

## Notes

# UNBALANCED: THE CASE FOR REMOVING TITLE IX'S PRIVATE COLLEGE ADMISSIONS EXEMPTION

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### ABSTRACT

*Title IX prohibits any federally funded educational program from discriminating on the basis of sex—except when it comes to private undergraduate admissions decisions. This exemption is the result of lobbying during the 1970s by private colleges that resisted being subject to Title IX out of concern that admitting more women would lower their academic standards, hurt future alumni contributions, and deprive them of the ability to choose the ratio of male to female students. However, nearly fifty years later, the exemption is having unforeseen consequences as many private liberal arts colleges are using their exemption to give admissions preference to male applicants in order to ensure their student body has an equal number of male and female students. This practice, known as “gender balancing,” has been adopted by private colleges due to the fact that women apply to college in higher numbers and tend to apply with stronger high school records than their male peers.*

*This Note analyzes Title IX's legislative history and argues that removing the private college admissions exemption would further Title IX's intended purpose of ensuring that women are neither held to higher admissions standards nor subject to quotas that cap their enrollment. This Note then refutes the arguments made by private college admissions officers both when Title IX was passed and today,*

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*in hopes of dispelling the concern that removing the exemption will create overwhelmingly female campuses that will no longer attract students who desire a gender balance for social reasons.*

## INTRODUCTION

Just over fifty years ago, as Title IX was introduced in Congress, many undergraduate institutions either banned or limited the number of women admitted, often on the unfounded notion that admitting women would lower educational standards.<sup>1</sup> In 1969, a Princeton alumnus opposed admitting women because he feared it would lead to Princeton becoming “an institution designed to meet the requirements of the average.”<sup>2</sup> But women’s academic performance in higher education today is hardly average. Women compose the majority of college<sup>3</sup> students<sup>4</sup> and consistently outperform men in terms of higher graduation rates and grade point averages.<sup>5</sup> The tremendous progress women have achieved within higher education can, in part, be attributed to the passage of Title IX, a federal civil rights law that

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1. See, e.g., *United States v. Virginia*, 518 U.S. 515, 537–38 (1996) (discussing that in 1970 the University of Virginia started admitting women despite fears that “they ‘would encroach on the rights of men[.] . . . standards would be lowered to those of other coeducational schools[,] and the glorious reputation of the university . . . would be trailed in the dust’” (quoting 2 THOMAS WOODY, *A HISTORY OF WOMEN’S EDUCATION IN THE UNITED STATES* 255 (1929)); NANCY WEISS MALKIEL, “KEEP THE DAMNED WOMEN OUT” 465, 470 (2016) (noting that Dartmouth College did not accept women until the fall of 1972, which was notably after Representative Edith Green first introduced legislation in the House that laid the foundation for Title IX).

2. WEISS MALKIEL, *supra* note 1, at 293 (quoting Letter from Henry D. Prickett).

3. This Note uses the terms “college” and “university” interchangeably because both types of institutions engage in gender balancing. See Dave Bergman, *Gender in College Admissions—Do Men or Women Have an Edge?*, *COLL. TRANSITIONS* (May 13, 2020), <https://www.collegetransitions.com/blog/can-your-gender-give-you-an-admissions-edge> [<https://perma.cc/FD79-QQDA>] (reporting that both Brown University and Vassar College give men a boost in admissions to help maintain a gender balanced student body). While the two terms technically have different definitions, many in the public as well as journalists who cover education use the terms interchangeably. See Alia Wong, *What’s the Difference Between a College and a University?*, *ATLANTIC* (Nov. 19, 2019), <https://www.theatlantic.com/education/archive/2019/11/is-a-college-different-from-a-university/602215> [<https://perma.cc/GT7J-U73G>] (noting that the traditional definitions of the terms “college” and “university” have numerous exceptions and that most Americans use the terms as synonyms).

4. Jeremy Bauer-Wolf, *Student Wants to ‘End Affirmative Action for Women,’* *INSIDE HIGHER ED* (May 21, 2018), <https://www.insidehighered.com/news/2018/05/21/yale-being-investigated-discrimination-against-men-unusual-title-ix-complaint> [<https://perma.cc/VC82-KZR8>].

5. Shayna Medley, Note, “*Gender Balancing*” as *Sex Discrimination in College Admissions*, 51 *HARV. C.R.-C.L. L. REV.* 537, 542–43 (2016).

broadly bans discrimination “on the basis of sex” in federally funded educational institutions.<sup>6</sup>

However, as Title IX approaches its fiftieth anniversary, not everyone considers how the law has impacted women’s standing in education a success. To some, the idea that women could outperform men in school is “so shocking”<sup>7</sup> that they believe the imbalance must be evidence of a “boy problem” in education.<sup>8</sup> These commentators blame schools for waging a “war against boys” to explain the declining success of male students as compared to female students.<sup>9</sup> This concern is highlighted in a complaint filed by Kursat Christoff Pekgoz, a male doctoral student, which led the U.S. Department of Education Office for Civil Rights to begin an investigation into whether Yale University discriminates against men in violation of Title IX.<sup>10</sup> The complaint alleges that since women are no longer an underrepresented group at universities, Yale’s policy of providing certain scholarships and programs for women illegally discriminates against men.<sup>11</sup> The National Coalition for Men, a nonprofit organization, has filed similar Title IX complaints against several other universities.<sup>12</sup>

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6. 20 U.S.C. § 1681(a) (2018) (“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 . . .”).

7. Tamar Lewin, *At Colleges, Women Are Leaving Men in the Dust*, N.Y. TIMES (July 9, 2006), <https://nyti.ms/131cSXP> [<https://perma.cc/9RCZ-LHB2>] (quoting Sara Mead, author of a report for Education Sector, a Washington policy center, who noted that she is “troubled by this tone of [a boy] crisis” particularly because such “concern might in part reflect some people’s nervousness about women’s achievement”); see also HANNA ROSIN, THE END OF MEN AND THE RISE OF WOMEN 149 (2012) (“[W]omen’s dominance on college campuses is possibly the strangest and most profound change of the century, even more so because it is unfolding in a similar way pretty much all over the world.”).

8. Lewin, *supra* note 7. See generally CHRISTINA HOFF SOMMERS, THE WAR AGAINST BOYS (2000) (“After so many years of hearing about the silenced, diminished girls, the suggestion that boys are not doing as well as girls is not taken seriously even by teachers who see it with their own eyes in their own classrooms.”).

9. See THOMAS A. DIPRETE & CLAUDIA BUCHMANN, THE RISE OF WOMEN: THE GROWING GENDER GAP IN EDUCATION AND WHAT IT MEANS FOR AMERICAN SCHOOLS 13, 159–63 (2013) (“For example, some maintain that feminists are waging a ‘war against boys’ in schools. In this view, schools have become dominated by a feminine culture that is not supportive of the way boys behave and learn.” (citation omitted) (quoting HOFF SOMMERS, *supra* note 8 *passim*)).

10. Bauer-Wolf, *supra* note 4.

11. *Id.*

12. See Elizabeth Douglas, *Men’s Group Files Title IX Complaint Against University*, HOYA (Oct. 26, 2018), <https://thehoya.com/mens-group-files-title-ix-complaint-university> [<https://>

Yet, drowned out by claims that schools are waging a “war against boys” is a “little-known secret[.]”<sup>13</sup> that some top private college admissions turn down women for less qualified men.<sup>14</sup> This is occurring because not only are more women applying to college than men, but female applicants maintain higher grade point averages, participate more in extracurricular activities, and take more rigorous courses in high school than their male peers.<sup>15</sup> In response, some private colleges give male applicants a boost in admissions to ensure that their student body is equally balanced between men and women.<sup>16</sup> For example, Vassar College has a male acceptance rate that is fifteen percentage points higher than its female acceptance rate.<sup>17</sup> Such gender

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perma.cc/53Z4-KH3U] (noting that “NCFM filed similar complaints against several universities nationwide, including the University of Pennsylvania, Northeastern University, and Yale University, and has filed Title IX complaints against other universities in the past”).

13. Jon Birger, *Why Getting into Elite Colleges Is Harder for Women*, WASH. POST (July 30, 2015, 6:00 AM) [hereinafter Birger, *Elite Colleges*], <https://www.washingtonpost.com/posteverything/wp/2015/07/30/achieving-perfect-gender-balance-on-campus-isnt-that-important-ending-private-colleges-affirmative-action-for-men-is> [<https://perma.cc/D2WJ-AKL7>].

14. See Libby Nelson, *Gender Discrimination Against Women Is a Real Problem in College Admissions*, VOX (Feb. 17, 2016, 12:00 PM), <https://www.vox.com/2015/2/17/8050259/discrimination-against-women-is-a-real-problem-in-college-admissions> [<https://perma.cc/6FTF-9297>] (collecting studies); Sandy Baum & Eban Goodstein, *Gender Imbalance in College Applications: Does it Lead to a Preference for Men in the Admissions Process?*, 24 ECON. EDUC. REV. 665, 666 (2005) (examining admissions data from thirteen liberal arts colleges and concluding that “men appear to be given preference as college applicant pools become more female”); Madeleine Brand & Anthony Brooks, *Magazine Researches Gender Gaps at Colleges*, NPR (June 19, 2007, 1:00 PM), <https://www.npr.org/transcripts/11185546?storyId=11185546> [<https://perma.cc/BN8C-QQ3P>] (explaining that since universities are receiving more female than male applications and are trying to keep a fifty-fifty gender balance on campus then it is “just basic statistics . . . men stand a better chance of getting in”).

15. See DIPRETE & BUCHMANN, *supra* note 9, at 201 (highlighting that women get better grades in elementary school through college); *id.* at 97 (noting that more women apply to college after completing high school than men); *infra* notes 112–16 and accompanying text. Despite the fact that more women apply and complete college with higher grades, there has been a scientific consensus that “girls and boys have similar levels of academic aptitude.” DIPRETE & BUCHMANN, *supra* note 9, at 2. The reason why women surpass men in educational attainment is a source of study, one which still needs a complete explanation. See generally *id.* (evaluating potential causes of why men have fallen behind women in attaining college degrees).

16. Birger, *Elite Colleges*, *supra* note 13; Brand & Brooks, *supra* note 14.

17. Nick Anderson, *At Some Colleges, Your Gender—Man or Woman— Might Give You an Admissions Edge*, WASH. POST (Mar. 14, 2016, 6:00 AM), <https://www.washingtonpost.com/news/grade-point/wp/2016/03/13/want-an-edge-in-college-admissions-see-the-schools-where-women-and-men-have-an-advantage> [<https://perma.cc/UV2M-FCY3>]. Vassar is hardly the only private college to have a discrepancy in admissions rates between men and women. *Id.* Of the top thirty liberal arts colleges (excluding all-women colleges), only two favored women over men by at least

discrepancies are entirely legal for a school like Vassar because, despite Title IX's equality mandate, the law includes an exemption for private undergraduate admissions decisions.<sup>18</sup> As a result, men often have an easier time gaining admissions to their college of choice,<sup>19</sup> leaving female applicants without a statutory avenue to challenge these admissions practices.<sup>20</sup>

Although Title IX's exemption for private college admissions does not impact students applying to public undergraduate institutions, there are 1,687 private nonprofit universities in America<sup>21</sup> that, under this exemption, are legally allowed to discriminate on the basis of sex in their admissions policies. This means that the 40 percent of U.S. college students who attend private colleges could be impacted by this admissions exemption.<sup>22</sup> Furthermore, although many students are not directly affected by the discrimination against female applicants at top private colleges,<sup>23</sup> the admissions policies at these schools are still worth examining because of their "outsized influence" on the policies of other colleges.<sup>24</sup>

Due, in part, to the exemption for private college admissions, Title IX has not ended discrimination against women in higher education.<sup>25</sup>

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3 percent in admissions. *Id.* At most of the other top liberal arts colleges, men were accepted at a higher rate than women: Davidson had a seven-point gender admissions gap; Bates, Pomona, and Swarthmore all had a five-point gap; Bowdoin and Carleton both had a four-point gap. *Id.*

18. See 20 U.S.C. § 1681(a)(1) (2018) (noting that "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").

19. See Bergman, *supra* note 3 (listing some of the "prestigious schools where men receive[d] a slight admissions boost" in the 2018–2019 admissions cycle).

20. See *infra* Part II.A.

21. Josh Moody, *A Guide to the Changing Number of U.S. Universities*, U.S. NEWS & WORLD REP. (Feb. 15, 2019), <https://www.usnews.com/education/best-colleges/articles/2019-02-15/how-many-universities-are-in-the-us-and-why-that-number-is-changing> [<https://perma.cc/249Q-4F8N>].

22. JON BIRGER, DATE-ONOMICS: HOW DATING BECAME A LOPSIDED NUMBERS GAME 186–87 (2015).

23. DIPRETE & BUCHMANN, *supra* note 9, at 72 ("Academically elite institutions have great prominence on the educational landscape, but they enroll only a small fraction of the students in four-year educational institutions. Only 14 percent of four-year colleges accept fewer than 50 percent of their applicants.").

24. WEISS MALKIEL, *supra* note 1, at xviii.

25. For examples of continued discrimination against women in higher education and beyond, see, e.g., S. Res. 262, 116th Cong. (2019) ("[T]he number of baccalaureate degrees in

Current scholarship highlights the discriminatory effects of gender-balancing<sup>26</sup> policies<sup>27</sup> and proposes removing the exemption, among other solutions.<sup>28</sup> This Note expands on that scholarship by analyzing Title IX's legislative history as well as previously unaddressed

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science, technology, engineering, and math earned by women has *decreased* over the past decade . . . ." (emphasis added)); Colleen Flaherty, *Smaller Pots for Women*, INSIDE HIGHER ED (Mar. 6, 2019), <https://www.insidehighered.com/news/2019/03/06/new-study-nih-funding-says-women-get-smaller-grants-men> [<https://perma.cc/H9UH-7GJ4>] (examining a study of NIH grants between 2006 and 2017 that found women on average are awarded less grant money than men even after controlling for the research potential of the proposals); Bridget Turner Kelly, *Though More Women Are on College Campuses, Climbing the Professor Ladder Remains a Challenge*, BROOKINGS INST. (Mar. 29, 2019), <https://www.brookings.edu/blog/brown-center-chalkboard/2019/03/29/though-more-women-are-on-college-campuses-climbing-the-professor-ladder-remains-a-challenge> [<https://perma.cc/4X9B-LK96>] (highlighting the continued "gender inequities" within the academy that both white women and women of color face as they try to enter university faculty).

26. The terms "gender" and "sex" have been used interchangeably both in scholarship and by the courts. This is despite the fact that they have different meanings. The American Psychological Association defines gender as "the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex . . . [It] is a social construct and a social identity." *Gender*, AM. PSYCH. ASS'N, <https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/gender> [<https://perma.cc/ML77-TNBS>] (citation omitted). "Gender identity is a component of gender that describes a person's psychological sense of their gender." *Id.* Separately, sex "refers to biological sex assignment; use the term 'sex' when the biological distinction of sex assignment (e.g., sex assigned at birth) is predominant." *Id.* Previous scholarship and reporting on the legality of private colleges taking into account an applicant's gender have used the term "gender balancing" to describe the practice. *See, e.g.,* Medley, *supra* note 5, at 538 ("[A] majority of selective liberal arts institutions are engaging in so-called 'gender balancing' . . ."); Nelson, *supra* note 14 (describing the "push for gender balance on campus[es]"). Yet the language of Title IX bans discrimination "on the basis of *sex*," 20 U.S.C. § 1681(a) (2018) (emphasis added), and most of the statute's legislative history uses the term "sex discrimination," *see, e.g., infra* note 63. This Note uses both "sex" and "gender" interchangeably to mirror both the language in the statute and the scholarship with which it interacts.

27. *See generally* 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) (discussing the gender gap in college admissions and evaluating whether it is constitutional under the Supreme Court's affirmative action jurisprudence).

28. *See* Medley, *supra* note 5, at 538–40 (proposing "several possible" solutions to the problem of "sex discrimination in college admissions," such as implementing civil rights investigations on the topic, encouraging "litigation to create distinct precedent for sex discrimination in admissions," and removing the Title IX exemption for private college admissions). Medley focuses on challenges that both public and private universities can bring to combat this discrimination. *See id.* at 551–62 (examining options under the state action doctrine that students at public universities could bring under the Equal Protection Clause of the Fourteenth Amendment). This Note has a narrower focus by examining the topic only from the perspective of private colleges and the prospect of a congressional amendment abolishing the Title IX exemption for private college admissions.

arguments made by deans of private colleges in favor of maintaining the exemption. Based on Senate and House Reports, this Note argues, first, that removing the private college admissions exemption would further Title IX's intended purpose—ensuring that women are not held to higher admissions standards or subject to quotas that cap female enrollment—and, second, that the reasons private universities used to justify the exemption in 1972 are no longer applicable. This Note then refutes arguments made by private college admissions deans today to justify the exemption from Title IX as needed for social reasons to attract prospective students.<sup>29</sup> It emphasizes that, even without a Title IX exemption, private universities will not become “overrun”<sup>30</sup> by women and that many of the social justifications for gender balancing are based on outdated stereotypes.

This Note proceeds in four parts. Part I examines the context and purpose of Title IX, noting the historic discrimination against women in higher education and the slow move toward admitting women. Part II discusses a loophole that exists in Title IX for private college admissions, allowing these institutions to continue to discriminate against women. This Part first examines the congressional record to determine the purpose of the exemption and then describes how the exemption is currently impacting college admissions policies in private universities. Part III analyzes the reasons private universities gave in 1972 for their exemption, such as the fear that compliance with Title IX would lower their academic standards, decrease alumni contributions, and remove their ability to experiment with different student body gender ratios.

Finally, Part IV argues that sex-blind admissions policies are needed because women lag behind men in many fields as well as in the workforce more generally, challenging the reasons offered today by private universities for upholding their Title IX exemption. Despite advocating for removing gender-balancing policies, this Part does not

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29. Previous calls to abolish the exemption from Title IX for private college admissions only address the counterargument that removing the exemption would end single-sex private colleges. See Medley, *supra* note 5, at 569–71 (addressing concerns “among scholars and college administrators, liberals and conservatives alike . . . that the exemption’s removal could mean an end to all single-sex higher education”). This Note examines a separate counterargument provided by admissions officers today that gender balancing is needed for social reasons and to attract students. See *infra* Part IV.B.

30. WEISS MALKIEL, *supra* note 1, at 3–5.

dispute the educational benefits of having a diverse student body made up of both men and women.<sup>31</sup> Instead, it seeks only to point out the misconception of some admissions officers who conflate the removal of gender-balancing admissions policies with creating overwhelmingly female-majority college campuses.

## I. OVERVIEW OF TITLE IX

The long history of female exclusion from educational institutions and continued discrimination by universities even after they had become coeducational prompted the drafting of Title IX in the 1970s. When Title IX was initially proposed, institutions of higher education discriminated against female applicants by holding them to higher admissions standards than their male peers and restricted female enrollment by instituting strict gender quotas. As Title IX's legislative history demonstrates, the general purpose of Title IX was to outlaw these types of discriminatory policies and quotas in education.

### A. *The History of Discrimination Against Women in Higher Education*

The history of women's access to higher education is one marked by discrimination and exclusion.<sup>32</sup> The first American universities categorically excluded women from university admissions.<sup>33</sup> The exclusion of women from higher education was often based on the idea that such a rigorous learning environment would be physically harmful for women and a woman's proper place was in the home, not in the classroom.<sup>34</sup> But early experiments in coeducation during the late 1800s

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31. In fact, the importance of having a diverse student body that includes both sexes was one of the rationales proponents of coeducation used to convince all-male universities to accept women in the 1960s and 70s. See WEISS MALKIEL, *supra* note 1, at 122–24 (discussing Princeton's study on coeducation that concluded “[m]en and women had much to learn from one another; they brought ‘different approaches, different angles of vision, [and] different viewpoints to many subject matters . . . . Bringing them together in the classroom improves the education of both’” (second alteration in original) (quoting “*The Education of Women at Princeton*”: *A Special Report*, 69 PRINCETON ALUMNI WKLY. 31–32 (Sept. 24, 1968))).

32. *United States v. Virginia*, 518 U.S. 515, 536–37 (1996).

33. *Id.* at 537 (“[T]he Nation's first universities and colleges—for example, Harvard in Massachusetts, William and Mary in Virginia—admitted only men.”).

34. See *id.* at 536 n.9 (“Dr. Edward H. Clarke of Harvard Medical School . . . maintained that the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs[; ‘I]dentical education of the two sexes is a crime

undermined this notion. Both public and private institutions founded during this time, such as Cornell University, the University of Michigan, and Stanford University, initially accepted both male and female students.<sup>35</sup> Despite concerns about higher education being unsuited for women, these coeducational universities quickly discovered that they had “[t]oo many women students enrolling” who were doing “too well academically.”<sup>36</sup> This trend troubled university officials who feared that women would “overrun” their institutions and men would be discouraged from applying.<sup>37</sup> In response, Cornell and Michigan established separate rules and restrictions for women that remained in place until the 1960s,<sup>38</sup> and Stanford instituted a quota on female enrollment, a version of which was in place until 1973.<sup>39</sup>

Coeducation at most of America’s elite private institutions was not seriously considered again until the 1960s. Interestingly, many public state universities already accepted female applicants and had been coeducational since their founding in the middle to late nineteenth

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before God and humanity, that physiology protests against, and that experience weeps over.” (citations omitted) (quoting EDWARD H. CLARKE, *SEX IN EDUCATION; OR, A FAIR CHANCE FOR THE GIRLS* 127 (Boston, James R. Osgood & Co. 1873)); WEISS MALKIEL, *supra* note 1, at 112 (quoting a Princeton alumnus who felt that “Princeton was just ‘too ‘intellectual’” for women, who should be in training to become ‘a good wife, mother & family person [rather] than a whiz kid’” (alteration in original)).

35. WEISS MALKIEL, *supra* note 1, at 3–5.

36. *Id.*

37. *See id.* (noting that universities feared that too many women “might feminize, even overrun, their universities”).

38. *See id.* at 3–4 (finding that in response to the growing number of women these universities “separated men and women in many spheres of campus life, a separation finally reversed only in the 1960s”); *see also* CHARLOTTE WILLIAMS CONABLE, *WOMEN AT CORNELL: THE MYTH OF EQUAL EDUCATION* 106–13 (1977) (detailing Cornell’s 1884 decision to require women to live in Sage College, setting “female bed quotas” that limited female enrollment and “channel[ed] women into fields of study considered appropriate for their sex”); James Tobin, *Women Apart*, HERITAGE PROJECT, UNIV. OF MICH., <https://heritage.umich.edu/stories/women-apart> [<https://perma.cc/2V8A-55ZJ>] (finding that by the early 1900s women at the University of Michigan, who “had once fended for themselves and mixed freely with men,” were now required to live “in a segregated, regulated and tightly supervised sphere marked ‘Women Only’”).

39. WEISS MALKIEL, *supra* note 1, at 5–6. Stanford’s founding grant required “equal facilities” for men and women, but Jane Stanford later capped female student enrollment at five hundred—a limit that “remained in effect until 1933, when enrollments were low because of the Great Depression. The Stanford trustees then reinterpreted the quota to mean an undergraduate male-female ratio of 3 to 2, which remained in place until 1973.” *Id.*

century.<sup>40</sup> For private institutions, this transition was led by Harvard, Yale, and Princeton, followed by “a flood” of other private colleges during the late 1960s and early 1970s.<sup>41</sup> Yet even as the Ivy League decided to admit women, most of the rationales behind the change had nothing to do with an interest in educating women.<sup>42</sup> Nor was it, on the whole, the result of women activists pushing for greater access to higher education.<sup>43</sup> Rather, the move to coeducation resulted “from strategic decisions taken by powerful men” generally made to ensure their institutions could still attract the best and brightest male applicants who were increasingly only interested in attending coed institutions.<sup>44</sup> For example, universities, such as Yale, saw “the prospect of female students as one more amenity, like better athletic facilities, to entice male students.”<sup>45</sup>

Even as universities began to accept women, female applicants were held to far higher admissions standards, as strict quotas limited their enrollment. For example, Yale, well into the 1970s, enrolled 1,000 men but capped female enrollment at only 250 in the first-year undergraduate class.<sup>46</sup> Similarly, into the 1970s, New York State College of Agriculture at Cornell University required women to have SAT scores thirty to forty points higher than men to gain admission.<sup>47</sup> Despite the move toward coeducation, universities created policies that blatantly discriminated against women—something that was entirely legal in 1970.<sup>48</sup> The move toward coeducation in private

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40. 2 WOODY, *supra* note 1, at 238–40. There were notable exceptions to this trend, such as the University of Virginia, which was the last state university to become coeducational in 1970. WEISS MALKIEL, *supra* note 1, at 3 n.2.

41. WEISS MALKIEL, *supra* note 1, at 31, 595 (collecting cases of the “many other men’s colleges” that moved coed following Princeton and Yale).

42. *See id.* at 66 (stating that Yale’s president told alumni in 1967 that his concern was “not so much what Yale can do for women but what can women do for Yale”).

43. *Id.* at xxi.

44. *See id.* at xxi, 61, 97, 448–49 (noting that officials at Princeton and Yale felt their male-only admissions policies were “a real handicap in getting the best men,” and both schools started to lose cross-admits to Harvard, which had started coeducational undergraduate programs).

45. *Id.* at 66.

46. *Id.* at 156.

47. NAT’L ADVISORY COUNCIL ON WOMEN’S EDUC. PROGRAMS, TITLE IX: THE HALF FULL, HALF EMPTY GLASS 25 (1981), <https://files.eric.ed.gov/fulltext/ED209152.pdf> [<https://perma.cc/SH8T-8BLK>].

48. Bernice R. Sandler, “*Too Strong for a Woman*”—*The Five Words That Created Title IX*, 33 EQUITY & EXCELLENCE EDUC. 9, 9 (2000) [hereinafter *Too Strong for a Woman*], <https://>

universities highlighted this inequity, and contemporary lawmakers could not help but take notice of the practice.<sup>49</sup>

*B. The Purpose of Title IX: Rectifying Sex Discrimination in Education*

Despite the growing number of women enrolling in colleges in the 1970s, the opportunities for women pursuing a college degree remained limited. Congress responded in 1970 with hearings held by the Special House Subcommittee on Education.<sup>50</sup> These hearings, chaired by Representative Edith Green, were the first on the topic and exposed nationwide sex discrimination in education.<sup>51</sup> The hearings were held in connection with Green's amendment to Title VI of the 1964 Civil Rights Act to include a ban on discrimination on the basis of sex in education.<sup>52</sup> The subcommittee's hearings lasted for seven days, produced over 1,300 pages of documents, and provided foundational evidence about existing sex discrimination in education at the time.<sup>53</sup> The record included fourteen studies about women's access to universities, as well as testimony from an official at the Department of Education who summarized the data as showing "a tendency to require

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[www.tandfonline.com/doi/abs/10.1080/1066568000330103](https://doi.org/10.1080/1066568000330103) [https://perma.cc/NV8C-DA5C]; see also JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 230 (2002) ("Many universities had openly discriminatory policies toward women in key areas such as admissions, where women were held to higher standards and even then limited by exclusionary quotas.").

49. Unlike private colleges, by the 1970s, many public state universities were already coeducational. See *supra* note 40 and accompanying text. Nevertheless, because of the exemption for private undergraduate admissions, Title IX only applied to public university admissions that arguably had less discrimination against women compared to private colleges.

50. SKRENTNY, *supra* note 48, at 242.

51. *Id.*; see also *Too Strong for a Woman*, *supra* note 48, at 11.

52. SKRENTNY, *supra* note 48, at 242.

53. *Too Strong for a Woman*, *supra* note 48, at 12. As Dr. Bernice Sandler explains,

The hearings probably did more than anything else to make sex discrimination in education a legitimate issue. When administrators or faculty members would deny the existence of sex discrimination in academe, women (and men) could point out that this was not a frivolous issue and that Congress itself had held *days* of hearings on this important subject.

*Id.* (emphasis added). According to Professor John Skrentny, the "statistical evidence of underrepresentation" presented during these hearings was "massive, almost mind numbing in its breadth and consistency." SKRENTNY, *supra* note 48, at 243.

higher standards of women for admissions.”<sup>54</sup> These hearings marked the origins of the bill that would ultimately pass in 1972 as Title IX.<sup>55</sup>

Initially, Green’s amendment, as well as similar bills seeking to ban discrimination against women in education, failed to gain much traction in Congress.<sup>56</sup> However, Senator Birch Bayh successfully introduced in the all-male Senate the provision that would eventually become Title IX as part of the Education Amendments of 1972.<sup>57</sup>

Congressional debates on the bill make clear that Title IX’s purpose was to address a loophole in the Civil Rights Act of 1964 which did not cover sex-based discrimination in education.<sup>58</sup> The 1964 Act outlawed discrimination in public places, schools, and employment on the basis of race, color, religion, and national origin, but only the employment provision included a prohibition on the basis of sex.<sup>59</sup> Seven years later, legislators sought to remedy this as they were concerned about the discrimination against women in higher education and the impact it was having on their ability to start careers on an equal footing to men.<sup>60</sup> Much of the discussion focused on discrimination

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54. *Discrimination Against Women: Hearing on H.R. 16098 Section 805 Before the Special Subcomm. on Educ. of the H. Comm. on Educ. & Labor*, 91st Cong. 657 (1970) (statement of Peter P. Muirhead, Associate Commissioner for Higher Education).

55. *Too Strong for a Woman*, *supra* note 48, at 11.

56. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 & n.13 (1982) (“The proposal on which the hearings were held, however, never emerged from committee.”); R. SHEP MELNICK, *THE TRANSFORMATION OF TITLE IX* 40–41 (2018) (noting that Senator Birch Bayh had proposed a similar amendment in 1971 that was ruled out of order).

57. *Bell*, 456 U.S. at 523–24; SKRENTNY, *supra* note 48, at 245.

58. *See, e.g.*, 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh) (“Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex.”).

59. Kristen M. Galles, *Filling the Gaps: Women, Civil Rights, and Title IX*, AM. BAR ASS’N (July 1, 2004), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol31\\_2004/summer2004/irr\\_hr\\_summer04\\_gaps](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol31_2004/summer2004/irr_hr_summer04_gaps) [<https://perma.cc/9K2S-4BMT>] (“In fact, only the employment provisions of Title VII mention women at all—and that mention was inserted as a last-minute attempt to defeat the bill entirely rather than to include women in the civil rights revolution.”).

60. *See, e.g.*, 117 CONG. REC. 39,253 (1971) (statement of Rep. Leonor Sullivan) (“Career discrimination begins in undergraduate schools. Quotas should not be imposed. Admissions should be on the basis of ability. Women should have equal opportunity to start their careers on a sound basis.”).

against women in the university admissions process,<sup>61</sup> a problem that was highlighted by studies included in the 1970 hearing.<sup>62</sup> During these congressional debates, several legislators expressed support for the idea of sex-blind admissions policies.<sup>63</sup> One lawmaker wondered, “Why ask whether Leslie Jones is a boy or girl? Why not consider only the overall qualifications and potential for success as a student, and admit or not admit solely on that basis?”<sup>64</sup>

Despite a focus on remedying discriminatory policies in the admissions process for higher education, the use of quotas for establishing a fifty-fifty gender ratio was specifically mentioned in floor debates as something that would be prohibited by Title IX.<sup>65</sup> In fact, the idea of gender balancing was raised by Senator Peter Dominick who noted that “[t]here are a number of colleges . . . [that] definitely try to keep a certain quota or a certain ratio as between male and female students.”<sup>66</sup> Bayh replied that such a policy was “the very thing this [bill] is trying to prohibit.”<sup>67</sup> Title IX supporters in fact wanted the removal of quotas in admissions to higher education, not their continued use. Therefore, the purpose of Title IX was not to require a gender-balanced student body but to remove any quotas that put up barriers to making admissions decisions based on merit, not sex.<sup>68</sup>

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61. See 118 CONG. REC. 5805 (1972) (statement of Sen. Bayh) (suggesting a focus on discrimination in admissions because such policies “affect[] the greatest number of women”); *Implementing Title IX: The HEW Regulations*, 124 U. PA. L. REV. 806, 810 (1976) (finding most of the congressional debate focused on admissions, especially the admissions exceptions).

62. See 118 CONG. REC. 5806 (1972) (statement of Sen. Bayh) (discussing data presented in the 1970 hearing and emphasizing that in “a 1970 study of 240 random schools . . . applications from men [were] markedly preferred over identical applications from women”); see also *supra* note 54 and accompanying text.

63. See, e.g., 117 CONG. REC. 39,251–52 (1971) (statement of Rep. Patsy Mink) (“But just as we insist that schools be color-blind, we must insist also that they be sex-blind as well.”); *id.* at 39,253 (statement of Rep. Sullivan) (“I believe people—men and women—should be recognized on their ability, not their sex.”); 118 CONG. REC. 18,437 (1972) (statement of Sen. Bayh) (“The language of my amendment does not require reverse discrimination. It only requires that each individual be judged on merit, without regard to sex.”).

64. 117 CONG. REC. 39,251–52 (1971) (statement of Rep. Mink).

65. See *id.* at 39,259 (statement of Rep. Green) (“I believe it would be very wrong for us to establish a quota system in colleges or universities and [to require] . . . that the group . . . be 50 percent men and 50 percent women.”).

66. *Id.* at 30,406 (statement of Sen. Dominick).

67. *Id.* (statement of Sen. Bayh).

68. See *id.* at 39,251–52 (statement of Rep. Mink) (“We do not advocate quotas and certainly we do not insist upon an even split of all college undergraduate enrollments.”).

Ultimately, Congress passed the omnibus education bill that contained Title IX, and President Richard Nixon signed the bill into law in 1972.<sup>69</sup> As enacted, Title IX requires that no one “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>70</sup> This language is followed by a provision noting that Title IX does not require strict numerical equality between the sexes at an educational institution.<sup>71</sup> The broad language of Title IX had a wide-ranging impact on women’s access to higher education. However, “despite the enormous progress” the passage of Title IX made toward ending discrimination against women in higher education, the “struggle” for equality remains ongoing.<sup>72</sup>

## II. THE LIMITATIONS OF TITLE IX

The broad language of Title IX notwithstanding, there are several exemptions to the statute, including for private undergraduate college admissions, historically single-sex schools, elementary and secondary school admissions, private schools controlled by religious organizations, military schools, social fraternities and sororities, voluntary youth service organizations, boys and girls conferences, and YMCA and YWCA membership.<sup>73</sup> The exemption for private undergraduate college admissions can be attributed to lobbying by private colleges that resisted being subject to Title IX. They feared that if they had to admit more women, it would lower their academic standards, hurt future alumni contributions, and take away their right to determine the ideal ratio of men and women students. However, the exemption today is having unforeseen consequences, as it permits private colleges to raise admissions standards for female applicants who now outnumber male applicants.

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69. SKRENTNY, *supra* note 48, at 248–49.

70. 20 U.S.C. § 1681(a) (2018).

71. Section 1681(b) clarifies that Title IX does not “require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex.”

72. *Too Strong for a Woman*, *supra* note 48, at 13.

73. 20 U.S.C. § 1681(a); *Exemptions from Title IX*, U.S. DEP’T EDUC. (last updated Jan. 15, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html> [<https://perma.cc/68W4-69RB>].

A. *The Creation of the Statutory Exemption for Private Undergraduate Admissions*

Despite the interest of many legislators in eliminating discrimination against women in higher education,<sup>74</sup> Title IX does not apply to the practices of private undergraduate admissions. The language of Title IX states that “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.”<sup>75</sup> Although this permits private colleges who receive federal funds to discriminate based on sex during the admissions process, the school’s programs unrelated to admissions must comply with Title IX.<sup>76</sup> This exemption gives broad powers to private colleges in making admissions decisions and allows for a private university to legally be single sex.<sup>77</sup>

During the drafting of Title IX, private universities strongly pressured Congress to exempt undergraduate admissions.<sup>78</sup> The initial version of Title IX proposed in the House banned sex discrimination broadly in nearly all federally funded programs.<sup>79</sup> Republicans on the Special Subcommittee on Education criticized this version of the bill,

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74. See *supra* note 60 and accompanying text.

75. 20 U.S.C. § 1681(a)(1) (emphasis added); see also 118 CONG. REC. 5812 (1972) (statement of Sen. Bayh) (“This amendment does not apply to the admissions policies of private undergraduate institutions.”).

76. *Exemptions from Title IX, supra* note 73 (“All other programs and activities of private undergraduate colleges . . . are governed by Title IX if the college receives any Federal financial assistance.”). Few private institutions are completely exempt. See *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (finding that “in practice, the vast majority of all accredited colleges and universities” receive some kind of “federal financial support” and thus must comply with Title IX); P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARO. SPORTS L.J. 149, 162 (1990) (noting that after the Civil Rights Restoration Act of 1988 was passed, Title IX applied to all educational institutions, both private and public, whose students receive any kind of federal funding).

77. See Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV. 473, 477 (2007) (“[I]f Harvard or any other private institution wanted to have no women students, they could do so today, legally.”).

78. Erin Buzuvis, “*On the Basis of Sex*”: *Using Title IX To Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L. GENDER & SOC’Y 219, 224 (2013).

79. See H.R. Rep. No. 92-554, at 108 (1971) (exempting only “education[al] institutions in which substantially all the students are of the same sex” and “education institutions controlled by religious organizations where compliance would not be consistent with religious tenets,” and providing a seven-year grace period to institutions switching from single sex to coeducational enrollments).

mostly because it included the admissions practices of undergraduate institutions, including private institutions in the Ivy League.<sup>80</sup> In response to such criticism, Representative John Erlenborn offered an amendment that exempted all undergraduate admissions programs from compliance with Title IX, a significant departure from the initial version of the bill that included these institutions.<sup>81</sup> Numerous private universities lobbied in favor of Erlenborn's amendment.<sup>82</sup> Officials wrote letters to Congress, which were referred to frequently by Erlenborn,<sup>83</sup> expressing "opposition to Title [I]X . . . as it applies to admission of undergraduates on the ground that it would establish an undesirable degree and kind of Federal influence over the ability of institutions to select students."<sup>84</sup> Many of these universities had only just begun admitting women, subject to a strict quota, and were concerned that Title IX would require them to accept women in equal numbers to men.<sup>85</sup>

Generally, private institutions provided three main justifications for why their admissions should be exempt from Title IX. First, they argued that if they were subject to scrutiny, it would reduce the standards and facilities of these institutions based on stereotypical notions of why women go to college and what they want to study there. For example, officials from Princeton University wrote a letter to Erlenborn, expressing concern about Princeton's ability to "maintain

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80. SKRENTNY, *supra* note 48, at 247.

81. See 117 CONG. REC. 38,639 (1971) (statement of Rep. Erlenborn) ("My amendment will exempt the undergraduate admission policies of institutions of higher education from the provisions of title [I]X.").

82. See *id.* ("Since announcing my intention, I have received support from numerous institutions and associations.")

83. See *id.* at 38,639–41 (including in the record letters of support from Harvard University, Smith College, Yale University, Princeton University, and Dartmouth College "for the information of [Representative Erlenborn's] colleagues").

84. See *id.* at 38,641 (quoting Letter from Charles V. Kidd, Exec. Sec'y, Ass'n of Am. Univs. to Rep. John N. Erlenborn, U.S. House of Representatives (Oct. 29, 1971)); *id.* at 39,249 (statement of Rep. Erlenborn) (noting that institutions such as Bowdoin, Bryn Mawr, Columbia, Dartmouth, Harvard, Mercer, Princeton, Smith, Rockhurst, and Yale "have expressed their opposition to the provisions of title [I]X"); *id.* at 38,640 (reprinting a letter from Princeton "writing to support such an amendment" that would "exempt undergraduate education from the provisions of Title [I]X" (quoting Letter from Robert F. Goheen, President, Princeton Univ. to Rep. John N. Erlenborn, U.S. House of Representatives (Oct. 28, 1971))).

85. See, e.g., *id.* at 38,639 ("[I]n effect, institutions must be either substantially single sex or completely equal." (quoting Letter from Charles U. Daly, Vice President of Gov't & Cmty. Affs., Harvard Univ. to Rep. John N. Erlenborn, U.S. House of Representatives (Nov. 1, 1971))).

and advance academic standards” if their admissions were subject to Title IX.<sup>86</sup> Specifically, the letter noted concern about “dilut[ing]” the university’s existing faculty and laboratories built “to meet the needs of male students” to accommodate new faculty and facilities in “academic fields which women generally prefer.”<sup>87</sup> This justification highlights the reluctance of private universities to “waste” a man’s spot on a woman who was assumed to be attending to find a husband.<sup>88</sup>

Second, private schools argued that moving to an open admissions policy for both men and women would decrease alumni contributions. Initially, there was concern that many alumni would be opposed to the open admissions policy at their previously male-only schools or schools that admitted a limited number of women. The president of Dartmouth College in fact predicted that there would be “a substantial loss of alumni contributions if [schools] are compelled to adopt an open-admissions policy” because it would “take time and discretion if the support of many alumni is to be gained for a basic change in the character of their schools.”<sup>89</sup>

These institutions also worried about the impact of admitting more women, who, in their view, were less likely than men to donate back to the school. In a letter to Congress on behalf of Harvard, the vice president of government and community affairs noted that a “critical problem[] for Harvard” was “financial,” given that “[t]he available evidence seems to suggest that alumni support their university to a degree far in excess of alumnae.”<sup>90</sup> The head of the Administrative Office at Princeton also remarked that enrolling

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86. *Id.* at 38,640 (quoting Letter from Robert F. Goheen, President, Princeton Univ. to Rep. John N. Erlenborn, U.S. House of Representatives (Oct. 28, 1971)).

87. *Id.*

88. See 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh) (discussing the common stereotype that women only go to college to find a husband, which makes many schools reluctant to accept women); NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., REPORT CARD ON GENDER EQUITY 5 (1997), <https://www.newge.org/PDF/TitleIXReport.pdf> [<https://perma.cc/9UV6-5Y8J>] (“Admissions policies too frequently were guided by . . . the widespread belief that women would drop out of school to take their ‘rightful’ place in the home. As a result, many colleges and universities limited women’s entry to ensure that only the most ‘committed’ students—men—would have access to educational opportunities.”).

89. 117 CONG. REC. 38,641 (1971) (quoting Letter from John G. Kemeny, President, Dartmouth College to Sens. Claiborne Pell, Walter F. Mondale, Thomas F. Eagleton, Jacob K. Javits & Peter H. Dominick, U.S. Senate (Oct. 27, 1971)).

90. *Id.* at 38,639 (quoting Letter from Charles U. Daly, Vice President of Gov’t & Cmty. Affs., Harvard Univ. to Rep. John N. Erlenborn, U.S. House of Representatives (Nov. 1, 1971)).

women would create “a huge problem” and “a lot of confusion” for the alumni donations office, which would presumably have to track down alumnae who had changed their last name upon marriage, making it more difficult to contact them for donations.<sup>91</sup> Given that private institutions, unlike public ones, rely on private donations more than federal funds for their operations, these arguments proved persuasive to Congress.<sup>92</sup>

Third, these universities wanted the ability to experiment with differing sex ratios to determine the best balance as they transitioned from a single-sex to an open admissions policy.<sup>93</sup> Many schools rejected the idea of federal requirements mandating female admissions rates, and they instead thought the schools were better positioned to determine the pace of female enrollment.<sup>94</sup> As explained in a letter on behalf of Dartmouth, the last school in the Ivy League to admit women,<sup>95</sup> it was “extremely important that [schools] be free to experiment with varying ratios of men and women on the campus.”<sup>96</sup> Although Title IX provided a seven-year period in which single-sex colleges that were transitioning to coeducational would be exempted, some schools disputed the practicability of that timetable.<sup>97</sup>

Ultimately, the lobbying by private elite universities was successful, and the version of Title IX with an exemption for *private*

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91. WEISS MALKIEL, *supra* note 1, at 111 (quoting Letter from Arthur J. Horton to Leslie L. Vivian (Mar. 22, 1968)).

92. 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh) (suggesting that “allow[ing] time for a careful and specific study of the financial repercussions” was reasonable “since private institutions of higher education rely on private gifts and endowment income for 17.6 percent of their operating expenses and public moneys for only 6.8 percent of expenses”).

93. Buzuvis, *supra* note 78, at 223–24; see *Too Strong for a Woman*, *supra* note 48, at 12 (discussing that, as Title IX was being debated, Harvard, Princeton, and Yale had only “recently admitted women but had strict quotas” and that “Dartmouth was planning to admit women in the near future”).

94. See, e.g., 117 CONG. REC. 38,640 (1971) (“I doubt that Congress knows more than anybody else on the subject of the proper mix of sexes in undergraduate programs . . . .” (quoting Letter from Alfred B. Fitt, Special Adviser, Yale Univ. to Rep. John. N. Erlenborn, U.S. House of Representatives (Oct. 28, 1971))).

95. Marjorie Valbrun, *New Era for Women as Donors*, INSIDE HIGHER ED (May 11, 2018), <https://www.insidehighered.com/news/2018/05/11/colleges-are-turning-women-philanthropists-source-new-money-fund-raising-campaigns> [<https://perma.cc/TWJ9-ZURJ>].

96. 117 CONG. REC. 39,252 (1971) (statement of Rep. Peter Peyser).

97. See *id.* (stating that although the bill gives schools changing to coeducation “seven years in which to establish a practice of open admissions, financial considerations may make that timetable impossible”).

undergraduate admissions was adopted in conference.<sup>98</sup> Although Bayh, Title IX’s sponsor, ultimately accepted the exemption, he believed “many of these exemptions [would] not be supportable after further study and discussion.”<sup>99</sup> Similarly, other legislators were unhappy that numerous institutions of higher education would be exempt from the ban on sex discrimination in education.<sup>100</sup> As explained by Dr. Bernice Sandler, known as the “Godmother of Title IX,”<sup>101</sup> these “allegations” made by private colleges in support of their exemption had “no data to support” them.<sup>102</sup> Nevertheless, Congress ultimately included the exemption because of the power that these institutions and their alumni exercised in Congress.<sup>103</sup>

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98. In August of 1971, Bayh introduced a floor amendment banning sex discrimination in education as part of a package of educational amendments being debated in the Senate. *Grove City Coll. v. Bell*, 687 F.2d 684, 692 (3d Cir. 1982); SKRENTNY, *supra* note 48, at 247. Senator Bayh’s proposed amendment exempted private undergraduate admissions from the bill. 117 CONG. REC. 30,404 (1971) (statement of Sen. Bayh) (“My proposed amendment contains three major provisions . . . Section 601 expressly prohibits discrimination on account of sex—including the denial of admission or benefits—by any *public* institution of higher education or any institution of graduate education receiving Federal educational financial assistance.” (emphasis added)). Although initially not adopted, Bayh successfully reintroduced his amendment in February 1972, and it was ultimately passed as Title IX by both the House and the Senate. 118 Cong. Rec. 5815 (1972); *Bell*, 687 F.2d at 692–93. As made clear by the Senate Conference Report:

The house amendment exempted from the prohibition all undergraduate admissions to institutions of higher education. The Senate amendment exempted admissions to all institutions except institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education which do not have a traditional policy of admitting only students of one sex. The House recedes.

S. Rep. No. 92-798, at 221 (1972).

99. 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh).

100. See 117 CONG. REC. 39,254 (1971) (statement of Rep. Martha Griffiths) (“I urge Members to look through the provincialism of all the schools . . . If [women] are to be admitted to the best graduate schools, they must have been admitted to the best undergraduate schools on exactly the same criteria as men.”); 117 CONG. REC. 39,249 (statement of Rep. Green) (“I say to the Members that any amendment to title [I]X, that says we are going to end discrimination and then excepts 95 percent of the institutions in this country, is pure fraud.”).

101. Kerri Lee Alexander, *Bernice Sandler (1928–2019)*, NAT’L WOMEN’S HIST. MUSEUM, <https://www.womenshistory.org/education-resources/biographies/bernice-sandler> [https://perma.cc/A4WR-KZ8B].

102. *Too Strong for a Woman*, *supra* note 48, at 12.

103. *Id.*

*B. The Current State of Private Undergraduate Admissions*

Nearly fifty years later, the impact of Title IX on women's access to and success in higher education has been significant.<sup>104</sup> As noted in an op-ed by then-President Obama, "it's thanks in part to legislation like Title IX that more women graduate from college . . . more confident [and] empowered [to] enter our boardrooms and courtrooms, legislatures, and hospitals."<sup>105</sup> In fact, in a notably short period of time, there has been an "enormous change" in the number of women, compared to men, earning college degrees.<sup>106</sup> In 1970, men constituted 58 percent of college students.<sup>107</sup> Today, the percentage has almost exactly reversed with women comprising 57 percent of all college students.<sup>108</sup>

Despite Bayh's belief that exemptions in Title IX would be short-lived,<sup>109</sup> the exemption for private undergraduate institutions remains in effect today. Nearly fifty years later, this exemption has consequences not foreseen by the drafters of Title IX. Instead of concerns about female students lowering the academic standards of universities, private institutions now have the opposite problem of frequently having too many qualified female applicants as compared to male applicants.<sup>110</sup> This is because today, on average, women are more

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104. Although beyond the scope of this Note, Title IX has impacted more than college admissions by increasing women's participation in sports and addressing sexual assault on college campuses. See Barack Obama, *President Obama Reflects on the Impact of Title IX*, NEWSWEEK (June 25, 2012, 1:00 AM), <https://www.newsweek.com/president-obama-reflects-impact-title-ix-65097> [<https://perma.cc/LQ6Z-K7G4>] ("From addressing inequality in math and science education to preventing sexual assault on campus to fairly funding athletic programs, Title IX ensures equality for our young people in every aspect of their education."); Lauren Camera, *Title IX Faces Down the Culture Wars*, U.S. NEWS & WORLD REP. (Nov. 2, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-11-02/trump-obama-use-title-ix-as-a-tool-in-the-culture-wars> [<https://perma.cc/ZKV8-T5JL>] ("Girls' participation rate in high school sports is more than 10 times what it was when Title IX was passed.").

105. Obama, *supra* note 104.

106. DiPRETE & BUCHMANN, *supra* note 9, at 2.

107. *Id.* at 1.

108. *Women in Higher Education: Enrollment/Degree Attainment*, POSTSECONDARY NAT'L POL'Y INST. (Mar. 2020), <https://pnpi.org/women-in-higher-education> [<https://perma.cc/4282-DFBN>].

109. See *supra* note 99 and accompanying text.

110. See Jason England, *The Mess That Is Elite College Admissions, Explained by a Former Dean*, VOX (May 8, 2019, 9:10 AM), <https://www.vox.com/the-highlight/2019/5/1/18311548/college-admissions-secrets-myths> [<https://perma.cc/XYS6-UVL5>] (observing, as the former

likely to apply to college,<sup>111</sup> with higher grades,<sup>112</sup> in more challenging curricula,<sup>113</sup> having taken more credits,<sup>114</sup> and having been more involved in extracurricular activities in high school than their male counterparts.<sup>115</sup> Only in math and science standardized test scores do male high school students outperform their female peers.<sup>116</sup>

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admissions dean at Carnegie Mellon University, that admissions at “many elite liberal arts schools” are “particularly brutal to qualified women”).

111. Lewin, *supra* note 7; THOMAS D. SNYDER, CRISTOBAL DE BREY & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2017 393 (2019), <https://nces.ed.gov/pubs2018/2018070.pdf> [<https://perma.cc/8MQ7-5P7C>] (examining the percentage of eighteen- to twenty-four-year-old students enrolled in college by sex from 1960 to 2016).

112. See DIPRETE & BUCHMANN, *supra* note 9, at 85–88 (collecting studies and concluding that “[f]rom kindergarten through high school and into college, girls get better grades than boys in all major subjects”); CHRISTINE NORD, SHEP ROEY, ROBERT PERKINS, MARSHA LYONS, NITA LEMANSKI, YAEL TAMIR, JANIS BROWN, JASON SCHUKNECHT & KATHLEEN HERROLD, NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: AMERICA'S HIGH SCHOOL GRADUATES 28 (2011) [hereinafter THE NATION'S REPORT CARD], <https://nces.ed.gov/nationsreportcard/pdf/studies/2011462.pdf> [<https://perma.cc/S7QD-T8HX>] (“In 2009, female [high school] graduates had a GPA of 3.10 compared to 2.90 for male graduates.” (citation omitted)).

113. See DIPRETE & BUCHMANN, *supra* note 9, at 85–89 (comparing “males and females in their high school course-taking patterns over the last four decades” and finding that “more female students than male students complete middle- to advanced-level course work in math and science”); THE NATION'S REPORT CARD, *supra* note 112, at 22, 25 (“Although both male and female graduates completed more challenging curricula in 2009 than in 1990, a greater percentage of females than males completed a midlevel curriculum.” (citation omitted)); OFF. FOR CIV. RIGHTS, U.S. DEP'T OF EDUC., GENDER EQUITY IN EDUCATION 3 (2012), <https://www2.ed.gov/about/offices/list/ocr/docs/gender-equity-in-education.pdf> [<https://perma.cc/CN85-JMVS>] (“Girls outnumber boys in enrollment in AP science, AP foreign languages, and several other AP subjects.”).

114. See THE NATION'S REPORT CARD, *supra* note 112, at 24 (“In 2009, females earned 27.3 credits compared to 27.0 credits earned by males.”).

115. MELNICK, *supra* note 56, at 4; see also John Esterbrook, *College Admission: Tough Times for Girls?*, CBS NEWS (Aug. 16, 2007, 11:16 AM), <https://www.cbsnews.com/news/college-admission-tough-times-for-girls> [<https://perma.cc/KGV6-KSUW>] (“[Girls] are more likely to participate in drama, art, and music classes – extracurriculars that are catnip for admissions officers.”).

116. See Muriel Niederle & Lise Vesterlund, *Explaining the Gender Gap in Math Test Scores: The Role of Competition*, 24 J. ECON. PERSPS. 129, 129 (2010) (“This gender gap has been documented for a series of math tests including the AP calculus test, the mathematics SAT, and the quantitative portion of the Graduate Record Exam (GRE).”); DIPRETE & BUCHMANN, *supra* note 9, at 82 (stating that men score higher in mathematics and women score higher in reading, but cautioning that comparing “gender differences in SAT scores is problematic because the sample of SAT test-takers is not representative of the general population and because more females than males take the SAT”). *But see* MELNICK, *supra* note 56, at 4 (“[B]oys’ advantage on math tests has shrunk, almost to the point of disappearing.”).

Furthermore, women continue to outperform men once in college, with on average higher graduation rates and grade point averages, across all racial and ethnic groups.<sup>117</sup> Each year, “for every two men who get a college degree . . . three women will do the same.”<sup>118</sup> Across the board, in private and public, big and small universities, women are more likely than men to graduate from college with honors.<sup>119</sup> Women undergraduate students not only excel in the classroom but are also more likely than their male peers to serve in student government, write for college newspapers, and be involved in extracurricular activities, with the exception of sports.<sup>120</sup>

Given the larger number of strong female applicants, some private institutions have used their exemption from Title IX to give preference to “less qualified”<sup>121</sup> male applicants. These schools justify taking sex into account when making admissions decisions by claiming it is necessary to ensure the school’s student body remains relatively

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117. DIPRETE & BUCHMANN, *supra* note 9, at 2, 39, 201.

118. Hanna Rosin, *The End of Men*, ATLANTIC (July 2010), <https://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/308135> [<https://perma.cc/T4QZ-Y3Z5>].

119. Lewin, *supra* note 7 (“[A]t elite institutions like Harvard, small liberal arts colleges like Dickinson, huge public universities like the University of Wisconsin and U.C.L.A. and smaller ones like Florida Atlantic University, women are walking off with a disproportionate share of the honors degrees.”); *see also* Sandy Baum & Eban Goodstein, Presentation at the National Bureau of Economic Research Higher Education Workshop: Affirmative Action for Guys? The Consequences of Gender Imbalance in College Applications 5 (May 2003), <http://www2.nber.org/conferences/2003/HIEDS03/baum.pdf> [<https://perma.cc/Q48G-PSUQ>] (“[C]ontrolling for high school performance and test scores, men wind up 8 percentile points lower than women in college class rank.”); Dylan Conger & Mark C. Long, *Why Are Men Falling Behind? Gender Gaps in College Performance and Persistence*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 191 (2010) (finding that, among enrollees in Florida four-year institutions, men earn lower GPAs each semester).

120. MELNICK, *supra* note 56, at 3.

121. “Less qualified” is used here to refer to applicants as determined by standard admissions metrics. *See* Medley, *supra* note 5, at 543–44, 543 n.40 (“While men perform slightly better on the SAT and the ACT, there is general consensus at most top colleges that, when academic factors are combined, women put forth the stronger applications.”). However, there are many limitations to the current metrics used by universities to determine what a “strong” application is. *See, e.g.*, Jonathan R. Cole, *Why Elite-College Admissions Need an Overhaul*, ATLANTIC (Feb. 14, 2016), <https://www.theatlantic.com/education/archive/2016/02/whats-wrong-with-college-admissions/462063> [<https://perma.cc/AU8Q-KJYP>] (noting admissions standards at top schools are overly controlled by numerical benchmarks that go into *U.S. News & World Report* rankings, especially the ACT/SAT which are “deeply problematic as predictors of talent”).

balanced.<sup>122</sup> Admissions officers fear that sex-blind admissions will lead to a majority-female student body, which will make the school less attractive to applicants who want a gender-balanced campus.<sup>123</sup> Admissions officers have openly admitted this, sometimes lamenting that “[h]ad [a female] been a male applicant, there would have been little, if any, hesitation to admit.”<sup>124</sup>

The sentiment expressed by admissions officers today is confirmed by statistics, which show that 11.1 percent of universities say they admit men with lower grades and test scores to ensure gender balance, while only 2.7 percent of schools do so for women applicants.<sup>125</sup> Similarly, *The Washington Post* found that out of 128 universities with admissions rates under 35 percent, 64 of them admitted men at a higher rate than women.<sup>126</sup> For example, Brown University accepted men at a higher percentage—9 percent—as opposed to only a 6 percent acceptance rate for women in 2019.<sup>127</sup> This discrepancy is a trend seen at many other private universities.<sup>128</sup> Because of the exemption, private university admissions can legally adopt gender-balancing policies that cap the number of women schools admit.

122. England, *supra* note 110 (“We simply had more qualified women than men in the pool; to keep a gender balance on campus, many ended up in the rejection pile.”).

123. Jennifer Delahunty Britz, *To All the Girls I've Rejected*, N.Y. TIMES (Mar. 23, 2006), <https://nyti.ms/2k5558A> [<https://perma.cc/U46D-UHMS>] (“Once you become decidedly female in enrollment, fewer males and, as it turns out, fewer females find your campus attractive.”). *But see* Birger, *Elite Colleges*, *supra* note 13 (describing those concerns as “misplaced” because rising applications to majority-female student bodies indicate that “gender balance isn’t the only factor that potential students weigh”).

124. Delahunty Britz, *supra* note 123.

125. KENNETH C. GREEN, SCOTT JASCHIK & DOUG LEDERMAN, THE 2011 INSIDE HIGHER ED SURVEY OF COLLEGE & UNIVERSITY ADMISSIONS DIRECTORS 10 (2011), [https://www.insidehighered.com/sites/default/server\\_files/files/9-20finaladmissionsreport.pdf](https://www.insidehighered.com/sites/default/server_files/files/9-20finaladmissionsreport.pdf) [<https://perma.cc/Y93M-CMUS>]; *see also* Anderson, *supra* note 17 (noting that the acceptance rate was higher for women “[a]t several schools known for a focus on science and engineering”).

126. Nick Anderson, *The Gender Factor in College Admissions: Do Men or Women Have an Edge?*, WASH. POST (Mar. 26, 2014) [hereinafter *The Gender Factor*], <http://wapo.st/114j3mE> [<https://perma.cc/AM5S-P55E>] (“At 16 of these schools, men and women were admitted at equal rates . . . . At 48 schools, women were admitted at a higher rate than men . . . . At 64 schools, men were admitted at a higher rate.”).

127. *Brown University*, NAT’L CTR. FOR EDUC. STAT. (2019), <https://nces.ed.gov/college-navigator/?q=brown&s=all&id=217156#admsns> [<https://perma.cc/2EZL-3ZP3>].

128. *See, e.g., The Gender Factor*, *supra* note 126 (“At 64 schools, men were admitted at a higher rate. At Brown University and Amherst, Swarthmore and Pitzer colleges, the male edge was three percentage points. At Vanderbilt, Wesleyan and Tufts universities, and Davidson and Pomona colleges, it was five points.”).

As previously discussed, this is not the first time universities have experienced high rates of female enrollment and success.<sup>129</sup> Nor is it the first time these institutions have expressed concern that too many female students would make a university less attractive to students.<sup>130</sup> In fact, institutions, such as Stanford, already tried to address this “problem” by placing a cap on female enrollment during the nineteenth century.<sup>131</sup> Today, private colleges are seeking to cap female enrollment in similar ways and are basing their decisions on similar fears as expressed by schools in the nineteenth century. Such restrictions and quotas on female enrollment are hardly new and instead remain as discriminatory relics that resemble the sex discrimination in higher education Congress sought to end in passing Title IX.

### III. THE REMOVAL OF THE PRIVATE UNDERGRADUATE EXEMPTION FROM TITLE IX

Today, one of the most effective ways to require sex-blind admissions is to amend Title IX to remove the exemption for private undergraduate admissions. This could be achieved by simply removing the qualifier of “public” before “institutions of undergraduate higher education.”<sup>132</sup> Such an amendment would be consistent with Title IX’s purpose to end discrimination against women and caps on female enrollment. Furthermore, in evaluating the reasons private colleges initially gave for their exemption, it is clear they no longer provide a compelling justification. Private universities presently do not believe admitting more women will hurt their academic standards, diminish alumni donation rates, or curtail their freedom to experiment with sex ratios following their recent move to coeducation.

#### *A. Ending the Exemption is an Important Step Toward Fulfilling the Purpose of Title IX*

As recognized by Judge Hugh Bownes, Title IX was enacted “to remedy discrimination that results from stereotyped notions of

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129. See *supra* notes 35–39 and accompanying text.

130. See *supra* notes 35–39 and accompanying text.

131. See *supra* note 39 and accompanying text.

132. 20 U.S.C. § 1681(a)(1) (2018).

women’s interests and abilities.”<sup>133</sup> Current gender-balancing admissions policies contradict that goal because they raise the standards for female applicants to create a balanced student body.<sup>134</sup> In fact, it appears to be an unfortunate consequence that just as Title IX has increased opportunities for women in higher education, a loophole in the law allows private college admissions, especially highly selective colleges, to discriminate against women.<sup>135</sup> Removing this exemption would further Title IX by ending the practice of requiring higher admissions standards for women.

Another goal of Title IX was to abolish the use of quotas in admissions, which is evidenced in Title IX’s legislative history.<sup>136</sup> Bayh intended that “[t]he basis for determining compliance [with Title IX] would not be an arbitrary ratio but . . . whether the institution required significantly higher standards for women students.”<sup>137</sup> Similarly, as articulated by Green on the House floor:

If a college has 5,000 men and 3,000 or 4,000 women in it and if we adopt title [I]X, it does not mean that the college has to bring the number of women up to 5,000. If we do that, then we are engaging in discrimination, also. In that case we would be discriminating against men. All I want and all I ask is that if two individuals, a man and a woman, come to a college or a university and they have equal credentials and apply for admission, that they shall be treated as equals—two individuals without any quota.<sup>138</sup>

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133. *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996).

134. *See Medley, supra* note 5, at 539 (“[Gender balancing] should be characterized as what it really is — a cap on female enrollment.”); *cf. infra* note 201 and accompanying text.

135. *See Delahunty Britz, supra* note 123 (“We have told today’s young women that the world is their oyster; the problem is, so many of them believed us that the standards for admission to today’s most selective colleges are stiffer for women than men. How’s that for an unintended consequence of the women’s liberation movement?”).

136. Zachary Nathan Klein, Note, *STEMing Out Disparities: The Challenges of Applying Title IX to the Study of Sciences, Technology, Engineering, and Mathematics*, 64 RUTGERS L. REV. 895, 901–02 (2012) (“[I]t is clear Congress rejected the use of quota requirements.”). The intent behind Title IX also shines through in its implementing law. 34 C.F.R. § 106.21(b)(ii) (2020) (prohibiting “numerical limitations upon the number or proportion of persons of either sex who may be admitted”); *see also* 20 U.S.C. § 1681(b) (“Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist . . .”).

137. 117 CONG. REC. 30,409 (1971) (statement of Sen. Bayh).

138. *Id.* at 39,251 (statement of Rep. Green).

As Green's statement demonstrates, lawmakers in the 1970s understood that gender balancing policies are equivalent to "discriminating against" whichever sex composes the majority of college students at the time.<sup>139</sup> As long as private colleges are legally permitted to engage in gender balancing, Title IX's central purpose of prohibiting sex discrimination will be continually unfulfilled.

Given that some senators acquiesced to the exemption for private college admissions on the understanding that it would be temporary,<sup>140</sup> abolishing the exemption nearly fifty years later is long overdue. Congress should consider statements from Bayh, and others, opposing the use of gender-balancing policies under Title IX and his expectation that the exemption for private college admissions would be temporary.<sup>141</sup> These statements by congressional leaders lend support to the fact that current gender-balancing policies contradict the purpose behind the enactment of Title IX. Congress made an exemption for private institutions in 1972 based on rationales that are now irrelevant,<sup>142</sup> just as Bayh expected.<sup>143</sup> Congress should follow through on statements articulated in this legislative history and finish the job it set out to accomplish in passing Title IX.

### *B. Expired Justifications*

The reasons private undergraduate institutions gave Congress in 1972 as to why they needed an exemption from Title IX are no longer compelling. During the Title IX debate, private colleges gave three main reasons for their exemption from the law.<sup>144</sup> The first justification, the concern of private institutions that Title IX requirements would reduce their academic standards, is unfounded today given that women

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139. *Id.*

140. *See supra* note 99 and accompanying text.

141. *Id.* In interpreting provisions of Title IX, the Supreme Court has examined Title IX's purpose by looking to statements made by legislators during debates given the lack of committee reports and hearings on the bill. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982) (looking to congressional intent in interpreting whether Title IX was meant to prohibit gender discrimination in employment). In carrying out that analysis, the Court noted that "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction . . . [and therefore] are the only authoritative indications of congressional intent." *Id.*

142. *See supra* Part III.B.

143. *See supra* note 99 and accompanying text.

144. *See supra* Part II.A.

are on average academically more successful than men at these institutions.<sup>145</sup> For example, despite historic concerns about women lowering academic standards,<sup>146</sup> today, 55 percent of women graduate from Harvard with honors compared with “barely half” of the men.<sup>147</sup> Thus, women are contributing more than their share to Harvard’s high academic standards.

Second, with regard to the fear that alumni would disapprove of their alma mater complying with Title IX in admissions,<sup>148</sup> this is unlikely to be a concern today because most people support the inclusion of women in higher education.<sup>149</sup> As for donation rates, while there was a discrepancy between alumni and alumnae donations in the 1970s,<sup>150</sup> today there is no statistically significant disparity, even after adjusting for other confounding factors.<sup>151</sup> Private liberal arts colleges, which are many of the same schools that pushed for the exemption from Title IX, now find that women are actually more likely than men

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145. See *supra* notes 4–5 and accompanying text.

146. See 117 CONG. REC. 39,254 (1971) (stating Harvard’s concern expressed during the drafting of Title IX that if it was required to remove quotas on women’s admissions it would pose “critical problems” to the school’s educational standards).

147. Lewin, *supra* note 7.

148. See *supra* note 89 and accompanying text; 117 CONG. REC. 39,254 (1971) (noting Harvard’s concern that “[i]n the longer run, there may be even more serious risk of substantially impairing the level of alumni support”).

149. See Press Release, Nat’l Women’s L. Ctr., Public Supports Title IX, but Discrimination Against Girls and Women Remains Widespread (June 19, 2007), <https://nwlc.org/press-releases/public-supports-title-ix-discrimination-against-girls-and-women-remains-widespread-june-19-2007> [<https://perma.cc/Z7AL-9YST>] (“A national survey demonstrates overwhelming support for Title IX enforcement. Not only does the public strongly support the law’s mandate of equal opportunity, it also backs action in cases of unequal treatment.”).

150. See *supra* note 90 and accompanying text.

151. See Robert E. Freeland, Kenneth I. Spenner & Grace McCalmon, *I Gave at the Campus: Exploring Student Giving and Its Link to Young Alumni Donations After Graduation*, 44 NONPROFIT & VOLUNTARY SECTOR Q. 755, 759 (2015) (“[R]ecent studies employing large samples from multiple universities (which allow assessing the effect of gender while controlling for income) found no gender difference when controlling for other factors such as income.” (citations omitted)); Christen Lara & Daniel Johnson, *The Anatomy of a Likely Donor: Econometric Evidence on Philanthropy to Higher Education*, 22 EDUC. ECON. 293, 301 (2014) (“There is no statistically significant difference between genders, although the data suggest that men give slightly less often and slightly less generously than women do, a finding completely in line with previous research which has found gender to be an insignificant determinant in alumni giving.”); Valbrun, *supra* note 95 (commenting on the “growing focus on women’s philanthropy” because universities are “seeing more women giving, and . . . giving more broadly”).

to donate back to these institutions.<sup>152</sup> In fact, Dartmouth, once vocal about the financial impact Title IX would make on donations,<sup>153</sup> launched a very successful fundraising campaign targeted at women donors in 2018.<sup>154</sup> Given this information, the admission of female students is unlikely to decrease the level of donations private institutions receive, and private liberal arts schools graduating more alumnae may actually see increased donation levels.

Finally, the rationale that private universities transitioning to coeducational institutions needed the freedom to experiment with different ratios is an expired justification.<sup>155</sup> Private schools have now had fifty years to experiment with different ratios and have been given the freedom to progress toward open admissions at their own pace.

#### IV. THE ARGUMENT FOR SEX-BLIND ADMISSIONS TODAY

The removal of Title IX's exemption would ensure that both private and public universities have sex-blind admissions policies. The justifications for continuing to exempt private colleges from Title IX's sex-blind admissions mandate are no more persuasive today than they were in 1972. Yet the need for Title IX's protection against sex discrimination remains, as women have yet to achieve parity with their male peers in many aspects of the educational system and workforce. Calls for sex-blind admissions, however, cannot be conflated with calls for race-blind admissions. Whereas race-based affirmative action seeks to remedy past discrimination and improve diversity, the same rationales do not apply to gender-balancing admissions policies.

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152. See Jessica Holmes, *Prestige, Charitable Deductions and Other Determinations of Alumni Giving: Evidence from a Highly Selective Liberal Arts College*, 28 ECON. EDUC. REV. 18, 24 (2009) (finding that "males are 7% less likely to donate than females").

153. See 117 CONG. REC. 38,641 (1971) (warning of a "substantial loss of alumni contributions" (quoting Letter from John G. Kemeny, President, Dartmouth College to Sens. Claiborne Pell, Walter F. Mondale, Thomas F. Eagleton, Jacob K. Javits & Peter H. Dominick, U.S. Senate (Oct. 27, 1971))).

154. See Valbrun, *supra* note 95 (noting Dartmouth's fundraising campaign targeted at women donors has already received fifty-three donations from alumnae each totaling \$1 million).

155. Although institutions may believe different ratios produced "better" educational results, this justification does not provide a legitimate reason for maintaining the exemption. See *infra* notes 175-76 and accompanying text.

A. *The Continued Need for Sex-Blind Admissions*

The idea that universities today will predominately enroll women is distinguishable from the male dominance in higher education before Title IX. As opposed to the case for women in the 1960s, qualified men are not disadvantaged in seeking admission due to their sex.<sup>156</sup> Rather, under Title IX, even if a student body is predominantly female, that composition is based on the quality of applications, not on discriminatory policies. Just as it was wrong in the 1960s to put a cap on female enrollment to ensure universities remained mostly male, it is wrong in 2021 to put a cap on female enrollment to ensure universities remain balanced between the genders. If the Title IX exemption is removed and admissions become truly sex blind, women would likely constitute more than 50 percent of the student body at some private institutions. But this fear of some colleges having more than a 50 percent female student body belies the reality that many aspects of higher education and beyond remain disproportionately male dominated.<sup>157</sup>

Although women have begun to outnumber men at some undergraduate institutions, Title IX still has work to do in eradicating the “still-gendered patterns of academic achievement” at institutions of higher education and beyond.<sup>158</sup> Universities still exist where men outnumber women, and by a greater margin than 60 percent.<sup>159</sup> In several undergraduate fields of study, women remain underrepresented, such as computer science, engineering, and

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156. See BIRGER, *supra* note 22, at 34 (quoting Harvard Professor Claudia Goldin, who explained she doesn’t “see any obvious reason to worry” about the gender gap given that there “aren’t impediments or hurdles or barriers or prejudices or discriminatory factors or regulations standing in the way [of men going to college]” (alteration in original)).

157. See *infra* note 168 and accompanying text.

158. WEISS MALKIEL, *supra* note 1, at 604–06.

159. See, e.g., *Georgia Institute of Technology*, U.S. NEWS & WORLD REP. (2020), <https://www.usnews.com/best-colleges/georgia-institute-of-technology-1569> [<https://perma.cc/P3ZH-VPMP>] (recording a gender distribution of 62 percent male students and 38 percent female students); *Kettering University*, U.S. NEWS & WORLD REP. (2020), <https://www.usnews.com/best-colleges/kettering-university-2262> [<https://perma.cc/GP2A-Q6F2>] (reporting the student body is 80 percent male and 20 percent female); *United States Naval Academy*, U.S. NEWS & WORLD REP. (2020), <https://www.usnews.com/best-colleges/united-states-naval-academy-2101> [<https://perma.cc/7UKK-XWMT>] (reporting the student body is 72 percent male and 28 percent female).

mathematics.<sup>160</sup> Women looking to enter those fields continue to face stereotypes about their lack of interest or ability in science and math,<sup>161</sup> the type of gender stereotypes Title IX was passed to address.<sup>162</sup> As stated by the more than thirty cosponsors of Senate Resolution 262, “despite the progress that has been made in higher education,” the Senate “recognizes the work that still remains to be done to secure the promise of title IX.”<sup>163</sup> Title IX’s commitment to ensuring sex-blind educational opportunities for both men and women should not be abandoned just because some of Title IX’s goals have been met. Work remains to be done in the educational field.

Furthermore, despite the fact that women are entering college at higher rates and graduating with more honors than men, this success has not necessarily translated beyond university campuses. The idea of a “war against boys”<sup>164</sup> and that men need a boost in college admissions to keep pace with their female peers is questionable given men’s greater professional success. Once in the workforce, any discrepancy between male and female performance in college dissipates as men consistently graduate college with less student debt, earn higher pay, and are more likely to be promoted.<sup>165</sup> As explained by Sara Mead, a

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160. See DiPRETE & BUCHMANN, *supra* note 9, at 52 (“In contrast to the rapid changes in the educational attainment of women, the gender composition of fields of study has changed far more slowly. . . . [T]he overall level of segregation in scientific fields of study has actually been rising during the past fifteen years.”); *id.* at 189–90 (citing studies showing that gender differences in science majors are not explained by gender differences in standardized test scores in math and science).

161. See Marcia D. Greenberger & Neena K. Chaudhry, *Sex Discrimination in Education: Miles To Go Before We Sleep*, AM. BAR ASS’N (Oct. 1, 2005), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol32\\_2005/fall2005/hr\\_Fall05\\_sexdiscrimination](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/fall2005/hr_Fall05_sexdiscrimination) [<https://perma.cc/9TTK-3CXC>] (stressing that sex discrimination based on gender stereotypes continues in many areas, especially in math and science programs).

162. *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996) (“Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women’s interests and abilities. Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.”).

163. S. Res. 262, 116th Cong. (2019).

164. See *supra* notes 8–9 and accompanying text.

165. See, e.g., S. Res. 262 (“[D]espite representing 56 percent of all students enrolled in colleges and universities in the United States, women hold almost 2/3 of all outstanding student debt . . . and the average amount of student debt owed by a woman following the completion of a baccalaureate degree is \$2,700 more than the average amount of student debt owed by a man . . . .”); Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 3–4 (2015) (“Although women’s workforce numbers and academic accomplishments grow, they still command much lower wages than men and remain

senior policy advisor at Education Sector, “Even if you control for the field they’re in, boys right out of college make more money than girls, so at the end of the day, is it grades and honors that matter, or something else the boys may be doing?”<sup>166</sup> Not only are men more successful than women right out of college, but men continue throughout their careers to “control most of society’s levers of power.”<sup>167</sup> Women make up only 15 percent of equity partners in big law firms, less than 5 percent of Fortune 500 CEOs, and under 20 percent of Congress.<sup>168</sup> Despite the gender imbalances of these institutions, none have implemented policies requiring equal representation of men and women, as is done in private college admissions.

Although some critics have used the term “affirmative action for men”<sup>169</sup> to describe gender-balancing policies, the call for sex-blind admissions policies should be distinguished from race-blind admissions policies.<sup>170</sup> Race-conscious admissions policies at universities seek to benefit groups who have previously been excluded in education and society.<sup>171</sup> That justification cannot be given for the use of gender-balancing policies, considering that male applicants have never been systematically excluded from higher education. Nor is there any concern about men becoming inadequately represented. In institutions subject to Title IX men still make up over 40 percent of the student

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significantly underrepresented at the highest corporate rungs.”); *see also* WEISS MALKIEL, *supra* note 1, at 606 (“Despite the ample supply of female graduates of prestigious previously all-male institutions, women continue to face challenges in finding leadership positions and professional advancement. Pressing issues also remain in the area of work-family balance.”).

166. Lewin, *supra* note 7.

167. Cunningham-Parmeter, *supra* note 165, at 9.

168. *Id.* at 4, 9.

169. *See generally* Gail Heriot & Alison Somin, *Affirmative Action for Men? Strange Silences and Strange Bedfellows in the Public Debate over Discrimination Against Women in College Admissions*, 12 *ENGAGE* 14 (2011) (arguing for both color-blind and sex-blind admissions policies).

170. Nelson, *supra* note 14.

171. Louis Menand, *The Changing Meaning of Affirmative Action*, *NEW YORKER* (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action> [<https://perma.cc/YJY7-QUHY>] (“But the reason we have affirmative action is that we once had slavery and Jim Crow and redlining and racial covenants . . . . Affirmative action is an attempt to redress an injustice done to black people.”).

body.<sup>172</sup> Instead, as previously explained,<sup>173</sup> men continue to earn the majority of science, technology, engineering, and math degrees as well as “hold the vast majority of leadership positions.”<sup>174</sup> Additionally, higher education has used affirmative action policies to help achieve a more diverse learning environment by bringing together a critical mass of students from different backgrounds and perspectives.<sup>175</sup> Yet, when it comes to gender-balancing policies, “it’s hard to argue that colleges today lack a critical mass of men.”<sup>176</sup> Instead of committing to diversity or remedying past discrimination, gender-balancing policies are grounded in different rationales that must be examined separately.

### *B. Critiques on Contemporary Rationales for Gender Balancing*

In recent years, there has been a growing interest in how different gender ratios, especially between public and private universities, impact campus social life.<sup>177</sup> This interest has led some, such as economic journalist Jon Birger, to encourage prospective college students to “[m]ake gender ratios a consideration when choosing colleges.”<sup>178</sup> Birger notes such considerations are especially important for heterosexual women who should “understand that a woman attending a college with fewer men faces lower odds of meeting her future husband in school.”<sup>179</sup>

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172. See *infra* Part IV.B.

173. See *supra* notes 158–68 and accompanying text.

174. S. Res. 262, 116th Cong. (2019).

175. *Id.*

176. Nelson, *supra* note 14 (“[C]olleges aren’t restricting women’s opportunities to achieve critical mass with an underrepresented group. They’re just putting a ceiling on the number of women they admit.”).

177. See Alex Williams, *The New Math on Campus*, N.Y. TIMES (Feb. 5, 2010), <https://www.nytimes.com/2010/02/07/fashion/07campus.html> [<https://perma.cc/JQ5R-VUBX>] (reporting anecdotes from women at the University of North Carolina, who are “surrounded by so many other successful women [that] they often find it harder than expected to find a date on a Friday night”). See generally BIRGER, *supra* note 22 (collecting examples of how the gender gap has become “a source of distress for women who are ostensibly benefiting from attending college in greater numbers than men”).

178. BIRGER, *supra* note 22, at 171.

179. *Id.* at 176–78 (“A college-bound high school girl in Georgia, for example, might think twice about attending University of Georgia and consider making Georgia Institute of Technology her top choice instead . . . . Georgia Tech is 66 percent male [and] UGA is 62 percent female . . .”).

Building on these claims, private colleges argue that having a gender-balanced student body is necessary to attract applicants who want a campus with an equal number of men and women for social reasons.<sup>180</sup> Specifically, university admissions directors are concerned about having predominately female populations for two reasons: (1) the worry that men will view their institutions as “‘girls’ schools’ [and] will be deterred from applying”; and (2) the idea that female applicants will also be deterred due to “the lack of opportunities to interact with members of the opposite sex.”<sup>181</sup> Kenyon College’s dean of admissions, for example, believes that when a college “become[s] decidedly female in enrollment, fewer males and, as it turns out, fewer females find your campus attractive.”<sup>182</sup> When asked what academic reasons exist for ensuring a gender balance, admissions officers struggle to articulate one.<sup>183</sup> In fact, to ensure these schools have the optimal social environment for attracting the best students, admissions officers impose a “tipping point” of avoiding reaching 60 percent female

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180. See Nelson, *supra* note 14 (“The rationale isn’t that male applicants need a leg up because they’re at some kind of disadvantage. It’s much simpler. Colleges don’t want too many women on campus, because they’re afraid a college that’s too female will struggle to attract both women and men.”); Melana Zyla Vickers, *Where the Boys Aren’t*, CBS NEWS (Dec. 28, 2005, 1:36 PM), <https://www.cbsnews.com/news/where-the-boys-arent> [<https://perma.cc/5F6S-DHG7>] (according to Richard Nesbitt, an admissions director at Williams College, if the schools “got to 60-40, that would set off some alarm bells because we would like to have a 50-50 split’ . . . adding [that] balance is desirable ‘in terms of the social atmosphere and so forth’”).

181. Lindsey Sacher, Comment, *From Stereotypes to Solid Ground: Reframing the Equal Protection Intermediate Scrutiny Standard and Its Application to Gender-Based College Admissions Policies*, 61 CASE W. RES. L. REV. 1411, 1414 (2011); see also *Gender Bias in College Admissions*, CHRISTIAN SCI. MONITOR (July 24, 2007), <https://www.csmonitor.com/2007/0724/p08s01-comv.html> [<https://perma.cc/J4XL-73AT>] (“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 . . .”).

182. Delahunty Britz, *supra* note 123.

183. In one example, an admissions officer was deposed in a proceeding challenging the University of Georgia’s gender preference in its 1999 admissions plan. *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1375–76 (S.D. Ga. 2000). The officer mustered no justification more articulate than “gender diversity is valued”:

Q. . . . What does a more proportionate gender-based class do for each other academically?

A. I assume that the faculty could answer that better than I could since I’m not a faculty member.

Q. Do you know?

A. My understanding is that diversity is valued on this campus in any number of forms and gender diversity is valued.

*Id.* at 1375.

classes.<sup>184</sup> There are three main reasons why this concern about attracting students should not dissuade lawmakers from removing the exemption from Title IX for private college admissions.

First, instituting sex-blind admissions policies will not lead to all-female universities. One admissions officer justifies his university's use of gender balancing on the grounds that "only 3% of female students even consider a single-sex institution."<sup>185</sup> Although this admissions officer is correct that many students would not be interested in attending a school where the study body is almost exclusively female, there is no evidence that the removal of the Title IX exemption for private colleges would create such a learning environment.<sup>186</sup> For example, if Brown admitted women and men at equal rates, its undergraduate female population would go from 52 to 60 percent.<sup>187</sup> Such a change could hardly be characterized as making Brown a single-sex school and importantly would not surpass the "tipping point" of female students many of these private colleges are trying to avoid.

A useful point of comparison is the ratio of male and female students at public universities, which under Title IX cannot discriminate "on the basis of sex."<sup>188</sup> Because public universities are subject to Title IX, they generally do not engage in gender balancing and admit women at a higher rate than men, often leading to a sixty-fourty ratio of women to men.<sup>189</sup> For example, since the passage of Title IX, the University of North Carolina at Chapel Hill has seen an "eerily consistent 60 to 40 ratio of female to male students."<sup>190</sup> This can be contrasted with Duke University, a private university just down the road, which has a gender distribution of 50 percent male students and

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184. Delahunty Britz, *supra* note 123.

185. Valerie Strauss, *Gender and College Admissions: William and Mary Dean Talks Back*, WASH. POST (Nov. 18, 2009, 9:39 AM), <http://voices.washingtonpost.com/answer-sheet/gender-and-college-admissions.html> [<https://perma.cc/D9YE-TYBR>] (quoting a note from Henry Broadus, writing as the Dean of Admissions at William and Mary).

186. Birger, *Elite Colleges*, *supra* note 13.

187. *Id.*

188. 20 U.S.C. § 1681(a)(1) (2018).

189. See Birger, *Elite Colleges*, *supra* note 13 ("For students who attend public colleges and universities, the playing field is more level. . . . Indeed, women are admitted at higher rates at such top public universities as U.C. Berkeley, Ohio State, Penn State, Michigan and UVA.").

190. Sara Salinas, *The Road to a 60 Percent Female Campus*, DAILY TAR HEEL (Apr. 12, 2016, 10:40 PM), <https://www.dailytarheel.com/article/2016/04/the-road-to-a-60-percent-female-campus> [<https://perma.cc/LB85-8MKF>].

50 percent female students.<sup>191</sup> Similarly, after the University of Georgia’s admissions policy of awarding additional points to male applicants was struck down under Title IX,<sup>192</sup> the university now uses sex-blind admissions and is composed of 57 percent female students.<sup>193</sup> Thus, removing any preferences for male applicants in public admissions has not been shown to create overwhelmingly female schools. Instead, private institutions would begin to look more like public institutions, which still have yet to surpass the “tipping point” of female students. The removal of the Title IX admissions exemption will still leave universities with an adequate split of men and women to create a diverse educational environment that provides them both with the opportunity to learn from one another.

Second, the idea that a gender-balanced campus is more attractive for dating prospects rests on a rationalization that has historically been used to undermine female commitment to pursuing higher education. The stereotype that women only go to college to get their “Mrs.” degree and then drop out is an argument that was used by private schools in the 1970s to explain why their admissions should be exempt from Title IX.<sup>194</sup> Today the notion that there needs to be an equal number of men and women is, in part, based on a related assumption that women will be less attracted to a college that has fewer dating prospects.<sup>195</sup> Yet this line of thinking may undermine the fact that

191. *Duke University*, U.S. NEWS & WORLD REP. (2019), <https://www.usnews.com/best-colleges/duke-university-2920/student-life> [<https://perma.cc/3PFZ-C8EA>].

192. *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1375–76 (S.D. Ga. 2000).

193. *University of Georgia*, U.S. NEWS & WORLD REP. (2019), <https://www.usnews.com/best-colleges/university-of-georgia-1598> [<https://perma.cc/5WDZ-5M9T>].

194. As Bayh stated:

We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again. The desire of many schools is not to waste a ‘man’s place’ on a woman stems from such stereotyped notions.

118 CONG. REC. 5804 (1972).

195. BIRGER, *supra* note 22, at 172–73 (“Young women seeking a more traditional college social life might consider other selective colleges that offer better gender balance . . . . The end result: more dates and fewer hookups.”). A student at Brown University wrote an op-ed about how antiquated the rationales for gender balance have become. Samantha Savello, *Savello ’18: Gender Should Play No Role in Admissions*, BROWN DAILY HERALD (Dec. 4, 2016), <https://www.browndailyherald.com/2016/12/04/savello-18-gender-play-no-role-admissions> [<https://perma.cc/BJ6C-3B2S>] (“According to this style of thinking—which we can liken to heteronormative dating culture—too many male students and not enough female students might

“women are primarily in college not because they are looking for men, but because they want to earn a degree.”<sup>196</sup> Although students’ decision about where to attend college is certainly impacted by campus social life, it is not clear that “women students would prefer to be rejected at the admissions stage rather than attend a college where it’s slightly more difficult to find a boyfriend.”<sup>197</sup> Furthermore, on the admissions side, as explained by Dr. Sandler, colleges exist primarily “to educate” students, not to find them a spouse.<sup>198</sup> This assumption that women will prioritize dating prospects in picking a college has, in the past, undervalued women seeking higher education and thus should be viewed skeptically.

Third, the purported need for a balanced ratio between men and women for social reasons makes several assumptions about the identities of college applicants. The characterization of a college as a “matchmaking service”<sup>199</sup> rests on the premise that men only date women and women only date men. Given the inaccuracy of that stereotype, the idea that gender-balanced student bodies will ensure “the availability of dance partners for the winter formal”<sup>200</sup> is no longer the case. As pointed out by the former Vice President for Education and Employment of the National Women’s Law Center, Jocelyn Samuels, the justification for gender balancing on the grounds of ensuring students can get dates “is the kind of stereotypical thinking that Title IX was intended to prohibit.”<sup>201</sup> In 2016, the American College Health Association found that 10 percent of undergraduate students identified as lesbian, gay, bisexual, transsexual, queer, asexual, or pansexual (“LGBTQ+”).<sup>202</sup> The growing number of applicants who identify as LGBTQ+ and therefore do not contribute

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deter males from coming, and vice versa, because of slimmer pickings and more competition in the dating pool.”).

196. Williams, *supra* note 177.

197. Nelson, *supra* note 14.

198. BIRGER, *supra* note 22, at 34; *see also* Scott Jaschik, *Affirmative Action for Men*, INSIDE HIGHER ED (Mar. 27, 2006), [https://www.insidehighered.com/news/2006/03/27/affirmative-action-men#.Xw\\_IaG15Okg.link](https://www.insidehighered.com/news/2006/03/27/affirmative-action-men#.Xw_IaG15Okg.link) [<https://perma.cc/6TJN-CDXA>] (quoting a columnist for *The Nation*, who asked, “Is this an intellectual endeavor or the prom committee?”).

199. Birger, *Elite Colleges*, *supra* note 13 (“[C]ollege isn’t a matchmaking service.”).

200. Delahunty Britz, *supra* note 123.

201. *See* Jaschik, *supra* note 198.

202. *LGBTQ Students in Higher Education*, POSTSECONDARY NAT’L POL’Y INST. (Dec. 7, 2018), <https://pnpi.org/lgbtq-students-in-higher-education> [<https://perma.cc/P8PE-G9WU>].

to the dating pool for the opposite sex provides yet another reason that undermines the need for a fifty-fifty gender balance.

### CONCLUSION

To prevent private universities from maintaining higher admissions standards for female applicants, Title IX must be amended to remove the exemption for private undergraduate admissions. Successfully passing a Title IX amendment through Congress, however, has risks that may dissuade Congress from acting. The option of opening up Title IX for amendment to remove the exemption might permit other amendments that would weaken the law. This is not a far-fetched concern, given the almost continuous, yet unsuccessful, attempts to water down Title IX regulations.<sup>203</sup> This was anticipated by Title IX cosponsor Representative Patsy Mink who told her daughter that enforcing Title IX would “require never[-]ending vigilance to ensure that the regulations were enforced and not changed—and if they were changed, changed in the direction of strengthening them.”<sup>204</sup>

Despite these risks, Congress should still amend Title IX to remove the exemption for private college admissions. The justifications for the exemption—both the ones provided in 1972 and 2021—do not support its continuation. Instead, the exemption contradicts Title IX’s purpose by permitting colleges to continue doing two things the law was intended to remedy: raise admissions standards for women and cap their enrollment. As demonstrated by the legislative history, amending Title IX to prohibit sex discrimination in *all* undergraduate institutions would better address the concerns that drove lawmakers to pass Title IX. Therefore, a congressional amendment removing this outdated Title IX exemption is not just long overdue—it is vital to eliminating sex discrimination and finishing the work that Congress set out to accomplish in 1972.

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203. See MELNICK, *supra* note 56, at 43 (noting “several occasions” where members of Congress have tried to use appropriation riders as a means to curtail Title IX rules). See generally Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required To Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11 (2003) (tracing the long history of repeated efforts to repeal Title IX, especially the regulations pertaining to athletics).

204. Beth Pearsall, *Title IX: Looking Back, Moving Forward*, AAUW (Nov. 24, 2014), <https://www.aauw.org/2014/11/24/title-ix-patsy-mink> [<https://perma.cc/NJ35-NJP4>].