

# ARTICLES

## THE HYPOCRISY OF SEX OR PREGNANCY-BASED AFFIRMATIVE ACTION

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### ABSTRACT

*The Supreme Court's sex-based jurisprudence has always been a mess; the Court, for example, is not even willing to conceptualize pregnancy-based discrimination as sex discrimination. But, oddly, within this mess, the Court has consistently recognized sex-based affirmative action as consistent with its sex discrimination jurisprudence.*

*The Supreme Court's race-based affirmative action jurisprudence has consisted of a different kind of mess, a confusion stemming from its choice to narrowly justify affirmative action in college admissions based on the need for a robust exchange of ideas rather than on the need to remedy centuries of race-based subjugation in our society. After decades of hammering away at this limited justification, the Court has now seemingly abandoned the race-based affirmative action enterprise altogether. This states' rights Court has swept broadly by taking away the opportunity for state and private actors to craft effective affirmative action programs.*

*While critiquing this Court's sex- and race-based jurisprudence, this Article highlights one bizarre but salutary logical outcome from these constitutional strands. Both sex-based and pregnancy-based affirmative action should be found constitutional under the logic of the Court's existing jurisprudence. This Article urges state entities to aggressively push both sex-based and pregnancy-based affirmative action to remedy historical vestiges of discrimination in both arenas while also making the public and the courts see the absurdity of the current situation. While it is hard to imagine the current Court changing course on the need for race-based affirmative action, I hope this Article can help reinvigorate discussions about the Court's approach to race-based affirmative action by drawing on the Court's recognition of the continuing need for sex-based affirmative action. The robust exchange of ideas justification for race-based affirmative action has done its damage and needs to be replaced by an anti-subordination approach, which has been somewhat reflected in the Court's sex-based jurisprudence.*

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## INTRODUCTION

The Supreme Court's sex-based jurisprudence is a mess. Pregnancy is not a sex<sup>1</sup>-based condition, and the level of scrutiny in sex-based discrimination cases is often incomprehensible. But this Article argues that this mess should result in both sex- and pregnancy-based affirmative action being found constitutional.

The mess began in 1974 when the Supreme Court ruled in *Geduldig v. Aiello*<sup>2</sup> that pregnancy is not a sex-based classification invoking heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause.<sup>3</sup> As Professor Sylvia Law noted in 1984, criticizing *Geduldig* became a "cottage industry. Over two dozen law review articles include denunciations of the decision."<sup>4</sup> That criticism continued into the modern era with Justices Ginsburg, Breyer, Sotomayor, and Kagan calling for the decision to be overturned in a 2012 dissenting opinion<sup>5</sup> because "pregnancy discrimination is inevitably sex discrimination, and . . . is tightly interwoven with society's beliefs about pregnancy and motherhood."<sup>6</sup> Nonetheless, in 2023, the Supreme Court majority opinion in *Dobbs* favorably cited *Geduldig* in support of its conclusion that abortion restrictions do not constitute sex-based discrimination and therefore do not trigger heightened

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1. The Court inconsistently uses the terms "sex" and "gender." For consistency, this Article uses the word "sex" except when quoting authors who use the term "gender."

2. 417 U.S. 484 (1974).

3. *Id.* at 496 n.20 ("Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.").

4. Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PENN. L. REV. 955, 983 (1984).

5. *Coleman v. Court of Appeals*, 566 U.S. 30, 56-57 (2012) ("In sum, childbearing is not only a biological function unique to women. It is also inextricably intertwined with employers' 'stereotypical views about women's commitment to work and their value as employees.' Because pregnancy discrimination is inevitably sex discrimination, and because discrimination against women is tightly interwoven with society's beliefs about pregnancy and motherhood, I would hold that *Aiello* was egregiously wrong to declare that discrimination on the basis of pregnancy is not discrimination on the basis of sex.").

6. *Id.*

scrutiny.<sup>7</sup> Thus, pregnancy-based discrimination continues to be subject to mere rational basis scrutiny.

Pregnancy discrimination survived unfavorable treatment by a state actor in *Geduldig*,<sup>8</sup> and this Article argues it should also survive affirmative treatment by state actors in the future. Studies show that women who have children<sup>9</sup> experience a lifetime wage loss of \$49,000 to \$230,000 with higher skilled women suffering the largest wage gap while men who have children earn more than men who do not have children.<sup>10</sup> Affirmative hiring and promotion practices for women who have children could help mediate some of those lost earnings and should easily survive rational basis scrutiny.

The Court also has created a “real differences” line of cases that contributes to the incoherence of sex discrimination doctrine but also can support justifications for pregnancy-based affirmative action. While this line of cases does not involve explicit pregnancy-based discrimination, the Court allows different treatment of men and women based on women’s presumed ability to become pregnant. For example, a state can treat teenage women better than teenage men in the context of statutory rape because of women’s presumed ability to become pregnant,<sup>11</sup> and can make it easier for children to attain U.S. citizenship if their U.S. parent is a woman rather than a man because of the presumed inherent bond between a pregnant woman and the child.<sup>12</sup> The results in these cases look more like rational basis scrutiny than intermediate scrutiny but the Court does not directly offer that rationale.<sup>13</sup> Rather than being based on considerations of women’s historic

7. See *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 236 (2022) (“The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’”).

8. In *Geduldig*, California was permitted to exclude “normal pregnancy” from coverage under its disability insurance program while covering voluntary conditions such as cosmetic surgery and sex-based conditions such as “prostatectomies.” *Geduldig*, 417 U.S. at 499-500 (Brennan, J., Douglas, J. & Marshall, J., dissenting).

9. This Article uses the phrase women who “have children” to include women who bear children as well as women who adopt children. Not all women who “have children” have been pregnant. Given the small number of women who have adopted children, it is likely that more than 98% of women who “have” children have also given birth to those children. See Chinagozi Ugwu & Colleen Nugent, *Adoption-related Behaviors of Women Aged 18-44 in the United States: 2011-2015*, NAT’L CTR. HEALTH STATS (July 2018), <https://perma.cc/KL3Y-9WYX>.

10. Linda Gorman, *How Childbearing Affects Women’s Wages*, NAT’L BUREAU OF ECON. RSCH. (April 2011), <https://perma.cc/P9FU-YQM4> (summarizing a working paper by Elizabeth Ty Wilde, Lily Batchelder & David Ellwood, *The Mommy Track Divides: The Impact of Childbearing on Wages of Women of Differing Skill Levels*).

11. See, e.g., *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding a statutory rape law that imposed criminal liability on the under-age male but not the under-age female).

12. *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001) (upholding a provision in federal law that imposes different requirements for the acquisition of a child’s citizenship depending on whether the citizen parent is the mother or the father).

13. See *Nguyen*, 533 U.S. at 74 (“While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents.”) (O’Connor, J., Souter, J., Ginsburg, J. & Breyer, J., dissenting).

mistreatment due to their presumed ability to become pregnant, these cases are unfortunately based on gender-based stereotypes about women's agency<sup>14</sup> and experience of child-bonding.<sup>15</sup> Nonetheless, these cases would seem to support affirmative treatment based on one's presumed ability to become pregnant, because both of those cases benefited women (and disadvantaged men) under that rationale.

Outside the context of pregnancy-based discrimination, the Court's sex-based jurisprudence offers explicit support for sex-based affirmative action even as the Court seeks to dismantle race-based affirmative action. In 1976, a majority of the Supreme Court, for the first time, invoked what is often called "intermediate" or "heightened" scrutiny<sup>16</sup> to assess the constitutionality of a sex-specific state law.<sup>17</sup> In 1976,<sup>18</sup> and in more modern cases,<sup>19</sup> however, the Court made clear that its use of heightened scrutiny in the sex discrimination context did not overrule cases permitting sex-based affirmative action even while it also began to question the use of ethnic- or race-based affirmative action in the context of college admissions.<sup>20</sup> In fact, in 1978, the *Bakke* Court distinguished the permissibility of sex-based affirmative action from the impermissibility of ethnic- or race-based

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14. For an excellent critique of the *Michael M.* decision, see Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984) (surveying the different strands of feminist analysis that are critical of the decision). For a more contemporary discussion of statutory rape laws and their failure to support greater sexual agency for women, see Leslie Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 UTAH L. REV. 117 (2019).

15. See *Nguyen*, 533 U.S. at 70 ("It is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond."). The dissenting Justices criticize this approach as not meeting the exacting standard of sex discrimination jurisprudence. See *id.* at 87 ("A bare assertion of what is allegedly 'almost axiomatic,' however, is no substitute for the 'demanding' burden of justification borne by the defender of the classification.") (O'Connor, J., Souter, J., Ginsburg, J. & Breyer, J., dissenting).

16. As Justice O'Connor explained in a unanimous opinion, the Court evaluates a sex-based classification under a standard that lies "[b]etween th[e] extremes of rational basis review and strict scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

17. *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

18. *Id.* at 198 n.6 ("Kahn v. Shevin, 416 U.S. 351 (1974) and *Schlesinger v. Ballard*, 419 U.S. 498 (1975), upholding the use of gender-based classifications, rested upon the Court's perception of the laudatory purposes of those laws as remedying disadvantageous conditions suffered by women in economic and military life.").

19. See *Califano v. Webster*, 430 U.S. 313, 320 (1977) (upholding favorable treatment of female wage earners under the Social Security Act because the program was "deliberately enacted to compensate for particular economic disabilities suffered by women"); *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered . . . to 'promot[e] equal employment opportunity,' . . . to advance full development of the talent and capacities of our Nation's people.'").

20. Contrast the cases cited in the previous footnote with *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (rejecting the argument that ameliorating the effects of identified past discrimination could be a constitutionally permissible purpose for race-based affirmative action).

affirmative action in concluding that the California affirmative action program in admissions was unconstitutional.<sup>21</sup> The recognition of the permissibility of sex-based affirmative action continued<sup>22</sup> even as a minority of the Court accused the majority of moving the sex-based jurisprudence to a version of strict scrutiny.<sup>23</sup>

Even though this Article characterizes the sex- and pregnancy-based cases as a jurisprudential mess, this Article accepts those results as the Court's current doctrine and seeks to squeeze lemonade from these lemons. This Article argues that, in the wake of the cataclysmic decision in *Students for Fair Admissions v. President and Fellows of Harvard College*,<sup>24</sup> these bizarre and antiquated sex discrimination decisions are oddly good news for women and those who can become pregnant. They provide the foundation to argue that universities and others can invoke affirmative action in admissions on the basis of sex or pregnancy.<sup>25</sup>

Nonetheless, and of crucial importance, if universities aggressively pursued sex-based and pregnancy-based affirmative action in admissions, one would expect Latino and Black men to lag even further behind white women in their educational opportunities.<sup>26</sup> One might (naively) hope that evidence of such further degradation of the educational opportunities for Latino and Black men might cause the Court to re-think its decision in *Students for Fair Admissions* to reverse course and once again permit race and ethnic-based affirmative action. Ideally, the Court would engage in intersectional analysis by noting the crucial need for educational affirmative action for Latino and Black men.

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21. "Nor is petitioner's view as to the applicable standard supported by the fact that gender-based classifications are not subjected to this level of scrutiny. . . . Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria." *Bakke*, 438 U.S. at 302-03.

22. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citing sex-based affirmative action cases with approval).

23. See *Virginia*, 518 U.S. at 596 ("And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny.") (Scalia, J., dissenting).

24. See *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) (race-based affirmative action programs in admissions violated Title VI of the Civil Rights Act of 1964 and failed strict scrutiny).

25. This Article makes that argument even though I have long argued for both race- and sex-based affirmative action, while recognizing the flexibility of intermediate scrutiny to advance those arguments. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1004-05 (1986) (arguing that intermediate scrutiny has a beneficial flexibility that could be more tolerant of affirmative action than strict scrutiny). I have likewise consistently attacked the *Geduldig* decision, arguing that we should understand abortion restrictions to constitute sex discrimination. See Ruth Colker, *PREGNANT MEN: PRACTICE, THEORY, AND THE LAW* 128-65 (1994) (arguing that pregnancy discrimination should be considered sex discrimination).

26. In 2018, the college enrollment rate of eighteen- to twenty-four-year-olds was 32% for Latino men, 33% for Black men, 39% for white men, 40% for Latino women, 41% for Black women, and 45% for white women. See National Center for Education Statistics, *College Enrollment Rates in THE CONDITION OF EDUCATION 3* (2020), <https://perma.cc/PJ6A-VFQ3>. Because Latino men have lower rates of college enrollment than Black men, and Latino women have lower rates of college enrollment than Black women, it is important to highlight both the ethnic and racial impacts of the Court's recent affirmative action decision.

This Article argues for the legitimacy of sex-based or pregnancy-based affirmative action for two reasons. First, women and those who are capable of or presumed capable of becoming pregnant<sup>27</sup> need affirmative action because of the continued wage-based inequality in the workforce,<sup>28</sup> and elsewhere, based on those characteristics. Second, entities should push sex-based affirmative action aggressively to show the illogic of the Roberts Court's equal protection jurisprudence. Sex-based and pregnancy-based affirmative action should exist alongside ethnic- and race-based affirmative action to help overcome the subordination of various groups in our society. Universities, in particular, should feel free to proclaim loudly that they are engaging in sex-based or pregnancy-based affirmative action to force the Court to clean up its doctrinal mess, while also using every available tool to admit applicants who are ethnic or racial minorities. Furthermore, they should stop relying on an outdated and inherently conservative justification for affirmative action based on a "robust exchange of ideas." That justification has difficulty serving as a rationale outside of the context of a discussion-styled classroom and has little to do with the historical circumstances that have led to a racial underclass. For example, affirmative action is desperately needed in the science and engineering occupations not to spur a robust exchange of ideas in a science lab but to overcome the persistent historical pattern of white men overwhelmingly dominating these professions.<sup>29</sup> It is time to retire the "robust exchange of ideas" rationale for affirmative action.

Part I sets up the hypothetical affirmative action admissions questions that might be asked under the Court's current jurisprudence. Further, it creates the backdrop for a discussion of these affirmative measures by reminding the reader of the kinds of arguments that have *not been* permitted in the ethnicity or race affirmative action context. Part II explains how intermediate scrutiny has, and can continue to, permit broad affirmative use of sex distinctions. Part III explains how the pregnancy discrimination case law permits explicit favoritism for applicants who are pregnant or have the presumed ability to become pregnant. So, what is to be done about this mess? Part IV concludes by suggesting that the Court adopt the anti-subordination perspective that the dissent affirmed<sup>30</sup> in *Students for Fair*

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27. The phrase "capable of or presumed capable of" seeks to include transgender men who can become pregnant and well as cis gender and transgender women who society views as being capable of becoming pregnant even if they are infertile or otherwise incapable of becoming pregnant.

28. See, e.g., *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, NAT'L COMM. ON PAY EQUITY, <https://perma.cc/LS3X-2SL4> ("Over the past 40 years, the real median earnings of women have fallen short by an estimated \$700,000 to \$2 million."). See also *infra* note 10 (discussing pregnancy-based wage disparities).

29. See *Women, Minorities, and Persons with Disabilities in Science and Engineering Occupations: 2015*, NAT'L SCI. FOUND., <https://perma.cc/R9XHE6D2>.

30. See *Students for Fair Admissions*, 600 U.S. at 328 & 339 (arguing that *Brown* recognized the "harmful effects of entrenched racial subordination on racial minorities and American democracy," while also recognizing that from "Harvard's founding, slavery and racial subordination were integral parts of the institution's funding, intellectual production, and campus life.") (Sotomayor, J., Kagan, J. & Jackson, J. dissenting). By contrast, Justice Thomas asked: "Must others in the future make sacrifices to



*Admissions*<sup>31</sup> so that sex-based, pregnancy-based, ethnicity-based, and race-based affirmative action can once again be understood to be constitutional. That conclusion would be based on a recognition of the importance of remedying a history of discrimination against various groups in our society. Anti-subordination would finally be the accepted theoretical framework.<sup>32</sup>

## I. THE BACKDROP

### A. THE NEW ADMISSIONS APPLICATION

Imagine the following application for admissions to a university:

Let us assume that the university asks a candidate to state their gender identity by checking all the boxes that apply:

- Cis Gender Female
- Cis Gender Male
- Nonbinary
- Intrasex
- Transgender Female
- Transgender Male
- Queer
- Other

The university decides to affirmatively consider candidates who checked any of these boxes except for cis gender male. Someone who checked “cis gender male” might be able to challenge that affirmative treatment under the Court’s intermediate scrutiny jurisprudence. The result is uncertain, but the policy may be found to be constitutional under the Court’s current sex-based discrimination doctrine, as discussed in Part II. One problem, as we will see, in upholding this sex-based use of affirmative action is that the Court’s doctrine is mired in the understanding of sex as a rigid, bipolar category. It is not clear if unraveling that assumption would cause the Court’s support for sex-based affirmative action to collapse.

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re-level the playing field for this new phase of racial subordination?”) *Id.* at 283 (Thomas, J., concurring).

31. 600 U.S. at 203 (arguing that “even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students.”). See also *Students for Fair Admissions*, 600 U.S. at 284 (“Must others in the future make sacrifices to re-level the playing field for this new phase of racial subordination? . . . In the wake of the Civil War, the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens’ skin color and focus on their individual achievements.”) (Thomas, J., concurring); *Id.* at 329 n.3 (“At the risk of stating the blindingly obvious, and as *Brown* recognized, the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system.”) (Sotomayor, J., Kagan, J., & Jackson, J., dissenting).

32. See generally Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (arguing for an anti-subordination framework that can be used to uphold race- and sex-based affirmative action).

Now, let us assume that the university asks a candidate to check any of the boxes that apply:

- Currently pregnant
- Capable of becoming pregnant<sup>33</sup>
- Previously pregnant

The university decides to affirmatively consider candidates who checked at least one of those boxes “yes.” Further, let us assume that someone who could not check “yes” to any of those boxes brings a reverse discrimination claim against the university. Under the Court’s current jurisprudence, that challenge would be subject to rational basis scrutiny and the policy would likely be ruled constitutional, as will be discussed in Part III.

By contrast, we know what would happen if the university would ask similar questions to learn an individual’s ethnic or racial identity. Consideration of those kinds of questions would be struck down under the current Court’s version of strict scrutiny.<sup>34</sup>

These results make no sense but the contrasting treatment between ethnic-, race-, and sex-based affirmative action, as well as the bizarre treatment of pregnancy-related discrimination, may help unravel the irrationality of the Court’s current equal protection doctrine.

#### B. RATIONALES REJECTED FOR ETHNIC- OR RACE-BASED AFFIRMATIVE ACTION

While it is obviously true that the Roberts Court has soundly rejected the constitutionality of ethnic- or race-based affirmative action in the college admissions context,<sup>35</sup> the rejection of an anti-subordination rationale for ethnic- or race-based affirmative action has a longstanding presence in the Court’s interpretation of the Fourteenth Amendment. This is not a new development. By contrast, as Part II will discuss, a rejection of an anti-subordination perspective has been less salient in the cases involving sex-based affirmative action.

The starting point in this discussion is *Regents of the University of California v. Bakke*.<sup>36</sup> Plaintiff Allan Bakke sought admission to the Medical School of the University of California at Davis. The Supreme Court affirmed the trial court’s ruling that Bakke be admitted to the Medical School but overturned that aspect of the lower court’s decision that enjoined the Medical School from according any

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33. The university could add the category “presumed to be capable of becoming pregnant” but that category would include those who already checked “cis gender female,” “transgender female,” and possibly some of the other categories such as “intersex” or “queer.”

34. For an extensive critique of applicants checking racial boxes, see *Students for Fair Admissions*, 600 U.S. at 291-94 (arguing that “attempts to divide us all into a handful of groups have become only more incoherent with time”) (Gorsuch, J. & Thomas, J. concurring).

35. See *Students for Fair Admissions*, 600 U.S. at 230 (race-based affirmative action programs in admissions violated Title VI of the Civil Rights Act of 1964 and failed strict scrutiny).

36. 438 U.S. 265 (1978).



consideration to race in its admissions process.<sup>37</sup> Because the Court did not reject the use of race or ethnicity entirely, it started down the path of determining constitutional rationales for ethnic- or race-based affirmative action.<sup>38</sup>

Before discussing what kinds of rationales are permissible under strict scrutiny, the *Bakke* Court contrasted the need for strict scrutiny in the context of race or ethnicity and the need merely for intermediate scrutiny in the sex discrimination context. It said:

Nor is petitioner's view as to the applicable standard supported by the fact that gender-based classifications are not subjected to this level of scrutiny . . . . Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts.<sup>39</sup>

In other words, the Court never expected its discussion of ethnic- and race-based affirmative action to extend beyond the area of race. And, as will be discussed in Part III, the Supreme Court has largely followed the path of being more receptive to sex-based affirmative action than ethnic- or race-based. The Court's (mis)perception of sex as being bipolar (everyone is either a man or a woman for their entire life) seems to have influenced that conclusion. This Article's hypothetical admissions form does not comply with that presumption because this Article does not want to reinforce the Court's historical misunderstanding of sex and gender. It is too soon to know whether the Supreme Court's decision in *Bostock v. Clayton County*<sup>40</sup> is a harbinger of a decision to reject the bipolar conception of sex for constitutional purposes or is merely a text-based interpretation of a statute. For historical purposes, however, it is important to mark the Court's stark bipolar discussion of sex in *Bakke* as a rationale to continue sex-based affirmative action while the Court put the brakes on race- and ethnic-based affirmative action in admissions.

But returning to the holding in *Bakke*, we can see the Court begin to develop a list of permissible and impermissible rationales for race-based affirmative action. In the permissible category, the Court acknowledges that a state can seek to eliminate

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37. *Id.* at 271.

38. The Court also determined that white plaintiffs could bring race discrimination claims under the Court's strict scrutiny framework. *Id.* at 291. That determination is inconsistent with an anti-subordination perspective but is not the focus of this Article.

39. *Id.* at 302-03.

40. 590 U.S. 644 (2020) (finding that transgender discrimination is covered under Title VII of the Civil Rights Act of 1964).

“the disabling effects of identified discrimination,”<sup>41</sup> drawing on school desegregation cases in which courts ordered states to remedy specific instances of racial discrimination. It also suggested that a state could seek to use race-based affirmative action to “improv[e] the delivery of health-care services to communities currently underserved,”<sup>42</sup> but found no evidence that the state’s affirmative action program was “needed or geared to promote that goal.”<sup>43</sup> Finally, the Court concluded that the attainment of a “diverse student body”<sup>44</sup> was permissible because of its link to academic freedom which, in turn, is a “special concern of the First Amendment.”<sup>45</sup>

The “diverse student body” objective was not chosen out of some perceived need to offer remedies or reparations for those who have suffered race discrimination in the United States. Instead, it was chosen because of the ways in which educational communities would benefit from a “robust exchange of ideas.”<sup>46</sup> Although this case was about admission to a medical school, the Court recited language from a case about law schools in which it had said: “Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.”<sup>47</sup> With respect to the practice of medicine, the Court noted that physicians serve a heterogeneous population that would benefit from medical schools training and equipping its graduates to provide services “with understanding their vital service to humanity.”<sup>48</sup> It’s hard to see how a robust exchange of ideas in the classroom would lead to physicians better serving a heterogeneous population but the Court seemingly accepted that connection since, as we will see below, it refused to accept other rationales for race-based affirmative action in admissions.

By contrast, the Court held that states’ entities could not seek to remedy “the effects of ‘societal discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past.”<sup>49</sup> Remedying societal discrimination would “aid[] persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”<sup>50</sup>

Importantly, the limited range of the accepted rationales for race-based affirmative action eventually led to the end of the doctrine. The “robust exchange of ideas” rationale could easily be attacked. Does it apply to K-12 educational spaces? Does it apply to science labs? Does it apply to lecture courses in which

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41. *Id.* at 307.

42. *Id.* at 310.

43. *Id.*

44. *Id.* at 311.

45. *Id.* at 312.

46. *Id.*

47. *Id.* at 314.

48. *Id.*

49. *Id.* at 307.

50. *Id.*

there is limited discussion? Does it apply to employment? By contrast, a rationale grounded in historical patterns of discrimination that include woefully underfunded education for many Black, Latino and Native youth<sup>51</sup> and well-documented prejudice regarding their academic potential<sup>52</sup> could have served as a strong grounding for race-based affirmative action in admissions. Justice Powell was not known for his progressive racial attitudes.<sup>53</sup> Thus, it is no surprise that he picked a weak rationale to support race-based affirmative action in admissions. And, unfortunately, the Court never accepted a stronger rationale as it further limited the applicability of *Bakke* rationale.

Later cases refrained from adding to the list of possible rationales for race-based affirmative action in cases that were outside the context of higher education admissions. In 1986, the Court was confronted with the constitutionality of a school board K-12 policy implemented in 1976-77 and 1981-82 that allowed some minority teachers to be retained during layoffs who had less seniority than nonminority teachers.<sup>54</sup> The district court had ruled, and the court of appeals had affirmed, that the affirmative action policy could be upheld as an attempt to remedy societal discrimination by providing role models for minority children in the K-12 setting.<sup>55</sup> The Supreme Court reversed. It rejected the role model theory as a permissible justification for a racially classified remedy. “Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness . . . [A]s the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive.”<sup>56</sup>

Then, in 2007, in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>57</sup> a case involving K-12 school assignments, the Court said that there were only two possible justifications for race-based affirmative action: (1) remedying the effects of past intentional discrimination<sup>58</sup> and (2) contributing to

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51. *See Districts That Serve Students of Color Receive Significantly Less Funding*, EDUCATION TRUST (Dec. 8, 2022), <https://perma.cc/9J2F-7UTC>. (“Across the country, districts with the most Black, Latino, and Native students receive substantially less state and local revenue – as much as \$2,700 per student – less than districts with the fewest students of color. In a district with 5,000 students, this means \$13.5 million in missing resources.”)

52. *See* Tasmina K. Dhaliwal, Mark J. Chin, Virginia S. Lovison & David M. Quinn, *Educator Bias Is Associated with Racial Disparities in Student Achievement and Discipline*, BROOKINGS (July 20, 2020), <https://perma.cc/VG9N-CVS7>.

53. *See* Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1431 (2020) (Before joining the Court, Justice Powell “spent nearly two decades resisting compulsory integration . . . [and] traveled the country telling audiences that African Americans were owed nothing for injustices of the past.”).

54. *See* *Wygant v. Jackson Board of Education*, 476 U.S. 267, 272 (1986).

55. *Id.* at 272-73.

56. *Id.* at 276.

57. *See* 551 U.S. 701 (2007).

58. *See id.* at 721.

diversity in higher education.<sup>59</sup> It rejected the application of the second state interest to primary and secondary schools, calling the diversity student body interest as “unique to institutions of higher education.”<sup>60</sup> That conclusion was an amazing about-face to the underpinnings of *Brown v. Board of Education*<sup>61</sup> which focused on the per se harm to Black children of being educated in a racially segregated environment.<sup>62</sup> In *Parents Involved*, the Court concluded those harms are only redressable by the legislature if they are the result of intentional discrimination. Thus, state actors could not proactively seek to remedy the absence of racial diversity in K-12 education through race-conscious measures until students got to college when the exposure to a robust exchange of ideas rationale came into effect. Further, this interest in racial diversity did not seem to extend from higher education to any other area of life, such as the workplace,<sup>63</sup> because the Court considered higher education to have a unique relationship to the First Amendment.

*Students for Fair Admissions* rejected the state interests that the Court had previously concluded could satisfy strict scrutiny. The previously approved goal of promoting a robust exchange of ideas was now described as incoherent. Focusing on the administrative difficulty of implementing this previously approved state interests, the Court asks: “How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.”<sup>64</sup>

But the *Students for Fair Admissions* Court did not eliminate all possible state interests as failing strict scrutiny. Courts can still “ask whether temporary racial segregation of inmates will prevent harm to those in the prison.”<sup>65</sup> Further, courts can consider race as part of a remedial measure after intentional discrimination has been found at the workplace or the public schools.<sup>66</sup> Somehow, it is acceptable to draw conclusions about race and violence in the prison context,<sup>67</sup> but race

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59. See *id.* at 722.

60. *Id.* at 725.

61. 349 U.S. 294 (1955).

62. *Id.*; As Justice Stevens notes in his dissent, “There is a cruel irony in the Chief Justice’s reliance on our decision in [*Brown*]. The first sentence in the concluding paragraph of his opinion states: ‘Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. *Ante.* at 2767-2768. The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court’s most important decisions.” *Parents Involved*, 551 U.S. at 799 (Steven, J., dissenting).

63. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989) (limiting use of race-based affirmative measures in city contracting to efforts to eliminate private discrimination within its own legislative jurisdiction); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) (applying *Croson* to federal government program and invaliding aspect of program that allowed “subcontractors to invoke the race-based presumption for social and economic disadvantage”).

64. *Students for Fair Admissions*, 600 U.S. at 215.

65. *Id.* at 215.

66. *Id.* at 215.

67. See *Johnson v. California*, 543 U.S. 499, 515 (2005) (“Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts.”).

no longer presumptively matters outside of that context. A college admissions committee can no longer assume that a Black male applicant may have faced racial prejudice and stereotyping as he walked down the street or entered a classroom.<sup>68</sup> Those considerations are limited to prisons. Schools have few tools to try to stop the school to prison pipeline; race-based integration tools are not one of them.

Thus, the Supreme Court has not simply shut the door on ethnic- and race-based affirmative action in the arenas of education and work, it has done so through an opinion based on its own racial stereotypes about race and violence. How far we have come. But, as will be discussed further below, this is purely an ethnic and racial journey. The Court has not slammed the door as firmly against sex- and pregnancy-based affirmative action and seems willing to consider the societal discrimination arguments in that context although those cases are rooted in deep-seated gender and sex stereotypes.

## II. SEX-BASED AFFIRMATIVE ACTION

The Court has insisted that sex-based discrimination receives intermediate rather than strict scrutiny. What is the difference between the two? One can argue that intermediate scrutiny is less likely to invalidate governmental action than strict scrutiny.

The Court has upheld what can be described as sex-based affirmative action in a long line of cases. None of them have been overturned. Let's look at them in chronological order to see how the Court dismissed many of the arguments currently made to overturn race-based affirmative action to uphold sex-based affirmative action.

In 1974, the Supreme Court reviewed a Florida statute that provided a \$500 property tax exemption for (female) widows but not (male) widowers in *Kahn v. Shevin*.<sup>69</sup> As a backdrop to this case, the Supreme Court had already found unconstitutional an Idaho statute that dictated a preference for men over women as the executor of an estate in *Reed v. Reed*.<sup>70</sup> It also had found unconstitutional a federal statute that allowed a male service member to automatically treat his wife as a dependent but only allowed a female service member to do so if her husband was, in fact, dependent upon her for more than one-half of his support in *Frontiero v. Richardson*.<sup>71</sup> Further, four members of the *Frontiero* Court had indicated their approval of strict scrutiny in the sex discrimination context, but Justice Powell's concurrence, which was joined by Chief Justice Burger and

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68. See, e.g., John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, J. PERSONALITY & SOC. PSYCHOLOGY 59, 59 (Mar. 13, 2017), <https://perma.cc/TY5U-R7GY>. ("The results of 7 studies showed that people have a bias to perceive young Black men as bigger (taller, heavier, more muscular) and more physically threatening (stronger, more capable of harm) than young White men.").

69. 416 U.S. 351 (1974).

70. 404 U.S. 71 (1971).

71. 411 U.S. 677 (1973).

Justice Blackmun, urged the Court to wait on announcing strict scrutiny until the Equal Rights Amendment completed the ratification process.<sup>72</sup> Thus, when the Court heard *Kahn*, it was possibly on the brink of ruling that sex discrimination was subject to strict scrutiny so that the case law in the race and sex discrimination areas would be equivalent.

A further complication in *Kahn* was that the lawyer arguing the case for the male widower who sought the property tax exemption was feminist icon Ruth Bader Ginsburg. Ginsburg argued as an amicus curiae, by special leave of the Court, in *Frontiero v. Richardson* where she supported strict scrutiny for sex discrimination cases.<sup>73</sup> Ginsburg likewise sought strict scrutiny in *Kahn* and thought application of strict scrutiny would allow the male widower to prevail. A victory for Ginsburg's position would arguably limit an affirmative action program for female widows and allow strict scrutiny to be a tool in that decision.

The male widower lost in *Kahn*. The Court upheld the sex-based property tax exemption, relying on generalities about the economic status of most women and most men following the death of their spouse to uphold this law. There was no discussion of whether the male plaintiff fit that generality.<sup>74</sup> While recognizing that Congress had taken steps to ban sex discrimination in the workforce, the Court said:

But firmly entrenched practices are resistant to such pressures, and, indeed, data compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males – a figure actually six points lower than had been achieved in 1955.<sup>75</sup>

Then focusing on widows, the Court stated: "While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her economic dependency, she will have fewer skills to offer."<sup>76</sup> Thus, the Court concluded the law could be upheld as one that was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."<sup>77</sup>

It is difficult to discern the level of scrutiny in *Kahn*. The six-member Court majority suggests that mere rational basis scrutiny attaches because this case involved a state tax law.<sup>78</sup> Even if one considers this case to be an application of

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72. *Id.* at 691 (Powell, J., Burger, C.J. & Blackmun, J., concurring).

73. *Id.* at 678.

74. The briefs and filings on Westlaw provide no facts about the plaintiff's financial circumstances.

75. *Kahn*, 416 U.S. at 353.

76. *Id.* at 354.

77. *Id.* at 355.

78. *Id.*



rational basis scrutiny, it is important to recognize that the Court upheld the use of a sex-based distinction in the tax code to remedy a historical pattern of discrimination under rational basis scrutiny. In other words, it is an arguable victory for the societal discrimination against women rationale to justify affirmative action.

Justices Brennan and Marshall dissented because they believed the state policy could not survive “close judicial scrutiny.”<sup>79</sup> They accepted the argument that the state should be able to remedy “the economic effects of past sex discrimination for needy victims of that discrimination”<sup>80</sup> but concluded that the state did not bear “its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means.”<sup>81</sup> In other words, they were trying to develop a version of strict scrutiny – that would be applied in both the race and sex contexts – in which race- or sex-specific rules could be used to help overcome historical discrimination so long as they were narrowly tailored to only reach individuals in that category. They objected that the \$500 property tax exemption could “be obtained by a financially independent heiress as well as by an unemployed widow with dependent children.”<sup>82</sup>

But notice the agreement among eight members of the Court. They did not object, in theory, to the tax code being used to help individuals overcome longstanding discrimination at the workplace. Six members of the Court offered a lenient approach to that issue, two offered a more stringent approach. But, unlike *Bakke* (which was on the horizon), there was no objection to the consideration of broad economic discrimination in society as a basis for a state policy.

In 1975, the Court made it even clearer that it was willing to uphold sex-based affirmative measures to improve women’s status at the workplace. *Schlesinger v. Ballard*<sup>83</sup> involved the constitutionality of a federal policy that allowed women in the Navy to serve thirteen years before facing an “up or out” promotion policy, while allowing men to serve less than thirteen years before being subject to mandatory discharge for want of a promotion.<sup>84</sup> The male plaintiff had been discharged after nine years of service.<sup>85</sup> The Court upheld that policy but recognized that it had previously overturned a different federal policy that adversely affected women in the military.<sup>86</sup> In other words, it could distinguish between harmful and affirmative use of sex-specific policies.

The *Schlesinger* Court upheld the differential treatment of male and female service members because their different treatment was not a result of “archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to

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79. *Id.* at 357 (Brennan, J. & Marshall, J. dissenting).

80. *Id.* at 359-60.

81. *Kahn*, 416 U.S. at 360.

82. *Id.*

83. 419 U.S. 498 (1975).

84. *Id.* at 499-500.

85. *Id.* at 500.

86. *See Frontiero v. Richardson*, 411 U.S. 677 (1973).

opportunities for professional service [through] restrictions on women officers' participation in combat and in most sea duty."<sup>87</sup> The Court upheld this affirmative treatment of female officers even though it acknowledged that the affirmative rules for female officers probably caused male attrition to occur two years earlier.<sup>88</sup> Oddly, Justices Brennan, Douglas and Marshall dissented, arguing that the majority erred in concluding that the statute served a compensatory goal but they agreed that the compensatory justification is what allowed the majority to uphold the statute.<sup>89</sup> No member of the Court questioned whether Congress could constitutionally enact legislation that created a sex-based preference for women.

In 1977, the Court again upheld favorable treatment for women through a compensatory remedy regime. Until 1972, the Social Security Act had allowed women to eliminate more low-earning years from the calculation than men in determining their retirement benefits.<sup>90</sup> The male plaintiff was awarded his benefits based on an eighteen-year record of earnings; he argued that he would have received more compensation if he had been able to use the fifteen-year calculation for women.<sup>91</sup> A unanimous Court upheld the provision, because it served a compensatory purpose. "The challenged statute operated directly to compensate women for past economic discrimination."<sup>92</sup> The Court spent no time considering whether it was appropriate for all women to receive this preferential treatment because of the discrimination that some women may have faced in the workforce. Nor did it consider whether it was fair to provide this compensatory treatment to women, but not racial minorities, who may have faced equivalent discrimination.

Despite this straight march towards approving affirmative action in the form of compensatory treatment of women, the Court put the brakes on similar affirmative action in the ethnic and race arenas in *Bakke* merely a year later. And, as discussed above, the Court was aware that it was treating ethnic- and race-based affirmative action differently than sex-based affirmative action in 1978. It deliberately went down that path.

One might explain that differential treatment by suggesting that the Court had not yet gotten around to disapproving sex-based affirmative action. But that is not what happened. In 1996, while it continued to dismantle race-based affirmative action,<sup>93</sup> the Court cited with approval the prior case law permitting compensatory treatment of women.<sup>94</sup> One can imagine that, in 1996, the Court was still mired in the *Bakke* discussion of the compensatory treatment of women – that it could be justified because sex is a bipolar category so that there is less

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87. *Schlesinger*, 419 U.S. at 508 (emphasis in original).

88. *Id.* at 505.

89. *Id.* at 512 (Brennan, J., Douglas, J., and Marshall, J., dissenting).

90. *See Califano v. Webster*, 430 U.S. 313, 314 (1977).

91. *Webster v. Secretary of Health, Educ. & Welfare*, 413 F. Supp. 127, 128 (E.D. N.Y. 1976).

92. *Califano*, 430 U.S. at 318.

93. *See Infra* Part IB.

94. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (upholding compensatory sex-based distinctions).

competition between groups to be winners and losers for compensatory treatment. Or, one can imagine the Court believed that intermediate scrutiny was so weak that it was easy for government entities to defend adverse treatment of men to benefit women. Or, the Court may just not have yet gotten around to eliminating sex-based affirmative action.<sup>95</sup> Under the first two options, sex-based affirmative action survives constitutional review.

### III. BIOLOGICAL DIFFERENCES CASE LAW

Even if one doesn't accept the argument that intermediate scrutiny is more likely to permit affirmative action than strict scrutiny, there is a huge escape hatch in the sex discrimination case law in which the Court only uses rational basis scrutiny to assess different treatment based on the "real" biological differences between men and women. The earliest pronouncement of this theory was *Geduldig v. Aiello*.<sup>96</sup> In *Geduldig*, California was permitted to exclude "normal pregnancy" from coverage under its disability insurance program while covering voluntary conditions such as cosmetic surgery and sex-based conditions such as prostatectomies.<sup>97</sup>

Despite the heavy criticism of that case,<sup>98</sup> it was cited favorably in *Dobbs v. Jackson Women's Health Organization*.<sup>99</sup> Thus, six members of the current Court ascribe to its perspective.

If universities, for example, would say that they are providing affirmative treatment to those who have the presumed ability to become pregnant, then it would appear that only rational basis scrutiny would apply. Since nearly all female applicants to universities are under the age of 40, it is common to presume that they have the ability to become pregnant. And older women (who might be post-menopausal) could possibly be included if they *have* given birth to a child. Their proven ability to become pregnant could cause them to be added to the favored class.

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95. Arguably, there is language in *Bostock v. Clayton County*, 590 U.S. 644, 659 (2020) upholding an interpretation of Title VII that only looks at the harm to an individual rather than a group. That language, however, is focusing on the statutory language of Title VII, which repeatedly refers to discrimination against an "individual." Constitutional interpretation and statutory interpretation are not always identical. For example, Congress amended Title VII to clarify that pregnancy discrimination is sex discrimination, but the Court persists in stating that pregnancy discrimination is not sex discrimination for constitutional analysis. See Section 1 of the Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U.S.C. § 2000e(k), adding subsection (k) to § 701 of the Civil Rights Act of 1964 ("the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy"). For discussion of the Court's treatment of pregnancy discrimination under the Constitution, see *infra* Part III.

96. 417 U.S. 484 (1974).

97. *Id.* at 499-500 (Brennan, J., Douglas, J. & Marshall, J., dissenting).

98. See *infra* note 4.

99. 597 U.S. at 236 ("The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.'").

Under rational basis scrutiny, a university could argue that it is merely providing affirmative treatment to those who have the presumed ability to become pregnant due to the unique challenges that that particular health condition poses to the affected group. Just as a state may choose to ban abortion, it might choose to treat those who can or have become pregnant affirmatively to encourage them to choose childbirth over abortion. Because one's income is predicted to be higher if one has a college education,<sup>100</sup> then one can see a link between the affirmative admissions program and future earning power of those who can become pregnant. The feminization of poverty has been long documented and negatively affects both women and children as poor women are likely to raise children without financial assistance from a partner.<sup>101</sup> Rather than take a punitive approach to the treatment of pregnant women, a state might choose to take an affirmative approach that treats them preferentially.

In *Dobbs*, the Court applied rational basis scrutiny to state restrictions on abortion, saying restrictions could be justified through the "legitimate interests" of "respect for and preservation of prenatal life at all stages of development, . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."<sup>102</sup> States were permitted to further those legitimate interests by restricting abortion even though, for example, those restrictions might have a profound negative effect on maternal health and safety.<sup>103</sup>

In response to the state's affirmative treatment of people who have the presumed ability to become pregnant, one might offer two critical responses. First, one might argue that the program is wildly overinclusive in that it provides affirmative treatment to those people who may never choose to become pregnant or have family wealth that could temper the economic impact of pregnancy. But programs are allowed to be overinclusive under rational basis scrutiny so long as they seem to seek to attain some legitimate state interest. Given the connection between pregnancy and poverty, as well as the positive connection between college education and earning capacity, this program would easily meet legitimate state interests.

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100. "Men with bachelor's degrees earn approximately \$900,000 more in median lifetime earnings than high school graduates. Women with bachelor's degrees earn \$630,000 more." See *Research, Statistics & Policy Analysis*, SOCIAL SEC. ADMIN. <https://perma.cc/5TM2-63WH>.

101. See RUTH SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA*, xvi (1986) (explaining that 48% of poor families are headed by women).

102. *Dobbs*, 597 U.S. at 236.

103. The extent to which abortion bans can impair the health and well-being of pregnant women is at the heart of a lawsuit pending in Texas. State district court judge Jessica Mangrum issued a temporary exemption to the state's abortion ban "that would allow women with complicated pregnancies to obtain the procedure and keep doctors free from prosecution if they determined the fetus would not survive after birth." Texas appealed that ruling and the case is currently on appeal to the Texas Supreme Court. See William Melhado, *Texas AG Appeals Judge's Order that Allows Women with Complicated Pregnancies to Get Abortions*, THE TEXAS TRIBUNE (Aug. 4, 2023), <https://perma.cc/GG62-RP8M>.

Second, one might argue that the program is intended to “effect an invidious discrimination” against one sex or another. But it is hard to see how that standard could be met. The state is sincerely trying to ameliorate the negative effect of pregnancy in the lives of those who have the presumed ability to become pregnant. To the extent that some men have the ability to become pregnant, they would be covered under this program. Further, the male or female partners of women who can attain a college education due to this program would likely benefit as their family may be less likely to live in poverty.

Thus, there is nothing pretextual about a state trying to use its policies to help potentially pregnant people escape poverty. Just as *Dobbs* leaves abortion restrictions to the states, a future Court could conclude that *Dobbs* leaves positive treatment of pregnancy to the states as well. It is a policy area in which they should be free to legislate.

#### IV. CONCLUSION

This article has proceeded along a path that should be seen as a farcical exercise. It makes no sense to try to improve women’s educational and economic opportunities through affirmative state admissions policies while not permitting such a positive path for racial and ethnic minorities. In fact, as Professor Serena Mayeri argued in 2008, civil rights advocates should push for the Court’s race-based affirmative action jurisprudence to benefit from the recognition of the need for sex-based affirmative action programs.<sup>104</sup> The need for that benefit has never been more urgent.

In 2018, the college enrollment rate of 18- to 24-year-olds was 32% for Latino men, 33% for Black men, 39% for white men, 40% for Latino women, 41% for Black women, and 45% for white women.<sup>105</sup> If we want to help disadvantaged groups from escaping poverty, our attention should be focused on Latino men and Black men, who have the lowest rate of college enrollment.

I have long argued that we need an anti-subordination perspective to assess what kinds of state action are constitutional.<sup>106</sup> Justice Sotomayor’s dissent in *Students for Fair Admissions* details the racial subordination that is at the bedrock of esteemed institutions like Harvard.<sup>107</sup> She then argues, using an anti-subordination

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104. See Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1790 (2008) (arguing “how advocates and their judicial allies argued that sexual equality jurisprudence could and should be a template for the constitutional treatment of race-based affirmative action”).

105. See Nat’l Ctr. for Educ. Stats., *College Enrollment Rates in THE CONDITION OF EDUCATION 1, 3* (2020), <https://perma.cc/UQ7M-QPN6>.

106. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007); Ruth Colker, *Reflections on Race: The Limits of Formal Equality*, 69 OHIO STATE L. J. 1089 (2008); RUTH COLKER, *WHEN IS SEPARATE UNEQUAL?: A DISABILITY PERSPECTIVE* (2009).

107. See *Students for Fair Admissions*, 600 U.S. at 339 (“From Harvard’s founding, slavery and racial subordination were integral parts of the institution’s funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments.”) (Sotomayor, J. Kagan, J. & Jackson, J., dissenting).

lens, that it “is against this historical backdrop that Harvard and UNC have reckoned with their past and its lingering effects. Acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion.”<sup>108</sup> The plaintiffs successfully argued “that Harvard should adopt a plan designed by SFFA’s expert for purposes of trial, which increases preferences for low-income applicants and eliminates the use of race and legacy preferences. . . . Under SFFA’s model, however, Black representation would plummet by about 32%, and the admitted share of applicants with high academic ratings would decrease, as would the share with high extracurricular and athletic ratings.”<sup>109</sup> An anti-subordination perspective is needed to attain meaningful racial diversity; race-neutral models do not get there, as SFFA’s own model demonstrates.

So, we are at a peculiar crossroad. Remarkably, we could continue to offer affirmative treatment of women and those presumed to be capable of being pregnant, but cannot extend such affirmative treatment to racial and ethnic minorities. That path would likely widen the existing education gap between women (of all races) and Black and Latino men. The appropriate path is not to eliminate sex- and pregnancy-based affirmative treatment; the appropriate path is to re-establish the constitutionality of ethnic- and race-based affirmative action alongside sex and pregnancy-based affirmative action. The recognition of the importance of an anti-subordination rationale for affirmative action, rather than a robust exchange of ideas rationale, could help us move in that direction.

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108. *Id.* at 341.

109. *Id.* at 346.