
CIVIL RIGHTS

AFFIRMATIVE ACTION FOR MEN? STRANGE SILENCES AND STRANGE BEDFELLOWS IN THE PUBLIC DEBATE OVER DISCRIMINATION AGAINST WOMEN IN COLLEGE ADMISSIONS

By Gail Heriot and Alison Somin*

While some news reports indicate that discrimination against women on the basis of sex¹ in college² admissions is increasingly common, there has been relatively little public discussion about it—especially compared to the much more heated public debate concerning race-based affirmative action. Not surprisingly, therefore, there have been few attempts to study the extent of the problem systematically. One such attempt with which we are both familiar—a study by the U.S. Commission on Civil Rights of sex discrimination at nineteen colleges and universities in the mid-Atlantic states—was unfortunately abandoned for what appear to be political rather than substantive reasons.³ Although the fate of the Commission's probe may in part be explained by the Commission's institutional quirks, the muddled politics surrounding the attempted probe may reflect in microcosm the muddled politics of the broader national debate. In this article, we discuss those politics and suggest that the lack of attention the issue has received to date may be unfair.

The scope of the gender discrimination problem: Multiple news reports indicate that some colleges and universities, both public and private, have what they regard as “too many” women applicants and are therefore discriminating in favor of men—largely because more women than men apply to college and their academic credentials are in some ways better.⁴ Several colleges have more or less openly admitted to discriminating against women – including the University of Richmond⁵ (a private institution) and the College of William and Mary (a public institution).⁶ Others—including Southwestern University (Texas),⁷ Knox College (Illinois),⁸ Brandeis University (Massachusetts),⁹ Boston University (also Massachusetts),¹⁰ and Pomona College (California)¹¹—shy away from admitting directly that they are discriminating, but admit that maintaining an optimal gender balance by non-discriminatory means is difficult. Trustees at the University of North Carolina have proposed instituting affirmative action for men, but ultimately decided against doing so.¹²

Sex discrimination in admissions at public universities is illegal under Title IX of the Education Amendments of 1972.¹³ But under federal law, it is perfectly legal for private institutions

* Gail Heriot is a law professor at the University of San Diego and one of eight members of the U.S. Commission of Civil Rights (“the Commission”), a bipartisan, federal agency that makes “appraisals of the laws and policies of the Federal Government . . . with respect to discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice.” 42 U.S.C. 1975(a). Alison Somin is Gail Heriot’s special assistant and counsel at the Commission. The views expressed in this article are those of the authors alone and are not necessarily those of the Commission.

to engage in sex discrimination in admissions—though once both sexes are admitted, neither may be discriminated against. There has been relatively little litigation regarding these preferences. We are aware of just one case—in 2000, several plaintiffs brought suit against the University of Georgia challenging the legality of preferences for men along with preferences for under-represented racial minorities.¹⁴ The district court found that the preference for men was indeed illegal under Title IX and the Equal Protection Clause of the Fourteenth Amendment, but the university opted not to appeal the gender issue to the Eleventh Circuit.¹⁵

Perhaps the most attention-getting piece on this topic was a 2006 *New York Times* op-ed by Jennifer Delahunty Britz, an admissions officer at Kenyon College, in which she admitted that her office often gave preferential treatment to men. Some admissions insiders wrote in response to Delahunty Britz’s piece that these preferences were quite common—what was shocking was only Delahunty Britz’s candor in airing this information publicly.¹⁶ *Inside Higher Ed* noted that “[w]hile few admissions officers wanted to talk publicly about the column, the private reaction was a mix of ‘of course male applicants get some help’ along with ‘did she have to share that information with the world?’” Several years later, after the wave of chatter over Delahunty Britz’s piece had died down, Columbia University law professor Ted Shaw referred to such discrimination as an “open secret.”¹⁷

Ultimately, while Delahunty Britz’s piece did touch off a wave of chatter elsewhere in the media and in blogs, it did not lead immediately to any attempts to study the problem systematically.¹⁸ One article in *U.S. News and World Report* did make some attempt to quantify the problem by printing a table of eighteen schools that have particularly pronounced differences in admission rates between men and women. At Wheaton College, the school with the largest gender gap of the schools examined, the male admissions rate was twenty-one percentage points higher than the rate for females; at Grove City College, the next school on the list, it was fifteen percentage points higher.¹⁹ While these numbers are indeed eye-catching, there is a possible non-discriminatory explanation for them: the male applicant pool at these particular colleges may simply be stronger. For whatever reason, women who are marginal candidates may simply be more likely to send in applications to these particular institutions. Without studies controlling for relevant credentials, we cannot know for sure. In addition, even if the applicant pools turn out to be precisely identical, these figures do not show how large the preferences for male applicants are measured in SAT score points or in GPA.

The U.S. Commission on Civil Rights made perhaps the best publicized attempt of which we are aware to look at

sex discrimination in admissions.²⁰ In September 2009, the Commission voted to examine gender discrimination at a number of colleges and universities in the mid-Atlantic states. The late Dr. Robert Lerner, the head of the Commission's Office for Civil Rights Evaluation and Research, designed a study that would look at admissions decisions at nineteen different colleges and universities in that region. The schools were chosen so as to ensure a diverse sample in terms of size, selectivity, religious affiliation, and status as a historically black institution. The Commission's researchers would control for entering credentials such as high-school grade point average and SAT score to see if colleges appeared to be granting preferential treatment to one sex. During an eighteen-month long investigation, the Commission obtained data from fifteen colleges and universities—Lincoln University of Pennsylvania; University of Maryland-Eastern Shore; Virginia Union University; Howard University; Catholic University of America; Loyola College in Maryland; University of Richmond; York College, Pennsylvania; Goucher College; Goldey-Beacom College; Washington College; Shepherd University; Shippensburg University of Pennsylvania; the University of Delaware; and the University of Maryland at Baltimore County. After much resistance, three others—Georgetown University, Johns Hopkins University, and Gettysburg College—agreed to crunch their own numbers following the Commission's research protocols.²¹

Yet in a surprising March 2011 vote, a majority of members of the Commission voted to cancel the long-established study just as it was coming to fruition. No notice had been given to the study's supporters on the Commission that such a vote would be taken. Eighteen months' work was all gone in an instant.

Members of the Commission who voted to terminate the study claimed that the limited geographic scope of the project and shortcomings in the data of the project motivated their vote. But both were makeweight arguments. The argument that it was necessary for the Commission to undertake the expense of a national study rather than a study of schools in the mid-Atlantic region in order to better understand sex discrimination is decidedly unpersuasive. There is no evidence at this point that gender discrimination is a more severe problem in some regions than in others. As noted earlier, colleges in locations as diverse as Ohio, Georgia, Virginia, Texas, Massachusetts, Illinois and California have all admitted to struggles with gender imbalance. The Commission chose to study schools in the mid-Atlantic region because there could be no argument that the reach of its subpoenas issued by its national office extended at least that far. If, after completing the study, anyone was concerned that results from the mid-Atlantic states were not definitive, the Commission could have chosen to view this original project as a pilot study and expanded it accordingly. But to undertake a study of the entire country right off the bat would have been a waste of Commission resources.

As for the notion that there would have been shortcomings in the data, anyone who has ever done large-scale research on admissions policies (or any other large-scale social science research) knows there are always shortcomings in the data. There will be missing values because somebody forgot to check a box indicating whether a "Stacey Smith" or "Leslie Jones" is

he or a she. Some schools will accept students with either SAT or ACT scores, thus making it harder to compare one student's treatment to another's. In the end, some results will be statistically significant and some won't be. But there was nothing wrong with the data in this study that would remotely justify tossing the whole study out. There were fears that data from one of the schools in the study would turn out to be unusable. But given that eighteen schools were selected in the hope that the data would pan out on fifteen or so, the results had actually exceeded the expectations of staff researchers, as well as the commissioners who had voted in favor of the study.

It was obvious something else was going on. One might suspect that there had been a change in the Commission's membership. And one might suspect that the new members did not want a study on discrimination against women in higher education. But who? Was it the conservatives, who have been accused of not caring about women?

Well . . . no. There had indeed been a change in the Commission's makeup. In September 2009, when the project was undertaken, it was supported by five of six Republican-appointed members and neither of the two Democratic-appointed members of the eight-member Commission. By March 2011, when the project was abandoned, two of the Bush appointees had been replaced by Obama appointees.²² As Andy Ferguson wrote in *The Weekly Standard*, "[T]he politics are very odd. [Republican appointees with generally right-of-center views] might be thought by the usual ideological taxonomy to be reluctant to press an investigation into wholesale discrimination against girls. On the other hand, the project should have been meat-and-taters to the Democrats—a chance to expose a concerted effort by large, wealthy, unaccountable institutions to deny an education to qualified women purely on the basis of their sex."²³ Indeed, Ferguson is not the only commentator to have noted the odd political valence of the issue. Richard Whitmire, an education reporter for *USA Today*, titled an article about the project's cancellation "The Muddled Politics of Male Gender Preferences,"²⁴ and conservative writer Charlotte Allen—in a piece that was somewhat critical of the Commission's project just as Ferguson's and Whitmire's were sympathetic—described the coalition that has coalesced around the issue as a group of "strange bedfellows."²⁵

While Allen is correct to characterize the coalition forming in support of male preferences as "strange bedfellows," she is incorrect to describe the coalition *opposing* these preferences as comprised of "opponents of affirmative action for any group" and "hard-line feminists." And therein lies one of the more remarkable facts about the debate over affirmative action for men: contrary to what one might expect, most feminists, hard-line or otherwise, have said little or nothing at all about the issue. The lone prominent feminist whom Allen quotes as having spoken out about Jennifer Delahunty Britz's column—Katha Pollitt—never wrote or spoke publicly about the Commission's investigation, to our knowledge. In one *Inside Higher Ed* article about the Commission project, all of the representatives from feminist groups quoted were actually opposed to it.²⁶

What could cause even the most hard-line feminists to turn a blind eye to what is probably among the more blatant forms of sex discrimination one can find domestically these

days? While there may be several plausible reasons to want to maintain the ability of private schools to discriminate on the basis of sex, many feminists have been eager to denounce anything that seems to even superficially work to women's detriment.²⁷ Is there some special reason that sex discrimination in college admissions—even at public institutions where it is illegal—does not bother them?

We can only speculate as to the reasons for their strange silence, although commentators have offered up a few intriguing and plausible-sounding possibilities. Some have claimed that women's groups have been reluctant to speak out about preferences for men because they realize that preferences exist because men are falling behind in K-12 education. If men are falling behind, then women have "won" the gender wars, and feminist organizations are no longer necessary—or so the argument goes.²⁸ Others claim that feminist groups are reluctant to speak out on this issue for fear that undermining affirmative action for men will lead to the undermining of affirmative action for racial and ethnic minorities, and these groups are part of the broad coalition of left-leaning activists first and advocates for women second.²⁹ We note only that the website for the Feminist Majority Foundation devotes far more space to a "Say No to Pesticides!" campaign than it does to sex discrimination in admissions.³⁰

We find a third possible reason for feminists' silence to be especially intriguing—although we do not claim it fully explains the attitudes of feminist organizations. After years of failure to comment on sex discrimination in admissions, feminist opposition to the Commission study focused on a single line in the project proposal to justify their opposition to the study. That line read, "A small but significant problem may lie in the enforcement policies of the Department of Education" with regard to Title IX.³¹

The reference in the project proposal is to the method by which the Department of Education ensures compliance with Title IX in the area of athletics. In the almost forty years since Title IX's passage, a disproportionate share of the attention of enforcement officials has been focused on sex discrimination in athletics—so much so that non-experts are sometimes under the mistaken impression that Title IX is a law that forbids sex discrimination in athletics rather than sex discrimination more generally. What was originally a relatively obscure enforcement policy—the Department of Education's *A Policy Interpretation: Title IX and Intercollegiate Athletics*—may be having perverse and unintended effects on college and university admissions.

Unlike other college and university programs, most athletic programs are sex-segregated. Given that it is not self-evident that if given the choice men and women would choose the same kinds or the same level of athletic activity, athletics tends to raise the thorniest issues under Title IX. In chemistry classes, achieving equality is relatively easy: both women and men should be permitted to enroll, there should be no distinction made between men and women in the use of laboratory resources, and both men and women should be graded on the same scale. In athletics, it is not so easy. Since schools ordinarily prohibit men from joining the women's field hockey team or women from joining the men's wrestling team, some other way of establishing equality must be devised. Should

schools have to spend the same total number of dollars on each sex? What if there are more male than female students at a given school? What if there are more male than female students interested in athletics? How should schools determine whether a student is interested in athletics or not? What if more women students prefer that resources be put in other extracurricular activities, such a chorus or theater—activities that men can participate in too, but sometimes choose not to?³²

There is plenty of evidence that at this particular point in history, female students are somewhat less likely to be interested in sports than male students.³³ Nevertheless, the Department of Education has devised guidelines which make it extremely difficult for any school to do anything but presume that men and women are equally interested in athletics and spend accordingly. Before an extra slot can be created on a men's team, schools must show that women's interest has been fully met, and the level of proof demanded is essentially prohibitive.³⁴ Smart schools resign themselves to "substantial proportionality." In other words, a university that is 60% female has little choice but to offer 60% of its slots on athletic teams to women—even if there are not enough women interested in playing sports and willing to take these slots and even if it means cutting back on athletic opportunities for men.

Such an approach leaves colleges and universities that fear "gender imbalance" in a bind. Offering male students the opportunity to engage in or watch athletic competitions is a time-honored method for recruiting them as students. In recent years, it has been a particularly useful strategy for some small liberal arts schools that view themselves as lacking a sufficient number of men.³⁵ Because these schools ordinarily do not compete in Division I of the NCAA, they can offer some students, who would almost certainly be overlooked by the sports powerhouse schools, a chance to compete. But the Department of Education makes this strategy difficult.

The problem with the Department of Education's "substantial proportionality" approach is that in its zeal to prevent what is likely phantom sex discrimination in athletics, it can end up encouraging real sex discrimination in admissions. Because it is perfectly legal to discriminate against women in admissions, as discussed *supra*, the substantial proportionality approach can have the unintended consequence of encouraging universities to discriminate in admissions rather than attempting to attract male students by offering them more athletics, knowing that, if they do, they will also have to shell out for female sports teams for which there is little or no interest.

Several feminists have taken the public position that they oppose the Commission's study because it may touch on this issue. This seems odd to us on many levels. For one thing, as is clear from the full text of the Commission's proposal, the Commission's first priority was to get hard facts indicating whether discrimination was occurring at all. One would think that would be a priority for feminist organizations too. Discussion of the appropriate policy response is something that would come later if the study had confirmed that a substantial number of schools were in fact engaged in discrimination against female applicants.

Of course, it may be that feminists simply misunderstood the concerns about Title IX expressed in the proposal. One

remarked, for example, that “[t]he goal of this [i.e. the Commission’s proposed] approach would be to stop schools from discriminating in admissions by permitting them to discriminate in athletics.”³⁶ The proposal does not state—and neither of us thinks—that Title IX permits or should permit universities that receive federal funds to discriminate against women in offering athletic opportunities. The problem, rather, lies with the “substantial proportionality” approach that the Department of Education has adopted in enforcing Title IX. Under current law, women students are presumed to be too burdened by cultural stereotypes to express a desire to play varsity sports even when directly asked by the school officials via internet survey.³⁷ In lieu of the survey method, university officials are instead supposed to engage in a range of different activities to determine whether and to what extent there is unmet female interest. One Department of Education document states that to determine female interest in sports, colleges should among other things look at “participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).”³⁸ So national universities like our respective alma maters are perhaps supposed to look at female participation rates in sports at reliable feeders like Phillips Exeter Academy or Stuyvesant High School in New York City. Or maybe they are supposed to look at patterns of female athletic interest at secondary schools that do send them students occasionally if more rarely, such as Raffles Junior College in Singapore or Palmer High School in Palmer, Alaska (population 8,201), the high school alma maters of one author’s college classmates. The Department of Education offers colleges no guidelines on what they are supposed to do if amateur athletics associations in Singapore compete in different sports than community sports leagues in Palmer, Alaska or if members of both such organizations have totally different preferences than Exeter and Stuyvesant students do. It is not surprising that most universities conclude that they have no choice except to throw up their hands regarding measuring possible unmet female interest and instead just to opt for quotas.

We advocate the simpler approach of sparing universities the trouble of beating the bushes of Singapore looking for female athletes and of showing some respect for college women’s choices. If women want more opportunities for athletics, they can be expected to answer survey questions forthrightly.

Our fear is that some of these commentators do understand our concerns about the unintended consequences of current Title IX enforcement, but that they and the organizations that employ them are committed to an athletic-centric view of Title IX. They have built their reputations on this issue and cannot retreat, no matter what the unintended consequences turn out to be. In any event, it seems unlikely to us that many women, given the choice, would find being flat-out denied admission to a particular college preferable to not having an opportunity to participate in competitive ice fishing because that college failed to make a sufficiently careful study of trends in Alaskan community athletics association membership.³⁹

Then there is the right half of the political spectrum.

Unlike those on the left, conservatives appear to have controversy within their ranks regarding affirmative action for men—even a wee bit of acrimony. A few months after the Commission undertook its project on sex discrimination, conservative columnist Mona Charen, published a column entitled “Civil Rights Commission Blunders Again.” In it she argued that the Commission “is about to subtract from national wisdom about college admissions by focusing on exactly the wrong problem.” Charen argued her point this way:

[W]e seem to have a boy problem here. For every 100 women who earn a college degree, only 73 men do. These statistics practically shout ‘boy crisis.’ Yet the Civil Rights Commission apparently sees the problem as one of discrimination.⁴⁰

...

... The Civil Rights Commission can do us all a favor by going away.

In her essay, Ms. Charen argues that boys are shortchanged at K through 12 levels by “feminized school environments; that they are also disadvantaged by their family environments. This somehow justifies preferences at the college level. This argument parallels one of the more common arguments in favor of preferential treatment for under-represented minorities—that African Americans, Hispanics, and American Indians should receive preferential treatment at the college level, because they are shortchanged in K through 12 and/or in their family environment. (We note that on other occasions, Ms. Charen has supported California’s Proposition 209, which bans both race and sex discrimination in, among other things, admissions to state colleges and universities.)⁴¹ We would respond to those arguments the same way as we have to the argument in the race context.

We are perfectly willing to entertain the possibility boys are being shortchanged in K through 12 and/or in their family environments. (This point can be overstated, however, since part of the reason men are relatively scarce in higher education is that they are more likely to prefer to enter the military or the building trades, both honorable paths in life.) But if it is true that boys are being shortchanged, the problem needs to be corrected early on, while they are still in K through 12. It will do no good to paper over it at the college level, and it may well do harm.

There is now abundant evidence that accepting an affirmative action leg-up hurts a minority student’s chances of becoming a doctor, scientist, or engineer.⁴² A better strategy is to attend a school at which one’s entering academic credentials roughly match the median student’s. It is entirely possible that affirmative action is similarly backfiring for male students accepting a preference—and that preferences are thus leading to fewer rather than more male students fulfilling their ambition to become a physician, scientist, or engineer.⁴³ That is one among many reasons the current state of affairs is worth investigating.

Moreover, if the source of boys’ difficulty in K through 12 is “feminized school environments” such that boys lose interest in school, Ms. Charen should have been positively

enthusiastic about the Commission's project and especially about examining the Department of Education's substantial proportionality rule.⁴⁴ Discrimination in admissions allows colleges and universities to perpetuate any such feminization. By enforcing the law against sex discrimination in admissions that cover public colleges and by promulgating similar laws that would cover private colleges, the federal government would be strongly encouraging schools to adopt other methods of attracting male students—like offering them more athletics, more programs in engineering and physical science, and perhaps even a few frogs and snails and puppy dog tails or whatever it is that is supposed to please male students.

We note for example that Brandeis University recently tried the “puppy dog tail” approach with a promotion that gave free baseball caps to the first 500 men who applied there—a gimmick that we believe is unlikely to have much impact.⁴⁵ Other institutions have engaged in creating academic or vocational programs designed to appeal to men, such as institutes for building and construction and a “motor sports program,” which one university official described as an engineering program in disguise.⁴⁶ All of this is exactly what Charen should wish to encourage in her quest to counter any feminization of colleges and universities.

Some social conservatives dubbing themselves “biological realists” have claimed that preferences are necessary because women want or need to date men in college so that they can marry and have families within a narrow biological window of opportunity.⁴⁷ We certainly do not reject this argument out of hand. But we have several comments: First, we should note that nobody seems to have asked actual college-age women about this. The proposal for the Commission study suggested making efforts to get actual data on this question.⁴⁸ Second, sex discrimination in admissions probably does not increase the total number of male students attending college; it simply re-arranges them. From the standpoint of an individual school attempting to please its female “customers,” sex discrimination in admissions may seem like a crowd pleaser, but from the standpoint of the system as a whole, there is no net benefit and hence it is in some ways gratuitous. Third, even if women generally prefer being discriminated against at the admissions level to attending schools where women dominate, that is not the whole of the issue. We very much doubt they prefer the Department of Education's misguided Title IX enforcement policies relating to athletics to sex-blind admissions policies. Put differently, if allowing colleges to create more opportunities for men to play sports—so long as they can show with reasonable evidence, like internet surveys, that they have already met the demand for opportunities in women's athletics—would attract more qualified men and hence obviate the need to discriminate in favor of less-qualified men, we strongly suspect that most women would prefer it.

Finally, there is another possible “biological reality” that deserves some thought: It has been our experience at least that many women want men who are at least as smart as they are and perhaps smarter. Without data, of course, it is difficult to do anything but speculate. But consider this: One of the consequences of widespread *race*-preferential admissions policies is that talented African American students end up distributed

among colleges and universities in very different patterns from those of their white and Asian counterparts. When the schools that are highest on the academic ladder relax their admissions policies in order to admit more under-represented minority students, schools one rung down must do likewise. Otherwise, they will have far fewer minority students than they would have had under a general color-blind admissions policy. The problem is thus passed on to the schools another rung down, which respond similarly. As a result, students from under-represented minorities today are overwhelmingly at the bottom of the distribution of entering academic credentials at most selective colleges and universities. The problem with sex-preferential admissions is almost certainly not as great. But we are concerned that it may be greater than many realize. Is this really something “biological realists” or conservatives concerned about the “feminization” of schools would want to ignore?

This isn't an easy issue. We don't pretend to have all the answers. All we can offer at this point is food for thought. The one thing we are quite sure of is this: Despite the fact that neither those on the left nor those on the right want to “own” this issue, it cannot be wisely ignored. We very much regret that the Commission's study was cancelled after eighteen months of work.

Endnotes

1 Although we are aware that there is active and rancorous debate within the academic and policy worlds regarding the appropriate use of “sex” and “gender,” the two terms are used interchangeably throughout this article.

2 The terms “college” and “university” are also used interchangeably throughout this piece.

3 Transcript of Business Meeting, U.S. Commission on Civil Rights, Mar. 11, 2011 at 125; Daniel de Vise, *Federal Panel Ends Probe of College Gender Bias*, *WASH. POST*, Mar. 16, 2011, available at http://www.washingtonpost.com/local/.../feds.../ABoIQ5g_story.html.

4 These days many indicators suggest that there are simply more qualified women than men applying to college. Although women continue to receive lower average scores than men on the math section of the SAT, women outscore men on the writing section of the test. Interestingly, although women receive slightly lower average scores on the “Critical Reading” section, there are more women than men scoring above 700 on this test section in part because more women take the test. A higher percentage of the women taking the test reported to the College Board that they had either an A range or B range grade point average. Similarly, higher percentages of women than men report being ranked in either the top tenth or second tenth of their high school classes. By contrast, a greater percentage of the men taking the test reported that they are in the bottom three-fifths of their high-school classes. Higher percentages of women than men also reported taking honors or Advanced Placement classes in English, mathematics, the natural sciences, history, and foreign languages. THE COLLEGE BD., 2010 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT, 1-8 (2010), available at <http://professionals.collegeboard.com/profdownload/2010-total-group-profile-report-cbs.pdf> (last accessed August 10, 2011).

5 Alex Kingsbury, *Many Colleges Reject Women at Higher Rates than for Men*, *U.S. News & World Rep.*, June 16, 2007, available at <http://www.usnews.com/usnews/edu/articles/070617/25gender.htm>.

6 Henry Broaddus, the director of admissions there, told *U.S. News and World Report* that “[e]ven women who enroll . . . expect to see men on campus. It's not the College of Mary and Mary; it's the College of William and Mary.” *Quoted in id.* The College of William and Mary was named for a husband and wife pair of British monarchs who ruled jointly from 1689 to 1694. They are the only two monarchs to have ruled jointly in the millennium-long history

of the British monarchy. It is perhaps fortunate for Virginian women that the British Jacobites were not successful at their project of restoring James II to the throne in the 1690s. Otherwise, the College of William and Mary might well have been named the College of King James II instead, and by Broadus's logic, women apparently should then never have been admitted there at all. But we digress.

7 Mark Clayton, *Overview: The Gender Equation*, CHRISTIAN SCI. MONITOR, May 22, 2001, available at <http://www.csmonitor.com/2001/0522/p11s2.html>.

8 *Id.*

9 Melana Zyla Vickers, *Where the Boys Aren't*, WKLY. STANDARD, Jan. 2, 2006.

10 *Id.*

11 Lauri Valerio, *Federal Government Investigates Gender Discrimination at Liberal Arts Colleges*, STUDENT LIFE, Nov. 18, 2009, available at http://tsl.pomona.edu/new/index.php?option=com_content&view=article&id=577&Itemid=67.

12 Scott Jaschik, *Gender Gap at Flagships*, INSIDE HIGHER ED, June 3, 2005, available at <http://www.insidehighered.com/news/2005/06/03/gender>.

13 See 20 U.S.C. 1681(a)(1), which reads in relevant part:

(a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition. in 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.

14 *Johnson v. Bd. of Regents*, 106 F. Supp. 2d 1362, 1376 (S.D. Ga. 2000). Notably, the case came down before the prominent pair of Supreme Court cases addressing race-based affirmative action in higher education—*Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). The system that the University of Georgia was using more closely resembles the point-based system at issue in *Gratz* than the holistic system used in *Grutter*. So it might be that the Supreme Court would, post-*Gratz*, also find point-based systems unconstitutional in the gender context. But because gender classifications receive less scrutiny than do racial classifications, the Court might well decide that gender-based point systems are constitutionally permissible even if race-based point systems are not. It would indeed be interesting to find out if Georgia returned to using the point-based system for men after *Grutter*. That said, as many commentators have pointed out, there is little, if any, difference between how “holistic” systems of review work in practice compared to point-based ones.

15 *Id.*

16 17 Scott Jaschik, *Affirmative Action for Men*, INSIDE HIGHER ED, Mar. 27, 2006, available at <http://www.insidehighered.com/news/2006/03/27/admit>. Elsewhere, Swarthmore College history professor Timothy Burke commented on his blog, “I have been a bit surprised about how surprised some observers are about Jennifer Delahunty Britz’s op-ed piece in the New York Times regarding the role of gender in the admissions process at many selective private colleges and universities. . . . Unfortunately for anyone who objects to this approach [i.e. admissions preferences for men], it’s actually pretty common.” Kenyon’s Confession, Posting of Timothy Burke to Easily Distracted, <http://weblogs.swarthmore.edu/burke/2006/03/28/kenyons-confession/> (Mar. 28, 2006).

17 See Theodore M. Shaw, Professor, Columbia Law School, Remarks at the Heritage Foundation in Panel Discussion Sponsored by the Federalist Society’s Civil Rights Practice Group and the Heritage Foundation on “Civil Rights in the Age of Obama” (May 13, 2009), available at http://www.fed-soc.org/publications/pubID.1416/pub_detail.asp.

18 One odd angle of this story is that Delahunty Britz seems to have publicly retreated from the position that she took in her *New York Times* op-ed. In an essay posted on Kenyon’s website, she writes, “Some critics accuse Kenyon of favoring girls; others say we’re favoring boys. The fact is we’re favoring neither.”

Jennifer Delahunty Britz, A Personal Statement from Jennifer Delahunty Britz, <http://www.kenyon.edu/x31612.xml> (last visited Apr. 22, 2011). And in an NPR radio interview in November 2009, Delahunty Britz said, “I don[’]t see anybody who has a policy that says, you know, that we[’]re going to choose less qualified boys over more qualified girls. No admissions office would make those kinds of decisions.” Yet these statements seem to directly contradict her account of one particularly difficult decision she and her colleagues in the Kenyon admissions office had to make: “Few of us sitting around the table were as talented and as directed at age 17 as this young woman. Unfortunately, her test scores and grade point average placed her in the middle of our pool. We had to have a debate before we decided to swallow the middling scores and write ‘admit’ next to her name. Had she been a male applicant, there would have been little, if any, hesitation to admit.” Delahunty Britz indicated that this instance was far from atypical: “The reality is that because young men are rarer, they’re more valued applicants.”

We cannot say for sure what motivated the change in Delahunty Britz’s public stance. Did her perception of Kenyon’s admissions policies change? Was she afraid that Kenyon would retaliate against her for publishing a controversial newspaper column? In any case, her about-face may have had a small negative impact on efforts to stimulate a national conversation on gender discrimination in admissions—which is unfortunate.

19 Alex Kingsbury, *Education: Many College Reject Women at Higher Rates Than for Men*, U.S. NEWS & WORLD REP., June 17, 2007. Some have speculated that sex discrimination in admissions is most pronounced at mid-level private colleges. While some schools fitting this description show up on Kingsbury’s list—e.g., Skidmore, Richmond, Providence, and Wheaton—it may be important to note that no particular type of school dominates it. Regarding the “mid-level” claim, Kingsbury claims that the most selective universities in the country—the Ivy League schools and a handful of other institutions that are equally selective—generally have no difficulty attracting highly qualified men. Indeed, no Ivy League colleges show up on his list. But some colleges that do appear—including Swarthmore, Pomona, Vassar, and William and Mary—are equally or only slightly less selective. Several large public universities—Georgia State University, the University of Texas at Dallas, and Rutgers-Newark—also make appearances. The campus political climates of the universities on the list are equally varied. Grove City is generally considered among the most conservative universities in this country, whereas Vassar students are usually regarded as leaning politically far in the opposite direction. The diversity among institutions showing up on this list only underscores the need for broad probes like the Commission’s.

20 See authors’ byline for a brief description of the Commission’s history, functions, and duties and the authors’ connections to the Commission.

21 Although the Commission has the authority to issue subpoenas and it did so in this case, to enforce those subpoenas it depends on the Department of Justice. The Commission never requested the Department of Justice to step in.

22 Five commission members—Chairman Gerald Reynolds, Peter Kirsanow, Ashley Taylor, Gail Heriot, and Todd Gaziano—voted to approve the sex discrimination project in September 2009. Reynolds, Kirsanow, and Taylor were all appointed by President Bush. Heriot was appointed by President pro Tempore of the Senate on the recommendation of Minority Leader Mitch McConnell in 2007. Gaziano was appointed by the Speaker of the House upon recommendation by then-Minority Leader John Boehner 2008.

Three commission members were not present when the vote took place, having left the meeting earlier in an effort to defeat quorum for tactical reasons. These included Abigail Thernstrom, who was appointed to the Commission by President George W. Bush, but who has caucused with Democratic appointees rather than Republican appointees for the past two years; Michael Yaki, who was appointed on the recommendation of Minority Leader Nancy Pelosi; and Arlan Melendez, who was appointed on the recommendation of Senate Minority Leader Harry Reid.

In December 2010, Reynolds’s and Taylor’s terms expired. In January 2011, President Obama nominated their replacements, Martin Castro (who was later chosen as Chair) and Roberta Achtenberg. Arlan Melendez’s term expired in December 2010 as well. Harry Reid appointed Dina Titus, a former Democratic congresswoman from Nevada, as his replacement in December 2010. Titus has since resigned from the Commission to pursue a run for congressional office. Commissioner Michael Yaki’s term also expired in December. He was reappointed in April 2011, a month after the Commission’s sex discrimination in admissions project was cancelled.

23 Andy Ferguson, *The Quotas Everyone Ignores*, WKLY. STANDARD, Mar. 28, 2011, available at http://www.weeklystandard.com/articles/quotas-everyone-ignores_554831.html.

24 Richard Whitmire, *The Muddled Politics of Male Gender Preferences*, EDUC. WK., Mar. 18, 2011, available at http://blogs.edweek.org/edweek/whyboysfail/2011/03/the_muddled_politics_of_male_gender_preferences.html.

25 Charlotte Allen, *The Quiet Preference for Men in Admissions*, MINDING THE CAMPUS, June 7, 2010, available at http://www.mindingthecampus.com/originals/2010/06/the_quiet_preference_for_men_i.html.

26 Scott Jaschik, *Title IX Trojan Horse?*, INSIDE HIGHER ED, Nov. 3, 2009, available at <http://www.insidehighered.com/news/2009/11/03/titleix>.

27 See *Int'l Union, United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991).

28 See, e.g., Richard Whitmire, *Missed Opportunity*, INSIDE HIGHER ED, Apr. 22, 2011, available at http://www.insidehighered.com/views/2011/04/22/essay_criticizing_end_of_inquiry_into_possible_bias_against_female_applicants_to_colleges. We do not believe it logically follows from the fact women do better than men in some walks of life that they are doing better in all walks. But it might take the punch out of some of the more extreme feminist rhetoric to have to concede how much better girls are doing than boys in high schools today.

29 See, e.g., Richard Whitmire, *The Muddled Politics of Male Gender Preferences*, EDUC. WK., Mar. 18, 2011, available at http://blogs.edweek.org/edweek/whyboysfail/2011/03/the_muddled_politics_of_male_gender_preferences.html. (“The groups you would expect to complain the loudest about discrimination against women—national feminist groups and the American Association of University Women—are mute. Why are they okay with discriminating against females? After watching the issue for years I’ve come up with three explanations. First, liberals want to safeguard the freedoms granted to admissions officials to pick the freshman class they want, which includes putting the thumb down to favor minorities. They have a good point. Male preferences, for example, are no different from favoring a potential star quarterback, cello player or legacy admit whose parents are likely to finance a new dorm.”)

Indeed, the debate over affirmative action for men throws into relief the tension between two of the more commonly offered justifications for affirmative action in the race context—the “compensatory justice” and “diversity” rationales.

The compensatory justice rationale for affirmative action holds that preferences are permissible when they are used to compensate a group for past discrimination or mistreatment. The diversity argument for preferences, by contrast, holds that preferences ought to be permissible when they help ensure that a broad variety of viewpoints will be represented on campus. As some commentators have hinted, it is difficult to justify preferences for men under the compensatory justice rationale for affirmative action. Men are historically thought to have been the privileged sex relative to women; there is no apparent need for remedial discrimination to help them. See, e.g., Liz Dwyer, *Rejected from College: If You’re a Woman, A Less Qualified Man Probably Took Your Spot*, GOOD, Apr. 25, 2011, available at <http://www.good.is/post/rejected-from-college-if-you-re-a-woman-a-less-qualified-man-probably-took-your-spot/>.

In some ways, it is easier to justify affirmative action for men under a diversity rationale for affirmative action. Yet ultimately, the argument even there is problematic. *Grutter v. Bollinger*, 539 U.S. 306 (2003), the leading court case spelling out the diversity rationale for affirmative action, emphasized that colleges and universities may use racial preferences to ensure a “critical mass” of students from a particular group on campus—e.g., that there are enough black students present to ensure that other black applicants do not decline to apply out of concern about racial isolation. *Id.* at 330. Yet the same argument makes less sense in the sex context; that is, it is hard to argue that somehow a university that is 40% male lacks a “critical mass” of men, but that one that is 50% male has reached said “critical mass.” Similarly, attending a university that is 40% male can almost surely convey to a female student the range of male perspectives on a subject and can lead her to understand that not all men think the same way. Ultimately, the only real way that one can defend preferences for men under the “diversity” rationale is by equating “diversity” with “proportional representation”—which advocates of the diversity model have repeatedly and vocally claimed is not their goal.

For further elaboration of the tension between these two justifications for affirmative action in the race context, see Asian-American Applicants and

Competing Rationales for Affirmative Action in Higher Education, Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/2009/10/17/asian-american-applicants-and-competing-rationales-for-affirmative-action-in-higher-education/> (Oct. 17, 2009, 01:54 EDT); Immigrant Students and the Tension Between Two Rationales for Affirmative Action, Posting of Ilya Somin to The Volokh Conspiracy http://volokh.com/archives/archive_2007_02_04-2007_02_10.shtml#1170741033 (Feb. 5, 2007, 23:50 EST). In those two posts, Somin argues that the diversity rationale leads to perverse results in the cases of recent African immigrants—students who have black skin, but whose ancestors were never American slaves—and to discrimination against Asian-Americans—who, like women, have historically been victims of discrimination but who are currently over-represented in higher education. Although the problem of discrimination against Asian-Americans is of course different from that of discrimination against women, the two groups are similarly situated in that they are similarly harmed by the diversity model of affirmative action.

Some may argue that young men deserve preferences in college admission because they have been unfairly victimized by the excesses of the feminist movement. In some sense, this is a compensatory justice argument. We agree that some of the practices complained of are ridiculous; we discuss some of them *infra* at 17-18. At the same time, the severity of the alleged injuries to young men appear slight compared to the harms suffered by groups on whose behalf the compensatory justice arguments have more commonly been advanced, e.g., African-Americans. In any case, we worry that using affirmative action in this way will only distract attention from real problems in the education of boys in grades K-12. See 17-18, *infra*.

30 See *Say NO to Pesticides?*, Choices Campus Blog, http://feministcampus.blogspot.com/2011/04/say-no-to-pesticides.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+FeministCampusBlog+%28Choices+Feminist+Campus+Blog%29 (Apr. 19, 2011, 14:39). The National Women’s Law Center’s website contains no issue papers, press releases, blog posts, or other materials that we could find about affirmative action for men in university admissions. At the National Organization for Women’s website, there is a section devoted to “Affirmative Action.” <http://www.now.org/issues/affirm/> (last visited Apr. 25, 2010), that solely contains papers about the need to protect affirmative action on behalf of racial and ethnic minorities. A page titled “Education and Title IX” is equally silent about admissions preferences for men.

31 A copy of the project proposal is available online at <http://chronicle.com/article/Full-Text-The-Proposal-That/49012/>.

32 This list is by no means exhaustive. What if market forces beyond any school’s control have driven up the salaries of men’s football coaches but not women’s field hockey coaches? Is it okay to allocate more money to men’s sports under those circumstances? Or should men be forced to tighten their belts in other ways to cover the costs of the coach? What if men’s sports attract more spectators and hence more revenue?

33 See JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, AND TITLE IX* (2002). *The New York Times* has reported on the lengths to which colleges and universities go to pad their women’s sports team rosters—evidently in order to avoid having to cut back on men’s sports teams. At Quinnipiac University, for example, women members of the cross-country team were *required* to join the indoor and outdoor track teams, so they could be counted three times. At Marshall University the women’s tennis coach was evidently reduced to bargaining with students with no particular talent or time for tennis. “They could come to practice when they liked,” the coach was said to have told these women, “and would not have to travel with the team.” At the University of South Florida, half the women on the cross country team failed to show up for a race. When asked about it, a few laughed and said they had not realized they were on the team. South Florida had evidently been including its track athletes on the cross country rosters. See Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, available at <http://www.nytimes.com/2011/04/26/sports/26titleix.html?pagewanted=all>.

34 For fuller discussions of the problems with current enforcement of Title IX with regard to athletics, see JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS AND TITLE IX* (2002); Alison Somin, *THE OBAMA ADMINISTRATION: CHANGING THE RULES OF THE TITLE IX GAME*, ENGAGE, Dec. 2010, at 26; U.S. COMM’N ON CIVIL RIGHTS, *TITLE IX ATHLETICS: ACCOMMODATING INTERESTS AND ABILITIES* (2010), available at <http://www.usccr.gov/pubs/TitleIX-2010-rev100610.pdf>.

35 See, e.g., David Moltz, *Looking to Sports to Bolster Enrollments*, INSIDE HIGHER ED, Jan. 21, 2009, available at <http://www.insidehighered.com/news/2009/01/21/ncaa> (describing the success of LaGrange College in rural western Georgia in using football teams to recruit more men).

36 See the comments of Leslie Brucker, an attorney for Public Justice, quoted in Jaschik, *supra* note 16.

Our answers to three of the other critics quoted in the *Inside Higher Ed* article are similar. Donna Lopiano, president of Sports Management Resources, comments that “[c]ivil rights laws are not utilitarian actions meant to recalibrate student or social populations. . . . They are statements of human-rights principles, that if followed, will allow student or social populations to evolve without unfairness. To suggest that civil rights should be suspended for any reasons is an indication of someone missing the point by a long shot.” Inasmuch as “suspending civil rights” here should be taken to mean “letting universities decide to fund teams on the basis of the sex of the athletes involved,” we are in agreement with Ms. Lopiano that civil rights should not be suspended. Our disagreement with her is over the “substantial proportionality” approach, which in effect compels universities to fund women’s teams in circumstances in which they likely would not fund a men’s team because they are concerned about being able to show proportional numbers to the Department of Education. Likewise, inasmuch as universities are suspending women’s civil rights by denying them admission based on their sex, this is an issue that we are very concerned about. We do not understand why this latter issue seems not to worry Ms. Lopiano.

Fatima Goss Graves of the National Women’s Law Center comments that “[t]he hypothesis is flawed from the start. It presumes that only men are interested in sports, and that all men are interested in sports, so right there you are operating on flawed presumptions about the interests and abilities of students.” Neither of us have ever assumed or suggested that only men are interested in sports or that all men are interested in sports. Each of us has known women who are excellent athletes and quite interested in sports; we have also each had occasion to interact with plenty of male law professors, a group that is disproportionately uninterested in sports and actively disdainful of those who are. Our more modest claim is that there is some evidence that, at this particular moment in time, college-age men are somewhat more interested in sports than women are. Expanding the athletic opportunities available to men at some campuses might increase at the margin the number of men applying there. We do not suspect or claim that expanding athletic opportunity alone would dramatically raise the numbers of men applying to many colleges and universities. But difficult problems are more often solved by a number of incremental adjustments rather than by a single fix. If there were a single fix that would remedy the problem easily, somebody would have thought of it already. See also *infra* at 17 for a discussion of how boys’ lagging performances in K-12 education may also be contributing to gender imbalances in higher education.

Erin Buzuvis, an associate professor at the Western New England College of Law, states that “[t]here’s always been resistance to Title IX,” and notes that this is a new strategy, but with the same goal (apparently of undermining Title IX). She predicted that it would fail because “in the end most people believe in equal opportunities.” We are both believers in equal opportunities, and this is why we are concerned about the perceived lack of equal opportunity for women in admissions at some schools. Our concern about Title IX is that the substantial proportionality approach represents a move away from emphasizing equality of opportunity and instead toward the creation of de facto quotas in athletics. This would be troubling even if it were not leading to actual discrimination against women in admissions. If it is, it should be a high priority to set things right.

37 To make it easier for some colleges to demonstrate that they were adequately meeting female interest in sports under Title IX, the Bush Administration propounded a Model Survey that schools could administer to determine if there was unmet female interest in some sports on their campuses. If a school was fully accommodating female interest in sports teams as shown by the survey results, the Department of Education would presume that the college was in compliance in Title IX. Feminist interest groups opposed the survey, and the Obama Administration rescinded the Bush policy a little more than a year ago.

We find it odd to suggest that a woman who is genuinely interested in playing a varsity sport would be unwilling to fill out a short internet survey conveying this preference to her university’s administration. Playing a varsity sport generally requires at least ten to fifteen hours of practice and training time each week, sometimes more in the height of the season. Many college

athletes have spent years competing in that same sport at the high school level and sometimes even for years before that. It is rare for a novice athlete to pick up a tennis racket or field hockey stick for the first time at nineteen and compete successfully for her college varsity team. In other words, playing on an intercollegiate athletic team is a huge commitment, especially in contrast to the modest time commitment required to fill out an internet survey. We find it hard to believe that there are many women sufficiently dedicated to a sport to make one commitment but not the other.

Although neither of us has experience recruiting potential college varsity athletes, one of us has experience recruiting college and law students to participate in non-athletic extracurricular endeavors such as newspaper writing and conservative/libertarian political clubs. It is our experience that it is extremely easy to convince students to check a box saying that yes, they are interested in joining the Federalist Society or in writing for the college paper. It is quite another to get many of these same students to commit to recruiting a speaker, writing an article, or even to attending a single lecture. We find it odd that opponents of surveying women about their athletic interests seem not to have noticed this common phenomenon.

38 U.S. Dep’t of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test (Jan. 16, 1996), available at <http://ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

39 We hasten to add, however, that flat-out discrimination in allocation of athletic opportunities based on sex is illegal under Title IX and also wrong as a policy matter.

40 The Commission’s jurisdiction extends to discrimination or denials of equal protection under the law (in this case on the basis of sex). It does not specifically include an examination of the status of one sex or the other.

41 Mona Charen, *Schwarzenegger Swaggers into the Race*, TOWNHALL.COM, Aug. 12, 2003, available at http://townhall.com/columnists/monacharen/2003/08/12/schwarzenegger_swaggers_into_the_race/page/full/ (“We [conservatives] were pleased by Proposition 209, which outlawed affirmative action”); Mona Charen, *The Fog of Affirmative Action*, TOWNHALL.COM, Jan. 21, 2003, available at http://townhall.com/columnists/monacharen/2003/01/21/the_fog_of_affirmative_action (“Racial preferences perpetuate the very worst stereotype about African-Americans—that they are not as smart as whites and Asians.”).

42 Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier & Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. HIGHER EDUC. 681 (1996); Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?* (Working Paper, Draft July 2009); Frederick L. Smyth & John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admissions Policy and College Choice*, 45 RES. HIGHER EDUC. 353 (2004); U.S. COMM’N ON CIVIL RIGHTS, ENCOURAGING MINORITY STUDENTS TO PURSUE SCIENCE, TECHNOLOGY, ENGINEERING AND MATH CAREERS (2010).

43 Although statistics generally indicate that men outnumber women in these fields, it might be that still more men would go into these fields if not for preferences for men in college admissions. Also, if affirmative action for men is a recent phenomenon, it may be that the trend will reverse at some point.

44 In her 2000 book *The War Against Boys*, Christina Hoff Sommers laid much of the blame for boys’ lagging scholastic achievement at the feet of feminist interest groups. CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* (2000). According to Sommers, these groups’ success at popularizing flawed studies about how schools shortchanged girls distracted educators from looking at the problems of boys. She describes also how efforts at raising students’ feminist consciousness in the K-12 grades may have inadvertently alienated boys. For example, there is a discussion of a guide called “Quit It!” designed to help little boys be less aggressive, in part by coming up with less aggressive variations on the game of tag. *Id.* at 52. Elsewhere, we learn about government-sponsored day care guides that encourage teachers to occasionally reverse the order of Jack and Jill’s names in the traditional nursery rhyme, apparently in the name of gender equity. *Id.* at 77. It is unclear how common such extremes are, but it is not impossible what Charen calls “feminized school environment” has an adverse effect on male students.

Richard Whitmire rejects most of Sommers’s claims. He argues instead in his provocatively titled *Why Boys Fail* that “[i]f forced to come up with a single sentence summarizing what I learned researching this book, it would be

