Comparing Single-Sex and Reformed Coeducation: A Constitutional Analysis

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I. INTRODUCTION

In the ongoing debate regarding sex-segregated education, 2011 was another busy year. On September 22, the *New York Times*,¹ *Washington Post*,² and *ABC News*³ reported on a recent study published in *Science* magazine rejecting “The Pseudoscience of Single Sex Schooling.” In April, a decision was issued in *Doe v. Vermilion Parish School Board*,⁴ the first federal appellate case on single-sex education since 1996, when the United States Supreme Court struck down sex segregation at the Virginia Military Institute. At issue in *Vermilion Parish* was a school initiative encouraged by Department of Education regulations passed in 2006 explicitly allowing public single-sex education, and after the Fifth

1. Tamar Lewin, *Single-Sex Education Is Assailed in Report*, N.Y. TIMES (Sept. 22, 2011), <http://www.nytimes.com/2011/09/23/education/23single.html>.

2. Michael Alison Chandler, *Study: Single-Sex Education May Do More Harm than Good*, WASH. POST (Sept. 22, 2011), http://www.washingtonpost.com/local/education/study-single-sex-education-may-do-more-harm-than-good/2011/09/22/gIQABAQOoK_story.html?hpid=z4.

3. Mikaela Conley, *Single-Sex Schools Have Negative Impact on Kids, Says Study*, ABC NEWS (Sept. 22, 2011), <http://abcnews.go.com/Health/single-sex-schools-negative-kids-study/story?id=14581023>.

4. 421 F. App’x 366 (5th Cir. 2011).

Circuit remanded the case for a determination regarding mootness,⁵ the school district decided to cease all sex-segregated classes.⁶

These recent events are only the latest developments in one of the most enduring educational debates of the past three decades, a debate that can often look confusing, given the number of debaters and the diversity of their perspectives and agendas. More than this diversity, however, the debate is confusing because it has been structured as a contest between the “innovation” of sex-segregated education and status quo coeducation. Missing from the debate is a comparison between *reformed* coeducation and a single-sex alternative, a comparison that is markedly more useful in determining what ought to be done about the problems animating the debate, particularly problems of gender equity in education and society.

Also missing from the debate are comprehensive constitutional analyses of sex-segregated education generally and sex-segregated programs in K-12 public schools in particular. Most articles simply discuss the two main Supreme Court cases involving sex-segregated education, *Mississippi University for Women v. Hogan*⁷ and *United States v. Virginia*,⁸ as well as *Vorchheimer v. School District*,⁹ where a divided Court was unable to make a decision as to the constitutionality of a pair of sex-segregated public high schools.¹⁰ Those who have done a more comprehensive

5. *Id.* at 376.

6. *Doe v. Vermilion Parish School Board*, ACLU (Oct. 18, 2011), <http://www.aclu.org/womens-rights/doe-v-vermilion-parish-school-board>.

7. 458 U.S. 718 (1982).

8. 518 U.S. 515 (1996).

9. 430 U.S. 703 (1977) (mem.) (per curiam), *aff'g* by an equally divided Court 532 F.2d 880 (3d Cir. 1976).

10. See, e.g., David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 147–48 (2009); Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 756 (2002); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 456–60 (1999); Isabelle Katz Pinzler, *Separate but Equal Education in the Context of Gender*, 49 N.Y.L. SCH. L. REV. 785, 792–94 (2004); Gary J. Simson, *Separate but Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 444–45 (2005); Juliet A. Williams, *Learning Differences: Sex-Role Stereotyping in Single-Sex Public Education*, 33 HARV. J.L. & GENDER 555, 566–68 (2010) [hereinafter Williams, *Learning Differences*]; Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 31–36 [hereinafter Williams, *Reform*]; Benjamin P. Carr, Note, *Can Separate Be Equal? Single-Sex Classrooms, the Constitution, and Title IX*, 83 NOTRE DAME L. REV. 409, 413–20 (2007); Ashley Elizabeth Johnson, Note, *Single-Sex Classes*

analysis have focused on only one aspect of the constitutional test.¹¹ This Article therefore began as an attempt to conduct a comprehensive analysis and to apply to sex-segregated K-12 public education the “intermediate scrutiny” test used by the U.S. Supreme Court in reviewing government action utilizing sex-based classifications under the Equal Protection Clause.

In attempting to apply this test, however, it soon became clear that much of the variation in opinion as to sex-segregated education’s constitutionality derives from the Court’s equal protection jurisprudence itself. Many have looked at this jurisprudence at varying levels of detail and comprehensiveness, developing a rich literature with a wide variety of normative and descriptive perspectives on the issue. With regard to the intermediate scrutiny test adopted by the Court to review sex classifications in particular, scholars have engaged in several debates related to certain indeterminacies in the Court’s case decisions.¹² For instance, some scholars view the Court’s approach as being akin to, if not more exacting than, the “strict scrutiny” standard the Court uses in race classification cases.¹³ In contrast, others have concluded that intermediate scrutiny is virtually the same as the “rational basis” scrutiny test used by the Court for all other classifications besides race and gender.¹⁴ Still others have pointed out, based on empirical studies, that intermediate scrutiny exists between strict scrutiny and rational basis scrutiny in terms of the frequency with which the Court invalidates statutes awarding differing benefits or rights to different classifications of people.¹⁵ As a result, a common criticism of the Court’s approach is that it is “vague, poorly defined and malleable, providing insufficient

in *Public Secondary Schools: Maximizing the Value of a Public Education for the Nation’s Students*, 57 VAND. L. REV. 629, 642–52 (2004); Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 234 (2008).

11. See, e.g., Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 1974–76 (2006).

12. For a general discussion of various commentaries on this issue, see Lee Epstein et al., *Constitutional Sex Discrimination*, 1 TENN. J.L. & POL’Y 11, 25–34 (2004).

13. See, e.g., Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1450 (2000).

14. See, e.g., Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 187 (2003).

15. See Epstein et al., *supra* note 12, at 48–49.

guidance in individual cases and giving broad discretion to individual judges” to decide cases however they want.¹⁶

Therefore, this Article seeks both to address the lack of comprehensive analyses regarding the constitutionality of sex-segregated K-12 public education and to untangle the underlying debate regarding the Court’s application of the intermediate scrutiny test. In undertaking this analysis, it posits a new way to look at the Court’s jurisprudence regarding legislation that facially classifies based on sex, one that suggests that the Court’s jurisprudence may be more consistent and predictable than most commentators have suggested up to this point. It then applies this jurisprudence to sex-segregated K-12 public education. In doing so, it pays particular attention to the reformed coeducation and sex-segregated education comparison as the proper one for analyzing the constitutionality of single-sex education. It concludes that, when assessing whether a classification substantially advances an important government objective under the Supreme Court’s thirty-year-plus line of cases beginning with *Reed v. Reed*¹⁷ and ending with *Flores-Villar v. United States*,¹⁸ it is extremely useful and possibly necessary to compare the sex classification with sex-neutral alternatives for advancing that objective.

Sex-segregated K-12 public education is the focus of this Article’s application of the Court’s equal protection jurisprudence for three reasons. First, only public education programs involve state action reviewable for its constitutionality.¹⁹ Second, K-12 public education educates the vast majority of Americans.²⁰ Third, K-12 public education is the “last (educational) resort” for American children in the sense that, absent conduct qualifying for expulsion, all children are both guaranteed

16. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1213 (2005) (summarizing critiques from lower courts, scholars, and Justice Souter’s comments at his Supreme Court confirmation hearing).

17. 404 U.S. 71 (1971).

18. 131 S. Ct. 2312 (2011) (per curiam).

19. See generally Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379 (2006) (discussing the requirement of state action to bring constitutional challenges).

20. Michael A. Resnick, *An American Imperative: Public Education*, CENTER FOR PUB. EDUC. (Apr. 27, 2006), <http://www.centerforpubliceducation.org/Main-Menu/Public-education/An-American-imperative-Public-education->.

a space in the appropriate K-12 public school and required by compulsory attendance laws to attend that school.²¹

In light of the simultaneous “last resort” and compulsory nature of K-12 public education, combined with the potentially wide impact of sex-segregated programs in K-12 public schools, this Article is particularly concerned with any harms attendant to K-12 public sex-segregated education. That is, because sex-segregated K-12 public education occurs in a context where students’ and families’ choices have hard limits, even when participation in a sex-segregated program is facially voluntary, any constitutional review must be sensitive to the potentially harmful effects of the program not only on the students who choose sex-segregated education but also on the students who do not choose such programs.

In fact, both recent litigation and research regarding sex-segregated K-12 public education indicates that the harms are significant. Indeed, several troubling aspects have recently emerged in current sex-segregated programs.²² As an initial matter, logistical problems that arise from the aforementioned characteristics of K-12 public schools often cause schools to reduce or eliminate students’ and parents’ ability to choose sex-segregated or coeducation, making participation in single-sex programs not fully voluntary. More importantly, however, evidence suggests that some sex-segregation proponents are manipulating school boards and teachers who know neither the research nor the law related to sex-segregated education.²³ This unawareness, in turn, often causes schools to rely on brain research that is at best highly contested by scientists and at worst rife with gender stereotypes.²⁴ A more balanced perspective on the brain research, moreover, suggests that in actuality, stereotyping can cause serious, nontheoretical harm to children’s learning abilities and educational achievements—the exact opposite effect that single-sex education proponents advance as the purpose of adopting sex-segregated programs.²⁵ In addition, studies have shown that learning alongside the opposite sex can help students develop better and more balanced skills, whereas existing sex segregation—which is actually quite widespread in

21. See *id.*; *Compulsory School Age Requirements*, NAT’L CONF. ST. LEGISLATURES (June 2010), <http://www.ncsl.org/documents/educ/ECSCompulsoryAge.pdf>; *Contemporary Education Issues*, K12 ACADEMICS, <http://www.k12academics.com/education-united-states/contemporary-education-issues> (last visited Oct. 8, 2012).

22. See Diane F. Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 SCIENCE 1706, 1706–07 (2011).

23. *Id.*

24. *Id.*

25. *Id.* at 1707.

current coeducational schools—often leads to “troublesome gaps” for both sexes.²⁶

The last resort, compulsory nature and potentially wide impact of sex-segregated programs in K-12 public schools also initially led to this Article’s inclusion of the full breadth of the Supreme Court’s equal protection jurisprudence regarding sex-based classifications in its constitutional analysis. Because K-12 public education differs in these respects from the sex-segregated higher educational institutions at issue in *Mississippi University for Women v. Hogan*²⁷ and *United States v. Virginia*,²⁸ it was necessary to look beyond these two cases to assess K-12 public single-sex education’s constitutionality comprehensively. Despite this initial, more limited goal, however, larger insights regarding the parameters of the Supreme Court’s equal protection jurisprudence, particularly its application of the intermediate scrutiny test, emerge from this review. Most critically, the review suggests that the Court’s jurisprudence with regard to sex-based classifications is more consistent than it may appear at first glance and that the intermediateness of the test may come more from *when* the Court applies the test than from *how* the Court applies the test.

Accordingly, Part II of this Article begins with a review of the Court’s jurisprudence regarding sex-based classifications, with a particular focus on its application of the intermediate scrutiny test, which asks whether a government is using a sex-based classification to achieve an “important” government objective and whether the classification bears a “substantial relationship” to that objective. Part III then considers the constitutionality of sex-segregated K-12 public education in light of general principles that can be drawn from this jurisprudential review. It first reviews the history and context of current sex-segregated K-12 public education programs, with a particular focus on comparing sex-segregated education to reformed coeducation, not status quo coeducation. It then applies the comprehensive analysis of Part II to sex-segregated K-12 public education, ultimately concluding that such programs are clearly unconstitutional under the Supreme Court’s thirty-year-plus line of equal protection cases examining sex-discriminatory legislation. In light of this conclusion, it recommends that the Department of Education rescind its 2006 regulations

26. LISE ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLESOME GAPS—AND WHAT WE CAN DO ABOUT IT 304–06 (2009).

27. 458 U.S. 718 (1982).

28. 518 U.S. 515 (1996).

not only because they are themselves unconstitutional but also because they are leading schools to develop unconstitutional programs that are vulnerable to lawsuits.²⁹

II. THE SUPREME COURT'S EQUAL PROTECTION JURISPRUDENCE AND ITS APPLICATION OF THE INTERMEDIATE SCRUTINY TEST

It took some years from the time the Court arguably first started viewing sex classifications as suspect for it to announce the test that has come to be known as the intermediate scrutiny test.³⁰ When *Reed* was decided,³¹ the Court already used a strict scrutiny test for racial classifications, in which a classification would only be upheld if it was the least restrictive means by which to fulfill a compelling government interest.³² All other classifications were judged under the permissive rational basis test.³³

However, the Court did eventually make clear that laws that facially treat men and women differently will be viewed suspiciously by the Court and scrutinized carefully to make sure that they do not violate the Equal Protection Clause.³⁴ In espousing the intermediate scrutiny approach, the Court essentially adopted a test that, as its name indicates, is not as strict as the test used in the case of racial classifications, but not as permissive as the rational basis test.³⁵ It is perhaps unsurprising that such an in-between approach has been hard to apply, and, as noted above, the Court's decisions in sex classification cases have accordingly been widely criticized as unpredictable.³⁶

One of the primary sites of debate, both within and outside the Court, deals with whether intermediate scrutiny has evolved over the years to look more similar to strict scrutiny or whether it is in fact no more strict than rational basis scrutiny,³⁷ a problem which some suggest is systemic

29. See 34 C.F.R. § 106.34(b) (2011). Note that there are specific administrative law procedures and issues related to rescinding or otherwise changing regulations in circumstances such as these, but discussion of those specific procedures and issues are outside the scope of this Article.

30. See Jason M. Skaggs, Comment, *Justifying Gender-Based Affirmative Action Under United States v. Virginia's "Exceedingly Persuasive Justification" Standard*, 86 CALIF. L. REV. 1169, 1172–73 (1998).

31. 404 U.S. 71, 76 (1971).

32. Skaggs, *supra* note 30, at 1172.

33. *Id.*

34. *Id.*

35. *Id.* at 1172–73.

36. See, e.g., *id.* at 1170; Wharton, *supra* note 16, at 1213.

37. See, e.g., Deutsch, *supra* note 14, at 187 (“In reality, intermediate scrutiny in gender cases is a form of rational basis review.”); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) (arguing that “the Court did not merely restate the intermediate scrutiny test but pressed it closer to strict scrutiny”);

to the Court's application of the test and others view as resulting from misapplications of the test by particular Court majorities.³⁸ Related to this disagreement is a debate over whether the intermediate scrutiny test requires comparing a sex-based classification's effectiveness in achieving the particular government objective with sex-neutral alternatives for achieving that objective.³⁹ In the context of racial classifications, strict scrutiny has necessitated such a comparison, requiring a racial classification to constitute the "least restrictive means" by which a government can achieve its objective in order to be upheld.⁴⁰ However, because the Court has not specified that a least restrictive means analysis must be used in sex classification cases, some argue that intermediate scrutiny is still not the same as strict scrutiny.⁴¹

A close reading of the cases,⁴² however, demonstrates that the different perspectives involved in these debates may all be at least partially correct and that the Court's equal protection jurisprudence on sex classifications may be more consistent than it appears to be at first

Skaggs, *supra* note 30, at 1182–83 (concluding that gender-based classifications are subject to a "more demanding standard of review than traditional intermediate scrutiny").

38. Deutsch, *supra* note 14, at 187. *But see* *Nguyen v. INS*, 533 U.S. 53, 74–97 (2001) (O'Connor, J., dissenting).

39. *See* Deutsch, *supra* note 14, at 205–06.

40. Epstein et al., *supra* note 12, at 23.

41. *See, e.g.,* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 954–56 (2002).

42. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (per curiam); *Nguyen*, 533 U.S. at 53; *Miller v. Albright*, 523 U.S. 420 (1998); *United States v. Virginia*, 518 U.S. 515 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Heckler v. Mathews*, 465 U.S. 728 (1984); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality opinion); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Califano v. Westcott*, 443 U.S. 76 (1979); *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Parham v. Hughes*, 441 U.S. 347 (1979) (plurality opinion); *Orr v. Orr*, 440 U.S. 268 (1979); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Vorchheimer v. Sch. Dist. of Phila.*, 430 U.S. 703 (1977) (per curiam), *aff'd by an equally divided Court* 532 F.2d 880 (3d Cir. 1976); *Califano v. Silbowitz*, 430 U.S. 924 (1977) (summary affirmance of district court decision declaring unconstitutional benefits regime giving unequal insurance benefits to husbands and wives); *Jablon v. Califano*, 430 U.S. 924 (1977) (summary affirmance of district court decision declaring benefits regime giving unequal spousal benefits to husbands and wives to be unconstitutional); *Califano v. Webster*, 430 U.S. 313 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

glance. Several insights emerge from this close reading. First, the cases suggest that the appearance of inconsistency may come from the Court's use of an unarticulated first step in its analysis, whereby the Court decides whether a sex classification deals with circumstances in which the sexes are similarly situated. If the sex classification deals with a matter in which the Court views the sexes as not similarly situated, the cases suggest that the Court never applies the test at all. However, if the sex classification deals with a matter in which the sexes are similarly situated, the Court applies intermediate scrutiny to that classification.

Moreover, once the Court decides to apply it, the intermediate scrutiny test does in fact look a lot more like strict scrutiny, leading to a second insight. That is, although the Court has not used the "least restrictive means" magic language in its sex classification cases, in actuality, when reviewing sex classifications, it does generally consider the availability of sex-neutral alternatives that a government may use to achieve its objective in lieu of the sex classification. The remainder of this Part explains these insights, including elucidating in what circumstances the Court considers the sexes to be similarly situated and demonstrating the ways in which the Court's application of the intermediate scrutiny test, once it has decided that the sexes are similarly situated, looks quite similar to strict scrutiny, including with regard to the consideration of sex-neutral alternatives.

A. The "Similarly Situated" Question

Reed marks the beginning of the shift in the Supreme Court's view on sex classifications. In *Reed*, the Court overturned a statute that automatically appointed men over women as estate administrators, stating that this was as an "arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."⁴³ Beyond this statement, however, it did not expound on its reasons for judging the distinction to be arbitrary or for regarding it as violating the Equal Protection Clause.

Over the next five years and until the Court finally established the intermediate scrutiny test in *Craig v. Boren*,⁴⁴ the Court decided six more cases involving laws that made distinctions on the basis of sex without clearly articulating that sex was a "suspect classification" deserving more exacting scrutiny than the standard rational basis scrutiny.⁴⁵

43. *Reed*, 404 U.S. at 76.

44. 429 U.S. at 197.

45. See *Stanton*, 421 U.S. at 13; *Weinberger*, 420 U.S. at 651–52; *Schlesinger*, 419 U.S. at 508–10; *Geduldig*, 417 U.S. at 494–97; *Kahn*, 416 U.S. at 355; *Frontiero*, 411 U.S. at 682, 688–90 (in which only a plurality supported the proposition that

Nevertheless, despite the lack of a clear majority for “heightened scrutiny” for sex-based classifications during these years, the Court would establish during this period only three areas in which it would, until the present day, be inclined to allow sex-based classifications: laws implicating pregnancy and proof of parenthood,⁴⁶ restrictions on women serving in combat,⁴⁷ and compensation for past discrimination against women.⁴⁸ In the first two categories, involving pregnancy and proof of parenthood and combat, the Court majorities—or, in some cases, pluralities—focused on a lack of similar situation between the sexes.⁴⁹ Pregnancy and proof of parenthood both involve biologically-based reproductive roles in which men and women are not similarly situated, and the combat restrictions on women were not challenged as sex discriminatory and thus were accepted as a circumstance in which women and men were also not similarly situated.⁵⁰

The first case involving pregnancy, *Geduldig v. Aiello*, was decided in 1974 and upheld a statute that excluded pregnancy from the state’s disability insurance program.⁵¹ In that case, the Court characterized the issue as “whether the California disability insurance program invidiously discriminates against [pregnant women] and others similarly situated by not paying insurance benefits for disability that accompanies normal pregnancy and childbirth.”⁵² The Court then upheld the statute by distinguishing an exclusion based on pregnancy from one based on sex.⁵³

The suggestion in *Geduldig* that pregnancy makes the sexes not similarly situated is developed further in subsequent cases implicating pregnancy and proof of parenthood, all of which were decided after *Craig* adopted the intermediate scrutiny test. The first case implicating proof of parenthood was *Fiallo v. Bell*, where the Court upheld a federal statute giving special immigration status to the illegitimate children of

classifications based on sex are “inherently suspect” and should be “subjected to close judicial scrutiny”).

46. See, e.g., *Parham*, 441 U.S. at 354; *Geduldig*, 417 U.S. at 497.

47. See, e.g., *Schlesinger*, 419 U.S. at 508.

48. See, e.g., *Orr v. Orr*, 440 U.S. 268, 280 (1979); *Weinberger*, 420 U.S. at 648.

49. See, e.g., *Schlesinger*, 419 U.S. at 508.

50. See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (White, J., dissenting); *Schlesinger*, 419 U.S. at 508.

51. 417 U.S. at 494.

52. *Id.* at 492.

53. *Id.* at 497. Note that Congress overrode the decision in *Geduldig* when it passed the Pregnancy Discrimination Act of 1978. See Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

natural-citizen mothers, but not natural-citizen fathers.⁵⁴ While basing its decision primarily on separation of powers concerns, the Court did note that Congress's decision to exclude unwed fathers could have been due to "a concern with the serious problems of proof that usually lurk in paternity determinations."⁵⁵ The Court did not mention the intermediate scrutiny test at all.

In a second case, *Parham v. Hughes*, a Court plurality upheld a statute that required a father but not a mother of an illegitimate child to legitimate that child legally in order to sue for the wrongful death of that child.⁵⁶ In so doing, four Justices reasoned that "mothers and fathers of illegitimate children are not similarly situated. . . . Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown."⁵⁷ Justice Powell, concurring in the judgment, regarded the statute as meeting the intermediate scrutiny test, but only stated that "the State's objective of avoiding difficult problems of proof of paternity"⁵⁸ was important and that the statute was substantially related to it, without further explanation of how. In addition, Justice Powell's statement that "[t]he marginally greater burden placed upon fathers is no more severe than is required by the marked difference between proving paternity and proving maternity—a difference we have recognized repeatedly,"⁵⁹ suggested that lack of similar situation between mothers and fathers still factored into his analysis.

Another plurality opinion came along two years later in *Michael M. v. Superior Court*, where four Justices upheld a statute that prosecuted boys but not girls under eighteen for statutory rape, ostensibly to prevent teen pregnancy,⁶⁰ stating that "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."⁶¹ In concurrence, Justice Stewart stated that where "in certain narrow circumstances men and women are *not* similarly situated[,] . . . a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional."⁶² All five Justices devoted

54. 430 U.S. 787, 799–800 (1977).

55. *Id.* at 799.

56. 441 U.S. 347, 356–59 (1979) (plurality opinion).

57. *Id.* at 355.

58. *Id.* at 361 (Powell, J., concurring).

59. *Id.* at 360.

60. 450 U.S. 464, 472–73 (1981) (plurality opinion).

61. *Id.* at 469.

62. *Id.* at 478 (Stewart, J., concurring). Of note, Justice Blackmun also concurred, but most of his concurrence deals with drawing connections between statutory rape laws and abortion laws. *Id.* at 481–87 (Blackmun, J., concurring). He also includes a portion

most of their discussion to the importance of the government interest in preventing teen pregnancy, but without doing a detailed analysis of how a statutory rape prohibition was substantially related to such a goal.

An additional two years later, in *Lehr v. Robertson*, the Court upheld a statute that required fathers but not mothers of illegitimate children to register with the state in order to receive notice of adoption proceedings involving such children.⁶³ In an analysis comprising only five paragraphs, the Court acknowledged that statutes involving such distinctions “may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child,” but held that where, as here, “one parent has an established custodial relationship with the child and the other parent has . . . never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.”⁶⁴

Finally, in *Nguyen v. INS*, the Court upheld a federal statute giving citizenship to illegitimate children born abroad of a foreign national father and a U.S. citizen mother, but requiring U.S. citizen fathers of illegitimate children to take various steps to legitimize the child before the child could acquire citizenship.⁶⁵ After explaining that the mother’s biological relationship to a child is verifiable from the birth itself but that even a father’s presence at a birth is not sufficient evidence of such a relationship, the Court stated that “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective.”⁶⁶

Commentators sometimes refer to this line of cases under the moniker of the “real differences doctrine.”⁶⁷ However, opinions vary as to what

of the victim’s testimony in the criminal case, which suggests strongly that the victim was forcibly raped but that the prosecution either did not pursue or unsuccessfully pursued forcible rape charges because of inconsistencies in the victim’s testimony and other ways to question her credibility—she had been drinking, first kissed the assailant willingly, and willingly kissed another boy also present during the same evening. *Id.* at 483 n.*.

63. 463 U.S. 248, 267–68 (1983).

64. *Id.*

65. 533 U.S. 53, 58–59 (2001).

66. *Id.* at 62–63.

67. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 90 (2009) (citing *United States v. Virginia*, 518 U.S. 515, 533–34 (1996)); Virginia F. Milstead, *Forbidding Female Toplessness*:

the real differences doctrine means to the intermediate scrutiny test, with some suggesting but not developing further the idea that the finding of a real difference keeps the Court from applying intermediate scrutiny at all,⁶⁸ others not viewing the real differences doctrine as differentiating these cases from other sex classification cases,⁶⁹ and still others suggesting that the consideration of a real difference happens at some point in the intermediate scrutiny test.⁷⁰ It is worth noting that these commentators also often criticize the real differences doctrine as a normative matter,⁷¹ critiques with which this Author agrees but which are outside the scope of this Article. More importantly, and perhaps as a result of this normative critique, there are indications that the doctrine has always been unstable and is becoming more so. In fact, one-third of the cases upholding sex classification based on real differences were plurality opinions,⁷² and all but one had at least three,⁷³ but usually four strong dissenters.⁷⁴ Many of these dissents also protest a failure to apply or apply properly the intermediate scrutiny test.⁷⁵ Finally, a very recent case not discussed above but which struck down a sex classification very similar to *Nguyen* was affirmed per curiam by a divided Court because Justice Kagan did not participate in it.⁷⁶

Cases involving sex-based classifications related to the exclusion of women from combat make up the second category of sex-based classifications that the Court has consistently found to be permissible under the Equal Protection Clause. Again, the reason advanced by the

Why “Real Difference” Jurisprudence Lacks “Support” and What Can Be Done About It, 36 U. TOL. L. REV. 273, 278 (2005); Wharton, *supra* note 16, at 1216.

68. Milstead, *supra* note 67, at 311; Wharton, *supra* note 16, at 1216.

69. Case, *supra* note 13, at 1457; Epstein et al., *supra* note 12, at 51.

70. Lindsey Sacher, Comment, *From Stereotypes to Solid Ground: Reframing the Equal Protection Intermediate Scrutiny Standard and Its Application to Gender-Based College Admissions Policies*, 61 CASE W. RES. L. REV. 1411, 1429–30 (2011).

71. See, e.g., Case, *supra* note 13, at 1457; Milstead, *supra* note 67, at 311; Wharton, *supra* note 16, at 1217 (noting “wide” criticism of *Geduldig* and the formal equality approach of the Court (citing KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 803 (15th ed. 2004))).

72. *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality opinion); *Parham v. Hughes*, 441 U.S. 347 (1979) (plurality opinion).

73. *Lehr v. Robertson*, 463 U.S. 248, 268 (1983) (White, J., dissenting); *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (Brennan, J., dissenting).

74. *Nguyen v. INS*, 533 U.S. 53, 74 (2001) (O’Connor, J., dissenting); *Michael M.*, 450 U.S. at 488 (Brennan, J., dissenting); *id.* at 496 (Stevens, J., dissenting); *Parham*, 441 U.S. at 361 (White, J., dissenting).

75. *Nguyen*, 533 U.S. at 79 (O’Connor, J., dissenting); *Michael M.*, 450 U.S. at 488 (Brennan, J., dissenting); *Parham*, 441 U.S. at 362 (White, J., dissenting); *Geduldig*, 417 U.S. at 498 (Brennan, J., dissenting).

76. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (per curiam), *aff’d by an equally divided Court* 536 F.3d 990 (9th Cir. 2008).

Court for allowing such distinctions is that the exclusion of women from combat makes men and women not similarly situated when it comes to military matters. Therefore, in *Schlesinger v. Ballard*, a case decided prior to *Craig*'s announcement of the intermediate scrutiny standard, the Court allowed female naval officers a longer time in which to achieve promotion than male officers, stating that "male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service."⁷⁷ Following *Craig*, the Court continued to make this distinction, upholding in *Rostker v. Goldberg* the governmental requirement that men but not women register for a potential draft into the military.⁷⁸

B. Application of Intermediate Scrutiny

In cases where it judges women and men to be similarly situated, the Supreme Court, arguably since *Reed* but certainly since *Craig*, has consistently invalidated sex-based classifications by applying the intermediate scrutiny test. *Craig* struck down a statute setting a lower drinking age for "3.2% beer" for women than for men, articulating and applying a test under which "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."⁷⁹ The Court in *Craig* expounded on the application of this test in the following manner:

Reed . . . also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. . . . In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.⁸⁰

In this explanation, the Court made clear that it would look particularly closely at the relationship between the sex distinction and the actual achievement of the government's objective, including in comparison to available sex-neutral alternatives. The state proffered empirical evidence on the higher rates of young men involved in arrests for drunkenness, as

77. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

78. *Rostker v. Goldberg*, 453 U.S. 57, 78–79 (1981).

79. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

80. *Id.* at 198–99.

well as arrests and traffic accidents relating to drunk driving.⁸¹ The Court nevertheless stated that “prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.”⁸² It concluded that

proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. Suffice to say that the showing offered by the [government] does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving.⁸³

As the review below will show, post-*Craig*, in cases involving classifications where men and women were viewed as similarly situated, with a limited and unstable exception in affirmative action cases, the intermediate scrutiny test has been applied consistently by the Court and has regularly emphasized certain elements. It is this line of cases, moreover, that supports the argument that the intermediate scrutiny test operates more like strict scrutiny—it is perhaps even harder to satisfy than strict scrutiny.⁸⁴ Indeed, this review demonstrates that the Court’s

81. *Id.* at 200–02.

82. *Id.* at 202.

83. *Id.* at 204.

84. Many commentators have argued that the intermediate scrutiny test actually places more emphasis on determining whether the sex classification constitutes a “stereotype” rather than applying the intermediate scrutiny test. *See, e.g.,* Cohen, *supra* note 10, at 180; Franklin, *supra* note 67, at 88; Hasday, *supra* note 10, at 760–61; Jenkins, *supra* note 11, at 1986–87; Williams, *Learning Differences*, *supra* note 10, at 567; Sacher, *supra* note 70, at 1417. Most prominently, for instance, Professor Mary Ann Case has argued that the Court requires that the sex classification be a “perfect proxy” for the category of persons the government intends to affect. Case, *supra* note 13, at 1449. According to this argument, were the government to use some other method besides sex to classify persons so as to achieve its stated objective, the sex classification may not exclude even one woman or one man who should be included—making the statute “underinclusive”—and it may not include even one woman or one man who should be excluded—making the statute “overinclusive.” *See id.* at 1449–50. As such, Case argues that intermediate scrutiny can actually be more strict than strict scrutiny. *Id.* at 1453. She also accounts for the non-similar-situation cases discussed above as cases where the Court views the categories of pregnancy, proof of parenthood, and combat as “perfect proxies.” *Id.* at 1457–58. However, Case and some Justices have pointed out that pregnancy, proof of parenthood, and combat can be seen as susceptible to stereotyping themselves. *Id.* at 1458; *see also* *Nguyen v. INS*, 533 U.S. 53, 86–87 (2001) (O’Connor, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting) (identifying differences in proof of parenthood for mothers and fathers as based on stereotype). This adds support to the argument here that in the pregnancy, proof of parenthood, and combat cases, the Court is in fact never applying any intermediate scrutiny analysis because that analysis does not come into play when the sexes are not similarly situated. In addition, the view of some Justices as to the potential for stereotyping in the areas of pregnancy, proof of parenthood, and combat underscores the instability of the similarly situated step in the Court’s equal protection analysis.

application of the test has been tough enough to mean that every classification since *Craig* that did not involve pregnancy, proof of parenthood, or participation in combat, with the single exception of *Califano v. Webster*,⁸⁵ an affirmative action case discussed in Part II.B.3 below, has been overturned by the Court. The remainder of this Part will seek to elucidate how the intermediate scrutiny approach ends up operating, outside of the non-similarly-situated cases, to lead to results very similar to those in cases using strict scrutiny.

1. Important Government Interest

The “important government interest” prong seems, upon first consideration, to be a fairly straightforward matter, with not much to discuss without a particular government interest to assess, although some commentators have indicated that the Court sometimes does its stereotyping analysis during this part of the test.⁸⁶ More critically, however, certain procedural aspects of the test, rarely discussed in the literature, come into play at the important government interest stage of the test. The first procedural aspect of the test also applies to the substantial relationship prong, which will be discussed in more detail below.

First, as Justice O’Connor has pointed out, in any case involving heightened scrutiny, the burden of proving that the classification passes the intermediate scrutiny test is on the government.⁸⁷ This means that the government must both produce an important interest that it is trying to achieve and later prove that the sex classification actually achieves that interest. This assignment of burden to the government gives any challenge to a sex classification a procedural edge and means that the government will always have a tougher road defending such a classification than a challenger will have disputing it. As a result, this procedural rule

85. 430 U.S. 313 (1977).

86. See, e.g., Sacher, *supra* note 70, at 1417–18.

87. *Nguyen*, 533 U.S. at 74–75 (O’Connor, J., dissenting); see also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (indicating that the party seeking to uphold a gender-based classification has the burden of showing a justification for the classification); *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (same); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150–51 (1980) (stating that the party seeking to uphold the statute carries the burden of proof, met only by showing that the classification serves an important governmental objective and that the means are substantially related to that objective).

is likely to push the intermediate scrutiny test more in the direction of strict scrutiny.

Second, once a government does produce an important government objective that its sex classification is designed to advance, the Court has repeatedly stated that it will look closely at this objective to make sure it is genuine and “not hypothesized or invented *post hoc* in response to litigation.”⁸⁸ This inquiry has flushed out many pretextual goals, including in *Virginia*, where the Court found that Virginia had not excluded women from the Virginia Military Institute to advance an overall plan of providing single-sex educational options in the state as claimed.⁸⁹ Similarly, in *Weinberger v. Wiesenfeld*, the Court looked at the legislative history of the Social Security Act and found that the government’s objective for the challenged provision providing survivors’ benefits to widows but not widowers was not to compensate women for past economic discrimination but to enable widows with minor children to stay home even after their husbands died.⁹⁰ Yet a third example can be found in *Califano v. Goldfarb*, where both the plurality opinion of Justices Brennan, White, Marshall, and Powell and the concurrence of Justice Stevens rejected the government’s proffered reason of administrative convenience for a provision that, in this case, paid all widows social security benefits but only paid benefits to widowers who were dependent on their deceased wives.⁹¹ Finally, in *Califano v. Westcott*, the Court rejected the reason given for legislation awarding unemployment benefits to men but not women because “[t]here is little to suggest that the gender qualification had anything to do with [the government’s stated objective of] reducing the father’s incentive to desert.”⁹²

2. Substantial Relationship

As suggested above, the bulk of the Court’s test—and the toughest aspect to satisfy—comes under the substantial relationship prong. The Court’s cases applying the test typically discuss one or more of three key analyses as a part of the substantial relationship prong. These analyses include the stereotyping examination already mentioned, an inquiry into the empirical proof for the alleged relationship between the sex

88. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

89. *Id.* at 536.

90. 420 U.S. 636, 648 (1975).

91. 430 U.S. 199, 209 n.8, 220 (1977) (Stevens, J., concurring).

92. 443 U.S. 76, 88 (1979); *see also Hogan*, 458 U.S. at 728 (1982) (requiring a “searching analysis” of the government’s stated purpose for a sex-based classification); *Orr v. Orr*, 440 U.S. 268, 281 (1979) (rejecting administrative convenience rationale as an important government interest).

classification and the government objective, and a consideration of what alternative methods the government could have used to achieve its objectives.

a. Stereotyping

The Court has referred to stereotyping in various ways over the four decades since *Reed*: “archaic and overbroad generalizations,”⁹³ “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas,’”⁹⁴ “old notions,”⁹⁵ “stereotypes about the ‘proper place’ of women and their need for special protection,”⁹⁶ “fixed notions concerning the roles and abilities of males and females,”⁹⁷ “traditional, often inaccurate, assumptions about the proper roles of men and women,”⁹⁸ and “group stereotypes rooted in, and reflective of, historical prejudice.”⁹⁹ Although some observe that the Court will occasionally begin the stereotyping analysis when discussing the government interest,¹⁰⁰ most of the characterizations listed here demonstrate the way in which the Court’s stereotyping analysis fits into the substantial relationship prong of the intermediate scrutiny test.¹⁰¹ They indicate that the Court is looking at the fit between the classification and the government objective to see whether the generalization about men and women embodied in the sex classification precisely and accurately advances the achievement of the government’s goal.¹⁰² If the generalization is “overbroad,” it will not fit the reality of female and male characteristics, roles, and lives, and then it will not

93. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975); *see also Virginia*, 518 U.S. at 533 (“overbroad generalizations about the different talents, capacities, or preferences of males and females”); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (“overbroad generalizations”); *Goldfarb*, 430 U.S. at 211 (quoting *Schlesinger*, 419 U.S. at 508); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (same).

94. *Craig*, 429 U.S. at 198–99 (quoting *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975)).

95. *Goldfarb*, 430 U.S. at 211 (quoting *Stanton*, 421 U.S. at 14) (internal quotation marks omitted).

96. *Orr*, 440 U.S. at 283.

97. *Hogan*, 458 U.S. at 725.

98. *Id.* at 726.

99. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994).

100. *Sacher*, *supra* note 70, at 1417–18.

101. *See, e.g., Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975).

102. *See, e.g., id.*

advance the objective in the way intended.¹⁰³ In addition, if the generalization draws from old or fixed notions, traditional assumptions, outdated misconceptions, or historical bias, it is unlikely to fit current reality, especially in a societal context of rapid change in sex and gender roles, which has been true in the United States since at least 1971, the year of *Reed*, and arguably since well before then.¹⁰⁴

b. Empirical Proof

The Court's view on stereotypes also demonstrates the role that empirical proof plays in determining whether a particular sex-based classification violates equal protection. Although the Court will consider empirical evidence, as early as *Craig* the Court expressed skepticism about the usefulness of empirical studies.¹⁰⁵ In addition, it has repeatedly made clear that "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."¹⁰⁶ The concern here appears to relate to what the Court has referred to as "self-fulfilling prophec[ies]."¹⁰⁷ For instance, in pointing out why Mississippi

103. See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (stating that the Navy's different treatment of male and female naval officers did not reflect an impermissibly overbroad generalization).

104. See, e.g., *Stanton*, 421 U.S. at 14–15.

105. *Craig v. Boren*, 429 U.S. 190, 204 (1976) ("[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.").

106. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994); see also *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151–52 (1980) ("It may be that there is empirical support for the proposition that men are more likely to be the principal supporters of their spouses and families, but the bare assertion of this argument falls far short of justifying gender-based discrimination on the grounds of administrative convenience." (citation omitted)); *Califano v. Goldfarb*, 430 U.S. 199, 206 (1977); *Craig*, 429 U.S. at 202 ("[P]rior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this."); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) ("Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." (citation omitted)).

107. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982); see also *United States v. Virginia*, 518 U.S. 515, 542–43 (1996) ("The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophec[ies],' once routinely used to deny rights or opportunities." (footnotes and citation omitted)); *Craig*, 429 U.S. at 202 n.14 ("The very social stereotypes that find reflection in age-differential laws are likely substantially to distort the accuracy of these comparative statistics. Hence 'reckless' young men who drink and drive are

University for Women's all-female nursing program did not meet the equal protection standard, the Court explained:

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that [MUW] allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.¹⁰⁸

In retaining skepticism regarding empirical studies, the Court has recognized that although "a shred of truth may be contained in some stereotypes, [the Equal Protection Clause] requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination."¹⁰⁹

c. Availability of Sex-Neutral Alternatives

The Court's skeptical attitude toward empirical data in turn relates to the last hallmark of the substantial relationship prong, which considers the availability of sex-neutral means to accomplish the government's objective. Although the Court has never explicitly used a least restrictive means analysis as it has done in strict scrutiny cases, in its cases applying intermediate scrutiny since *Craig*, when sex-neutral means have been available to achieve a government's objective, the Court has overturned the use of the sex-based classification. Perhaps the clearest statement of this principle came in the opinion of the Court in *Orr v. Orr*, where the Court invalidated an Alabama law that required husbands but not wives to pay alimony.¹¹⁰ The Court found two possible objectives for the law, assistance to needy spouses and compensation to women for past discrimination, but found that the state was already conducting sex-neutral, individualized hearings to determine neediness between the spouses.¹¹¹ Therefore, the Court concluded that Alabama's own behavior acknowledged that "[w]here, as here, the State's compensatory and

transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home." (citation omitted)).

108. *Hogan*, 458 U.S. at 729–30.

109. *J.E.B.*, 511 U.S. at 139 n.11.

110. 440 U.S. 268, 283 (1979).

111. *Id.* at 280–81.

ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.”¹¹²

Although not every case provides as clear a statement of it as *Orr* did, the Court has nevertheless acted upon this principle several times. In *Wengler v. Druggists Mutual Insurance Co.*, for instance, the Court rejected a sex classification that denied widowers death benefits under the state’s workers’ compensation law, but acknowledged the importance of the state’s interest in providing for needy spouses.¹¹³ It noted, nevertheless, that

[s]urely the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need. Why, then, employ the discriminatory means of paying all surviving widows without requiring proof of dependency, but paying only those widowers who make the required demonstration?¹¹⁴

In addition, several cases involving the relative rights of the fathers and mothers of illegitimate children or the illegitimate children’s rights vis-à-vis their mothers and fathers—even those that have ostensibly used rational basis scrutiny—have discussed the need for states to ensure that “the statute ‘is carefully tuned to alternative considerations.’”¹¹⁵ Finally, in seven of the eleven cases where the Court upheld a statute as not violating equal protection, there was a dissent of two to four Justices arguing that the intermediate scrutiny test should have been applied or had not been applied properly.¹¹⁶ In applying the test to the facts, these

112. *Id.* at 283; *see also* *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652–53 (1975) (“[T]o the extent that Congress legislated on the presumption that women as a group would choose to forgo work to care for children while men would not, the statutory structure, independent of the gender-based classification, would deny or reduce benefits to those men who conform to the presumed norm and are not hampered by their child-care responsibilities. . . . Thus, the gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids.” (footnote omitted)).

113. 446 U.S. 142, 151–52 (1980).

114. *Id.* at 151.

115. *Trimble v. Gordon*, 430 U.S. 762, 772 (1977); *see also* *Caban v. Mohammed*, 441 U.S. 380, 392 (1979) (invalidating a law that allowed unwed mothers but not fathers to block the adoption of their children by withholding consent, stating “[w]hen the adoption of an older child is sought, the State’s interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in § 111”).

116. *See* *Nguyen v. INS*, 533 U.S. 53, 74 (2001) (O’Connor, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting) (“In a long line of cases spanning nearly three decades, this Court has applied heightened scrutiny to legislative classifications based on sex.”); *Rostker v. Goldberg*, 453 U.S. 57, 87 (1981) (Marshall, J., joined by Brennan, J.,

dissents all discuss the significance of the availability of sex-neutral alternatives in reaching their conclusions that the statutes violated the Equal Protection Clause.¹¹⁷

dissenting) (identifying the necessary level of scrutiny as “heightened”); *Michael M. v. Superior Court*, 450 U.S. 464, 488 (1981) (Brennan, J., joined by White & Marshall, JJ., dissenting) (referring to the necessary level of scrutiny as “mid-level”); *Pers. Adm’r v. Feeney*, 442 U.S. 256, 282 (1979) (Marshall, J., joined by Brennan, J., dissenting) (applying intermediate scrutiny test to find statutory scheme unconstitutional); *Parham v. Hughes*, 441 U.S. 347, 361 n.2 (1979) (White, J., joined by Brennan, Marshall, & Blackmun, JJ., dissenting) (arguing that the majority did not subject the upheld statute to “an appropriate level of scrutiny”); *Geduldig v. Aiello*, 417 U.S. 484, 498 (1974) (Brennan, J., joined by Douglas & Marshall, JJ., dissenting) (stating that the Court’s precedents “mandate a stricter standard of scrutiny” than that applied by the majority); *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., joined by Marshall, J., dissenting) (concluding that the upheld statute should have been “subjected to close judicial scrutiny”).

117. *Nguyen*, 533 U.S. at 78 (O’Connor, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting) (“[W]e require a much tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification.”); *Rostker*, 453 U.S. at 94 (Marshall, J., joined by Brennan, J., dissenting) (“Under our precedents, the Government cannot meet this burden without showing that a gender-neutral statute would be a less effective means of attaining this end.”); *Michael M.*, 450 U.S. at 491 (Brennan, J., joined by White & Marshall, JJ., dissenting) (“California still has the burden of proving that there are fewer teenage pregnancies under its gender-based statutory rape law than there would be if the law were gender neutral.”); *Feeney*, 442 U.S. at 285 (Marshall, J., joined by Brennan, J., dissenting) (“Particularly when viewed against the range of less discriminatory alternatives available to assist veterans, Massachusetts’ choice of a formula that so severely restricts public employment opportunities for women cannot reasonably be thought gender-neutral.” (footnote omitted)); *Parham*, 441 U.S. at 364–65 (White, J., joined by Brennan, Marshall, & Blackmun, JJ., dissenting) (pointing out that requiring unwed fathers but not unwed mothers to have legitimated a child prior to that child’s death in order to sue for a child’s wrongful death is a more drastic measure than “merely a rule concerning the competency of evidence” to protect against spurious tort litigation claims); *Geduldig*, 417 U.S. at 505 (Brennan, J., joined by Douglas & Marshall, JJ., dissenting) (“California’s legitimate interest in fiscal integrity could easily have been achieved through a variety of less drastic, sexually neutral means.”); *Kahn*, 416 U.S. at 358 (Brennan, J., joined by Marshall, J., dissenting) (“I think that the statute is invalid because the State’s interest can be served equally well by a more narrowly drafted statute.”). Of the remaining four cases, one, *Califano v. Webster*, 430 U.S. 313 (1977), was per curiam, one was the nonsubstantive decision of *Heckler v. Mathews*, 465 U.S. 728 (1984), and in the last two the dissent never reached the substantial relationship prong because it viewed the government objective as illegitimate in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), and would have overturned the statute on non-equal-protection grounds in *Lehr v. Robertson*, 463 U.S. 248 (1983).

3. *Constitutionality of Sex Classifications Designed To Compensate for Past Discrimination*

The only circumstance in which the Court has upheld a statute using sex-based distinctions after applying intermediate scrutiny has been when those distinctions clearly were designed to compensate women for past discrimination. However, of the three cases where a compensatory purpose was involved, intermediate scrutiny was only straightforwardly applied in one, *Califano v. Webster*, where the Court solidly upheld a compensatory, affirmative action-type classification.¹¹⁸ *Schlesinger* was upheld as compensatory, but the more important issue influencing the Court in *Schlesinger* may have been the combat exclusion basis mentioned above.¹¹⁹ The only other case involving a compensatory motive was *Kahn v. Shevin*, which was decided before *Craig* and included language that the distinction in *Kahn* had “a fair and substantial relation to the object of the legislation,” suggesting that the Court was applying rational basis scrutiny.¹²⁰ It is therefore not as certain that the legislation at issue in *Kahn* would have been upheld post-*Craig*.

Moreover, Supreme Court jurisprudence regarding the use of intermediate versus strict scrutiny in the affirmative action context may indicate that even benign sex classifications will now have a tougher time satisfying the Court. First, the Court has rejected the use of a different standard of scrutiny for benign race classifications,¹²¹ and this creates the question of whether benign sex classifications would be reviewed under intermediate scrutiny, as are all sex classifications, or under strict scrutiny as a benign classification.¹²² Second, some Justices have indicated that, in their opinion, benign classifications would not meet intermediate scrutiny either. In *Metro Broadcasting, Inc. v. FCC*, a dissent by Justices who would later be a part of the majority that applied strict scrutiny to benign racial classifications speculated that the FCC’s affirmative action program “cannot survive even intermediate scrutiny because race-neutral and untried means of directly accomplishing the governmental interest are readily available.”¹²³ Besides indicating that the Court’s view on sex classifications that seek to compensate women for past discrimination has changed since *Webster*, this last quote also

118. 430 U.S. at 316–18.

119. See *supra* notes 77–78 and accompanying text.

120. *Kahn*, 416 U.S. at 355 (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)) (internal quotation marks omitted).

121. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995).

122. Skaggs, *supra* note 30, at 1170–71.

123. 497 U.S. 547, 622 (1990) (O’Connor, J., dissenting).

provides more evidence of the relevance under intermediate scrutiny of the availability of sex-neutral alternatives.

In sum, when the Court is faced with a sex classification, in reality there is significantly more to its analysis than is acknowledged by the doctrinal description that the Court examines whether the classification is “substantially related to an important government objective.”¹²⁴ First, the Court will consider whether the sex classification classifies the sexes as to a trait in which they are similarly situated. Only when it finds similar situation will the Court apply the intermediate scrutiny test. Second, once the intermediate scrutiny test is triggered, it operates in such a fashion as to create results similar to those generated by strict scrutiny: overwhelming invalidation of sex classifications as violating the Equal Protection Clause. Specifically, because the government bears the burden of proof, it must produce and show that it has a genuine, important objective and must show that the sex classification closely fits the achievement of that objective. In its demonstration of fit, moreover, the government must demonstrate that the classification does not constitute a sex stereotype, regardless of whether that stereotype can be supported by empirical proof showing that most women or most men act in accordance with the stereotype. The government must also show that the sex classification is more effective than existing sex-neutral alternatives in advancing the government’s objective. Finally, the evidence that sex classifications with a compensatory purpose would pass constitutional muster under intermediate scrutiny today is shaky and likely will not exempt the classification from being compared to available sex-neutral alternatives.

III. THE CONSTITUTIONALITY OF SEX-SEGREGATED K-12 PUBLIC EDUCATION GENERALLY AND THE 2006 DEPARTMENT OF EDUCATION REGULATIONS SPECIFICALLY

While nothing is an absolute certainty in Supreme Court litigation, when the more comprehensive approach articulated above is applied to it, sex-segregated K-12 public education seems destined to be judged unconstitutional. Therefore, the regulations passed in 2006 by the Department of Education (ED) are themselves challengeable.¹²⁵

124. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.6 (1994) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982)).

125. 34 C.F.R. § 106.34(b) (2011).

Accordingly, this Part will analyze public K-12 single-sex programs in general, but with an emphasis on the 2006 regulations and programs that have arguably been encouraged by the regulations, including those at issue in the *Vermilion Parish* case¹²⁶ and in another case challenging a public K-12 sex-segregation initiative, *A.N.A. ex rel. S.F.A. v. Breckinridge County Board of Education*,¹²⁷ both of which are discussed in greater detail below. This emphasis on contemporary sex-segregated programs is generated not only by their links to the 2006 regulations but also by the context in which many of these programs have been formed. This context includes several decades of criticism of K-12 public coeducation for failing to educate girls and boys equitably, a movement to promote public educational “choice,” and a recent fad in popular books and commentary regarding research on male and female brains. These factors have converged to cause an increase in the promotion of sex-segregated education as a solution to the inequities and other problems of coeducation and the current public educational system more generally.

As already mentioned, the typical comparison assumed by the literature on sex-segregated education compares sex-segregated education with the coeducational status quo. Missing from this assessment, therefore, is whether creating sex-segregated programs or *reforming* coeducation will go further to improve educational outcomes for girls and boys. Yet it is this comparison—between the effectiveness of sex-segregated education and reformed coeducation—that is the critical one, not only as a policy matter but also in terms of the constitutional test that sex-segregated programs will have to pass. Therefore, this Part first explains the context of the current sex-segregated educational initiatives, with particular focus on the proper—and constitutionally required—comparison between sex-segregated education and reformed coeducation, then applies the Supreme Court’s sex classifications equal protection jurisprudence to current K-12 public sex-segregated education generally and the 2006 regulations specifically. As the application of the intermediate scrutiny test will show, comparing sex-segregated education to reformed coeducation, rather than comparing sex-segregated education and the coeducational status quo, demonstrates that K-12 sex-segregated public education is clearly unconstitutional.

126. *Doe v. Vermilion Parish Sch. Bd.*, 421 F. App’x 366 (5th Cir. 2011).

127. *A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673 (W.D. Ky. 2011).

A. *Comparing Sex-Segregated Education, Status Quo
Coeducation, and Reformed Coeducation*

1. *The Coeducational Status Quo*

Exactly what is the coeducational status quo? As with anything, the answer depends in part on what one stresses. With regard to the sex-segregated education debate, the stress is on whether coeducation treats male and female students equitably and on the relative educational achievements of girls and boys.¹²⁸ Both strands are concerned to a greater or lesser extent not only with what children experience in schools but also how those experiences feed into their lives as adults. Concerns about first girls' then boys' achievements and experiences in schools have sometimes been termed the "girls' crisis" and the "boys' crisis" in education.¹²⁹

Extensive studies have been published regarding girls' and boys' experiences in school. These accounts have documented a number of difficulties that girls face in school, including experiencing a drop in their standardized test scores relative to boys between the early grades and high school,¹³⁰ feeling less positive and confident in math and science,¹³¹ and receiving less teacher time and attention, both in terms of quantity and quality.¹³² In addition to specifically educational problems, girls face other significant problems that impact their ability to stay and succeed in school, including teen pregnancy, eating disorders, sexual harassment, and a drop in self-esteem—problems that are worse for minority girls, and are a part of the cycle of poverty that makes women the poorest of the poor.¹³³

128. Note that consideration of such assessments should keep in mind that their relative quality can give the inaccurate impression that education is a boys-against-the-girls "zero-sum" game. Remembering that the weaknesses of girls can be the strengths of boys—and vice versa—can help avoid such an inference.

129. See Elizabeth Weil, *Teaching to the Testosterone*, N.Y. TIMES MAG., Mar. 2, 2008, at 38, available at <http://www.nytimes.com/2008/03/02/magazine/02sex3-t.html?pagewanted=all>.

130. DAVID SADKER ET AL., *STILL FAILING AT FAIRNESS: HOW GENDER BIAS CHEATS GIRLS AND BOYS IN SCHOOL AND WHAT WE CAN DO ABOUT IT* 24 (Scribner ed. 2009).

131. *Id.* at 124.

132. *Id.* at 24.

133. See *id.*; *id.* at 161–62 ("[A]bout one-third of teenage girls will become pregnant at least once by age twenty. . . . When girls leave [school], they rarely return to earn their high school diploma or general equivalency diploma (GED)."); see also PEGGY ORENSTEIN, *SCHOOLGIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE CONFIDENCE*

Boys also have a serious list of educational difficulties relative to girls, including lower grades throughout school,¹³⁴ lack of interest and achievement in writing and reading,¹³⁵ and lower percentages both going to and graduating from college.¹³⁶ As with girls, boys also experience nonacademic problems that affect their academic performance. They are more likely than girls to be sent to school psychologists;¹³⁷ to be diagnosed as hyperactive, autistic, and emotionally disturbed, but underdiagnosed for depression;¹³⁸ to face discipline for misbehavior,¹³⁹ especially if they are boys of color;¹⁴⁰ to manifest violent behavior;¹⁴¹ to get involved in crime and arrests and engage in risk-taking behaviors that lead to a high rate of accidental deaths;¹⁴² and to commit suicide and homicide.¹⁴³

GAP 199 (1994) (“Latina girls . . . are twice as likely as white girls to become teenage mothers.” (citing SONIA M. PEREZ ET AL., NAT’L COUNCIL OF LA RAZA, REDUCING HISPANIC TEENAGE PREGNANCY AND FAMILY POVERTY: A REPLICATION GUIDE 9 (1992))); MYRA SADKER & DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA’S SCHOOLS CHEAT GIRLS 116 (1994) (stating that across the board, “[e]conomic and educational poverty set the stage for adolescent pregnancy”); SADKER ET AL., *supra* note 130, at 143 (explaining that 90% of Americans with anorexia and bulimia are women between the ages of twelve and twenty-five, that 42% of “first- to third-grade girls want to be thinner, and 81 percent of ten-year-olds are afraid of being fat”). In 2001, the American Association of University Women (AAUW) reported that 81% of girls and 79% of boys reported experiencing some type of unwanted sexual behavior in school and that 65% of girls and 42% of boys said they had been touched in a sexual way. SADKER ET AL., *supra* note 130, at 156 (citing AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 20–21 (2001)). Between the ages of nine and fifteen, the self-esteem of girls drops 38% for Latinas, 33% for white girls, and 7% for black girls. ORENSTEIN, *supra*, at xxi–xxii. Although black girls retain their overall self-esteem more than other girls, they are more pessimistic about their teachers and school than other girls. *Id.* Further,

[e]conomic penalties follow women after graduation. Careers that have a high percentage of female workers, such as teaching and nursing, are poorly paid. And even when women work in the same jobs as men, they earn less money. Most of America’s poor live in households that are headed by women.

SADKER & SADKER, *supra*, at 14.

134. SADKER ET AL., *supra* note 130, at 126.

135. *Id.*

136. Levit, *supra* note 10, at 472.

137. SADKER ET AL., *supra* note 130, at 126.

138. *Id.*

139. SADKER & SADKER, *supra* note 133, at 220–21.

140. Levit, *supra* note 10, at 470.

141. See ELIOT, *supra* note 26, at 3.

142. *Id.* at 280 (“Boys are 73 percent more likely than girls are to die from accidents between birth and age fourteen. Males of all ages are more likely than girls to get stitched up in the ER, drown, or die in a car accident or ATV crash. They also break more rules. Boys are likelier than girls to cheat on exams, get expelled from school, drive drunk, and sell drugs. As adults, men are arrested at least four times as often as women are for every crime (except prostitution).”).

143. *Id.* at 3, 264.

The same and similar sources suggest that the most significant of the causes for these inequities are those linked to gender socialization, either through the gendered messages children receive from adults or the gendered behaviors of peers. Identified as the “hidden curriculum,” these are elements of “the running subtext through which teachers communicate behavioral norms and individual status in the school culture, the process of socialization that cues children into their place in the hierarchy of larger society.”¹⁴⁴ A typical example of the hidden curriculum can be seen when examining the puzzling fact that although girls score behind boys on standardized tests, they get better grades.¹⁴⁵ Educational equity scholars Karen Zittleman and Myra and David Sadker have reviewed research that suggests that girls get better grades because teachers give them “good grade[s] for good behavior.”¹⁴⁶ In this way, educators “teach girls to value silence and compliance, to view those qualities as a virtue.”¹⁴⁷ Girls learn these lessons well because when they get less attention from teachers or face other inequities they are more likely to resist passively by “opting out rather than acting out.”¹⁴⁸ African-American girls, who tend to resist the passivity lessons of the hidden curriculum and participate and seek attention in class, are the most frequently rebuffed in their attempts to initiate contact with teachers¹⁴⁹ and are the least likely to receive clear academic feedback.¹⁵⁰ These “microinequities” translate into substantially unequal education.¹⁵¹ This may be because greater attention from teachers translates into greater learning,¹⁵² because girls’ learning problems or “gifted” statuses are not noticed and they do not get the special attention they need,¹⁵³ or because they are stigmatized and pushed out of the system for resisting the lessons of the hidden curriculum.¹⁵⁴

Although the hidden curriculum first received attention in the context of its harms to girls, those studying boys, men, and educational equity

144. ORENSTEIN, *supra* note 133, at 5 (internal quotation marks omitted).

145. SADKER ET AL., *supra* note 130, at 176.

146. *Id.* at 196.

147. ORENSTEIN, *supra* note 133, at 35.

148. *Id.* at 81.

149. *Id.* at 180.

150. SADKER ET AL., *supra* note 130, at 73.

151. Levit, *supra* note 10, at 464 (quoting ROBERTA M. HALL & BERNICE R. SANDLER, ASSOC. OF AM. COLLS., *THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN?* 5, 7–9 (1982)) (internal quotation marks omitted).

152. SADKER & SADKER, *supra* note 133, at 43–44, 55.

153. ORENSTEIN, *supra* note 133, at 36.

154. *Id.* at 36, 181.

increasingly attribute boys' educational problems to rigid, outdated, and damaging masculinity lessons. A recent and comprehensive discussion of masculinity and single-sex education by Professor David S. Cohen, for instance, discusses "essentialized" and "hegemonic" masculinity as the dominant form of masculinity used in many discussions about educating boys.¹⁵⁵ This essentialized masculinity says that boys are naturally heterosexual, aggressive, active, sports-obsessed, competitive, stoic, and, most importantly, not girls.¹⁵⁶ Cohen's research reflects older research that is consistent with this definition.¹⁵⁷

Cohen also reviews the harms that come to boys from this dominant definition of masculinity. He divides those harms into two general areas: harm to boys who do not fit the definition¹⁵⁸ and constraints on all boys because it is "virtually impossible for any one boy to always live consistently with [the ideal of masculinity asserted by this definition]."¹⁵⁹ In terms of specific harms, Cohen mentions both general losses in self-esteem that can come from the inability of any boy to meet this standard and the particular abuse that can be directed at some boys, especially those perceived as feminine or homosexual, or those with disabilities who are limited in their pursuits of sports and other activities that rely on physical activity, competitiveness, and aggression.¹⁶⁰ Others have drawn even more direct lines between traditional masculinity and violence, suppression of emotion, risk-taking behaviors, and substance abuse.¹⁶¹

Despite these harms, there is less critique of how the hidden curriculum socializes boys into traditionally masculine behaviors. Adults are more

155. Cohen, *supra* note 10, at 153–54.

156. *Id.*; see also SADKER ET AL., *supra* note 130, at 125–26.

157. Other authors have noted that the most insulting thing a boy can be called is "girl," "woman," "sissy," or "fag." See ORENSTEIN, *supra* note 133, at 116; SADKER ET AL., *supra* note 130, at 127; Barrie Thorne, *Girls and Boys Together . . . But Mostly Apart: Gender Arrangements in Elementary School*, in *MEN'S LIVES* 87, 94 (Michael S. Kimmel & Michael A. Messner eds., 4th ed. 1998). Authors also note that traditional masculinity is constructed by differentiating it from femininity—"girl"—and feminized men, namely homosexuals, "sissies," or "fags." See Michael S. Kimmel, *Rethinking "Masculinity": New Directions in Research*, in *CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY* 9, 16 (Michael S. Kimmel ed., 1987). Additionally, they note boys' constant competition for the spotlight and star status and that being a "winner" is a core trait of the male sex-role stereotype. See SADKER & SADKER, *supra* note 133, at 210–13.

158. Cohen, *supra* note 10, at 170–71.

159. *Id.* at 173.

160. *Id.* at 170–72.

161. See generally Michael Kimmel, *Men, Masculinity, and the Rape Culture*, in *TRANSFORMING A RAPE CULTURE* 139 (Emilie Buchwald et al. eds., rev. ed. 2005); Michael A. Messner, *The Triad of Violence in Men's Sports*, in *TRANSFORMING A RAPE CULTURE*, *supra*, at 23.

anxious when boys engage in cross-sex behavior than when girls do.¹⁶² Where children's books have shifted their characterizations of women's roles, there have been few comparable moves to show men in more nurturing and caring behaviors.¹⁶³ When masculinity and education is discussed, discussion focuses on and anxiously disapproves of the "feminization of education" and the assumed detrimental effects such a feminization will have on boys,¹⁶⁴ reinforcing the boundaries of traditional masculinity in the typical oppositional, hierarchical structure, with masculine behaviors at the top and feminine behaviors at the bottom. As a result, few seem to notice the links between boys' concerns about their place in these gendered hierarchies and some of the educational difficulties boys face. For example, "boys often regard reading and writing as 'feminine' subjects that threaten their masculinity" and accordingly "perform below females in writing and reading achievement."¹⁶⁵ Similarly, discussions about youth and violence are mainly silent about the part masculinity plays in teaching boys about the acceptability—indeed, the admirable qualities—of violence,¹⁶⁶ yet many of the problems boys face are related to their involvement in violence, crime, and risk-taking activities bordering on violence.¹⁶⁷

Finally, it is worth noting that many of the harms of the hidden curriculum to boys are also linked to harm to girls. For instance, consider sexual harassment, which occurs at disturbingly high levels in schools,¹⁶⁸ is mainly directed at girls,¹⁶⁹ and when directed at boys is directed at those who are perceived as feminine or homosexual.¹⁷⁰ The insights of Cohen and others point out that traditional masculinity "relies

162. SADKER ET AL., *supra* note 130, at 127–28.

163. MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* 156 (2000); *see also* SADKER ET AL., *supra* note 130, at 22 (comparing the gender roles presented in two popular children's titles from 2008).

164. SADKER ET AL., *supra* note 130, at 200; Cohen, *supra* note 10, at 168.

165. SADKER ET AL., *supra* note 130, at 126.

166. KIMMEL, *supra* note 163, at 10.

167. ELIOT, *supra* note 26, at 180.

168. *See* AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., *supra* note 133; CATHERINE HILL & HOLLY KEARL, AM. ASS'N OF UNIV. WOMEN, *CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL* (2011); *see also* Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 616–17 (2009) (describing the prevalence of sexual assault among college students).

169. HILL & KEARL, *supra* note 168, at 2.

170. *See* Cantalupo, *supra* note 168, at 688; *see also* SADKER ET AL., *supra* note 130, at 129 ("The most likely targets [of bullying] are gay students, or students perceived as gay.").

on societal domination of women by men” and “can lead to emotional and physical harassment of and violence against girls” because “[t]he notion of femininity as the opposite of desirable hegemonic masculinity . . . leads to a conception that to be a boy means to dominate and control female bodies.”¹⁷¹ Thus, not only can a hidden curriculum in traditional masculinity harm boys, but it can also be linked to a prominent inhibitor of girls’ academic success.¹⁷²

2. Reformed Coeducation

Although the previous review gives a sense of what kinds of problems have been documented with regard to coeducation, it does not discuss what efforts have been made, if any, to reform coeducation in light of these critiques, nor does it discuss how successful any attempted reforms have been. Yet educational literature abounds with an amazing list of techniques teachers, administrators, and parents can and do use to intervene in the lessons of the gendered hidden curriculum, in addition to providing much evidence that such techniques are being used successfully in schools and classrooms across the country.

Indeed, the information generated greatly exceeds the scope of this Article. A sampling of techniques, however, shows them organized around several themes. These include techniques to balance positive and negative teacher attention to students and standards of conduct for all students in a class;¹⁷³ confronting bias and including women in curricular materials, classroom decorations, displays, examples, and illustrations;¹⁷⁴ giving feedback and guidance commonly given to boys to all children, including explicit instructions on how to complete assignments for themselves, encouragement to work hard, and attribution of error to lack of effort,

171. Cohen, *supra* note 10, at 172. These points have also been corroborated by others whose research concludes that differentiating themselves from anything feminine means that boys suppress emotions and learn to devalue girls, which can cause explosions of violence that are often directed at girls and women. SADKER & SADKER, *supra* note 133, at 205–09. There is also evidence from cases of rampage school shootings that the inability of some boys—in those cases, the shooters—to live up to the traditional masculine “ideal,” as well as the resulting harassment to which they may fall victim, could lead them to try and assert their masculinity in devastating ways that are often directed mainly at women or girls. Cantalupo, *supra* note 168, at 622.

172. See *infra* notes 224, 228–29 and accompanying text.

173. See, e.g., ORENSTEIN, *supra* note 133, at 30, 245.

174. See, e.g., *id.* at 145–46; SADKER ET AL., *supra* note 130, at 99, 174, 305 (encouraging parents and educators to incorporate “females and males from diverse racial and ethnic groups” into classroom displays, introduce biographies of individuals who broke gender barriers in their fields, or promote reading about accomplished women); Karen J. Warren, *Rewriting the Future: The Feminist Challenge to the Malestream Curriculum*, in THE FEMINIST TEACHER ANTHOLOGY: PEDAGOGIES AND CLASSROOM STRATEGIES 45, 52 (Gail E. Cohee et al. eds., 1998).

not lack of ability;¹⁷⁵ providing connections with the community;¹⁷⁶ and leveling with students about the hidden curriculum, including home, family, and relationship issues,¹⁷⁷ bias in curricular materials,¹⁷⁸ sexuality,¹⁷⁹ classroom dynamics,¹⁸⁰ and masculinity and femininity.¹⁸¹ Still other techniques include assigning and not leaving to peer dynamics the choice of classroom toys, equipment, research topics, and group roles;¹⁸² using cooperative group learning techniques and “interest enhancers” that build skills;¹⁸³ and working to desegregate the widespread sex segregation in

175. SADKER ET AL., *supra* note 130, at 111.

176. Evidence suggests that this technique can particularly benefit girls of color. See ORENSTEIN, *supra* note 133, at xxi (“The AAUW survey revealed that . . . far more African American girls retain their overall self-esteem during adolescence than white or Latina girls, maintaining a stronger sense of both personal and familial importance. . . . The one exception . . . is their feelings about school” (citing AM. ASS’N OF UNIV. WOMEN, *SHORTCHANGING GIRLS, SHORTCHANGING AMERICA: FULL DATA REPORT* 19, 28 (1991))). These higher levels of self-esteem may be historical, in that “the model of European femininity—grounded . . . in . . . idealized helplessness—has largely been unavailable to black women. Instead, they have measured their worth through strength of character and a tenacious sense of self.” *Id.* at 159 (citing Mary Burgher, *Images of Self and Race in the Autobiographies of Black Women*, in STURDY BLACK BRIDGES: VISIONS OF BLACK WOMEN IN LITERATURE 107, 107–22 (Roseann P. Bell et al. eds., 1979)). However, this self-esteem does not transfer to the school context because of what “some researchers [posit as] a vision of a dual self-esteem,” positive at home but negative and stigmatized at school. *Id.* at 160. Latina girls in the AAUW survey, on the other hand, have the largest drops in self-esteem, *id.* at xxi, 218 (citing generally AM. ASS’N OF UNIV. WOMEN, *supra*), attributed by one commentator to their invisibility and lack of knowledge about the positive aspects of their culture. SADKER ET AL., *supra* note 130, at 108–09.

177. SADKER & SADKER, *supra* note 133, at 223–25.

178. SADKER ET AL., *supra* note 130, at 100.

179. ORENSTEIN, *supra* note 133, at 246.

180. *Id.* at 27; SADKER ET AL., *supra* note 130, at 307–08.

181. SADKER & SADKER, *supra* note 133, at 228.

182. R.W. Connell, *Disruptions: Improper Masculinities and Schooling*, in MEN’S LIVES, *supra* note 157, at 141, 151–52; see also ELIOT, *supra* note 26, at 137–38. Smaller groups are more conducive to all students talking freely. JOYCE S. KASER ET AL., *GUIDE FOR SEX EQUITY TRAINERS* 72 (1982). This is especially true when small groups are governed by rules that rotate individual roles and explain to students that all students should get to lead. SADKER & SADKER, *supra* note 133, at 270–73. When students also teach each other, it leads to achievement and promotes diverse friendships. *Id.* at 270. Finally, games such as chess and puzzles and experimentation at home can humanize math and science to girls and teach alternatives to brute strength and size, such as communication, patience, calmness, and focus, to boys. *Id.* at 123, 223–24.

183. SADKER & SADKER, *supra* note 133, at 123–24; see also SADKER ET AL., *supra* note 130, at 210 (suggesting gender-collaborative group learning techniques).

coeducational settings that can exacerbate the inequities between boys and girls.¹⁸⁴

These techniques are in no way theoretical. From various reports, techniques as diverse as waiting an extra few seconds instead of calling on the first student to raise, usually, *his* hand,¹⁸⁵ community-service projects that create bonding across divisional lines,¹⁸⁶ and depicting boys playing with dolls or dancing are all getting results.¹⁸⁷ Girls become more assertive,¹⁸⁸ boys call out less and are less disruptive,¹⁸⁹ and segregation begins to break down.¹⁹⁰ A teacher who attended a workshop of the Sadkers' shared a technique where she gives students a set number of poker chips at the beginning of a class, telling them that everyone must spend all of their chips by talking in class.¹⁹¹ The technique involved the girls more, she said, but even better, "[t]he students who usually dominate the classroom receive a wonderful lesson, too. Because they can talk only twice, they must choose which comments to say. Now noisy students are doing something they never did before: They think before they speak."¹⁹² Such a technique transforms the entire classroom and, as a result, it provides a better and fairer education to all.

The only teacher whose real name is used in Peggy Orenstein's *Schoolgirls* is Ms. Logan, who requires students to do two monologues as African-American history makers, one female and one male, during their African-American history unit.¹⁹³

"This is learning from the inside out," she explains enthusiastically. "They do the research, they connect into that other life, and they really *become* the person. People always ask me how you can get boys to stop being so totally male-oriented. I say, 'You just do it, and they'll pick it up as you go.' . . . It's a

184. Sex segregation is a major phenomenon in elementary schools. SADKER & SADKER, *supra* note 133, at 64; Thorne, *supra* note 157, at 87. It creates misunderstandings between students, reinforces the messages boys get about masculinity and the inferiority of girls, and contributes to girls' invisibility because teachers' attentions are drawn to the male sections of the classroom, and girls are ignored as a group. SADKER & SADKER, *supra* note 133, at 62–65. Teachers often organize activities and sort children by gender instead of organizing and legitimating cross-sex contact. Thorne, *supra* note 157, at 89–90, 97.

185. ORENSTEIN, *supra* note 133, at 30, 245; SADKER ET AL., *supra* note 130, at 99, 307.

186. ORENSTEIN, *supra* note 133, at 165–66.

187. SADKER & SADKER, *supra* note 133, at 223–25; Connell, *supra* note 182, at 151–52.

188. SADKER & SADKER, *supra* note 133, at 273–74.

189. ORENSTEIN, *supra* note 133, at 266.

190. SADKER & SADKER, *supra* note 133, at 276.

191. SADKER ET AL., *supra* note 130, at 248–49.

192. *Id.* (internal quotation marks omitted).

193. ORENSTEIN, *supra* note 133, at 247–57.

thrill for me to hear the way boys stand up for women's rights in their monologues.”¹⁹⁴

Later, Orenstein talks to an eleven-year-old white boy who wrote an essay on Anita Hill for a NOW contest and performed a monologue as Etta James.¹⁹⁵ As Orenstein interrupts his work on the Rosa Parks square for the class's “Women We Admire” quilt, “Jeremy turns to [her] in exasperation. ‘I don’t see what the big deal is about women,’ he says. . . . ‘I mean, as long as they’re interesting, what’s the difference if they’re women? Women are people, too, you know.’”¹⁹⁶

In sum, coeducational reforms to improve equity and girls’ and boys’ relative success in school have been undertaken and undertaken successfully. When motivated to do so, teachers and schools have plenty of tools both available and proven to achieve gender equity in coeducation.

3. *Sex-Segregated Educational Initiatives*

The actual and potentially more widespread success of coeducational reforms, if more widely adopted, begs the question, then, why so many educators are turning to sex-segregated programs to promote greater equity and better relative educational achievement between girls and boys. One potential explanation is that the real goal of such proponents is to promote school choice. However, the school choice movement is not the focus here because the school choice movement has supported sex-segregated education as merely one way to expand school options, not for some reason intrinsic to sex segregation itself.

Another potential explanation is that the consideration of sex-segregated education as a solution to the gendered hidden curriculum has coincided on the one hand with the positive views and experiences of sex-segregated education held by some influential women lawmakers and policymakers,¹⁹⁷ and on the other hand with the promotion of sex-segregated education by proponents of brain research allegedly showing significant sex-based brain differences.¹⁹⁸ This somewhat strange alliance

194. *Id.* at 257.

195. *Id.* at 274.

196. *Id.*

197. Hillary Clinton, who cosponsored the portion of the No Child Left Behind Act that led to the regulations, figures most prominently among these influential women. 147 CONG. REC. 10,180 (2001) (statement of Sen. Hillary Clinton).

198. *See generally Boys’ Brains vs. Girls’ Brains: What Sex Segregation Teaches Students*, ACLU (May 19, 2008), <http://www.aclu.org/womens-rights/boys-brains-vs->

has received an occasional boost from the school choice movement¹⁹⁹ and received a nationwide seal of approval when ED announced its intent to allow sex-segregated programs in 2002 and passed regulations to that effect in 2006.²⁰⁰

Ultimately, regardless of the reasons, the topic of sex-segregated education has generated an enormous amount of research, as well as an enormous amount of argument over the quality, methodology, and relevance of this research. For this reason, the focus here is mainly on overall reviews of the existing research, in an attempt to determine what the empirical evidence says as a whole about the value of single-sex education in improving boys' and girls' relative educational achievement and gender equity in education. The overall conclusion resulting from this examination is that evidence of the benefits of sex-segregated education is inconclusive, whereas evidence of its harms is getting increasing attention and is worthy of serious concern.

The first of the reviews of research on sex-segregated education was conducted by the American Association of University Women in 1997, which brought sixteen prominent researchers together for a roundtable to examine and discuss twenty years' worth of research on K-12 single-sex education.²⁰¹ Among other findings, the group agreed that there was no evidence that sex-segregated education was "better" than coeducation.²⁰² The researchers also expressed concern that sex-segregated programs would "have effects on other classrooms . . . by siphoning off students from coed classes and skewing the sex ratio in those classes," and that sex-segregated education's "appeal . . . to policymakers often has little to do with the classes' effectiveness" but rather are designed to "'relieve pressure on the system' without necessarily making substantive changes."²⁰³

Another major examination of the research was undertaken by Professor Nancy Levit, who made "an attempt to catalog the principal quantitative and qualitative studies, from elementary through postsecondary education,

girls-brains-what-sex-segregation-teaches-students-0 (quoting GURIAN INST., *TEACHER TRAINING MATERIALS: HOW BOYS AND GIRLS LEARN DIFFERENTLY* (2006); and LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 218–28 (2005)).

199. See, e.g., Lea Hubbard & Amanda Datnow, *Are Single-Sex Schools Sustainable in the Public Sector?*, in *GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING* 109, 115 (Amanda Datnow & Lea Hubbard eds., 2002).

200. 34 C.F.R. § 106.34(b)(1) (2011); Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102 (May 8, 2002).

201. AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., *SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS* 1 (1998) [hereinafter *SEPARATED BY SEX*].

202. *Id.* at 2–3.

203. *Id.* at 9.

that evaluate the benefits and detriments of single-sex education.”²⁰⁴ She concluded that the “‘general consensus’ about positive education and socialization effects of single-sex education simply does not exist” and notes several deficiencies in the research methodologies used in the studies showing such positive effects.²⁰⁵

A third review was conducted by ED itself, for which the result was again “equivocal,” finding “some” or “limited” support for both “the premise that single-sex schooling can be helpful,” and that it “may be harmful or that coeducational schooling is more beneficial.”²⁰⁶ Of the 2,221 studies initially culled from an “exhaustive search of electronic databases,” only eighty-eight were not eliminated from the review for factors such as “obvious methodological considerations (e.g., nonstudy, weak study).”²⁰⁷ Of those eighty-eight quantitative studies, even when ED relaxed its usual standards, only forty made it into the final review because of most studies’ failure to include statistical controls for factors such as “religious values, financial privilege, selective admissions, or other . . . differences that might account for the differences between single-sex and coeducational schools.”²⁰⁸ The review acknowledges that studies on single-sex education may never be able to meet the usual standards because “the inclusion of covariates cannot control for important unobservable differences between the groups, such as motivation.”²⁰⁹

Two studies deserve individualized attention because they focused on K-12 public education and made an attempt to improve on many of the studies whose problems were noted in the reviews discussed above. The first was conducted on a set of six paired public “single-gender academies”

204. Levit, *supra* note 10, at 473.

205. *Id.* at 503.

206. FRED MAEL ET AL., U.S. DEP’T OF EDUC., SINGLE-SEX VERSUS COEDUCATIONAL SCHOOLING: A SYSTEMATIC REVIEW, at x (2005), *available at* <http://www2.ed.gov/rschstat/eval/other/single-sex/single-sex.pdf>.

207. *Id.*

208. *Id.* at xi.

209. *Id.*; *see also* Weil, *supra* note 129 (“Cornelius Riordan, a Providence College professor . . . explained . . . that such muddled findings are the norm for education research on school effects. School-effects studies try to answer questions like whether large schools are better than small schools or whether charter schools are better than public schools. The effects are always small. So many variables are at play in a school: quality of teachers, quality of the principal, quality of the infrastructure, involvement of families, financing, curriculum—the list is nearly endless.”). According to Riordan, “You’re never going to be able to compare two types of schools and say, ‘The data very strongly suggests that schools that look like *a* are better than schools that look like *b*.’” *Id.*

created by California in 1998.²¹⁰ Funded by then-Governor Pete Wilson to promote school choice and “stimulate competition,”²¹¹ the academies were seen by parents, teachers, and administrators as a way to meet “at-risk” students’ needs, were not focused on the single-sex aspects of the schools,²¹² and did not provide any specific training on gender.²¹³ Segregating students by sex put a strain on scarce resources and facilities,²¹⁴ and while some teachers of girls-only classes embraced the opportunity, many teachers anticipated discipline problems in the all-boys classes and did not want to teach them.²¹⁵ “By separating girls and boys, gender became the primary marker of identity,”²¹⁶ and gender differences were “made paramount to any commonalities.”²¹⁷ As a result, the academies not only did not challenge but seemed to reinforce students’ and teachers’ “traditional gender expectations.”²¹⁸ Ultimately, all but one of the pairs of academies closed within three years.²¹⁹

The second study compared the educational achievement of students in a public all-girls middle school in Arizona with girls in coeducational schools in the same district and tried to control for factors that are analytically separate from a school’s single-sex character, such as student motivation, school selectivity, and peer quality.²²⁰ With regard to student motivation and school selectivity, the researchers found that although the sex-segregated school purported to use a lottery to select students, the girls admitted to the all-girls school had significantly higher preadmission achievement scores than the girls who wanted to attend but were not selected for the all-girls school.²²¹ In addition, the students in the all-girls school and a coeducational magnet school performed similarly well during their first year enrolled in these schools, leading researchers to suggest that “it is overall peer quality, rather than the gender composition of the schools, that explains single-sex school

210. Hubbard & Datnow, *supra* note 199, at 109.

211. *Id.* at 115.

212. *Id.* at 117.

213. *See id.*

214. *Id.* at 125.

215. *Id.* at 120.

216. Elisabeth L. Woody, *Constructions of Masculinity in California’s Single-Gender Academies*, in GENDER IN POLICY & PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING, *supra* note 199, at 280, 301.

217. *Id.* at 286.

218. *Id.* at 301.

219. Hubbard & Datnow, *supra* note 199, at 109.

220. Amy Roberson Hayes et al., *The Efficacy of Single-Sex Education: Testing for Selection and Peer Quality Effects*, 65 SEX ROLES 693, 694–96 (2011), available at http://homepage.psy.utexas.edu/homepage/deptarea/Developmental/news_files/pdfs/pubs/HayesPahlkeBigler2011.pdf.

221. *Id.* at 701.

students' outperformance of coeducational school students."²²² The study concluded that "the efficacy of single-sex schools may not be a function of the gender composition of the school" because both student and school selection biases cause sex-segregated schools to have higher-performing student bodies *to begin with*, and this overall higher peer quality is more likely what causes higher student achievement—*just like* in coeducational schools with similarly higher-performing students.²²³

Although these research reviews and individual studies are equivocal as to benefits and express only limited concerns regarding harms that may come from sex-segregated education, the vast majority of the research they review has been conducted on all-girls education. In contrast, various observers of all-boys education have noted serious concerns regarding the harms present in those environments. These harms are predicated on evidence that the masculinity lessons of the hidden curriculum, which have been shown to be harmful in the coeducational context, are intensified in all-male environments. This makes sense, given that traditional masculinity is constructed to denigrate femininity and thus encourages boys to avoid and devalue any and all things feminine, especially girls.²²⁴ Institutionally separating girls and boys shows adult approval for such attitudes and therefore likely tends to encourage them.

In fact, an oft-noted aspect of single-sex education for boys was the outdated gendered behavior encouraged and the negative attitudes towards girls and women observed there. Valerie Lee, who has conducted extensive research on sex-segregated education, said that although sexism occurred in all schools, "in boys' schools we saw incidents that went beyond the pale. When I see a class of boys talking about women as a collection of body parts hooked together, I think it's a scandal."²²⁵ The Sadkers agree, saying that "the most clearly disturbing forms of sexism occurred in boys' schools."²²⁶ For example,

[i]n all-male classrooms teachers encouraged boys to be aggressive . . . ; one even addressed his students as "studs." . . . [D]iscussions of sexual scenes in literature sometimes degenerated into the treatment of girls as sex objects. . . .

222. *Id.* at 702.

223. *Id.*

224. Kimmel, *supra* note 161, at 142.

225. SADKER ET AL., *supra* note 130, at 279.

226. SADKER & SADKER, *supra* note 133, at 240.

[S]exual depictions of women decorated the walls in several all-boys schools.²²⁷

Finally, the researchers of the California single-gender academies noted that, at one academy, the boys were required to follow a traditionally masculine code of conduct, including such rules as standing when a woman entered the room, which “instilled a strong sense of male privilege and authority. Men were either positioned as the protector and provider or as the predator, and women were either in need of assistance or in a position of sexual objectification.”²²⁸ Accordingly, “[g]irls at this academy were most likely to express fears and frustration about persistent sexual harassment from their male peers. Likewise, as [female] researchers, we experienced discomfort and disrespect . . . in interviews with boys at this school that were never experienced anywhere else throughout the project.”²²⁹

These comments are a less intense and disturbing version of the violently misogynistic and homophobic behavior often featured in examinations of other all-male schools. For instance, Susan Faludi examined the Citadel during and immediately after Shannon Faulkner’s successful challenge of the Citadel’s exclusion of women. “That this crucible of masculine transformation could be misogynistic was a vast understatement,” she concludes, reviewing the harassment of female faculty members, tacitly encouraged and tolerated by male faculty and administrators; abuse and humiliation of “the dates,” followed by bragging about these activities; cadences with “lyrics about gouging out a woman’s eyes, lopping off body parts, and evisceration”; and the use of “female” as the ultimate insult among the cadets.²³⁰ She also notes that, especially in times of anxiety and crisis, the Citadel was “a campus consumed with a fascination for and fear of homosexuality,” including such behavior as upperclassmen warning freshmen not to bend down to pick up soap in the showers because, they would warn, “[w]e’ll use you like we used those girls,” and beatings of sophomores called “Bananarama,” where cadets were sodomized with bananas.²³¹ Her observations fit with findings that boys in single-sex classes receive the most harassment, perhaps because, in the absence of girls, certain boys are forced into feminine-gendered roles

227. *Id.*

228. Woody, *supra* note 216, at 288.

229. *Id.*

230. SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* 116–19 (1999).

231. *Id.* at 146.

such as “sissies.”²³² Given these dynamics, it is no surprise that both boys and teachers prefer coed over single-sex classes for boys.²³³

Perhaps most disturbingly, statements from such sex-segregated education proponents as Leonard Sax and Michael Gurian uncritically promote sex-segregated education as a necessary response to characteristics associated with traditional masculinity, which these proponents claim are biologically based in boys’ brains. Any boy who does not exhibit such characteristics, moreover, must be educated to become more traditionally masculine. For instance, as reviewed by the ACLU, Leonard Sax claims that

[a] boy who likes to read, who does not enjoy contact sports, and who does not have a lot of close male friends has a problem, even if he thinks he is happy. He should be firmly disciplined, required to spend time with “normal males,” and made to play sports.²³⁴

The ACLU also notes that Michael Gurian accounts for the statistical differences in boys’ and girls’ math and science achievement by stating:

Boys are better than girls in math because boys’ bodies receive daily surges of testosterone. Girls have similar skills only during the few days in their menstrual cycle when they have an estrogen surge. Because of this estrogen surge, “an adolescent girl may perform well on any test, including math, a few days a month.” Boys can do well any day.²³⁵

Gurian also trains teachers that “[p]ursuit of power is a universal male trait. Pursuit of a comfortable environment is a universal female trait.”²³⁶

Sex-segregated education proponents such as Sax and Gurian very selectively use research that has supposedly found sex-based brain differences in children to support the need for sex-segregated education. Several overall reviews of this brain research have found that these distortions come on top of even bigger methodological problems and more inconclusive findings in the brain research than in the single-sex education research. One such comprehensive review of the brain research

232. Pamela Haag, *Single-Sex Education in Grades K-12: What Does the Research Tell Us?*, in SEPARATED BY SEX, *supra* note 201, at 13, 20.

233. Patricia B. Campbell & Ellen Wahl, *What’s Sex Got To Do With It? Simplistic Questions, Complex Answers*, in SEPARATED BY SEX, *supra* note 201, at 63, 66–67; Levit, *supra* note 10, at 499.

234. *Boys’ Brains vs. Girls’ Brains*, *supra* note 198 (citing SAX, *supra* note 198, at 218–28).

235. *Id.* (quoting MICHAEL GURIAN & ARLETTE C. BALLEW, *THE BOYS AND GIRLS LEARN DIFFERENTLY: ACTION GUIDE FOR TEACHERS* 100 (2003)).

236. *Id.* (quoting GURIAN INST., *supra* note 198).

by neuroscientist and professor Lise Eliot found “surprisingly little solid evidence of sex differences in children’s brains.”²³⁷ In fact, “the behavioral and psychological differences between males and females [are m]uch smaller . . . than our physical differences are and, notably, quite small compared to the range of performance *within each sex*.”²³⁸ Furthermore, the research claims of sex-based brain differences are either “blatantly false, plucked out of thin air because they sound about right[,] . . . cherry-picked from single studies[,] or extrapolated from rodent research without any effort to critically evaluate all the data, account for conflicting studies, or even state that the results have never been confirmed in humans.”²³⁹

Professor Eliot particularly debunks many of the premises on which sex-segregation proponents rely. For instance, she characterizes as “disingenuous” Leonard Sax’s reliance on sex differences in seeing and hearing to justify his sex-segregated teaching methods,²⁴⁰ and she states that “a close look at the research on sensory differences in newborns reveals that they are small and of little relevance to children’s learning.”²⁴¹ Without naming him, she also addresses Michael Gurian’s claims that hormones affect math and science ability when she discusses the many studies that have failed to prove this premise and concludes that “high-school girls have no reason to postpone their geometry tests if they happen to be ovulating during finals week. Nor is circulating testosterone the reason why males consistently outperform females in . . . any other cognitive ability.”²⁴² Finally, although these problematic studies and conclusions are often splashed about in the media, Eliot attributes this to the “file-drawer effect”: studies finding no sex difference languish in the researchers’ file drawers because they are less interesting and therefore less publishable.²⁴³

Like Eliot, psychologist Cordelia Fine exposes serious methodological problems with much of the brain difference research.²⁴⁴ Fine also spends a significant amount of time tracing the path between such studies and the warped claims of popular writers, including sex-segregation proponents such as Gurian and Sax, whose ideas Fine describes as a “self-serving

237. ELIOT, *supra* note 26, at 5.

238. *Id.* at 11.

239. *Id.* at 8.

240. *Id.* at 62.

241. *Id.* at 59. Eliot also notes that Sax’s “presentation of the actual data on single-sex schools suffers from the same sort of cherry-picking as his proclamations about the neurologic differences between boys and girls . . .” *Id.* at 304.

242. *Id.* at 228.

243. *Id.* at 10.

244. See, e.g., CORDELIA FINE, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE* 15–17, 112–17 (2010).

projection of prejudices onto brain jargon.”²⁴⁵ Her investigations show that much of what has been presented as scientific research showing sex-based brain differences is not only problematic to begin with but also has gone through an additional process of distortion on its way to consumption by the general public. For instance, Fine repeatedly mentions Louann Brizendine, author of *The Female Brain*, a book that reviewers in *Nature* characterized as so “riddled with scientific errors” and “rife with ‘facts’ that do not exist in the supporting references”²⁴⁶ that Professor Mark Liberman has described his attempts to correct Brizendine’s errors as akin to “the circus clown that follows the elephant around the ring with a shovel.”²⁴⁷

Fine also devotes several chapters to reviewing studies that exhaustively demonstrate the ways in which societal expectations and constructions regarding gender affect and interact with cognitive and psychological functions such as intellectual abilities and interests. Among other things, she discusses a virtual treasure trove of studies regarding “stereotype threat,”²⁴⁸ whereby individual performance on certain tests is affected—often negatively—when individuals taking the test are reminded of their identity group—woman, Asian-American, European, et cetera—even in the most seemingly innocuous ways, such as answering demographic questions prior to taking a standardized test.²⁴⁹ She concludes that

[w]hen the environment makes gender salient, there is a ripple effect on the mind. We start to think of ourselves in terms of our gender, and stereotypes and social expectations become more prominent in the mind. This can change self-perception, alter interests, debilitate or enhance ability, and trigger unintentional discrimination.²⁵⁰

245. *Id.* at 155 (referring to the work of John Gray); *see also id.* 112, 139–40 (criticizing the work of Gurian and Sax).

246. *Id.* at 158 (internal quotation marks omitted) (quoting Rebecca M. Young & Evan Balaban, *Psychoneuroindocrinology*, 443 *NATURE* 634 (2006) (book review)).

247. *Id.* (quoting Mark Liberman, *The Spread of Bogus Numbers in the Meme Pool*, *LANGUAGE LOG* (Dec. 16, 2006, 8:08 PM), <http://itre.cis.upenn.edu/~myl/language-log/archives/003923.html>) (internal quotation marks omitted). Fine also provides repeated examples where Brizendine cites studies and communications supposedly proving that women’s brains are more “wired” for empathy when those studies or communications were conducted only on one sex—such that they could not compare the sexes—never sought to compare males and females, did not make the findings Brizendine claims, or simply do not exist. *Id.* at 158–61.

248. *See, e.g., id.* at 30–38, 42–44, 50–52, 172–73, 184–85.

249. *Id.* at 31–32.

250. *Id.* at xxvi.

Eliot provides a biological explanation for this phenomenon: brain plasticity. Brain plasticity means that the brain changes in response to experience, and therefore, quite simply, “your brain is what you do with it.”²⁵¹ In fact, Eliot concludes that, although there are small biological differences between the sexes at birth, it is gender socialization, incorporated into the brain through plasticity, that causes the “troublesome gaps” that develop between girls and boys.²⁵² She notes:

[Because l]earning and practice rewire the human brain . . . considering the very different ways boys and girls spend their time while growing up, as well as the special potency of early experience in molding neuronal connections, it would be shocking if the two sexes’ brains *didn’t* work differently by the time they were adults.²⁵³

Furthermore, she explains, “the male-female differences that have the most impact—cognitive skills, such as speaking, reading, math, and mechanical ability; and interpersonal skills, such as aggression, empathy, risk taking, and competitiveness—are heavily shaped by learning.”²⁵⁴

For these reasons, both Fine and Eliot conclude that education—both formal and informal—matters, but more importantly, the type of education matters. And neither is too keen on sex-segregated education. Although Eliot acknowledges that there may be “sound reasons to advocate single-sex schooling,” she insists that “sex differences in children’s brains or hormones are not among them.”²⁵⁵ Indeed, the main conclusion of Eliot’s central point regarding brain plasticity is that if we want children of both sexes to achieve and to improve in the areas in which they tend to be weaker, we need to give them less gender-stereotypic experiences so their plastic brains will grow in more balanced ways. She points out that “[t]he more similar boys’ and girls’ activities are, the more similar their brains will be,” and that “[t]here can be no doubt that success in our world increasingly requires a mixture of male and female strengths.”²⁵⁶ Therefore, “[t]he earlier we can step in and tweak kids’ growing neurons and synapses, the better our chances of raising *both* boys and girls with well-balanced sets of skills.”²⁵⁷

251. ELIOT, *supra* note 26, at 6.

252. *Id.* at 6–7.

253. *Id.* at 6.

254. *Id.* at 6–7.

255. *Id.* at 305.

256. *Id.* at 16.

257. *Id.*

Eliot also gives much evidence in support of her conclusion that “each gender has much to learn from the other.”²⁵⁸ On the one hand, early sex segregation on the playground leads to “gender intensification”: “Boys spend their time with other boys, sealing the boys-will-be-boys prophecy; girls hang out with other girls, honing one another’s chatty, cautious, and decidedly pink preferences . . . leav[ing] boys and girls with few similarities by the time they finish kindergarten.”²⁵⁹ In contrast, studies of children with older, opposite-sex siblings have shown that the younger siblings have more balanced masculine and feminine traits,²⁶⁰ with corresponding benefits for their cognitive and emotional skills.²⁶¹ As the younger siblings seek to imitate their older, opposite-sex siblings, the younger siblings tend to develop interests and activities in less gender-stereotypic ways, and their abilities become more well-rounded.²⁶² Thus, “coed classes are ultimately a better environment for deflating stereotypes of the opposite sex,” and “the greater risk—of gender stereotyping and the loss of mutual understanding—makes such segregation a step in the wrong direction.”²⁶³

Fine is even more negative—even grim—about sex-segregated education, largely because of links between the brain research—and its disingenuous use by sex segregation proponents—first to the perpetuation of stereotyping and then to potential discrimination. Fine explains these links, first, by discussing studies showing that people tend to believe scientific—particularly neuroscientific—explanations that they would otherwise identify as specious and are therefore less likely to be skeptical of the accuracy of the sex-based brain differences research.²⁶⁴ Then, she reminds us of the ways in which “so-called experts” such as Sax and Gurian have distorted findings—that were not particularly conclusive to begin with—of much brain research to support gender stereotyping of the kind quoted above.²⁶⁵ Finally, she reviews studies showing that

258. *Id.* at 312; *see also* Levit, *supra* note 10, at 499 (“Other research suggests that girls in the classroom exert a positive influence on the behavior of boys. Boys, it seems, benefit from the presence of girls . . .”).

259. ELIOT, *supra* note 26, at 154.

260. *Id.* at 41–42, 122, 136, 155, 161, 279.

261. *Id.* at 161, 279.

262. *Id.* at 122–23.

263. *Id.* at 312.

264. *See, e.g.,* FINE, *supra* note 244, at 171–72 (discussing a study where the addition of a clause referring to brain scans kept participants from identifying an explanation that, without the “neurononsense,” they easily identified as circular).

265. *Id.* at 172. Here, Fine gets help again from Professor Mark Liberman, who has analyzed and fact-checked Sax in particular and has concluded that “the disproportion

explanations of gender that “emphasize biological factors leave us more inclined to agree with gender stereotypes, to self-stereotype ourselves, and even for our performance to fall in line with those stereotypes.”²⁶⁶ These studies include one in which women who had been given an article that attributed sex differences in mathematical ability to genetics performed worse on a mathematical standardized test than women who were told that sex differences in mathematical ability were due to men’s greater efforts in math.²⁶⁷ Even more disturbingly, in a similar study, male participants who read an article that presented gender differences as scientific “fact,” in comparison to male participants who read an article that presented gender differences as under debate within the scientific community, were

more cavalier about discriminatory practices: compared with men who read the “debate” article, they agreed more with statements like “If I would work in a company where my manager preferred hiring men to women, I would privately support him,” and “If I were a manager in a company myself, I would believe that more often than not, promoting men is a better investment in the future of the company than promoting women.”²⁶⁸

Thus, according to Fine’s analysis, the justification of single-sex education using mischaracterized “facts” supposedly based in neuroscience increases the damaging effects of stereotyping even as far as possibly encouraging or at least excusing gender discrimination.

Thus, as the foregoing review has shown, although coeducation has its problems, three decades of research and experience demonstrate that it is infinitely reformable and that teachers and school officials who are committed to addressing gender inequities in school have a range of techniques available that are proven to work in coeducational settings. Furthermore, research on sex-segregated education has turned up evidence of at least as many harmful as beneficial effects of such programs. Therefore, a comparison of sex-segregated education with reformed

between the reported facts and Sax’s interpretation is spectacular,” and that Sax and Gurian’s use of scientific data is “shockingly careless, tendentious and even dishonest. Their over-interpretation and mis-interpretation of scientific research is so extreme that it becomes a form of fabrication.” *Id.* at 164–65 (quoting Mark Liberman, *Are Men Emotional Children?*, LANGUAGE LOG (June 24, 2006, 6:19 AM), <http://itre.cis.upenn.edu/~myl/languagelog/archives/003284.html>; and Mark Liberman, *Blinding Us with Science*, LANGUAGE LOG (June 19, 2007, 10:01 AM), <http://itre.cis.upenn.edu/~myl/languagelog/archives/004618.html>). And then there are the out-and-out liars, such as the educational speaker who reportedly accounts for supposed cognitive differences by stating that “the ‘crookus’—a region of the brain that does not exist—is four times larger in girls than in boys.” *Id.* at 162.

266. *Id.* at 172.

267. *Id.* at 172–73.

268. *Id.* at 185.

coeducation demonstrates the clear superiority of reforming coeducation as a way to improve educational outcomes for both girls and boys.

B. The Constitutional Analysis

It is into this indisputably rich and controversial context that ED entered when it passed its regulations allowing public school districts to create sex-segregated programs. Those regulations were quickly followed by litigation, including in *Vermilion Parish* and *A.N.A.*²⁶⁹ Because neither case was decided based on the constitutional equal protection question,²⁷⁰ they are only discussed here to the extent that they show the types of sex-segregated programs that the 2006 regulations are encouraging schools to form and why those programs are vulnerable to a constitutional challenge.

The 2006 regulations allow single-sex classes and activities in K-12 public schools under conditions that take their language from the intermediate scrutiny test. Schools must have an “important objective,” and the single-sex method must be “substantially related to achieving that objective.”²⁷¹ The regulations further permit two possible goals: (1) to “improve educational achievement of [a school’s] students, through a recipient’s overall established policy to provide diverse educational opportunities,”²⁷² and (2) to “meet the particular, identified educational needs of its students.”²⁷³ By doing so, on their face the regulations suggest

269. *Doe v. Vermilion Parish Sch. Bd.*, 421 F. App’x 366, 368 (5th Cir. 2011); *A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673 (W.D. Ky. 2011).

270. In *Vermilion Parish*, the Fifth Circuit found in favor of the student plaintiff on a standing question and remanded the case to the district court on a mootness question. 421 F. App’x at 374, 376. As a result, it did not address the equal protection issues, other than disagreeing with the district court’s finding that “intentional discrimination” was required to trigger a review of the program’s constitutionality and stating that because the program used facial sex classifications, the court did not need a finding of intentional discrimination to prompt such a review. *Id.* at 372. Similar to the district court in *Vermilion Parish*, the district court in *A.N.A.* seems to misunderstand sex-segregated programs as facial sex classifications. It found that the student plaintiffs did not have standing because there was no injury in fact, stating that “[t]he Supreme Court has never held that separating students by sex in a public school—unlike separating students by race—or offering a single-sex public institution is *per se* unconstitutional” and finding “no evidence of . . . discrimination” in the record, seeming not to realize that the facial sex classification involved in the school’s programs is all the evidence required to trigger equal protection review. *A.N.A.*, 833 F. Supp. 2d at 678–79.

271. 34 C.F.R. § 106.34(b)(1)(i) (2011).

272. *Id.* § 106.34(b)(1)(i)(A).

273. *Id.* § 106.34(b)(1)(i)(B).

that single-sex educational initiatives can be constitutional, but a closer look suggests otherwise. Indeed, such initiatives are unlikely to escape having the intermediate scrutiny test applied to them because girls and boys are in fact similarly situated with regard to education. Once the test is applied, moreover, because it requires a comparison of sex-segregated programs to the sex-neutral alternative of reforming coeducation, it is frankly hard to imagine sex-segregated public education programs passing the intermediate scrutiny test. With three decades of research and experience demonstrating the clear superiority and proven effectiveness of reforming coeducation to address gender inequalities in K-12 schools, the likelihood that the Court will approve a sex classification—especially one that carries with it potentially serious harms—seems slim to none.

1. The “Similarly Situated” Inquiry

First, as discussed above, the Court has upheld facial legislative distinctions between the sexes based on those distinctions involving areas where men and women are not similarly situated, namely in cases involving pregnancy, proof of parenthood, and combat.²⁷⁴ Because education does not involve pregnancy, proof of parenthood, or combat, it is unlikely that the Court will conclude that boys and girls are not similarly situated when it comes to education.

Moreover, the highly contested research on sex-based brain differences is unlikely to lead to girls and boys being regarded as not similarly situated in learning abilities. For one thing, the research is too questionable to establish any clear scientific proof that such differences exist, or even if they did exist, that they suggest children should be taught in single-sex groupings. In fact, in their comprehensive reviews of the brain differences research, Lise Eliot and Cordelia Fine conclude exactly the opposite: that any sex-based brain differences are very small at birth, can be greatly influenced by social factors, including education, due to the brain’s plasticity, and are likely to be increased—to the detriment of students’ educational outcomes generally—by sex segregation.²⁷⁵ For another thing, the Court has made it clear that it is skeptical about sex classifications that must rely on complicated empirical studies and proof to prove their worth.²⁷⁶ In contrast to the claims about sex-based brain differences, the non-similarly-situated areas already identified in the Court’s jurisprudence—pregnancy, proof of parenthood, and combat—are all based on simpler, more common observations. It is a simpler proposition to

274. See *supra* Part II.A.

275. ELIOT, *supra* note 26, at 312; FINE, *supra* note 244, at 165.

276. See, e.g., *Craig v. Boren*, 429 U.S. 190, 204 (1976).

say that only women can get pregnant, that there are difficulties in proving parenthood with men that do not exist for women, and that women are excluded from combat positions in the military, than it is to say women and men or even girls and boys have brain differences that are completely biological and separate from social factors.

Because girls and boys are in fact similarly situated in matters relevant to education, and because sex-segregated educational initiatives make facial distinctions based on sex, such programs will be assessed under the intermediate scrutiny test. As explained above, this means that any public single-sex educational initiative needs to be substantially related to an important government objective.

2. Important Government Objective

Four possible important government objectives are commonly advanced for sex-segregated education: (1) educational choice,²⁷⁷ (2) better education,²⁷⁸ (3) gender equity or compensation for discrimination,²⁷⁹

277. Jolee Land, Note, *Not Dead Yet: The Future of Single-Sex Education After United States v. Virginia*, 27 STETSON L. REV. 297, 318 (1997); see also JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 215–19 (1990) (analyzing the benefits of school choice); Caroline M. Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 90 AM. ECON. REV. 1209, 1228–29 (2000) (discussing the effects of school choice on academic achievement); Jenkins, *supra* note 11, at 1974–76 (concluding that the Court is likely to “find increasing diversity of educational options a sufficiently important objective for single-sex schools, at least when such diversity is offered to both sexes”); Johnson, *supra* note 10, at 669 (“The Court has seemingly recognized . . . provision of a diversity of educational choices as an important state interest . . .”); James M. Sullivan, Note, *The Single-Sex Education Choice Facing School Districts After the No Child Left Behind Act of 2001 Is Not the One That Congress Intended*, 10 GEO. J. ON POVERTY L. & POL’Y 381, 397 (2003) (“There is a strong case that providing a diversity of educational options will be found an important, if not compelling, government interest.”).

278. Jenkins, *supra* note 11, at 1971–74; Tod Christopher Gurney, Comment, *The Aftermath of the Virginia Military Institute Decision: Will Single-Gender Education Survive?*, 38 SANTA CLARA L. REV. 1183, 1212 (1998); Johnson, *supra* note 10, at 662–68; Land, *supra* note 277, at 317; Sullivan, *supra* note 277, at 388.

279. Jenkins, *supra* note 11, at 1976–78; 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, 419; Carr, *supra* note 10, at 435–37; Carrie Corcoran, Comment, *Single-Sex Education After VMI: Equal Protection and East Harlem’s Young Women’s Leadership School*, 145 U. PA. L. REV. 987, 1032 (1997); Johnson, *supra* note 10, at 655–62; Kiselewich, *supra* note 10, at 240; Land, *supra* note 277, at 317; Sullivan, *supra* note 277, at 392; Fred von Lohmann, Note, *Single-Sex Courses, Title IX, and Equal Protection: The Case for Self-Defense for Women*, 48 STAN. L. REV. 177, 213 (1995).

and (4) experimenting with or studying the effects of public K-12 single-sex education.²⁸⁰ ED's 2006 regulations incorporate two—possibly three—of these goals, educational choice and better education, both generally and as a compensatory measure, but only better education and gender equity or compensation for discrimination are likely to be accepted as truly “important.”

Educational choice is likely to be judged insufficiently important because it is a means to the end of better education rather than constituting an end in and of itself. Many proponents of school choice initiatives promote choice as a way of spurring competition between schools, the theory being that competition will increase quality among the competitors. For instance, when Governor Wilson promoted the single-sex academies discussed above, he made it clear that his primary motivation was to expand school choice, and that the “single-gender academies will stimulate competition.”²⁸¹ This effort was thus part of an overall “choice movement” fueled by “conservative social and political arguments regarding the power of the free market to inspire educational innovation, improve achievement, increase accountability, and regain parental support for public schooling.”²⁸² Moreover, that educational choice would not be an end goal makes logical sense because if the choice itself was the end goal, one would look no farther than the fact that choice exists and would not consider the content of that choice. However, making *any* educational choice would arguably not be acceptable either to educational choice proponents or to courts. Neither would promote an educational choice where, for instance, students skateboarded all day and graduated from school illiterate.²⁸³ This is in

280. Jenkins, *supra* note 11, at 1978; Rosemary Salomone, *Rich Kids, Poor Kids, and the Single-Sex Education Debate*, 34 AKRON L. REV. 209, 229 (2000); Gurney, *supra* note 278, at 1214.

281. Hubbard & Datnow, *supra* note 199, at 115 (internal quotation marks omitted).

282. Amanda Datnow et al., *Single-Sex Public Schooling as a New Form of Choice: Implications for Diversity*, in *SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS* 112, 112 (Janelle T. Scott ed., 2005); *see also* Hoxby, *supra* note 277, at 1209 (“[P]roponents [of increasing parental choice] hope that competition [will] improve schools . . .”).

283. Were the Court to accept a two-step, indirect justification such as “single-sex education promotes educational choice which promotes the important government objective of better education,” it is worth noting that several empirical studies analyzing the actual economics of school choice and whether competition does in fact lead to better schools have not produced much evidence supporting this theory. *See* Hoxby, *supra* note 277, at 1229 (saying that although choice between school districts is positively correlated with increased educational achievement, the relationship of choice between individual schools and increased achievement is “impossible to determine”); *see also* Jesse Rothstein, Comment, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 97 AM. ECON. REV. 2026, 2026 (2007) (“Hoxby’s positive estimated effect of interdistrict competition on student achievement is not robust, and . . . a fair reading of the evidence does not support claims of a large or significant effect. . . . The

fact acknowledged by the structure of the clause addressing educational choice in the 2006 regulations, which states that “diverse educational opportunities” are a method “through” which a school can “improve educational achievement.”²⁸⁴

Similarly, experimentation with sex-segregated education is unlikely to be a sufficiently important government objective because it is also not an end to itself. In addition, there is no equal protection case involving sex classifications that has accepted experimentation of any kind as an objective. Furthermore, the state of the current research on sex-segregated education plays into the Court’s general skepticism over empirical evidence. First, as reviewed above, there have been many single-sex education studies done already, and their cumulative proof for the benefits of single-sex education is inconclusive at best.²⁸⁵ Second, this inconclusiveness is likely due in part to the fact that no studies where students or parents can choose whether to send their students to a single-sex school or class can adequately control for the “pro academic choice.”²⁸⁶ The “pro academic choice” refers to the fact that students and parents who exercise their choices to go to a single-sex or other school with a particular pedagogical strategy are more engaged in their own or their child’s education. This engagement itself may have as much or more to do with student achievement than the characteristics of the school and its pedagogical methods or demographic make-up because engaged students with parents who care about their children’s education tend to have more resources for success and to value education more themselves. For these reasons, the only kind of experiment that has any hope of producing results illuminative enough to constitute an important government objective is one that removes the choice factor altogether. However, because removing all choice basically sacrifices the students in the experiment, without their full consent, to the experiment itself, it is hard to imagine a court upholding such an experiment.

In addition, as demonstrated by the Arizona experiment that sought to control for such student/parent motivation factors, this motivation is

evidence that competition among schools will improve academic outcomes is thus substantially weaker than it might have appeared.”).

284. 34 C.F.R. § 106.34(b)(1)(i)(A) (2011).

285. See *SEPARATED BY SEX*, *supra* note 201; Levit, *supra* note 10; see also MAEL ET AL., *supra* note 206, at xv (“[A]ny positive effects of [single sex] schooling on long-term indicators of academic achievement were not readily apparent.”).

286. See *supra* note 223 and accompanying text.

only one factor that may interfere with the reliability of a study seeking to measure the effectiveness of the single-sex character of a school.²⁸⁷ Other factors include the school's selection of students and the academic achievements of the peer students at the school.²⁸⁸ When the Arizona study attempted to control such factors, it concluded that "the efficacy of single-sex schools may not be a function of the gender composition of the school."²⁸⁹ This provides more evidence that a goal of experimentation is aimed at producing research that is in fact impossible to conduct.

Unlike educational choice and experimentation, better education, educational equity, and compensation for past discrimination are not subject to the criticisms advanced above and are in fact widely acknowledged to be important goals. Nevertheless, under the Court's equal protection jurisprudence, any specific single-sex initiative will have to prove that one of these goals is its true goal and is not a pretext for a different goal. For instance, Professor Valorie Vojdik points out that the Young Women's Leadership School in Harlem is vulnerable to attack because the history of its founding and current curriculum do not demonstrate that it was originally formed for its stated compensatory purpose: to improve girls' performance in math and science.²⁹⁰ Rather, it originated with a conservative think tank with an agenda to privatize schools,²⁹¹ and the intention to benefit girls was only announced after an administrative complaint was filed against the school.²⁹² In addition, the Board of Education never discussed the plans and design of the school with the Chancellor of Education's Task Force on Sex Equity in New York Schools, and the mission and curriculum of the school were not geared toward improving girls' math and science skills.²⁹³ To the extent that there is evidence that a single-sex program has been promoted to advance school choice or other goals rather than educational equity and better education, those programs could have difficulties surviving intermediate scrutiny.

287. See *supra* notes 220–23 and accompanying text.

288. Hayes et al., *supra* note 220, at 702.

289. *Id.*

290. Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 98 (1997); see also *Young Women's Leadership School*, INSIDESCHOOLS, <http://insideschools.org/high/browse/school/188> (last visited Oct. 8, 2012) (noting the lack of advanced science and math courses).

291. Vojdik, *supra* note 290, at 69.

292. *Id.* at 96.

293. *Id.* at 96–98.

3. *Substantial Relationship of Single-Sex Education to Better Education and Educational Equity/Compensation for Past Discrimination*

Even if better education and educational equity or compensation for past discrimination are judged to be real and not pretextual goals, a sex-segregated educational initiative must still be substantially related to the achievement of better education, educational equity, or both. Because the discussion about improving boys' and girls' performance is often a comparative one—comparing girls' achievements to boys' and vice versa—the two goals are a bit difficult to differentiate from each other, particularly in the absence of a particular single-sex program as an example. This is not necessarily solved by the 2006 regulations, which are themselves general.

In addition, the 2006 regulations, although they refer to a substantial relationship,²⁹⁴ do nothing to guide or regulate schools so that any single-sex programs they create do in fact bear a substantial relationship to the improved-education goal. Although schools are directed to “conduct periodic evaluations . . . at least every two years,”²⁹⁵ nothing in the regulations indicates to whom those assessments need to be reported or even that schools must cease sex-segregated programs if their assessments prove they do not advance the government objective. In addition, there is no mechanism for either enforcement by or consultation with ED, although one can presumably file a complaint through the standard process for violations of Title IX.²⁹⁶ School districts are therefore essentially left on their own to devote the substantial resources involved in assessing programs and determining their constitutionality, with virtually no consequences should they not devote those resources.

In an attempt to fill this void, this subpart will discuss first the application of the substantial relationship prong to the goal of better education for all children, understanding that most of that discussion is applicable to many educational equity goals as well. Second, this subpart

294. 34 C.F.R. § 106.34(b)(1) (2011).

295. *Id.* § 106.34(b)(4).

296. *How the Office for Civil Rights Handles Complaints*, U.S. DEP'T EDUC., <http://www.ed.gov/about/offices/list/ocr/complaints-how.html> (last visited Oct. 8, 2012) (explaining that the Office of Civil Rights enforces Title IX of the Education Amendments of 1972, “which prohibits discrimination on the basis of sex”); *How To File a Discrimination Complaint with the Office for Civil Rights*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt> (last visited Oct. 8, 2012).

will examine whether single-sex education bears a substantial relationship to the specific educational equity goal of compensating women for past discrimination.

a. Better Education for All Children

The chief proponents of sex-segregated education as a method of achieving the important government objective of better education for all children are those who believe that girls and boys have biologically-determined, sex-based brain differences that affect their learning abilities and styles. As discussed above, these proponents argue that single-sex education can adjust the classroom environment to these different sex-based learning styles and abilities and to the underlying brain differences because only one sex is present in the classroom. Because of the presence of serious sexual stereotyping in the writings of many of these proponents, as well as the questionable empirical support for their theories, single-sex educational initiatives designed along the lines advocated by these proponents are unlikely to pass the substantial relationship portion of the intermediate scrutiny test. Moreover, even if these factors were not as strong, when sex-segregated education is compared to the sex-neutral alternative of reforming coeducation, which has been proven to be much more effective in addressing the goal of better education for all children, the sex classification must fall.

With regard to sexual stereotyping, the writings of sex-segregated education proponents such as Leonard Sax and Michael Gurian that are reviewed above are rife with stereotypes that would be almost laughable if it were not so disturbing to think that teachers actually receive training in these kinds of ideas. Unfortunately, however, Sax and Gurian are only the tip of the iceberg when it comes to the stereotyping that has been repeatedly documented to occur in single-sex environments. The authors who studied the single-sex academies in California observed that the academies reinforced traditional gender stereotypes, including that girls should be “feminine and . . . concerned about their appearance” and boys should be “strong men and take care of their wives.”²⁹⁷ Authors such as Professors Verna Williams, Elisabeth Woody, Cohen, and Levit have done more extensive analyses of stereotyping in the single-sex education movement, including on the intersectionality of race and gender stereotyping in single-sex education,²⁹⁸ on the intersectionality of gender

297. AMANDA DATNOW ET AL., IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR?: LESSONS FROM CALIFORNIA’S PILOT PROGRAM 7 (2001)

298. See generally Williams, *Reform*, *supra* note 10.

and sexuality stereotyping in single-sex education,²⁹⁹ on the reinforcement of traditional and essentialist masculinity by single-sex education,³⁰⁰ and on the way in which educational segregation itself leads to stereotyping.³⁰¹ Finally, Faludi's account of life at the Citadel and research conducted by authors such as Zittleman and the Sadkers show a disturbingly misogynistic and homophobic culture at many all-male schools.³⁰²

The ample documentation of sex stereotyping in sex-segregated educational initiatives is particularly damaging under the intermediate scrutiny test when viewed in combination with empirical evidence refuting the conclusions of much of the sex-based brain differences research used by proponents such as Sax and Gurian to justify their single-sex programs. For instance, Eliot's and Fine's reviews of the brain differences research demonstrate the methodological problems with much of the research upon which sex-segregated education proponents rely, as well as how these proponents have further distorted that research.³⁰³ They also discuss the enormous amount of empirical evidence countering the conclusions of this research³⁰⁴ and emphasize how the brain's plasticity makes what happens in the home, school, and other social environments a much larger influence on the brain's development of certain skills and abilities than biological factors such as chromosomes and exposure to prenatal testosterone.³⁰⁵

In fact, Eliot's and Fine's insights on brain plasticity are perhaps most damaging when considered under the substantial relationship prong of intermediate scrutiny because they provide a scientific explanation and evidence supporting the Court's concern about "self-fulfilling prophec[ies]."³⁰⁶ For example, both Eliot and Fine review the many studies that have shown the influence of stereotype threat and "stereotype lift" on both girls' and boys' performances on challenging tests.³⁰⁷ These studies show how students' test scores are influenced by whether they

299. See generally Cohen, *supra* note 10.

300. See generally Woody, *supra* note 216.

301. See generally Levit, *supra* note 10.

302. See FALUDI, *supra* note 230, at 116–19; SADKER & SADKER, *supra* note 133, at 240–41; Woody, *supra* note 216, at 288–90.

303. ELIOT, *supra* note 26, at 304–06; FINE, *supra* note 244, at 162–65.

304. ELIOT, *supra* note 26, at 305–07; FINE, *supra* note 244, at 155–67.

305. ELIOT, *supra* note 26, at 6–8; FINE, *supra* note 244, at 236–37.

306. *United States v. Virginia*, 518 U.S. 515, 542–43 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729–30 (1982)).

307. ELIOT, *supra* note 26, at 237–39; FINE, *supra* note 244, at 30–33.

have been exposed to a stereotype about their group prior to taking the test—with negative stereotypes resulting in a “threat” and poorer performance and positive stereotypes resulting in a “lift” in performance.³⁰⁸ Such studies, combined with studies showing rampant gender and racial stereotyping in single-sex education, demonstrate that rather than advancing the important government objective of increasing educational achievement, single-sex education could actually lower students’ educational achievement through increasing the effects of stereotype threat.

Eliot’s review of the research also suggests that a proposition exactly opposite those advanced by sex-segregated education proponents is true with regard to educational achievement and sex-based brain differences. As mentioned above, the research on older and younger opposite-sex siblings suggests that when children act in nonstereotypical ways to emulate an admired member of the other sex such as an older sibling, their brains develop in a more balanced fashion, and they can learn and excel in more diverse subjects and skills.³⁰⁹ Contrary to the conclusions of single-sex education proponents such as Sax and Gurian, this research suggests that children’s educational achievements benefit from *more* interaction with children of the opposite sex and *less* sex segregation.

The schools involved in the *Vermilion Parish* and *A.N.A.* cases offer concrete examples of Eliot’s and Fine’s critiques. In *Vermilion Parish*, the school board approved an experimental single-sex middle school program, largely because the school’s principal only presented positive studies of sex-segregated education to the board when he proposed the experiment.³¹⁰ At the end of the experiment, the board approved an expansion of the program based on the principal’s presentation of falsified evidence of the pilot’s success.³¹¹ In light of these fraudulent “successes,” the school mandatorily assigned students to single-sex or coeducational classes.³¹² Students and parents were only given a choice after the plaintiff in the case wrote to the board to notify them of the classes’ illegality, a fact that the superintendent admitted not knowing.³¹³ In *A.N.A.*, the Breckenridge County Middle School (BCMS) also began sex-segregated classes as a pilot program that it quickly expanded to virtually all classes.³¹⁴ Before long, however, BCMS began to assign

308. ELIOT, *supra* note 26, at 237–39; FINE, *supra* note 244, at 30–33, 50.

309. ELIOT, *supra* note 26, at 122–23.

310. Doe v. Vermilion Parish Sch. Bd., 421 F. App’x 366, 368 (5th Cir. 2011).

311. *Id.*

312. *Id.*

313. *Id.* at 369.

314. Memorandum of Law in Support of A.N.A. Plaintiffs’ Motion for Summary Judgment at 3, A.N.A. *ex rel.* S.F.A. v. Breckinridge Cnty. Bd. of Educ., 833 F. Supp. 2d

students to single-sex classes without giving students or parents a choice, likely because it had trouble keeping class sizes balanced.³¹⁵

Both of these school districts adopted theories and teaching methodologies supposedly drawn from brain research and promoted by proponents such as Sax and Gurian. Vermilion used different teaching techniques in the all-girls, all-boys, and coed classes, including different books for the boys' and girls' classes based on the students' "perceived interests," "action techniques" with boys, and "a more quiet environment" with girls.³¹⁶ In *A.N.A.*, BCMS articulated its approach as using different teaching techniques according to what it described as each sex's "specific needs," based on "[brain] research" that "supports theories that boys and girls learn differently."³¹⁷

In both cases, the schools adopted these techniques, first as an experiment, then permanently, for the goal of improving educational outcomes for the students.³¹⁸ However, in *A.N.A.*, BCMS had in fact never sought to measure the success of its sex-segregated classes in improving education for the students, either through grades or test scores, and school officials have stated that "student performance indicators are irrelevant to their decision whether to continue offering sex-segregated classes."³¹⁹ In *Vermilion Parish*, the program did not lead to better education; the principal who proposed the program falsified evidence that grades went up during the time students were in single-sex classes when grades actually went down, and that there was a decline in behavioral problems that he attributed to sex-segregated education rather than their true source, "a state-mandated 'positive behavior support' system."³²⁰

Even aside from the insights regarding stereotyping, how the Court has applied the intermediate scrutiny test and the ways it has used empirical research do not bode well for the constitutionality of single-sex education. In fact, every comprehensive review of sex-segregated

673 (W.D. Ky. 2011) (No. 3:08-cv-00004-CRS) [hereinafter *A.N.A. Brief*], available at http://www.aclu.org/files/assets/Memorandum_of_Law_2.pdf.

315. *Id.* at 7–8.

316. *Vermilion Parish*, 421 F. App'x at 371.

317. *A.N.A. Brief*, *supra* note 314, at 4. In connection with this emphasis on brain research, the school sent teachers to the Gurian Institute, founded by one of the popular authors discussed above, Michael Gurian. *Id.* at 5. Note that BCMS began denying that it used such sex-specific teaching methods at some point after litigation commenced. *Id.* at 24, 25 n.32.

318. *Vermilion Parish*, 421 F. App'x at 368; *A.N.A. Brief*, *supra* note 314, at 3, 27.

319. *A.N.A. Brief*, *supra* note 314, at 5, 7.

320. *Vermilion Parish*, 421 F. App'x at 368.

education has emphasized the inconclusiveness of the research as to benefits, and this inconclusiveness is paralleled and echoed by the inconclusiveness of the sex-based brain difference research. In addition, the research has produced enough evidence of potential harm to cause serious concern. Looked at as a whole, therefore, the research picture increases significantly the likelihood that the Court will ignore the empirical studies or instead use them to invalidate single-sex education.

Finally, and in many ways most damaging, is the comparison between sex-segregated education and the sex-neutral alternative of reformed coeducation. Although, as discussed above, the Court has not articulated a least restrictive means requirement for sex classifications as it has for race, its cases since *Reed* indisputably indicate at least that “the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification.”³²¹ Even if this comparison is not enough on its own, when combined with the various problems single-sex education has under other parts of the test, this comparison has a “final nail in the coffin” effect. First, the research reviewed here emphasizes that comparing status quo coeducation and single-sex education, when reform of coeducation is proven to address gender inequities and improve education for all children, is the wrong comparison. Indeed, the non sequitur between “coeducation is sexist” and “we should start a single-sex school” is a deep logical flaw.

In contrast, when the right comparison is considered, it is obvious that reforming coeducation by applying sex-neutral techniques such as curricular changes targeting gender equity is a more effective method of increasing gender equity in schools. Such reform avoids the stereotyping that comes from the very fact of segregation,³²² as well as the stereotyping spouted by sex-segregation proponents such as Sax and Gurian. In addition, as the California single-gender academies experiment shows, even when teachers and administrators have not imbibed such stereotypes, if they have no training or knowledge of how gender operates in schools and how to make education more equitable, they can inadvertently engage in stereotyping.³²³ Moreover, the California experiment suggests that the single-sex environment increases the tendency for this inadvertent stereotyping,³²⁴ perhaps because the presence of members of the sex being stereotyped cannot check such behavior the way having members of the stereotyped group in the same room naturally does. The California academies show that nothing about single-sex environments makes them

321. *Nguyen v. INS*, 533 U.S. 53, 78 (2001).

322. *Levit*, *supra* note 10, at 521.

323. *DATNOW ET AL.*, *supra* note 297, at 44.

324. *Id.* at 7.

immune from sexism,³²⁵ and Faludi's account of the rampant misogyny and homophobia at the Citadel indicates the exact opposite: that single-sex environments can be rife with sexism.³²⁶ Researchers agree that sex-segregated environments do not necessarily promote equity when gender issues are not addressed curricularly or pedagogically.³²⁷ So if teachers need training in the gender dynamics of classrooms and other school settings, as well as pedagogical techniques to deal with such dynamics, regardless of whether that setting is sex-segregated, why not apply those techniques in a coeducational setting, thereby avoiding the inherent messages of inequality sent by segregation?

This question demonstrates that truly separate but equal single-sex education is unachievable, at least as the Court defines it. In *United States v. Virginia*, the Court made clear that equality was to be measured by tangibles such as facilities and intangibles such as curriculum.³²⁸ Therefore, under *Virginia* such curricular and pedagogical methods would only be acceptable in one school if they did not differ too much from other schools, including coeducational ones. This Article shows that achieving equity through curriculum and pedagogy in coeducation achieves better equity outcomes than single-sex education does, so any possible gender equity promotion advantage to single-sex education goes away if these methods are implemented in coeducation, leaving only the invidious classification. The situation presents a practical catch-22 in that the Court's jurisprudence essentially requires schools to implement methods that are more effective in coeducation and thus cannot pass the intermediate scrutiny test's comparison of sex-specific and sex-neutral alternatives.

There are other practical difficulties. Although governments in the past have regularly used administrative convenience as a justification for a facial sex classification, no one is alleging such a purpose here. This could be in part because the Court has roundly struck down classifications relying on such purposes.³²⁹ More likely, however, is that these schemes are markedly *inconvenient*. Because all are agreed that mandating single-sex education is out of the question, a public school that provides single-sex education for any purpose other than compensation for past

325. See *supra* notes 216–18, 228–29 and accompanying text.

326. See *supra* notes 230–31 and accompanying text.

327. SEPARATED BY SEX, *supra* note 201, at 9.

328. 518 U.S. 515, 551 (1996).

329. See *supra* notes 91–92 and accompanying text.

discrimination must offer each student a viable choice between a single-sex and a coeducational option. Practically speaking, this means at least three classes per grade level. It also means three teachers, three classrooms, and three sets of class schedules to coordinate. This might be possible in a school large enough to support so many classes, if only the practical difficulties stopped there. They do not because every child's choice to be in one class or the other affects the gender balance of the coeducational class. This is particularly an issue if boys find single-sex environments less attractive than girls do, as the research suggests they do.³³⁰ If girls overwhelmingly choose the single-sex class, the boys and a few girls are left in a "coeducational" environment that is actually either all-boy or boy-dominated. In addition, because the school has done all of its sorting of students by gender, it cannot sort students based on their academic strengths and weaknesses or other traits associated with learning, such as speaking English as a second language. Finally, because of the tangible and intangible equality mandate already discussed, there is pressure to keep all classes operating at exactly the same pace, regardless of the abilities of the students in the course.

Although these difficulties might not factor into the calculus in private or even public charter schools, these schools are neither educating the vast majority of children in a particular geographic school district nor functioning as the last resort for schooling for all students in that geographic area. Therefore, their experiences with sex-segregated education are not really transferable to the K-12 public school context, as is illustrated by the schools at issue in *Vermilion Parish* and *A.N.A.* First, in *Vermilion Parish*, the single-sex classes were less popular with boys than with girls, so the coed classes were not fully coed, with the overall ratio being 73% boys to 27% percent girls.³³¹ Likewise, in *A.N.A.*, BCMS had trouble keeping class sizes balanced, with all-girls and coed classes being generally more popular—coed classes being the most popular—and therefore about twice the size of the all-boys classes,³³² meaning that the all-girls and coed classes did not get the benefits of small class size that the all-boys classes did.³³³ This was despite both schools engaging in "steering" techniques. BCMS sent letters to parents encouraging them to choose single-sex classes.³³⁴ In *Vermilion Parish*, the principal individually called and convinced over thirty parents who originally

330. See *supra* note 233 and accompanying text.

331. *Doe v. Vermilion Parish Sch. Bd.*, 421 F. App'x 366, 370 (5th Cir. 2011).

332. *A.N.A. Brief*, *supra* note 314, at 8 n.7.

333. *Id.* at 39.

334. *Id.* at 22 n.25.

selected coed classes to switch to single-sex classes.³³⁵ Second, the school in *A.N.A.* was not able to maintain the same pace and level of instruction in both the single-sex and coed classes. The most advanced eighth grade math class, for instance, was the all-girls class, and the all-boys and coed classes “moved at a slower pace . . . and used a less advanced textbook” than the all-girls class.³³⁶ The school’s apparent attempt to correct this inequality was to begin sending the all-girls class to the computer lab and having the all-boys class meet more often; no acceleration efforts were apparently made with the coed class.³³⁷ Although BCMS continues its sex-segregated programs, Vermilion Parish ended its program in 2011 because not enough families chose sex-segregated classes.³³⁸

As these difficulties show, from an administrative perspective, the sheer inconvenience of sex-segregated education versus reformed coeducation damages the case for single-sex education. These cases also demonstrate that such administrative difficulties hinder the achievement of both better education for all children and educational equity. When looked at through the lens of intermediate scrutiny and the comparison between sex-neutral and sex-specific means, it is hard to conceive of the Supreme Court upholding a classification that not only is not *more* effective than the sex-neutral method but is actually demonstrably *less* effective.

335. *Vermilion Parish*, 421 F. App’x at 370.

336. First Amended Complaint at 27, *A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673 (W.D. Ky. 2011) (No. 3:08-cv-00004-CRS), available at http://www.aclu.org/files/pdfs/womensrights/ana_v_usdeptofeducation_amendedcomplaint.pdf.

337. *Id.* at 28.

338. *Vermilion Parish School Board Ends Single-Sex Program*, FEMINIST MAJORITY FOUND. (June 14, 2011), <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=13059>. Vermilion Parish is not the only school district returning to coeducation. In 2008, the *New York Times* reported:

Lori Clark, principal at Jefferson Leadership Academies in Long Beach, Calif., which in 1999 became the first public middle school in the country to convert to a single-gender format, is in the process of reverting her school to coed. “We just didn’t get the bang for the buck we’d been hoping for with our test scores,” Clark told me. “Our master schedule is like one of those old Rubik’s cubes. It’s hard enough to make sure each kid gets *this* level English class and *that* level math class—and then we need to account for if that student is a boy or a girl? We just couldn’t have our hands tied like that.”

Weil, *supra* note 129.

b. Educational Equity/Compensation for Past Discrimination

Besides the goal of improved education, the ED's 2006 regulations may contemplate an additional important government objective of educational equity or compensation for past discrimination.³³⁹ The second possible objective listed by the regulations is to "meet the particular, identified educational needs of [a school's] students,"³⁴⁰ which could include a specific educational need linked to past discrimination and needing compensation. In any case, educational equity or compensation for past discrimination is an objective that the Supreme Court has ruled to be an important government objective.³⁴¹

However, as discussed above, the *Webster* case is arguably the only one where the Court has upheld a sex classification by applying the intermediate scrutiny test consistently with its other precedents not involving similar-situation problems and concluding that the classification was in fact substantially related to the important government objective of compensating women for past discrimination. A closer look at the case shows the factors that the Court regarded as supporting its conclusion. First, the classification, which was designed to compensate women for the unequal pay they have received throughout history, did not "in fact penalize[] women wage earners,"³⁴² "was not a result of 'archaic and overbroad generalizations' about women,"³⁴³ and its "only discernible purpose [for] more favorable treatment [was] the permissible one of redressing our society's longstanding disparate treatment of women."³⁴⁴ Based on the foregoing analysis, it is questionable whether single-sex education, even if only for girls and only to compensate for past discrimination, could satisfy any of these characteristics. First, to the extent that contemporary sex-segregated programs rely on the sex-based brain difference research or sex-segregated education proponents' often-distorted use of that research, the stereotyping evident especially in the proponents' use of the research will present problems under the *Webster* precedent. Second, even if some programs do not rely on such ideas, the research on stereotype threat suggests that even a seemingly innocuous suggestion of being stereotyped, such as filling out demographical information prior to a test, can have detrimental effects on the stereotyped group, both in terms of the group's self-perception and the

339. *See supra* Part II.B.1.

340. 34 C.F.R. § 106.34(b)(1)(i)(B) (2011).

341. *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam).

342. *Id.*

343. *Id.* (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

344. *Id.* (quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977)).

discrimination that others may enact based on the stereotype.³⁴⁵ Therefore, to the extent that sex-segregated education gives institutional legitimacy to stereotypes, the research suggests that it can have not just theoretically but actually harmful effects on the stereotyped groups.³⁴⁶ Finally, in a public school district providing the majority of K-12 education, as well as the school of last resort option, it is likely logistically impossible to allow sex-segregated education for girls only without skewing the gender ratio in coeducation, leading school districts to provide either de jure or de facto sex-segregated education for boys. Because studies on traditional masculinity indicate that traditional masculinity teaches boys to associate sex segregation with female inferiority, and messages of female inferiority lead to such problematic behaviors as sexual harassment and gender-based violence, where the victims are primarily girls and women,³⁴⁷ K-12 sex-segregated public education could cause indirect harm to girls and women. Such an effect would be the exact opposite of compensation for past discrimination.

As if these problems were not enough, once again the comparison between the sex-neutral alternative of reforming coeducation and the sex-specific classification of single-sex education will likely prove fatal even to affirmative action programs to compensate women for past discrimination. The *Webster* Court made very clear that it upheld the classification because “[t]he challenged statute operated *directly* to compensate women for past economic discrimination.”³⁴⁸ It stretches credulity to regard sex-segregated education as a more direct method of addressing past discrimination when one could reform coeducation so that both boys and girls are educated together about that past discrimination and have a chance to learn how to work together across gender lines to achieve a better, more equitable future.

IV. CONCLUSION

Of the twenty-five agencies that have regulations that enforce Title IX in some way, only ED has adopted an interpretation supporting sex-segregated education.³⁴⁹ Even some of those who have counted themselves

345. See *supra* notes 248–50, 308 and accompanying text.

346. See *supra* notes 248–50, 308 and accompanying text.

347. See *supra* notes 171–72, 230 and accompanying text.

348. *Califano v. Webster*, 430 U.S. 313, 318 (1977) (per curiam) (emphasis added).

349. *A.N.A. Brief*, *supra* note 314, at 41–42, 44.

as supporters of sex-segregated education, such as Rosemary Salomone, who was recruited to write the regulations, may be changing their minds about their support in light of what has occurred since the 2006 regulations were passed.³⁵⁰ This lack of support comes on top of the “equivocal” conclusions that ED itself made when it reviewed the research, looking for support that single-sex education was a useful and beneficial method by which to improve education.³⁵¹

In short, only a tiny minority of any group appears to support sex-segregated education, and the experiences of schools such as those in *Vermillion Parish* and *A.N.A.* suggest that the tiny minority is using some very suspicious and troubling tactics, including distortion, stereotyping, and even fraud, to advance their agenda. Yet despite these tactics, as the *Vermillion Parish* and *A.N.A.* cases again confirm, when given a choice, the majority of students and parents still prefer coeducation. Thus, in passing the 2006 regulations, ED has given a governmental imprimatur to sex-segregated education that is in fact not supported by the usual indicia—legal, policy-based, political, or otherwise—that such governmental approval suggests. Moreover, this imprimatur has led some school districts to waste valuable resources experimenting with an expensive, difficult, largely ineffective, and ultimately both unpopular and unconstitutional educational approach. Their resources are wasted further when they are sued due to their often inadvertent violations of Title IX and the Constitution.

With regard to the constitutional question examined here, concerns about single-sex initiatives from constitutional, legal, empirical, policy, political, and resource-based perspectives are valid. It would be one thing if there were evidence that coed reform was unrealistic or exhausted as a remedy. But there is not, and contrary to one commentator’s observation, the methods and strategies available are not “a vague if optimistic call for systemwide reform.”³⁵² They are concrete, effective, and capable of creating real change without the dangers of invidious classifications. In light of the productive and effective ways we could be reforming coeducation, the valuable time and money that are diverted by single-sex initiatives from the greater benefits of such coeducational reform, and the fact that, even when given a choice, most students and parents prefer coeducation, the question must be asked, “Why sex-segregated education and why now?”

350. See Weil, *supra* note 129 (discussing Salomone’s evolving view on single-sex education).

351. See *supra* note 206 and accompanying text.

352. Karen Stabiner, *Boys Here, Girls There: Sure, If Equality’s the Goal*, WASH. POST, May 12, 2002, at B1.

Instead of supporting sex-segregated education, ED can and should change its regulations to give incentives to schools to achieve gender equity and better educational outcomes for both boys and girls through the reform of coeducation. To quote one commentator, “[W]hy . . . should [children have to] choose between bad coeducation and [a sex-segregated] option[?]”³⁵³ And as women’s rights attorney and professor Isabelle Katz Pinzler says,

To save all the babies we need to focus on both the equality and quality in education for all children, all girls and all boys. Realistically, that means co-education for all but a very few. So we had better make sure that that education is as excellent and as bias-free as possible.³⁵⁴

353. 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, 48 (1998).

354. Pinzler, *supra* note 10, at 807.