the program.<sup>148</sup> Another proposed a

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143. See Skaggs, *supra* note 12, at 1174 (“Because the only guidance the Supreme Court has provided for deciding affirmative action cases comes from opinions analyzing race-based programs under strict scrutiny, the proper level of scrutiny for analyzing gender-based affirmative action is unclear.”).

144. See *supra* note 87.

145. *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring) (“[T]he intermediate scrutiny test we have applied may not provide a very clear standard in all instances . . .”). “Even Justice Rehnquist, dissenting in *Craig*, criticized intermediate scrutiny as ‘so diaphanous and elastic as to invite subjective judicial preferences or prejudices,’ although Justice Rehnquist’s solution would be to subject gender classifications to rational basis, rather than strict scrutiny review.” Brake, *supra* note 28, at 958–59 (citing specific examples of lower court confusion and misapplication of the intermediate scrutiny standard) (footnote omitted).

146. *Smith v. Univ. of Wash.*, 392 F.3d 367, 373 (9th Cir. 2004).

147. Though the *Grutter* test came from a case applying strict scrutiny because the admissions policy was taking race into consideration, it is possible that the factors can be applied less stringently under a lesser standard of review or can be modified to work within an intermediate or “heightened” intermediate standard of review. A less complicated, though unlikely, solution would be for the Court to decide to apply strict scrutiny to all protected classifications, including both race and gender, in the educational affirmative action context.

148. Skaggs, *supra* note 12, at 1208–09 (“First, courts should require the consideration of alternative remedies for gender-based as well as race-base affirmative action. . . . Second, the concerns underlying the relationship prong under strict scrutiny, such as the desire to benefit only those who are the true victims of discrimination and the concern about stigmatizing the group benefiting from the classification, apply to gender as well as race. . . . Third, consideration of gender-neutral remedies

*Grutter*-esque multi-factor framework which is to be applied under an intermediate standard of review.<sup>149</sup>

It is easy to jump to one of two conclusions about the level of scrutiny required when the policy is benefiting males rather than a group that has historically been discriminated against, like racial minorities or women. One conclusion is that the level of scrutiny should be very high, because men do not need protection. Therefore, colleges should be required to have a very specific reason for discriminating against women so that it is difficult for them to implement these types of policies.<sup>150</sup> The other conclusion is that the level of scrutiny should remain intermediate. Because it is very unlikely that a male affirmative action policy would pass intermediate scrutiny, let alone strict scrutiny, the more deferential standard should suffice.<sup>151</sup> However, it is important to resist the temptation to pick a standard based on the fact that it is men—as opposed to a historically disenfranchised group—who are benefiting in this particular scenario.

Whichever standard the Court chooses to apply when reviewing the constitutionality of a gender-conscious admissions policy, the standard should be the same whether the affirmative action is benefiting males or females. The level of scrutiny should be based on the fact that universities are classifying applicants—arguably a similarly situated group—for different

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does not require an actual attempt to implement these plans. . . . Fourth, the duration of the program should remain a relevant consideration. . . . Fifth, in terms of the link between the goals of a program and the proportion of qualified women in the field, the requirement that women be compensated only for particular economic disabilities mandates a close tie between the numerical goals of a gender-based program and the proportion of qualified women in the market.”)

149. Franzese, *supra* note 8, at 742–43 (“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 simply enroll an equal proportion of male and female students. 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.” (footnote omitted)). Franzese’s factors are: (1) “Rigid point systems do not constitute flexible affirmative action policies” (analogous to *Grutter* factor number one, absence of quotas); (2) “Admissions officers must conduct an individualized evaluation of each applicant including the consideration of gender neutral factors” (analogous to *Grutter* factor number two, individualized consideration); (3) “Affirmative action policies must not disproportionately benefit male applicants” (analogous to *Grutter* factor number four, no undue harm); and (4) “Colleges must consider and reject gender neutral alternatives before adopting an affirmative action policy that benefits male applicants” (analogous to *Grutter* factor number three, consideration of neutral alternatives). *Id.* at 743–46.

150. “The choice between strict and intermediate scrutiny is quite significant in the context of affirmative action, as it is much easier to justify an affirmative action plan under intermediate scrutiny than strict scrutiny.” Skaggs, *supra* note 12, at 1176.

151. The *Gender Curve* article suggests a “framework to review the constitutionality of gender-based affirmative action policies *benefiting male students* and concludes that such policies would fail intermediate scrutiny.” Franzese, *supra* note 8, at 738 (emphasis added).

treatment based on their gender, rather than based on how the classification affects one gender versus the other. In contrast to the uncertainty regarding the appropriate standard of review for gender classifications, it seems fairly well-settled that the Court does not change the standard of review based on whether the class is benefited or burdened.<sup>152</sup> Therefore, the framework must be the same for the review of gender-conscious admissions policies, whether they benefit or discriminate against males or females. “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another [gender].”<sup>153</sup> If men and women “are not accorded the same protection, then it is not equal.”<sup>154</sup> Thus, even though intermediate scrutiny might be a sufficiently stringent standard to strike down most male affirmative action policies, “[t]hat intermediate scrutiny yields the right result in [one] case is not a good reason to continue to apply it” to all gender-based classifications.<sup>155</sup>

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152. *See* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (“That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.”); Skaggs, *supra* note 12, at 1198 (“[T]he Supreme Court has consistently stated that the level of analysis under equal protection should not change based on the group that is disadvantaged by the classification at issue. . . . Instead, the standard changes based on the type of classification at issue.”); 16B AM. JUR. 2D *Constitutional Law* § 831 (1998) (“The Equal Protection Clause protects against classifications based on gender. The standard of review under the Equal Protection Clause does not depend on the race or gender of those burdened or benefited by a particular classification.”); *Hogan*, 458 U.S. at 724 n.9 (“Our past decisions establish . . . that when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court.”).

153. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978). Women *have* been discriminated against, and, furthermore, women are the losers in male affirmative action programs. If the standard is based on the fact that men *have not* been discriminated against, this effectively makes equal protection mean one thing when applied to women and another when applied to men. Just as one’s race alone is not relevant to one’s success in college, one’s gender arguably isn’t either. Racial classifications are considered to be inherently suspect and are, therefore, automatically subject to strict scrutiny because, among other reasons, people of different races do not have different physical abilities in the same way that men and women do. But, in the context of a college education, these inherent differences between men and women are not relevant, and, therefore, classification by gender in college admissions should be inherently suspect. And, because gender in this context is inherently suspect, strict scrutiny is appropriate. *See* *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (“[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”). Though a majority of the Court has never held sex to be an inherently suspect classification and applied strict scrutiny to a gender classification, it has not closed the door to the possibility. *See supra* notes 134–38 and accompanying text.

154. *Bakke*, 438 U.S. at 290.

155. Brief for Nat’l Women’s Law Ctr. et al. as Amici Curiae Supporting Petitioner at 5, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941), 1995 WL 703392; NOWAK & ROTUNDA, *supra* note 27, at 635 (“[C]lassifications are not tested by whether or not the individuals are truly different in some absolute sense from those who receive different treatment. For example, it is undeniably true that men and women are biologically different. However that difference does not mean that gender-based classifications will be generally upheld, for most often there is no difference between men and women in terms of the promotion of a legitimate governmental end.”).

### B. *The Ends-Means Review*

Whatever the level of scrutiny and whatever the challenged classification, the Court's analysis under the Equal Protection Clause is an ends-means review. First, the Court determines whether there is a sufficient governmental purpose asserted by the party as justification for treating similarly situated people differently.<sup>156</sup> Second, the Court determines whether the "means" to that end is appropriate.<sup>157</sup>

#### 1. The Ends Analysis

When evaluating an equal protection claim, the Court begins by examining whether the university has asserted sufficient governmental ends in support of its allegedly discriminatory admissions policy. However, there is a problem with the ends analysis in that the Court does not really engage in any. Instead of reasoned analysis, the Court has repeatedly made conclusory statements about whether it thought the asserted state interest was "legitimate," "important," "exceedingly persuasive," or "compelling"—pick your standard.<sup>158</sup> Nevertheless, we do have some clues as to what the Court may consider to be a constitutional end.

In evaluating the use of race-conscious admissions policies by universities, the Court has recognized two interests as compelling.<sup>159</sup> First, the

156. "Usually one must look to the end or purpose of the legislation in order to determine whether persons are similarly situated in terms of that governmental system. The judiciary need not always review the permissibility of the legislative purpose, but it must decide what is the end of the legislation to be tested. Once a court has found an end of government which does not in itself violate the Constitution, it can analyze the way in which the government has classified persons in terms of that end." 3 ROTUNDA & NOWAK, *supra* note 32, § 18.2.

157. *Id.*

158. *See, e.g.,* Grutter v. Bollinger, 539 U.S. 306, 356 (2003) (Thomas, J., dissenting) ("A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a 'compelling interest in securing the educational benefits of a diverse student body.'"). In his dissent in *Craig*, Justice Rehnquist "counsel[s] weightily against" recognizing intermediate scrutiny as a third level of judicial review. *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) ("How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough."). "While trying to read the minds of Supreme Court justices is risky, it seems hard to imagine that Justice Ruth Bader Ginsburg, author of the [*PMI*] decision, was thinking about a good ratio of dance partners as such a[n] important government interest." Jaschik, *supra* note 8.

159. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752–53 (2007). "It is true that some language in [post-*Bakke* affirmative action] opinions might be read to suggest

Court has found the “interest of remedying the effects of past intentional discrimination” to be a compelling government interest.<sup>160</sup> Second, the Court has upheld “the interest in diversity in higher education.”<sup>161</sup> Regarding gender-based classifications, the Court has endorsed the following ends: “to compensate women ‘for particular economic disabilities they have suffered,’ to ‘promote equal employment opportunity,’ [and] to advance full development of the talent and capacities of our Nation’s people.”<sup>162</sup> As the Supreme Court has cautioned, however, “such classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women.”<sup>163</sup> Gender classifications must “be applied free of fixed notions concerning the roles and abilities of males and females,” so as not to reinforce gender stereotypes.<sup>164</sup> It is an open question whether the Court’s holding that racial diversity can be a compelling interest justifying some kinds of racial preferences in higher education might lead courts to equate equality in representation between the sexes with “diversity,” and to conclude that a gender balance might similarly further educational goals and thus justify a preference for males, despite the absence of a need to remedy past discrimination.<sup>165</sup>

One possible objective for male affirmative action that is very unlikely to hold up in court would be one based on “customer preference”: that the gender ratio needs to be balanced because customers (potential applicants) prefer to have a more balanced campus.<sup>166</sup> However, depending on the level

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that remedying past discrimination is the only permissible justification for race-based governmental action.” *Grutter*, 539 U.S. at 328 (majority opinion) (citation omitted). However, the Court has “never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.” *Id.*

160. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2752–53.

161. *Id.* at 2753; 16B C.J.S. *Constitutional Law* § 1134 (2005) (“The attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education and ethnic diversity can be one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. A state university’s interest in achieving educational diversity can constitute a compelling state interest capable of supporting a narrowly tailored means, for purposes of determining whether that university’s policy of using race in undergraduate admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment.”).

162. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (citations omitted).

163. *Id.* at 534 (citation omitted).

164. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982).

165. *But see Berkelman v. S.F. Unified Sch. Dist.*, 501 F.2d 1264, 1268–70 (9th Cir. 1974) (holding that requiring higher admission standards for female than for male high school applicants violated the Equal Protection Clause of the Fourteenth Amendment, and finding no support for the notion “that a balance of the sexes furthers the goal of better academic education”).

166. As the Fifth Circuit noted, “[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the [Civil Rights] Act was meant to overcome.” *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *see Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (holding that passenger preference for single airline stewardesses did not justify no-marriage rule that applied only to women); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (holding that customer preference based on sexual stereotype cannot

of scrutiny applied and the state interest asserted by the university, the Court may defer to a university's concerns about "tipping" affecting its ability to attract quality applicants and its view on what the necessary gender balance is.<sup>167</sup> Another purpose for male affirmative action that would not likely pass any constitutional test is that of a need for a "critical mass." Although women are applying and attending university at a higher rate than men, males still make up about forty percent of the student population.<sup>168</sup> In *Grutter*, the Court supports the purpose of attaining a "critical mass" of minority students.<sup>169</sup> A critical mass is defined as "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race."<sup>170</sup> This can be distinguished from "outright racial balancing, which is patently unconstitutional."<sup>171</sup> It seems very unlikely that a forty percent population of male students would not be enough to constitute a critical mass as defined in *Grutter*.<sup>172</sup> Justices Scalia and Thomas would almost certainly agree: the "mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions."<sup>173</sup> Thus, in justifying a gender-conscious admissions policy, a university will need to look beyond customer preference and critical mass for a constitutionally sound objective.

## 2. The Means Analysis

If the Court finds a permissible objective, it next determines "whether the requisite . . . relationship between objective and means is present."<sup>174</sup> If the university is able to convince the Court of an "important" or "compelling" government interest, the university will then be required to show either that the discriminatory policy is "substantially related" to achieving its goal

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justify discriminatory conduct). The "customer preference" idea and research appeared in the 2008 Chicago Bar Association Moot Court Competition problem cited *supra* note 105.

167. See *supra* notes 113–15 and accompanying text.

168. See *supra* note 102 and accompanying text.

169. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

170. *Id.* at 318–19.

171. *Id.* at 330 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)).

172. *Jaschik*, *supra* note 8 ("Some lawyers cautioned against viewing gender and race in admissions in the same legal terms because the Supreme Court has generally subjected racial distinctions to the highest scrutiny. But others—especially critics of affirmative action—said that if the O'Connor standards were applied to gender, public colleges could be in trouble for favoring men, since no one is suggesting that there isn't a critical mass of men in higher education.")

173. *Grutter*, 539 U.S. at 346–47 (Scalia, J., dissenting).

174. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).



(intermediate scrutiny), or is “narrowly tailored” to achieve its approved purpose (strict scrutiny).<sup>175</sup> *Grutter* may be especially helpful in establishing whether the requisite relationship between the ends and the means exists.<sup>176</sup>

The Court in *Grutter* acknowledged that public higher education is a special context which requires the framework for analysis to “be calibrated to fit the distinct issues raised.”<sup>177</sup> This respect for public higher education as a special context provides support for applying the *Grutter* factors to both race- and gender-conscious admissions policies, because it turns the focus to protecting equality in education, rather than concentrating on the specific classification at issue.

The following factors distilled from *Grutter* should be used to test the constitutionality of the “means” of a university’s gender-conscious admissions policy: “(1) the absence of quotas; (2) individualized consideration of applicants; (3) serious, good-faith consideration of [gender]-neutral alternatives to the affirmative action program; (4) that no member of [either gender] was unduly harmed; and (5) that the program had a sunset provision or some other end point.”<sup>178</sup> Requiring the presence of these factors should discourage universities from using gender-conscious policies as a facile solution to correct a gender imbalance on campus. Providing some guidance to universities in the formulation of their admissions policies may even lead to voluntary compliance. Although these factors were used to describe how a race-conscious admissions program could survive the narrowly-tailored requirement under strict scrutiny, it does not make them less relevant to a gender-conscious admissions policy which may be evaluated under a more deferential standard of review. If the Court determines that intermediate or heightened intermediate is the appropriate level of scrutiny, the Court could apply these same factors in a less stringent manner, allowing the university more leeway in its decision making, but still protecting the equality interest of the applicants. The following sections illustrate how the *Grutter* factors could be applied in a gender context.

#### a. No Quotas

In *Grutter*, Justice O’Connor explained that a constitutional admissions policy does not use a quota system to achieve its goal.<sup>179</sup> Instead, a universi-

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175. *See id.*

176. *See supra* notes 145–47 and accompanying text.

177. *Grutter*, 539 U.S. at 334 (majority opinion).

178. *See Smith v. Univ. of Wash.*, 392 F.3d 367, 373 (9th Cir. 2004); *supra* note 87.

179. *Grutter*, 539 U.S. at 334 (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot ‘insulate each category of applicants with certain desired qualifications from competition with all other applicants.’” (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978))). “The Court [*in Grutter*] defined a quota as (1) reserving a fixed number

ty is permitted to count an applicant's race as a "'plus' in a particular applicant's file."<sup>180</sup> Applying this requirement to a gender-conscious admissions policy would mean that a university could not employ a "male quota" or a rigid point-based system to move the gender balance closer to 50/50, but perhaps could consider an applicant's gender as a "plus," just as it would consider extracurricular activities or extensive community service as plusses on an application.<sup>181</sup> This would help to ensure that the university was not enrolling more men than women without focusing on additional qualifications.<sup>182</sup>

*b. Individualized Consideration of Applicants*

Another way that a university could demonstrate the constitutionality of its admissions program would be "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>183</sup> Indeed, the Court in *Grutter* found the "importance of this individualized consideration" to be "paramount."<sup>184</sup> This requirement would help to ensure that gender was not the defining feature of a student's application, but rather all applicants could be assured they were being judged on their merits.<sup>185</sup>

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or proportion of opportunities—which must be attained and cannot be exceeded—for certain minority groups; and (2) insulating individuals from comparison with all other candidates for the available seats." *Smith*, 392 F.3d at 374.

180. *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317).

181. Franzese, *supra* note 8, at 743–44 ("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. 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 quota system and the lack of individual evaluation of all applicants.").

182. "'Some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." *Grutter*, 539 U.S. at 336 (citing *Bakke*, 438 U.S. at 323).

183. Franzese, *supra* note 8, at 743. The "admissions program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317) (internal quotation marks omitted).

184. *Grutter*, 539 U.S. at 337 (citing *Bakke*, 438 U.S. at 318).

185. It seems that if applicants felt they had received a "highly individualized, holistic review," they would be less likely to feel that they had received unequal treatment. See *Grutter*, 539 U.S. at 337. Not all students have the same ability to fatten their college applications with potential "plus" factors. For example, a high school student in an isolated, rural town may not have the same opportunities for community service as a student coming from an inner-city, but this does not mean that a university may not take community service hours into consideration. However, if a lack of commu-

*c. Good-Faith Consideration of Gender-Neutral Alternatives*

*Grutter* required a university, in good faith, to consider “workable race-neutral alternatives” to its race-conscious admissions policy.<sup>186</sup> Applying this requirement in the gender context would mean that a university would need to have first considered gender-neutral alternatives before implementing a gender-conscious admissions policy. When an admissions policy is examined under intermediate scrutiny, the university is “not required to implement a gender-conscious program only as a last resort.”<sup>187</sup> In fact, even strict scrutiny does not demand “exhaustion of every conceivable race-neutral alternative.”<sup>188</sup> As alternatives to gender-conscious admissions policies, some universities have implemented “targeted recruitment programs, changes in advertising materials, and the addition of sports teams to attract male students,” which arguably “cannot be considered neutral alternatives.”<sup>189</sup> However, this does suggest that universities are experimenting with solutions other than gender-conscious point-based admissions systems. This “gender-neutral alternative” requirement would likely reinforce this experimentation, encouraging universities to expend more effort searching for viable alternatives to formal gender-conscious admissions policies.<sup>190</sup>

*d. Policy Does Not Cause Undue Harm*

Acknowledging that “there are serious problems of justice connected with the idea of preference itself,” the Court in *Grutter* declared that to be constitutional, “a race-conscious admissions program [must] not unduly harm members of any racial group.”<sup>191</sup> In the context of gender-based af-

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nity service hours immediately disqualified an applicant, this would likely lead to a claim of discrimination.

186. *Grutter*, 539 U.S. at 339.

187. *Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305, 1332 (S.D. Fla. 2004) (citing *Eng’g Contractors Ass’n of S. Fla., Inc. v. Metro. Dade*, 122 F.3d 895, 929 (11th Cir. 1997)).

188. *Grutter*, 539 U.S. at 339. “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” *Id.* (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509–10 (1989)).

189. Franzese, *supra* note 8, at 746. For example, one college “where about 45 percent of the students are men, recently removed some pictures of women and minorities from its marketing materials in favor of more pictures featuring action shots of white males.” Clayton, *supra* note 1.

190. In addition to encouraging neutral alternatives at the university level, this requirement may reinforce early intervention measures that are aimed at improving the quality of education at the primary level. According to many, preferential admissions policies used in higher education are only masking the underlying causes of educational underachievement. See Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 230 (1999).

191. *Grutter*, 539 U.S. at 341 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)) (“Even remedial race-based governmental action generally ‘remains subject to continuing

firmative action, this requirement would mean that the policy must not unduly burden the non-favored gender in terms of educational opportunities. In other words, if the gender-conscious policy benefits males, it must not cause undue harm to females. The Court in *Grutter* was satisfied that the school's admissions policy did not unduly harm members of any group because the program centered on individualized consideration of the applicants.<sup>192</sup> If gender is used only as a plus, rather than as a decisive factor in a student's application, a qualified woman may lose out on an admissions offer to a less-qualified male; in such a case, the Court may consider this gender-conscious policy a burden to women, but it may not consider it an *undue* burden.<sup>193</sup>

*e. Policy Has a Reasonable End Point*

Keeping in mind that "a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race," the Court determined that "race-conscious admissions policies must be limited in time."<sup>194</sup> The Court found that "sunset provisions" and "periodic reviews" to determine the continuing necessity of the program could meet the requirement of a reasonable end point in the context of higher education.<sup>195</sup> These approaches to satisfying the durational limit requirement could be implemented whether the admissions policy was race- or gender-conscious. Perhaps a university would determine that a reasonable ending

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oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.' To be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'" (quoting *Bakke*, 438 U.S. at 308; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting))).

192. *Id.* ("As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a 'plus' factor in the context of individualized consideration, a rejected applicant 'will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.'" (quoting *Bakke*, 438 U.S. at 318)).

193. Examples of factors the Court could consider in determining the extent of the burden on women are as follows: whether the women who were not admitted were forced to attend lower-ranked institutions, whether the women received less financial aid than they otherwise would have, and how many women are affected by the policy.

194. *Id.* at 341-42 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)) ("This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.").

195. *Id.* at 342.

point is when the gender balance approaches 50/50 again, but it may ultimately be up to the Court to make that call.

## V. CONCLUSION

Despite the fact that the *Grutter* factors were applied as part of a strict scrutiny analysis, these factors are separable from the strict scrutiny standard and could be applied in a flexible way to accommodate whatever standard of review the Court chooses to apply.<sup>196</sup> The use of the *Grutter* factors would not result in gender-conscious policies being per se unconstitutional, but it might help to ensure that qualified female applicants receive the consideration they deserve in the university admissions process. And instead of perpetuating outdated stereotypes, it would give credence to the fact that, while there may be inherent immutable differences between genders, these differences lose significance in the context of public higher education.<sup>197</sup> In a perfect world, “[t]he way to stop discrimination on the basis of [sex] is to stop discriminating on the basis of [sex],”<sup>198</sup> but until that world becomes a reality, a solid framework established by the Court to guide universities as they devise their admissions policies may be a good way to help stop discrimination on the basis of any classification.

Amy Hinkley\*

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196. *See supra* Part IV.B.2.

197. *See supra* notes 153, 155.

198. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

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