

**TRANS-CENDING SPACE IN WOMEN’S ONLY SPACES:
TITLE IX CANNOT BE THE BASIS
FOR EXCLUSION**

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INTRODUCTION

When Cerri Banks started as Dean of Mount Holyoke College in fall of 2011, “assess[ing] the campus climate to see how it can better support diversity and inclusivity” was high on her list of priorities.¹ This is not surprising considering that Mount Holyoke College students hail from forty-eight states and seventy countries, and twenty percent of its student body is international citizens.² What some may find surprising, however, is that the newest dean of the oldest women’s college in the world wants to ensure an inclusive environment for non-women; among her priorities is making the campus more inclusive for transgender individuals.³

The presence of transgender students on many private women’s college campuses has garnered attention from the media⁴ and academia,⁵ and has

¹ Allie Grasgreen, *Women's Colleges and Ex-Women*, INSIDE HIGHER ED. (July 28, 2011), http://www.insidehighered.com/news/2011/07/28/new_mount_holyoke_degree_prompts_examination_of_women_s_college_transgender_policies#Comments.

² *Fast Facts*, MOUNT HOLYOKE COLLEGE, <http://www.mtholyoke.edu/about/facts.html> (last visited Apr. 5, 2012).

³ See Grasgreen, *supra* note 1.

⁴ See, e.g., Adrian Brune, *When She Graduates as He*, BOS. GLOBE MAG. (Apr. 8, 2007), http://www.boston.com/news/globe/magazine/articles/2007/04/08/when_she_graduates_as_he/?page=full; Krystie Yandoli, *California Bills Can Set Precedent for Women's Colleges to Sharpen Transgender Policies*, NATION (Dec. 19, 2011), <http://www.the-nation.com/blog/165234/california-bills-can-set-precedent-womens-colleges-sharpen>

produced heated debate among campus communities and alumni.⁶ Some, however, may not find including transgender students surprising. Given that many women's colleges claim to "operate to dissipate . . . traditional gender classifications,"⁷ choosing a women's college may be an easy decision for prospective students questioning their gender identities.

In many ways, the tensions raised by including transgender students at women's colleges are as old as the feminist movements themselves. The history of the fight to end sex discrimination in the United States is oft criticized as an exclusive movement for straight, upper or middleclass, white women that excluded lesbians, women of color and poor women.⁸ Tensions of inclusion and exclusion exposed by embracing the similarities and synergies between the women's and transgender rights movements may be captured within an institution's own policies. Despite many women's colleges' concern for and sensitivity toward the needs of their transgender communities, they simultaneously discriminate against *prospective* members of that community; there is no women's college that claims to *admit* any student identifying as anything other than female, and most do not have a formal policy regarding the continued enrollment of those students who identified as female at the time of admission but identify otherwise while enrolled.⁹

transgender-policies; Don Troop, *Women's University to Reconsider Hard Line on Transgender Students*, CHRON. HIGHER ED. (Oct. 23, 2011), <http://chronicle.com/article/Womens-University-to/129490/?key=Sz0mKFIwYSIEZnllNzoWZT1QYCNhMk17YyYdPi0nbltUFg%3D%3D>; Alissa Quart, *When Girls Will be Boys*, N.Y. TIMES MAG. (Mar. 16, 2008), <http://www.nytimes.com/2008/03/16/magazine/16students-t.html?n=Top/Reference/Times%20Topics/Organizations/B/Barnard%20College&pagewanted=print>.

⁵ See, e.g., Laura MinSun Brymer, *Better Dead than Co-Ed? Transgender Students at All-Women's Colleges*, 18 WM. & MARY J. WOMEN & L. 135 (2011) (arguing for a looser definition of "women's college"); Cathy Perifimos, *The Changing Faces of Women's Colleges: Striking a Balance Between Transgender Rights and Women's Colleges' Right to Exclude*, 15 CARDOZO J.L. & GENDER 141 (2008) (discussing balancing transgender rights with the right to exclude); Susan B. Marine, *Navigating Discourses of Discomfort: Women's College Student Affairs Administrators and Transgender Students* (May 2009) (unpublished Ph.D. dissertation, Boston College Lynch School of Education) (on file with Boston College Library), available at http://dcollections.bc.edu/R/-?func=dbin-jump-full&object_id=95248&local_base=GEN01-BCD03.

⁶ See, e.g., Cortney Harding, *Wellesley Slights Transgendered Alum, Sparks Debate About What it Means to be a "Women's College"*, ALTERNET.ORG (May 20, 2011), <http://alternet.org/story/150982>. Additionally, a Facebook group exists titled "Keep Mount Holyoke, Wellesley and Smith Single-Sex!" Group, *Keep Mount Holyoke, Wellesley, and Smith Single-Sex!*, FACEBOOK, <http://www.facebook.com/groups/42690181982> (last visited April 5, 2012).

⁷ Brief of Twenty-Six Private Women's Colleges as Amici Curiae in Support of Petitioner at 5, *United States v. Virginia*, 518 U.S. 515 (1995) (Nos. 94-1941, 94-2107) [hereinafter Brief of Women's Colleges]. It should be noted that Mount Holyoke College was not a signatory to this amicus brief.

⁸ KARLA JAY, *TALES OF THE LAVENDER MENACE: A MEMOIR OF LIBERATION* 145 (2000).

⁹ See, e.g., Grasgreen, *supra* note 1:

Mount Holyoke at this point has no written policies, but Banks shrugged that off, saying the college's historical practice is just as authoritative. . . . Smith College also did not specify, but pointed to its website, which says, "Smith does not track

Nor does there appear to be any policy regarding transwomen who passed as female in the admissions process but were later outed as transgender.

The reason most cited to account for this informal policy of discriminatory admission followed by inclusive enrollment is Title IX of the Education Amendments of 1972.¹⁰ The rationale is as follows: although Title IX allows single-sex colleges to discriminate based on sex, they would be in violation of Title IX if they were to admit a student who was not the sex the particular institution serves. Therefore, if a women's college were to admit a student identifying as male (or not identifying as female), the institution would jeopardize its federal funding. Alternatively or additionally, institutions argue that if they admit individuals who do not identify as women they will be required to provide equal access accommodations, and their failure to do so would result in a Title IX violation.

First, recent cases involving discrimination against gender nonconforming individuals, brought both under Title VII for discrimination in the work place and Title IX for discrimination in education, suggest that Title IX is an inclusive tool that protects transgender individuals from discrimination the same way it protects women.¹¹ Therefore, using Title IX as a tool for exclusion in the former argument conflicts with contemporary interpretations of Title IX.

Second, the latter argument is flawed because Title IX does not force an institution not to admit transgender individuals; rather, it forces institutions to accommodate them once they are enrolled. It is thus erroneous for institutions to hold Title IX up as a shield to criticism directed at their exclusive admission policy to deflect attention from their choice not to invest in accommodating non-female-identifying students. In addition, such an argument is incongruous with a policy of inclusive enrollment like the one championed by Dean Banks.

This Note argues that while women's colleges may have questionably tenable or legitimate reasons for refusing to admit individuals who do not

statistics related to the gender identity, gender expression or sexual orientation of its students. Once admitted, any student who completes the college's graduation requirements will be awarded a degree." One residence life official at Smith said she knows students who have transitioned to male while at the college and graduated. Mills College "only considers female applicants for undergraduate admission," and like Smith will graduate any admitted student who completes the requirements.

See also, e.g., Perifimos, *supra* note 5, at 164:

Barnard's Dean of Admissions states that, for the purposes of reviewing applications, her office adheres to "what the government says is a legal definition of a woman." . . . The Dean of Admissions does note, however, that she relies on certain cues in the application, such as the social security number, essays and teacher recommendation letters to provide some idea of the applicant's gender identity.

¹⁰ 20 U.S.C. §§ 1681–1688 (2006); *see also* Grasgreen, *supra* note 1 (noting that gender inclusiveness at women's colleges "is complicated by Title IX").

¹¹ *See* discussion in *infra* Part III.

identify as female, they cannot rely upon Title IX to avoid defending that difficult decision because Title IX has been interpreted to protect transgender individuals. In addition, I refute the argument that admitting transgender individuals would inevitably lead to coeducation because transgender individuals and cis-women are both historically and currently marginalized on the basis of gender.

The argument will proceed in six parts. Part I will discuss transgender discrimination and how Title VII and Title IX prohibit gender discrimination against transgender and gender nonconforming individuals. Part II will discuss women's colleges' ability to discriminate based upon sex in light of Title IX's affirmative action provision and Equal Protection jurisprudence. Next, Part III will consider the evolution of Women's Liberal Arts Colleges that has led to their contemporary missions that comply with Title IX and Equal Protection jurisprudence. Part IV will argue that admitting transgender individuals does not jeopardize the legality of women's colleges' sex-specific admissions policies, and Part V argues that Title IX's affirmative action provision not only allows women's institutions to admit transgender individuals, but that affirmatively admitting transgender individuals is one way to help remedy the discrimination in education experienced by gender nonconforming people. Finally, Part VI concludes that while there may be other mission-specific reasons women's institutions choose not to admit transgender individuals, Title IX should not be used as a crutch to enable the decision to exclude.

I. TRANSGENDER DISCRIMINATION AND TITLE IX

A. *Transgender Discrimination in Education*

Ninety percent of transgender students experience harassment at school.¹² Over half of them experience physical violence due to their gender expression, and forty-six percent report missing at least one day of school in the past month because they felt unsafe or uncomfortable.¹³ Transgender students are victims of verbal and physical harassment more often than any other students harassed on the basis of gender expression.¹⁴ Not surprisingly, this harassment leads to decreased academic performance; "transgender students who experienced high levels of harassment had significantly

¹² Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools*, GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK 10 (2009), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1375-1.pdf.

¹³ *Id.* at xi.

¹⁴ Tonei Glavinic, *Research Shows Lack of Support for Transgender and Gender-Nonconforming Youth in U.S. School Systems*, STUDENT PULSE, <http://www.studentpulse.com/articles/135/research-shows-lack-of-support-for-transgender-and-gender-nonconforming-youth-in-us-school-systems#> (last visited Apr. 5, 2012).

lower grade point averages than those who experienced low levels of harassment.”¹⁵ This harsh reality demands something be done to address the educational opportunities foregone by transgender students at the hands of others’ discrimination. Title IX was enacted to eliminate discrimination based on sex and is one possible avenue to remedy the deplorable violence experienced by transgender individuals.¹⁶

B. *Title IX as a Shield Against Transgender Discrimination*

In September 1990, Jennifer Miles enrolled in graduate school at New York University to pursue a degree in musicology.¹⁷ In February 1993, Professor Cliff Eisen made advances toward Ms. Miles by fondling her breasts, buttocks, and crotch and making forcible attempts to kiss her.¹⁸ Ms. Miles was treated with hostility from professors after filing grievances through NYU’s formal procedures. When she brought a Title IX suit against NYU, the institution asserted a troubling defense—it claimed Jennifer Miles was not protected under Title IX because “although admitted to the school as a female and at all relevant times treated as such, plaintiff is in fact a male-to-female transsexual who, at the time of the professor’s alleged conduct was in the process of becoming a female.”¹⁹

Fortunately for Ms. Miles, the court rejected NYU’s defense that she was not protected because she was not discriminated against because of her sex.²⁰ The court stated that “[t]he issue before us is whether Title IX protects a biological male who has been subjected to discriminatory conduct while perceived as female,”²¹ and reasoned that “[t]here is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to Professor Eisen and everyone else at the university, plaintiff was not a biological female.”²² The court went on, “Title IX was enacted precisely to deter that type of behavior, even though the legislators may not have had in mind the specific fact pattern here involved.”²³ Many courts

¹⁵ Greytak, *supra* note 12, at xii.

¹⁶ See, e.g., Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 *CARDOZO J.L. & GENDER* 337 (2005); Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation’s Schools*, 86 *IND. L.J.* 827 (2011); Susan H. Duncan, *College Bullies—Precursors to Campus Violence: What Should Universities and College Administrators Know About the Law?*, 55 *VILL. L. REV.* 269 (2010); Susan Hanley Kosse & Robert H. Wright, *How to Best Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?*, 12 *DUKE J. GENDER L. & POL’Y* 53 (2005); Tina Sohaili, *Securing Safe Schools: Using Title IX Liability to Address Peer Harassment of Transgender Students*, 20 *L. & SEXUALITY REV.* 79 (2011).

¹⁷ Miles v. N.Y. Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997).

¹⁸ *Id.*

¹⁹ *Id.* at 248–49.

²⁰ *Id.*

²¹ *Id.* at 249.

²² *Id.*

²³ *Id.* at 250.

have subsequently followed this interpretation of Title IX's anti-discriminatory purpose.²⁴

1. *Sexual Harassment in School & Title IX*

In many ways, *Miles*, decided in 1997, was ahead of its time and illustrated two important points: one, that transgender individuals are protected under Title IX based upon their *perceived* gender identity; and two, that protection follows even though legislators may not have had transgender individuals in mind at the time of enactment, and may have conceived of sex or gender as a male-female dichotomy.²⁵

At the time Ms. Miles's case was decided, there was a split among the courts as to whether or not Title IX conferred a right of action against an educational institution for sexual harassment of a student by a teacher; it is now settled law that Title IX confers a right of action in such a case.²⁶ In *Davis v. Monroe County Board of Education*, the Supreme Court also held that peer-to-peer sexual harassment is actionable against the institution under Title IX when it is sufficiently "severe, pervasive, and objectively offensive [so as to] bar[s] the victim's access to an educational opportunity or benefit."²⁷ The Court, however, did not clearly articulate what constitutes sufficiently severe harassment to give rise to a claim under Title IX, but suggested that it would "depend . . . 'on a constellation of surrounding circumstances, expectations, and relationships,' . . . including, but not limited to, the ages of the harasser and the victim and the number of individuals involved."²⁸ The Department of Education Office for Civil Rights has published a guide to aid schools in determining the scope of their liability, but it provides little meaningful guidance, stating only that the "totality of the circumstances in which the behavior occurred" is determinative.²⁹ This ambiguity and high standard of severity and pervasiveness can be a barrier to seeking redress for peer-to-peer harassment in school, which will be discussed further in Part V.

²⁴ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

²⁵ *See, e.g.*, Nancy Jay, *Gender and Dichotomy*, 7 FEMINIST STUD. 38 (1981).

²⁶ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998).

²⁷ *Davis*, 526 U.S. at 633.

²⁸ *Id.* (quoting *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998) (citing Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,041-42 (Mar. 13, 1997))).

²⁹ U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 7 (2001), available at <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf>.

2. *Price Waterhouse Strengthens the Transgender Title IX Shield*

Courts have established that the phrase “on the basis of sex” in Title IX should be interpreted in the same manner as “because of sex” in Title VII.³⁰ For this reason, several cases that help define the scope of Title IX protection of transgender individuals were litigated under Title VII of the Civil Rights Act.³¹ Unlike in Ms. Miles’s case, federal courts originally ruled that protection based upon sex did not extend to discrimination against transgender individuals. For example, in 1984, the Seventh Circuit held that Congress passed Title VII with a narrow conception of sex and did not intend to extend protection to gender nonconforming individuals when an individual was fired after transitioning.³² However, five years later, in *Price Waterhouse v. Hopkins*, the Supreme Court held that workplace discrimination against a woman based on sexual stereotyping, such as statements that she was too masculine or did not dress in a sufficiently feminine manner, constituted actionable sexual harassment under Title VII.³³ *Waterhouse* has subsequently been “interpreted to prohibit discrimination against people whose gender expression does not conform to typical societal expectations.”³⁴ In 2004, the Sixth Circuit held in *Smith v. City of Salem* that Title VII prohibited discrimination against a firefighter who was biologically male but began assuming a feminine appearance at work,³⁵ and in *Schwenk v. Hartford* the Ninth Circuit held that “sex” as used in Title VII (and thus as used in Title IX), includes sex and gender and protects gender nonconforming individuals.³⁶

The *Price Waterhouse* interpretation of discrimination based on sex utilized by *Smith v. City of Salem* and *Schwenk* has also been successfully applied to harassment based on gender nonconformity in schools. In 2000, a Minnesota district court held that Title IX makes schools liable for harassment on the basis of gender nonconformity,³⁷ and in 2005 a Kansas district court similarly held that a student may demonstrate harassment on the basis of sex under Title IX by showing that the harassment was based upon the victim’s failure to conform to gender stereotypes.³⁸

³⁰ *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 250 n.4 (S.D.N.Y. 1997); *see, e.g., Davis*, 526 U.S. at 633; *Murray v. N.Y. Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995).

³¹ 42 U.S.C. § 2000e (2006).

³² *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984).

³³ 490 U.S. 228, 256 (1989).

³⁴ *Perifimos*, *supra* note 5, at 156.

³⁵ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

³⁶ *See* 204 F.3d 1187, 1202 (9th Cir. 2000).

³⁷ *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090–92 (D. Minn. 2000). While this case was a victory in one regard, it was a defeat in others because the court refused to hold that Title IX prohibits discrimination based upon sexual orientation.

³⁸ *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 972 (D. Kan. 2005).

Given the encouraging direction this doctrine has taken, it appears that Title IX protection on the basis of sex as interpreted by federal courts includes transgender individuals; however, it is not clear that Title IX litigation is a sufficient remedy to the disturbing prevalence of mental and physical violence experienced by students who do not conform to society's gendered expectations, which will be discussed further in Part V.

II. WOMEN'S COLLEGES' ABILITY TO DISCRIMINATE BASED ON SEX UNDER TITLE IX

The litigation discussed in Part I highlights Title IX's anti-discriminatory purpose, begging the question: how can women's institutions continue to discriminate based upon sex in their admissions practices? Title IX of the Education Amendments of 1972 generally prohibits discrimination on the basis of sex in educational programs or activities that receive federal financial assistance;³⁹ however, it limits this prohibition to vocational, professional, graduate, and public undergraduate institutions.⁴⁰ Therefore, Title IX does not prohibit non-vocational, elementary and high schools or private undergraduate institutions from discriminating based upon sex in their admissions processes. Moreover, the regulations implementing Title IX explicitly permit institutions receiving federal funding to offer single-sex education; in fact, they specifically address such sex-based affirmative action.⁴¹

A. *Title IX Affirmative Action and Women's Colleges*

Title IX regulations explicitly address affirmative action: “[i]n the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.”⁴² Dawinder Sidhu persuasively argues that “[t]he plain meaning of the words ‘affirmative action’ in this context authorizes the use of gender-based classifications designed to assist the historically-disadvantaged gender.”⁴³ Thus, his argument defends the very existence of women-only institutions of education.

While a colorable argument can be made that Title IX allows discriminatory admissions policies based upon sex, sex-based affirmative action must also be defended on Equal Protection grounds.

³⁹ 20 U.S.C. § 1681(a) (2006).

⁴⁰ *Id.* § 1681(a)(1).

⁴¹ 34 C.F.R. § 106.34(b)–(c) (2007).

⁴² 34 C.F.R. § 106.3(b) (2007).

⁴³ Dawinder S. Sidhu, *Are Blue and Pink the New Brown? The Permissibility of Sex-Segregated Education as Affirmative Action*, 17 CORNELL J.L. & PUB. POL'Y 579, 587–88 (2008).

B. *Constitutionality of Title IX Affirmative Action*

In *Brown v. Board of Education*, the United States Supreme Court held that “‘separate but equal’ has no place” in education.⁴⁴ It has also since expressed concern regarding race-based affirmative action, and race-based affirmative action continues to be a controversial and sensitive issue.⁴⁵ Given the court’s discomfort with race-based segregation and affirmative action, any analysis of sex-based affirmative action under Title IX requires an inquiry into its constitutionality under the Equal Protection Clause.⁴⁶ In fact, the leading cases dealing with challenges of single-sex schools, classes, or activities under Title IX (including those programs established for the purpose of sex-based affirmative action—arguably the purpose of women’s colleges) were litigated under an equal protection analysis similar to the Supreme Court’s analyses in *Brown* and the affirmative action cases.⁴⁷

In the landmark case of *United States v. Virginia*, the Supreme Court held that single-sex schools, such as the then all-male Virginia Military Institute, require an “exceedingly persuasive justification”⁴⁸ such that “the defender of the challenged classification must show ‘at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’”⁴⁹ The Supreme Court has suggested that measures to compensate for historical or identifiable gender-based discrimination constitute an “important governmental objective.”⁵⁰ However, in *Mississippi University for Women v. Hogan*, the Court found that a single-sex admission policy was not substantially related to the objective of compensating women for limited educational opportunities, and stated that permitting men to attend classes as auditors fatally undermined the university’s claim that a women-only environment was necessary because women were adversely affected by the presence of men.⁵¹

Thus, the second prong of analysis—that the admission policy be substantially related to the objective of compensating for discrimination—is a

⁴⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

⁴⁵ Sidhu, *supra* note 43, at 581 (citing *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting) (“Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing with it the potential to destroy confidence in the Constitution and in the idea of equality.”); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 512 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (“It is a sordid business, this divvying us up by race.”)).

⁴⁶ See generally David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217 (2005) (discussing the relationship between Title IX and the Equal Protection Clause’s prohibition of discrimination based on sex).

⁴⁷ See *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Brown*, 347 U.S. at 483.

⁴⁸ *United States v. Virginia*, 518 U.S. at 531.

⁴⁹ *Id.* at 524 (quoting *Hogan*, 458 U.S. at 724).

⁵⁰ *Califano v. Webster*, 430 U.S. 313, 316–17 (1977).

⁵¹ *Hogan*, 458 U.S. at 730–731.

difficult constitutional hurdle. However, “[s]imply because the Supreme Court has invalidated the only two single-sex education programs that have come before it does not suggest, by any means, that single-sex programs as a general matter are disfavored by the Court or can never be implemented in a manner consistent with the Equal Protection Clause.”⁵² Moreover, tying Title IX into the equal protection analysis, the First and Second Circuits have respectively held that “voluntary affirmative action to overcome the effects of gender discrimination are permitted under the Title IX regulations,”⁵³ and that “voluntary affirmative action measures to overcome effects of historical conditions that have limited participation by members of one sex are authorized by the [Title IX] regulation.”⁵⁴

Based on these cases and in light of the anti-discriminatory purpose of Title IX, Sidhu persuasively argues that based upon *Hogan, Virginia*, and *Califano*, single-sex affirmative action programs implemented under Title IX can maintain their constitutionality as long as the institutions maintain a substantial relationship to the important governmental objective of ending gender-based discrimination. Specifically, Sidhu argues that in order for an institution to satisfy the requirements under *VMI* and *Hogan* they must satisfy seven criteria, five of which are relevant to the analysis of affirmative action as applied to private women's college admissions: (1) they must not perpetuate archaic gender stereotypes; (2) they must intentionally and directly assist a disadvantaged gender in a manner related to that disadvantage; (3) enrollment in the single-sex affirmative action program must be completely voluntary; (4) the single-sex affirmative action program must not include members of the non-disadvantaged gender; and (5) the single-sex affirmative action program must last no longer than the discriminatory conditions.⁵⁵ Sidhu's work convincingly argues that women's colleges satisfy these five criteria. However, given that the level of access to education has increased for women throughout the history of women-only education, the ways in which it satisfies the criteria have changed. The next parts will first discuss the history of women's liberal arts colleges and then argue that admitting transgender individuals does not jeopardize these colleges' ability to discriminate against men.

III. HISTORY OF WOMEN'S LIBERAL ARTS COLLEGES⁵⁶

A brief investigation of the history of nonprofit women's liberal arts colleges demonstrates the ways in which they have adapted and redefined

⁵² Sidhu, *supra* note 43, at 605.

⁵³ *Cohen v. Brown Univ.*, 101 F.3d 155, 171 n.11 (1st Cir. 1996).

⁵⁴ *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 297 n.20 (2nd Cir. 2004).

⁵⁵ Sidhu, *supra* note 43, at 609–18.

⁵⁶ I chose to follow liberal arts colleges in particular, as other women's institutions such as religious institutions are likely to make different arguments (not based upon Title

themselves in response to the changing ways that women have been and continue to be a disadvantaged gender. Over time, the institutional values of women-only colleges have shifted from a focus on ending overt exclusion from education to empowering their students to navigate more subtle forms of discrimination that continue to hold glass ceilings in place. While the missions have shifted and changed, they continue to maintain a substantial relationship to the important government objective of ending gender discrimination.

A. *Educating Women for the Household*

Prior to the Civil War, women were not admitted to any colleges or universities, making women's colleges, which were often three-year seminaries, the only option for women seeking an education.⁵⁷ The earliest advocates for women's education championed the idea that women were both fit for and worthy of access to education; Mary Lyon, the founder of Mount Holyoke College, urged early graduates: "Go where no one else will go. Do what no one else will do."⁵⁸ Early arguments often also championed women's education in order to expand capabilities for women's destined roles as wives and mothers.⁵⁹ In this way, the women's colleges originally both challenged and perpetuated gender norms in ways that if practiced today might jeopardize the constitutionality of their federal funding.

B. *Educating Women Equally to Men*

During and after the Civil War, women's colleges moved away from perpetuating nineteenth-century gender norms to more intellectual missions to "perfect [women's] intellect by the best methods which philosophy and experience suggest"⁶⁰ and to "help [women] in their search for self-knowledge, abiding principles, a broad cultural background, and honest, orderly processes of thought and methods of approaching situations."⁶¹ Such missions were common among the "Seven Sisters" institutions, which were founded to provide opportunities for women equal to those available to the then male-only Ivy League institutions.⁶² The decades after World War I could be considered the "golden age" for American women's colleges; more

IX) to defend their decision to exclude transgender individuals; liberal arts colleges are also some of the most commonly known women's institutions, including the "Seven Sisters."

⁵⁷ Marine, *supra* note 5, at 6–8.

⁵⁸ *Id.* at 6; MOUNT HOLYOKE COLL., *The Legacy of Mary Lyon*, <http://www.mtholyoke.edu/marylyon/legacy.html> (last visited Apr. 5, 2012).

⁵⁹ Marine, *supra* note 5, at 7.

⁶⁰ MABEL NEWCOMER, *A CENTURY OF HIGHER EDUCATION FOR AMERICAN WOMEN* 55 (1959) (Smith College's original mission).

⁶¹ *Id.* at 60 (Wellesley College's original mission).

⁶² IRENE HARWARTH, MINDI MALINE & ELIZABETH DEBRA, *WOMEN'S COLLEGES IN THE UNITED STATES: HISTORY, ISSUES, AND CHALLENGES* 6 (1997). The Seven Sisters

women of color and women from diverse socioeconomic backgrounds sought access to higher education, and black women's colleges, like Spelman College, flourished.⁶³ Following World War II and the Serviceman's Readjustment Act,⁶⁴ college became more accessible than ever, and people attended at unprecedented rates.⁶⁵ Women graduating from women's colleges began to build careers in the professions and in government.⁶⁶ From these positions, they began to usher in movements for sex equality in America.⁶⁷ During this period, women's colleges no longer problematically perpetuated gender norms, and they directly assisted women in the fight towards equality by providing access to an intellectually rich academic experience not otherwise available at the then men-only institutions.

C. Educating Women to Lead, Defending Their Existence, and Boasting Inclusivity

The civil rights movement increased women's awareness of the discrimination they were suffering on America's college and university campuses, and expectations for equity between the sexes began to rise. In 1961, President Kennedy established The Presidential Commission on Women, which was tasked with evaluating women's status in U.S. society.⁶⁸ With the passage of Title IX of the Education Amendments of 1972,⁶⁹ the overwhelming majority of institutions of higher education admitted women and were required by federal law to offer them equal opportunities.⁷⁰ By 1979 women constituted the majority on college campuses.⁷¹

The demand for women's colleges plummeted as the most highly competitive institutions opened their doors to women.⁷² Many women's colleges merged with coeducational institutions, and some closed their doors altogether.⁷³ Those that have survived, such as Spelman and the five remaining

colleges are Barnard, Smith, Mount Holyoke, Vassar, Bryn Mawr, Wellesley, and Radcliffe. *Id.*

⁶³ Marine, *supra* note 5, at 11–12 (citing BARBARA MILLER SOLOMON, *IN THE COMPANY OF EDUCATED WOMEN: A HISTORY OF WOMEN AND HIGHER EDUCATION IN AMERICA* (1986); JOHN S. BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES* (1997)).

⁶⁴ 38 U.S.C. § 3701 (2006) (known informally as the G.I. Bill, the Serviceman's Readjustment Act provided WWII veterans with college tuition).

⁶⁵ Marine, *supra* note 5, at 12.

⁶⁶ *Id.* at 12–13.

⁶⁷ *Id.*

⁶⁸ *Id.* at 13–14; HARWARTH ET AL., *supra* note 62, at 12.

⁶⁹ 20 U.S.C. §§ 1681–1688 (2006).

⁷⁰ HARWARTH, *supra* note 62, at 7.

⁷¹ National Center for Education Statistics, *120 Years of American Education: A Statistical Portrait* 66 (Thomas D. Snyder, ed. 1993), available at <http://nces.ed.gov/pubs93/93442.pdf>.

⁷² HARWARTH ET AL., *supra* note 62, at 28.

⁷³ See LESLIE MILLER-BERNAL & SUSAN L. POULSON, *CHALLENGED BY COEDUCATION: WOMEN'S COLLEGES SINCE THE 1960s* 8 (2006); see also HARWARTH ET AL., *supra* note 62, at 29.

women-only Seven Sisters, have done so largely due to wealthy endowments and the strong support of loyal alumnae who support their institutions' decisions to remain single-sex.⁷⁴ With equal *access* to education arguably accomplished, women's colleges have been continuously forced to defend their existence and continued dedication to education in a women-centered environment and have come under fire even from feminists.⁷⁵ Adjusting and adapting to the type of disadvantage that women continue to experience, women's colleges in the twenty-first century "primarily locate themselves on the national spectrum of higher education options as specialized breeding grounds for women's leadership in an increasingly competitive post-industrial society."⁷⁶ Scholars have demonstrated that graduates of women's colleges have a greater likelihood to pursue doctoral and professional degrees and to achieve greater status in their chosen field.⁷⁷ Advocates for women's education (and women's college admissions offices) boast statistics that while their graduates make up only a small percent of the population, they make up twenty-four percent of women members of Congress and thirty-three percent of women board members of Fortune 500 companies.⁷⁸ The first women to hold major leadership posts have been women's college graduates, such as Madeline Albright (Wellesley alumna and Secretary of State), Frances Perkins (Mount Holyoke alumna and Secretary of Labor), and Donna Shalala (Western College for Women alumna and Secretary of Health and Human Services).⁷⁹ Through the years, the task of women's colleges has shifted from breaking the glass ceiling of education to equipping their students to break professional glass ceilings, all in the name of gender equality and ending the disadvantages experienced by women.

How exactly women's colleges train future leaders is unclear,⁸⁰ but one common theme is that when women see other women in leadership roles and

⁷⁴ HARWARTH ET AL., *supra* note 62, at 31.

⁷⁵ David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 539 (2010); Kristen J. Cerven, *Single-Sex Education: Promoting Equality or an Unconstitutional Divide?*, 2002 U. ILL. L. REV. 699, 702-04 (2002).

⁷⁶ Marine, *supra* note 5, at 14.

⁷⁷ Mikyong Minsun Kim, *Institutional Effectiveness of Women-Only Colleges: Cultivating Students' Desire to Influence Social Conditions*, 72(3) J. OF HIGHER EDUC. 287 (2001); M. Elizabeth Tidball, *Perspective on Academic Women and Affirmative Action*, 54(2) EDUCATIONAL RECORD 130 (1973); *see generally* M.E. TIDBALL, *TAKING WOMEN SERIOUSLY: LESSONS AND LEGACIES FOR EDUCATING THE MAJORITY* (1999) (outlining research demonstrating the powerful positive impact of women's colleges on women's achievement in society).

⁷⁸ WOMEN'S COLL. COALITION, *Women's College Alumnae—Notable Firsts*, <http://www.womenscolleges.org/alumnae/notables> (last visited Apr. 5, 2012).

⁷⁹ Brief of Women's Colleges, *supra* note 7, at 3; WOMEN'S COLL. COALITION, *Women's College Alumnae*, *supra* note 78.

⁸⁰ One author summarized outcome studies and identified ten proposed sources of advantage for students at women's colleges: diminished strength of youth culture values, greater degree of order and control, more successful role models, reduced sex differences in opportunities for curriculum, reduced sex-based bias in interaction with professors, reduced sex stereotyping in peer interaction, increased leadership opportunities, increased

take on leadership roles in college, they are empowered to see themselves in leadership roles upon graduation. As Smith College President Carol Christ recently put it:

Women still face gender prejudice. There are a surprising number of people who do not see, who cannot see, a woman in a major leadership position in a country or a government. . . . I think the most important barrier that women face in entering leadership positions is the comparative scarcity of precedents. There aren't that many women in leadership positions, and so this tends to reinforce any prejudice against women being in such positions that exist. At women's colleges, every leadership role is held by a woman. Women run the student government, they edit the student newspaper, they govern themselves in their houses or their dormitories. Every organization is led by a woman, and this develops the capacity for leadership.⁸¹

Another recurring theme for the remaining women's colleges is inclusivity; however, this has not always been the strength that it is for some institutions today. Women's institutions have also been forced to adapt from an unfortunate history of excluding women of color, women of different socioeconomic backgrounds, Jewish women, lesbians and bisexuals,⁸² and most recently, transgender or gender queer individuals.

Perhaps most salient to an analysis regarding transgender inclusion at women's colleges is the treatment of lesbians and bisexuals at women's colleges. While they do not evoke the same debate since they are admitted as females, they still evoke questions of what it means to be a woman and conform to gender norms. Despite rampant homophobia in the nineteenth century, lesbians and bisexual women began congregating at women's colleges in the early twentieth century.⁸³

Today, there is still concern—some quiet and some vocal—from some alumnae regarding the reputation of women's colleges in the face of a noticeable lesbian population.⁸⁴ The fact that the lesbian population was drawn to women's colleges illustrates another way in which women's colleges, despite the wishes of some members of their community, have pushed further towards gender equality. Given lesbian women's gravitation towards these in-

emphasis on student choice, increased programming specific to women, and greater accommodations for gender difference in learning. Cornelius Riordan, *The Value of Attending a Women's College: Education, Occupation, and Income Benefits*, 65 J. HIGHER EDUC. 486, 491 (1994).

⁸¹ Smith College, *The Importance of the Women in Public Service Project*, SMITH COLLEGE, <http://www.smith.edu/video/women-public-service-project> (last visited Apr. 5, 2012).

⁸² Marine, *supra* note 5, at 16.

⁸³ LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN THE 20TH CENTURY AMERICA* 13 (1991); JAY, *supra* note 8, at 137–38.

⁸⁴ Marine, *supra* note 5, at 19.

stitutions as a safe haven in the early twentieth century, these communities were arguably light years ahead of the gay rights movement in finding and building gay communities.

The history of women's colleges reveals that they have morphed from perpetuating gender norms by educating women for work in the house, to providing educations equally rigorous as that offered in male-only or coeducation institutions, to educating breakers of glass ceilings. They have also followed patterns of inclusivity and exclusivity, and have often been ahead of the curve in pushing towards gender equality and building communities of gender-nonconforming individuals. Arguably, women's colleges have started to build a community for transgender and gender queer individuals in the past decade.⁸⁵ The question remains whether women's institutions will fully embrace and take pride in their role as advocates for equality by admitting transgender individuals.

IV. ADMITTING TRANSGENDER STUDENTS DOES NOT JEOPARDIZE THE CONSTITUTIONALITY OF WOMEN'S COLLEGES OR THEIR TITLE IX FUNDING

Since Title IX has been interpreted to protect transgender individuals from discrimination,⁸⁶ it would follow that "based on sex" language would carry throughout the statute and its accompanying regulations. Therefore, affirmative action in education is permissible for an increasingly "historically-disadvantaged gender"—transgender individuals.

One of the main benefits of utilizing Title IX affirmative action as a method to remedy discrimination against transgender individuals is that an institution need not first prove a specific instance of discrimination to establish an educational practice to aid in "overcom[ing] the effects of conditions which resulted in limited participation therein by persons of a particular sex."⁸⁷ This makes affirmative action an attractive alternative in the many instances where the severe and pervasive bar of proving a discriminatory act cannot be met.

Based upon this analysis, it is not clear what sex-based affirmative action to remedy transgender discrimination would look like. Certainly, it could play a factor in collegiate admissions process; perhaps most radically, it could support establishing a transgender college that admits only gender nonconforming individuals.⁸⁸ For the purposes of this work, I will argue that women's colleges could utilize Title IX affirmative action to admit trans-

⁸⁵ See, e.g., Quart, *supra* note 4.

⁸⁶ Part I.B.2 *supra* (applying Title IX to transgender).

⁸⁷ 34 C.F.R. § 106.3(b) (2007).

⁸⁸ Title IX affirmative action could be used as alternative justification for the existence of LGBTQ public schools like Harvey Milk High School. See, e.g., Kristina Brittenham, *Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone is Not Enough*, 45 B.C. L. REV. 869 (2004).

gender students and do so without losing Title IX funding or exposing themselves to the risk of forced coeducation on equal protection grounds by showing how Sidhu's Title IX affirmative action criteria are satisfied when transgender individuals are admitted to institutions that discriminated based upon sex.

A. *Admission Does Not Perpetuate Archaic Gender Stereotypes*

Admitting transgender students to women's colleges does not perpetuate archaic gender stereotypes; in fact, if anything, it does the opposite. By including transgender individuals as a disadvantaged gender, women's colleges are inherently challenging the notion of a static gender dichotomy. They are embracing a community of people whose very lives and identities envision a world outside of the gender straitjacket, which narrowed the prospects of generations of women.

B. *Admitting Transgender Students to Women's Colleges Directly Assists Transgender Individuals Related to Their Disadvantage*

The statistics discussed in Part I paint a startling picture, particularly that transgender individuals will miss school and perform at a lower level than their non-discriminated-against peers.⁸⁹ By openly admitting transgender students, women's colleges provide access to education for a population that has been ostracized in education. While the tension within the community at women's colleges certainly does not suggest that a transgender person's experience in this educational environment will be less subject to discrimination, the awareness and sensitivity to the issue that is evident at these institutions suggests an improvement over the startling picture painted by these statistics. Moreover, the contemporary value of women's education discussed by Carole Christ is in many ways the value of a community void of traditional notions of patriarchy and strict policing of gender norms, which some legal scholars suggest fosters a less-violent environment.⁹⁰ Therefore, when women's colleges admit transgender students, they offer access to an environment that fosters empowerment and decreases the violence experienced by transgender individuals. Moreover, for male-to-female transgender individuals, women-only education is likely no less valuable than it is to her cisgender classmates.

⁸⁹ See, e.g., Greytak, *supra* note 12, at xii.

⁹⁰ See, e.g., Diane L. Rosenfeld, *Sexual Coercion, Patriarchal Violence and Law*, in *SEXUAL COERCION IN PRIMATES AND HUMANS: AN EVOLUTIONARY PERSPECTIVE ON MALE AGGRESSION AGAINST FEMALES* 424, 428–29 (Martin W. Muller & Richard W. Wrangham eds., 2009).

C. *Enrolling Transgender Individuals in Women's Colleges is Completely Voluntary*

Admitting transgender individuals would not change the voluntary nature of the current admissions system in women's colleges.

D. *Admitting Transgender Individuals in Women's Colleges Does Not Include Members of a Non-Disadvantaged Gender*

This requirement, based in Justice O'Connor's opinion in *Hogan*, is probably where many women's colleges rely upon Title IX as the rationale to refuse admission to transgender individuals. Here again, the statistics on the experiences of transgender individuals establishes their disadvantage; however, as discussed previously, Title IX affirmative action's burden of proof to show disadvantage does not require showing specific incidents of disadvantage. The fear for women's institutions then is that to admit transgender individuals is to admit self-identified men, a non-disadvantaged gender. Transgender individuals, even once legally recognized as their new gender, experience discrimination. Additionally, given the timing of transition for most college-aged individuals, it is somewhat unlikely that a transgender individual would "pass" sufficiently to the point of experiencing no discrimination for his or her perceived failure to conform to gender norms prior to graduation, and even when transwomen pass as female they continue to face discrimination like cisgender women.⁹¹

E. *Admitting Transgender Individuals to Women's Colleges Today Will Not Create an Affirmative Action Program that Lasts Longer than the Discriminatory Conditions*

Unfortunately, bullying and discrimination affecting access to education for transgender individuals does not yet seem to be on a downward trend, and the scars of such discrimination will be felt for years. There are very few openly transgender individuals that hold posts at the highest levels of professional achievement, and addressing such gender disparities is a contemporary goal of women's education. While we can hope it will not take long to fill these gaps, the history of other civil rights movements suggests that this goal will not be realized in the near future.

Admission of transgender students under Title IX affirmative action is constitutional under Sidhu's analysis, which considers the major cases in the single-sex doctrine. Thus, given the discrimination transgender individuals face and experience as a disfavored gender, women's colleges should use Title IX to include rather than exclude transgender individuals in their ad-

⁹¹ See, e.g., Troop, *supra* note 4, at 3.

missions decisions. The next Part will discuss why sex-based affirmative action is often a preferable path since other remedies are often inadequate.

V. TITLE IX AFFIRMATIVE ACTION AS A REMEDY FOR TRANSGENDER DISCRIMINATION IN SCHOOLS

Litigation is not always sufficient to remedy the harm caused by discrimination. Victims will not bring claims for reasons such as fear of retaliation, lack of resources, or a lack of knowledge their claim for relief exists.⁹² Moreover, only those directly injured by discrimination or harassment may bring a claim under Title IX; however, the externalities of discrimination and tolerance thereof are felt by those who are beyond our litigation system's redress.⁹³ Unlike other federal anti-discrimination statutes, Title IX is nonetheless situated to help redress the harms that litigation cannot reach through its explicit provision for affirmative action to remedy gender discrimination. In the following section, I will outline how Title IX's affirmative charge is a tool that can help remedy gender discrimination since Title IX litigation is often insufficient.

A. *Title IX Litigation Burdens Victims and Provides Insufficient Remedies*

Other authors have provided in-depth analyses arguing that Title IX litigation is not a sufficient remedy to redress the harms caused by harassment and bullying of transgender individuals at school.⁹⁴ While that level of analysis is beyond the scope of this work, the arguments can be summarized as follows.

1. *The Burden of Proof in Title IX Suits Against Educational Institutions Is Onerous*⁹⁵

As discussed in Part I.B.1, the ambiguous "severe, pervasive, and objectively offensive" standard described in *Davis* creates a heavy burden of proof for plaintiffs.⁹⁶ Therefore, it is likely that some cases may not prevail despite the legitimate occurrence of harassment.

⁹² See, e.g., Higdon, *supra* note 16, at 865–66.

⁹³ See, e.g., Greytak, *supra* note 12, at 10.

⁹⁴ See, e.g., Higdon, *supra* note 16, at 865–66; Kosse & Wright, *supra* note 16, at 60; Joshua A. Jones, *Section 504 of the Rehabilitation Act of 1973: A Double-Edged Sword for the Protection of Students with Gender Identity Disorder*, 25 WIS. J.L. GENDER & SOC'Y 353, 370–71 (2010).

⁹⁵ See, e.g., Jones, *supra* note 87, 370–71, Higdon, *supra* note 16, at 866; Kosse & Wright, *supra* note 16, at 70.

⁹⁶ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); see also, *Howell v. Austin Indep. Sch. Dist.*, 323 F. App'x 294, 295 (5th Cir. 2009) (holding that the student

2. *Reporting of Bullying is Startlingly Low*

In its report on experiences of transgender students in school, the Gay, Lesbian and Straight Education Network (GLESN) found that the majority of self-identified transgender students were physically harassed for their gender expression, and eighty-seven percent were verbally harassed; however, the majority of these students did not report their harassment.⁹⁷ Therefore, even when bullying and discrimination have occurred, in the majority of cases it is likely to go unreported and unmitigated under Title IX or, for that matter, under any state anti-bullying or anti-discrimination law.

3. *Compensation Under Title IX Does Not Remedy the Harms of Harassment and Is an Insufficient Deterrent*

In the event a student prevails in litigation, the individual has already been harmed. As Michael Higdon argues:

The degree to which a monetary judgment—assuming the child can even prevail—would cure any psychological harms the child has already suffered as a result of his victimization is very much in doubt. Thus when it comes to targeting the overall incidence of gender-based bullying, to the extent a lawsuit can provide some remedy, litigation by itself it [sic] is entirely ineffective. Indeed, litigation in this context does little to protect future victims from bullying, and it is doubtful whether litigation can even “remedy” the child who brought the litigation.⁹⁸

The shortcomings of Title IX litigation require exploring alternative methods to correct the harms of discrimination against transgender persons. Others have considered affirmative requirements on schools to institute anti-bullying policies,⁹⁹ state anti-discrimination or anti-bullying legislation,¹⁰⁰ or suits under § 504 of the Rehabilitation Act of 1973.¹⁰¹ While each of these options are possible remedies with their own respective strengths, problems, and weaknesses, an uninvestigated option is affirmative action under Title IX. Women’s colleges are poised to use Title IX to extend their glass-ceiling-demolishing mission in a way that will enable transgender individuals to reach their full potential.

did not establish that the school district had actual knowledge of the student’s sexual abuse as required under Title IX).

⁹⁷ Greytak, *supra* note 12, at 18, 22.

⁹⁸ Higdon, *supra* note 16, at 866–67.

⁹⁹ See, e.g., Kosse & Wright, *supra* note 16, at 68.

¹⁰⁰ See, e.g., *id.* at 70.

¹⁰¹ See, e.g., Jones, *supra* note 91.

VI. REASONS WOMEN'S COLLEGES MAY REFUSE TO ADMIT
TRANSGENDER STUDENTS

This Note has argued that women's colleges should not use Title IX as an excuse to refuse to admit transgender individuals and that admitting transgender individuals would not jeopardize their Title IX funding or the constitutionality of their decision not to become a purely co-educational institution. However, there may be other reasons women's colleges choose not to admit transgender individuals. Exploring the Title IX arguments women's colleges rely upon, along with the history of these colleges, highlights their shortcomings in light of the Title IX and equal protection jurisprudence discussed herein. However, they also expose the other reasons that motivate the decision not to admit transgender individuals. This part will discuss the arguments put forth by women's colleges to refuse to admit transgender individuals that rely upon Title IX as well as other possible reasons they choose not to expand their vision of sex equality to include transgender rights.

A. *Title IX as Excuse*

Two types of Title IX argumentation may inform women's colleges' decisions not to admit self-identified transgender individuals. First, they may argue, as discussed and refuted above, that admitting transgender students would compromise the constitutionality of their sex-discriminatory admission practices by admitting persons who are not women. As discussed above, Title IX provides for affirmative action not only for women, but also for the non-advantaged gender, and transgender individuals are most certainly members of a disadvantaged gender. Title IX case law, such as *Miles* and the cases that follow, shows that despite the dichotomous conception of gender when it was enacted in the 1970s, Title IX can embrace the notion of discrimination not only against *the* non-advantaged gender, but against the non-advantaged genders. While this is not well-settled law, if women's colleges strive to "be at the forefront of [transgender equality], not sort of catching up to the rest of the world," the logical step is to end reliance upon Title IX and embrace an inclusive conception of Title IX's anti-discriminatory charge.¹⁰²

Another Title IX argument that may be put forward to defend a refusal to admit transgender individuals is that Title IX requires equal opportunity in education, including extracurricular activities. Thus, if women's colleges were to admit transgender students, they would then be compelled to provide equal access to gender-segregated activities and places such as athletic teams and restrooms. This argument is flawed for two reasons. First, this argument is untenable in light of (commendable) institutional commitment to transgender inclusivity in enrollment. Enrollment implicates the duty to pro-

¹⁰² Grasgreen, *supra* note 1.

vide equal opportunities; therefore the concern for accommodating transgender individuals by providing equal access to sex-specific activities is relevant regardless of whether they *admit* transgender students; if this is a true concern, it would follow that women's colleges would not be fostering a community of inclusion for transgender individuals, but rather expelling them upon transition or coming out of the gender queer closet, and *this* would violate Title IX. The contradictory practice of inclusive enrollment and discriminatory admission suggests that their reliance upon Title IX incorporates a *mens rea* defense into Title IX's requirement to provide equal access when more than one sex is present. It is as if they believe they could use a defense of ignorance in the event of a Title IX complaint by a transgender student; however, there is no such knowledge requirement evidenced by Title IX jurisprudence. Whether a growing transgender population could threaten Title IX funding for a women's college is an unclear and separate issue beyond the scope of this Note. What is clear is that the Title IX argument against *admitting* transgender students is using Title IX to deflect accountability from an institutional decision to avoid incurring the cost of making accommodations required by Title IX.

B. *Other Rationales for Refusing to Admit Transgender Students*

Independent of Title IX, there may be other reasons that women's colleges choose not to admit transgender individuals. For example, if the power of women-only education is, as Carol Christ put it, seeing oneself in positions of leadership, since every leadership position on campus is held by a woman, how is the power of women-only education compromised by including transgender individuals?¹⁰³ Is this power diluted with the admission of transgender individuals? History has revealed that the vitality of surviving women's-only institutions has been due, at least in part, to the widespread support of loyal alumnae. Perhaps institutions fear that admitting transgender students would jeopardize these critical funds. Weighing the merits of these arguments against admitting transgender students is beyond the scope of this paper; therefore, to be clear, I do not definitively argue that women's colleges *must* admit transgender students, I argue instead that if they choose not to, they should not rely on Title IX in so doing.

CONCLUSION

As typified by the James Oppenheim poem sung each year at Mount Holyoke College's laurel parade, demanding bread and roses,¹⁰⁴ the history of women's colleges reveals a tension between perpetuating and progressing notions of gender. In many ways, the inclusive environment these institu-

¹⁰³ SMITH COLL., *supra* note 81.

¹⁰⁴ James Oppenheim, *Bread and Roses*, THE AMERICAN MAGAZINE (Dec. 1911).

tions are commendably striving to provide for their students are challenging gender norms by graduating highly intelligent gender-norm-challenging individuals. However, they lag behind by relying upon Title IX as an explanation for refusing to admit the individuals they subsequently seek to embrace.¹⁰⁵ As evidenced by a growing number of cases, discrimination “based on sex” under Title IX includes those who do not conform to gender norms; it includes individuals who identify as transgender at the time of application to college. These developments are evidence of growing discrimination, making transgender applicants a newly recognized group disadvantaged because of their sex. If women’s colleges want to continue to be at the forefront of challenging gender norms, then the next step in their metamorphosis should be to stop using Title IX as a sword against transgender applicants when courts have decided it is their shield.

¹⁰⁵ See Grassgreen *supra* note 1.

