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In-Group Bias—Coloring Public Opinion and Spurring Public Backlash: A Comparative Analysis of Affirmative Action and Title IX

A Capstone Project Submitted in Partial Fulfillment of the
Requirements of the Renée Crown University Honors Program at
Syracuse University

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and Renée Crown University Honors
May 2013

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Abstract

The Civil Rights and Women's Rights Movements were two parallel rights revolutions in American history. Each spurred noteworthy social change for a disadvantaged group, through affirmative action for African Americans and through Title IX programs for women. However, in looking at the college enrollment data, it becomes clear that these programs achieved success at different rates—at least in higher education. This thesis is an attempt to explain why these seemingly analogous programs produced such disparate results. It attempts to answer the question: Did in-group bias influence public opinion and public backlash in the form of Supreme Court litigation, impacting the time it took for race-based affirmative action programs to achieve success in comparison with similar women's rights initiatives?

In studying affirmative action and Title IX, this thesis examines both public opinion data and Supreme Court litigation surrounding each program. In doing so, it attempts to argue that in-group bias colors the public opinion data, diminishing the support for race-based affirmative action. It also attempts to show that public backlash, in the form of Supreme Court litigation, presents a direct challenge to race-based affirmative action in higher education. On the contrary, there are no Supreme Court cases that question the need for Title IX enforcement in the academic sector of higher education.

The proof is in the college enrollment statistics. It took women just 7 years after the passage of Title IX to become the majority of the college undergraduate population and just 8 years to reach what this thesis defines as the point of success. That is, the point when the percentage of the group—whether women or African Americans—in the undergraduate population exceeds the percentage of said group in the general American population. It took African Americans 34 years after President John F. Kennedy coined the term “affirmative action” to reach this point of success.

Therefore, based on the college enrollment data and the explanatory variables of public opinion and Supreme Court litigation, this thesis concludes that: in-group bias colored the public opinion data and spurred public backlash against race-based affirmative action programs in the form of Supreme Court litigation, slowing the adoption and success of race-based affirmative action programs in comparison with analogous women's rights initiatives.

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Chapter 1

Introduction

The Civil Rights and Women's Rights Movements were two of the greatest cultural developments in American history. Each brought about radical social change that encompassed the totality of America, instituting transformations in the workplace and in the classroom. Though similar in their aims, the movements achieved success at different rates, especially in higher education. Whereas the Women's Rights Movement, backed by Title IX legislation, was generally well received by the public, the Civil Rights Movement, particularly affirmative action programs, faced public resistance. While some of this resistance may have stemmed from public confusion surrounding affirmative action, as there was no autonomous piece of legislation that enacted affirmative action programs, much of it was based on genuine public opposition, which I argue was spurred by in-group bias. This led to several Supreme Court cases challenging individual affirmative action programs including: *Regents of the University of California v. Bakke*, *Grutter v. Bollinger* and most recently *Fisher v. University of Texas*. While there were also numerous federal cases dealing with Title IX, most were expansions of the scope of protection under the statute and none questioned the need for Title IX enforcement in the academic sector of

higher education. Based on these findings, this thesis will endeavor to answer the following question which has yet to be examined in the field of political science: Did in-group bias influence public opinion and public backlash in the form of Supreme Court litigation, impacting the time it took for race-based affirmative action programs to achieve success in comparison with similar women's rights initiatives? I will attempt to prove that in-group bias has indeed colored the public opinion statistics and has prompted Supreme Court litigation against race-based affirmative action programs, slowing their adoption and success in relation to women's right initiatives, namely Title IX.

Chapter 2

Historical Context

“We hold these truths to be self-evident, that all men are created equal.”

These words from our Declaration of Independence have become one of the most revered phrases in American history. Yet, the United States of America has rarely treated all men and women equally. From the ratification of the Constitution on June 21, 1788 until the Emancipation Proclamation on January 1, 1863, millions of African Americans suffered under the imperious rule of slavery. Despite the abolition of slavery, this same group continued to suffer from discrimination and segregation under the Jim Crow laws and other unjust doctrines through the mid-twentieth century. Then, in an executive order on March 6, 1961, President John F. Kennedy coined the term “affirmative action” as a means to redress the pervasive discrimination that persisted in American society. This ushered in the era of affirmative action, involving multiple executive orders as well as policies like Title VI of the Civil Rights Act of 1964, which focused on education and jobs and ensured that African Americans and other minorities experienced the same opportunities as whites.

Soon thereafter, with Title IX—a portion of the Education Amendments of 1972—women were also guaranteed equal opportunity under “any educational

program or activity receiving federal financial assistance.” In less than a decade, African Americans and women were granted the rights to equal opportunity, particularly in higher education. These turning points illustrated a newfound American commitment to achieving equality.

However, this equality could not come without controversy. Due to public backlash against affirmative action programs, this educational principle has been continually challenged in cases that have reached the Supreme Court. In *Federalist 78*, Alexander Hamilton stated that “the judiciary, from the nature of its functions, will always be the least dangerous [branch of government] to the political rights of the Constitution.” This has been interpreted to mean that the judiciary was presumed to be the weakest branch of the American government. But, through the unenumerated power of judicial review, the Supreme Court has gained prominence in securing and protecting citizen’s rights. This has been seen in numerous affirmative action cases, where the Supreme Court has played a vital role in preserving educational opportunities for African Americans. Though the Supreme Court has largely backed and enforced affirmative action programs, continual challenges to the programs are indicative of the public opposition they continue to face.

Chapter 3

Literature Review

No official statute enacted what is often referred to as affirmative action, a program promulgated as a means to guarantee equality to African Americans, specifically in education. Rather, the programs were spawned through a variety of edicts at the national, state, and even the individual university level. Affirmative action has been debated for nearly five decades by philosophers, legal scholars, social scientists, politicians, journalists, editorial writers and common citizens (Skrentny 1). Like other contemporary issues in American politics, such as abortion and gay marriage, there are two distinct perspectives that never tire of defending their positions based on reason or emotion. One faction of the population resists affirmative action, saying that it is an “un-American guarantee of equal results instead of equal opportunity” that leads to “reverse discrimination” (Skrentny 1). Clarence Thomas, the second African American justice in Supreme Court history, has vocally supported the theory that affirmative action produces equal results rather than equal opportunity. In his new autobiography, *My Grandfather's Son*, Thomas writes about his law degree from Yale University, stating, “I learned the hard way that a law degree from Yale meant one thing for white graduates and another for blacks, no matter how much

anyone denied it. I'd graduated from one of America's top law schools, but racial preference had robbed my achievement of its true value." This stance is juxtaposed against another segment of the American population that supports affirmative action programs as "compensation for past injustices, a guarantee of a fair share of the economic pie and because it is a civil right, guaranteed by the Constitution" (Skrentny 1). These competing public opinions have persisted from the onset of the Civil Rights Movement in the 1950s to the present. Though similar in scope, Title IX and the Women's Rights Movement have not faced comparable controversy. This is seen in the difference in support for the programs in public opinion polls.

But what does public opinion have to do with Supreme Court litigation and Congressional legislation? It has long been speculated that the Supreme Court and Congress exhibit deference toward public opinion on groundbreaking issues. In his book, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, Michael Klarman seeks to explain the Supreme Court's landmark decisions, from *Plessy v. Ferguson* to *Brown v. Board of Education*, by referencing public opinion and other political factors rather than legal analysis (Keck 601). However, much of this explanation is borrowed from Robert Dahl, particularly his 1957 journal article, "Decision-Making in a Democracy: The Supreme Court as National Policy Maker." In this article Dahl asserts that "the Supreme Court follows the election returns." This sentiment is born out of two related arguments. First, the Supreme Court lacks the power to enforce its judicial decisions. Therefore, the Supreme Court will not succeed in enacting broad social

change without support from other institutions—namely the executive and legislative branches. Second, the Supreme Court justices are themselves members of the national governing coalition and the American public and thus they are unlikely to challenge national core commitments unless an issue is ripe for change based on public sentiment (Dahl 281).

These Dahlian arguments are referenced and expounded upon in a variety of journal articles. Kevin T. McGuire and James A. Stimson’s article, “The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences,” echoes the Dahlian view that the Supreme Court needs support in order to enforce their decisions. They argue that, “a Court that requires the support of others to give life to its pronouncements must surely work within the broad boundaries of public acceptability” (1033). Thus, William Mishler and Reginald S. Sheehan, maintain in their article, “Popular Influence on Supreme Court Decisions,” that individual Supreme Court justices’ opinions are not “static and immutable,” but rather “fluid and dynamic” based on the opinion of the public (722). Perhaps this is why Klarman observes that Supreme Court justices “rarely hold views that deviate far from dominant public opinion” (6). But what if the Supreme Court justices are simply responding to the same forces that influence the American public, rather than public opinion. Christopher J. Casillas, Peter K. Enns and Patrick C. Wohlfarth, in their article, “How Public Opinion Constrains the U.S. Supreme Court” argue that “the public mood directly constrains the justices’ behavior and the Court’s policy outcomes, even after controlling for the social forces that influence the public and the Supreme Court”

(86). This wealth of scholarly research is part of a revival of Dahlian thinking regarding judicial decisions. However, these same sentiments have also been applied to the United States Congress.

Around the same time that Title IX and rest of the Education Amendments of 1972 were being argued in Congress, Warren E. Miller and Donald E. Stokes authored a paper, entitled “Constituency Influence in Congress,” which suggested that Congressional representatives were often influenced by public sentiment, especially the public opinion of their constituents (48). Benjamin I. Page and Robert Y. Shapiro expanded upon these effects in their journal article “Effect of Public Opinion on Policy.” Page and Shapiro present evidence showing that not only does public opinion affect policy, it is often the proximate cause of policy. Thus, they argue that public opinion has a greater effect on policy than policy has on public opinion (Page and Shapiro 189). Perhaps this is why there was no federal statute enacting affirmative action—because there was simply not enough public support to drive a foundational piece of legislation. Whether or not this is true, it seems that—based on these as well as other scholarly articles—Congressional legislation, like Supreme Court litigation, is significantly influenced by public opinion.

If public opinion is not caused by policy then it must be influenced by other factors. One of those factors is in-group bias. William Sumner, in his 1906 book *Folkways*, argued that humans, as a species, naturally join together in groups. Furthermore, human social interaction arrangements are often characterized by the differentiation and separation into in-groups and out-groups.

This division is a demarcation of loyalty and cooperation. Individuals have an innate tendency to favor their own group over groups perceived as “others” (Sumner 12). As Sumner puts it, “each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders” (13). When this classification occurs based on ethnic or cultural distinctions, it is called ethnocentrism—a term that Sumner coined. When this classification occurs along racial lines it has been called prejudice or racism.

In-group bias is something that is often difficult to prevent, as it is tied to the subconscious or conscious cataloguing and classification of human beings. However, human beings belong to a variety of group categorizations—they have many social identities. According to Marilyn Brewer, in her article “Reducing Prejudice through Cross-Categorization: Effects of Multiple Social Identities,” if humans share a common in-group identity it can reduce the feeling of intergroup threat, ultimately quelling the effects of in-group bias (169). Therefore, despite the fact that in-group bias subconsciously occurs, it can be limited through a separate common in-group identity. Ultimately, in-group bias colors the human experience. It impacts an individual’s view of others as well as an individual’s view of issues that affect his in-group or another out-group. Thus, as an aggregate, it influences public opinion on a national scale. And because public opinion influences policymaking or the lack thereof, it can be argued that in-group bias has had a profound impact on the differentiation in success of affirmative action and Title IX programs.

Chapter 4

Research Method

This thesis began as an examination of two analogous cultural developments in modern American society. Historically, the Civil Rights Movement and Women's Rights Movement have paralleled and supported one another. Thurgood Marshall, a renowned civil rights advocate who secured the victory as the lawyer in *Brown v. Board of Education* and went on to become the first African American Supreme Court justice, became an advocate for women's rights on the bench. The same can be said for many advocates on either side; activists of each movement supported the other. So, it seemed, that these two movements would be equally supported and achieve success at similar rates during this historical rights revolution in America.

But, this was not the case. In examining the quantitative data, namely collegiate enrollment data and public opinion surrounding both affirmative action and Title IX programs, it became clear that these two cultural phenomenon were treated differently and consequently achieved success at different rates. The public approached affirmative action programs with skepticism, whereas Title IX programs were met with majority support. This slowed the adoption and success of affirmative action programs, as seen in the collegiate enrollment data. I chose

to focus this thesis on higher education because I believe that education is at the heart of social change and therefore an essential element in both the Civil Rights and Women's Rights Movements.

After discovering the key difference in public support for affirmative action and Title IX programs, I explored the possibilities as to why this divergence would occur. Ultimately, I will argue that in-group bias has colored the public opinion data. That is, that in-group bias has predisposed the American population based on race, causing whites to refuse support for race-based affirmative action programs. I will also argue that this psychological phenomenon has influenced the public's reaction to affirmative action programs. Because the general population is unable to directly influence affirmative action programs or discontinue them, they have moved to hinder them in one of the few ways they can—through the courts. This has brought about numerous challenges to affirmative action programs, several of which have reached the Supreme Court. Though Title IX has also been the cause of several federal cases, most have sought to expand support for women under the program and none have questioned the need for Title IX enforcement in the academic segment of higher education. On the contrary, Supreme Court litigation, spurred by in-group bias, has slowed the adoption and success of affirmative action programs. The comparative analysis of success for affirmative action programs and Title IX programs can be seen in the subsequent discussion of collegiate enrollment statistics.

Chapter 5

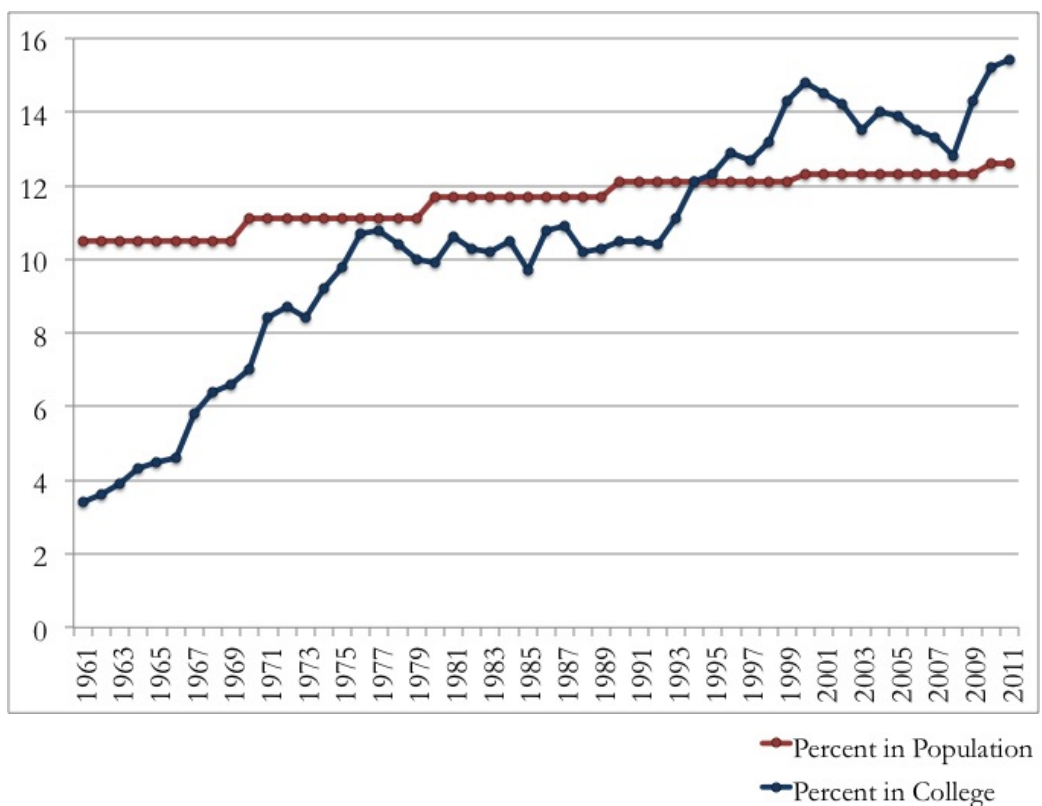
Enrollment Statistics

In the realm of higher education, the ultimate goal of both affirmative action and Title IX programs is to increase collegiate enrollment. When John F. Kennedy coined the term affirmative action in 1961, African Americans made up just 3.4 percent of the undergraduate population at American universities despite being 10.5 percent of the general population (U.S. Census Bureau 1961). In 1972, when Title IX was enacted, women made up 41.6 percent of the undergraduate population at American universities; however, they were also 50.9 percent of the American population (U.S. Census Bureau 1972). By 1979, women had surpassed men in collegiate enrollment, making up 50.5 percent of the undergraduate population at American universities (U.S. Census Bureau 1979). By 1980, the percentage of the college population that was female reached 51.6 percent, surpassing the percentage of women in the general population, which was 51.0 percent at the time (U.S. Census Bureau 1980). For the purpose of this thesis, I have defined this as the point of success for Title IX—when the percentage of the college population that is female exceeded the percentage of women in the American population. After the passage of Title IX it took women just eight years to make up the 9.3 percent gap between the percentage of women in the general

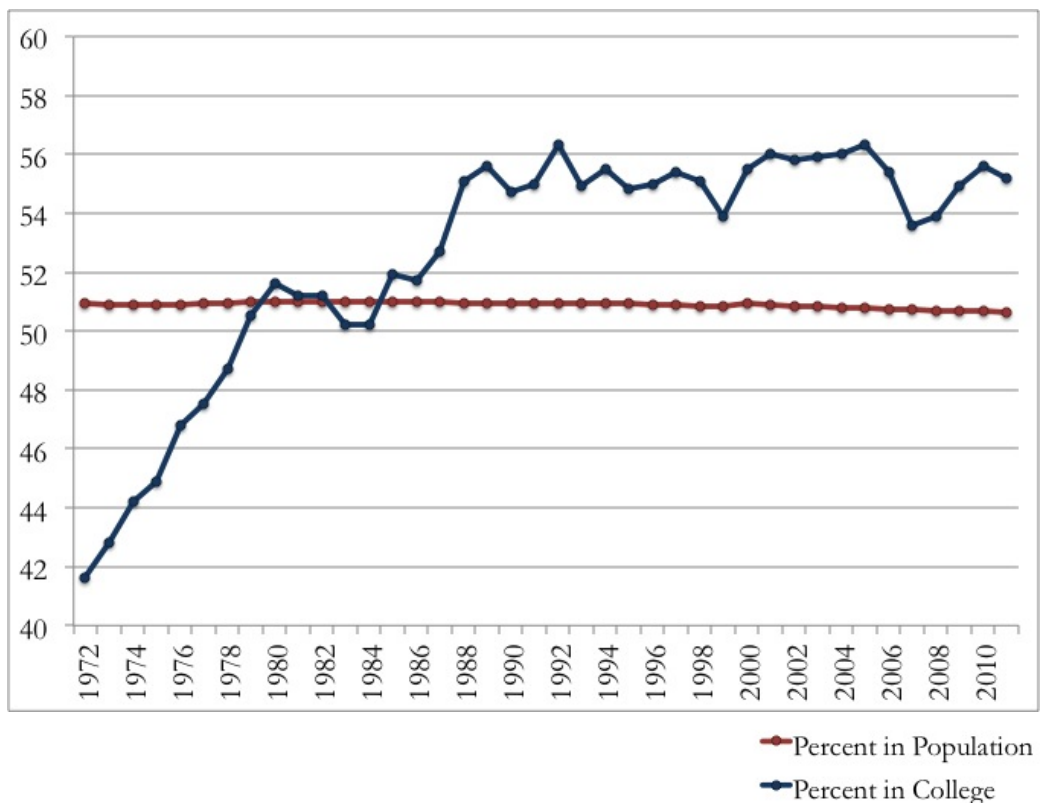
population and the percentage of women in the undergraduate population.

The same cannot be said for African Americans. Whereas it took women just eight years to make up the gap between the percentage of women in the general population and the percentage of women in the college undergraduate population, it took African Americans nearly three and a half decades to overcome the gap. In 1995, 34 years after John F. Kennedy coined the term affirmative action, African Americans made up 12.3 percent of the undergraduate population, surpassing the percentage of African Americans in the general population, which was 12.1 percent at the time (U.S. Census Bureau 1995). For the purpose of this thesis, I have defined this as the point of success for affirmative action programs—when the percentage of African Americans in the undergraduate population exceeded the percentage of African Americans in the general population. While affirmative action programs were ultimately successful in boosting the percentage of African Americans in college, it took African Americans 34 years to make up the 7.1 percent gap between the percentage of African Americans in the general population and the percentage of African Americans in the undergraduate population. When juxtaposed against the expedited success of Title IX, it is clear that affirmative action achieved adoption and success at a significantly slower rate than the analogous women's rights initiative.

African American College Enrollment



Female College Enrollment



Chapter 6

Public Opinion

In his Gettysburg Address, Abraham Lincoln described the United States government as a “government of the people, by the people, and for the people.” This seems to fit with the contemporary political narrative in which Congress, the President and the Supreme Court are all cited as showing deference to public opinion. Simply stated, public opinion is the aggregate of individual’s beliefs and attitudes surrounding an issue. This definition is similar to that of George Gallup, a pioneer in the areas of survey sampling and polling, who defined public opinion as “an aggregate of the views men hold regarding matters that affect or interest the community” (Gallup 1958). In the United States, national public opinion data can offer a powerful statement regarding controversial issues from gay marriage to abortion to affirmative action.

But what is affirmative action? One key issue that influences public opinion is in defining the term. Affirmative action can be broadly read to include any policies that take steps to promote equality for specific groups, though it is primarily used in describing policies benefitting African Americans. As a general term, affirmative action encompasses more than just the “quotas” or “preferences” for which the program has largely become known (Steech & Krysan 129). The

term also refers to “open recruiting procedures, efforts to monitor progress in hiring and promoting underrepresented groups, contracts set-aside for minorities and other proactive policies” (Graham 53). Based on these different definitions of the term affirmative action, it is “likely that people have difficulty figuring out what they are being asked” when poll questions are phrased in an abstract manner (Steech & Krysan 129). However, most polling data centers around two specific framings of the term affirmative action—preferences and quotas.

When the public is questioned regarding affirmative action as a general racial preference for African Americans, the results have been relatively steady. In Times Mirror polls from 1987 through 1994, those who agreed with preferential treatment for African Americans ranged from 24 to 34 percent. Among the white population this percentage ranged from 17 to 29 percent; whereas, among the black population it ranged from 62 to 70 percent (Times Mirror 1987-1994). However, in Gallup polls from 1977 to 1991, those who believed that ability alone should determine who is admitted to college or gets a job was steadily between 81 and 84 percent. Support for preferential treatment for minorities, when framed in competition with ability as a determining factor, was just 10 percent (Gallup 1977-1991). This is a major discrepancy from the Times Mirror polls, simply based on the framing of the question. There has been greater support for preferential affirmative action programs when the program is specifically described, rather than broadly cast as “affirmative action” or as generally “preferential.” Preference in hiring and promotion for African Americans has been supported by as much as 47 percent of the population in CBS

and New York Times polls that mention prior discrimination against blacks (CBS News and New York Times 1985-1995). However, even in these situations, the framing of the question can drastically influence results. In National Election Studies and General Social Survey questions, which mention that some scholars argue that “preference in hiring and promotion of Blacks is wrong because it gives Blacks advantages they haven’t earned,” as little as 15 percent of the population supported preferential programs similar to those described in the Times Mirror, CBS and New York Times polls (NES, GSS 1986-1994). No matter how the question is framed, affirmative action programs described as preferential have not received a majority of support from the American public.

However, when affirmative action programs are framed as having no rigid quotas, they have gained significantly more public backing. In Harris polls which ask: “Do you favor or oppose affirmative action programs in higher education for blacks provided there are no rigid quotas?” the programs have been supported by 68 to 76 percent of the population (Harris 1978-1982). However, in National Election Studies that mention past discrimination and ask if the person is “for or against quotas to admit black students,” public support for quotas ranges from 33 to 38 percent. Among whites, those in favor of quotas to admit black students fell between 26 and 31 percent of the population; whereas these same quotas were supported by as much as 83 percent of the African American population (NES 1986-1992). Based on the divergent results depending on if the question is framed as a preference or a racial quota, it seems as though the framing of the question is just as important, if not more important, than the content of the question in

determining public opinion poll results.

Though public opinion data paints an interesting picture of support, or lack thereof, for affirmative action, it is not without limitations. Currently, public opinion is readily captured in National Election Day exit polls; however, this practice did not start until the early 1970s. Therefore, in studying affirmative action, a program that began in the mid-1960s, one must overcome the obstacle of spottiness in the survey record. There is little information available regarding what public opinion toward affirmative action was in the late 1960s and early 1970s when the programs were first instituted (Steech & Krysan 128). It was not until the mid-1980s that “systematic attempts to trace trends” on the issue were made (Steech & Krysan 129). One reason for heightened awareness to affirmative action trends and more consistent and conscious polling was that politicians, at the time, began to see affirmative action as an issue that could win them votes (Swain 329). Because it was enacted a decade after the onset of affirmative action, public opinion data regarding Title IX does not face as much spottiness in the survey record.

Beginning with its passage in the 1970s, Title IX has generally been met with public support. In Harris polls regarding racial and religious minorities and women from 1972-1985, the percentage of the population in favor of Title IX ranged from 62 to 71 percent. When Title IX achieved success in 1980—when the percentage of the college population that was female exceeded the percentage of women in the American population—64 percent of the general public supported Title IX programs (Harris 1972-1985). In recent years, after the positive effects of

Title IX have been clearly seen, support for the programs has grown. In a 2000 poll, conducted by NBC News and the Wall Street Journal, 79 percent of the American population approved of Title IX when described as “a prohibition of discrimination on the basis of gender” (NBC News & Wall Street Journal 2000). In a similar poll taken in 2003, 68 percent of the population approved of Title IX (NBC News & Wall Street Journal 2003). That same year, in a Gallup, CNN and USA Today poll, 61 percent of the population said that Title IX has had a “mostly positive overall impact” (Gallup, CNN & USA Today 2003). In 2012, on the 40th anniversary of the passage of Title IX, 78 percent of the American population agreed that Title IX’s impact has been mostly positive (CBS News & NY Times 2012). In comparison with race-base affirmative action programs, there has been less breadth in public opinion polling regarding Title IX. I postulate that this may be due to the fact that Title IX is a slightly less contentious issue in the political sphere and in the public eye, based on the results of historical public opinion polls. Though there have not been as many polls dealing with Title IX when compared to race-based affirmative action, the public’s support for Title IX programs and appreciation of their positive impact has been clearly seen in public opinion data.

Even when dealing with the more controversial issue of gender-based affirmative action, the public has shown significant support. In a 1978 Harris poll that asked, “Do you favor or oppose affirmative action programs in higher education for women provided there are no rigid quotas?” 90 percent of the African American population and 70 percent of the white population responded in

favor of gender-based affirmative action. In Harris surveys that utilized the same question framing from 1982-1991, public support for gender-based affirmative action ranged from 75 to 78 percent. However, in more recent years—as women have surpassed men not only in undergraduate collegiate enrollment, but also in undergraduate and advanced college degrees earned—support for gender-based affirmative action has waned. In a 1995 Los Angeles Times poll, 61 percent of the population was in favor of “affirmative action programs designed to help women get better jobs and education” (LA Times 1995). In Gallup polls from 1995-2005, support for gender-based affirmative action programs ranged from 56 to 59 percent (Gallup 1995-2005). Finally, in a 2009 poll that asked if respondents “generally favored or opposed affirmative action programs for women,” 63 percent of the population responded in favor of gender-based affirmative action programs (AP 2009). Based on the public opinion data—despite the fact that women have become the majority in collegiate enrollment and have begun to earn the majority of undergraduate and advanced college degrees—the majority of the American population still supports gender-based affirmative action. Therefore, whether dealing with a prohibition of discrimination based on gender, like Title IX, or a program that provides preferential treatment, like gender-based affirmative action, the majority American public responds favorably. On the contrary, even at the height of support for race-based affirmative action, a program described as generally preferential based on race or as utilizing a race-based quota never received majority support from the American public.

Even the order of questioning is important when comparing race-based

and gender-based affirmative action programs. In a 2003 Gallup poll, respondents were asked whether they favored or opposed affirmative action programs for women and racial minorities. Respondents who were first asked about affirmative action for women favored it 62 percent of the time. Meanwhile, those who were asked the same question after a similar question about racial minorities favored it just 56 percent of the time (Gallup 2003). A reverse pattern is evident when examining the questions regarding racial minorities. Respondents who were first asked about affirmative action for racial minorities opposed it 48 percent of the time, while favoring it just 45 percent of the time. On the contrary, those who were asked the same question after a similar question about women favored it 53 percent of the time, while opposing it just 38 percent of the time (Gallup 2003). This poll illustrates that Americans are clearly more likely to support affirmative programs for women than affirmative action programs for racial minorities.

But, question order and comparative context matter. When the discussion of affirmative action focuses only on racial minorities then public support for these programs is nearly evenly divided—leaning slightly against rather than in favor. Similarly, if the focus is solely on Title IX programs or gender-based affirmative action programs for women then public support is quite substantial.

However, if the context of the debate is framed around affirmative action programs for both women and racial minorities, some people attempt to be consistent. Their support or opposition for one of the programs sways their answers. They may choose to support the program for minorities because they support it for women, or they may oppose the program for women because they

oppose it for minorities. This comparative context is what causes such divergent responses based on question order (Gallup 2003). When the respondents are broken down by race and gender, the data shows that women and African Americans are consistent in their level of support for affirmative action programs for women and for racial minorities. Therefore, only responses of white men are affected by question order. Still, based on the disparities in responses to public opinion questions regarding affirmative action, it seems likely that women—as well as African American men—may change their stance on the program in certain situations.

While some of the difference in responses to affirmative action questions can be blamed on the lack of an autonomous piece of congressional legislation enacting the program, it is unlikely the sole cause. The inconsistency of responses reflects more than unconscious public confusion due to lack of understanding of the programs or the framing of the question. In each of the affirmative action polls stratified by race, African American support for race-based affirmative action has often doubled and occasionally tripled white support for the programs, depending on the question's framing. Therefore, while framing is an important issue that may influence public support for race-based affirmative action programs, it seems more likely that the disparities can be explained by the biases at play.

Chapter 7

In-Group Bias

Why is the public's opinion of two seemingly similar programs so different? I argue that the explanation may lie in social psychology; namely, in the work of William Sumner. His theory has developed and been identified under several nomenclatures: intergroup bias, in-group favoritism, in-group out-group bias and in-group bias. For the purposes of this thesis, this sociological phenomenon will be referred to as in-group bias. The study of in-group bias has been used to explicate several cultural developments including ethnocentrism, prejudice and racism.

Individuals are rarely in a position to directly impact an entire social group. However, they are free to develop social policy attitudes that they expect will influence in-group and out-group outcomes. Because of this, a large body of research has centered on evaluating individuals' policy preferences as a way of examining various intergroup conflicts (Goff, Lowery, Knowles & Unzueta 961). One of the most commonly studied policies is that of affirmative action. Despite widespread support for the egalitarian ideals that inspired affirmative action, the policy has been met with considerable resistance from whites (Sears, Henry, & Kosterman 79). This is reflected in the stratification of support for affirmative

action in public opinion polls along racial lines.

Depending on the poll, white support for race-based affirmative action ranges from 15 to 30 percent. Meanwhile, African American support for the programs varies between 60 and 85 percent. The majority of each racial group is operating from the framework of an in-group bias based on their support or lack of support for affirmative action programs.

Unlike race-based affirmative action programs, Title IX and even gender-based affirmative action programs have been met with relative support from the general American public. I argue that this occurs because the majority of the American public subconsciously views women as part of their in-group, due to a common in-group identity beyond gender. In-group bias stems from a perceived intergroup threat. This is based in Realistic Conflict Theory which proposes that when two groups are in competition with one another over scarce resources—like places in a collegiate undergraduate class—the potential success of one group threatens the well-being of the other (Sherif & Sherif 232). However, a common in-group identity will reduce the perceived threat between groups. In fact, when a common in-group identity is formed, it can create a perception of cooperation and shared fate (Brewer 167). I believe this has increased the nexus between women and males of both races.

Naturally, all women are part of the in-group who benefit from Title IX and gender-based affirmative action. But what is really interesting is that men seem to form a common in-group identity with women, based on their responses to questions regarding Title IX and gender-based affirmative action. As was

previously established, white men are the only ones who change their views of affirmative action programs based on if the debate begins speaking about women or racial minorities (Gallup 2003). They attempt to aid women, whom they categorically view as their own mothers, sisters and daughters—unless it is correlated with aiding African Americans and other racial minorities. This is illustrative of a perception of women as part of the “white” in-group. The same can be said for African American males, who likely view women as part of the “black” in-group for similar reasons. Therefore, it seems as though gender differences, whether dealing with Title IX or gender-based affirmative action programs, do not trigger the out-group negativity that racial differences do. This type of stratification along racial, but not gender, lines explains the significant differences in public opinion relating to race-based affirmative action versus Title IX and gender-based affirmative action. Because the Supreme Court often exhibits deference toward public opinion, it also begins to explain the differences in Supreme Court litigation and Supreme Court rulings regarding gender-based affirmative action and similar women’s rights initiatives.

Chapter 8

Public Opinion and the Supreme Court

The Supreme Court follows the election returns. This simple statement, initially purported by Robert Dahl, has influenced the analysis of the Supreme Court over the past half-century. Many scholars have used it to explicate the Court's opinions—especially those on controversial issues. Few issues have been as contentious, or as noteworthy, as affirmative action. Thus, the Court has shown significant deference to public opinion in dealing with affirmative action cases. In a 1977 Roper poll, just 25 percent of the American public supported keeping quotas in college admissions “to insure a certain number of minority students” (Roper 1977). Just a year later, in the landmark *Regents of the University of California v. Bakke* case, the Supreme Court ruled that utilizing a quota system based on race in the collegiate admissions process was unconstitutional. However, in that same case, the Supreme Court held that affirmative action programs were constitutional, reflective of the 68 percent of the public who were in favor of affirmative action programs with “no rigid quotas” at the time (Harris 1978). By 2003, when the Supreme Court again ruled on affirmative action in the *Grutter v. Bollinger* case, the public was considerably divided on the issue of affirmative action. This was reflected in the Court's divisive 5-4 decision, which produced

strong written opinions both in concurrence and dissent. Finally, though the Court has yet to rule in the *Fisher v. University of Texas* case, based on the lack of public support for affirmative action in recent years, it would seem likely that the Court would rule for Fisher, limiting or effectively ending affirmative action.

The Supreme Court has shown similar deference to public opinion in women's rights cases. Because the public has generally supported Title IX, there have been few challenges to the statute at the Supreme Court level. However, the one significant limitation to Title IX came in the *Grove City College v. Bell* case, decided in 1984. This limitation, however brief—it was abrogated by the Civil Rights Restoration Act of 1988—was reflective of a slight decline in support for Title IX programs after women became the majority of the college undergraduate population in 1979. Yet, even at this juncture, 65 percent of the general public still supported Title IX programs (Harris 1979). There have been several other noteworthy women's rights cases dealing with the more contentious issue of gender-based affirmative action. However, in both the 1976 case *Craig v. Boren* and the 1979 case *Califano v. Webster*, the Supreme Court has distinguished gender-based affirmative action from race-based affirmative action and has rendered support for gender-based affirmative action programs. This distinction is reflective of the disparity in public opinion regarding the two programs during this era. While remedial race-based affirmative action programs did not muster majority support in the late 1970s, gender-based affirmative action was supported by 90 percent of the African American population and 70 percent of the white population at that time (Harris 1978). Thus, it seems as though public opinion—

colored by in-group bias—has spurred Supreme Court litigation and influenced the Supreme Court’s decisions in dealing with affirmative action and similar women’s rights initiatives.

Chapter 9

Race-Based Affirmative Action Cases

The Supreme Court's ruling in *Grutter v. Bollinger* is the most recent constitutional interpretation in the ongoing debate over affirmative action. In this 2003 case, Barbara Grutter, a Caucasian female Michigan resident, argued that the University of Michigan Law School had discriminated against her on the basis of race in violation of the Equal Protection Clause of the 14th Amendment, among other statutes. She believed that she had been rejected, despite her 3.8 GPA and 161 LSAT score, because the law school utilizes race as a "predominant factor" in its admissions process. According to Grutter, this gave applicants belonging to certain minority groups a significantly greater opportunity for admission than those of disfavored racial groups; however, the school argued that it was a compelling state interest for it to achieve a "critical mass" of minority students. The Court ruled, 5-4, in favor of the University of Michigan Law School, relying largely on precedent from the *Regents of the University of California v. Bakke* case. On the other hand, vocal dissenters relied on *United States v. Virginia* as precedential evidence. The differing views on the application of affirmative action inspired the written opinions of the court in the *Grutter v. Bollinger* case.

The majority in *Grutter v. Bollinger* utilized precedent from the *Regents of*

the University of California v. Bakke case in their written opinion. The ruling, authored by Sandra Day O'Connor, states that the University of Michigan Law School's policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." This seems like a reasonable argument, but the question at hand largely related to the Court's decision in *Bakke*. In the majority opinion, O'Connor asserts that Justice Powell's concurrence in *Bakke* has become the Court's standard for constitutional analysis of "race-conscious admissions policies." The Court held that the law school's interest in obtaining a "critical mass" of minority students was indeed a "narrowly tailored" use of race and was therefore constitutional. However, O'Connor recognized that affirmative action should still be a temporary measure and argued that at some time in the future it would be unnecessary to ensure diversity. At that point in time, she argues, a "colorblind" policy should be implemented.

On the other hand, the dissenters in *Grutter v. Bollinger* argue that affirmative action is illegal now—in this case. The dissent, authored by Chief Justice Rehnquist and joined by justices Scalia, Kennedy and Thomas, maintained that the University of Michigan Law School's admissions policy was unconstitutional and that it attempted to achieve an inconsistent racial balancing. This is in direct opposition with the idea of a "critical mass" presented by the majority. Rehnquist cited admissions statistics in his dissent, demonstrating that the admissions practices differed dramatically from year to year and from one race to another. As the data shows, there is a correlation between the law school's

pool of applicants of the minority groups and the percentage of admitted students that is “far too precise to be dismissed as merely the result of the school paying some attention to the numbers.”

Justice Thomas, the only African American on the Court at the time of *Grutter v. Bollinger* decision, also issued his own scathing opinion, concurring in part and dissenting in part. Thomas begins his opinion by quoting Frederick Douglass, one of the most prominent abolitionists of the 19th century. Douglass stated that what the African American people needed was “not benevolence, not pity, not sympathy, but simply justice.” He goes on to articulate that nothing should be done for African Americans; rather, they should be allowed to stand on their own legs—“if they fall, let them fall.” Thomas echoes this sentiment in his opinion. He argues that the University of Michigan Law School’s policy is not only unconstitutional, but that it also constitutes racial discrimination. According to Thomas, law schools necessitate this type of discriminatory policy by creating “elitist” admissions standards. “The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results.” Thomas then asserts that there is no compelling state interest in Michigan maintaining an elite law school—or even a law school at all—as a number of state schools do not have law schools, let alone law schools that would rank among the nation’s elite.

Therefore, the University of Michigan Law School should be “forced to choose between its classroom aesthetic and its exclusionary admissions system.” Thomas bases this argument on a precedent set in the *United States v. Virginia*

case. In this case the Court struck down the Virginia Military Institute's male-only admission policy in a 7-1 decision. Thomas recused himself from that case, likely because his son was enrolled at the institute at the time. However, he utilizes it as precedential evidence here, showing that the Court has previously forced institutions to drastically alter their admissions processes and the character of the institutions themselves. Finally, Thomas challenges the assertion that the University of Michigan Law School cannot achieve the diversity it desires without a preferential admissions policy. He cites the University of California, Berkeley School of Law as an example of an institution with a "reputation for excellence" rivaling Michigan that has achieved a diverse student body without "resorting to racial discrimination." Though Thomas sympathizes with the majority's attempt to aid African American students, he utilizes precedential evidence and contemporary examples to rule out preferential admissions policies as a constitutional means to achieve a diverse student body.

The *Grutter v. Bollinger* case centers on a controversial constitutional principle—the Equal Protection Clause of the 14th Amendment. This clause, which states that no state shall "deny to any person in its jurisdiction the equal protection of the laws," has largely been recognized as an endeavor to assure that the United States adheres to its professed commitment to the "proposition that all men are created equal." The clause has been referenced in many landmark Supreme Court decisions, none more infamous than the ruling in *Brown v. Board of Education*. In this case, the Court ruled unanimously that the segregation of students in public schools violates the Equal Protection Clause of the 14th

Amendment, because separate facilities are inherently unequal. Similarly, when the Court held that racial quota systems were unconstitutional, in 1978 case of *Regents of the University of California v. Bakke*, the majority relied upon the Equal Protection Clause for justification. However, by 2003, when the Court ruled in *Grutter v. Bollinger*, there was significant dissent regarding whether or not affirmative action and generally preferential admissions principles were in violation of the Equal Protection Clause. The majority followed the prior ruling in *Bakke*, arguing that affirmative action is constitutional as long as its use is narrowly tailored and not utilized to achieve a racial quota. However, the majority recognized that affirmative action was to be a temporary measure and that sometime in the future it would be unnecessary to achieve diversity in admissions. The dissenters, on the other hand, argued that affirmative action was unconstitutional then and there, and that its result was, in effect, racial discrimination. These divergent viewpoints illuminate the uncertainty surrounding the constitutionality of affirmative action programs, especially in recent years.

In general, affirmative action programs can be seen as a progressive unfolding of constitutional principles. Despite their linkage to the Equal Protection Clause of the 14th Amendment, affirmative action cases pose a difficult issue when referencing the Constitution from an originalist perspective. The Constitution mentions nothing regarding affirmative action or preferential treatment based on race. However, it seems implausible to argue that the Reconstruction Era Congress intended for the Equal Protection Clause to prohibit racial classifications and preferential programs based on race. In fact, that same

Congress promoted racial integration as a goal and deployed race-conscious measures to achieve it (Lemieux 2). They provided special payments to African American soldiers to ensure they were compensated for their service to the Union, passed numerous race-conscious antipoverty measures and most notably created the Freedman's Bureau to aid former slaves by funding school construction and education programs, among other necessities (Lemieux 2). Neither of the Court's originalist thinkers, Scalia nor Thomas, has attempted to argue that the Reconstruction Era Congress intended for the Equal Protection Clause to prohibit race-conscious programs. Rather, each "speaks in abstract terms about the principle of color blindness" (Lemieux 2). Because there is no tangible historical meaning surrounding affirmative action, as it goes unmentioned in the Constitution, originalists are left without a concrete answer.

However, most scholars have argued that an originalist interpretation of the 14th Amendment would lead the Court to uphold race-conscious affirmative action—a view that neither Scalia or Thomas seem to hold or support. Therefore, Scalia and Thomas have largely relied on policy arguments when dealing with race-conscious programs. Some justices, like O'Connor, argue that the Court should still follow the example of the Reconstruction Era Congress, utilizing race-conscious programs as that Congress did. However, others, like Scalia and Thomas, argue that, race-conscious programs should be considered unconstitutional racial discrimination from this point forward. This is seen in Thomas' written opinion, joined by Scalia, in *Grutter v. Bollinger*. Thomas concurs with O'Connor's famous statement in which she argues that affirmative

action will no longer be necessary to achieve racial equality 25 years from the decision; stating, “I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years.” However, Thomas and Scalia dissent from the remainder of the Court’s opinion because they believe that, “the Law School's current use of race violates the Equal Protection Clause” and that “the Constitution means the same thing today as it will in 300 months.” Each of these camps supposedly relies on the perspective of the Reconstruction Era Congress; yet each arrives at a divergent endpoint, as seen in their interpretation and opinions in race-based affirmative action cases.

But why is there such a controversy surrounding affirmative action—why does all of this matter? As time has passed affirmative action and race-conscious programs have become more and more controversial. Since its unanimous decision in *Brown v. Board of Education* the Court’s position on race-consciousness has gradually shifted, first to placing limitations on affirmative action programs, and then to vocal dissent regarding the constitutionality of affirmative action as a whole. Seemingly the next step in the process would be the prohibition of race-conscious programs altogether. This type of “colorblind” principle is something that O’Connor addressed in the majority opinion in *Grutter v. Bollinger*. She argued that affirmative action should not be granted permanent status and that 25 years from the decision, or around 2028, preferential treatment would no longer be necessary to create equality amongst the races. Thomas argued that this level of equality had been reached and that preferential treatment was unnecessary then—in 2003—rather than 25 years from that date as O’Connor

suggested. Though Thomas did not get his wish in 2003, the Court may abolish preferential treatment based on race sooner than O'Connor thought.

The Supreme Court has heard another major case dealing with the use of race in undergraduate admissions decisions, this time at the University of Texas. This case, *Fisher v. University of Texas*, was brought by Abigail Fisher; a white student who says the university denied her admittance because of her race. In Texas, the top 10 percent each of high school's graduating class is automatically admitted to the state's public university system. Though this policy does not consider race, it does increase racial diversity at the university level. Fisher missed this cutoff and was entered into a secondary pool of applicants who can be admitted through a program that utilizes race as a factor. Fisher argues that the University of Texas cannot "have it both ways" (Liptak 1). Because they have implemented a race-neutral program to increase minority admissions, she asserts, they cannot supplement it with a race-conscious program.

The lower federal courts ruled in favor of the university, arguing that the University of Texas' admissions program met the standards laid out in *Grutter v. Bollinger*. According to a Fifth Circuit panel of judges, the university recognized that "a quota system would not survive judicial review" and the school "took care to avoid this fatal mistake." In fact, the University of Texas' system was modeled after the *Grutter* program, which the Supreme Court held was not a quota. The panel points out that the University of Texas, "has never established a specific number, percentage, or range of minority enrollment that would constitute "critical mass," nor does it award any fixed number of points to minority students

in a way that impermissibly values race for its own sake.” Rather, the University of Texas’ program, like the one outlined in *Grutter* pursues the “twin objectives of rewarding academic merit and fostering diversity.” The Fifth Circuit panel argues that these can be “complementary rather than competing” objectives, as “students rising to the top of under-represented groups demonstrate promise as future leaders.” According to the Fifth Circuit panel, “these students’ relative success in the face of harmful and widespread stereotypes evidences a degree of drive, determination, and merit not captured by test scores alone.” Thus, the race-conscious program—which supplements the University of Texas’ race-neutral admissions program—is constitutional, as it follows the precedential standards established in *Grutter v. Bollinger*. Though the lower courts have ruled in favor of the university, should the Supreme Court choose to rule for Fisher, this case has the potential to “eliminate diversity as a rationale sufficient to justify any use of race in admissions decisions—the rationale the Court endorsed in the *Grutter v. Bollinger* decision” (Liptak 2). Though the Supreme Court has not yet ruled in the *Fisher v. University of Texas* case many, including famed Supreme Court reporter Jeffrey Toobin, have predicted that the Court will effectively end affirmative action with its ruling on the case.

Chapter 10

Title IX Cases

While affirmative action has faced significant challenges in the Supreme Court through cases like *Regents of the University of California v. Bakke*, *Grutter v. Bollinger* and mostly recently *Fisher v. University of Texas*, Title IX has been relatively unopposed in the realm of higher education. Most Title IX cases have sought to expand support for women under the program. In the 1979 case *Cannon v. University of Chicago*, the Supreme Court ruled that individuals could sue under Title IX. Though this was not explicitly stated in the statute, this expansion allowed for an individual remedy to coincide with the potential termination of federal funds for Title IX violations.

Many subsequent cases utilized this opportunity to sue under Title IX, especially regarding issues of sexual harassment. In *Franklin v. Gwinnett County Public School*, a 1992 case, the Supreme Court held that Title IX supports a claim for monetary damages in sexual harassment cases between a female student and a teacher. In *Doe v. Petaluma Unified School District*, a Ninth Circuit case in 1995, Title IX's coverage was expanded to cases of student-on-student sexual harassment. Through the 1999 case, *Davis v. Monroe County Board of Education*, the Supreme Court indoctrinated this into federal law. In ruling, the Supreme

Court held that a school district is liable for student-on-student harassment if it is aware of the problem and acts with “deliberate indifference” rather than trying to resolve it. This case echoed the “deliberate indifference” standard established in the 1998 case, *Gebser v. Lago Vista Independent School District*. That case dealt with liability for damages when a teacher harasses a student. In *Gebser v. Lago Vista Independent School District*, the Supreme Court ruled that a school is liable for damages when a school official with knowledge of the teacher’s harassment and the authority to take action acts with “deliberate indifference” to the conduct. Thus, *Davis v. Monroe County Board of Education* was merely an expansion of school liability to include student-on-student sexual harassment as well as the aforementioned teacher-on-student sexual harassment. While many of the cases filed under Title IX have expanded the scope of the statute, a few legitimate challenges have been rendered against it.

However, most of the cases confronting Title IX have centered on athletics rather than academics. In 1997, the Supreme Court declined to review a First Circuit case that upheld the use of the Three-Prong Effective Accommodation Test for Title IX compliance. In this case, *Cohen v. Brown University*, the First Circuit upheld that schools must show athletic opportunities that are proportionate with male and female enrollment levels, show a history of increasing opportunities for the underrepresented sex, or show that they are fulfilling the interests and abilities of the underrepresented sex. Though a cert denial technically does not indicate the Supreme Court’s views on an issue, by denying Brown’s petition for cert, the Supreme Court allowed the First Circuit ruling to

stand—effectively supporting Title IX—even in the more controversial realm of athletics. This was seen again in the 2004 case, *National Wrestling Coaches Association v. United States Department of Education*. In that case, the United States Court of Appeals for the D.C. Circuit affirmed a lower court’s dismissal of the claim that men’s sports teams are discriminated against because of Title IX. Consequently, even in relation to collegiate athletics the Supreme Court and other federal courts have rendered support for Title IX.

In more recent cases, women have utilized Title IX to challenge for equal opportunity in collegiate athletic departments. In *Mansourian v. Board of Regents of the University of California at Davis*, a 2010 case out of the United States District Court for the Eastern District of California, a group of female wrestlers challenged U.C. Davis’s decision to cut them from the previously coed wrestling team. The court found in favor of the female wrestlers, arguing that the University had not provided equal athletic opportunity to female athletes. A similar case was recently decided in the Second Circuit. The case, *Biediger v. Quinnipiac University*, centered around Quinnipiac’s decision to cut its women’s volleyball program as well as its men’s golf and outdoor track and field teams. The elimination of these sports would theoretically allow Quinnipiac to create a new varsity sports team, women’s competitive cheerleading. Stephanie Biediger and other members of the women’s volleyball team filed suit against Quinnipiac, arguing that even with the competitive cheerleading team Quinnipiac had a disproportionate number of male athletes. Females make up 61.87 percent of the Quinnipiac University student body but are afforded only 58.25 percent of the

varsity athletic participation opportunities. The Second Circuit upheld the District Court's decision that this 3.62 percent disparity was enough to constitute a Title IX violation. Consequently, Quinnipiac was forced to reinstate the women's volleyball program. The vast majority of Title IX cases have either expanded the scope of support for women under the statute or have protected women's rights under the statute. However, the Supreme Court did render one significant limitation on Title IX through the 1984 case, *Grove City College v. Bell*. The case initially looks like another clear expansion of Title IX, as the Court held that Title IX could be applied to private schools that refused direct federal funding but where a large number of students received financial aid or federally funded scholarships. However, the decision goes on to narrowly interpret Title IX, constraining its protections to the departments that actually receive federal funding—essentially the school's financial aid department—rather than applying the statute to the institution as a whole. This ruling significantly impacted Title IX enforcement in collegiate athletics as it virtually immunizes athletic programs from Title IX scrutiny because they rarely receive direct federal funding. On the other hand, this Title IX limitation did not have much of an impact on the academic sector; in fact, it served as a means to expand Title IX implementation into private schools. This decision was later abrogated by the Civil Rights Restoration Act of 1988, which stated that recipients of federal funding must comply with civil rights laws as an entire institution, not just in the particular department, program or activity that is receiving federal funding. This legislative act paved the way for many of the aforementioned Title IX cases dealing with

collegiate athletics. Though there have been many federal cases dealing with Title IX, most have been expansions of the scope of the statute or have dealt with Title IX enforcement in athletics. Even in its narrowest interpretation of Title IX, in the *Grove City College v. Bell*, the Supreme Court has recognized and supported the need for Title IX enforcement in the academic sector of higher education.

Chapter 11

Competing Explanation: Gender-Based Affirmative Action

While Title IX and race-based affirmative action are similar programs, they are not completely analogous. In its simplest form, Title IX is a policy that guarantees non-discrimination for women. Race-based affirmative action, on the other hand, is a policy that provides preferential treatment—whether in collegiate admissions or the hiring process—for African Americans. However, after the passage of Title IX, gender-based affirmative action programs, which provide preferential treatment to women, were also instituted. As seen in the prior discussion of public opinion, Americans tend to support gender-based affirmative action more than race-based affirmative action—albeit by a smaller margin than between affirmative action and Title IX programs.

Though Title IX and gender-based affirmative action programs are closely linked, they have a different history of support, not only in the public, but also in the Supreme Court. Whereas there have been few legitimate challenges to Title IX, the Supreme Court has heard numerous other women's rights cases including cases dealing with gender-based affirmative action. One of the most significant cases for women's rights was handed down a year prior to the passage of Title IX. In *Reed v. Reed*, the Supreme Court ruled for the first time that the Equal

Protection Clause of the 14th Amendment applied to differential treatment based on gender.

In ruling on Equal Protection cases, the Supreme Court has established three distinct levels of scrutiny. The default level of review is rational basis scrutiny. Under a rational basis analysis, a law is constitutional as long as it is “reasonably related” to a “legitimate government interest.” If the Equal Protection case deals with a “quasi-suspect class” then the Supreme Court will utilize the intermediate scrutiny standard. In these cases, a law is unconstitutional unless it is “substantially related” to an “important government interest.” Finally, if the Equal Protection case deals with a “suspect class” then the Supreme Court will employ the strict scrutiny standard. In these cases, a law is unconstitutional unless it is “narrowly tailored” to achieve a “compelling government interest.” Additionally, in cases that arouse strict scrutiny, there must not be a “less restrictive means” for achieving that interest. Since *Korematsu v. United States*, the 1944 case dealing with the internment of Japanese Americans during World War II, race has been labeled as a suspect class in the eyes of the Supreme Court. Therefore, any Equal Protection case dealing with racial discrimination triggers the strict scrutiny standard. But to what standard does the Supreme Court hold gender-based discrimination?

In the 1973 case, *Frontiero v. Richardson*, a plurality of the Court used a strict scrutiny standard in deciding that benefits given by the United States military to service member’s families cannot be allocated differently based on gender. In arguing for strict scrutiny, the Court focused on the history of gender-

based discrimination in America. In the plurality opinion, the Court states that, “There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of “romantic paternalism” which, in practical effect, put women, not on a pedestal, but in a cage.” This paternalistic view allowed the laws of the United States to “gradually became laden with gross, stereotyped distinctions between the sexes.” In fact, the Court argues that, for much of the 19th century, “the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.” The Court also acknowledges that gender, like race and national origin—the two prior suspect classes, is an “immutable characteristic determined solely by accident of birth” and that, like those classes, it “frequently bears no relation to ability to perform or contribute to society.” This line of argumentation seems to link race and gender together under the strict scrutiny standard of Equal Protection.

However, the strict scrutiny standard, utilized by the Court in *Frontiero v. Richardson*, was not employed in subsequent cases regarding gender discrimination. In fact, just three years later, in the 1976 case *Craig v. Boren*, the Supreme Court instituted the standard of intermediate scrutiny in dealing with distinctions based on gender. Thus, to uphold race-based discrimination the government must still provide a compelling interest justification and narrowly

tailored means. In contrast, after the decision in *Craig v. Boren*, gender-based classifications require only that the law be substantially related to an important government interest. This minor distinction had significant ramifications for gender-based affirmative action.

Just a year later, in the 1977 case *Califano v. Webster*, the Court addressed a challenge to a Social Security provision that allowed women, for the purposes of calculating their retirement benefits, to omit three more lower-earning years than men. As a result, women's benefits were skewed toward their later and higher-earning years, allowing them to qualify for slightly greater Social Security benefits. Unlike discriminatory laws that penalize women, the Court explained that this provision was not "the accidental byproduct of a traditional way of thinking about females but rather was deliberately enacted to compensate for particular economic disabilities suffered by women." The Court applied intermediate scrutiny in the decision, arguing that the "reduction of disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as an important government objective." This reasoning, according to the Court, fulfilled the intermediate scrutiny standard. Thus, in *Califano v. Webster*, the Court distinguished between "invidious gender discrimination and remedial action" and held that "generalized societal discrimination provided a sufficient justification for remedial action," such as gender-based affirmative action (Levinson 9).

This support for remedial action—namely gender-based affirmative action—was again seen in the 1987 case, *Johnson v. Transportation Agency of*

Santa Clara. Paul Johnson, a male employee of the Transportation Agency of Santa Clara, was passed over for a promotion; instead, Diane Joyce, a female employee, was promoted to the position of road dispatcher. The Transportation Agency had an affirmative action plan in place in order to “achieve a statistically measurable yearly improvement in hiring and promoting minorities and women in job classifications where they are underrepresented.” The Court ruled that the Transportation Agency’s promotion procedures were constitutional. In doing so, the Court argued that it was “not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Ms. Joyce in making its decision.” The Court also noted that, “the Agency plan did not unnecessarily trammel male employees’ rights or create an absolute bar to their advancement.” In fact, the plan set aside no positions for women, and expressly stated that its goals “should not be construed as “quotas” that must be met.” In *Johnson v. Transportation Agency of Santa Clara*, the Court utilized the standards laid out in *Califano v. Webster* to decide—for the first time—that a voluntary sex-based affirmative action plan can be utilized to overcome the effects of past job discrimination based on gender.

But what about race-based affirmative action plans? In 1978, just a year after *Califano v. Webster*, four dissenting justices argued that the same standards outlined in the decision should be applied to uphold a race-based preference for admission to a California medical school in *Regents of the University of California v. Bakke*. Had they succeeded, this decision would have reestablished a legal parallel between racial and gender classification. However, the five justices

in the majority in *Bakke* voted to strike down the University of California affirmative action program. In fact, Justice Powell, in his written opinion, explicitly rejected the race and gender parallel. Instead, he concludes that “whether invidious or benign” all race-based classifications must be subject to strict scrutiny (Levinson 9). Though this segment of Powell’s opinion did not muster a majority vote, the Supreme Court has relied on the *Bakke* decision—decided by the contentious 5-4 margin—in subsequent race-based affirmative action decisions. In these cases, the Court has solidified strict scrutiny as the standard for race-based affirmative action and has largely rejected societal discrimination as a sole justification for such programs.

The distinction between the Court’s rulings in *Califano v. Webster* and *Regents of the University of California v. Bakke*, illustrates the Court’s divergent views on race-based and gender-based affirmative action. Based on the precedent in *Califano v. Webster*, the Court—under the intermediate scrutiny standard—has allowed remedial action like gender-based affirmative action. However, based on the precedent in *Regents of the University of California v. Bakke*, the Court—under the strict scrutiny standard—has rejected or limited remedial action in the form of race-based affirmative action programs. This distinction at the Supreme Court level echoes the public sentiment, which consistently supports not only Title IX but also gender-based affirmative action more than race-based affirmative action.

Chapter 12

Conclusion

The Civil Rights and Women's Rights Movements were two parallel revolutions aiming for equality in America. Within a decade of one another, African Americans and women gained victories through non-discrimination guarantees and preferential treatment programs meant to usher in an era of equality in a nation that claims to hold it "self-evident" that all men—and women—are created equal. Despite the similarities between the movements and the programs they enacted: affirmative action for African Americans and Title IX programs for women, the American public received them dramatically differently. While Title IX was met with majority support, race-based affirmative action faced public disdain. While women utilized Title IX programs to eclipse men in collegiate undergraduate enrollment, in just seven years, race-based affirmative action programs sputtered. This is due to in-group bias. While America may no longer be mired in the era of slavery that treated African Americans as less than human, it is not without racial stratification. While I would argue that in-group bias is distinct from conscious discrimination, prejudice or racism, it is still a subconscious othering that places one group above another. This psychological phenomenon has accelerated the adoption and success of Title IX programs,

allowing women to surpass men in collegiate undergraduate enrollment, while slowing the progress and success of race-based affirmative action programs.

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Summary of Capstone Project

The Civil Rights and Women’s Rights Movements were two of the most significant “rights revolutions” in American history. Each spawned radical social change in both the workplace and the classroom. This thesis focuses on changes in the classroom—specifically in higher education. I chose to focus on higher education because I believe that education is at the heart of social change and therefore an essential element in both the Civil Rights and Women’s Rights Movements. Though similar in their aims, the movements achieved success at different rates, particularly in higher education. Whereas the Women’s Rights Movement, backed by Title IX legislation, was generally well received by the public, the Civil Rights Movement, particularly affirmative action programs, faced public resistance. While some of this resistance may have stemmed from public confusion surrounding affirmative action, as there was no autonomous piece of legislation that enacted affirmative action programs, much of it was based on genuine public opposition, which I argue was spurred by in-group bias. The public’s resistance to race-based affirmative action programs led to several Supreme Court cases challenging the programs including: *Regents of the University of California v. Bakke*, *Grutter v. Bollinger* and most recently *Fisher v. University of Texas*. While there were also numerous federal cases dealing with Title IX, most were expansions of the scope of protection under the statute and none questioned the need for Title IX enforcement in the academic sector of higher education.

Based on these findings, this thesis endeavors to answer the following

question which has yet to be examined in the field of political science: Did in-group bias influence public opinion and public backlash in the form of Supreme Court litigation, impacting the time it took for race-based affirmative action programs to achieve success in comparison with similar women's rights initiatives? It attempts to prove my hypothesis that in-group bias has indeed colored the public opinion statistics and has prompted Supreme Court litigation against race-based affirmative action programs, slowing their adoption and success in relation to women's right initiatives, namely Title IX.

What is in-group bias? In-group bias is a social psychological theory developed by William Sumner. It has developed and been identified under several nomenclatures: intergroup bias, in-group favoritism, in-group out-group bias and in-group bias. For the purposes of this thesis, this sociological phenomenon is referred to as in-group bias. Sumner argues that humans, as a species, naturally join together in groups. Furthermore, human social interaction arrangements are often characterized by the differentiation and separation into in-groups, or groups to which an individual belongs, and out-groups, or groups to which an individual does not belong. This division is a demarcation of loyalty and cooperation. Therefore, in-group bias refers to a pattern in human behavior in which humans tend to favor members of their in-groups over members of their out-groups or groups perceived as "others." The study of in-group bias has been used to explicate several cultural developments including ethnocentrism, prejudice and racism. In this thesis, I attempt to utilize in-group bias to explain why public opinion toward race-based affirmative action is so divergent from public opinion

toward similar women's rights initiatives—namely Title IX and gender-based affirmative action.

What is public opinion? Simply stated, public opinion is the aggregate of individual's beliefs and attitudes surrounding an issue. This definition is similar to that of George Gallup, a pioneer in the areas of survey sampling and polling, who defined public opinion as “an aggregate of the views men hold regarding matters that affect or interest the community.” In the United States, national public opinion data provides a snapshot of the nation's views on controversial issues from gay marriage to abortion to affirmative action. In this thesis, public opinion data is utilized to illustrate public support or disdain for affirmative action and Title IX programs. Based on in-group bias' effect on public opinion, I attempt to explain the different rates of success for affirmative action and Title IX programs despite their similarities.

What is affirmative action? In its simplest form, affirmative action is a preferential treatment program meant to promote advancements toward equality for disadvantaged groups. Affirmative action can be broadly read to include any policies that take steps to promote equality for specific groups, though it is primarily used in describing race-based affirmative action policies benefitting African Americans. As a general term, affirmative action encompasses more than just the “quotas” or “preferences” for which the program has largely become known. The term also refers to open recruiting procedures, efforts to monitor progress in hiring and promoting underrepresented groups, contracts set-aside for minorities and other proactive policies. Despite being linked to race-based

policies, affirmative action can also be utilized to benefit other groups such as women. Affirmative action policies benefitting women are referred to as gender-based affirmative action programs in this thesis. What is Title IX? Title IX is a portion of the Education Amendments of 1972 that guarantees non-discrimination and equal opportunity for women. It states that, “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” This thesis attempts to clarify why the public treated two seemingly similar programs—affirmative action and Title IX—so differently and consequently why these programs achieved success at such divergent rates.

What is the point of success? For the purpose of this thesis, I defined the point of the success in higher education for both affirmative action and Title IX programs as the point when the percentage of the group—whether women or African Americans—in the undergraduate population exceeds the percentage of said group in the general American population. As seen in the college enrollment data, it took women just 8 years after the passage of Title IX to reach this point. On the contrary, it took African Americans 34 years after John F. Kennedy coined the term “affirmative action” to reach this point.

This thesis attempts to tie all of these terms together. In doing so, it attempts to explain how in-group bias colored the public opinion data and spurred public backlash in the form of Supreme Court litigation against race-based affirmative action programs, slowing their progress toward success in relation to

analogous women's rights initiatives—namely Title IX and gender-based affirmative action.

This thesis' significance lies in its historical context and current application. It deals with two of the greatest cultural developments in American history, the Civil Rights and Women's Rights Movements. Thus, it relates to a key period of rights revolution in American history that is often studied. However, more importantly, this thesis has a contemporary application as the Supreme Court has heard the *Fisher v. University of Texas* case, but has yet to rule on it. Many scholars have predicted that the Supreme Court's ruling in the case could effectively end affirmative action in higher education. Therefore, affirmative action and the success of such programs in higher education are timely issues to be examined in the wake of the Supreme Court's decision in *Fisher v. University of Texas*.