

IN DEFENSE OF THE 2006 TITLE IX REGULATIONS FOR SINGLE-SEX PUBLIC EDUCATION: HOW SEPARATE CAN BE EQUAL

Abstract: The U.S. Department of Education recently amended the regulations implementing Title IX of the 1972 Education Amendments, which is the federal statute prohibiting discrimination on the basis of sex. The new regulations provide greater flexibility for school districts to offer single-sex public elementary and secondary education. They embrace the recent growth of single-sex education in the United States, but some question their constitutionality. This Note explores how the U.S. Supreme Court should rule on a challenge brought against the regulations under the Equal Protection Clause. It introduces Title IX, the new regulations, and the relevant Equal Protection Clause jurisprudence, and it presents an argument for upholding the regulations' constitutionality. The Note then proceeds by rejecting a previously proposed analogy to the "separate but equal" doctrine prohibiting segregation on the basis of race in education. Instead, it favors an analogy to the athletic field, where segregation by sex has thrived under Title IX, suggesting that the single-sex programs promoted under the new regulations may be able to withstand judicial scrutiny.

INTRODUCTION

The pursuit of true gender equality in public education in the United States has been, and continues to be, a thorny one.¹ Indeed, in 1973, in *Frontiero v. Richardson*, the U.S. Supreme Court recognized, "[O]ur Nation has had a long and unfortunate history of sex discrimination," which has been fueled in part by "discrimination in our educational institutions."² During the American colonial period and the years following the Revolutionary War, schoolhouse doors were commonly

¹ See Diane Heckman, *Women and Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9 (1992). Throughout this Note, the word "sex" is used to refer to biological differences between males and females, while the word "gender" is used to refer to cultural differences between the two. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1 (1995).

² See 411 U.S. 677, 684 (1973), quoted in *United States v. Virginia*, 518 U.S. 515, 531 (1996).

closed to girls.³ Throughout the nineteenth and twentieth centuries, all female high schools and colleges began sprouting up to offer an education considered appropriate for girls—one far inferior to that available to boys.⁴ Also during that time, more schools became coeducational.⁵

The enactment of the Nineteenth Amendment in 1920, which granted full citizenship status to women, and the momentum produced by the civil rights and feminist movements of the mid-twentieth century helped turn a spotlight onto the differential treatment of women in the United States.⁶ To reduce the possibility of discrimination on the basis of sex in education, almost all public schools in the second half of the twentieth century were made coeducational.⁷ In fact, in 1996, Justice Scalia heralded the death of all single-sex public education.⁸ His pronouncement, however, appears to have been misguided.⁹ The number of single-sex educational environments has ex-

³ Maryam Ahrahanjani, *Mary Daly v. Boston College: The Impermissibility of Single-Sex Classrooms Within a Private University*, 9 AM. U. J. GENDER SOC. POL'Y & L. 179, 183 (2001); Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 779–80 (2002).

⁴ Hasday, *supra* note 3, at 780–83, 795–801; Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 66.

⁵ See Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 514 (1999).

⁶ See U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J.L. & PUB. POL'Y 123, 127 (1997).

⁷ See Whitney Ransome & Meg Milne Moulton, *Why Girls' Schools? The Difference in Girl-Centered Education*, 29 FORDHAM URB. L.J. 589, 589–90 (2001).

⁸ See *Virginia*, 518 U.S. at 596 (Scalia, J., dissenting) ("[T]he rationale of today's decision is sweeping . . . [I]t ensures that single-sex public education is functionally dead."). This was a stronger pronouncement than the one made by Justice Blackmun in dissent in 1982, in *Mississippi University for Women v. Hogan*:

While the Court purports to write narrowly, declaring that it does not decide the same issue with respect to "separate but equal" undergraduate institutions for females and males, or with respect to units of MUW other than its School of Nursing, there is inevitable spillover from the Court's ruling today. That ruling, it seems to me, places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant. The Court's reasoning does not stop with the School of Nursing of the Mississippi University for Women.

458 U.S. 718, 734 (1982) (Blackmun, J., dissenting) (citations omitted); see also Patricia Werner Lamar, Comment, *The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Education Amendments of 1972*, 32 EMORY L.J. 1111, 1140 (1983) (portending the death of single-sex education after *Hogan*).

⁹ See Galen Sherwin, *Single-Sex Schools and the Antisegregation Principle*, 30 N.Y.U. REV. L. & SOC. CHANGE 35, 56 (2005).

ploded over the past few years.¹⁰ According to the National Association for Single Sex Public Education (the "NASSPE"), in 1995 only three public elementary and secondary schools offered single-sex educational opportunities; in the 2005–06 school year at least 262 did so; as of October 2007, at least 383 did so.¹¹

The U.S. Department of Education (the "DOE") has embraced this new trend.¹² It recently amended the regulations implementing Title IX of the 1972 Education Amendments ("Title IX"), the federal gender antidiscrimination statute,¹³ expanding the public elementary and secondary schools' ability to provide single-sex educational opportunities.¹⁴ These new regulations have stirred deep passions, both in those who favor and oppose them.¹⁵ Some people, such as those at the NASSPE, heartily endorse this progressive movement, celebrating the new regulations as an enormously beneficial weapon for achieving gender equality in the United States.¹⁶ Others, such as the American Civil Liberties Union (the "ACLU") and the National Organization for Women ("NOW") bemoan that the DOE has taken a significant step backwards on the road to gender equality, opening the door for the

¹⁰ Nat'l Ass'n for Single Sex Pub. Educ., *Single-Sex Schools/Schools With Single-Sex Classrooms/What's the Difference?*, <http://www.singlesexschools.org/schools-schools.htm> (last visited Oct. 17, 2007).

¹¹ *Id.*

¹² See 71 Fed. Reg. 62,530 (Oct. 25, 2006).

¹³ 20 U.S.C. §§ 1681–1688 (2000 & Supp. III 2003). Title IX is "a strong and comprehensive measure . . . [designed] to provide women with solid legal protection as they seek education and training for later careers . . . [and] to expand some of our basic civil rights and labor laws to prohibit the discrimination against women which has been so thoroughly documented." 118 CONG. REC. 5806–07 (1972) (statement of Sen. Bayh).

¹⁴ 71 Fed. Reg. 62,530; see 34 C.F.R. § 106.34 (2007).

¹⁵ See Isabelle Katz Pinzler, *Separate but Equal Education in the Context of Gender*, 49 N.Y.L. SCH. L. REV. 785, 785 (2004); Sherwin, *supra* note 9, at 36.

¹⁶ See Letter from Leonard Sax, Executive Dir. of the Nat'l Ass'n for Single Sex Pub. Educ., to Kenneth L. Marcus, Assistant Sec'y for the Dep't of Educ. (Apr. 16, 2004) [hereinafter Letter from Leonard Sax], available at <http://www.singlesexschools.org/OCR.htm>.

resurgence of discrimination.¹⁷ In addition, those who oppose the regulations argue that they should be struck down as unconstitutional.¹⁸

Litigation on this subject appears to be inevitable.¹⁹ The ACLU, for example, has indicated that it is "looking at schools that are segregating students by sex and considering whether any of them are ripe for a challenge."²⁰ This Note seeks to evaluate how the U.S. Supreme Court should rule on such a challenge to the constitutionality of single-sex education and the new Title IX regulations.²¹ Part I begins with an overview of Title IX and the new regulations concerning public elementary and secondary single-sex education.²² Next, Part II presents a discussion of how courts have considered single-sex education in the past, particularly under the Equal Protection Clause of the Fourteenth Amendment.²³ It then continues with an argument in favor of upholding the new regulations as constitutional according to the current Equal Protection Clause standard, with support from Title IX's legislative history.²⁴ Part III first rejects the application of the doctrine prohibiting "separate but equal" educational opportunities based on race to the gender context.²⁵ It then concludes by exploring the constitutional-

¹⁷ See, e.g., Am. Civil Liberties Union, *New Title IX Regulations Pose a Serious Threat to Civil Rights of Students* (Oct. 25, 2006), <http://www.aclu.org/womensrights/edu/27207res20061026.html> [hereinafter ACLU] (quoting Emily Martin, Deputy Director of the ACLU Women's Rights Project); Nat'l Org. for Women, *Comments of the National Organization for Women on the Department of Education's Notice of Intent to Regulate on Single-Sex Education* (May 2002), <http://www.now.org/issues/education/single-sex-education-comments.html> [hereinafter NOW]; see also Chris Moran, *Benefits, Drawbacks Seen in Gender Separate Classes*, SAN DIEGO UNION-TRIB., Dec. 20, 2004, at A1 (noting that ACLU and NOW contributed over 5000 comments to the proposed Title IX regulations to argue that the regulations were unconstitutional).

¹⁸ See Letter from Laura W. Murphy, LaShawn Y. Warren, Lenora Lapidus & Emily Martin, Representatives of the Am. Civil Liberties Union, to Kenneth L. Marcus, Assistant Sec'y for the Dep't of Educ. (Apr. 23, 2004) [hereinafter Letter from Murphy et al.], available at <http://www.aclu.org/womensrights/edu/13176leg20040423.html>.

¹⁹ See Kimberley J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 1985 n.168 (2006) ("As the number of single-sex schools increases, single-sex schools may be more likely to spur litigation.").

²⁰ Diana Jean Schemo, *Change in Federal Rules Backs Single-Sex Public Education*, N.Y. TIMES, Oct. 25, 2006, at A1 (quoting Emily Martin, Deputy Director of the Women's Rights Project at the ACLU).

²¹ See *infra* notes 162-324 and accompanying text.

²² See *infra* notes 27-105 and accompanying text.

²³ See *infra* notes 106-161 and accompanying text.

²⁴ See *infra* notes 162-249 and accompanying text.

²⁵ See *infra* notes 250-281 and accompanying text.

ity of sex segregation in the classroom by comparison to sex segregation on the athletic field.²⁶

I. AN HISTORICAL REVIEW OF TITLE IX AND SINGLE-SEX EDUCATION

The U.S. Congress enacted Title IX pursuant to its Spending Clause power²⁷ as a progressive measure intended to achieve gender equality in educational institutions receiving federal funds.²⁸ The statute speaks in sweeping language that does not specifically address single-sex elementary and secondary education; rather, its regulations have broached this topic.²⁹

This Part provides a general description of Title IX, where it comes from, and what it seeks to accomplish.³⁰ It then details Title IX regulations, which were recently amended to encourage the growth of single-sex education.³¹ Lastly, it explains how these amendments developed in response to research indicating the potential pedagogical benefits of single-sex education.³²

A. Background of Title IX

The origins of Title IX date back to President John F. Kennedy's 1961 Executive Order No. 10,980 establishing the President's Commission on the Status of Women, which revealed distressing levels of sex discrimination in the United States.³³ Six years later, on October 13, 1967, President Lyndon B. Johnson amended his Executive Order No. 11,246 to include the first prohibition of discrimination on the basis of sex.³⁴

Less than three years later, these executive actions garnered congressional support.³⁵ Congressional hearings in 1970 drew attention

²⁶ See *infra* notes 282–324 and accompanying text.

²⁷ See U.S. CONST. art. I, § 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.").

²⁸ See 20 U.S.C. §§ 1681–1688 (2000 & Supp. III 2003).

²⁹ See *id.* § 1681; 34 C.F.R. § 106.34 (2007); *infra* notes 59–85 and accompanying text.

³⁰ See *infra* notes 33–58 and accompanying text.

³¹ See *infra* notes 59–85 and accompanying text.

³² See *infra* notes 86–105 and accompanying text.

³³ Exec. Order No. 10,980, 26 Fed. Reg. 12,059 (Dec. 14, 1961).

³⁴ See Exec. Order No. 11,375, 3 C.F.R. 339 (1964–1965) (amending Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965)). This prohibition was added to prohibitions of discrimination on the basis of race, color, religion, and national origin in the employment of federal contractors. *Id.*

³⁵ See *infra* notes 36–46 and accompanying text.

to rampant sex discrimination in education.³⁶ The response to these hearings was Title IX, which emerged out of separate bills from both houses of Congress.³⁷ The first draft of the statute, proposed by the House Subcommittee on Higher Education, chaired by Representative Edith Green, surfaced in the House of Representatives in 1970, as a part of a general education bill.³⁸ This draft took the form of an amendment to Title VI of the Civil Rights Act of 1964 ("Title VI"), proposing that the statute would include sex discrimination among its prohibitions.³⁹ Ultimately, this measure did not pass but evolved into a separate bill, H.R. 7248, which specifically prohibited sex discrimination.⁴⁰ This bill passed in the House on November 4, 1971.⁴¹

Meanwhile, in the Senate, Senator Birch Bayh proposed an amendment to an education bill then on the floor, which sought to prohibit sex discrimination in educational institutions.⁴² This version, which did not pass, provided for a phase-in period during which all single-sex schools would be required to integrate the excluded sex.⁴³ In contrast, the next version of the bill, proposed in the following year also by Senator Bayh, contained an explicit exemption for single-sex admissions policies to elementary, secondary, and private undergraduate schools, as well as for religious and military academies.⁴⁴ It eventually passed on March 1, 1972, and was sent to conference with H.R. 7248.⁴⁵ An agreement over the differing provisions of the House and Senate bills was finally reached, and the resulting bill became law when President Nixon signed it on June 23, 1972.⁴⁶

³⁶ 118 CONG. REC. 5808-09 (1972). Research compiled by the Senate Labor and Public Welfare Committee indicated that: women comprised only 29.3% of the entering class for the most selective schools in the United States; on average, men were awarded more financial aid; schools paid their female professors substantially less than their male counterparts; and other such evidence of discrimination against women. *Id.*

³⁷ H.R. 7248, 92d Cong. (1971); S. 659, 92d Cong. (1971).

³⁸ H.R. 16,098, 91st Cong. § 885 (1970).

³⁹ See H.R. 16,098. It appeared along with amendments to Title VII of the 1964 Civil Rights Act and to the Equal Pay Act. *Id.*

⁴⁰ 117 CONG. REC. 30,882 (1971); see *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523 n.13 (1982).

⁴¹ 117 CONG. REC. 30,882, 39,252 (1971); see *N. Haven Bd. of Educ.*, 456 U.S. at 523 n.13.

⁴² See 117 CONG. REC. 30,155 (1971).

⁴³ See *id.* at 30,399 (1971).

⁴⁴ See 118 CONG. REC. 5803, 5812-13 (1972).

⁴⁵ *Id.*

⁴⁶ See *id.* at 22,702. The Senate agreed to the bill, *id.* at 18,862, as did the House, *id.* at 20,340. The final bill took the form of a separate title, proposed by Representative Green,

This law, now known as Title IX, mandates, "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."⁴⁷ Congress modeled the language of Title IX's antidiscrimination proclamation to be almost identical to that used in Title VI.⁴⁸ It did so in the hopes that Title IX would promote sex equality as dramatically and effectively as Title VI had promoted racial equality.⁴⁹ Indeed, the U.S. Supreme Court has consequently interpreted Title VI and Title IX *in pari materia*.⁵⁰ In addition, Congress intended to use Title VI as a limit on Title IX; Senator Bayh stated:

[W]e really are not doing anything to the private school that is not now in the law under title VI of the Civil Rights Act, relating to discrimination in other areas. We are saying that the power which now resides in the Federal Government over private institutions shall be extended. We are only adding the 3-letter word "sex" to existing law.⁵¹

Thus, Title IX was revolutionary for the type of discrimination it aimed to prevent but not for its approach in accomplishing that aim.⁵²

so as to honor the requests of Americans who feared that amendments to Title VI would weaken it. Valentin, *supra* note 6, at 125.

⁴⁷ 20 U.S.C. § 1681 (2000). In 1984, the Supreme Court held, in *Grove City College v. Bell*, that Title IX was "program-specific," applying only to those programs actually receiving federal funds. See 465 U.S. 555, 570-74 (1984). Congress, however, did not agree with such a narrow reading of Title IX and thus legislatively reversed *Grove City College* by enacting the Civil Rights Restoration Act of 1987, which adopted an "institution-wide" approach. Pub. L. No. 100-259, § 2, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687 (2000 & Supp. III 2003)).

⁴⁸ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 693-96 (1979) (plurality opinion) ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."); 117 CONG. REC. 30,156 (1971) (remarks of Sen. Bayh); see 20 U.S.C. §§ 1681-1688 (2000 & Supp. III 2003); Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

⁴⁹ See *Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, 524 F. Supp. 531, 541 (E.D. Pa. 1981) ("Title IX was intended to do to sex discrimination what Title VI was intended to do to discrimination on the basis of race, color, and national origin."); see also 20 U.S.C. §§ 1681-1688.

⁵⁰ See 20 U.S.C. §§ 1681-1688; *Cannon*, 441 U.S. at 696 (plurality opinion). Provisions that are *in pari materia* are construed together. See, e.g., *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972).

⁵¹ 117 CONG. REC. 30,408 (1971); see 20 U.S.C. §§ 1681-1688.

⁵² See 20 U.S.C. §§ 1681-1688; 117 CONG. REC. 30,408 (1971).

In enacting Title IX, Congress took a brazen step in a new direction because this was the first time that it set out to prohibit sex discrimination in education.⁵³ Congress had lofty goals, hoping for Title IX to be an "antidote" against the use of federal funds in support of discriminatory practices in "all facets of education—admissions, scholarship programs, faculty hiring and promotion, profession staffing and pay scales."⁵⁴

To accomplish this, Title IX provides both a public remedy and a private cause of action against such practices.⁵⁵ Public enforcement of the statute occurs through the DOE's Office of Civil Rights ("OCR"). This agency is authorized to terminate federal funding to any non-complying institution or to pursue "other means authorized by law" including, but not limited to, proceeding under state or local law and appealing to the Department of Justice to enforce the regulations.⁵⁶

⁵³ See 20 U.S.C. §§ 1681–1688; 117 CONG. REC. 30,155 (1971). Senator Bayh proclaimed, "Amendment No. 874 [which included what later became Title IX] is broad, but basically it closes loopholes in existing legislation relating to general education programs More specifically, the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds." 118 CONG. REC. 5803 (1972). Senator Bayh likely used the term "amendment" to refer to the whole amendment package, which expanded the scope of already-existing statutes, whereas he used the term "provision" to refer to Title IX's antidiscrimination proclamation "because it was something new." Cheri L. Crow, Note, *Does Title IX of the Education Amendments of 1972 Prohibit Employment Discrimination—An Analysis*, 22 B.C. L. REV. 1099, 1113 (1981) (citations omitted).

⁵⁴ 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh); see 20 U.S.C. §§ 1681–1688 (2000 & Supp. III 2003).

⁵⁵ 20 U.S.C. § 1682; see *Cannon*, 441 U.S. at 704 (plurality opinion); 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh). Protection under Title IX extends to the "direct beneficiaries of federal financial assistance." Junior Coll. Dist. v. Califano, 455 F. Supp. 1212, 1215 (D. Mo. 1978), *aff'd*, 597 F.2d 119 (8th Cir. 1979). This includes students, applicants, and employees of educational institutions. See *N. Haven Bd. of Educ.*, 456 U.S. at 530; *Cannon*, 441 U.S. at 694 (plurality opinion); *Islesboro Sch. Comm. v. Califano*, 593 F.2d 424, 426 (1st Cir. 1979). Such plaintiffs may sue any educational program directly receiving federal funding except for those explicitly exempted by the statute. 20 U.S.C. § 1681(a).

⁵⁶ 20 U.S.C. § 1682; 45 C.F.R. § 80.8 (2006). Educational institutions not in compliance with the requirements of Title IX may be reported to the OCR, either through a complaint or in the course of a compliance review carried out by the OCR. See U.S. Dep't of Educ., OCR's Complaint Resolution Procedures, <http://www.ed.gov/about/offices/list/ocr/complaints-how.html> (last visited Oct. 25, 2007). In response, the agency may initiate an administrative proceeding. 20 U.S.C. § 1682. The OCR first investigates the complaint of sex discrimination and attempts to resolve the discrimination by informal means, but, if voluntary compliance is unobtainable, the OCR is authorized to revoke funding. *Id.*; 34 C.F.R. § 100.8 (2007). This threat, however, is largely just government scare-tactics used as an enforcement mechanism. See *Cannon*, 441 U.S. at 705 n.38 ("Personally, I think it would be a rare case when funds would actually be cut off. In most cases alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy.")

In addition, Title IX affords an implied private cause of action—the Supreme Court established in its 1979 decision in *Cannon v. University of Chicago* that, in response to a violation of Title IX, a plaintiff may sue to recover money damages or to receive injunctive or declaratory relief.⁵⁷ In these ways, Title IX has come to combat discrimination on the basis of sex.⁵⁸

B. *The Most Recent Development in Title IX Regulations—Paving the Road for Single-Sex Public Education*

Congress drafted Title IX's prohibition of sex discrimination in broad strokes.⁵⁹ It, therefore, left much of the interpretation of Title IX up to the Department of Health, Education and Welfare ("HEW"), which has since transferred its responsibilities to the DOE's OCR.⁶⁰ To this end, Congress specifically empowered HEW to promulgate regulations implementing Title IX's requirements.⁶¹ HEW, in turn, issued regulations that endow the statute with a substantial reach and endow the agency with substantial power to enforce it.⁶² HEW's regulations were first published in June 1974, and were then submitted to the

(quoting 110 CONG. REC. 7067 (1964)(statement of Sen. Ribicoff)); *N. Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 785 (2d Cir. 1980), *aff'd*, 456 U.S. 512; *see also* Heckman, *supra* note 1, at 25. Actual termination of funds would be a highly severe and inappropriate remedy because it would likely cripple the program and, thus, benefit neither students nor employees. *See Cannon*, 441 U.S. at 704–05.

⁵⁷ *See* 441 U.S. at 709 ("Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."); *see also* *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (awarding damages under Title IX to a plaintiff who had suffered from sexual harassment and finding that Congress did not expressly limit the remedies available under Title IX); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (granting declaratory and injunctive relief). For more discussion of remedies available under Title IX, *see* Farah S. Ahmed, *Title IX of the 1972 Education Amendments*, 5 GEO. J. GENDER & L. 361, 370–73 (2004).

⁵⁸ *See supra* notes 47–54 and accompanying text.

⁵⁹ *See* 20 U.S.C. §§ 1681–1688.

⁶⁰ *See* *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993). HEW was abolished in 1979, at which point the DOE assumed responsibility for Title IX enforcement. *Id.*; *see* The Department of Education Organization Act, 20 U.S.C. § 3441(a)(3) (2000).

⁶¹ 20 U.S.C. § 1682 (2000). On May 4, 1980, this power was transferred to the DOE. *See* 20 U.S.C. § 3441 (2000). For this reason, the HEW regulations effectuating Title IX, 45 C.F.R. § 86.1–71 (1979), were reissued without change on May 4, 1980, in 34 C.F.R. § 106.1–71 (1980). *See* 45 Fed. Reg. 30,802 (May 9, 1980).

⁶² *See* Robert R. Hunt, *Implementation and Modification of Title IX Standards: The Evolution of Athletics Policy*, 1999 BYU Educ. & L.J. 51, 61. . .

Senate and House for review.⁶³ They entered into force, with no congressional opposition, when President Ford signed them on May 27, 1975.⁶⁴

Approximately twenty-seven years later, on May 8, 2002, the DOE published a Notice of Intent to Regulate ("NOIR") indicating that the Secretary planned to amend Title IX regulations.⁶⁵ Under the regulations in force at that time, single-sex classes were prohibited except in limited circumstances including: (1) physical education based on objective standards of physical ability, (2) contact sports, (3) classes dealing exclusively with human sexuality, and (4) choruses based on vocal range or quality.⁶⁶ Vocational schools could never be single-sex, and nonvocational schools could only be single-sex when there was a comparable single-sex school for students of the excluded sex.⁶⁷ The Secretary thought amendments were necessary to provide more "flexibility" to educational institutions in establishing single-sex schools and programs at the elementary and secondary school level.⁶⁸

⁶³ 40 Fed. Reg. 24,127 (June 4, 1975). The regulations were submitted to Congress on June 3, 1975. 121 CONG. REC. 16,294, 17,301 (1975). Congressional review was mandated by statute. See 20 U.S.C. § 1232(d)(1) (2000) (made applicable to Title IX by 20 U.S.C. § 1232(f) (2000)). The regulations were to take effect forty-five days after their submission unless Congress, by concurrent resolution, found them to be inconsistent with the authorizing act and disapproved them. See *id.* During this time period, HEW received an unprecedented 9700 comments, which were carefully considered and resulted in significant differences between the proposed and final regulations. See 39 Fed. Reg. 22,228 (June 20, 1974).

⁶⁴ Valentin, *supra* note 6, at 126. OCR has also provided further guidance on Title IX's requirements in the form of a "Policy Interpretation." See 44 Fed. Reg. 71,413 (Dec. 11, 1979). Among other clarifications, the Policy Interpretation established a three-prong test for compliance in meeting the interests and abilities of male and female student-athletes. See *id.*

⁶⁵ 67 Fed. Reg. 31,102-03 (May 8, 2002).

⁶⁶ 34 C.F.R. § 106.34(b), (c), (e), (f) (2007).

⁶⁷ *Id.* § 106.35. The regulation states:

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to: (a) Any institution of vocational education operated by such recipient; or (b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

Id.

⁶⁸ *Id.* The NOIR was published simultaneously with "Guidelines on current Title IX requirements related to single-sex classes and schools," which was required under the No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 5131(c), 115 Stat. 1425 (2002) (codifying and amending Elementary and Secondary Education Act, 20 U.S.C. §§ 6301-7941 (West 2003 & Supp. 2007)), signed into law by President Bush on January 8, 2001. *Id.*

Following its NOIR, on March 9, 2004, the DOE published a Notice of Proposed Rulemaking, which set out the proposed amendments to Title IX regulations.⁶⁹ It described how in 1975 gender discrimination was "widespread," so at that time limiting single-sex conditions as much as possible was used to limit opportunities for discriminatory practices as much as possible.⁷⁰ In contrast, the DOE determined that "schools are now far more equitable in their treatment of female students."⁷¹ Moreover, the DOE cited educational research conducted over the past thirty years suggesting that single-sex education may provide educational benefits for some students.⁷² Thus, Title IX needed amending to reflect the "dramatically" changed face of the American educational landscape.⁷³

In response to the proposed amendments to Title IX regulations, the DOE received approximately 5860 comments, and on October 25, 2006, it published the final version of the new regulations, effective November 24, 2006.⁷⁴ These new regulations make it easier for federal funding recipients to operate public elementary and secondary schools that exclude admission to any student on the basis of sex.⁷⁵ Nonvocational schools may be single-sex so long as there is also a "substantially equal"⁷⁶ single-sex school for students of the excluded sex *or a coeducational school*—whereas previously only a single-sex school for students of the excluded sex had sufficed.⁷⁷ Nonvocational charter schools may be

An amendment to the No Child Left Behind Act proposed by Senator Kay Bailey Hutchison specifically provides that public schools may use federal funds for single-sex programs. 146 CONG. REC. S5942 (daily ed. June 28, 2000). It received unanimous approval in the Senate. Press Release, Senate Passes Education Bill, Senator Hutchison's Single-Sex Education Amendment Included (June 14, 2001) (on file with the Boston College Law Review), available at http://www.bc.edu/schools/law/lawreviews/bclawreview/Past_Issues.html. Congress allocated more than \$400 million to support such programs. Susan G. Clark, *Public Single-Sex Schools: Are They Lawful?*, 213 EDUC. L. REP. 319, 319 (2006).

⁶⁹ 69 Fed. Reg. 11,276 (Mar. 9, 2004).

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.* (citing studies).

⁷³ See *id.*

⁷⁴ See 71 Fed. Reg. 62,530–32 (Oct. 25, 2006). None claimed that the new regulations were in and of themselves wrong, but rather the commentators focused on questioning how the regulations were to be implemented. See Valerie Strauss, *Schools May Offer More Single-Sex Classes Under New U.S. Regulations*, WASH. POST, Oct. 25, 2006, at A4 (quoting Stephanie Monroe, Assistant Secretary for Civil Rights in the DOE).

⁷⁵ See 34 C.F.R. § 106 (2007); *infra* notes 76–85 and accompanying text.

⁷⁶ 34 C.F.R. § 106.34(c)(3). OCR defines this term using the same factors as for single-sex programs and activities. See *id.* § 106.34(b)(3); *infra* note 84.

⁷⁷ 34 C.F.R. § 106.34(c)(1) (emphasis added); *id.* § 106.35; *supra* note 67 and accompanying text.

single-sex unconditionally,⁷⁸ but public vocational schools are still prohibited entirely from being single-sex.⁷⁹

Furthermore, in addition to the four previously established exceptions,⁸⁰ the new regulations include a more general exception allowing nonvocational coeducational elementary and secondary schools to provide certain single-sex classes or extracurricular activities.⁸¹ Classes or activities may be single-sex when they are completely voluntary, implemented in an evenhanded manner,⁸² and substantially related either to improving students' educational achievement through diversity in educational opportunities or to meeting students' particular identified educational needs,⁸³ so long as a substantially equal coeducational class is also available.⁸⁴ Thus, under the new Title IX regulations, there is greater opportunity for single-sex education to exist.⁸⁵

C. *The Impetus Behind the New Title IX Regulations: Scientific Justifications for Single-Sex Education*

The new Title IX regulations arose in response to research suggesting that there are hard-wired differences in learning between the sexes and, therefore, that separating girls and boys in school permits gender-tailored education more conducive to learning than coeducation.⁸⁶

⁷⁸ 34 C.F.R. § 106.34(c) (2).

⁷⁹ *Id.* § 106.35.

⁸⁰ See *id.* § 106.34(a); *supra* note 66 and accompanying text.

⁸¹ See 34 C.F.R. § 106.34(b) (1) (i)-(iv). These programs and activities do not include interscholastic, club, or intramural athletics. *Id.* § 106.34(b) (5) (noting that these are subject to the provisions of 34 C.F.R. § 106.41 and § 106.37(c)).

⁸² *Id.* § 106.34(b) (2). This may require the recipient "to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex." *Id.*

⁸³ *Id.* § 106.34(b) (1) (iii).

⁸⁴ *Id.* § 106.34(b) (1) (iv) ("The recipient [must] provide[] to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity."). The DOE provides six factors for consideration in determining whether a class or extracurricular activity is substantially equal:

the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.

Id. § 106.34(b) (3). These factors may be considered individually or in the aggregate, and other factors may be considered as well. *Id.*

⁸⁵ See *supra* notes 76-84 and accompanying text.

⁸⁶ See Laura Fortney, *Public Single-Sex Elementary Schools: "Separate but Equal" in Gender Fifty Years Following Brown v. Board of Education*, 35 U. Tol. L. Rev. 857, 873-77 (2004)

Evidence indicates that the brains of boys are physically different from those of girls—prenatal testosterone seems to change the brain tissue of boys permanently,⁸⁷ and male brain tissue and structure is, in fact, different from female brain tissue and structure.⁸⁸ Additionally, girls' brains develop differently than those of boys,⁸⁹ and girls and boys use different parts of their brains to perform the same tasks.⁹⁰

Other research suggests that boys and girls learn differently.⁹¹ This is due in part to the fact that girls tend to have higher standards for themselves in the classroom and are more likely to evaluate their academic performance excessively critically, whereas boys tend to overestimate their academic performance unrealistically.⁹² Moreover, girls are generally much more concerned with pleasing adults such as teachers and parents than are boys.⁹³

More general studies have demonstrated that all students, regardless of their sex, may perform better in single-sex educational environments than in coeducational ones.⁹⁴ For example, having students of only one sex in a classroom eliminates the distraction that students of the other sex pose.⁹⁵ In addition, research indicates that girls participate less and receive less attention and encouragement from teachers

(citing studies); Michael J. Kaufman, *Beyond Presumptions and Peafowl: Reconciling the Legal Principles of Equality with the Pedagogical Benefits of Gender Differentiation*, 53 BUFF. L. REV. 1059, 1079–96 (2005); Nat'l Ass'n for Single Sex Pub. Educ., *Brain Differences* (2006), <http://www.singlesexschools.org/research-brain.htm> [hereinafter *Brain Differences*].

⁸⁷ *Brain Differences*, *supra* note 86 (citing studies).

⁸⁸ Kaufman, *supra* note 86, at 1081–83; *Brain Differences*, *supra* note 86 (citing studies).

⁸⁹ Kaufman, *supra* note 86, at 1080–81; *Brain Differences*, *supra* note 86 (citing studies).

⁹⁰ Kaufman, *supra* note 86, at 1086–88; *Brain Differences*, *supra* note 86 (citing studies).

⁹¹ See Kaufman, *supra* note 86, at 1090–96; Nat'l Ass'n for Single Sex Pub. Educ., *Learning Style Differences* (2006), <http://www.singlesexschools.org/research-learning.htm> [hereinafter *Learning Style Differences*].

⁹² *Learning Style Differences*, *supra* note 91 (citing studies).

⁹³ *Id.* (citing studies).

⁹⁴ See Kay Bailey Hutchison, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 AM. U. L. REV. 1075, 1076 (2001) (citing reports); Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 803–06 (2000); Kristin S. Caplice, *The Case for Public Single Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 242–43 (1994); Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 390–95; Ransome & Moulton, *supra* note 7, at 596–99; Nat'l Ass'n for Single Sex Pub. Educ., *Single-Sex v. Coed: The Evidence*, <http://www.singlesexschools.org/research-singlesexvcoed.htm> (last visited Oct. 25, 2007) [hereinafter *Single-Sex v. Coed: The Evidence*].

⁹⁵ See U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-96-122, *PUBLIC EDUCATION: ISSUES INVOLVING SINGLE-GENDER SCHOOLS AND PROGRAMS* 4 (1996).

in coeducational settings.⁹⁶ In such settings, girls are also more likely to hide their intelligence, lack self-confidence, and shy away from "male" subjects like math and science.⁹⁷ Coeducation also seems to be failing boys, especially in areas such as reading and writing, where studies show that girls tend to outperform them.⁹⁸

Proponents of single-sex education look to the above data for support.⁹⁹ Indeed, some believe that, assuming girls and boys do in fact differ in how their brains function and how they learn, gender equality can *only* be achieved if girls and boys are taught in different settings.¹⁰⁰

As the DOE itself recognizes, however, educators cannot all agree on the effectiveness of single-sex education.¹⁰¹ The validity of the research in this area is vulnerable to attack because there may actually be numerous non-sex-based factors at work, such as classroom activities, teacher qualification, class size, and amount of funding.¹⁰² Although substantial support for single-sex education does exist, there is no commonly accepted notion today that single-sex education is superior to coeducation.¹⁰³ Further research is required,¹⁰⁴ and as of yet

⁹⁶ MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS* 1 (1994); Patricia B. Campbell & Ellen Wahl, *Of Two Minds: Single-Sex Education, Coeducation, and the Search for Gender Equity in K-12 Public Schooling*, 14 N.Y.L. SCH. J. HUM. RTS. 289, 302-03 (1997) (citing studies).

⁹⁷ See Jolee Land, *Not Dead Yet: The Future of Single-Sex Education After United States v. Virginia*, 27 STETSON L. REV. 297, 313-14 (1997) (citing studies); Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 86 (1997).

⁹⁸ See Jenkins, *supra* note 19, at 1965-69; Levit, *supra* note 5, at 471 (citing studies).

⁹⁹ See Letter from Leonard Sax, *supra* note 16.

¹⁰⁰ See Michael J. Kaufman, *Rhetorical Questions Concerning Justice and Equality in Educational Opportunities*, 36 LOY. U. CHI. L.J. 495, 509 (2005).

¹⁰¹ 71 Fed. Reg. 62,532 (Oct. 25, 2006) (admitting that "there is a debate among educators on the effectiveness of single-sex education").

¹⁰² See Jenkins, *supra* note 19, at 1985 ("Single-sex schools may be beneficial or harmful to students, depending on how they are operated."); Levit, *supra* note 5, at 502-53; Martha Minow, *Fostering Capacity, Equality, and Responsibility (and Single-Sex Education): In Honor of Linda McClain*, 33 HOFSTRA L. REV. 815, 827 (2005); Gary Simson, *Separate but Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 452-53 (2005); Letter from Murphy et al., *supra* note 18; NOW, *supra* note 17 ("Studies reveal that, once researchers control for background factors such as intelligence, socioeconomic status, motivation, and prior achievement, there are no statistically significant differences between all-female and coeducational schools.").

¹⁰³ See Brian Johnson, *Admitting That Women's Only Public Education Is Unconstitutional and Advancing the Equality of the Sexes*, 25 T. JEFFERSON L. REV. 53, 75-85 (2002); Levit, *supra* note 5, at 503; Simson, *supra* note 102, at 451-53; Vojdik, *supra* note 97, at 93; Maggie Ford, *Gender-Bias Study Does Not Advocate Single-Sex Education*, WASH. TIMES, May 19, 1999, at A18 (describing that a report prepared in 1998 by the American Association of University Women concluded that "single-sex education is not the solution to gender inequity in school").

¹⁰⁴ Keri McWilliams, *Education Law Chapter: Single-Sex Education*, 7 GEO. J. GENDER & L. 919, 932-33 (2006); Minow, *supra* note 102, at 822; Pinzler, *supra* note 15, at 805 ("I chal-

the Supreme Court has not taken the opportunity to weigh in on the debate over the pedagogical benefits of single-sex education.¹⁰⁵

II. THE FUTURE OF TITLE IX'S REGULATIONS CONCERNING SINGLE-SEX EDUCATION

Prior to the enactment of Title IX, the Equal Protection Clause of the Fourteenth Amendment provided the only shield against any discrimination on the basis of sex.¹⁰⁶ Even now, after the passage of Title IX and its new regulations, the Equal Protection Clause remains a potential obstacle to any sex segregation in public elementary and secondary education.¹⁰⁷

Because the scope of Title IX is not necessarily coextensive with that of the Equal Protection Clause, its new regulations do not necessarily pass constitutional muster.¹⁰⁸ But neither do they necessarily run afoul of the Equal Protection Clause, and the U.S. Supreme Court has yet to rule on the constitutionality of public single-sex elementary and

lenge the Department of Education . . . to fund a 'gold standard' experiment on the relative advantages of single-sex education.").

¹⁰⁵ See *United States v. Virginia*, 518 U.S. 515, 535 (1996) (noting that the United States did not challenge Virginia's assertion that single-sex education benefits at least some students).

¹⁰⁶ See U.S. CONST. amend. XIV, § 1, cl. 2 ("No state shall . . . deny to any person within [the] jurisdiction [of the United States] the equal protection of the laws."). For a discussion of cases relevant to the constitutionality of single-sex education, see Lamar, *supra* note 8, at 1119-42. The Fourteenth Amendment originally applied only to race-based classifications, as it was meant to end discrimination against former slaves, but in the 1971 decision of *Reed v. Reed*, more than 100 years after its passage, the Supreme Court extended its scope to gender-based classifications. 404 U.S. 71, 77 (1971) (striking down a statute giving preference to males over females in petitioning to become an administrator of an estate).

¹⁰⁷ See U.S. CONST. amend. XIV, § 1, cl. 2. This issue only arises in public institutions, as private institutions are, in general, not subject to constitutional limitations. See 42 U.S.C. § 1983 (2000) (providing a remedy for violations of constitutional rights that applies only against persons "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia"); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States."). For more discussion see Lamar, *supra* note 8, at 1160-62. Receipt of federal funds does not convert an otherwise private actor into a state actor. See, e.g., *West v. Atkins*, 487 U.S. 42, 52 n.10 (1988); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

¹⁰⁸ See 71 Fed. Reg. 62,533 (Oct. 25, 2006). The DOE itself provides a disclaimer along with the new regulations: "If possible, the regulatory provisions of Title IX are informed by constitutional principles, but because the scope of the Title IX statute differs from the scope of the Equal Protection Clause, these regulations do not regulate or implement constitutional requirements or constitute advice about the U.S. Constitution." *Id.* (citations omitted).

secondary education.¹⁰⁹ The regulations must meet the intermediate scrutiny standard set out in the 1996 Supreme Court case, *United States v. Virginia*.¹¹⁰ Although the Court ruled against single-sex education in that particular instance, it in no way obviously precluded the constitutionality of all single-sex education.¹¹¹ In fact, the Court provided many reasons to uphold such education.¹¹²

This Part examines the standard that applies to the new regulations allowing single-sex education.¹¹³ Next, it considers how a challenge to the constitutionality of the regulations under that standard would play out, and it presents an argument differentiating the education permitted under the new Title IX regulations from that which the Court has previously deemed unconstitutional.¹¹⁴ The Part then concludes with a look at the ways in which the legislative and post-enactment history of Title IX further recommend against striking down the new regulations.¹¹⁵

A. *The Treatment of Single-Sex Education by Courts Under the Equal Protection Clause to Date*

According to Equal Protection Clause jurisprudence, the new regulations would be subject to intermediate scrutiny.¹¹⁶ This standard, as first set out by the Supreme Court in 1976, in *Craig v. Boren*, requires that any gender classification serve important governmental objectives and be substantially related to the achievement of those objectives in order to be constitutional.¹¹⁷ Indeed, under this standard, the Court will usually strike down sex-based classifications when the government could achieve its objective through classifications that are sex-neutral¹¹⁸

¹⁰⁹ See *infra* notes 160–161 and accompanying text.

¹¹⁰ See 20 U.S.C. §§ 1681–1688 (2000 & Supp. III 2003); *United States v. Virginia*, 518 U.S. 515, 531–33 (1996); *infra* notes 117, 153–156 and accompanying text.

¹¹¹ See *Virginia*, 518 U.S. at 534; *infra* notes 162–218 and accompanying text.

¹¹² See *Virginia*, 518 U.S. at 524; Land, *supra* note 97, at 323 (“In light of the [*Virginia*] decision and application of the intermediate scrutiny test, the constitutional validity of ‘separate but equal’ single-sex schools is a distinct possibility.”); *infra* notes 162–218 and accompanying text.

¹¹³ See *infra* notes 116–161 and accompanying text.

¹¹⁴ See *infra* notes 162–218 and accompanying text.

¹¹⁵ See *infra* notes 219–249 and accompanying text.

¹¹⁶ See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (striking down a state statute prohibiting the sale of 3.2% beer to males under age twenty-one and to females under age eighteen).

¹¹⁷ *Id.*

¹¹⁸ See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150–52 (1980) (striking down a state statute favoring males over females in the distribution of workers’ compensation benefits); *Orr v. Orr*, 440 U.S. 286, 281–83 (1979) (striking down a state statute requiring

or when classifications are based on "archaic and overbroad generalizations" related to sex.¹¹⁹ Intermediate scrutiny is a more exacting standard than rational basis review but more lenient than strict scrutiny, which are the other two methods that the Court uses to evaluate government action under the Equal Protection Clause.¹²⁰

The Supreme Court has never applied intermediate scrutiny to elementary and secondary education,¹²¹ though it attempted to do so in 1977, in *Vorchheimer v. School District*.¹²² There, Philadelphia maintained an all-boys school and a separate all-female equivalent, in addition to multiple coed schools; a female plaintiff filed suit against the School District of Philadelphia after being denied admission to the boys' school.¹²³ The U.S. District Court for the Eastern District of Pennsylvania found in favor of the plaintiff under the Equal Protection Clause,¹²⁴ but the U.S. Court of Appeals for the Third Circuit reversed because it determined that the school district's important objective of providing quality education is substantially related to the theory that students perform better in single-sex settings.¹²⁵ The court, therefore, refused to prohibit the use of what it deemed "a respected educational

males, but not females, to pay alimony upon divorce); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (striking down a federal statute favoring widows over widowers in the distribution of Social Security benefits).

¹¹⁹ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 740 (1982) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)); *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (holding that widows and widowers are equally entitled to Social Security benefits); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973); see also *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 139 n.11 (1994).

¹²⁰ *Hasday*, *supra* note 3, at 759-60; *Jenkins*, *supra* note 19, at 1985-86. Under the requirements of rational basis review, which applies to all classifications not based on race, national origin, or gender, a classification must be rationally related to a legitimate state interest, and the challenged practice is usually upheld. See *Orleans v. Duke*, 427 U.S. 297, 306 (1976); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955). Under the requirements of strict scrutiny, which is reserved for race and national origin, a classification must be narrowly tailored to achieve a compelling governmental interest, and the challenged practice is usually struck down. See *Clark v. Jeter*, 486 U.S. 465, 461 (1988); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 299 (1978); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹²¹ See 71 Fed. Reg. 62,533 n.13 (Oct. 25, 2006); *Fortney*, *supra* note 86, at 863-64.

¹²² See generally 430 U.S. 703 (1977), *affg* by an equally divided Court 532 F.2d 880 (3d Cir. 1976). Justice Rehnquist did not participate in the decision. *Id.*

¹²³ *Vorchheimer*, 532 F.2d at 881.

¹²⁴ *Id.* at 882 ("The trial judge found the gender based classification of students at the two schools to lack a 'fair and substantial relationship to the School Board's legitimate interest' and enjoined the practice.").

¹²⁵ *Id.* at 888.

methodology."¹²⁶ On appeal, the Supreme Court remained evenly divided and thus merely affirmed the Court of Appeals decision without issuing an opinion.¹²⁷

By contrast, the Supreme Court has successfully reviewed single-sex education at the postsecondary school level on two occasions.¹²⁸ In 1982, in *Mississippi University for Women v. Hogan*, the Court held that denying admission to males to the nursing program at Mississippi University for Women ("MUW") violated the Equal Protection Clause.¹²⁹ A male, who was a qualified applicant to the program except by virtue of his sex, brought suit when he was not admitted to MUW.¹³⁰ The U.S. District Court for the Northern District of Mississippi entered summary judgment in favor of MUW, but the U.S. Court of Appeals for the Fifth Circuit reversed on the ground that the lower court had improperly applied a rational basis standard instead of intermediate scrutiny.¹³¹ Upon grant of certiorari, the Supreme Court affirmed the Court of Appeals' decision by a five to four majority.¹³²

Justice O'Connor, writing for the majority, explained that a classification on the basis of sex would be upheld only upon a showing of "exceedingly persuasive justification."¹³³ A plaintiff needed to present evidence that "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"¹³⁴ The Court strongly proscribed the use of classifications stemming from "fixed notions concerning the roles and abilities of males and females" and "archaic and stereotypic notions."¹³⁵

The Court disapproved of MUW's female-only admissions policy because rather than creating opportunities previously denied to women, it instead tended to perpetuate the stereotype that nursing is a female profession.¹³⁶ The policy failed to pass constitutional muster because it was not substantially related to benefiting women.¹³⁷ The Court rea-

¹²⁶ *Id.*

¹²⁷ *Vorchheimer*, 430 U.S. at 703.

¹²⁸ See generally *Virginia*, 518 U.S. 515; *Hogan*, 458 U.S. 718.

¹²⁹ See 458 U.S. at 731.

¹³⁰ *Id.* at 720-21.

¹³¹ *Id.* at 721.

¹³² *Id.* at 723.

¹³³ *Id.* at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)); see also *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

¹³⁴ *Hogan*, 458 U.S. at 724 (quoting *Wengler*, 446 U.S. at 150).

¹³⁵ *Id.* at 725.

¹³⁶ *Id.* at 729.

¹³⁷ See *id.* at 730-31.

soned that MUW already allowed men to audit its classes as full classroom participants without encountering any adverse effect on the women's experience, so nothing justified denying males official MUW student status.¹³⁸ The Court, however, did recognize that sex-based classifications may be justified in other circumstances where they "intentionally and directly" assist members of the disproportionately burdened sex.¹³⁹

Fourteen years after *Hogan*, the Supreme Court in *United States v. Virginia* struck down the male-only admissions policy espoused by the state-run Virginia Military Institute ("VMI").¹⁴⁰ Upon the complaint, filed with the Attorney General, of a female high-school student seeking to attend VMI, the United States sued Virginia for an alleged Equal Protection Clause violation.¹⁴¹ Although Virginia prevailed before the U.S. District Court for the Western District of Virginia, the U.S. Court of Appeals for the Fourth Circuit refused to accept Virginia's reasoning that it maintained VMI as a single-sex institution to provide a diversity of educational opportunities—both coeducational and single-sex—to its citizens.¹⁴²

Therefore, at the court's suggestion, the Commonwealth designed a parallel all-female institution to be the sister school of VMI.¹⁴³ The proposed school, Virginia Women's Institute for Leadership ("VWIL"), was intended to train "citizen-soldiers" as did VMI, but it was to function under very different conditions than those at VMI.¹⁴⁴ Rather than offering the rigorous military training found at VMI, VWIL planned to adopt a more "cooperative method" of education.¹⁴⁵

The Commonwealth returned to court for approval of its plans, justifying the dissimilarity between VMI and VWIL on pedagogical differences between men and women "in learning and developmental needs" and "psychological and sociological differences."¹⁴⁶ This satisfied the district court, whose decision a divided Court of Appeals af-

¹³⁸ See *id.*

¹³⁹ See *Hogan*, 458 U.S. at 728.

¹⁴⁰ See 518 U.S. at 534.

¹⁴¹ *Id.* at 523.

¹⁴² See *id.* at 523–25.

¹⁴³ *Id.* at 526. The court had suggested that the Commonwealth either admit women to VMI, establish a parallel institution for women, or forego public funding for VMI. *Id.* at 525–26.

¹⁴⁴ See *id.* at 548.

¹⁴⁵ *Virginia*, 518 U.S. at 548.

¹⁴⁶ *Id.* at 549 (quoting Brief for the Respondents at 28, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107)).

firmed.¹⁴⁷ The Supreme Court, however, was not satisfied that the two programs were "substantially equal[1]."¹⁴⁸ Therefore, by a seven to one majority,¹⁴⁹ the Court held that the Commonwealth violated the Equal Protection Clause by offering the unique educational opportunities available at VMI only to men and not to women.¹⁵⁰ Moreover, the separate but *unequal* arrangement with VWIL did not remedy this violation.¹⁵¹ In so holding, the Court reiterated its commitment to protecting women's "full citizenship stature" by striking down those policies that deny equal opportunity to women simply on account of their sex.¹⁵² The Court also reaffirmed the standard set out in *Hogan*, calling it "skeptical scrutiny."¹⁵³

Justice Ginsburg, writing for the majority, specifically noted that men and women have inherent differences, however, and thus are not "fungible."¹⁵⁴ She clarified that sex classifications will be upheld if they are designed to "compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' [and] to advance full development of the talent and capacities of our Nation's people," but not if they are designed to "create or perpetuate the legal, social, and economic inferiority of women."¹⁵⁵ She also added a further qualification that governmental objectives "must be genuine, not hypothesized or invented *post hoc* in response to litigation."¹⁵⁶

The Court rejected the Commonwealth's argument that VMI could not admit women because, if it did, it would have to change its curriculum to accommodate the physical capacities of women, which are on average lesser than those of men, and thus would have to

¹⁴⁷ *Id.* at 527-28.

¹⁴⁸ *Id.* at 554. It noted that the programs differed in the average SAT score of the student body, the number of faculty members holding doctoral degrees, faculty salary, range of curricular offerings, athletic facilities, endowment size, prestige, and alumni network. *Id.* at 551-52.

¹⁴⁹ *See id.* at 518. Justices Ginsburg, Stevens, O'Connor, Kennedy, Souter, and Breyer composed the majority, joined by Chief Justice Rehnquist concurring; Justice Scalia dissented; Justice Thomas recused himself because his son attended VMI at the time the matter was being argued. *Id.*

¹⁵⁰ *Virginia*, 518 U.S. at 518.

¹⁵¹ *Id.* at 534.

¹⁵² *See id.* at 532.

¹⁵³ *See id.* at 531, 533 (citing *Hogan*, 458 U.S. at 724); *supra* notes 133-134 and accompanying text.

¹⁵⁴ *Virginia*, 518 U.S. at 531, 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

¹⁵⁵ *Id.* at 533-34 (citations omitted).

¹⁵⁶ *Id.*

eliminate the unique opportunities VMI was touted to offer.¹⁵⁷ The Court condemned this for being a "notably circular argument" and pronounced that single-sex education may only be used as a means, not an end, in sex classifications.¹⁵⁸ The Court focused on the fact that there were *some* women "who have the will and capacity" to meet the challenging demands of VMI.¹⁵⁹

Thus, *Virginia* and *Hogan*, both of which concern public postsecondary education, inform our understanding of how the Supreme Court might handle a challenge to single-sex education in public elementary and secondary schools, but they do not definitively answer this question.¹⁶⁰ In both cases the Court explicitly reserved judgment on the constitutionality of "separate but equal" single-sex public education in general, and neither case specifically addresses the elementary and secondary school level.¹⁶¹

B. The Constitutionality of Title IX's Regulations Under Virginia

The fate of Title IX's new regulations in the courts, although uncertain as of yet, does not necessarily seem destined to be a gloomy one.¹⁶² The unclear standard set forth in *Virginia*, which incorporates that in *Hogan*, leaves much room for argumentation.¹⁶³ Justice Scalia

¹⁵⁷ See *id.* at 545.

¹⁵⁸ *Id.*

¹⁵⁹ *Virginia*, 518 U.S. at 542.

¹⁶⁰ See *id.* at 532; *Hogan*, 458 U.S. at 720.

¹⁶¹ *Virginia*, 518 U.S. at 534 n.7; *Hogan*, 458 U.S. at 720 n.1. In *Virginia*, no "separate but equal" issue arose because VMI was at that time the only single-sex school in the state and because VMI and VWIL were unequal. 518 U.S. at 534 n.7 ("We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique,' an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college.") (citations omitted). In *Hogan*, the Court specifically noted that, because at that time Mississippi did not maintain any other single-sex public university, no "separate but equal" issue was raised. 458 U.S. at 720 n.1 ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.").

¹⁶² See 34 C.F.R. § 106.34 (2007); William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27, 44 (1997) ("[T]he majority [in *Virginia*] went out of its way to emphasize that its decision turned on the unique nature of VMI, and that no per se condemnation of single-sex public education was implied."); Land, *supra* note 97, at 323 ("[T]he constitutional validity of 'separate but equal' single-sex schools is a distinct possibility."); Morgan, *supra* note 94, at 384-85; Amy H. Nemko, *Single-Sex Public Education After VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 22 (1998).

¹⁶³ See *Virginia*, 518 U.S. at 533; *Hogan*, 458 U.S. at 724; Virginia P. Croudace & Steven A. Desmarais, *Where the Boys Are: Can Separate Be Equal in School Sports?*, 58 S. CAL. L. REV.

commented at the inception of intermediate scrutiny that the standard is "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation."¹⁶⁴ It has grown only more ambiguous over the years—indeed, Chief Justice Rehnquist complained that *Virginia* introduced even more confounding uncertainty.¹⁶⁵

Justice Ginsburg's intent in renaming the standard in *Virginia* "skeptical scrutiny," rather than the previous "intermediate scrutiny," is also unclear.¹⁶⁶ Some have argued that Justice Ginsburg actually heightened the intermediate scrutiny standard,¹⁶⁷ though others dis-

1425, 1435–36 (1985) ("Application of [the intermediate scrutiny] standard leaves considerable room for judicial discretion, because what constitutes a close fit between the statutory classification and the objective sought cannot be defined with any degree of precision."); Hasday, *supra* note 3, at 773 ("[T]he Court [in *Virginia*] does not begin to tell us how we might take seriously the suggestions [concerning heightened scrutiny] that *Virginia* put forth."); Jenkins, *supra* note 19, at 1987 (noting that the Supreme Court has interpreted the requirements of intermediate scrutiny inconsistently).

¹⁶⁴ *Craig*, 429 U.S. at 221 (Scalia, J., dissenting).

¹⁶⁵ See *Virginia*, 518 U.S. at 559 (Rehnquist, C.J., concurring).

¹⁶⁶ See *id.* at 531 (majority opinion). Compare Lee Schottenfeld, *The Fate of Separate but Equal in the Athletic Arena*, 10 U. MIAMI BUS. L. REV. 649, 682 (2002) ("Justice Ginsberg [sic] intentionally refers to an upgraded intermediate scrutiny, which requires the proponent of the discriminatory action to provide a heightened level of justification."), with Hurd, *supra* note 162, at 49 (concluding that the Court in *Virginia* did not "ratchet up the level of scrutiny for sex-based classifications"), and Fortney, *supra* note 86, at 862 (arguing that "it is more likely that Justice Ginsburg was simply using alternative language to rearticulate the Court's use of intermediate scrutiny").

¹⁶⁷ See, e.g., *Virginia*, 518 U.S. at 595 (Scalia, J., dissenting) (declaring that "the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny" because the majority applied a "least-restrictive-means analysis" by finding VMI unconstitutional when only some women could go there); Deborah L. Brake, *Reflections on the VMI Decision*, 6 AM. U. J. GENDER & L. 35, 36 (1997) ("While the Court stopped short of explicitly adopting strict scrutiny for sex-based classifications, the opinion includes a number of indicators suggesting that the standard applied in [*Virginia*] is essentially as rigorous as today's strict scrutiny standard."); Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133, 144 (2005) ("[T]he [*Virginia*] test makes clear that no deference is due whatsoever. The state unquestionably bears a heavy burden.") (citation omitted); Christopher H. Pyle, *Women's Colleges: Is Segregation by Sex Still Justifiable After United States v. Virginia?*, 77 B.U. L. REV. 209, 233 (1997) ("Justice Ginsburg's opinion came as close to strict scrutiny as possible without actually embracing it."); Kevin N. Rolando, *A Decade Later: United States v. Virginia and the Rise and Fall of "Skeptical Scrutiny"*, 12 ROGER WILLIAMS U. L. REV. 182, 209–10 (2006) ("This holding makes clear that the Court's standard of 'skeptical scrutiny' was concerned . . . with the individual. This is where the 'exceedingly persuasive justification' language heightens the standard."); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) ("The Court [in *Virginia*] did not merely restate the intermediate scrutiny test but pressed it closer to strict scrutiny.").

agree.¹⁶⁸ But regardless, what does remain clear is that there are decidedly some circumstances in which sex segregation is acceptable because the Supreme Court does not categorically prohibit it and, moreover, specifically chooses not to apply strict scrutiny to it.¹⁶⁹ Justice Ginsburg herself has stated that her opinion in *Virginia* never questioned "the value or viability of single-sex schools."¹⁷⁰ Indeed, the strict holding of *Virginia* is that neither generalizations about women nor references to psychological and sociological differences between the sexes may be used to justify the inequality of the single-sex programs.¹⁷¹ This holding is not immediately transferable to single-sex programs, which, by the express terms of the Title IX regulations themselves, must be equal.¹⁷² The Court's determination that VMI's admissions policy was unconstitutional does not automatically signal the unconstitutionality of single-sex public elementary and secondary education.¹⁷³

¹⁶⁸ See *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 60 (2001) (citation omitted) (purporting to apply intermediate scrutiny as set out in *Virginia* but in fact upholding a law requiring different action for an alien to obtain citizenship depending on whether the applicant's mother or father was a U.S. citizen, without calling it "skeptical scrutiny," without requiring "exceedingly persuasive justification," and without focusing on the individual); Morgan, *supra* note 94, at 383, 414 (arguing that the majority in *Virginia* did not raise the level of scrutiny for gender classifications above intermediate scrutiny); Sharon E. Rush, *Diversity: The Red Herring of Equal Protection*, 6 AM. U. J. GENDER & L. 43, 44-45 (1997) (same); Tod Christopher Gurney, Comment, 38 SANTA CLARA L. REV. 1183, 1205-10 (1998) (arguing that "[t]he majority [in *Virginia*] did not raise the level of review of gender classifications above the traditional intermediate level"); Ashley Elizabeth Johnson, Note, *Single-Sex Classes in Public Secondary Schools: Maximizing the Value of a Public Education for the Nation's Students*, 57 VAND. L. REV. 629, 653-54 (2004) ("[T]he Court, in *Virginia*, quotes the standard of intermediate scrutiny, and, despite using the term 'exceedingly persuasive justification' throughout the opinion, defines that term only by reference to the traditional intermediate scrutiny test.").

¹⁶⁹ See David S. Cohen, *Title IX, Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 249 (2005) ("Even if the Supreme Court's decision in *United States v. Virginia* changed the level of scrutiny applied to classifications based on sex, the decision nonetheless allows sex-based classifications . . ."); Morgan, *supra* note 94, at 383; Schottenfeld, *supra* note 166, at 674; Sunstein, *supra* note 167, at 75-76 (determining that the Court in *Virginia* did not invalidate all single-sex educational programs); Williams, *supra* note 4, at 31 ("The Constitution also allows for sex segregation in education under limited circumstances.").

¹⁷⁰ Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School*, 102 COLUM. L. REV. 1441, 1447 (2002).

¹⁷¹ See *Virginia*, 518 U.S. at 554.

¹⁷² See *id.*

¹⁷³ See *infra* notes 174-218 and accompanying text.

1. Single-Sex Public Elementary and Secondary Education May Be Constitutional Under *Virginia*

The *Virginia* standard left some wiggle room for single-sex public elementary and secondary education to fit within constitutional bounds.¹⁷⁴ Indeed, in amending Title IX regulations, the DOE purposely tracked the Supreme Court's language in *Virginia*¹⁷⁵ and acknowledged its holding.¹⁷⁶ In doing so, the DOE strove to protect what it calls the "evenhanded provision of single-sex public educational opportunities, among a diversity of educational opportunities" from constitutional challenge.¹⁷⁷

In general, single-sex education is substantially related to multiple important governmental objectives approved in *Virginia*.¹⁷⁸ First, single-sex schools may be used to redress past economic harm done to women and to promote equal employment opportunity.¹⁷⁹ Education correlates with earnings,¹⁸⁰ and even today women's salaries lag behind those of their male counterparts in the workplace; thus, our largely coeducational system does not appear to be substantially closing the salary gap between the sexes.¹⁸¹ Although perhaps not conclusive, some studies do indicate that girls receive a better education in single-sex environments.¹⁸² In this way, single-sex schooling appears to offer a viable option that may compensate for past discrimination, which created the salary gap, and may boost the current economic status of women by increasing their earning potential.¹⁸³ Also, other studies indicate that single-sex education promotes the legitimate ob-

¹⁷⁴ See *Virginia*, 518 U.S. at 524. See generally Johnson, *supra* note 168.

¹⁷⁵ 71 Fed. Reg. 62,534 (Oct. 25, 2006) (citing *Virginia*, 518 U.S. at 534 n.7 ("We do not question the State's prerogative evenhandedly to support diverse educational opportunities.")).

¹⁷⁶ See *id.* ("[T]he Supreme Court has indicated that to justify a sex-based classification the public entity must demonstrate that it is based on an important governmental objective and that exclusion of students of the other sex is substantially related to achievement of that objective. The Supreme Court has ruled that the 'justification must be genuine, not hypothesized or invented *post hoc* in response to litigation' and that 'it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.'" (quoting *Virginia*, 518 U.S. at 533)).

¹⁷⁷ See Sherwin, *supra* note 9, at 56.

¹⁷⁸ See *Virginia*, 518 U.S. at 533-34.

¹⁷⁹ See *id.* at 533.

¹⁸⁰ See Press Release, U.S. Census Bureau, Earnings Gap Highlighted by Census Bureau Data on Educational Attainment (Mar. 15, 2007), <http://www.census.gov/Press-Release/www/releases/archives/education/009749.html>.

¹⁸¹ See *id.*

¹⁸² See *Single-Sex v. Coed: The Evidence*, *supra* note 94.

¹⁸³ See *Virginia*, 518 U.S. at 533.

jective of fully developing the talents and capacities of all because it may also benefit boys.¹⁸⁴

In addition, the Court in *Virginia* left open the question of whether providing diverse educational opportunities—such as those provided by having both coeducational and single-sex programs—may be a legitimate governmental objective under the Equal Protection Clause.¹⁸⁵ Although the Court found the Commonwealth's alleged policy of diversity to be unpersuasive in *Virginia* because history did not support it, the Court was careful not to foreclose this line of argument altogether.¹⁸⁶ The Court stated: "We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities."¹⁸⁷ OCR specifically identifies diversity as one of the important governmental objectives being served through allowing the option of single-sex education.¹⁸⁸

Critics of single-sex education point to the definition of diversity endorsed in 2003, in *Grutter v. Bollinger*, wherein the Supreme Court referred to diversity *within* each classroom as a compelling governmental objective.¹⁸⁹ These critics argue that it is this specific objective to which the Court was referring in *Virginia*, and that single-sex education actually controverts it.¹⁹⁰ But that argument is misplaced because the new Title IX regulations do not toll the end of coeducation; rather, they allow for diversity of two types, both in the classroom in coeducational schools, and also among schools by virtue of having coeducational and single-sex schools.¹⁹¹

¹⁸⁴ See *id.*, quoted in 71 Fed. Reg. 62,535 (Oct. 25, 2006); *Single-Sex v. Coed: The Evidence*, *supra* note 94.

¹⁸⁵ See generally *Virginia*, 518 U.S. 515.

¹⁸⁶ See *id.* at 539–40.

¹⁸⁷ *Id.* at 534 n.7.

¹⁸⁸ See 71 Fed. Reg. 62,534 ("[A] recipient can have an important governmental or educational objective evenhandedly to provide the opportunity to choose among diverse educational opportunities Although the Supreme Court has not decided the specific issue of whether this objective is an important governmental or educational objective for the purposes of justifying a sex-based classification under either Title IX or the Equal Protection Clause, the Court has suggested it would uphold the evenhanded provision of single-sex educational opportunities." (citations omitted)).

¹⁸⁹ 539 U.S. 306, 328 (2003); see, e.g., Letter from Kim A. Gandy & Martha F. Davis, Nat'l Org. for Women, to Kenneth L. Marcus, Assistant Sec'y for the Dep't of Educ. (Apr. 23, 2004) [hereinafter Letter from Gandy & Davis], available at <http://www.now.org/issues/education/042304comments.pdf>; Letter from Murphy et al., *supra* note 18.

¹⁹⁰ See Letter from Gandy & Davis, *supra* note 189; Letter from Murphy et al., *supra* note 18.

¹⁹¹ See 34 C.F.R. § 106 (2007); Sherwin, *supra* note 9, at 62–63.

Single-sex education singularly provides the means by which the above objectives, approved in *Virginia*, can be carried out.¹⁹² It is substantially related to those objectives because they cannot be carried out in a purely coeducational system.¹⁹³ Our current coeducational system has not succeeded in eliminating the gender gap in our society and generally does not offer diversity in the types of educational opportunities available, and the single-sex education Title IX regulations permit has the potential to change this.¹⁹⁴ Moreover, OCR seeks to ensure the constitutionality of its regulations by requiring funding recipients to conduct at least biennial evaluations to confirm that "any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities."¹⁹⁵

2. *Virginia* Does Not Necessarily Preclude Single-Sex Public Elementary and Secondary Education

Similarly, *Virginia*'s constitutional bar against VMI's single-sex policy does not offer a cookie-cutter standard for all single-sex education. For many reasons, the single-sex programs formed pursuant to Title IX regulations can escape the pitfalls of sex classification deemed unconstitutional under *Virginia*'s standard.¹⁹⁶

The Court in *Virginia* proclaimed sex classifications unconstitutional when they are based upon any generalization that tends to reinforce the inferiority of one sex.¹⁹⁷ But, because parents may choose whether to enroll their children at a single-sex school or not, single-

¹⁹² See 518 U.S. at 533-34; *supra* notes 178-188 and accompanying text. Thus, in accordance with the Supreme Court's mandate, single-sex education is not the end of those objectives. See *Virginia*, 518 U.S. at 545.

¹⁹³ See *Virginia*, 518 U.S. at 545-46; *Hogan*, 458 U.S. at 731. In fact, for this reason, single-sex education might even be able to meet the "narrowly tailored" requirement of strict scrutiny. See *Loving*, 388 U.S. at 11.

¹⁹⁴ See *Virginia*, 518 U.S. at 534 n.7; *United States v. Virginia*, 766 F. Supp. 1407, 1411 (W.D. Va. 1991) ("The sole way to attain single-gender [in addition to coeducational] diversity is to maintain a policy of admitting only one gender to an institution."), *vacated*, 976 F.2d 890 (4th Cir. 1992); *Single-Sex v. Coed: The Evidence*, *supra* note 94.

¹⁹⁵ 34 C.F.R. § 106.34(b)(4)(i).

¹⁹⁶ See *Virginia*, 518 U.S. at 550; 34 C.F.R. § 106.34.

¹⁹⁷ See *Virginia*, 518 U.S. at 550 ("Generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."); see also *Wengler*, 446 U.S. at 152; *Caban v. Mohammed*, 441 U.S. 380, 394 (1979); *Goldfarb*, 430 U.S. at 206-07; *Craig*, 429 U.S. at 198-99; *Weinberger*, 420 U.S. at 645; *Frontiero*, 411 U.S. at 684-85; *Reed*, 404 U.S. at 77; *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (D. Colo. 1977).

sex schools do not *impose* any badge of inferiority on their students.¹⁹⁸ Indeed, courts have found that sex segregation in education "carries no stigma of unworthiness to the excluded class."¹⁹⁹

In addition, the new regulations do not unconstitutionally rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females" that *Virginia* chastised.²⁰⁰ Single-sex education is premised, at least in part, on the fundamental idea that boys and girls learn in different ways.²⁰¹ It need not be premised on the idea that boys are more talented at algebra than girls, or that girls have a greater capacity to understand literature than boys.²⁰² This rationale further accords with *Virginia's* precedent, which repeatedly recognized that "real differences" between the sexes may be taken into consideration.²⁰³ Sex segregation is perfectly constitutional when

¹⁹⁸ Allison M. Otto, *Single-Sex Education*, 5 GEO. J. GENDER & L. 353, 358 (2004); see 34 C.F.R. § 106.34; cf. Levit, *supra* note 5, at 518 ("[I]t is difficult to believe that state sponsorship of sex segregation can avoid imposing feelings of inferiority and superiority."); Rosemary Salomone, *Feminist Voices in the Debate over Single-Sex Schooling: Finding Common Ground*, 11 MICH. J. GENDER & L. 63, 73 (2004) (arguing that sex segregation "represents subordination and inferiority, it perpetuates harmful stereotypes, and . . . stigmatizes girls"); Vojdik, *supra* note 97, at 94 (arguing that sex segregation "send[s] the message that the responsible adults in society are unable (or unwilling) to prevent discrimination in our public schools").

Defending parents' control in their children's education is a goal of both the Court and the legislature. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 5131(c), 115 Stat. 1425 (2002) (codifying and amending Elementary and Secondary Education Act, 20 U.S.C. §§ 6301-7941 (West 2003 & Supp. 2007)); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Vorchheimer*, 532 F.2d at 888. Providing single-sex schools, in addition to coeducational ones, augments such control by allowing parents in the public school system—just like those who can afford private school—to decide what type of education is best for their children. See *Vorchheimer*, 532 F.2d at 888; 71 Fed. Reg. 62,534-35 (Oct. 25, 2006).

¹⁹⁹ *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 859 (Ill. App. Ct. 1979); see *Attorney Gen. v. Mass. Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284, 291 (Mass. 1979).

²⁰⁰ See *Virginia*, 518 U.S. at 533 (citing *Weinberger*, 420 U.S. at 643, 648); see also 34 C.F.R. § 106.34; cf. Williams, *supra* note 4, at 36 (arguing that "the proposed regulations very likely will lead to the very gender-based stereotyping Title IX was enacted to combat"); ACLU, *supra* note 17 (quoting Emily J. Martin, Deputy Director of the ACLU Women's Rights Project and disapproving of the "junk science stereotypes" on which the DOE relied upon in developing the new regulations).

²⁰¹ See *Learning Style Differences*, *supra* note 91.

²⁰² See *id.*

²⁰³ *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981); *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *Croudace & Desmarais*, *supra* note 163, at 1435 (citing *Hogan*, 458 U.S. at 726); see also *Miller v. Albright*, 523 U.S. 420, 434-37 (1998); *Rostker v. Goldberg*, 453 U.S. 57, 76-79 (1981); *Schlesinger*, 419 U.S. at 508. Concurring in the Court's decision in *Michael M. v. Superior Court*, Justice Stewart wrote:

[W]hile detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differ-

based upon those differences or upon generalizations that apply to all women.²⁰⁴

Sex segregation only becomes unconstitutional when it is based upon generalizations that represent a characteristic of the "average" woman, not every woman.²⁰⁵ OCR anticipated and eliminated this problem by specifying that single-sex programs may be established when "some students under certain circumstances" might benefit from them, thus eliminating the use of sex as a proxy for learning ability.²⁰⁶ Moreover, the new Title IX regulations specifically stipulate that funding recipients must conduct at least biennial evaluations to ensure that single-sex opportunities are "based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex essentially to ensure they remain constitutional."²⁰⁷

In addition to lacking those characteristics deemed unconstitutional in *Virginia*, single-sex programs formed pursuant to Title IX regulations also differ from VMI in many ways that make them more likely to prevail in a constitutional challenge.²⁰⁸ The Court in *Virginia* focused on the fact that VMI offered a *unique* opportunity to those men hoping to become "citizen-soldiers" trained through an adversa-

ences between males and females that the Constitution necessarily recognizes.

... [I]n certain narrow circumstances men and women are *not* similarly situated; in these circumstances a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional.

In short, the Equal Protection Clause does not require that the physiological differences between men and women must be disregarded.

450 U.S. at 478-81 (Stewart, J., concurring).

²⁰⁴ See *Hogan*, 458 U.S. at 728 ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."); *Michael M.*, 450 U.S. at 476 (upholding a statutory rape law that applied differential treatment to men and women because only women have the capacity to become pregnant).

²⁰⁵ See, e.g., *Virginia*, 518 U.S. at 550 ("Generalizations about 'the way women are,' estimates of what is appropriate for *most* women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."); *Wengler*, 446 U.S. at 152; *Caban*, 441 U.S. at 394; *Goldfarb*, 430 U.S. at 206-07; *Craig*, 429 U.S. at 198-99; *Weinberger*, 420 U.S. at 645; *Frontiero*, 411 U.S. at 686-87; *Reed*, 404 U.S. at 77; *Hoover*, 430 F. Supp. at 169.

²⁰⁶ 71 Fed. Reg. 62,532 (Oct. 25, 2006); Sherwin, *supra* note 9, at 58.

²⁰⁷ 34 C.F.R. § 106.34(b)(4)(i)-(ii) (2007).

²⁰⁸ See *Virginia*, 518 U.S. at 520; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Hogan*, 458 U.S. at 720; Johnson, *supra* note 168, at 675.

tive method "of a kind not available anywhere else in [the state]."²⁰⁹ It is unlikely that any public elementary or secondary school would offer such a unique opportunity. Education in the public school system tends to be relatively uniform across the board, particularly because teachers must gear their lessons towards enabling their students to pass national standardized tests.²¹⁰ Furthermore, the Court in *Virginia* rejected VMI's categorical exclusion of all women "in total disregard of their individual merit," despite the fact that some women could meet its rigorous standards;²¹¹ but such an individualized inquiry does not matter in single-sex public elementary and secondary schools where admission is not merit-based like it was at VMI.²¹²

Another constitutionally relevant difference is that, on the whole, students in elementary and secondary schools are minors, whereas those in postsecondary schools are not.²¹³ This matters because the constitutional rights of students in elementary and secondary schools are "not automatically coextensive with the rights of adults."²¹⁴ Although

²⁰⁹ See *Virginia*, 518 U.S. at 520.

²¹⁰ See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 5131(c), 115 Stat. 1425 (2002) (codifying and amending Elementary and Secondary Education Act, 20 U.S.C. §§ 6301-7941 (West 2003 & Supp. 2007)) (penalizing schools educating students who consistently fail to do well enough on standardized tests); Land, *supra* note 97, at 320 ("Most primary and secondary schools, however, will not have the problems VMI did in being unique. The general lack of 'intangible benefits' due to the generic nature of the educational curriculum at primary and secondary schools suggests that most lower-level single-sex schools will pass intermediate scrutiny." (citation omitted)).

²¹¹ *Virginia*, 518 U.S. at 546 (citation omitted).

²¹² See Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 350 (1998).

²¹³ See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 238 n.4 (2000) (declining to analogize cases dealing with public school students directly to those involving university students because "[these] students and their schools' relations to them are different and at least arguably distinguishable from their counterparts in college education"); *Bradshaw v. Rawlings*, 612 F.2d 135, 140 (1979) ("[S]ociety considers the modern college student an adult, not a child of tender years. It could be argued . . . that an educational institution possesses a different pattern of rights and responsibilities and retains more of the traditional custodial responsibilities when its students are all minors, as in an elementary school, or mostly minors, as in a high school.").

²¹⁴ See *Fraser*, 478 U.S. at 682 (finding no First Amendment violation when a public high school regulated the speech of one of its students); see also *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995) (concluding that "unemancipated minors lack some of the most fundamental rights of self-determination"); *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring) (finding that "[t]he law recognizes a host of distinctions between the rights and duties of children and those of adults"); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[O]ur cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" (quoting *McKeiver v. Penn-*

elementary and secondary school students are without a doubt entitled to some protection under the Equal Protection Clause, they may not be entitled to as great protection as the postsecondary students at VMI.²¹⁵ Single-sex education is thus less likely to infringe on the constitutional rights of the elementary and secondary school students.²¹⁶ Moreover, sex-based learning differences are more pronounced when students are younger, so scientific research on those differences presents more persuasive justification in favor of single-sex education in elementary and secondary settings than in undergraduate and postgraduate settings.²¹⁷ Therefore, programs formed pursuant to Title IX regulations may more easily satisfy *Virginia's* standard.²¹⁸

*C. Support from Title IX's Legislative and Post-Enactment History
Concerning Single-Sex Education*

Although not conclusive on the constitutionality of Title IX's regulations, the legislative and post-enactment history of the statute is a significant point of reference in its interpretation.²¹⁹ It reveals Congress's implied acceptance both of single-sex education at the elementary and secondary level and also of Title IX's new regulations generally, and thus it supports the regulations being upheld.²²⁰

Significantly, Title IX's framers neither categorically endorsed co-education nor categorically proscribed single-sex education.²²¹ As an initial matter, Congress clearly sought to provide equal access to educa-

sylvania, 403 U.S. 541, 550 (1971) (plurality opinion)); *Grayned v. City of Rockford*, 408 U.S. 104, 120 n.45 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) ("The state's authority over children's activities is broader than over like actions of adults.").

²¹⁵ See *Fraser*, 478 U.S. at 682.

²¹⁶ See *id.*

²¹⁷ See Hutchison, *supra* note 94, at 1080; Johnson, *supra* note 168, at 679.

²¹⁸ See Hutchison, *supra* note 94, at 1080; Johnson, *supra* note 168, at 679.

²¹⁹ See *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523-30 (1982). This is true despite the paucity of congressional material to provide insight on what exactly the drafters intended—no committee report or other congressional material recording the drafting of Title IX exists, and the floor debates on the statute were exceedingly brief, likely because of all the legislative efforts and proceedings for the multiple failed attempts to pass similar legislation prior to 1972. See *N. Haven Bd. of Educ.*, 456 U.S. at 523 n.13, 527; Cohen v. Brown Univ., 991 F.2d 888, 893 (1st Cir. 1993); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 410 (2000).

²²⁰ See *infra* notes 221-249 and accompanying text.

²²¹ See 20 U.S.C. §§ 1681-1688 (2000 & Supp. III 2003); Rosemary Salomone, *Rich Kids, Poor Kids, and the Single-Sex Education Debate*, 34 AKRON L. REV. 209, 225 (2000).

tional opportunities for all students, regardless of their sex.²²² This overarching goal by no means necessarily requires coeducation.²²³

The text of Title IX itself neither expressly prohibits nor permits single-sex education in elementary or secondary schools, as it does in other educational settings, because it explicitly does not cover admission to nonvocational elementary or secondary schools at all.²²⁴ This certainly does not eliminate the possibility of having single-sex public elementary and secondary education, and indeed, it supports that possibility.²²⁵ Moreover, in no way does the statutory text provide a blanket prohibition against single-sex education.²²⁶ It does expressly prohibit single-sex education in "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."²²⁷ It expressly does not, however, apply to certain sex-segregated activities such as fraternities and sororities,²²⁸ the Boy and Girl Scouts,²²⁹ any Boys or Girls State or Nation Conference,²³⁰ father-son or mother-daughter activities at an educational institution,²³¹ or beauty pageants.²³² It also explicitly creates an exception for public institutions of higher education that "traditionally and continually" since their establishment have had a single-sex admissions policy.²³³ These textual exceptions allowing single-sex education suggest that Title IX was not meant to bring about an era of ab-

²²² See 20 U.S.C. §§ 1681-1688; 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh); 117 CONG. REC. 30,155 (1971) (statement of Sen. Bayh).

²²³ See 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh); 117 CONG. REC. 30,155 (1971) (statement of Sen. Bayh).

²²⁴ See 20 U.S.C. § 1681(a)(1). Title IX expressly prohibits single-sex admissions policies in "institutions of vocational education, professional education, and graduate higher education, and . . . public institutions of undergraduate higher education." *Id.* Some argue, therefore, that Title IX prohibits single-sex elementary and secondary education according to the canon of statutory interpretation, *expressio unius est exclusio alterius* (the expression of one thing suggests the exclusion of others). See *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1008-10 (E.D. Mich. 1991). This interpretation, however, ignores other modes of interpretation. See *infra* notes 225-249 and accompanying text.

²²⁵ See 20 U.S.C. § 1681(a)(1); 71 Fed. Reg. 62,540 (Oct. 25, 2006). *But cf.* Letter from Murphy et al., *supra* note 18 (arguing that single-sex education is precluded by the presence of only narrow textual exceptions for permissible sex discrimination under Title IX).

²²⁶ See 20 U.S.C. § 1681(a).

²²⁷ *Id.* § 1681(a)(1).

²²⁸ *Id.* § 1681(a)(6)(A).

²²⁹ *Id.* § 1681(a)(6)(B).

²³⁰ *Id.* § 1681(a)(7).

²³¹ 20 U.S.C. § 1681(a)(8).

²³² *Id.* § 1681(a)(9).

²³³ *Id.* § 1681(a)(5).

solute coeducation but rather to end discrimination in existing educational institutions.²³⁴

The actions of Title IX's framers further suggest their approval of single-sex elementary and secondary education.²³⁵ In fact, in 1976, in *Vorchheimer v. School District*, the U.S. Court of Appeals for the Third Circuit held that an all-male high school in Philadelphia passed muster under the Equal Protection Clause in part for this reason.²³⁶ In finding for the school district, the court quoted extensively from a statement made by Senator Bayh during Title IX debates indicating that he specifically intended to leave the option of single-sex education available.²³⁷ Also, the court noted that whereas an early draft of Title IX passed by the House of Representatives contained an explicit mandate for all single-sex schools to become coeducational, the Senate purposely eliminated it from the final version.²³⁸ Thus, Title IX's legislative history precludes the argument that the statute was absolutely meant to foreclose the option of single-sex elementary and secondary education.²³⁹ In this way, Title IX's legislative history supports upholding the new regulations allowing for such education.²⁴⁰

²³⁴ See *id.* § 1681(a); Bennett L. Safenstein, Note, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 673-74 (1993); *supra* notes 224-233 and accompanying text.

²³⁵ See *Vorchheimer*, 532 F.2d at 883-85 ("Our research into the legislative history reveals no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives.").

²³⁶ See *id.* at 883, 888. This is the only circuit court, and thus the highest court, to rule on the issue of "separate but equal" elementary and secondary education after the invention of intermediate scrutiny. See Fortney, *supra* note 86, at 865. The only other post-1976 case concerning this issue is *Garrett v. Board of Education*, decided in 1991 by the U.S. District Court for the Eastern District of Michigan on a motion for a preliminary injunction, and not on a determination of the merits after a trial. 775 F. Supp. at 1005. There, the court invalidated an all-boys school in Detroit because the state failed to demonstrate a substantial relationship between the exclusion of girls from the school and its stated interest in overcoming the problems boys faced, including high unemployment and school drop-out rates. *Id.* at 1006-08.

²³⁷ See *Vorchheimer*, 532 F.2d at 883 ("One result of the House approach is that all single-sex elementary and secondary institutions of education—both public and private—would be required to become coeducational. While this may be a desirable goal, no one even knows how many single-sex schools exist on the elementary and secondary levels or what special qualities of the schools might argue for a continued single sex status After these questions have been properly addressed, then Congress can make a fully informed decision on the question of which—if any—schools should be exempted." (quoting 118 CONG. REC. 5804, 5807 (1972) (statement of Sen. Bayh))).

²³⁸ See *id.*

²³⁹ See *supra* notes 219-238 and accompanying text.

²⁴⁰ See Williams, *supra* note 4, at 29 n.65; *supra* notes 219-238 and accompanying text.

More generally, the fact that Title IX's drafters granted the statute broad, sweeping language also makes its regulations less vulnerable to attack.²⁴¹ The very broadness of the statute itself suggests that Congress left HEW, and later OCR, to be the vehicle for providing specific guidelines for compliance with Title IX.²⁴² Although these agency regulations are not strictly authoritative or binding, the Supreme Court has explained that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."²⁴³ The administrative interpretation may only be struck down when it is "arbitrary, capricious, or manifestly contrary to the statute."²⁴⁴ Thus, the administrative regulations that accompany Title IX enjoy great deference.²⁴⁵

Title IX's new regulations deserve additional deference because of Congress's tacit acquiescence to them.²⁴⁶ Congress could have expressed its disapproval of the agencies' interpretations by vetoing the regulations, but it did not exercise this power.²⁴⁷ Congress also has the ability to veto the application of the Title IX regulations indirectly through its ability to cut off funding under the statute, but it has not done this ei-

²⁴¹ See 20 U.S.C. §§ 1681-1688 (2000 & Supp. III 2003); *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984) ("The contemporaneous legislative history, in short, provides no basis for believing that Title IX's broad language is somehow inconsistent with Congress' underlying intent."); *N. Haven Bd. of Educ.*, 456 U.S. at 521 ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" (quoting *United States v. Price*, 383 U.S. 787, 801 (1966))); Greene, *supra* note 167, at 164 (arguing that the Title IX regulations concerning athletics should be given deference because congressional intent concerning athletics is unclear).

²⁴² See Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1261 (1979) [hereinafter *Sex Discrimination and Intercollegiate Athletics*].

²⁴³ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (citation omitted); cf. Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 199 (1999) ("[T]he regulations promulgated by OCR under Title IX have the force of statutory law."). See generally Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990) (discussing the level of deference agency regulations should be afforded).

²⁴⁴ *Chevron*, 467 U.S. at 844. But cf. *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) ("[A] court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." (citation omitted)).

²⁴⁵ See *N. Haven Bd. of Educ.*, 456 U.S. at 522 n.12.

²⁴⁶ See *Grove City Coll.*, 465 U.S. at 568; Harold H. Bruff, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1431 (1977); Cohen, *supra* note 169, at 246-47.

²⁴⁷ See 20 U.S.C. § 1232(d)-(g) (2000).

ther.²⁴⁸ The Supreme Court has declared that these are additional reasons that tend to support upholding regulations.²⁴⁹

III. INFORMATIVE COMPARISONS FOR THE CONSTITUTIONAL ANALYSIS OF THE TITLE IX REGULATIONS CONCERNING SINGLE-SEX EDUCATION

Because the U.S. Supreme Court has not yet ruled on the constitutionality of single-sex education promoted by the new Title IX regulations, analogous precedent may shed some light on how the Court would rule.²⁵⁰ Some critics of single-sex education argue by analogy to the Supreme Court's 1954 decision in *Brown v. Board of Education of Topeka*, which struck down racial segregation in education.²⁵¹ They claim that sex segregation in education similarly does not pass constitutional muster.²⁵² This analogy, however, is imperfect in many ways, as described below.²⁵³ Moreover, *Brown* has not had so pervasive an influence as to extinguish the constitutionality of "separate but equal" altogether.²⁵⁴ "Separate but equal" is a mechanism commonly used to maintain sex-segregated athletic teams, which courts and even feminists tolerate.²⁵⁵ Those who analyze the new Title IX regulations should recognize that the Constitution's tolerance of sex segregation in athletics suggests its corresponding tolerance of sex segregation in the classroom.²⁵⁶

²⁴⁸ See *Sex Discrimination and Intercollegiate Athletics*, *supra* note 242, at 1262 n.58.

²⁴⁹ See *N. Haven Bd. of Educ.*, 456 U.S. at 537-39; *supra* notes 219-248 and accompanying text (concerning the utility of Title IX's legislative history).

²⁵⁰ See *infra* notes 251-324 and accompanying text.

²⁵¹ See 347 U.S. 483, 495 (1954).

²⁵² See *Minow*, *supra* note 102, at 821; *Sherwin*, *supra* note 9, at 67; *ACLU*, *supra* note 17; *NOW*, *supra* note 17.

²⁵³ See *infra* notes 257-281 and accompanying text.

²⁵⁴ See 347 U.S. at 495; *Robinson*, *supra* note 212, at 324; *Sangree*, *supra* note 219, at 432. This has occurred despite the fact that language of Title IX itself contains nothing related to athletics, and even the congressional debates prior to its enactment gave only passing reference to them. *Sangree*, *supra* note 219, at 387; see *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (noting that "there were apparently only two mentions of intercollegiate athletics during the congressional debate" (citing 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh)); 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh) (noting that Title IX will not require gender-blended football teams). Furthermore, the contact sports exemption arose not from the originally proposed regulations, but rather from the comments in response to those regulations. See *Sangree*, *supra* note 219, at 387.

²⁵⁵ See *Croudace & Desmarais*, *supra* note 163, at 1427; *Robinson*, *supra* note 212, at 323.

²⁵⁶ See *Dudley & Rutherglen*, *supra* note 243, at 194.

A. "Separate but Equal" in the Gender Context Should Not Meet the Same Fate as in the Race Context

In *Brown*, the Supreme Court held the doctrine of "separate but equal" to be unconstitutional in so far as it enabled discrimination on the basis of race in public education.²⁵⁷ There, the Court struck down state laws permitting or requiring segregation of children in public elementary and secondary schools by race because the laws violated the Equal Protection Clause of the Fourteenth Amendment.²⁵⁸ Chief Justice Warren, writing for the unanimous Court, famously held, "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."²⁵⁹ The Chief Justice cited the paramount importance of education in American society,²⁶⁰ and he explained that racial segregation creates a detrimental and permanent stigma of inferiority for black children that greatly detracts from their educational development.²⁶¹ Over the past fifty-two years, this case has been cited by courts over 2000 times—its tremendous impact on the construction of equality in the United States cannot be understated.²⁶² It remains to be seen, however, whether this case will be extended to apply in the gender context.²⁶³

There are many reasons why the prohibition on "separate but equal" in the race context is not immediately transferable to the gender context.²⁶⁴ Important differences exist between race and sex such

²⁵⁷ See *Brown*, 347 U.S. at 495. The Supreme Court originally propounded this doctrine in *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (upholding a Louisiana statute providing for "separate but equal" accommodations for white and black passengers).

²⁵⁸ See *Brown*, 347 U.S. at 495.

²⁵⁹ *Id.*

²⁶⁰ See *id.* at 493.

²⁶¹ See *id.* at 494.

²⁶² A November 2007 Shepard's search on *Brown* revealed over 2000 case citations.

²⁶³ See Sherwin, *supra* note 9, at 65; Simson, *supra* note 102, at 443; Vojdik, *supra* note 97, at 319; Gurney, *supra* note 168, at 1218 n.281.

²⁶⁴ See Lucinda M. Finley, *Sex-Blind, Separate but Equal or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1103 (1996) (finding that although "separate but equal" is prohibited in the race context, it still "retains vitality when it comes to sexual segregation"); Robinson, *supra* note 212, at 336–37; Schottenfeld, *supra* note 166, at 674 ("It would be inaccurate to make a direct association between the separation of races and the separation of sexes."). Moreover, analogizing sex to race does not always lead to the conclusion that sex segregation has no place in the classroom. See Minow, *supra* note 102, at 821. For example, in joining the majority in *Missouri v. Jenkins*, in 1995, Justice Thomas reasoned that presuming black students will suffer psychological harm by being segregated means presuming their inferiority, 515 U.S. 70, 114 (1995) (Thomas, J., concurring). Thus, Professor Martha Minow argues, "By analogy, to assume that an all-girls school harms girls is to assume that girls are inferior and cannot receive the same

that legal analysis involving the two cannot be completely congruent.²⁶⁵ Such differences, in fact, contributed to the drafting of Title IX not as an amendment to Title VI, the race discrimination statute, but rather, as a separate entity.²⁶⁶ The Nixon administration opposed such an amendment to Title VI on the ground that gender, unlike race, could in some situations provide a legally-sound basis for differential treatment.²⁶⁷ Indeed, for this reason, although the language of Title IX tracks that of Title VI closely, it contains numerous exceptions not found in Title VI allowing for some differential treatment.²⁶⁸

Although race and sex are both immutable characteristics that may be used to impose a stigma of inferiority, they are different in two important ways.²⁶⁹ First, the history of race discrimination is tied up in hatred of the minority because of skin color, unlike that of sex discrimination, which is tied up in the desire to protect the minority because of alleged fragility.²⁷⁰ In the race context, separation enables hatred to thrive because lack of contact between the races prevents the growth of mutual understanding and respect.²⁷¹ In the gender context, separation enables those of the protected sex—usually women—to emerge from their sheltered bubble and find greater opportunity to excel and close the gender gap.²⁷² For this reason, though racial equality requires integration, gender equality does not.²⁷³

Second, unlike people of different races, people of different sexes are distinct because of physiological and psychological differences.²⁷⁴ Such differences are already used to justify the separation of

level of educational challenge alone together that they would in a coeducational setting." Minow, *supra* note 102, at 821.

²⁶⁵ See Croudace & Desmarais, *supra* note 163, at 1458.

²⁶⁶ See Sangree, *supra* note 219, at 411.

²⁶⁷ See *id.*

²⁶⁸ Allison Herren Lee, *Title IX, Equal Protection, and the Richter Scale: Will VMI's Vibrations Topple Single-Sex Education*, 7 TEX. J. WOMEN & L. 37, 68 (1997); see *supra* notes 226-233.

²⁶⁹ See Croudace & Desmarais, *supra* note 163, at 1458; *infra* notes 270-277 and accompanying text.

²⁷⁰ Croudace & Desmarais, *supra* note 163, at 1459; Levit, *supra* note 5, at 518.

²⁷¹ See Croudace & Desmarais, *supra* note 163, at 1459.

²⁷² See *id.*

²⁷³ *Id.* ("Thus, to achieve racial equality the races must mix; to achieve gender equality in school sports separation seems most desirable.").

²⁷⁴ See *id.* at 1458; Schottenfeld, *supra* note 166, at 674; Letter from Leonard Sax, *supra* note 16 ("You can't tell by looking at a child's brain whether that child is Black or White, Asian or Hispanic. But you can tell, by looking at a child's brain, whether the child is a girl or a boy.").

students by age throughout education.²⁷⁵ In 1996, in *United States v. Virginia*, the Supreme Court itself stated that although people of different races have no “inherent” differences, this is not the case for people of different sexes.²⁷⁶ Inherent sex differences thus provide a rationale for “separate but equal” in the gender context.²⁷⁷

Moreover, the courts have unwaveringly recognized that race and sex deserve to be treated differently, as demonstrated by the mere fact that the two receive different degrees of judicial scrutiny—race, which has been designated a suspect classification, receives strict scrutiny; whereas gender, which has been designated a *semi*-suspect classification, receives a lesser degree of scrutiny.²⁷⁸ Indeed, the Supreme Court in *Virginia* explicitly recognized that race classifications differ from gender classifications in this regard.²⁷⁹ In addition, *Virginia*—the most recent Supreme Court case addressing single-sex education—tellingly neglected to reference *Brown* even once in its opinion.²⁸⁰ Thus, the Su-

²⁷⁵ Letter from Leonard Sax, *supra* note 16 (“Most school districts routinely assign 6-year-olds and 16-year-olds to different schools. We understand that the differences in how 6-year-olds and 16-year-olds learn are so substantial that it doesn’t make sense to try to educate them together.”).

²⁷⁶ *United States v. Virginia*, 518 U.S. 515, 531 (1996) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

²⁷⁷ See *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (“[D]etrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated But we have recognized that in certain narrow circumstances men and women are *not* similarly situated.”); *Vorchheimer v. Sch. Dist.*, 532 F.2d 880, 886 (1976), *aff’d*, 430 U.S. 703 (1977) (“We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in the law.”); *Ritacco v. Norwin Sch. Dist.*, 361 F. Supp. 930, 932 (W.D. Penn. 1973).

²⁷⁸ See *Vorchheimer*, 532 F.2d at 886; see also Richard Alan Rubin, Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535, 557 (1974). In fact, Congress implicitly rejected the imposition of strict scrutiny on sex-based classifications when it failed to ratify a proposed amendment to the Constitution, the Equal Rights Amendment, which would have prohibited the federal government and the states from denying or abridging equality of rights on account of sex. See Hunt, *supra* note 62, at 58 n.26. For more discussion on the different levels of judicial scrutiny, see *supra* note 120.

²⁷⁹ 518 U.S. at 532 (“Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men).”) (emphasis added).

²⁸⁰ See Robinson, *supra* note 212, at 338 (“*Brown* is not mentioned in [*Virginia*] and it is quite possible that the lack of reference is intentional.”); Schottenfeld, *supra* note 166, at 674 (“[The *Virginia*] opinion made no mention of *Brown*, a tactic most likely used to avoid a complete indoctrination of the separate but equal notion as it currently applies to gender.”); Sherwin, *supra* note 9, at 50 (“[The Court in *Virginia*] does not view the absolute prohibition of racial segregation articulated in *Brown* and its progeny as controlling on

preme Court seems to be channeling its sex-segregation jurisprudence down a path different from that of its race-segregation jurisprudence.²⁸¹

B. *A Better Analogy: How the Constitutionality of Sex Segregation in Athletics Informs Our Understanding of the Constitutionality of Sex Segregation in Classrooms*

1. Title IX and Athletics: Leaving Room for Single-Sex Opportunities

Rather than following *Brown*, sex segregation in education, such as that permissible under the new Title IX regulations, should instead follow precedent involving sex segregation in athletics.²⁸² The "separate but equal" doctrine has flown beneath the radar and continued to thrive in the realm of athletics, where Title IX is perhaps best known for prohibiting discrimination on the basis of sex.²⁸³ Although this practice of sex-segregated athletic teams has not received explicit approval from the Supreme Court, which has denied certiorari on the subject, many of the lower courts have regularly thrown their weight in favor of upholding its constitutionality.²⁸⁴ In fact, every appellate court that has considered the constitutionality of Title IX's athletic equality regulation—which provides for segregation on the basis of sex—has upheld it.²⁸⁵ Moreover, many of the courts that have enjoined unisex teams when no team exists for the excluded sex have

questions of sex segregation. Indeed, the Court did not even cite *Brown*."). But see Pinzler, *supra* note 15, at 795–96 (arguing that the Court in *Virginia* does not cite to *Brown* simply because the issues in *Brown*, "separate but equal" educational opportunities in elementary and secondary education, were not at issue in *Virginia*).

²⁸¹ See Robinson, *supra* note 212, at 338.

²⁸² See *infra* notes 283–324 and accompanying text.

²⁸³ See Dudley & Rutherglen, *supra* note 243, at 178 ("In athletics, there is no 'sex blind' counterpart to 'colorblind' justice."); Sangree, *supra* note 219, at 432.

²⁸⁴ See Schottenfeld, *supra* note 166, at 680; see, e.g., O'Connor v. Bd. of Educ. of Sch. Dist. No. 23, 449 U.S. 1301, 1301 (1980) (holding that a girl may be excluded from trying out for the boys' basketball team when there was an girls' equivalent); Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); Leffel v. Wis. Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978); Hoover v. Meiklejohn, 430 F. Supp. 164, 170 (D. Colo. 1977); *Ritacco*, 361 F. Supp. at 932; Bucha v. Ill. High Sch. Ass'n, 351 F. Supp. 69, 75 (N.D. Ill. 1972).

²⁸⁵ See 34 C.F.R. § 106.41 (2007); Cohen, *supra* note 169, at 251 (citing Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 94–95 (D.D.C. 2003) (listing eight circuit courts that have approved of Title IX's requirements in challenges to the constitutionality or statutory authority of the regulations), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004).

clarified that the Equal Protection Clause violation could be corrected by the addition of, in their words, a "separate but equal" team.²⁸⁶

Title IX regulations do generally provide that no athletics may be segregated on the basis of sex, but this overarching provision is qualified in two substantial ways that essentially negate it.²⁸⁷ First, sex-segregated athletic teams may be maintained when they are selected based upon competitive skill and offered to both sexes.²⁸⁸ By and large, this exception applies to almost all athletic teams, which are generally selected based upon competitive skill.²⁸⁹ The regulation mandates sex integration for these competitive teams only when a team is offered to members of one sex but not the other *and* when the athletic opportunities of the members of the excluded sex have previously been limited.²⁹⁰

Second, the regulation sanctions sex-segregated athletic teams unconditionally for all contact sports such as boxing, wrestling, rugby, ice hockey, football, and basketball.²⁹¹ OCR has further clarified this to mean that under Title IX an institution may maintain an all-male

²⁸⁶ Croudace & Desmarais, *supra* note 163, at 1426 (citing cases); see *Gomes v. R.I. Interscholastic League*, 469 F. Supp. 659, 666 (D.R.I. 1979), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); *Hoover*, 430 F. Supp. at 170.

It is thus "the most authoritative statement to date that so long as females are provided with an all-female equivalent team, courts will not require defendants to allow females to try out for the all-male contact sports team to satisfy the guarantee of Equal Protection." Sangree, *supra* note 219, at 434; see *O'Connor*, 449 U.S. at 1301; *Yellow Springs*, 647 F.2d at 657-58; *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1976); *Ritacco*, 361 F. Supp. at 932; *Bucha*, 351 F. Supp. at 75.

The contact sports exemption tends to run afoul of the Equal Protection Clause when there exists only one single-sex team and no "equal" option for the excluded sex. See *Greene*, *supra* note 167, at 145. This Note examines only the issues that arise when the requirements of "separate but equal" have been met.

²⁸⁷ See 34 C.F.R. § 106.41(a) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis."); *id.* § 106.41(b) (providing exceptions to 34 C.F.R. § 106.41(a)); *Sex Discrimination and Intercollegiate Athletics*, *supra* note 242, at 1259 ("Separate teams are forbidden under the general prohibition of sex discrimination but are permitted under its exceptions.").

²⁸⁸ See 34 C.F.R. § 106.41(b).

²⁸⁹ See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 47 n.154 (2001); *Greene*, *supra* note 167, at 142; *Sex Discrimination and Intercollegiate Athletics*, *supra* note 242, at 1258 n.34 ("By virtue of this competitive-skill exception, all intercollegiate sports were exempted from the prohibition of separate teams."). The regulations themselves recognize the prevalence of single-sex sports. See 34 C.F.R. § 106.41(b).

²⁹⁰ 34 C.F.R. § 106.41(b).

²⁹¹ See *id.*

contact sports team that need never be open to women, and it must only offer a separate all-female team when there is the interest and ability to support such a team.²⁹²

The wide reach of the contact sports exemption has drawn much attention.²⁹³ The regulation itself offers no self-justification, thus those seeking to invoke its protection have had to coin their own reasoning.²⁹⁴ Courts have recognized a few governmental objectives, discussed below, that are important enough to satisfy the requirements of the Equal Protection Clause.²⁹⁵

The most accepted governmental objective is to maintain, foster, and promote athletic opportunities for girls.²⁹⁶ In large part, this is

²⁹² See 40 Fed. Reg. 24,134 (June 4, 1975) (statement of Caspar Weinberger, Secretary of HEW); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,417-18 (Dec. 11, 1979); see also *Mercer v. Duke Univ.*, 190 F.3d 643, 647-48 (4th Cir. 1999) (holding that a university does not have to allow members of the excluded sex to try out for a single-sex contact-sport team, but once it does allow such members to try out for the team it may no longer discriminate on the basis of sex); *Lantz v. Ambach*, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (finding that Title IX neither requires nor prohibits coed competition in contact sports); *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1025 (W.D. Mo. 1983) (finding that Title IX "simply takes a neutral stand" on whether a school may prohibit a girl from trying out for the all-boys football team).

²⁹³ See Greene, *supra* note 167, at 134-35.

²⁹⁴ See *id.* at 146.

²⁹⁵ See *infra* notes 296-305. Not all courts, however, have held these objectives to be important enough to withstand intermediate scrutiny. See *Hoover*, 430 F. Supp. at 169-71; *Clinton v. Nagy*, 411 F. Supp. 1396, 1399-1400 (N.D. Ohio 1974); *Darrin v. Gould*, 540 P.2d 882, 891-93 (Wash. 1975) (en banc).

²⁹⁶ See *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979). But this need may be receding as more and more girls are participating in sports as compared with boys. Adam S. Darowski, *For Kenny, Who Wanted to Play Women's Field Hockey*, 12 DUKE J. GENDER L. & POL'Y 153, 156-57 (2005) (citing *Me. Human Rights Comm'n v. Me. Principals Ass'n*, No. CV-97-599, 1999 Me. Super. LEXIS 23, at *14-15 (Me. Super., Jan. 21, 1999)).

Safety is another governmental objective that has been considered, but many courts have rejected it as illegitimate and unrelated to sex segregation. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); *Fortin v. Darlington Little League*, 514 F.2d 344, 349-51 (1st Cir. 1975) (rejecting safety as the rationale behind denying girls the right to participate in a little league baseball program); *Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (finding that safety is an important governmental objective but that prohibiting girls from wrestling is "overly 'paternalistic'" and not substantially related to that objective); *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626, 629 (D. Neb. 1988); *Force*, 570 F. Supp. at 128 (finding that safety is an important governmental objective but that "[t]here is no evidence, or even any suggestion, that [the female plaintiff] herself could not safely participate in [the] football program [at issue]"); *Hoover*, 430 F. Supp. at 169 (declining to allow an athletic association to exclude a qualified girl from a boys' soccer team simply out of fear of her becoming injured); *Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d at 296.

justified by inherent differences between girls and boys.²⁹⁷ Some people argue that physiological differences generally make boys bigger, stronger, and faster than similar-age girls such that boys are physically more athletic.²⁹⁸ As a result, on fields of integrated teams, boys control the game more than girls do.²⁹⁹ Moreover, boys take roster spots, starting positions, and playing time from girls.³⁰⁰ If boys and girls were to compete for spots on the same team based on skill and ability, many more boys would be selected, and thus many girls would lose the opportunity to play and/or would be discouraged from playing sports altogether.³⁰¹ To prevent such male domination and to ensure that girls have an equal opportunity to play—one that is “meaningful, rather than token”—separate teams are required.³⁰²

Moreover, a showing of male dominance in a coed athletic arena is detrimental because it may actually reinforce the stereotype that women are less athletically gifted.³⁰³ Giving girls a separate arena in which to demonstrate their abilities will promulgate their athletic prowess, providing a haven in which they can flex their muscles out-

²⁹⁷ See *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1129 (9th Cir. 1982); *Cape*, 563 F.2d at 795 (holding that separate girls' and boys' basketball teams further the important government objective of providing equal athletic opportunity based on “the distinct differences in physical characteristics and capabilities between sexes”); *Kleczek v. R.I. Interscholastic League, Inc.*, 768 F. Supp. 951, 953 (D.R.I. 1991) (“Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition. Some classification based on gender may therefore be justified.”), *vacated by* 612 A.2d 734, 738 (R.I. 1992); *Gomes*, 469 F. Supp. at 662 (“At the high school level, the average male is objectively more physically capable than the average female.”).

²⁹⁸ See *Gomes*, 469 F. Supp. at 662; *Bucha*, 351 F. Supp. at 75 n.3 (relying on testimony that men are taller, have greater muscle mass, larger hearts, deeper breathing capacity, and can run faster as compared with women (citing *Brenden v. Indep. Sch. Dist.*, 742, 342 F. Supp. 1224 (D. Minn. 1972))); *Petrie*, 394 N.E.2d at 862; see also *Darowski*, *supra* note 296, at 156–57 (citing *Me. Human Rights Comm'n*, 1999 Me. Super. LEXIS, at *14–15); *Sangree*, *supra* note 219, at 419; *Karen Tokarz, Separate but Unequal Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 218 (1985).

²⁹⁹ See *Darowski*, *supra* note 296, at 157.

³⁰⁰ See *id.*; see also *B.C. v. Bd. of Educ.*, 531 A.2d 1059, 1065 (N.J. Super. Ct. App. Div. 1987) (quoting *Clark*, 695 F.2d at 1131).

³⁰¹ See *O'Connor*, 449 U.S. at 1307 (“[T]here would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete.”); *Cape*, 563 F.2d at 795; *Force*, 570 F. Supp. at 1025–28; *Hoover*, 430 F. Supp. at 170; *Carnes v. Tenn. Secondary Sch. Athletic Ass'n*, 415 F. Supp. 569, 572 (E.D. Tenn. 1976); *B.C.*, 531 A.2d at 1065.

³⁰² *Brake*, *supra* note 289, at 135–36 (citing cases); see *Croudace & Desmarais*, *supra* note 163, at 1461; *Rubin*, *supra* note 278, at 551. Indeed, for this reason, “Separate teams may to a large extent aid in . . . equalization.” *Yellow Springs*, 647 F.2d at 657.

³⁰³ See *Croudace & Desmarais*, *supra* note 163, at 1449.

side of the intimidating shadow of boys.³⁰⁴ Thus, "separate but equal" allows girls to better attain their full athletic potential.³⁰⁵

2. Title IX and Athletics: Making a Case for Single-Sex Education

Physical differences that have been found to justify "separate but equal" on the athletic field provide an equally potent argument for "separate but equal" in the classroom.³⁰⁶ Although research may conflict over the merits of single-sex education, it generally does not refute the fact that there are physical differences between the minds of girls and boys, just as there are physical differences between the bodies of girls and boys.³⁰⁷ On this account, "separate but equal" in the classroom may find some support from an analogy to athletics.³⁰⁸ As the Supreme Court has already recognized, "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."³⁰⁹

Like the debate concerning the value of single-sex education, there exists a debate among scholars concerning the value of single-sex teams.³¹⁰ Some claim that coed competition may actually be more advantageous than single-sex competition.³¹¹ Likewise, such people view sex segregation in athletics as harmful to women by reinforcing a

³⁰⁴ See Brake, *supra* note 289, at 137; Croudace & Desmarais, *supra* note 163, at 1460; Polly S. Woods, *Boys Muscling in on Girls' Sports*, 53 OHIO ST. L.J. 891, 897 (1992) (arguing that girls may be able "to develop their own sports prowess, via all-girl teams, which may not be possible through a coeducational-team system").

³⁰⁵ See *supra* notes 298-304 and accompanying text.

³⁰⁶ Cf. Croudace & Desmarais, *supra* note 163, at 1458 (arguing that physical differences between the sexes prevent them from competing equally in sports, whereas no such impediment prevents equal competition in academics).

³⁰⁷ See Brain Differences, *supra* note 86; *supra* notes 87-90 and accompanying text.

³⁰⁸ See Brain Differences, *supra* note 86; *supra* notes 87-90 and accompanying text.

³⁰⁹ See *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding a law providing that any political organization whose candidate received twenty percent or more of the vote at the most recent gubernatorial or presidential election is a "political party"); see also *Yellow Springs*, 647 F.2d at 657-58 (upholding a regulation prohibiting all contact-sports teams from being coed and noting that "males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist"); Fortney, *supra* note 86, at 880 ("If scientific research shows differences [in male and female brains], no discrimination would be based on 'archaic and stereotypic notions.' Thus, any educationally-based gender segregation would be permissible, whether that be in the third-grade or law school.").

³¹⁰ See Croudace & Desmarais, *supra* note 163, at 1446; Jessica E. Jay, *Women's Participation in Sports: Four Feminist Perspectives*, 7 TEX. J. WOMEN & L. 1, 21 (1997) (citing Jack H. Wilmore, *Exploding the Myth of Female Inferiority*, 2 PHYSICIAN AND SPORTSMED. 54, 55 (1981)).

³¹¹ See *Brenden*, 477 F.2d at 1300-01.

stigma of inferiority.³¹² Others argue that physical differences affecting athletic performance between girls and boys may be sociologically, rather than biologically, induced due to the historical restrictions imposed on girls.³¹³ One court has noted that differences among individual athletes are greater than those between the sexes.³¹⁴ Other courts claim that sex-segregated teams are based merely on age-old stereotypes and doused in "romantic paternalism."³¹⁵ Indeed, critics of the contact sports exemption claim that sex segregation in athletics is the product of a lingering conception of sports as an exclusive all-boys club.³¹⁶

Despite all of those arguments, however, the constitutionality of "separate but equal" in athletics has generally been upheld.³¹⁷ Very similar arguments have been made to strike down the new Title IX regulations regarding single-sex education, but the constitutionality of these regulations should, by analogy, not necessarily be placed in jeopardy.³¹⁸

Furthermore, the acquiescence to the doctrine of "separate but equal" in the athletic arena suggests its general acceptability.³¹⁹ An investigation of Title IX and athletics reveals further proof that the framers of Title IX themselves did not envision a uniformly coeduca-

³¹² See Brake, *supra* note 289, at 144; Greene, *supra* note 167, at 163; Tokarz, *supra* note 298, at 232-33.

³¹³ See Croudace & Desmarais, *supra* note 163, at 1446; Jay, *supra* note 310, at 21 (citing Wilmore, *supra* note 310, at 55).

³¹⁴ See Hoover, 430 F. Supp. at 169.

³¹⁵ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1972) ("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."); *Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d at 290 ("[D]isadvantages suffered by males are often premised on a 'romantic paternalism' stigmatizing to women." (quoting *Frontiero*, 411 U.S. at 684)); see Lantz, 620 F. Supp. at 665-66 (enjoining the enforcement of a regulation that prohibits coed competition in basketball, boxing, football, ice hockey, rugby, and wrestling because it was based on "averages and generalities" concerning the relative strength and speed of boys and girls in violation of the Equal Protection Clause); *Force*, 570 F. Supp. at 1029; Croudace & Desmarais, *supra* note 163, at 1442. But see *Petrie*, 394 N.E.2d at 862 (explaining that sex segregation of sports teams is "not based on generalizations that are 'archaic,' nor does it represent an attitude of 'romantic paternalism'" (citations omitted)).

³¹⁶ See Sangree, *supra* note 219, at 409.

³¹⁷ See *O'Connor*, 449 U.S. at 1301; *Kelly v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Yellow Springs*, 647 F.2d at 656; see also Brake, *supra* note 289, at 134 ("Much of Title IX law . . . proceeds from the presumed validity of sex-segregation as an organizing principle for competitive athletic programs.").

³¹⁸ See *Kelly*, 35 F.3d at 270; *Yellow Springs*, 647 F.2d at 656; *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 545 F. Supp. 376, 383 (N.D. Ill. 1982), *aff'd*, 449 U.S. 1301 (1980).

³¹⁹ See *Dudley & Rutherglen*, *supra* note 243, at 194.

tional world.³²⁰ When promoting an unsuccessful earlier version of Title IX, Senator Bayh clearly stated:

I do not read [the predecessor bill of Title IX] as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated.³²¹

Thus, Senator Bayh was concerned with facilitating the full entrance of women to education and related activities, on a level equal to that of men; he was not advocating for the full integration of women with men in educational settings.³²²

Title IX has been most lauded for achieving gender equality in sports, and it did so largely through a "separate but equal" system generally considered constitutional.³²³ The new Title IX regulations open the door for gender equality to be achieved in the same way in public elementary and secondary education, and they should likewise be upheld as constitutional.³²⁴

CONCLUSION

Title IX has long been associated with the ascension of gender equality in the United States. The DOE has continued in this great legacy by promulgating new Title IX regulations that specifically allow for single-sex education in public elementary and secondary schools. In light of research suggesting the advantages offered by single-sex educational environments, the new regulations embrace the opportunity to

³²⁰ See *Yellow Springs*, 647 F.2d at 657 ("In Title IX, Congress struck a balance between the needs of the individual athlete and the group and determined that for purposes of the statute equality is to be measured by the opportunities offered to the group, not by the makeup of any individual team.") (citation omitted); 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh).

³²¹ 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh).

³²² See *id.*

³²³ See Cheryl L. Schubert-Madsen et al., *Gender Discrimination in Athletics*, 67 N.D. L. REV. 227, 234 (1991); *supra* notes 282-305.

³²⁴ See 34 C.F.R. § 106.34 (2007).

help eradicate the stubborn vestiges of gender discrimination in this country.

These Title IX regulations should be upheld, despite legal challenges likely to arise from speculative fears that they will only exacerbate discrimination on the basis of sex. Administrative regulations traditionally receive tremendous deference, and neither the legislative and post-enactment history of Title IX nor the pertinent Supreme Court decisions pose a bar to public elementary and secondary single-sex education. Although the U.S. Supreme Court has not ruled directly on the constitutionality of such education, the regulations permitting it would likely pass intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Providing single-sex education is substantially related to achieving important governmental objectives, such as redressing past economic harm to women, developing fully the talents and capacities of our entire population, and providing diversity in the types of educational opportunities available today.

Because it relies on inherent physiological and psychological differences between the sexes, single-sex education should not fall victim to the doctrine prohibiting "separate but equal" educational opportunities in the context of race. There are no such inherent differences between races, and consequently race receives a greater degree of judicial scrutiny than does gender.

Single-sex education should follow in the footsteps of the doctrine permitting "separate but equal" athletic teams segregated by sex. This doctrine has been met with near universal acceptance in society and in the courts. Just as we have used sex segregation to advance women's status in the realm of sports, we should also use it to advance women's status in the realm of education. Indeed, Title IX is best known for its success in leveling the playing field for athletics, which was accomplished largely through sex segregation; Title IX and its new regulations have just as much potential to do the same for education.

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