



**NATIONAL
WOMEN'S
LAW CENTER**

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MAKING THE CASE:

GENDER-CONSCIOUS
PROGRAMS IN HIGHER
EDUCATION

THE NATIONAL WOMEN'S

LAW CENTER (NWLC)

fight for gender justice—in the courts, in public policy, and in our society — working across the issues that are central to the lives of women and girls. We use the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQ people, and low-income women and families. For more than 45 years, we have been on the leading edge of every major legal and policy victory for women.

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MAKING THE CASE:

GENDER-CONSCIOUS PROGRAMS IN HIGHER EDUCATION

Gender-conscious programs—sometimes called affirmative action—on college campuses are under attack. Groups opposed to gender justice want to end programs that promote gender and racial diversity on campus. They also want to end programs with a focus on gender issues, such as gender studies courses—even though these programs are open to anyone regardless of gender. To counter these attacks, it's important to know the facts. Find out when gender-conscious programming is permissible in higher education and why it's still needed today.

WHAT KIND OF GENDER-CONSCIOUS PROGRAMS ARE LEGAL IN HIGHER EDUCATION?

Gender-conscious programs are lawful when they help overcome the effects of discrimination and other conditions that have limited the participation of women and girls in education. Title IX is a law that bans sex discrimination in schools that receive federal funds. Title IX regulations say that schools can “take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.”¹

In other words, schools can create policies aimed at increasing the participation of women and girls, including those who are transgender, in fields where they are underrepresented. Schools can offer programs, scholarships, and other services to women and girls that seek to expand their participation in these fields.

For example (and discussed within this guide), a school can provide targeted programming to women in science, technology, engineering, and math (STEM) because women are underrepresented in these fields. Schools can take steps to correct gender inequities in programs even when existing disparities have not been traced to specific instances of unlawful discrimination.²

The Supreme Court has also ruled that the Constitution allows public actors, such as state universities, to use gender-conscious programs to “compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, [and] to advance full development of the talent and capacities of our Nation's people.”³

WHY IS AFFIRMATIVE ACTION NECESSARY FOR WOMEN IN HIGHER EDUCATION?

Schools use affirmative action to promote diversity and to ensure that past discrimination and exclusion do not perpetuate ongoing exclusion. This country's laws and institutions, including schools and universities, have long reflected and perpetuated structural sexism, racism, and inequality (see the appendix starting on page 12 for a timeline of sex discrimination in the United States). Just two generations ago, public institutions, private actors, and state and federal laws conspired to exclude women, Indigenous people, and people of color from many aspects of American civic life. These practices



barred people from these historically marginalized groups from going to college, working in certain fields, living in certain neighborhoods, and voting. For centuries, this structural inequality cut off opportunities to advance economically or build individual wealth to the detriment of Black, Indigenous, and people of color broadly, as well as women both within and outside of those communities.

In the 1960s, Congress passed landmark legislation banning discrimination based on a number of protected traits, including race and sex. But it's not enough to say people can't be racist or sexist. Public and private systems that are based in centuries of legalized oppression must also work to dismantle structural sexism and racism. Without affirmative action to combat historic discrimination, these systems could continue to foreclose opportunities for people who have historically been marginalized by gender- and race-based bigotry. Indeed, the Supreme Court has repeatedly recognized that there is a compelling educational interest in fostering student diversity.⁴

Even now, when women and girls are finally able to get a seat in the classroom, opportunities for financial aid and

leadership roles can be hard to find—particularly for women and girls of color. Gender-conscious programs can give women and girls important pathways to success in roles and fields where few women and girls have participated.

WHY DO WE NEED DIVERSITY IN SCHOOL SETTINGS?

All students benefit when their classrooms are more diverse. Students in diverse classrooms get a host of unique viewpoints from their classmates. This allows for better critical thinking, problem solving, and innovation.⁵ It prepares students for the global economy, where they must interact and build relationships with people from different backgrounds.⁶ Diverse learning environments also help fight racist and sexist biases based on stereotypes, the effects of past discrimination, or a lack of exposure to different groups.⁷ Our schools, society, and economy are better when diversity is celebrated and encouraged.

Since Title IX was passed in 1972, women have made significant strides in attending college and getting degrees. But they are a long way from truly equal representation. Women of color remain underrepresented in higher

education. For example, Latina women hold only 4% of all bachelor's degrees though they are 9% of the U.S. population.⁸ Even worse disparities exist for master's and doctorate degrees.⁹

While the overall number of women completing college has increased, women still fall behind in male-dominated fields, like STEM. For example, only 8% of computer science degrees are held by white women, 3% by Black women, and 2% by Latina women. In contrast, white men hold 47% of computer science degrees.¹⁰ In an increasingly tech-focused economy, women cannot afford to be left out of these fields—and these fields cannot afford to exclude women.

As of 2018, women make up only 5% of Fortune 500 CEOs, and just two Fortune 500 CEOs are women of color.

Colleges are tasked with preparing students for the workforce. Gender-specific campus programs—particularly those focused on building professional networks, leadership skills, and other attributes for success in the workplace—help accomplish this goal. For example, women often need support to make their way through traditionally male-dominated programs. Many studies show that women stay in STEM when they receive tutoring programs and out-of-class engagement.¹¹

Gender-conscious programs can also target existing disparities that persist regardless of overall enrollment and degree attainment statistics, such as women's underrepresentation in many leadership positions. For example, while women represent approximately half of administrators in higher education, their representation is heavily clustered in lower-paying positions: the more high-ranking and high-paying the job is, the lower the representation of women.¹² Indeed, women make up less than 30% of top executive positions in colleges

and universities.¹³ Gendered leadership gaps are even more severe in other industries: as of 2018, women make up only 5% of Fortune 500 CEOs, and just two Fortune 500 CEOs are women of color.¹⁴ In the legal profession, women make up 45% of associates but only 22.7% of partners.¹⁵ In medicine, women represent 40% of all physicians and surgeons but only 16% of permanent medical school deans.¹⁶

In a world still dominated by male leaders, women deserve the opportunity to gain leadership experiences through programs that empower women, help them build strong professional networks, and teach them how to navigate sexism or racism while building skills like public speaking, team building, and negotiation.

In addition, when women enter the workforce they often have to deal with pressures that men typically don't. Women are more likely to take on primary family responsibilities while holding down full-time jobs. They often face pregnancy discrimination on the job. They are more likely to deal with sexual harassment, sex stereotyping, and other sex discrimination. Giving women spaces in college to talk about these challenges and learn ways to dismantle institutional inequities in the workplace will help women thrive once they graduate.

WHY NOT JUST FOCUS ON RACE-CONSCIOUS PROGRAMS TO ADDRESS THE NEEDS OF WOMEN AND GIRLS OF COLOR IN SCHOOLS?

Racism and sexism affect women of color in ways that are unique from white women or men of color. Women of color face discrimination based on stereotypes specific to their combined racial and sexual identities. For example, when Black or Latina women speak up and ask questions they are considered "loud," "angry," "aggressive," or "fiery." When they question unfair systems of oppression they are labeled "emotional" or ungrateful. Asian American and Pacific Islander women are often seen as "meek" and submissive,¹⁷ and as a result, they may be overlooked for

certain opportunities. For example, a recent study showed that professors are less likely to respond to women in general—but especially to those with Chinese- or Indian-sounding names.¹⁸

Girls of color also have specific challenges when it comes to discrimination in elementary, middle, and high school that can impact their ability to get into and succeed in college. For example, Black and Native American girls are suspended and expelled more often than white girls for subjective, nonviolent offenses. Disproportionate discipline makes it harder to graduate from high school and get into college.¹⁹ The effects that discrimination based on race and sex have on women and girls of color are unique. They can't be fixed without programs that consider both.

DO WOMEN'S STUDIES COURSES VIOLATE TITLE IX?

No. If a women's studies course or degree program is open to students of all genders, it does not discriminate based on sex and therefore does not violate Title IX. Women's and gender studies courses are designed to teach any student who wants to learn about the contributions that women and LGBTQ individuals have made in history, philosophy, social sciences, and other fields. Your university does not discriminate if it chooses to offer those courses to students.

WHEN IS IT PERMISSIBLE TO OFFER SCHOLARSHIPS OR FINANCIAL AID SPECIFICALLY FOR WOMEN?

Generally, schools cannot discriminate on the basis of sex when providing financial assistance.²⁰ But Title IX regulations allow schools to have sex-specific scholarships and fellowships that were established by a will, trust, bequest, or similar legal instrument if the financial assistance meets certain requirements.²¹ Specifically, when schools are making financial assistance calculations for their students, they must first select

students to receive funds based on criteria other than sex, such as GPA or extracurricular activities. If students of more than one sex qualify for financial assistance based on these criteria, a woman might be offered money from a scholarship created for women, while a man may receive funding from a different source. For more information, see flowchart on page 6.

A university may also be able to justify sex-specific scholarships by showing it's taking affirmative action to correct another measure of inequity—like a demonstrated debt inequity or representation inequities in specified programs, like STEM. Women hold two-thirds of the country's student debt, and on average borrow \$3,000 more than men to attend college.²² Because of the wealth gap,²³ the wage gap,²⁴ and women's overrepresentation in low-wage jobs,²⁵ women also have less disposable income to repay their loans. As a result, women take more time to pay off their debt. Scholarships for women thus help reduce the wealth gap and reduce inequitable student debt burdens. Schools may be able to show that debt inequity within their student body may justify a scholarship program designed to address those inequities. However, the Department of Education has not provided guidance or clarification about how Title IX's affirmative action regulations interact with the regulations specific to sex-specific scholarships; schools seeking to provide such sex-specific scholarships should seek legal counsel.

Women hold two-thirds of the country's student debt, and on average borrow **\$3,000 more than men to attend college.**

FOLLOW THIS FLOWCHART TO DETERMINE IF A SEX-SPECIFIC SCHOLARSHIP IS PERMISSIBLE:

1. Was the scholarship established by a will, trust, bequest, or similar legal instrument, or by acts of a foreign government?

a. If yes, go to 2. ➤

b. If no, your school's sex-specific scholarship **may violate Title IX.** Consult legal counsel.

2. Does the school first select students to receive financial assistance based on criteria other than sex, such as GPA, extracurricular activities, or financial need?

a. If yes, go to 3. ➤

b. If no, your school's sex-specific scholarship **may violate Title IX.** Consult legal counsel.

3. Does the school award financial assistance based on that criteria other than sex, and not based on the availability of sex-specific funds? In other words, if students of more than one sex qualify for financial assistance, and women are awarded a sex-specific scholarship, does the school ensure funds are awarded to the men from a different source?

a. If yes, your school's sex-specific scholarships are **likely lawful under Title IX.**

b. If no, your school's sex-specific scholarship **may violate Title IX.** Consult legal counsel, as well as the box on page 7 (Does my school need to supplement every scholarship designated for and awarded to a woman with a scholarship for a man?).



DOES MY SCHOOL NEED TO SUPPLEMENT EVERY SCHOLARSHIP DESIGNATED FOR AND AWARDED TO A WOMAN WITH A SCHOLARSHIP FOR A MAN?

Title IX regulations say a school cannot choose to allocate sex-specific funds to a woman, then deny a man similar funding **based solely** on the fact that there is no equivalent men-only or co-ed scholarship available. However, if there are legitimate, sex-blind reasons for awarding more scholarships to women, including sex-specific scholarships, the school's financial assistance allocations are unlikely to run afoul of Title IX. So, in the example above, your school may be able to allocate sex-specific funds to the woman and deny a man similar funding based on nondiscriminatory criteria, such as the woman facing greater financial need, being the first in her family to attend college,²⁶ or being a custodial parent—provided that the man does not fall into the same categories.²⁷

HOW SHOULD A SCHOOL'S GENDER-CONSCIOUS PROGRAMS APPLY TO TRANSGENDER* STUDENTS?

Title IX requires that schools make sure that transgender students have access to opportunities and programs that match their gender identity.²⁸ In other words, transgender women should have access to scholarships, programs, and other opportunities that are available to cisgender† women. The same goes for transgender and cisgender men—transgender men should have access to scholarships, programs, and other opportunities that are available to cisgender men. Transgender students face significant discrimination and other barriers to completion when they enter college. According to the U.S. Transgender Discrimination Survey, transgender students attending institutions of higher education reported high rates of harassment because of their gender identity. Of respondents who experienced harassment based on their transgender status, 16% left college because of that harassment.²⁹ A recent study of mental health outcomes for college students found that transgender, genderqueer,‡ and gender-nonconforming§ students are four times more likely than their peers to report mental health issues: 58% percent reported depression, and one-third reported that they had seriously considered suicide.

Because of these startling statistics, it is all the more important that colleges consider how their programming includes and supports all transgender students on their campuses.

Also, note that it is not enough to simply say that a program is open to all women and assume that transgender women will feel welcome in that space. Schools should make it explicit in promotional materials that these programs are inclusive of trans women.

HOW SHOULD A SCHOOL'S GENDER-CONSCIOUS PROGRAMS APPLY TO GENDER NONBINARY** STUDENTS?

Because Title IX prohibits discrimination based on gender nonconformity and sex stereotyping,³⁰ it also is appropriately understood to prohibit discrimination against students who are gender nonbinary. And like transgender students, gender nonbinary students face gender discrimination. Schools should make clear that programs limited to women are open to gender nonbinary students who would like to participate in those women-only spaces. At the same time, if gender nonbinary or transgender students express that available gender-conscious or gender-specific programming options do not suit their needs, schools should also consider creating or increasing programming and spaces specifically centered on the needs of transgender or gender nonbinary students to further promote gender equity on campus.

Of respondents who experienced harassment based on their transgender status, 16% left college because of that harassment.

* A transgender person is someone whose gender identity – their deeply held sense of being a particular gender – is different from the sex they were assigned at birth. For example, someone who was labeled “male” at birth but identifies as a woman today is a transgender woman, whereas someone who was labeled “female” as birth but identifies as a man is a transgender man.

† A cisgender person is someone whose gender identity is the same as the sex they were assigned at birth.

‡ A genderqueer person is someone who does not subscribe to the conventional gender binary, and may identify with neither, both, or a combination of male or female genders.

§ A gender-nonconforming person is someone who does not conform to prevailing cultural and social expectations traditionally associated with their gender.

** Gender non-binary is a term that is often used to describe people whose gender identity is not exclusively male or female.

WHAT DATA JUSTIFIES A SCHOOL'S USE OF GENDER-CONSCIOUS PROGRAMS?

Universities have a responsibility to ensure that a commitment to equity guides their policies surrounding gender-conscious programs and scholarships.

Schools can use data to defend their gender-conscious and gender-specific programs as lawful affirmative action programs. Gender-specific clubs and programming opportunities in a school, like engineering clubs or mentorship communities available only to women, including transgender women, can be justified by showing gender disparities in participation or opportunities that are evident on a local or national scale. For example, if your school enrolls and retains fewer women than men in STEM or other degree programs at the undergraduate, master's, or doctorate levels, that data can demonstrate the need for additional supports and programs for women to achieve equality in those fields. The same is true for mentorship and leadership programs designed for women if your school has gender disparities in student or academic leadership or is preparing students for work in sectors with such disparities. In addition, data demonstrating that female students are more likely to experience harassment and assault can justify programming related to sexual harassment and assault that is targeted to women.

If a school offers a gender-neutral or co-ed option that men can take part in, that often can be sufficient to show that your school offers equal opportunities for male students.

MUST AN EQUAL, MEN-ONLY OPPORTUNITY BE PROVIDED ANY TIME A WOMEN-ONLY OPPORTUNITY IS OFFERED?

No. If a school can show that an opportunity exclusively for women is designed to overcome the effects of conditions that resulted in limited participation by women, it does not need to provide an equal opportunity to groups that have not experienced the same obstacles. In addition, if a school offers a gender-neutral or co-ed option that men can take part in, that often can be sufficient to show that your school offers equal opportunities for male students who wish to participate in similar activities.³¹

Gender-conscious programs may also be justified by showing they have helped relieve past disparities. The purpose of many gender-conscious programs is to continue encouraging participation in various opportunities that are traditionally and currently less accessible to women. But if a program has successfully done this, it should not be assumed that the program's work is done. If your school has data showing that attempts to end gender-based programs have resulted in a decrease in participation by women, that can help to show that continued affirmative action remedies are necessary, despite data that may show current equality in participation.

For programs that are women-focused, but do not exclude members of other genders from taking part, it may be appropriate to further highlight that students of any gender may participate. For example, your college may have women's centers, programs for K-12 students, and other services hubs that—while focused on women and girls—allow individuals of any gender to participate but do not currently advertise this open-participation policy. You can make clear in materials promoting those services that they are open to people of all genders to reduce the appearance that they are only for women. You likely don't need to change the names of those programs, even if they have "women" or "girls" in the title so long as you make clear in marketing materials and public-facing information about those programs that they are open to people regardless of gender.

HOW SHOULD MY COLLEGE OR UNIVERSITY RESPOND TO A COMPLAINT THAT ITS SUPPORT OF AN ORGANIZATION OR PROGRAM FOR MIDDLE AND HIGH SCHOOL GIRLS VIOLATES TITLE IX?

Institutions of higher education can also support certain gender-specific or single-sex programs for middle and high school girls under Title IX's exemption for voluntary youth service organizations. Title IX does not apply to the membership practices of voluntary youth service organizations, such as the Girl Scouts, even when they receive significant assistance from a federal funding recipient.³² Therefore, a school that provides space, equipment, or staff time to a voluntary youth service organization that serves only girls will not violate Title IX "simply because of the single-sex membership of the organization."³³ If your school chooses to support this type of organization, it must provide comparable opportunities to members of the excluded sex. Available co-ed opportunities can satisfy this requirement.³⁴

Use the checklist on this page to determine if the K–12 program your school aids is a voluntary youth service organization that is exempt from Title IX. If you answer yes to all the questions, your school's support of the program does not violate Title IX:

- ☐ **Is the program voluntary?**
- ☐ **Is the program traditionally limited to members of one sex?** *An organization can meet this requirement if its foundational documents show the organization holds itself out to have single-sex membership, or if the organization's custom has been to limit membership to a single sex.*³⁵
- ☐ **Is the program mostly limited to persons under 19 years old?**
- ☐ **Does the program facilitate public services opportunities for its members?** *For example, an organization that hosts engineering camps for girls would meet this requirement if the members work on a project to recommend energy efficiency improvements for public buildings.*³⁶
- ☐ **Does your school provide comparable opportunities to members of the other sex?** *Co-ed opportunities can satisfy this requirement.*

This guidance only applies to voluntary youth service organizations. Different rules govern whether single-sex classes, programs, and activities are permitted at K–12 schools. For information about single-sex classes and activities in elementary and secondary schools that receive federal financial assistance, see the Department of Education's 2014 Dear Colleague Letter, [Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities](#).

WHEN WILL WE NO LONGER NEED GENDER-CONSCIOUS PROGRAMS FOR WOMEN?

In an ideal world, men and women of all races would have an equal opportunity to succeed, and bias would no longer be a part of our society. But structural inequities and stereotypes about women—particularly women of color—and their place in the classroom and the workplace persist. Gender-conscious programs can help keep those biases out of college. Unless and until those biases that silently shape our society are no longer present, carefully designed gender-conscious programs have a critical role to play.



APPENDIX & ENDNOTES

TIMELINE OF SEX DISCRIMINATION AND AFFIRMATIVE ACTION IN THE UNITED STATES

This timeline highlights some moments in the long history of discrimination and civil rights advocacy in the United States. However, it only provides a snapshot and is not meant to be comprehensive. For example, it does not include the history of state laws that limited property and ownership rights for women. Nonetheless, the timeline shows how discrimination has been deeply entrenched in our country's history and how hard it has been to undo systemic discrimination in law.

1777 to 1807: With the founding of country, women lose the right to vote in all state constitutions.

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1788: The Constitution of the United States of America is ratified. The document envisioned equality only for white, land-owning men, specifically excluded Native Americans from representation, and provided that for representation purposes, slaves were considered only three-fifths of a person.

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1865: The 13th Amendment of the Constitution is ratified, which abolished slavery and involuntary servitude, except as punishment for a crime.

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1868: The 14th Amendment is ratified, extending citizenship to all people born or naturalized in the United States and prohibiting states from denying any person equal protection under their laws.

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1869: National Woman Suffrage Association (NWSA) and American Woman Suffrage Association (AWSA) are founded to organize for the right of women to vote and respond to debates about the ratification of the 15th Amendment, which would extend voting rights to Black men. The NWSA opposed the 15th Amendment because it did not extend voting rights to women, while the AWSA supported the amendment.

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1870: The 15th Amendment is ratified, prohibiting federal and state governments from denying male citizens the right to vote based on their "race, color, or previous condition of servitude."

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1870s: Southern states start to enact **Jim Crow laws** that limit voting rights and educational and employment opportunities for Black and Native American people—including Native American, Black, and other women of color.

1873: *Bradwell v. Illinois*: Supreme Court holds that states may deny women the right to practice law.³⁷

1896: *Plessy v. Ferguson*: Supreme Court rules that “separate, but equal” facilities are constitutional—effectively okaying the segregation of schools, workplaces and public accommodations.³⁸

1913: President Woodrow Wilson begins to **segregate the federal workforce**.

1915: *MacKensie v. Hare*: Supreme Court upholds Expatriation Act of 1907, which said American women may lose citizenship if they married noncitizens (since a woman assumed the citizenship of her husband at the time).³⁹

1920: The 19th Amendment is ratified, ostensibly granting women the right to vote—though Jim Crow laws remain in effect in southern states—essentially continuing to disenfranchise Native American, Black, and other women of color.

1927: *Lum v. Rice*: Supreme Court upholds decision of a Mississippi school district to exclude a Chinese-American girl from school because of her race.⁴⁰

1948: *Goesaert v. Cleary*: Supreme Court upholds Michigan law prohibiting women from being a licensed bartender unless their father or husband owned the establishment.⁴¹

1954: *Brown v. Board of Education*: Supreme Court overturns *Plessy*, holding that racial segregation in schools is unconstitutional.⁴²

1961: *Hoyt v. Florida*: Supreme Court upholds jury rules that made it less likely for women to be called for jury service, on grounds that a “woman is still regarded as the center of home and family life.”⁴³

1961: President John F. Kennedy issues Executive Order 10925, allowing affirmative action to correct past racial discrimination in federal hiring.⁴⁴

1963: Congress passes the Equal Pay Act,⁴⁵ promising equitable wages for the same work, regardless of the race, color, religion, national origin, or sex of the worker. Today, women in America still make only 82 cents to every man’s dollar.⁴⁶ That gap is significantly wider for Black, Latina, Pacific Islander, and Native American women.⁴⁷

1964: Congress passes the Civil Rights Act, prohibiting race-based discrimination in employment, schools and public accommodations.⁴⁸ Title VII of the Act prohibits workplace discrimination based on sex, race, color, national origin or religion.⁴⁹

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1965: Congress passes the Voting Rights Act, finally putting in place mechanisms to repeal Jim Crow laws that prevent Black, Native American, and people of color from voting.⁵⁰

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1967: Lyndon B. Johnson amends Executive Order 11246, establishing affirmative action requirements for federal contractors on the basis of sex.⁵¹

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1971: *Reed v. Reed*: Supreme Court recognizes for the first time that the Constitution's Equal Protection Clause prohibits differential treatment based on sex.⁵²

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1972: Congress passes Title IX of the Education Amendments Act of 1972, prohibiting sex-based discrimination in educational programs and activities that receive federal financial assistance.⁵³

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1974: The Fair Housing Act—which was originally enacted in 1968 to prohibit race-based discrimination in housing—is amended to also prohibit sex-based discrimination.⁵⁴ The Equal Credit Opportunity Act is also passed, prohibiting credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or receipt of public assistance.⁵⁵

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1975: *Taylor v. Louisiana*: Supreme Court reverses 1961 decision in *Hoyt* and prohibits states from excluding women from juries.⁵⁶

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1976: *General Electric v. Gilbert*: Supreme Court holds that employers can exclude pregnancy-related conditions from benefits plans that cover other disabilities and illnesses.⁵⁷ Congress responds by passing the Pregnancy Discrimination Act two years later, which amends Title VII to explicitly ban this kind of pregnancy discrimination in the workplace.⁵⁸

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1978: *Regents of University of California v. Bakke*: Supreme Court upholds affirmative action policies that allow race to be considered as one of several factors in college admissions decisions. But the Court strikes down the university's use of racial quotas.⁵⁹

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1981: *Rostker v. Goldberg*: Supreme Court rules that single-sex registration for military draft is constitutional.⁶⁰

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1981: *Kirchberg v. Feenstra*: Supreme Court strikes down state law giving husbands the unilateral right to dispose of jointly owned property without spouse’s consent, holding that the law violates the Constitution’s Equal Protection Clause.

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1984: *Grove City College v. Bell*: Supreme Court holds that Title IX’s prohibition on sex discrimination only applies to the particular program within an institution that receives federal funding.⁶¹ Congress responds by passing the Civil Rights Restoration Act of 1987, to specify that institutions that receive federal funds must comply with civil rights laws in all areas and operations.⁶²

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1986: *Meritor Savings Bank v. Vinson*: Supreme Court holds that a hostile or abusive work environment can constitute sex discrimination under Title VII.⁶³

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1996: *United States v. Virginia*: Supreme Court holds that male-only admissions policy at Virginia Military Institute (VMI) violates the Constitution’s Equal Protection Clause.⁶⁴ The Court’s opinion emphasizes that overbroad generalizations and “fixed notions concerning the roles and abilities of males and females” that drove VMI’s admissions policy cannot justify single-sex programs.⁶⁵

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1998: *Burlington Industries, Inc. v. Ellerth*: Supreme Court holds that employers are liable for supervisors who create hostile or abusive work environments in violation of Title VII.⁶⁶

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1999: *Davis v. Monroe County*: Supreme Court holds that schools may be liable under Title IX for deliberate indifference to student-on-student sexual harassment.⁶⁷

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2000: *United States v. Morrison*: Supreme Court strikes down a crucial provision of the Violence Against Women Act (VAWA) that had given victims of gender-motivated violence a right to sue their attackers in federal court.⁶⁸

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2003: *Grutter v. Bollinger*: Supreme Court upholds race-conscious admissions policy of a state university law school, recognizing that schools have a compelling interest in attaining a diverse student body.⁶⁹ On the same day in *Gratz v. Bollinger*, the Supreme Court strikes down a university’s point-based admissions system that gives underrepresented applicants one-fifth of the points needed to guarantee admission.⁷⁰

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2003: *Nevada Department of Human Resources v. Hibbs*: Supreme Court holds that individuals may sue states that violate the Family and Medical Leave Act (FMLA) for denying men access to family leave. The Court acknowledged that the FMLA was designed to address a pattern of sex discrimination based on an assumption that caregiving was women’s work—an assumption that harmed men and women alike.⁷¹

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2005: *Jackson v. Birmingham*: Supreme Court holds that Title IX prohibits retaliation against people who complain about or report instances of sex-based discrimination at school.⁷²

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2007 to 2013: Starting with *Ledbetter v. Goodyear*, the Supreme Court issues a number of decisions that make it harder for victims of workplace discrimination to win in court. In effect, these rulings restrict the time in which victims can file claims alleging pay discrimination,⁷³ limit the availability of class action lawsuits for nationwide claims,⁷⁴ bar victims from suing their employer if they are wrongfully denied sick leave under FMLA,⁷⁵ change standards to make retaliation harder to prove,⁷⁶ and limit liability for when supervisors harass workers.⁷⁷ Of these decisions, Congress is only able to overturn *Ledbetter* through the Lily Ledbetter Fair Pay Act, which restores the ability of victims of pay discrimination to meet the statute of limitations.⁷⁸

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2013: *U.S. v. Windsor*: Supreme Court strikes down law banning same-sex marriage under federal law.⁷⁹ The same year, the Supreme Court struck down a key provision of the Voting Rights Act of 1965 in *Shelby County v. Holder*.⁸⁰ As of 2018, [more than 1,600 polling places](#) in seven southern states have closed.

.....

2014: *Schuette v. Coalition to Defend Affirmative Action*: Supreme Court upholds a state's ban on race- and gender-conscious affirmative action programs in public education and employment.⁸¹

.....

2016: *Fisher v. University of Texas*: Supreme Court upholds a state university's use of race as a factor in a holistic admissions process, finding that the school's use of race was narrowly tailored to the compelling interest of educational diversity.⁸²

.....

2020: *Bostock v. Clayton County*: Supreme Court holds that an employer violates Title VII's sex discrimination provisions when they discriminate based on a person's sexual orientation or gender identity.⁸³

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ENDNOTES

- 1 See 34 C.F.R. § 106.3(b); 28 C.F.R. § 54.110(b).
- 2 Dep't of Educ., Off. of Civ. Rts. & Off. of Career, Technical, and Adult Educ., *Dear Colleague Letter: Gender Equity in Career and Technical Education 2* (2016), <https://www.ed.gov/news/press-releases/education-department-releases-guidance-gender-equity-career-and-technical-education>.
- 3 *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996) (internal quotations marks, brackets, and citations omitted).
- 4 See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Texas at Austin*, ___ U.S. ___, 136 S.Ct. 2198 (2016).
- 5 See, e.g., Katherine W. Phillips, *How Diversity Makes Us Smarter*, *Scientific American* (Oct. 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/>.
- 6 See Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors 13-14*, in *Compelling Interesting: Examining the Evidence on Racial Dynamics in Colleges and Universities*, Stanford University Press (2003), https://web.stanford.edu/~hakuta/www/policy/racial_dynamics/Chapter5.pdf.
- 7 See Juan C. Garibay, *Diversity in the Classroom 6*, UCLA Diversity & Faculty Development (2014), <https://equity.ucla.edu/wp-content/uploads/2016/06/DiversityintheClassroom2014Web.pdf> (citing studies finding that diversity “fosters students’ cognitive and personal growth including their cultural knowledge and understanding, leadership abilities, and commitment to promoting understanding” and that students “learn to think more deeply, actively, and critically when they confront their biases and change erroneous information”).
- 8 NWLC calculations based on 2012-2016 American Community Survey (ACS) five-year averages using Steven Ruggles, Katie Genadek, Ronald Goeken, Josiah Grover, and Matthew Sobek. *Integrated Public Use Microdata Series: Version 6.0* [Machine-readable database]. Minneapolis: University of Minnesota, 2018, <http://usa.ipums.org/usa/>. Data are for 2016. These measurements do not include Asian American, Pacific Islander, and Native American students.
- 9 White women hold 41% of master’s degrees, while black women hold 5% and Hispanic women hold 3%. White women hold 29% of doctorate degrees, black women hold 3%, and Hispanic women hold 2%. *Id.*
- 10 NWLC calculations based on National Science Foundation Data Table 5-7: Bachelor’s Degree by Citizenship, Ethnicity, Race, Sex, and Field: 2014, <https://www.nsf.gov/statistics/2017/nsf17310/static/data/tab5-7.pdf> (Last visited November 6, 2018).
- 11 See Heidi Blackburn, *The Status of Women in STEM in Higher Education: A Review of the Literature 2007-2017*, 36 *Sci. & Tech. Libr.* 235, 235–273 (2017), <https://www.tandfonline.com/doi/abs/10.1080/0194262X.2017.1371658>.
- 12 Jacqueline Bichsel & Jasper McChesney, *The Gender Pay Gap and the Representation of Women in Higher Education Administrative Positions: The Century So Far 10* (2017), https://www.cupahr.org/wpcontent/uploads/cupahr_research_brief_1.pdf.
- 13 *Id.*
- 14 Ctr. for Am. Progress, *The Women’s Leadership Gap* (Nov. 2018), <https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/>.
- 15 *Id.*
- 16 *Id.*
- 17 See Mukkamala, S. & Suyemoto, K.L., *Racialized sexism/sexualized racism: A multimethod study of intersectional experiences of discrimination for Asian American women*, 9 *Asian American J. of Psychol.* 32, 32-46 (2018); Maggie Chang, *Made in the USA: Rewriting Images of the Asian Fetish 15-18* (2006), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1005&context=uhf_2006; National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls of Color*, 7-8 (2017), <https://nwl.org/resources/stopping-school-pushout-for-girls-of-color/> (“Let Her Learn”).
- 18 Milkman, et al., *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, 100 *J. of Applied Psychol.* 1678, 1678-1712 (2015), <https://www.apa.org/pubs/journals/releases/apl-0000022.pdf>.
- 19 See generally *Let Her Learn*, *supra* note 17.
- 20 34 C.F.R. § 106.37(a)(1).
- 21 34 C.F.R. § 106.37(b)(1).
- 22 Am. Assoc. of Univ. Women, *Deeper in Debt: Women & Student Loans* (Updated May 2019), <https://www.aauw.org/resources/research/deeper-in-debt/>.
- 23 See Heather McCulloch, *Closing the Women’s Wealth Gap: What It Is, Why It Matters, and What Can Be Done About It* (Updated Jan. 2017), <https://assetbuildingstrategies.com/wp-content/uploads/2017/01/Closing-the-Womens-Wealth-Gap-Jan2017.pdf>.
- 24 See Nat’l Partnership for Women & Families, *America’s Women and the Wage Gap* (2020), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/americas-women-and-the-wage-gap.pdf>.
- 25 Nat’l Women’s Law Ctr., *Low-Wage Jobs Are Women’s Jobs: The Overrepresentation of Women in Low-Wage Work* (2017), <https://nwl.org/resources/low-wage-jobs-are-womens-jobs-the-overrepresentation-of-women-in-low-wage-work/>.
- 26 See Ctr. for First-Generation Student Success, *First-generation College Students: Demographic Characteristics and Postsecondary Enrollment*, <https://firstgen.naspa.org/files/dmfile/FactSheet-01.pdf>.
- 27 See Inst. for Women’s Policy Research & Ascend at the Aspen Institute, *Parents in College: By the Numbers* (2019), https://iwpr.org/wp-content/uploads/2019/04/C481_Parents-in-College-By-the-Numbers-Aspen-Ascend-and-IWPR.pdf.
- 28 See, e.g., *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); *A.H. v. Minersville Area Sch. District*, 408 F. Supp. 3d 536 (M.D. Pa. 2019); *Bd. of Educ. of Highland Local Sch. Dist. V. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016).
- 29 Nat’l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey 135* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.
- 30 See, e.g., *Whitaker*, 858 F.3d at 1049 (applying sex stereotyping theory from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to hold that discrimination against students based on their gender-nonconformance violates Title IX); *Dodds*, 845 F.3d at 221 (defining gender nonconformity as “an individual’s failure to act and/or identify with his or her gender” and finding that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination”) (internal quotations and citations omitted); *Adams*, 318 F. Supp. 3d at 1312 (finding that sex-based discrimination against transgender students was subject to heightened scrutiny under the Equal Protection clause, stating that “[a]ll persons, whether transgender or not, are

- protected from discrimination on the basis of gender stereotype,' which includes 'perceived gender-nonconformity'") (quoting *Glenn v. Brumby*, 663 F.3d 1312, 1318-19 (11th Cir. 2011)).
- 31 This is particularly true if that gender-neutral programming is traditionally male-dominated. As an example, Ohio State University was subjected to a Title IX complaint regarding its single-sex programs. With respect to the contested "Women in Engineering Learning Community," Ohio State did not open the program to men, contending that its co-ed "Engineering House Learning Community" was dominated by male participants, and could be considered "an equitable offering for males not residing in the WIE LC." See *The Lantern, Ohio State Responds to Complaint of Male Discrimination* (Feb. 26, 2020), <https://www.thelantern.com/2020/02/ohio-state-responds-to-complaint-of-male-discrimination/>. The complaint against Ohio State is still under investigation.
- 32 20 U.S.C. § 1681(a)(6)(B).
- 33 Dep't of Educ., Off. of Civ. Rts, *Dear Colleague Letter on Voluntary Youth Service Organizations* 4 (Dec. 15, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201512-voluntary-youth-service-organizations.pdf>.
- 34 *Id.* at 6.
- 35 *Id.* at 4.
- 36 *Id.* at 4-5.
- 37 *Bradwell v. People of the State of Illinois*, 83 U.S. 130 (1872).
- 38 *Plessy v. Ferguson*, 163 U.S. 537 (1896).
- 39 *MacKensie v. Hare*, 239 U.S. 299 (1915).
- 40 *Lum v. Rice*, 275 U.S. 78 (1927).
- 41 *Goesaert v. Cleary*, 335 U.S. 646 (1948).
- 42 *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).
- 43 *Hoyt v. Florida*, 368 U.S. 57 (1961).
- 44 Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).
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- 46 Am. Assoc. of Univ. Women, *The Simple Truth About the Gender Pay Gap: Fall 2019 Update* 1 (2019), <https://www.aauw.org/resources/research/simple-truth/>.
- 47 Black women make 62 cents on the dollar, Hispanic women make 54 cents on the dollar, Native Hawaiian/Pacific Islander women make 61 cents on the dollar, and American Indian or Alaska Native women make 57 cents on the dollar. *Id.*
- 48 Civil Rights Act of 1964, Pub. L. No. 88-352, 74 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. Ch. 21).
- 49 42 U.S.C. § 2000e *et seq.*
- 50 Voting Rights Act of 1965, 52 U.S.C. § 10301.
- 51 Exec. Order No. 11246, 30 Fed. Reg. 12,319 (1965).
- 52 *Reed v. Reed*, 404 U.S. 71 (1971) (overturning state statute preferencing men over women when naming administrators of estates).
- 53 Title IX of the Education Amendments Act, 20 U.S.C. § 1681 *et seq.*
- 54 Fair Housing Act, 42 U.S.C. § 3604.
- 55 Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*
- 56 *Taylor v. Louisiana*, 419 U.S. 522 (1975).
- 57 *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).
- 58 See 42 U.S.C. § 2000e(k).
- 59 *Bakke*, 438 U.S. 265.
- 60 *Rostker v. Goldberg*, 453 U.S. 57 (1981).
- 61 *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).
- 62 Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687.
- 63 *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).
- 64 *U.S. v. Virginia*, 518 U.S. 515 (1996).
- 65 *Id.* at 541.
- 66 *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742 (1998).
- 67 *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).
- 68 *U.S. v. Morrison*, 529 U.S. 598 (2000).
- 69 *Grutter*, 539 U.S. 306.
- 70 *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).
- 71 *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).
- 72 *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).
- 73 *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).
- 74 *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).
- 75 *Coleman v. Maryland Court of Appeals*, 566 U.S. 30 (2012).
- 76 *University of Texas Southwestern Medical Center v. Nassar*, 200 U.S. 321 (2013).
- 77 *Vance v. Ball State University*, 570 U.S. 421 (2013).
- 78 Lily Ledbetter Fair Pay Act of 2009, 42 U.S.C. 2000e-5(e)(3).
- 79 *U.S. v. Windsor*, 570 U.S. 744 (2013).
- 80 *Shelby County v. Holder*, 570 U.S. 529 (2013).
- 81 *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014).
- 82 *Fisher*, 136 S.Ct. 2198.
- 83 *Bostock v. Clayton Cty.*, __ U.S. __, 2020 WL 3146686 (2020).



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