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## NOTES

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### CAN SEPARATE BE EQUAL? SINGLE-SEX CLASSROOMS, THE CONSTITUTION, AND TITLE IX

*Benjamin P. Carr\**

#### INTRODUCTION

At the turn of the millennium, one could be excused for believing that politicians—left, right, and center—were required by law to mention public school reform at least once in every stump speech. For example, before the 2000 election, presidential candidate George W. Bush ran on a platform calling for educational reform, in part due to the “failures” of public education.<sup>1</sup> After his election, the newly inaugurated President announced a new era of experimentalism in the public schools of America, remarking that “we will reclaim America’s schools, before ignorance and apathy claim more young lives.”<sup>2</sup>

The No Child Left Behind Act of 2001<sup>3</sup> embodied the essence of this experimentalism, claiming a goal of “ensur[ing] that all children

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1 See James Sterngold, *Bush Would Deny Money to Schools Judged as Failing*, N.Y. TIMES, Sept. 3, 1999, at A14 (“Mr. Bush . . . described Federal Education programs as offering ‘high hopes and low achievement, grand plans and unmet goals.’ One of the most frequent words in his speech was ‘failure.’”); see also William Booth, *Bush Proposes Giving School Funds to Parents: Opponents of Vouchers Criticize Idea*, WASH. POST, Sept. 3, 1999, at A1 (“Bush described a more activist role for the federal government in education than some conservatives embrace.”).

2 Inaugural Address, 1 PUB. PAPERS 1, 2 (Jan. 20, 2001).

3 Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C. (Supp. III 2003)).

have a fair, equal, and significant opportunity to obtain a high-quality education.”<sup>4</sup> No Child Left Behind touched off a firestorm of discussion regarding controversial issues in education, provoking nationwide debate about voucher programs and school choice, teacher accountability, and standardized testing. Another controversial issue buried within the strictures of No Child Left Behind—and one that has only recently come to the forefront of the national discussion—is the issue of single-sex education.<sup>5</sup>

Even before No Child Left Behind, single-sex education was a rising tide in the American educational system.<sup>6</sup> In 1992, a groundbreaking study by the American Association of University Women (AAUW) demonstrated marked differences between learning in single-sex and coeducational classrooms.<sup>7</sup> Following this study and the passage of No Child Left Behind, various public school systems around the country began to experiment with separating the genders into different schools or classrooms.<sup>8</sup> Now, the single-sex classroom movement has reached a pivotal, defining moment, as new regulations promulgated by the United States Department of Education (DOE) encourage public schools to engage in the single-sex experiment.<sup>9</sup>

These new DOE regulations face an uphill legal battle. The specter of the Fourteenth Amendment’s Equal Protection Clause<sup>10</sup> and a long line of Supreme Court cases, from *Brown v. Board of Education*<sup>11</sup>

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4 *Id.* § 1001. After announcing its lofty goal, the Act lists twelve ways in which this goal can be accomplished, including “promoting schoolwide reform and ensuring the access of children to effective, scientifically based instructional strategies.” *Id.* § 1001(9).

5 *See id.* § 5131(a)(23).

6 *See, e.g.*, Wendy Kaminer, *The Trouble with Single-Sex Schools*, ATLANTIC MONTHLY, Apr. 1998, at 22, 24 (noting that, since the early 1990s, applications to all-girls schools had increased twenty-one percent and four new all-girls secondary schools had been established).

7 *See generally* AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., HOW SCHOOLS SHORT-CHANGE GIRLS (1992) (reviewing over 1300 studies of girls in the American education system and exploring how and why these girls are systematically disadvantaged).

8 *See* 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-classrooms.htm> (last visited Oct. 15, 2007) (listing, state-by-state, 345 public schools that offer single-sex opportunities and classifying eighty-four of those schools as single-sex schools).

9 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2007).

10 U.S. CONST. amend. XIV, § 1.

11 347 U.S. 483 (1954).

to *United States v. Virginia*<sup>12</sup> stand in the way of any attempt to create “separate but equal” opportunities for boys and girls in public education. Even if the regulations are found to be constitutional, their implementation may run afoul of Title IX, a statutory prohibition on sexual discrimination.<sup>13</sup>

Fortunately for the new DOE regulations, both Title IX and the Supreme Court’s Equal Protection jurisprudence in gender discrimination cases evince a strong policy against the subordination of one gender to another. Courts consistently enforce this antisubordination policy in both the Title IX and Equal Protection areas. Gender discrimination is generally seen as invalid when based upon antiquated notions of gender roles or when such discrimination serves to preserve a status quo of male superiority and female inferiority.

This Note argues that single-sex classrooms conforming to the new DOE regulations should be found valid because they do not contradict the antisubordination underpinnings of the Constitution or Title IX. Part I of this Note examines the Supreme Court’s Equal Protection jurisprudence in the area of single-sex education. Part II will discuss the origins of Title IX, the antisubordination policies behind the statute, and the impact of the No Child Left Behind Act on Title IX. Part III of this Note details the history and requirements of the new DOE regulations. Finally, Part IV will evaluate the DOE regulations against a constitutional and statutory backdrop and demonstrate the validity of a school program that complies with the regulations.

## I. THE CONSTITUTION AND SINGLE-SEX SCHOOLING

Courts—and the Supreme Court in particular—have infrequently considered the constitutionality of single-sex schooling. However, cases from *Brown v. Board of Education* to *United States v. Virginia* indicate an evolving standard of scrutiny that relies on an antisubordination analysis to determine the validity of separate-gender programs.

### A. *Separate Is Inherently Unequal*: *Brown v. Board of Education*

The seminal case for any analysis of an educational plan that involves the segregation of students is *Brown v. Board of Education*,<sup>14</sup> in which the Supreme Court struck down the “separate but equal” doctrine of *Plessy v. Ferguson*<sup>15</sup> and ushered in an era of desegregation in America’s public schools. Writing for a unanimous Court, Chief Jus-

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12 518 U.S. 515 (1996).

13 See 20 U.S.C. § 1681 (2000).

14 347 U.S. 483 (1954).

15 163 U.S. 537 (1896).

tice Warren famously announced the reversal of a precedent that, for years, permitted the segregation of black and white students: “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>16</sup>

At the heart of the *Brown* decision was the Court’s use of intangible factors to determine that minority children were harmed by segregated schooling.<sup>17</sup> Under *Brown*’s analysis, the tangible aspects of education—teachers, facilities, supplies, etc.—were important, but not the primary basis of the decision.<sup>18</sup> Instead, citing previous decisions, the Court “relied in large part on ‘those qualities which are incapable of objective measurement.’”<sup>19</sup> Thus, the Court concerned itself with the mental and emotional effects of segregation: “To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>20</sup>

*Brown*’s emphasis on psychological effects and “intangible” factors was the genesis of the Court’s later antisubordination analyses in both race and gender discrimination cases. As one commentator noted, “[E]ven if the tangible aspects of the educational program are equal, the intangible message of the separatism itself was at the heart of *Brown*.”<sup>21</sup> The Court indicated that the message of separatism—that one group is subordinate to another—was the evil against which the Equal Protection Clause protected.<sup>22</sup> As the focus of the Court’s equal protection jurisprudence shifted from racial discrimination in *Brown* to later cases involving gender, the reliance on intangible factors would continue to animate much of the Court’s decisionmaking.

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16 *Brown*, 347 U.S. at 495.

17 *See id.* at 493–94.

18 *See* Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 498 (“While people knew at the time that the economically deprived black schools often did provide an inferior education, that was not the injury the *Brown* Court addressed.”).

19 *Brown*, 347 U.S. at 493 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

20 *Id.* at 494.

21 Levit, *supra* note 18, at 498.

22 The Court recently reiterated this view in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), stating that, in *Brown*, “we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race denoted inferiority.” *Id.* at 2767.

B. *Before Intermediate Scrutiny: Vorchheimer v. School District of Philadelphia*

Although *Brown* settled—somewhat<sup>23</sup>—the issue of racial segregation in public schools, nearly thirty years passed before the Supreme Court considered the constitutionality of schools segregated based on gender. During the interim, lower federal courts decided several cases concerning the constitutionality of single-sex schools,<sup>24</sup> most notably *Vorchheimer v. School District of Philadelphia*.<sup>25</sup> In *Vorchheimer*, the Third Circuit considered a case in which a female student wished to attend Philadelphia Central High School—an “academic”<sup>26</sup> high school with rigorous standards and extensive college preparatory courses—but was denied admission because the school was restricted to male students.<sup>27</sup> The Third Circuit reversed the district court’s determination that the gender classification violated the Equal Protection Clause<sup>28</sup> because it lacked a “fair and substantial relationship to the School Board’s legitimate interest.”<sup>29</sup> Notably, the court did not determine what level of scrutiny to apply in gender segregation cases: “We need not decide whether this case requires application of the rational or substantial relationship tests because, using either, the result is the same.”<sup>30</sup> That result hinged on the fact that the court found that the School District provided an “equal educational opportunity” for the female student at Girls High School—an academic high school restricted to female students.<sup>31</sup> Although the Third Cir-

23 See Levit, *supra* note 18, at 464–73 (describing subsequent cases that limit the mandates of desegregation in *Brown* and *Green v. County School Board*, 391 U.S. 430 (1968)).

24 See, e.g., *Williams v. McNair*, 316 F. Supp. 134, 138–39 (D.S.C. 1970) (applying a “rational basis” analysis and refusing to enjoin the enforcement of a statute limiting—to women only—admissions to a state-supported college); *Kirstein v. Univ. of Va.*, 309 F. Supp. 184, 187 (E.D. Va. 1970) (holding that the University of Virginia could not deny educational opportunities to women on the basis of sex).

25 532 F.2d 880 (3d Cir. 1976), *aff’d by an equally divided court*, 430 U.S. 703 (1977) (mem.).

26 “Academic” high schools were differentiated from “comprehensive,” “technical,” and “magnet” high schools, each of which had different admissions standards and curricular offerings. See *id.* at 881. The academic schools were the most selective, as only seven percent of the city’s students qualified under the standards of those schools. *Id.*

27 *Id.*

28 *Id.* at 888.

29 *Id.* at 882.

30 *Id.* at 888.

31 See *id.* at 887. One commentator has noted that, interestingly, “the educational disparities between the schools diminish as the [*Vorchheimer*] opinion progresses,” moving from the science facilities of Central High being superior to complete equal-

cuit found that single-sex schooling “has limited acceptance on its merits,” it was not willing to step in the way of experimentation by the School District, stating that, “given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship.”<sup>32</sup>

Perhaps the most striking feature of the Third Circuit’s analysis of the *Vorchheimer* case is its tacit dismissal of *Brown*’s pronouncement that “separate educational facilities are inherently unequal.”<sup>33</sup> The *Vorchheimer* majority refused to apply *Brown* because, unlike race, the Supreme Court had not characterized gender as a “suspect classification” under the Constitution.<sup>34</sup> According to the *Vorchheimer* court, “[T]here are differences between the sexes which may, in limited circumstances, justify disparity in law.”<sup>35</sup> The majority seemed to assert that sex separation is benign by nature, and unlike oppressive racial segregation. An evenly divided Supreme Court affirmed this decision in a memorandum opinion.<sup>36</sup>

### C. *Intermediate Scrutiny Applied: Mississippi University for Women v. Hogan*

After *Vorchheimer*, the next single-sex education case to reach the Supreme Court was *Mississippi University for Women v. Hogan*.<sup>37</sup> In *Hogan*, the Court held that Mississippi’s policy of excluding males from attending the Mississippi University for Women’s School of Nurs-

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ity between Central and Girls High Schools. Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 457 n.42 (1999).

32 *Vorchheimer*, 532 F.2d at 887–88.

33 *Id.* at 888–89 (Gibbons, J., dissenting). Judge Gibbons, writing in dissent, cleverly substituted gender-based words into the majority opinion of *Plessy* and calls the majority opinion in *Vorchheimer* “a twentieth-century sexual equivalent to the *Plessy* decision.” *Id.* Gibbons cautioned that the doctrine “can and will” be used to support gender segregation, much as it was used to support racial segregation prior to *Brown*. *Id.* at 889.

34 *Id.* at 886 (majority opinion).

35 *Id.* Ruth Bader Ginsburg—then head of the ACLU Women’s Rights Project—pursued a strategy in the *Vorchheimer* case that did not implicate a direct parallel between *Brown* and *Vorchheimer*, feeling—correctly—that the courts would not embrace such an argument. Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 259–64 (2006).

36 *Vorchheimer v. Sch. Dist. of Phila.*, 430 U.S. 703, 703 (1977) (mem.), *affg* by an equally divided court, 532 F.2d 880 (3d Cir. 1976).

37 458 U.S. 718 (1982).

ing violated the Equal Protection Clause.<sup>38</sup> In *Hogan*, unlike *Vorchheimer*, there was no “equivalent” educational opportunity available in Mississippi.<sup>39</sup>

The Court’s analysis in *Hogan* relied on the recently established doctrine of “intermediate scrutiny,” which had gained traction in gender discrimination cases after the *Vorchheimer* decision.<sup>40</sup> Noting that “[b]ecause the challenged policy expressly discriminates . . . on the basis of gender, it is subject to scrutiny under the Equal Protection Clause,” the *Hogan* Court applied a two-step “intermediate scrutiny” test to determine whether the policy survived an equal protection inquiry.<sup>41</sup> This test mandates that (1) the state must show an “exceedingly persuasive justification” for discriminating based on gender and (2) that the discrimination must “serve important governmental objectives,” and employ means “substantially related to the achievement of those objectives.”<sup>42</sup>

Applying this test, the *Hogan* Court warned that the justification for a discriminatory policy must not “reflect[ ] archaic and stereotypic notions”<sup>43</sup>—in other words, the justification could not rely on the subordination of one gender to another. Including examples of historical attempts to exclude women from certain occupations, the Court indicated that if the objective of the policy is to separate the genders based on a presumption of the innate inferiority of one of them, the

38 *Id.* at 732–33 (“Neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.”).

39 *Id.* at 720 n.1.

40 The first case to describe the intermediate scrutiny test for gender classifications was *Craig v. Boren*, 429 U.S. 190 (1976). In *Craig*, the Court considered a state statute which prohibited the sale of a certain type of alcohol to males under the age of twenty-one and females under the age of eighteen. *Id.* at 191–92, 210. Striking down the statute, the Court indicated that “[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve *important governmental objectives* and must be *substantially related to achievement of those objectives*.” *Id.* at 197 (emphasis added). This test would become known as “intermediate scrutiny.” *Id.* at 218 (Rehnquist, J., dissenting). For a discussion of why a previous Supreme Court case, *Frontiero v. Richardson*, 411 U.S. 677 (1973), is a more thorough explanation of the “intermediate scrutiny” test, see 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, 402–04.

41 *Hogan*, 458 U.S. at 723–24.

42 *Id.* at 724 (citations and internal quotation marks omitted).

43 *Id.* at 725. Justice O’Connor, writing for the majority, further noted that “if 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.” *Id.*



“objective itself is illegitimate.”<sup>44</sup> Rather, the Court indicated, the state’s objective must be more than a desire to “protect” members of one gender because they are presumed to “suffer from an inherent handicap or to be innately inferior.”<sup>45</sup> As one commentator noted, “*Hogan* . . . contains the seeds of an anti-subordination argument, for it seems to distinguish between programs that ameliorate the position of a subordinated group and those that reinforce the status quo.”<sup>46</sup> This antistatutory argument would play a larger role in later decisions.

Although the *Hogan* Court struck down the discriminatory state policy before it, it did not confront the “separate but equal” issue that concerned the Court in *Brown* and, to a lesser extent, in *Vorchheimer*. In *Hogan*, there was not an equivalent coeducational or male-only opportunity for the respondent.<sup>47</sup> Because of this, the “intangible factors” that were crucial in *Brown* were not at issue in *Hogan*, making it of limited value in assessing the constitutionality of single-sex classrooms.<sup>48</sup>

#### D. A New Standard of Skeptical Scrutiny: *United States v. Virginia*

Following *Hogan*, the Supreme Court remained silent on the issue of single-sex education for another fourteen years before its landmark decision in *United States v. Virginia*.<sup>49</sup> In *Virginia*, the United States, prompted by a complaint filed with the Attorney General by a female high school student who wished to attend the Virginia Military Institute (VMI), sued the State of Virginia, alleging that the male-only

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44 *Id.* at 725 & n.10.

45 *Id.* at 725.

46 Carolyn B. Ramsey, *Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools*, 8 TEX. J. WOMEN & L. 1, 28 (1999); see also *Hogan*, 458 U.S. at 733 (Burger, C.J., dissenting) (emphasizing that the Court’s holding “is limited to the context of a professional nursing school” and that “since the Court’s opinion relies heavily on its finding that women have traditionally dominated the nursing profession . . . it suggests that a State might well be justified in maintaining, for example, the option of an all-women’s business school or liberal arts program”); Levit, *supra* note 31, at 459 (“[T]he *Hogan* Court was concerned with antistatutory as well as antidiscrimination values.”).

47 *But see Hogan*, 458 U.S. at 733–36 (Blackmun, J., dissenting) (describing the alternatives available to the petitioner in the state of Mississippi and stating that “Mississippi . . . has not closed the doors of its educational system to males like Hogan”).

48 See, e.g., Levit, *supra* note 31, at 459 (“The specific question in *Hogan* was not the wisdom of sex-segregated education, but the constitutionality of excluding one sex without providing comparable educational alternatives.”).

49 518 U.S. 515 (1996).

policy of VMI violated the Equal Protection Clause.<sup>50</sup> Holding that this policy was, in fact, unconstitutional, the Court found that Virginia failed to show either (1) an “exceedingly persuasive justification” for excluding women from VMI or (2) that the remedy—a supposedly equivalent program for women only—cured the constitutional violation.<sup>51</sup>

In reaching this holding, the Court appeared to apply a somewhat different formulation of the “intermediate scrutiny” test that had dominated its gender discrimination jurisprudence for two decades.<sup>52</sup> Justice Ginsburg, writing for the majority, emphasized that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”<sup>53</sup> The majority also reiterated the classic means-ends test it employed in *Hogan*.<sup>54</sup>

The definition of intermediate scrutiny advanced by *Virginia*’s majority was not without controversy. Chief Justice Rehnquist, in a concurring opinion, took issue with the “exceedingly persuasive justification” language of the majority and stated that the Court should have adhered to its “traditional . . . standard that a gender-based classification ‘must bear a close and substantial relationship to important governmental objectives.’”<sup>55</sup> Justice Scalia, in what can only be called a vigorous dissent, found the standard applied by the majority even more odious: “[The majority] drastically revises our established standards for reviewing sex-based classification.”<sup>56</sup> One commentator has agreed with this assessment, finding that the *Virginia* Court not only redefined intermediate scrutiny with the “exceedingly persuasive justification” formulation, but that the Court moved gender-based scrutiny far closer to strict scrutiny.<sup>57</sup> However, other commentators have dis-

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50 *Id.* at 523.

51 *Id.* at 556.

52 *See id.* at 558–59 (Rehnquist, C.J., concurring) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)) (collecting cases).

53 *Id.* at 531 (majority opinion). The majority specified that the review standard was “heightened,” but that sex was not a “proscribed classification.” *Id.* at 533.

54 *See id.* at 533.

55 *Id.* at 559 (Rehnquist, C.J., concurring) (quoting *Pers. Adm’r v. Feeney*, 442 U.S. 256, 273 (1979)).

56 *Id.* at 566 (Scalia, J., dissenting). Justice Scalia proceeded to decry the majority’s willingness to ignore precedent and stated that “[o]nly the amorphous ‘exceedingly persuasive justification’ phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI’s single-sex composition is unconstitutional.” *Id.* at 570–76.

57 *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996); *see also* Cynthia Harrison, “Heightened Scrutiny”: An Alternative Route to Constitu-

agreed, finding that “Justice Scalia’s dissent and the law review articles that it has sparked are somewhat alarmist.”<sup>58</sup>

Justice Ginsburg’s majority opinion leaves unanswered the question of whether the “skeptical” standard enunciated in *Virginia*<sup>59</sup> is, in fact, a formulation of intermediate or strict scrutiny. In all likelihood, both sides of the debate may be right—*Virginia* moves the scales a little bit closer to the exacting standard of strict scrutiny, but only in cases evincing overbroad generalizations about women and sexual stereotypes that deny them the same opportunities as men.<sup>60</sup>

Unlike *Hogan*, which did not confront the issue of a separate educational facility for the opposite sex,<sup>61</sup> *Virginia* clarified the constitutional standards to be applied to parallel single-sex educational opportunities: Virginia had established a parallel program for women known as the Virginia Women’s Institute for Leadership (VWIL).<sup>62</sup> But the facts of the case made this arrangement’s constitutionality not even a close question. Examining a variety of factors including faculty, curricular offerings, facilities, financial support, and alumni support, the Court found that VWIL fell far short of matching the

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*tional Equality for U.S. Women*, in *WOMEN AND THE UNITED STATES CONSTITUTION* 347, 358 (Sibyl A. Schwarzenbach & Patricia Smith eds., 2003) (“The advocates of strict scrutiny in the [*Virginia*] briefs described a level of review with results very much like that of intermediate scrutiny as the Court was now applying it . . .”). Professor Harrison did acknowledge differences between the standard applied by the Court in *Virginia* and the strict scrutiny standard: “[The test in *Virginia*] permitted compensatory programs for women and separate educational facilities for women and men . . . it did not touch military limitations placed on women, and it left in place separate public accommodations in the way of sanitary facilities.” *Id.*

58 Morgan, *supra* note 40, at 409. For a full discussion of why *Virginia* did not replace intermediate scrutiny with strict scrutiny in gender discrimination cases, see *id.* at 408–13.

59 See *Virginia*, 518 U.S. at 531 (“Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.”).

60 See, e.g., Philippa Strum, *Women and Citizenship: The Virginia Military Institute Case*, in *WOMEN AND THE UNITED STATES CONSTITUTION*, *supra* note 57, at 335, 342–43 (“The difference between ‘strict’ and ‘skeptical’ scrutiny, then, lay in the delineation of the circumstances under which sex-conscious government policies might be legitimate.”). Professor Strum goes on to elaborate under what circumstances governmental sex-classification policies may be struck down: “Policies that kept women out of areas of life open to men [are] unconstitutional; policies that compensated them for past discrimination might be upheld by the courts.” *Id.* at 342.

61 See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 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.”).

62 See *Virginia*, 518 U.S. at 526.

opportunity and education offered by VMI.<sup>63</sup> Because VWIL could not be considered an equal educational opportunity for women, the Court neatly avoided subjecting the case to a “separate but equal” analysis.

Despite its avoidance of *Brown*, the Court left open the question of whether equitable treatment of the sexes would be allowed, even hinting strongly that it would be permissible: “We do not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities.”<sup>64</sup> This language suggests that single-sex educational programs will pass constitutional muster so long as they enhance the diversity of opportunities within a school system.<sup>65</sup> Furthermore, the *Virginia* Court indicated that sex classifications would be permissible “to advance full development of the talent and capacities of our Nation’s people.”<sup>66</sup> Taken as a whole, it appears that *Virginia* opens a window in constitutional jurisprudence that would allow for single-sex classrooms as long as they enhance diversity of choice, create educational benefits, and do not discriminate against women.<sup>67</sup>

*E. Summary: The Supreme Court’s Constitutional Jurisprudence and Single-Sex Education*

Unfortunately, the two major decisions by the Supreme Court on same-sex schooling were decided in the context of higher education and say little about how their analyses should apply to elementary or secondary public schools. Also, the educational programs challenged in *Hogan* and *Virginia* were previously established institutions of learning and were not created specifically to enhance the learning of one or both sexes. Nevertheless, four broad characterizations may be drawn from these cases about how the Court might treat a constitu-

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63 See *id.* at 551–54 (describing the VWIL program as a “pale shadow” of VMI).

64 *Id.* at 534 n.7.

65 See Morgan, *supra* note 40, at 419.

66 *Virginia*, 518 U.S. at 533–34. One commentator has argued that the antidisubordination analysis presented here is “asymmetric”; only applying to single-sex education for women, but not men. See Morgan, *supra* note 40, at 424–27. Morgan also admits that “the language of the [*Virginia*] opinion allows for several conflicting interpretations and leaves the constitutional status of single-sex public schools unclear.” *Id.* at 424.

67 See *infra* Part IV; see also, e.g., Morgan, *supra* note 40, at 427 (“Under this definition of anti-subordination, single-sex public schools will survive constitutional scrutiny as long as they are voluntary, educationally beneficial, allow alternatives to traditional gender identities and roles, and do not harm women’s economic or political interests.”).

tional challenge to single-sex classrooms in primary or secondary education.

First, it is clear that the Court will apply a heightened intermediate scrutiny test—"skeptical scrutiny"—to any challenged programs that discriminate based on gender. Exactly where the bar is set for this test is not clear, but it is somewhere between the nearly always fatal "strict scrutiny" test<sup>68</sup> and the "rational basis" test,<sup>69</sup> although the skeptical scrutiny test in separate-sex cases is probably closer to strict scrutiny, particularly in cases where there is any hint of sexual stereotyping.<sup>70</sup>

Second, "an exceedingly persuasive justification" for the separation of the sexes is required in order to pass the intermediate scrutiny test. The burden of proving this justification is on the governmental actor who promotes the same-sex program and the justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation."<sup>71</sup> Diversity of opportunity alone will not satisfy this requirement if no provision is made for the equal treatment of both sexes.<sup>72</sup> Exactly which justifications will qualify under this test is not clear, although the Court will look with a prejudiced eye on any justification that relies on "overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>73</sup>

Third, the Court will enforce an antisubordination policy in evaluating single-sex educational programs, particularly those that could disadvantage women. Classifications based on sex will be allowed as long as they do not "create or perpetuate the legal, social, or eco-

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68 See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

69 See, e.g., *New Orleans v. Duke*, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

70 See, e.g., *Strum*, *supra* note 60, at 343 ("The new standard in gender equality litigation became 'skeptical scrutiny,' with the burden of proof now on the state to demonstrate that gender-specific laws have been enacted to fulfill an important governmental function, that they are a least-restrictive method of achieving it, and that they are not based on stereotypical notions about 'the way women are' rather than on individual capabilities.").

71 *Virginia*, 518 U.S. at 533.

72 See *id.* at 539-40.

73 *Id.* at 533.

conomic inferiority of women.”<sup>74</sup> As one commentator has observed, the goal of the Court’s antisubordination analysis is “to identify and strike down rules that maintain the traditional hierarchy of men over women.”<sup>75</sup>

Finally, the applicability of *Brown* to a case involving the separation of genders is very much in doubt. None of the cases considered by the Supreme Court involved two single-sex programs that were found to have substantially equal tangible resources—facilities, faculty, or other forms of support. However, the Court implied—albeit in a footnote—that “evenhanded” separate-sex educational programs could survive constitutional scrutiny, effectively precluding a “separate is inherently unequal” argument, so long as the “separate but equal” educational program does not reinforce traditional, baseless gender stereotypes.<sup>76</sup>

## II. SINGLE-SEX EDUCATION UNDER TITLE IX

The Constitution is not the only hurdle that single-sex classrooms must clear. Title IX of the Education Act Amendments of 1972,<sup>77</sup> best known for its effects on high school and intercollegiate athletics,<sup>78</sup> presents a statutory roadblock for any educational program that divides students according to gender. Much like the Supreme Court’s gender discrimination equal protection jurisprudence, Title IX and its

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<sup>74</sup> *Id.* at 534.

<sup>75</sup> Morgan, *supra* note 40, at 384.

<sup>76</sup> See *supra* notes 64–67 and accompanying text. While *Brown* is not directly applicable to cases involving gender, it has a great impact upon the movement against sex discrimination in education and the Court’s jurisprudence on the subject. See Elizabeth Davenport, *Brown and Gender Discrimination*, in *BROWN V. BOARD OF EDUCATION 77, 77* (Dara N. Byrne ed., 2005) (“*Brown* and its progeny became the mechanism by which women could work to change sexual misconceptions and achieve equal rights. *Brown* opened the discussion for inequalities experienced by female students.”).

<sup>77</sup> 20 U.S.C. § 1681 (2000).

<sup>78</sup> See NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY* 107 (2006) (“While Title IX has wielded enormous impact on American education as a whole, for most people the law is synonymous with sports and recreation, celebrated everywhere, from the girls’ track meet to the ‘Title Nine’ sportswear catalog. Title IX may be the first federal law to have achieved true pop status.”); Katherine Hanson, *Title IX: Are We Moving from Separate and Sort of Equal to Integrated and Unequal? Perceptions of Title IX Coordinators on the Impact of Twenty Years of Legislation*, in *12 READINGS ON EQUAL EDUCATION: CIVIL RIGHTS IN SCHOOLS* 113, 116 (Steven S. Goldberg & Kathleen Kelley Lynch eds., 1995) (“In sports, Title IX forced many colleges and universities to restructure completely their approach to women athletes by requiring that women receive scholarships, teams, coaches, and facilities equal to those of male athletes.”).

history include a strong antisubordination undercurrent, although the statute is purely antidifferential on its face.

### A. *Title IX*

Title IX has been described as “stitched together” and “an odd assortment of prohibitions and exemptions.”<sup>79</sup> The language of the statute provides that “[n]o 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.”<sup>80</sup> This ban against sex discrimination, however, is “riddled with loopholes.”<sup>81</sup> Title IX contains numerous exceptions to its broad prohibition of discrimination, including religious schools, military schools, and traditionally single-sex institutions of higher education.<sup>82</sup> Notably, in regard to admissions, Title IX only applies to “institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education”<sup>83</sup>—elementary and secondary schools are not mentioned. However, courts construe this limitation to apply “primarily to historically pre-existing single sex schools,” and not to the establishment of new single-sex programs.<sup>84</sup>

Despite its exceptions, Title IX has greatly influenced the landscape of American education.<sup>85</sup> This influence is attributable to two

79 Ramsey, *supra* note 46, at 34.

80 20 U.S.C. § 1681(a) (2000).

81 Ramsey, *supra* note 46, at 34.

82 See 20 U.S.C. § 1681(a)(3)–(5) (2000). Additionally, Title IX exempts social fraternities and sororities, voluntary youth service organizations, Boys and Girls Conferences, father-son and mother-daughter activities, and beauty pageants. See *id.* § 1681(a)(6)–(9).

83 *Id.* § 1681(a)(1).

84 *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1008–09 (E.D. Mich. 1991). The House version of Title IX would have applied to all elementary and secondary schools, requiring them to become coeducational. See 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh). While Senator Bayh conceded that all coeducational schools “may be a desirable goal,” he acknowledged that there was no way of knowing how many single-sex elementary and secondary schools existed “or what special qualities of the schools might argue for a continued single sex status.” *Id.* Senator Bayh seemed to call for further investigation by the Commissioner of Education into the effectiveness of *current* single-sex elementary and secondary schools. See *id.*

85 See, e.g., LEVIT & VERCHICK, *supra* note 78, at 98–99 (“Consider that in 1972, when the act went into effect, only 9 percent of medical degrees and 7 percent of law degrees were earned by women; by 1994 those numbers had risen to 38 percent and 43 percent, respectively.”); THE SEC’Y OF EDUC.’S COMM’N ON OPPORTUNITY IN ATHLETICS, “OPEN TO ALL”: TITLE IX AT THIRTY 12 (2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf> (citing a GAO report which “notes

factors: (1) the scope of Title IX's coverage and (2) the proactive nature of statutes, as compared to constitutional provisions. As to the first factor, the Equal Protection Clause of the Fourteenth Amendment applies only to governmental actors, whereas Title IX applies to *any organization*, public or private, that accepts federal funding.<sup>86</sup> This expanded jurisdiction results in the regulation of "a much larger educational universe."<sup>87</sup> The second factor is Title IX's character as a set of statutory rather than constitutional prohibitions. As one author has explained:

Another aspect of Title IX's influence relates to its form. Constitutional protections, like those in the equal protection clause, are elaborated upon by courts, after a lawsuit has already defined and packaged the issue to be decided. The process is, by design, *singular* and *reactive*. In contrast, statutes can provide more comprehensive solutions by enlisting federal agencies to implement legislative objectives through detailed regulation. As a result, statutory solutions have the potential to be more *global* and *proactive* than constitutional solutions.<sup>88</sup>

Thus, Title IX has the potential to be more influential than the Equal Protection Clause—as proved by the flexibility it grants the Department of Education to establish new implementing regulations for the statute.<sup>89</sup>

Given this influence, a crucial question in examining the validity of single-sex educational programs is the rationale behind the provisions of Title IX. The language and the legislative history of Title IX reflect both antidifferentiation views and antistatutory views.<sup>90</sup> "[T]he plain language of the statute does not lend itself to an antistatutory reading."<sup>91</sup> Rather, the statute concerns itself with "equality of opportunity" for both sexes.<sup>92</sup>

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that the percentage of women earning degrees in 'predominately male fields of study' increased significantly from the 1971-72 school year to the 1996-97 school year, and in some, women now outnumber men"). *But see generally* NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 30 (2002), available at <http://www.ncwge.org/PDF/title9at30-6-11.pdf> (grading progress under Title IX in ten different areas and finding much room for improvement).

86 See LEVIT & VERCHICK, *supra* note 78, at 99.

87 *Id.*

88 *Id.*

89 See *infra* Part III.

90 See Ramsey, *supra* note 46, at 37-42 (describing the tensions between antidifferentiation and antistatutory).

91 *Id.* at 38.

92 118 CONG. REC. 5812 (1972) (statement of Sen. Bayh); see also THE SEC'Y OF EDUC.'S COMM'N ON OPPORTUNITY IN ATHLETICS, *supra* note 85, at 7 ("The word



Title IX's legislative history, however, reveals a strong antisubordination tone; one that is consistent with the Supreme Court's opinions in *Hogan* and *Virginia*.<sup>93</sup> As a former Congresswoman stated, "The purpose of Title IX is to guarantee equal access for women in the academic world and in athletics. In reality, it is part of an affirmative action program."<sup>94</sup> Senator Birch Bayh, the primary drafter of the Title IX legislation, frequently expressed concerns about the "corrosive and unjustified discrimination against women" that the statute was intended to remedy.<sup>95</sup> Title IX's legislative history is full of references to the harmful effects of gender separation and discrimination.<sup>96</sup>

Antisubordination is also at the root of one of the few federal court decisions on single-sex schools under Title IX. In *Garrett v. Board of Education*,<sup>97</sup> a federal district court granted a preliminary injunction against the School District of Detroit, halting a new program creating male-only "academies" within the school system.<sup>98</sup> In holding that the plaintiff's statutory and constitutional challenges would likely be successful on the merits, the district court found that the Detroit schools would violate both the Equal Protection Clause and Title IX.<sup>99</sup> In addition to holding that the "admissions" exemption of Title IX did not apply to *new* elementary or secondary

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quota does not appear . . . What we were really looking for was equal opportunity for young women and for girls in the educational system of the United States of America. Equality of opportunity. Equality. That shouldn't really be a controversial subject in a nation that now for 200 years has prided itself in equal justice." (quoting Sen. Bayh)).

93 See *supra* Part I.C–D.

94 An Interview on Title IX with Shirley Chisholm, Holly Knox, Leslie R. Wolfe, Cynthia G. Brown, and Mary Kaaren Jolly, in EDUCATIONAL EQUITY 2, 2 (Karen J. Maschke ed., 1997) [hereinafter *An Interview on Title IX*] (statement of Shirley Chisholm).

95 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh); see also Ramsey, *supra* note 46, at 38 ("Not surprisingly, Bayh's speech [introducing Title IX] did not contain a word about men being kept out of anything.").

96 See 118 CONG. REC. 5804 (statement of Sen. Bayh) (noting that a House Special Subcommittee on Education hearing on discrimination in education produced "[o]ver 1,200 pages of testimony document[ing] the massive, persistent patterns of discrimination against women in the academic world"); *id.* at 5804–05 (describing the discrimination against women in faculty hiring practices in higher education and administrative hiring practices in elementary and secondary schools); *id.* at 5805–06 (describing, with extensive statistical support, the discrimination present in "admissions to undergraduate, graduate, professional, and vocational institutions of education").

97 775 F. Supp. 1004 (E.D. Mich. 1991).

98 *Id.* at 1014.

99 See *id.* at 1006–12.

schools,<sup>100</sup> the court held that the statute did not authorize the establishment of single-sex schools.<sup>101</sup> The language of the opinion's analysis—particularly its constitutional analysis, which applied the intermediate scrutiny test as articulated in *Hogan*<sup>102</sup>—is very strongly weighted towards antisubordination: “Ignoring the plight of urban females institutionalizes inequality and perpetuates the myth that females are doing well in the current system.”<sup>103</sup> The court could not allow this “perpetuation” of historical gender stereotypes and discrimination.<sup>104</sup> Other courts have also found the antisubordination purposes of Title IX persuasive.<sup>105</sup>

### B. *No Child Left Behind Act of 2001*

In regard to single-sex schools, Title IX remained largely untouched for nearly thirty years—despite its relative incoherence on the topic.<sup>106</sup> After a long slumber, Title IX gained new vitality in this area with the passage of the No Child Left Behind Act of 2001 (NCLB). As part of the NCLB legislation, Congress provided for funding of local-level school systems and educational agencies for “innovative assistance programs.”<sup>107</sup> Under 20 U.S.C. § 7215(a)(23), one such group of programs to receive funding were “[p]rograms to provide same-gender schools and classrooms (consistent with applica-

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100 See *supra* note 84 and accompanying text.

101 See *Garrett*, 775 F. Supp. at 1008–10. The court based its decision largely on the stance of the Office of Civil Rights of the Department of Education, which “opined that all *male* public elementary and secondary school programs violate Title IX.” *Id.* at 1009 (emphasis added). Curiously, the court says nothing about what result would be reached if the academies were female-only, although the strong antisubordination language of the opinion indicates that the result may have been different. See *infra* notes 103–05 and accompanying text.

102 *Garrett*, 775 F. Supp. at 1006.

103 *Id.* at 1007.

104 See *id.* (warning of possible negative ramifications: “Even more dangerous is the prospect that should the male academies proceed and succeed, success would be equated with the absence of girls rather than any of the educational factors that more probably caused the outcome”).

105 See, e.g., *Berkelman v. S.F. Unified Sch. Dist.*, 501 F.2d 1264, 1269–70 (9th Cir. 1974) (“Congress recognized that, because education provides access to jobs, sex discrimination in education is potentially destructive to the disfavored sex. . . . Lowell High, as a conduit to better university education and hence to better jobs, is exactly that type of educational program with regard to which Congress intended to eliminate sex discrimination when it passed Title IX.”).

106 See *Ramsey*, *supra* note 46, at 39 (“While Congress may have intended to allow experimentation by enacting a hodgepodge of exemptions, the incoherence of Title IX with regard to single-sex education gives the court little guidance.”).

107 See 20 U.S.C. §§ 7211(a), 7215(a) (Supp. IV 2004).

ble law).<sup>108</sup> The issuance of regulations implementing this funding mandate was left to the Secretary of Education.<sup>109</sup>

These two sections—7215(a)(23) and 7215(c)—were the result of a curious alliance between two female senators: Republican Kay Bailey Hutchinson of Texas and Democrat Hillary Clinton of New York.<sup>110</sup> Amendment 540, which ultimately became the two sections, passed the Senate with unanimous consent—most likely because of the support of “feminist icon” Senator Clinton.<sup>111</sup> Senators Clinton and Hutchinson, in their remarks on the Senate floor, indicated that the primary purpose of Amendment 540 was to promote choice and increase the diversity of options available to public school students.<sup>112</sup>

As an example of the benefits that could spring from this diversity of options, both senators cited the success of a particular single-sex schooling program—the Young Women’s Leadership School in East Harlem, New York.<sup>113</sup> The founder of the school, Ann Rubenstein Tisch, envisioned a public school—modeled after the elite all-female private schools—that catered to disadvantaged girls and would move them “from poverty to academia and the boardroom.”<sup>114</sup> The school, as noted by Senator Clinton, was wildly successful with its first class of students: all thirty-two seniors were accepted to four-year colleges and all but one (who chose to serve in the United States Air Force) enrolled in an undergraduate program.<sup>115</sup> Although this program was trumpeted by both senators as a reason for experimenting with single-sex schools, many critics were quick to point out that the Acad-

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108 *Id.* § 7215(a)(23).

109 *See id.* § 7215(c) (“Not later than 120 days after January 8, 2002, the Secretary shall issue guidelines for local educational agencies seeking funding for programs described in subsection (a)(23) . . .”).

110 *See* Leonard Sax, *The Odd Couple*, *WOMEN’S Q.*, Summer 2002, at 14, 14. Senator Hutchinson first introduced a similar amendment in 1998—over the objections of Senator Ted Kennedy, who believed it would “undermine the whole movement of trying to get equal treatment for women”—but it failed due to a veto by President Clinton. *Id.*

111 *See id.* (“With Clinton on board, not a single senator spoke against the amendment.”).

112 *See* 147 CONG. REC. S5943 (daily ed. June 7, 2001) (statement of Sen. Kay Bailey Hutchinson) (“We are trying to open more options to public school than are available in private school because we want public schools to be able to tailor their programs to what best fits the needs of students in that particular area.”); *id.* (statement of Sen. Clinton) (“I believe public school choice should be expanded and as broadly as possible.”).

113 *See id.* (statements of Sens. Kay Bailey Hutchinson and Clinton).

114 Anemona Hartocollis, *First Graduates at a Haven for Girls*, *N.Y. TIMES*, June 6, 2001, at B8.

115 *See id.*

emy was not successful solely because of its single-sex status—many other factors were also responsible for its success.<sup>116</sup>

Although the senators intended Amendment 540 to increase the amount of choice for public school students, they also intended for the new legislation to eliminate past gender-related stereotyping. In her remarks, Senator Clinton indicated that the Amendment was not intended to conflict with Title IX and the Equal Protection Clause—rather, the Amendment was intended to *further* the antisubordination goals of both:

Both title IX and the equal protection clause provide strong protections so schools cannot fall back on harmful stereotypes. For example, we have done away with the prohibition that used to keep girls out of shop classes. I can remember that—even out of prestigious academic high schools because they were boys only. We have broken down those barriers. We don't in any way want this amendment to start building them up. We are trying to be very clear that we uphold title IX and the Constitution while we create more young women's leadership academies that will make a real difference in the lives of young women and young men.<sup>117</sup>

Senator Clinton went on to identify one of the major goals of the Amendment: “We want to eliminate sex-based stereotyping.”<sup>118</sup> Thus, the goals of the Amendment appear to be entirely consistent with the tone and spirit of both the Supreme Court's equal protection jurisprudence and Title IX.

### III. A BRAVE NEW WORLD: THE 2006 DEPARTMENT OF EDUCATION REGULATIONS

#### A. “*Out with the Old*”: *The Original Implementing Regulations*

As a result of Amendment 540, No Child Left Behind required the Department of Education to revise its regulations implementing Title IX. Senator Susan Collins—one of the cosponsors of Amendment 540—characterized the original implementing regulations as “a

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116 See, e.g., Levit, *supra* note 18, at 483–85 (citing an “extremely selective admissions process,” an “infusion of economic resources,” and the small class size as influential variables beyond sex exclusivity); Hartocollis, *supra* note 114 (stating that classes at the school only have twelve to fifteen students, less than half the size of a typical New York City high school class, and describing extra sources of funding, including grants and contributions from the school's founder that paid for “extras” such as summer math and science programs).

117 147 CONG. REC. S5944 (daily ed. June 7, 2001) (statement of Sen. Clinton).

118 *Id.*

misinterpretation of title IX of the education amendments of 1972 that clearly was never intended.”<sup>119</sup>

The original regulations had a tortuous early history. Although President Nixon signed Title IX into law on June 23, 1972,<sup>120</sup> and the law became effective on July 1, 1972, the Department of Health, Education, and Welfare (HEW—the precursor to the current Department of Education) took three years to turn the mandates of Title IX into specific regulations.<sup>121</sup>

For many years the regulations promulgated under Title IX appeared to foreclose the possibility of experimenting with single-sex public schools.<sup>122</sup> As recently as 2005, the regulations provided that

[a] recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.<sup>123</sup>

The regulations had few exceptions; only physical education classes involving contact sports,<sup>124</sup> classes dealing with human sexuality,<sup>125</sup> and vocal music classes<sup>126</sup> escaped the requirements of the regulation.

Other than the narrow exceptions, the original regulations applied to “almost every aspect of education: admission to institutions; treatment of students in programs, courses, and other activities and services; and employment.”<sup>127</sup> These regulations applied—and still apply—to any school that receives federal funding, which includes

119 *Id.* (statement of Sen. Collins).

120 *See* Statement on Signing the Education Amendments of 1972, PUB. PAPERS 701, 701–03 (June 23, 1972).

121 *See* Karen Zittleman, *Teachers, Students, and Title IX: A Promise for Fairness*, in GENDER IN THE CLASSROOM 73, 75 (David Sadker & Ellen S. Silber eds., 2007). One observer postulated that the long delay between the passage of Title IX and the final draft of the implementing regulations was institutional fear of the legislation: “The people who ran HEW were afraid of Title IX. They were afraid of the controversies that they knew would arise over Title IX, and, in classic bureaucratic fashion, they buried it in the hope that it might go away.” *An Interview on Title IX*, *supra* note 94, at 8 (statement of Holly Knox).

122 *See* LEVIT & VERCHICK, *supra* note 78, at 99.

123 34 C.F.R. § 106.34 (2005).

124 *Id.* § 106.34(c).

125 *Id.* § 106.34(e).

126 *Id.* § 106.34(f).

127 Hanson, *supra* note 78, at 114. The regulations covered both students and adults. *Id.*

almost every school in the country.<sup>128</sup> The statute and its regulations also apply to any other organizations that receive federal education funds, including for-profit and nonprofit groups.<sup>129</sup> Therefore, an organization willing to give up federal funding need not concern itself with Title IX. Of course, given the financial realities of modern public education, this is an unlikely course of action. Additionally, even if a public school chooses to eschew federal funding, it would still be constrained by the Equal Protection Clause.

### B. *"In with the New": The 2006 Regulations*

On October 25, 2006, the Department of Education released new Title IX regulations that substantially modified the language and intent of the previous regulations.<sup>130</sup> The new regulations allow schools to provide single-sex classes or extracurricular activities if certain requirements are met.<sup>131</sup> The requirements can be separated into three basic categories: (1) the single-sex class or activity must be based on an "important objective," (2) the class or activity must be implemented in an "evenhanded manner," and (3) the class or activity must be completely voluntary.<sup>132</sup> Furthermore, the school implementing the single-sex class or activity must conduct "periodic evaluations" of whether the class or activity meets the requirements of the regulations.<sup>133</sup>

The regulations list two "important objectives" that a single-sex class or activity can serve. The first objective is "[t]o improve [the] educational achievement of [the school's] students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective."<sup>134</sup> The second objective is "[t]o meet the particular, identified educational needs of [the school's] students, provided that the single-sex nature of the class or extracurricular activity is substantially related

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128 See, e.g., *id.* (noting that Title IX and its regulations apply to: "kindergartens, elementary and secondary schools, vocational schools, junior and community colleges, four-year colleges, universities, and graduate and professional schools").

129 *Id.*

130 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530 (Oct. 25, 2006) (codified as amended at 34 C.F.R. § 106 (2007)).

131 See 34 C.F.R. § 106.34(b)(1).

132 See *id.*

133 *Id.* § 106.34(b)(4).

134 *Id.* § 106.34(b)(1)(i)(A).

to achieving that objective.”<sup>135</sup> The first objective seems largely based on the diversity rationale for single-sex schools, while the second is concerned more with remedial education aimed at targeting past deficiencies in the school program—to some extent it is an antisubordination objective. Also interesting is the incorporation of the intermediate scrutiny test into the language of the regulations—both require an “important objective” to which the single-sex nature of the program is “substantially related.”<sup>136</sup>

In addition to having an important objective, the regulations call for the implementation of the program in an “evenhanded manner.”<sup>137</sup> The exact definition of “evenhanded manner” is not given in the regulations, although two later sections give some hint as to the “evenhandedness” required. One section requires the school to “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.”<sup>138</sup> The other section provides that the school *may* be required to provide a “substantially equal”<sup>139</sup> single-sex class or activity for the excluded gender.<sup>140</sup> These requirements seem to take advantage of the “window” left in *Virginia* for single-sex education.<sup>141</sup>

135 *Id.* § 106.34(b)(1)(i)(B).

136 *See supra* note 42 and accompanying text.

137 34 C.F.R. § 106.34(b)(1)(ii).

138 *Id.* § 106.34(b)(1)(iv).

139 Many factors are listed in the regulations for determining whether a class or activity is “substantially equal”: (1) the policies and criteria for admission; (2) the quality, range, and content of the curriculum; (3) the quality and availability of books, instructional materials, and technology; (4) the qualifications of faculty and staff; (5) the geographic accessibility of the program; (6) the quality, accessibility, and availability of facilities and resources; and (7) intangible factors such as the reputation of the faculty. *Id.* § 106.34(b)(3). This list was not intended to exclude other factors. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530, 62,538 (Oct. 25, 2006) (“The list of factors . . . was not intended to be exhaustive . . .”). The Department of Education noted—in response to the concerns that the “substantially equal” requirement was a lower threshold than “equal”—that the separate classes provided need not be “identical in every respect” and claimed that the standard was consistent with the holding of the Supreme Court in *United States v. Virginia*, 518 U.S. 515 (1996). 71 Fed. Reg. at 62,538.

140 34 C.F.R. § 106.34(b)(2).

141 *See Virginia*, 518 U.S. at 534 n.7 (“We do not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of appeals as ‘unique’ . . .”).

The most interesting aspect of this part of the regulations is the fact that schools are *required* to offer substantially similar coeducational classes, but are not required to offer substantially similar single-sex classes for the excluded sex. Assuming that the goal of the regulations is to comply with the Supreme Court mandate of “evenhandedness,” how can a single-sex program be considered constitutional if it does not provide a similar *single-sex* option for the excluded sex? The Department of Education addressed this concern by permitting schools to offer single-sex classes to one sex in certain circumstances, depending upon the objective of the single-sex classification. If the objective of the single-sex program is to provide diverse educational opportunities, the school may only offer a single-sex class to one sex if it can show that “students of the other sex are not interested in having the option to voluntarily enroll in a single-sex class.”<sup>142</sup> If the objective of the program is to meet the specific needs of students, then the school must show that “students of the other sex do not have educational needs that can be addressed by a single-sex class.”<sup>143</sup>

Beyond evenhandedness, the last requirement that must be met by a single-sex program is that enrollment must be completely voluntary.<sup>144</sup> In an effort to clarify this requirement, the Department of Education indicated that “[u]nless a recipient offers enrollment in a coeducational class in the same subject, enrollment in a single-sex class *is not voluntary*.”<sup>145</sup> In order to achieve the voluntariness required by the regulations, the Department of Education strongly encourages—and probably requires, given its emphasis on diversity of educational options—a school offering a single-sex program to notify parents and students about the option to enroll in the single-sex class or a coeducational class.<sup>146</sup>

It is apparent that the Department of Education took careful heed of the Supreme Court’s jurisprudence in crafting the 2006 regulations. The three-part requirement of an “important objective,” “evenhandedness,” and “voluntariness” is carefully designed to meet the requirements outlined in both *Hogan* and *Virginia*. But the question remains: does it actually meet those requirements? Can a public school implement a single-sex program under the current regulations without offending the Due Process Clause? Without offending Title

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142 34 C.F.R. § 106.34(b)(1)(iv).

143 *Id.*

144 *Id.* § 106.34(b)(1)(iii).

145 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530, 62,537 (Oct. 25, 2006) (emphasis added).

146 *Id.*



IX? In other words, do the current regulations provide an appropriate legal framework for schools considering implementing single-sex programs? The next Part seeks to answer these questions.

#### IV. ASSESSING THE VALIDITY OF THE NEW DEPARTMENT OF EDUCATION REGULATIONS

##### A. Finding an “Exceedingly Persuasive Justification”

As previously demonstrated, for a school’s single-sex classroom program to succeed under the Supreme Court’s decision in *Virginia*, the school must demonstrate an “exceedingly persuasive justification” for the program.<sup>147</sup> Under the 2006 Department of Education regulations, schools are given two basic justifications to rely on when implementing programs. One justification explains that a permissible objective of a single-sex program is to “improve educational achievement . . . through a[n] . . . overall established policy to provide diverse educational opportunities”—in other words, a diversity justification.<sup>148</sup> The other justification permitted by the regulation is that a single-sex program must “meet the particular, identified educational needs of its students.”<sup>149</sup> These “particular needs” are grounded in two distinct theories: an antisubordination rationale and educational research that demonstrates differences in learning between males and females. The following sections examine each justification in turn, and consider whether the Supreme Court will find them to be “exceedingly persuasive.”

##### 1. Diversity

Diversity of instruction has long been advanced as a good to be preserved in education.<sup>150</sup> Pre-service and in-service teachers are repeatedly told that a diverse, differentiated curriculum is the best way to instruct a classroom full of unique students.<sup>151</sup> Noted educational scholars emphasize that each student possesses inherent strengths and weaknesses.<sup>152</sup> Because of these varying strengths and weaknesses,

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147 See *supra* Part I.D.

148 34 C.F.R. § 106.34(b)(1)(i)(A).

149 *Id.* § 106.34(b)(1)(i)(B).

150 See JOHN DEWEY, *DEMOCRACY AND EDUCATION* 81 (Dover 2004) (“[D]iversity of stimulation means novelty, and novelty means challenge to thought.”).

151 See generally AMY BENJAMIN, *DIFFERENTIATED INSTRUCTION: A GUIDE FOR MIDDLE AND HIGH SCHOOL TEACHERS 1–10* (2002) (describing differentiated instruction and its values).

152 See generally HOWARD GARDNER, *FRAMES OF MIND* 73–276 (1983) (describing and discussing multiple autonomous “human intelligences”).

teachers are taught to identify the individual characteristics of their students, employ a variety of teaching strategies in the classroom, and offer a variety of educational pathways to their students.<sup>153</sup>

Supporters of single-sex education frequently invoke “diversity” as a justification for separating students based upon gender.<sup>154</sup> By offering single-sex options in addition to traditional coeducational offerings, the argument goes, schools permit students to choose the more beneficial of the two. As one proponent noted:

The best possible educational system would be one in which academic programs were designed exclusively for each individual, addressing each of his shortcomings, encouraging each of his strengths. Unfortunately, limited resources render this impossible. The most effective way to approach this ideal, however, is by making general classifications based on average needs. In the educational arena, the best way to isolate individuals by their particular developmental and educational needs is by gender, which is the primary determinant of learning differences.<sup>155</sup>

This diversity argument is flawed, however, because it conflates diversity with choice.<sup>156</sup> “Diversity,” in the constitutional sense, refers not to systemwide diversity of opportunity, but to a diversity of experiences for individual students. In *Regents of the University of California v. Bakke*,<sup>157</sup> Justice Powell’s controlling opinion suggested that “the attainment of a diverse student body” is a “constitutionally permissible goal.”<sup>158</sup> A more recent Supreme Court case, *Grutter v. Bollinger*,<sup>159</sup> addressed the issue of diversity as it related to the affirmative action policies of the University of Michigan Law School.<sup>160</sup> Upholding the policies of the University, the Supreme Court held that the attainment of a diverse student body “is a compelling state interest that can justify the use of race in university admissions.”<sup>161</sup>

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153 These techniques are sometimes referred to by the pejorative term “tracking.”

154 See Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL’Y 227, 251 (1994) (“Not only do single-sex schools promote important governmental interests in academic excellence and confident leaders, they also advance diversity in a state’s educational system.”).

155 *Id.* at 253.

156 See Levit, *supra* note 18, at 495 (“Use of the diversity argument in the single-sex schools context to mean variety rests on flawed logic: it is an argument that is labeled as diversity but one that is premised foundationally on a choice among alternatives.”).

157 438 U.S. 265 (1978).

158 *Id.* at 311–44 (opinion of Powell, J.).

159 539 U.S. 306 (2003).

160 *Id.* at 311–22.

161 *Id.* at 325.

As many critics of the diversity argument have pointed out, the diversity recognized by the Supreme Court as a “compelling state interest”—and presumably, an “exceedingly persuasive justification”—is not the same as the choice provided by single-sex schools. The Supreme Court recognizes “student population diversity,” but not a “diversity of choice.” As Professor Levit indicated, “The diversity benefits did not flow from the ability to choose one’s school companions but from the ‘exposure to widely diverse people, cultures, ideas, and viewpoints.’”<sup>162</sup>

The critics’ argument is supported by the recent Supreme Court decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>163</sup> Addressing the validity of diversity as a “compelling” interest, the Court indicated that the “specific interest found compelling in *Grutter* was student body diversity ‘in the context of higher education.’”<sup>164</sup> Furthermore, the *Parents Involved* opinion noted that “[t]he Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education.”<sup>165</sup>

Although the *Parents Involved* and *Grutter* cases both involved racial classifications, the opinions are instructive of how the Court will consider the diversity justification in gender classification cases. By specifically noting that the only “compelling” diversity rationale under the Fourteenth Amendment is that of student body diversity in higher education, diversity of choice will not likely be considered a compelling justification, particularly in secondary schools. While gender discrimination cases do not require a compelling interest, they require an exceedingly persuasive justification—a standard that is close to that of the strict scrutiny applied in race-based cases.<sup>166</sup> Because of the

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162 See Levit, *supra* note 18, at 496 (quoting *Grutter*, 539 U.S. at 330). Several other commentators have exposed similar logical flaws in the diversity rationale. See, e.g., Levit, *supra* note 31, at 519–20 (“The meaning of diversity in this context, however, refers only to a narrow slice of experience—‘system wide’ diversity. Use of the term ‘diversity’ in the single-sex schools debate thus decontextualizes its meaning.”); Morgan, *supra* note 40, at 398–99 (“Greater choice is only beneficial to the extent that the additional pedagogical choices are themselves desirable. Therefore, the diversity which single-sex schools add to public education systems is good for students *only* if the schools themselves are educationally beneficial.”); Gary J. Simson, *Separate but Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 453 (2005) (“By excluding one sex from the school, it makes for a less diverse student body and narrows the range of available student perspectives.”).

163 127 S. Ct. 2738 (2007).

164 *Id.* at 2753 (quoting *Grutter*, 539 U.S. at 328).

165 *Id.* at 2754.

166 See *supra* notes 68–70 and accompanying text.

close relationship of these levels of scrutiny, and the outright rejection of the justification in both *Parents Involved* and *Grutter*, it is unlikely that diversity of choice will be considered exceedingly persuasive.

Furthermore, the Supreme Court indicated in both *Hogan* and *Virginia* that it would not be receptive to this alternative form of diversity justification. In *Hogan*, the Court indicated that diversity of choice was not a valid rationale when only one sex is given the benefit of choice.<sup>167</sup> In *Virginia*, the Court flatly rejected the State's claim that the male-only admission policy of VMI was in furtherance of a state educational policy of diversity.<sup>168</sup> It emphasized that "[h]owever 'liberally' this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection."<sup>169</sup>

Given the Court's previous pronouncements and the weakness of the diversity claim, the courts are unlikely to find that the "diversity" rationale for single-sex schooling is an "exceedingly compelling interest" as required by *Virginia*. Therefore, an attempt to establish a single-sex program under the "important objective" of diversity in the 2006 Department of Education regulations will likely fail, and the school would be forced to turn instead to the alternative: an antisubordination rationale.

## 2. Antisubordination and Educational Research

The second "important objective" of the regulations may prove to be "exceedingly compelling" enough to pass constitutional scrutiny. The regulations permit a single-sex program that is used to meet the particularized needs of students. Anecdotal information, scientific studies, and the traditional subordination of women in education provide empirical support for the existence of "particularized needs" sufficient to provide an "exceedingly compelling justification" for single-sex education.

David and Myra Sadker first explored the division between boys and girls in the classroom in the controversial book *Failing at Fairness*.<sup>170</sup> Later, the Sadkers would observe:

The classroom consists of two worlds: one of boys in action, the other of girls' inaction. Male students control classroom conversation. They ask and answer more questions. They receive more

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167 See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 n.17 (1982).

168 See *United States v. Virginia*, 518 U.S. 515, 539 (1996).

169 *Id.* at 540.

170 MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS* 58–59 (1994) (contending that within public schools "[t]here are two separate, alien, unequal nations . . . walled off by gender but left undisturbed").

praise for the intellectual quality of their ideas. They get criticized. They get help when they are confused. They are the heart and center of interaction.<sup>171</sup>

Other advocates of single-gender education have also noted the inherent psychological differences between how boys and girls learn.<sup>172</sup> Much of the empirical research focuses on the disparities between male and female students in math and science classes. For example, one experiment compared high school girls enrolled in an advanced physics course designated “for girls only” with girls enrolled in a coeducational section of the same class.<sup>173</sup> The students in the girls-only section demonstrated better performance, increased participation in later advanced classes, and an increase in self-confidence.<sup>174</sup> One government report noted that many studies of single-sex education “reported positive effects for [single-sex schools] on all-subject achievement tests.”<sup>175</sup> The report did not conclusively determine that the studies were overwhelmingly in favor of single-sex education, only that most of the studies showed that single-sex schools perform as well as or better than their coeducational counterparts.<sup>176</sup>

Overall, studies indicate that girls in single-sex schools are less likely to show stereotyped sex-role attitudes and are more likely to pursue academic goals.<sup>177</sup> Girls at single-sex schools are more likely than their coed counterparts to participate in politics, pursue advanced degrees, and eschew gender stereotypes.<sup>178</sup>

Although some opponents claim that pro-single-sex-education research is based on uncontrolled studies, small samples, and anecdotal evidence,<sup>179</sup> the research clearly shows that at least *some* students

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171 Myra Sadker & David Sadker, *Missing in Interaction*, in RECONSTRUCTING GENDER 354, 354 (Estelle Disch ed., 4th ed. 2006).

172 See generally LEONARD SAX, WHY GENDER MATTERS (2005) (examining the biologically programmed differences between boys and girls in the education context).

173 LINDA L. LINDSEY, GENDER ROLES 309 (4th ed. 2005).

174 See *id.*

175 FRED MAEL ET AL., OFFICE OF PLANNING, EVALUATION & POLICY DEV., U.S. DEPT. OF EDUC., DOC. NO. 2005-01, SINGLE-SEX VERSUS COEDUCATIONAL SCHOOLING, at xv (2005), available at <http://www.ed.gov/rschstat/eval/other/single-sex/single-sex.pdf>. The report did note, however, that the results of the survey were hampered by the fact that most of the studies were conducted at the high school level and that the “preponderance” of the studies were conducted at parochial schools. *Id.* at 86–87. The report also lamented the “dearth of quality studies.” *Id.* at 87.

176 See *id.* at 86.

177 Pherabe Kolb, Comment, *Reaching for the Silver Lining: Constructing a Nonremedial yet “Exceedingly Persuasive” Rationale for Single-Sex Educational Programs in Public Schools*, 96 NW. U. L. REV. 367, 395 (2001).

178 See *id.*

179 See, e.g., Levit, *supra* note 31, at 503–05.

will be positively affected by enrollment in a single-sex classroom. If a school can show—preferably through concrete statistics specific to that particular school—that its students are being negatively affected by the coeducational environment and that one sex is at a disadvantage, then the requirement of an “exceedingly persuasive justification” will be met. The only question left, then, is how such a school must set up its single-sex classroom program to conform to the requirements of the Equal Protection Clause, Title IX, and the 2006 Department of Education regulations.

### B. *Setting Up a Single-Sex Classroom Program*

Essentially, four different types of single-sex programs can be set up within a coeducational public school. Two options are to provide the regular coeducational class plus either girls-only or boys-only classes. Another option is to separate the genders completely, offering both girls-only and boys-only classes, but not offering coeducational classes. Finally, there is a best-of-both-worlds option: providing girls-only classes, boys-only classes, and coeducational classes. Each of these options presents different challenges and will likely meet with varying levels of success under judicial antisubordination scrutiny.

#### 1. Girls-Only Classes

Girls-only classes have a fair chance to succeed under the constitutional and statutory scrutiny described above. Given the history of subordination of women in education, and the Supreme Court’s acknowledgement that eliminating the effects of gender discrimination is an important goal, girls-only classes that address these concerns will be allowed by the courts. As Professor Morgan notes, single-sex options must “show that they respond to particular educational needs of their students and that neither their purpose nor their effects are subordinating to women.”<sup>180</sup> Citing the example of the Young Women’s Leadership School,<sup>181</sup> Professor Morgan goes on to say that a single-sex option for girls “should survive constitutional scrutiny as long as it responds to an educational need, its students continue to outperform others in the same district, and it does not steer its students toward traditional gender identities or roles.”<sup>182</sup>

Professor Morgan’s analysis is most likely correct, although a school may have to show more than she suggests if it is to survive a

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180 Morgan, *supra* note 40, at 455–56.

181 See *supra* notes 113–16 and accompanying text.

182 Morgan, *supra* note 40, at 456.

challenge in the courts. The school offering girls-only classes must show that boys are receiving a substantially similar educational opportunity in the coeducational class—which may prove difficult if the girls-only class is wildly successful. A highly successful girls-only class will be closely scrutinized to see if its success is due solely to its single-sex nature, or if it is receiving other advantages. If it is in fact being favored over other classes, then a girls-only class may be deemed either unconstitutional for failing to evenhandedly support a diverse educational opportunity, or in violation of Title IX for subjecting one sex to unequal treatment.

## 2. Boys-Only Classes

The option of offering single-sex boys-only classes is the one most likely doomed to fail. First, given the lack of historical bias against males in the school system and the strong antisubordination principles of both the Equal Protection Clause and Title IX, a court will likely look upon this type of plan with great skepticism.<sup>183</sup> Such a plan, on its face, seems to be giving an advantage to boys, who have—in the common view—been the recipients of advantages in life, work, and schooling since time immemorial.

Although statistics show that boys are in more trouble at school than girls,<sup>184</sup> there is nothing to indicate that these troubles are due to the presence of girls in the classroom.<sup>185</sup> And if the coeducational system is not the real problem, then, as the court in *Garrett* realized, there is an inherent danger in separating the boys from the girls: “[E]ven more dangerous is the prospect that should the male academies proceed and succeed, success would be equated with the absence of girls rather than any of the educational factors that more probably caused the outcome.”<sup>186</sup>

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183 See *supra* Parts I, II.

184 See Michael S. Kimmel, “What About the Boys?” *What the Current Debates Tell Us—and Don’t Tell Us—About Boys in School*, in RECONSTRUCTING GENDER, *supra* note 171, at 361, 361–63 (“Boys drop out of school, are diagnosed as emotionally disturbed, and commit suicide four times more often than girls; they get into fights twice as often; they murder ten times more frequently and are 15 times more likely to be the victims of a violent crime.”); see also Janine DeFao, *Single-Gender Education Gains Ground as Boys Lag*, S.F. CHRON., June 18, 2007, at A1 (“Boys are 2.5 times more likely to be suspended from school and 3.4 times more likely to be expelled, according to federal education statistics. Two-thirds of special education students are male. The Centers for Disease Control and Prevention reports that nearly 10 percent of boys have learning disabilities, compared with 6 percent of girls, and boys are 2.5 times more likely than girls to be diagnosed with attention deficit hyperactivity disorder.”).

185 See *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1007 (E.D. Mich. 1991).

186 *Id.*

Furthermore, the provision of an all-boys class would be permissible only under the same conditions as an all-girls class—there cannot be any demand by the excluded sex for their own single-sex classroom.<sup>187</sup> Given the recent media attention towards the benefits of single-sex classrooms for girls,<sup>188</sup> it is unlikely that a school offering a boys-only class will find a lack of interest in a girls-only class, particularly if it fully informs parents and students as required by the 2006 DOE regulations.<sup>189</sup> The Fourth Circuit has indicated that it will look carefully into whether there is an actual absence of demand and require a detailed showing by the school of that absence.<sup>190</sup>

### 3. “Separate but Equal”: Separate Single-Sex Classes

A program offering only single-sex classes would likely be doomed to fail both constitutional and statutory scrutiny. First of all, though “separate is inherently unequal” has not proven to be a touchstone of gender segregation, a court is likely to subject a program of two separate classes to intense scrutiny in determining whether the programs are substantially equal as required by Title IX and the 2006 DOE regulations. Even though *Brown* does not directly apply in this situation, a court would likely take into account the ever-important “intangible factors” that controlled that case. Therefore, a school will have to walk a very narrow tightrope indeed to establish the validity of its separate-but-equal program. Not only will the resources, facilities, and instruction have to be the same for each class, the court will be on the lookout for any aspects of either course that “create or perpetuate the legal, social, and economic inferiority of women.”<sup>191</sup>

Furthermore, separating students in this manner may run afoul of the strong antisubordination undercurrents of the Equal Protection Clause and Title IX. A report on the California Single Gender Academies Pilot Program (“Pilot Program”) indicates that separate programs for boys and girls, when housed on the same campus, reinforce traditional gender stereotypes and ignore gender biases—the

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187 See *supra* notes 138–41 and accompanying text.

188 See, e.g., Tim Harford, *Snips, Snails, and Puppy Dog Tails: There’s Finally Proof That Boys Do Ruin Schools for Girls*, SLATE, Sept. 1, 2007, <http://www.slate.com/id/2173028/>.

189 See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530, 62,537 (Oct. 25, 2006).

190 See *Faulkner v. Jones*, 51 F.3d 440, 445 (4th Cir. 1995) (finding that the defendant male-only military school failed to present evidence supporting an absence of demand by female students to attend the school).

191 *United States v. Virginia*, 518 U.S. 515, 534 (1996).



very problems addressed by Justice Ginsburg in the *Virginia* case.<sup>192</sup> The Pilot Program, which was the first large-scale state program to experiment with single-sex schooling, sought to create separate-but-equal boys and girls “academies” on the same physical site.<sup>193</sup> Unfortunately, the “academies” were anything but equal. As noted by the report, “[T]raditional gender role stereotypes were reinforced, and gender was portrayed in an essentialist manner.”<sup>194</sup> Additionally, “[t]he physical separation of boys and girls . . . led to a heightened awareness of gender as a category to define students.”<sup>195</sup>

Given the Supreme Court’s strong antisubordination language and the underlying purpose of Title IX, a program like the California Pilot Program would be unlikely to survive a legal challenge. Therefore, it is highly unlikely that separate single-sex classrooms for boys and girls, even facially “evenhanded” ones, will be allowed by the courts. Even if such a program would theoretically be permissible, the practical challenge and difficulty of providing acceptable “separate but equal” resources likely would result in excessive expense.

#### 4. The Comprehensive Plan: Separate Single-Sex Classes Plus Coeducational Classes

Of the options presented, the most likely to survive the scrutiny of the courts is one offering the full buffet of educational options. Because the option of single-sex or coeducational classes will be open and available to all students, this type of program would—if all of the classes were of equal quality—satisfy the “evenhandedness” requirement of the 2006 DOE regulations, the “equality of opportunity” requirement of Title IX, and the “skeptical scrutiny” of the Equal Protection Clause. Of course, as with the other options, the school choosing this option must show that its program is being offered to achieve a specific objective that addresses the needs of the school’s students.<sup>196</sup> A school implementing this program can point out not only that social science research shows at least *some* students benefit from a single-sex environment, but also that all of its students have true educational options and choice.

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192 See AMANDA DATNOW ET AL., IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR? 7 (2001), available at <http://www.oise.utoronto.ca/depts/tps/adatnow/final.pdf>.

193 *Id.*

194 *Id.*; see also *id.* at 51–54 (describing how “the fact that teachers taught both boys and girls in most of the single gender academies actually served to create and maintain theories of gender”).

195 *Id.* at 51.

196 See *supra* notes 134–36 and accompanying text.

The greatest drawback to this program lies in the difficulty and cost of its implementation. Adding two extra sections of each course would strain a public school's resources: additional faculty, textbooks, and supplies would likely be needed.<sup>197</sup> Furthermore, demand for each course would likely vary from year to year, leading to a wide disparity in enrollment and possibly quality from class to class. And finally, a school implementing such a program must ever be vigilant that the single-sex classes do not breed gender stereotypes or violate any of the antisubordination principles previously discussed.<sup>198</sup>

### 5. The Policy Concerns of Single-Sex Classrooms

Even if single-sex classrooms in public schools pass constitutional and statutory scrutiny, are they really the remedy for our ailing public schools? Do the 2006 DOE regulations really help public education, or are they no more than a needless diversion from solving the real problem? As one commentator noted, single-sex schools "represent too limited a response to the gender equity problems that . . . spurred renewed interest in public single-sex education in recent years."<sup>199</sup> Research shows that single-sex classrooms do little to control the "hidden curriculum" that pervades education—those informal and unwritten norms regarding boys and girls that include expectations about gender.<sup>200</sup> The single-sex solution also ignores the subtle discrimination present in sexist textbooks, teachers who favor boys over girls, and lax enforcement of sexual harassment.<sup>201</sup> Critics note that gender equity problems are probably better addressed by changing the educational practices of teachers at coeducational schools.<sup>202</sup>

Beyond the limited efficacy of single-sex classrooms, such programs would also prove to be a financial burden on a public school system already notorious for being underfunded. Creating a voluntary single-sex program necessarily entails an *addition* to the current system. Of course, any addition to the public school system will have intrinsic monetary costs. Small communities may find this to be not only unattractive, but also economically infeasible.<sup>203</sup> As Professor Simson notes, successful single-sex programs often require "(1) a commitment of resources per child that school districts typically are not in

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197 See Simson, *supra* note 162, at 459.

198 See *supra* Part IV.A.2.

199 Simson, *supra* note 162, at 459.

200 See LINDSEY, *supra* note 173, at 296–308.

201 See Simson, *supra* note 162, at 459.

202 See *id.* at 460.

203 *Id.*

a position to make for large numbers of children and (2) a selectivity in admissions that would exclude a large proportion of the children in the district."<sup>204</sup>

#### CONCLUSION

In the American political landscape, dissatisfaction with the state of public education is the standard of the day. The recent DOE regulations promoting single-sex schooling demonstrate just one of the ways in which the federal government is attempting to address this dissatisfaction. Although single-sex classrooms implemented under the regulations may face legal challenges, it is unlikely that they will be struck down under the Constitution or Title IX. Rather, if the single-sex program is carefully designed, it should be considered valid under the antisubordination policies of both the Constitution and Title IX. Such a program would not only be separate, but equal, under the law.