

SINGLE-SEX EDUCATION

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I. INTRODUCTION

Does single-sex education provide developmental benefits and encourage women to pursue nontraditional fields? Or does single-sex education allow gender stereotypes to go unchallenged? In an educational system with a history of segregation along gendered, racial, and economic lines, the question of whether single-sex education promotes gender equity remains unanswered. The legality of single-sex schooling, particularly for primary and secondary institutions, is similarly unclear.

For a large number of public elementary and secondary school students, the experiment is already underway. As of May 2022, about 366 public schools qualified as single-sex schools or have single-sex classrooms.¹ In March 2002, by contrast, fewer than two dozen public schools offered single-sex classrooms to their students.²

While many students and parents have welcomed single-sex educational opportunities, scholars and civil rights groups such as the American Civil

1. Grace Chen, *Single-Sex Public Schools*, PUB. SCH. REV. (May 20, 2022), <https://perma.cc/9X5L-VVA3>.

2. Kenneth Jost, *Single-Sex Education: Do all-boy and all-girl schools enhance learning?*, 12 CQ RESEARCHER 569, 569 (2002), <https://perma.cc/D355-FJBY>.

Liberties Union (ACLU) believe that the separation of the sexes in education undermines the fight for gender equality. As a result, they have voiced strong opposition to the expansion of single-sex education.³

The original limitations on single-sex education derived from the Equal Protection Clause of the Fourteenth Amendment.⁴ Congress established further limitations in 1972 through Title IX of the Education Amendments, which prohibits discrimination on the basis of sex in any federally funded education program or activity.⁵ Since a 2006 amendment to Title IX, the United States (U.S.) Department of Education (DOE) has allowed for single-sex classes in coeducational schools only in certain instances, such as in sex education classes, physical education classes, or where the recipient of federal funding alleges an “important objective.”⁶

This Article will examine the current legal status of single-sex schooling in primary and secondary education. Part II sets up the constitutional framework for single-sex schooling. Part III provides an overview of the legal status of single-sex schools in elementary and secondary education, including consideration of the impact of the No Child Left Behind Act of 2001 (NCLB), its successor, the Every Student Succeeds Act of 2015, and subsequent regulations on single-sex elementary and secondary education, as well as popular arguments for and against increased expansion of single-sex classes and schools. Part IV discusses legal considerations in the context of higher education, including Title IX and major Supreme Court cases. Part V considers arguments for and against single-sex education and the need for additional research in this area. Finally, Part VI explores potential future challenges and changes to single-sex education. By providing an overview of the legal history of single-sex schooling in elementary and secondary education, this Article creates a framework for understanding the current debate over single-sex schooling.

II. CONSTITUTIONAL AND STATUTORY FRAMEWORK: THE EQUAL PROTECTION CLAUSE

The Fourteenth Amendment of the U.S. Constitution prohibits states from denying citizens equal protection of the laws.⁷ The Supreme Court has also held that the Fifth Amendment contains an equal protection component that similarly constrains the federal government.⁸ Although the Constitution does not provide a

3. Rosemary Salomone, *Evaluating Claims About the “End of Men”: Legal and Other Perspectives: Panel IV: Education: Rights and Wrongs in the Debate Over Single-Sex Schooling*, 93 B.U. L. REV. 971, 973 (2013); see also *Sex-Segregated Schools: Separate and Unequal*, AM. C.L. UNION, <https://perma.cc/E5JB-X7KN> (last visited Sept. 19, 2022).

4. U.S. CONST. amend. XIV, § 1.

5. Educational Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C.A. 1681) (West, Westlaw through Pub. L. No. 117-262).

6. Stephanie Monroe, Assistant Sec’y for Civil Rights, *Dear Colleague Letter*, U.S. DEP’T OF EDUC. (Apr. 20, 2010), <https://perma.cc/HMU7-XDLG>.

7. U.S. CONST. amend. XIV, § 1.

8. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678 n.1 (2017) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975)) (“This Court’s approach to Fifth Amendment equal protection claims has

fundamental right to education,⁹ the Court's Equal Protection jurisprudence requires heightened scrutiny of any laws that treat citizens differently based on suspect classifications like race, ethnicity, and sex,¹⁰ except laws regulating abortion, which need only survive rational basis review as of June 2022.¹¹ The Court in *Brown v. Board of Education*, applying strict scrutiny¹² to school assignments based solely on race, construed the Equal Protection Clause to mean that "in the field of public education the doctrine of 'separate but equal' has no place."¹³ Although *Brown* struck down racial segregation in public education, the theory that separate is "inherently unequal" has been noticeably absent from cases challenging gender discrimination in public education.¹⁴ Furthermore, at least two courts have ruled that schools which segregate students by sex are constitutional.¹⁵

In the last fifty years, the Supreme Court has spoken only three times on the issue of single-sex education.¹⁶ Yet, these few decisions, in addition to federal legislation, have changed the legal landscape for the treatment of sex in educational contexts.¹⁷ The Supreme Court's two-pronged analysis for determining whether state action violates the Equal Protection Clause asks whether: (1) the

always been precisely the same as to equal protection claims under the Fourteenth Amendment." (citations and internal quotation marks omitted; alteration in original).

9. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

10. *See Reed v. Reed*, 404 U.S. 71, 75 (1971) (applying heightened scrutiny to gender); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying heightened scrutiny to race). However, it is important to note that the Equal Protection Clause applies only to state action and thus does not apply to private schools unless state influence can be established. *See Brentwood Acad. v. Tenn. Secondary Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1975)); *see generally* *The Fourteenth Amendment and the State Action Doctrine*, 24 WASH. & LEE L. REV. 133 (1967) (discussing history of the amount of state action needed to show nexus).

11. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245 (2022) ("[A] State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications.").

12. 347 U.S. 483 (1954); *see Korematsu*, 323 U.S. at 216 (noting legal restrictions that curtail rights of any racial group are automatically subject to rigid scrutiny).

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

14. *See United States v. Virginia*, 518 U.S. 515, 553–56 (1996) (holding that excluding women from the all-male Virginia Military Institute was unconstitutional because the proposed remedy of an alternative Virginia Women's Institute for Leadership was not equal to the all-male Virginia Military Institute, but noting that the constitutionality of an "equal" all-female institution may remain an open question).

15. *See Vorchheimer v. Sch. Dist.*, 532 F.2d 880, 888 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977); *A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673, 678 (W.D. Ky. 2011).

16. *See Virginia*, 518 U.S. at 515; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Vorchheimer*, *aff'd* 430 U.S. 703.

17. Congress enacted Title IX pursuant to its powers under U.S. CONST. amend. XIV, § 5. *See The 14th Amendment and the Evolution of Title IX*, U.S. CTS., <https://perma.cc/BP98-VMXA> (last visited Apr. 4, 2023).

goal that the state seeks to achieve is constitutional and (2) the means implemented are sufficiently related to achieving that goal.¹⁸ Over time, as the Court has applied this analysis to various cases and situations, a hierarchy of “classifications” has developed. Strict scrutiny, the most stringent analysis applied by courts, is reserved for classifications based on race and requires that a state’s conduct be necessary to further a compelling state interest.¹⁹

Prior to 1976, the Court recognized only one other level of scrutiny—minimal scrutiny, also known as the rational basis test—which requires only that state conduct be rationally related to a legitimate state purpose.²⁰ Because sex classifications were considered less “invidious” than racial classifications, courts originally applied the rational basis test²¹ and thereby increased the likelihood that future courts would uphold sex classifications.²² Thus, in *Hoyt v. Florida*, a law that exempted females from jury service was held constitutional because, despite women’s “entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.”²³ Similarly, in *Goesaert v. Cleary*, the Court determined that it was reasonable for a Michigan law to prevent all women from being bartenders unless their husband or father was the tavern owner because “the oversight assured through ownership of a bar by a barmaid’s husband or father minimizes hazards that may confront a barmaid without such protecting oversight.”²⁴

Over a period of roughly twenty years, the Supreme Court struggled with the question of where to place sex classifications within the scrutiny hierarchy. In a 1973 plurality decision by Justice Brennan, four Justices recognized that “sex, like race . . . is an immutable characteristic determined solely by the accident of birth”²⁵ and as such is “inherently suspect, and must therefore be subjected to strict judicial scrutiny.”²⁶ Only three years later, in *Craig v. Boren*, the Court established “intermediate scrutiny” for sex classifications, a standard requiring

18. See Laura Fortney, Comment, *Public Single-Sex Elementary Schools: “Separate But Equal” in Gender Fifty Years Following Brown v. Board of Education*, 35 U. TOL. L. REV. 857, 861 (2004).

19. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding Virginia prohibition on interracial marriages violates equal protection because the racial classification is not “necessary to the accomplishment of some permissible state objective”); Holly Dyer, Comment, *Gender-Based Affirmative Action: Where Does it Fit in the Tiered Scheme of Equal Protection Scrutiny?*, 41 KAN. L. REV. 591, 594 (1993) (“Strict scrutiny requires that there be a compelling government interest or purpose and that the means employed to remedy the discrimination closely fit that purpose.”).

20. See Fortney, *supra* note 18, at 861.

21. See Dyer, *supra* note 19, at 596.

22. See *id.* at 592.

23. 368 U.S. 57, 62 (1961).

24. 335 U.S. 464, 466 (1948); see also *Bradwell v. Illinois*, 83 U.S. 130, 142 (1872) (holding law prohibiting women from joining state bar constitutional because a legislature could rationally believe that practice of law requires “decision and firmness which are presumed to predominate in the sterner sex”).

25. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

26. *Id.* at 688.

that sex classifications “serve important governmental objectives” and “be substantially related to achievement of those objectives.”²⁷

In the 1979 plurality decision of *Personnel Administrator v. Feeny*, the Supreme Court further stated that the “important government objective” prong of the intermediate scrutiny standard “would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.”²⁸ The “exceedingly persuasive justification” standard was adopted by a majority of justices in 1981 by *Kirchberg v. Feenstra*.²⁹ Though scholars question its clarity,³⁰ the Supreme Court has continued to use the “exceedingly persuasive justification” standard in the context of single-sex higher education.³¹ With conservatives composing a six to three supermajority on the Supreme Court since the Trump appointments of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney-Barrett, the “exceedingly persuasive justification” standard may disappear altogether should the Court take up single-sex education again.³²

III. ELEMENTARY AND SECONDARY EDUCATION

A. LITIGATION AFTER THE NO CHILD LEFT BEHIND ACT

Two federal court decisions—*A.N.A. ex rel. S.F.A. v. Breckinridge County Board of Education*³³ in 2011 and *Doe v. Wood County Board of Education*³⁴ in 2012—have helped clarify the meaning of the 2006 regulations at the elementary

27. 429 U.S. 190, 197 (1976) (holding Oklahoma law prohibiting the sale of non-intoxicating beer to males under the age of twenty-one and to females under the age of eighteen unconstitutional).

28. 442 U.S. 256, 273 (1979).

29. 450 U.S. 455, 461 (1981) (“[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an ‘exceedingly persuasive justification’ for the challenged classification.”).

30. See Herman D. Hofman, *Exceedingly [Un]persuasive and Unjustified: The Intermediate Scrutiny Standard and Single-Sex Education and United States v. Virginia*, 2015 MICH. ST. L. REV. 2047, 2072–94 (2015); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The Base Plus Six Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 238 (2002); Pherabe Kolb, Comment, *Reaching for the Silver Lining: Constructing a Nonremedial Yet “Exceedingly Persuasive” Rationale For Single-Sex Education in Public Schools*, 96 NORTHWESTERN U. L. REV. 367, 374 (2001) (noting that the “exceedingly persuasive” rationale led “some legal scholars to question whether the legal standard for reviewing gender classifications had been drastically altered”); Elizabeth Douglas, Note, *United States v. Virginia: Gender Scrutiny Under an “Exceedingly Persuasive Justification” Standard*, 26 CAP. U. L. REV. 173, 179–80 (1997) (“[W]ith no clear standard of what constitutes an exceedingly persuasive justification for gender discrimination, Equal Protection Clause jurisprudence has given rise to much debate regarding the implications of this seemingly heightened level of intermediate scrutiny.”).

31. See *Virginia*, 518 U.S. at 524; *Hogan*, 458 U.S. at 724.

32. See Wilson R. Huhn, *The Impact of Justice Scalia’s Replacement on Gender Equality Issues*, 8 CONLAWNOW 47, 51 (2001).

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

34. See generally *Doe v. Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d 771 (S.D. W. Va. 2012).

and secondary education level. In *Breckinridge County*, the Western District of Kentucky upheld the constitutionality of the regulations,³⁵ while in *Wood County*, the Southern District of West Virginia went a step further and defined “complete voluntariness” in participating in single-sex programs.³⁶

In Breckinridge County, Kentucky, the parents of students attending Breckinridge County Middle School (BCMS), filed a class action challenging the legality of the school’s decision to offer single-sex classes to its students.³⁷ The plaintiffs asserted that the single-sex education program, implemented under the provisions set forth in 34 C.F.R. § 106.34, violated both state and federal law.³⁸ They argued that “all BCMS students are injured by being required to attend a public middle school which engages in sex discrimination in education by offering a single-sex program.”³⁹

The Western District of Kentucky rejected the plaintiffs’ argument that the coexistence of single-sex and co-educational classes constitutes a form of discrimination.⁴⁰ It distinguished between separation based on sex and separation based on race, stating that, as a matter of law, “[i]ndividuals are harmed when they attend schools in which students are separated on the basis of race because such separation ‘generates a feeling of inferiority . . . that may affect [students’] hearts and minds in a way unlikely to ever be undone.’”⁴¹ While the court noted that precluding students from educational opportunities based solely on sex without an “exceedingly persuasive justification” is unconstitutional,⁴² it held that such a violation did not occur in this case, since BCMS students were given the option to participate in either single-sex or co-educational classes.⁴³ Because the choice to participate in single-sex classes was left to the discretion of the students’ parents and because there was no finding of “a concrete and particularized harm to any legally protected interest” as a result of BCMS’s program, the court dismissed the plaintiffs’ claims.⁴⁴

The court in *Wood County* was presented with a different issue. In that case, a mother and her three daughters, who attended Van Devender Middle School (VDMS) in Parkersburg, West Virginia, alleged that the school’s single-sex education program violated Title IX and the Equal Protection Clause.⁴⁵ Unlike the

35. *Breckinridge*, 833 F. Supp. 2d at 678.

36. *Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d at 776.

37. *Breckinridge*, 833 F. Supp. 2d at 674.

38. *Id.* at 675–76 (arguing that the program violated Title IX, the Equal Education Opportunities Act, the Equal Protection Clause, and the Kentucky Sex Equity Education Act).

39. *Id.* at 677. According to plaintiffs, “single-sex and coeducational classes can never offer substantially equal educational opportunities,” and thus “the mere exposure to such alleged inequality is injurious to BCMS students.”

40. *Id.* at 677–78.

41. *Id.* at 678 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

42. *Id.*; see also *Virginia*, 518 U.S. at 515; *Hogan*, 458 U.S. at 732.

43. *Breckinridge*, 833 F. Supp. 2d at 678–79.

44. *Id.* at 682.

45. *Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d at 773–74.

program at BCMS, in which students were given the option to participate in either single-sex or co-educational classes, students at VDMS were automatically placed in single-sex classes and then given the option to opt out of them.⁴⁶ Noting that the 2006 regulations require that student enrollment in a single-sex class or extracurricular activity be completely voluntary,⁴⁷ the court determined that VDMS program was unconstitutional. Although the DOE failed to define “completely voluntary” when it adopted the 2006 regulations, the court took “completely voluntary” to mean that participation in single-sex classes “require[s] an affirmative assent by parents or guardians,”⁴⁸ preferably in the form of a written, signed agreement “explicitly opting *into* a single-sex program.”⁴⁹ Because the program did not require affirmative assent from students’ parents or guardians, the opt-out provision in VDMS program did not meet the requirement that single-sex classes be “completely voluntary.”⁵⁰ Though the Southern District of West Virginia held that the program implemented by VDMS failed to meet the 2006 regulations’ requirements, it nonetheless noted that single-sex education programs are constitutional when they comport with Title IX’s guidelines.⁵¹

The *Breckinridge County* and *Wood County* decisions are notable in that both uphold the legality of the 2006 regulations. Taken together, these decisions suggest that single-sex classes do not constitute a form of discrimination where participation in such classes is a choice.

B. THE EVERY STUDENT SUCCEEDS ACT

Despite NCLB’s position as the overarching legislation on education in the U.S., NCLB faced significant backlash throughout the years, mainly because the law used tests to measure students’ achievement and sanctioned schools that failed to improve.⁵² Further, NCLB was criticized as too far-reaching and a “one-size-fits-all approach” to education.⁵³ Thus, in December 2015, President Barack Obama signed the Every Student Succeeds Act (ESSA), which largely rewrote

46. *See id.* at 777.

47. 34 C.F.R. §106.34(b)(1)(iii) (West, Westlaw through Feb. 23, 2023).

48. *Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d at 775–76 (“In order to ensure that participation in any single-sex class is completely voluntary . . . the recipient is strongly encouraged to notify parents, guardians, and students about their option to enroll in either a single-sex or coeducational class and receive authorization from parents or guardians to enroll their children in a single-sex class.” (emphasis added) (quoting Nondiscrimination on the Basis of Sex Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530, 62,537 (Oct. 25, 2006))).

49. *Id.* at 776 (emphasis in original).

50. *Id.* (“presuming that parents or guardians have enrolled their children in a single-sex class completely voluntarily because they failed to opt out would undermine the purpose of Title IX to prevent discrimination based on gender”).

51. *See id.* at 779.

52. Maggie Severns, *How Congress finally killed No Child Left Behind*, POLITICO (Dec. 11, 2015, 4:17 PM), <https://perma.cc/N5YA-KBLD>.

53. Gregory Korte, *The Every Student Succeeds Act vs. No Child Left Behind: What’s Changed?*, USA TODAY (Dec. 10, 2015), <https://perma.cc/9V7K-T3S9>.

NCLB.⁵⁴ ESSA attempts to balance federal and state powers by retracting some of NCLB's federally imposed regulations in favor of giving the states more decision-making power.⁵⁵ The bill was a bipartisan success in an often gridlocked Congress,⁵⁶ passing the House 359–64 and the Senate 85–12.⁵⁷

ESSA retained parts of NCLB—including federally mandated standardized testing—but eliminated penalties for states with poor test results.⁵⁸ ESSA allows each state to set its own performance goals, as well as repercussions if those individualized goals are not met.⁵⁹ ESSA prevents states from imposing certain academic requirements, such as the Common Core State Standards Initiative or the requirement that every student become proficient in math and reading by a set date.⁶⁰ Essentially, ESSA provides broadly defined guidelines for states' individual accountability goals and plans.⁶¹ While NCLB imposed sanctions for schools that did not meet federal goals, ESSA provides that federal requirements to close gaps in achievement will be imposed only on the schools that struggle the most (the bottom 5%)⁶² and does not mandate *how* the states will do so.⁶³

Although disability, adequate reporting, and abuse and harassment litigation has commenced under ESSA, no litigation has yet been brought regarding single-sex education. Thus, it remains to be seen if or how ESSA will affect the issue.

IV. HIGHER EDUCATION

A. TITLE IX

Title IX of the Education Amendments was signed into law on June 23, 1972 and places a general prohibition on discrimination on the basis of sex in “any education program or activity receiving Federal financial assistance.”⁶⁴ Unlike the Equal Protection Clause, which applies only to government action,⁶⁵ Title IX

54. Every Student Succeeds Act, 20 U.S.C.A. § 6301 (West, Westlaw through Pub. L. No. 117–262).

55. See Tim Walker, *With Passage of Every Student Succeeds Act, Life After NCLB Begins*, NEATODAY (Dec. 9, 2015), <https://perma.cc/HXR3-KV2N>.

56. Julie Hirschfield Davis, *President Obama Signs Into Law a Rewrite of No Child Left Behind*, N.Y. TIMES (Dec. 10, 2015), <https://perma.cc/6GTX-UJPU>.

57. *Severns*, *supra* note 52.

58. See *Every Student Succeeds Act, Accountability, State Plans, and Data Reporting: Summary of Final Regulations*, U.S. DEP'T OF EDUC., <https://perma.cc/D77A-DDND> (last visited Mar. 5, 2023).

59. *Id.*

60. *Id.*

61. See *id.*

62. See *id.*

63. *Id.*

64. Discrimination Based on Sex or Blindness, 20 U.S.C.A. § 1681 (West, Westlaw through Pub. L. No. 117–262 (excluding 113–128)) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .”).

65. U.S. CONST. amend. XIV; see *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the Equal Protection Clause of the Fourteenth Amendment applies only to state action).

applies to both public and private institutions, due to the federal funding provision.⁶⁶

However, for several reasons, Title IX should not be viewed as a prohibition on single-sex education. First, the law applies only to vocational or professional education, graduate higher education, and public institutions of higher education,⁶⁷ leaving the door open to single-sex public education at the elementary and secondary levels.⁶⁸ Second, at the undergraduate level, the law exempts any institution “that traditionally and continually from its establishment has had a policy of admitting only students of one sex.”⁶⁹ Third, the DOE’s Office for Civil Rights (OCR) has promulgated regulations that offer three exemptions under which single-sex groupings are explicitly allowed: (1) physical education classes when such grouping is “assessed by objective standards of individual performance” and during participation in sports involving bodily contact;⁷⁰ (2) human sexuality classes in elementary and secondary schools;⁷¹ and (3) groupings within choruses “based on vocal range or quality.”⁷² Despite these exceptions and the fact that Title IX does not contain an explicit prohibition on single-sex education, the statute has become a legal roadblock for those educators who have tried to open single-sex schools.

Title IX also has implications for single-sex institutions’ considerations of whether, and how, to admit transgender students. In April 2014, OCR issued guidance on Title IX expressly stating that the regulation protects transgender students from discrimination.⁷³ Subsequently, many women’s colleges put in place, or revised, policies on admitting transgender students.⁷⁴ In 2016, the Obama administration issued a second Dear Colleague letter, outlining the accommodations that schools were required to make in order to ensure a safe and non-discriminatory environment for trans students.⁷⁵ These letters comprised “significant guidance,” but no changes were made to the regulation through the formal notice and comment channels.⁷⁶ In February

66. 20 U.S.C.A. § 1681 (West, Westlaw through Pub. L. No. 117–262).

67. 20 U.S.C.A. § 1681(a)(1) (West, Westlaw through Pub. L. No. 117–262).

68. See JULIET WILLIAMS, *THE SEPARATION SOLUTION?: SINGLE-SEX EDUCATION AND THE NEW POLITICS OF GENDER EQUALITY* 29–30 (2016).

69. 20 U.S.C.A. § 1681(a)(5) (West, Westlaw through Pub. L. No. 117–262); see *Hogan*, 458 U.S. at 732 (recognizing that although the school’s admission policy fails under the Equal Protection Clause, it appears that the school would have been exempt from Title IX’s prohibitions under subsection 5).

70. Access to Classes and Schools, 34 C.F.R. § 106.34(a)(1)–(2) (West, Westlaw through Feb. 23, 2023).

71. 34 C.F.R. § 106.34(a)(3) (West, Westlaw through Feb. 23, 2023).

72. 34 C.F.R. § 106.34(a)(4) (West, Westlaw through Feb. 23, 2023).

73. *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T OF EDUC. (Apr. 29, 2014), <https://perma.cc/EWS3-A4XD>.

74. Anna North, *Can transgender students go to women’s colleges? Across the country, the answer is evolving.*, VOX (Sept. 22, 2017), <https://perma.cc/YA4Y-CJFL>.

75. *Dear Colleague Letter on Transgender Students*, U.S. DEP’T OF JUST., U.S. DEP’T OF EDUC. (May 13, 2016), <https://perma.cc/DT9L-V2ZJ>.

76. *Id.* (“ED and DOJ (the Departments) have determined that this letter is *significant guidance*. This guidance does not add requirements to applicable law but provides information and examples to inform

2017, the Department of Justice and the DOE under the Trump administration issued a Dear Colleague letter withdrawing the previous letter's guidance, but in 2021 the Biden administration reversed this guidance and issued an executive order protecting students from discrimination on the basis of sex, sexual orientation, or gender identity.⁷⁷

B. *MISSISSIPPI UNIVERSITY FOR WOMEN v. HOGAN*

Five years after *Vorchheimer*, the Supreme Court addressed the issue of sex segregation in higher education in *Mississippi University for Women v. Hogan*.⁷⁸ Joe Hogan, a male nurse, applied to the Mississippi University for Women, a state-supported all-female college, because the University's School of Nursing offered the closest nursing baccalaureate program to Hogan's home. Although otherwise qualified, he was rejected on the basis of the University's female-only admission policy. Applying a substantial relationship test (the stricter test considered by the *Vorchheimer* Court),⁷⁹ the Supreme Court held that the state-sponsored university violated the Equal Protection Clause by limiting enrollment to women and denying admission to otherwise qualified men.⁸⁰ Because it was clear that Hogan was denied admission on the basis of sex, the primary question before the Court was whether the state had a legitimate interest in keeping the school all-female. The University argued that restricting admission to females was a kind of "educational affirmative action" that compensated females for past discrimination.⁸¹ While acknowledging the permissibility of gender-based classifications when it serves to benefit a sex that is disproportionately burdened, the Court held that "Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field."⁸² Thus, the admissions policy was unconstitutional because it was not narrowly

recipients about how the Departments evaluate whether covered entities are complying with their legal obligations."

77. Sandra Battle & T.E. Wheeler, II, *Dear Colleague Letter*, U.S. DEP'T OF JUST., U.S. DEP'T OF EDUC. (Feb. 22, 2017), <https://perma.cc/KBK6-SFRJ>; Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 69 Fed. Reg. 11, 276 (Mar. 9, 2004).

78. *Hogan*, 458 U.S. at 720.

79. *Id.* at 721, 724. The district court ordered summary judgment for the Mississippi University for Women on the grounds that the single-sex institution bore a "rational relationship" to the State's legitimate interest "in providing the greatest practical range of education opportunities for its female student population." The Fifth Circuit reversed, recognizing that the lower court improperly applied a rational basis test to a gender classification. *Hogan v. Miss. Univ. for Women*, 646 F.2d 1116, 1118 (5th Cir. 1981).

80. *Hogan*, 458 U.S. at 725–26. ("The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.")

81. *Id.* at 727.

82. *Id.* at 729.

tailored to remedy a specific discrimination suffered and thereby discriminated against men in making non-compensatory classifications under the Equal Protection Clause of the Fourteenth Amendment.⁸³ The Court's analysis in this case clearly articulated the intermediate scrutiny standard: it noted that there must be important governmental objectives that create an "exceedingly persuasive justification" for any sex-based classification.⁸⁴ Furthermore, "the discriminatory means employed [must be] 'substantially related to the achievement of those objectives'" to be constitutional.⁸⁵

C. *UNITED STATES V. VIRGINIA*

In 1996, the Supreme Court issued another critical opinion on the constitutionality of single-sex education in *United States v. Virginia*.⁸⁶ The U.S. sued Virginia on behalf of all qualified female students who were denied admission to the Virginia Military Institute (VMI) because of their sex. Rejecting Virginia's contention that admitting women would change the nature of the institution, the Court ruled against VMI's male-only admission policy. Although Virginia argued that the single-sex admission policy at VMI was substantially related to the goal of providing diverse educational opportunities, the Court held that an "exceedingly persuasive justification" was required for sex-based classifications, and Virginia's justification did not meet this standard.⁸⁷

Justice Ginsburg's majority opinion assessed VMI's arguments using a heightened scrutiny standard.⁸⁸ It first considered VMI's contention that its founding as a single-sex school was substantially related to a Virginia state objective of providing a diverse array of educational options.⁸⁹ The Court noted that when VMI was founded in 1839, few national universities or colleges accepted women, and no Virginia institution did so.⁹⁰ Even though the state later opened some all-female colleges, by the time *Virginia* reached the Court, most of these schools and all of Virginia's all-male schools (with the exception of VMI) had begun to admit members of both sexes.⁹¹ VMI's reluctance to admit females rendered it an anomaly amongst formerly all-male Virginia schools, and as a result, the Court held that VMI's single-sex existence could not have been the product of a state policy of diversity.⁹²

83. *Id.* at 730.

84. *Id.* at 724.

85. *Id.*

86. 518 U.S. 515 (1996).

87. *Id.* at 534.

88. *Id.* at 541 (cautioning reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia).

89. *Id.* at 536–37.

90. *Id.*

91. *Id.* at 537.

92. *Id.* at 539.

The Court likewise declined to adopt VMI's argument that admitting women would force the school to modify its adversative training techniques.⁹³ VMI alleged that admitting women would force it to eliminate certain aspects of its training program and thus deny the benefits of such training to both men and women.⁹⁴ In rejecting VMI's logic, the Court relied on expert testimony that "some women . . . are capable of all of the individual activities required of VMI cadets."⁹⁵ The Court's rejection of both VMI arguments provided a strong precedent against single-sex education when segregation is justified solely based on traditional notions regarding the abilities of men or women.⁹⁶ Accordingly, in order for a state to justify instituting educational sex-based segregation, it must have an "exceedingly persuasive justification" for doing so, and the solution must be directly tied to the problem it confronts.⁹⁷

The Court further held that Virginia's proposed remedy, the formation of a Virginia Women's Institute for Leadership (VWIL), could not provide an experience and benefits similar to those of VMI⁹⁸ and thus failed to adequately cure the state's violation.⁹⁹ "A remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of [discrimination]."¹⁰⁰ VWIL students would not benefit from VMI's superior alumni network, prestigious degree, expansive endowment, and superior athletic facilities.¹⁰¹ Thus, female students seeking specific benefits from VMI could not obtain them through VWIL; the proposed school failed to place female students in the position they would have occupied absent VMI's discrimination.¹⁰² Therefore, Virginia's proposed remedy failed to directly address the sex-based discrimination.¹⁰³ The Court compared the situation to that of *Sweatt v. Painter*, in which Texas's decision to establish a law school for "Negro students" rather than admit African American students to the University of Texas School of Law failed the "substantially comparable test" because the newly established school could not provide educational opportunities similar to those at the University of Texas.¹⁰⁴ Just as no solution offered by Texas other than integration could

93. *Id.* at 541.

94. *Id.* at 540 (referencing VMI's allegations that "[a]lterations to accommodate women would necessarily be . . . so 'drastic' . . . [as to] 'destroy' VMI's program").

95. *Id.* at 540-41.

96. See Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 948 (2007). As Judge Pillard notes, Justice Ginsberg's analysis prevents "even statistically accurate" stereotypes regarding male and female abilities from entering into a justification for state-supported sex segregation. See *id.*

97. *Virginia*, 518 U.S. at 546.

98. *Id.* at 547-48.

99. See *id.*

100. *Id.* at 547 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

101. *Id.* at 526-27.

102. *Id.*

103. *Id.* at 534.

104. *Id.* at 553 (referencing *Sweatt v. Painter*, 339 U.S. 629 (1950)).

possibly provide African Americans with an experience equal to that of white students attending the University of Texas, no solution other than integration could provide young women with the same opportunities available to young men at VMI.¹⁰⁵

While the Supreme Court has never returned to Justice Brennan's strict scrutiny standard for sex classifications,¹⁰⁶ the Court did indicate a preference for heightening the level of scrutiny applied to gender cases in its *Virginia* opinion.¹⁰⁷ Although the Court majority explained this language using the traditional intermediate scrutiny test, Justice Scalia's *Virginia* dissent argued that the Court effectively heightened the scrutiny afforded sex classifications by using the "exceedingly persuasive" language.¹⁰⁸ He argued that the majority's language incorrectly introduced a new element into intermediate scrutiny; that is, the Court appeared to be requiring a "least-restrictive-means analysis, [rather than] only a substantial relation between the classification and the state interests that it serves."¹⁰⁹ The Supreme Court has continued to apply traditional "intermediate scrutiny" analysis while using the "exceedingly persuasive" language, effectively subjecting the educational institutions to a functionally higher standard.¹¹⁰ While the *Virginia* opinion hinted at heightening scrutiny for sex classifications, it did not explicitly promote a stricter standard of review. At least for the present, traditional "intermediate scrutiny" requiring application of a "substantial relationship" test controls; it remains to be seen whether the Court, in future cases, will choose to use "exceedingly persuasive" when applying intermediate scrutiny, or return to the substantial relationship standard unmodified by the "exceedingly persuasive language" or even use the "exceedingly persuasive" precedent as a stepping stone to justifying a shift to a strict scrutiny standard.

V. PUBLIC POLICY CONSIDERATIONS

In many ways, the debate over single-sex schooling mirrors struggles within feminist movements. For decades, feminists have debated whether gender-neutral laws or gender-sensitive laws are more likely to achieve substantive equality for

105. *Id.* at 554.

106. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

107. *Virginia*, 518 U.S. at 533. *But see id.* at 567–68 (Scalia, J., dissenting) (describing the opinion of the majority as improperly applying strict scrutiny to its assessment of VMI's justifications for maintaining a single-sex atmosphere).

108. *See id.* at 573.

109. *See id.* In his dissent, Justice Scalia argues that, if any change is to be made to the standard of review applied to gender classifications, "the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied rational-basis review until the 1970's . . ." *Id.* at 575 (citation omitted).

110. *See* Cora Leeuwenburg, *Separating Boys and Girls in Illinois Schools*, INSIDE COMPLIANCE (Sept. 18, 2020), <https://perma.cc/Z3EH-MXSP>.

women.¹¹¹ While there are biological differences between the sexes, courts and legislative bodies have struggled to determine when those differences justify or necessitate disparate or separate treatment. Though the DOE does not maintain a comprehensive list of schools providing single-sex education,¹¹² Education Week Research Center estimated that more than 366 public schools provided single-sex opportunities as of the 2022–2023 school year.¹¹³ That number will likely continue to grow as educators dissatisfied with current teaching methods continue to search for more effective approaches.

A. ARGUMENTS FOR SINGLE-SEX SCHOOLS

For educators seeking to combat challenging conditions in public schools, single-sex education provides a possible solution.¹¹⁴ In some urban areas, educators consider single-sex education a way to address the systemic challenges facing young men of color.¹¹⁵ The arguments for single-sex education generally fall into one of three categories. The first and most controversial argument is that boys and girls learn differently.¹¹⁶ The second argument deals with social relationships in the classroom and includes both distractions caused by members of the opposite sex and subtle differences in the ways that different genders are treated in co-educational settings.¹¹⁷ The third and final argument contends that parents should have diverse options.¹¹⁸

111. See generally Rosemary C. Salomone, *Feminist Voices in the Debate Over Single-Sex Schooling: Finding Common Ground*, 11 MICH. J. GENDER & L. 63, 67 (2004); See, e.g., Nicole Noll, *Gender Equality Does Not Equal Gender Neutrality*, GENDERSCI LAB (Feb. 17, 2020), <https://perma.cc/FP2X-4X9Y>.

112. WILLIAMS, *supra* note 68, at 7.

113. Grace Chen, *Single-Sex Public Schools*, PUB. SCH. REV. (last updated Feb. 10, 2023), <https://perma.cc/4CM2-GE53>. While federal data points to more than one thousand single-sex public schools, that figure excludes “juvenile justice facilities, alternative, special education, and vocational schools.” Corey Mitchell, *Single-Gender Public Schools in 5 Charts*, EDUC. WK. (Nov. 2, 2017), <https://perma.cc/XB5H-AVJF>. The National Association for Single Sex Public Education removed its database of single-sex schools in 2011 after learning that the ACLU was using it to identify programs potentially operating in violation of federal law. WILLIAMS, *supra* note 68, at 7.

114. See Grace Chen, *Why Single-Sex Public Schools are Growing in Popularity*, PUB. SCH. REV. (Jan. 13, 2023), <https://perma.cc/N5Z6-THT5>.

115. See Catherine Gewertz, *Black Boys’ Educational Plight Spurs Single-Gender Schools; New Federal Rules Seen as Chance for Innovation*, EDUC. WK. (Feb. 22, 2019), <https://perma.cc/SUD9-JN2N> (suggesting proponents of single-sex education aim to implement “instructional strategies that research suggests might work well for boys”).

116. *All Girls, All Boys, All Good—The Benefits of Single-Sex Education*, AM. FOREIGN SERV. ASS’N, <https://perma.cc/2P5Y-6PEF> (last visited Feb. 26, 2023).

117. See generally AM. ASS’N OF UNIV. WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS* (1992) (reporting on studies on girls’ experiences from elementary school through secondary school in the early 1990s); Ingela Åhslund & Lena Boström, *Teachers’ Perceptions of Gender Differences: What about Boys and Girls in the Classroom?*, 17 INT’L J. LEARNING 28 (2018), <https://perma.cc/X6Z3-XVRQ>.

118. See David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation’s Experiment with State-Sponsored Sex Segregation in Education*, 44 SETON HALL L. REV. 339, 352 (2014) (noting, with some disapproval, that “parental choice” is a primary argument of single-sex education proponents).

On the first argument, some proponents of single-sex schools argue that male and female brains develop in different patterns and, therefore, that separating boys from girls allows educators to teach more effectively to each group. Much of this argument is premised on the research of Carol Gilligan. Her seminal work, *In a Different Voice: Psychological Theory and Women's Development*, provides a thorough exploration of differences in the ways boys and girls approach problem-solving.¹¹⁹ She argues that U.S. culture tends to value, reward, and take as the norm male development.¹²⁰ While past research from the National Association for Single Sex Public Education proposed that physical differences between the male and female brain affected the ways boys and girls learn, more modern research has not found any significant connections between brain differences and the way boys and girls learn or how they should be taught.¹²¹ Recent research suggests that differences between men and women's brains are due to the physical size of the brain, not the gender of the person.¹²²

To the second argument, some proponents of single-sex education express concern about social interactions in coeducational classrooms. In 1991, the American Association of University Women conducted a groundbreaking study of girls in co-educational settings in grades K-12.¹²³ They found evidence of bias in teachers and curricula that undermines girls' self-esteem and discourages them from pursuing non-traditional careers, such as those involving math and science.¹²⁴ Myra and David Sadker, trailblazing researchers on the impact of sexism in the classroom, also researched the effects of co-educational classrooms for years and found that boys tend to receive more attention—both positive and

119. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (2d ed. 1993).

120. *Id.* at 14.

121. Educational psychologists have found that girls tend to be excessively critical of their academic performance, while boys tend to overestimate their academic abilities. This finding has led some to the conclusion that girls and boys would benefit from different teaching styles, namely, one that encourages girls and gives boys a "reality check." See Amy Novotney, *Coed versus single-sex ed: Does separating boys and girls improve their education? Experts on both sides of the issue weigh in.*, AM. PSYCH. ASS'N, <https://perma.cc/7ZQU-7VZK> (last visited Mar. 5, 2023). Additionally, some research has found structural differences between the brains of men and women. For example, female brains have a larger hippocampus, the brain's memory center. Female brains also typically featured more cross-hemisphere coordination, whereas males' brain activity was more "closely coordinated within local brain regions." Bruce Goldman, *Two Minds: Cognitive Differences Between Men and Women*, STAN. MED. (SEX, GENDER & MED.) (Spring 2017); Daniel Robinson, Jennifer Mitton, Greg Hadley, & Meagan Kettley, *Single-Sex Education in the 21st Century: A 20-year Scoping Review of the Literature*, 106 *TEACHING & TEACHER EDUC.* 1, 9 (2021).

122. *Massive Study Led by Rosalind Franklin University Neuroscientists Reveals Few Differences Between Men and Women's Brains*, ROSALIND FRANKLIN UNIV. (Mar. 29, 2021), <https://perma.cc/YTV8-NSX5>.

123. See generally AM. ASS'N OF UNIV. WOMEN, *supra* note 117 (reporting on studies on girls' experience in school from elementary school through secondary school in the early 1990s).

124. See *id.* at 45, 117.

negative—in the classroom.¹²⁵ Accordingly, they became strong advocates for thoughtfully structured single-sex public education.¹²⁶

To the final argument: the upsurge in schools experimenting with single-sex programs correlated with the explosion of “school choice” policies around the country.¹²⁷ NCLB played a role in this trend, requiring unsafe and failing schools to give students the option of transferring to better-performing public schools.¹²⁸ This phenomenon is particularly noticeable in urban districts where chronic underfunding has contributed to failing schools.¹²⁹ NCLB illuminated a landscape in which uncertain legal status for single-sex education discouraged experimentation.

While Title IX’s prohibition against discrimination on the basis of sex does not expressly bar single-sex schools, the court’s holding in *Garrett* signaled that the legal protections for single-sex schools were questionable at best. As such, few school systems sought to repeat Detroit’s attempted experiment with single-sex schools. A decade after *Garrett*, Congress took a first step towards clarifying the legal status of single-sex schools in NCLB, declaring that school systems could use federal funds to create single-sex schools and classrooms.¹³⁰

In 2015, ESSA, which neither prohibits nor expressly discourages single-sex education, replaced the NCLB.¹³¹ The DOE continues to permit single-sex public schools, so long as students of the excluded sex have access to “a substantially equal single-sex school or coeducational school.”¹³² Thus, advocates of single-sex education claim to enjoy sufficient legal protection in a post-NCLB era.

125. See MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA’S SCHOOLS CHEAT GIRLS* (1994), at 46–50; *Myra Sadker: 1943-1995*, MYRA SADKER FOUND., <https://perma.cc/4NH4-SFDV> (last visited Apr. 4, 2023).

126. See *id.* at 232 (“Single-sex schools, once dismissed as an anachronism, are now seen by many as a model for educating girls.”).

127. See Alia Wong, *Public Opinion Shifts in Favor of School Choice*, THE ATLANTIC (Aug. 21, 2018) <https://perma.cc/7DYL-CJJU>; *Fast Facts on School Choice*, EDCHOICE, <https://perma.cc/PR6J-J2XT> (last modified Feb. 26, 2023); Nora Caplan-Bricker, *The Trouble With Boys-Only Schooling*, NEW REPUBLIC (Mar. 12, 2013) <https://perma.cc/HBC2-E4SH>.

128. See *Choices for Parents*, U.S. DEP’T OF EDUC., <https://perma.cc/ZZX8-3ZCD> (last visited Mar. 6, 2023); Grace Chen, *Understanding No Child Left Behind*, PUB. SCH. REV. (Apr. 9, 2022), <https://perma.cc/TWN4-UPZ8>.

129. While NCLB required school choice options for students in failing urban public schools, those options often failed to reach students. More than 70% of parents in a sample of eight urban school districts reported not being notified of school choice options, despite all eight districts producing notification letters. RAND Corporation, *Title I School Choice and Supplemental Educational Services Under No Child Left Behind* (2008) (Research Brief).

130. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 §5131(a)(23) (repealed 2015).

131. See Statement of Purpose, 20 U.S.C.A. § 6301 (West, Westlaw through Pub. L. No. 117-262); Every Student Succeeds Act, 114 Pub. L. No. 95, 129 Stat. 1802.

132. Access to Classes and Schools, 34 C.F.R. § 106.34 (c)(1) (West, Westlaw through Feb. 23, 2023).

B. ARGUMENTS AGAINST SINGLE-SEX SCHOOLS

Critics have objected to the growing prevalence of single-sex education on several grounds, including concerns that: (1) single-sex education will perpetuate negative stereotypes about females; (2) separate education can never be equal; (3) single-sex education is losing relevance in light of new ideas about gender fluidity; and (4) single-sex education lacks empirical research.

First, in light of historical discriminatory treatment of women, some worry about the ways in which sex-segregation could perpetuate stereotypes. Single-sex education has traditionally been viewed as reinforcing gender norms such as by training girls to be wives and mothers and training boys for professional careers.¹³³ By stressing the biological differences between boys and girls, proponents of single-sex schools sometimes exacerbate these concerns.¹³⁴

Single-sex education has raised concerns about entrenching racial stereotypes as well as gender stereotypes. For example, in *Garrett*, the court acknowledged that “[t]he [single-sex] Academies were developed in response to the crisis facing African-American males manifested by high homicide, unemployment, and drop-out rates,”¹³⁵ but nonetheless held that the school system had not demonstrated that the exclusion of girls was “substantially related” to that crisis.¹³⁶ The district court in *Garrett* was particularly concerned about the potential of the planned all-male academies to encourage stereotypes rather than undermine them.¹³⁷

A second argument against single-sex schooling stems from skepticism that separate-but-equal education is realistic in any context.¹³⁸ Opponents of single-sex education argue that sex segregation in education “creates the risk of breeding second-class citizens.”¹³⁹ Separation “represents subordination and inferiority, it perpetuates harmful stereotypes, and in the case of single-sex programs, it stigmatizes girls.”¹⁴⁰ In fact, concerns about such stigma seemed to be a motivating

133. Kelsey Chapple, *Sports for Boys, Wedding Cakes for Girls: The Inevitability of Stereotyping in Schools Segregated by Sex*, 94 TEX. L. REV. 1, 5 (2016); Robert Blake Watson, *Applying Bostock: The Queer Case against Public Single-Sex Schooling*, 51 J.L. & EDUC. 185, 185 (2022).

134. Research using biology to justify existing differences in males and females, often empirically flawed, nonetheless tends to reinforce and exacerbate those differences. Chapple, *supra* note 133, at 548 (“Essentially, when stereotypes are backed by a biological justification, we are more likely to accept them as true and perform in accordance with the stereotypes.”).

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

136. *Id.*

137. *See id.* (noting that plaintiff’s argument that the proposed “Rites of Passage” curriculum at the all-male academies, which teaches that men need vision and a plan for living, “suggests a false dichotomy between the roles and responsibilities of boys and girls”).

138. *See, e.g.*, Salomone, *supra* note 111, at 74 (“Women’s advocates remember all too well the Philadelphia litigation where it became apparent that Girls’ High School was receiving significantly fewer resources than the all-boys Central High.”).

139. Sean Alfano, *Single-Sex Education Gets More Leeway*, CBS NEWS (Oct. 24, 2006), <https://perma.cc/ED87-PXAK> (citing the National Organization for Women).

140. *See* Salomone, *supra* note 111, at 73.

factor for both the district court in *Garrett* and the Supreme Court in *Virginia*. In *Garrett*, the court found that the proposed all-male academies risked stigmatizing girls in two ways:¹⁴¹ first, by acknowledging the difficulties for both sexes but only responding to male challenges, male academies create a false dichotomy between the sexes;¹⁴² and second, using single-sex schools as a remedy for low levels of male achievement may imply that their success requires the absence of females.¹⁴³ Similarly, the *Virginia* Court expressed concern that Virginia officials were perpetuating stereotypes about traditional female careers by excluding women from the state's historically all-male military academy.¹⁴⁴

Furthermore, opponents of single-sex education regard it as increasingly out of touch with contemporary understandings of gender and sex.¹⁴⁵ Both academic literature¹⁴⁶ and popular culture¹⁴⁷ have progressively rejected a strict cisgender binary in favor of an understanding of gender identity as a masculine-feminine spectrum, with an individual's position on that spectrum not predetermined by biology. Critics of single-sex education argue that it affirms and entrenches the gender binary and categorizes those outside of that binary as "an exception to the rule."¹⁴⁸ Indeed, opponents have expressed concern that transgender and gender-nonconforming gender identities may be incompatible with the core mission of single-sex education, often premised on the notion that there are fundamental, biological differences between boys and girls.¹⁴⁹ Transgender and gender-nonconforming students who desire single-sex education may experience intense psychological pressure trying to locate themselves within the binary on which single-sex programs are largely based.¹⁵⁰

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

142. *Id.* ("Urban girls drop out of school, suffer loss of self-esteem and become involved in criminal activity. Ignoring the plight of urban females institutionalizes inequality and perpetuates the myth that females are doing well in the current system.")

143. *Id.* ("Even more dangerous is the prospect that should the male academies proceed and succeed, success would be equated with the absence of girls rather than any of the educational factors that more probably caused the outcome.")

144. See *Virginia*, 518 U.S. at 550.

145. See, e.g., WILLIAMS, *supra* note 68, at 160 ("While long consigned to the margins of the [single-sex education] debate, questions concerning the educational interests and needs of gender non-conforming students have been gaining visibility in recent years . . .").

146. See, e.g., Julie L. Nagoshi, Stephanie Brzuzy, & Heather K. Terrell, *Deconstructing the Complex Perceptions of Gender Roles, Gender Identity, and Sexual Orientation Among Transgender Individuals*, 22 FEMINISM & PSYCH. 405, 412–14 (2012).

147. See, e.g., Candice Jalili, Taylor Andrews, & Rachel Varina, *Here's What You Need to Know About the Meaning of "Non-Binary"*, COSMOPOLITAN (May 26, 2022), <https://perma.cc/KB4E-V8KQ>.

148. Janna Jackson, 'Dangerous Presumptions': How Single-Sex Schooling Reifies False Notions of Sex, Gender, and Sexuality, 22 GENDER & EDUC. 227, 228 (2008).

149. *Id.* at 236 ("The diversity within genders and of genders and the diversity of anatomical sexes renders assumptions behind single-sex education overly simplistic and limiting."); see also WILLIAMS, *supra* note 68, at 163. ("[O]ne question we might consider is whether continued public support for single-sex public education will reinforce the idea that most children naturally fit into the categories 'girls' and 'boys.'")

150. See WILLIAMS, *supra* note 68 at 163. Transgender and non-binary students may also face legal challenges in accessing single-sex education consistent with their gender identity. *Tennessee v. U.S.*

Finally, even supporters of single-sex schooling have voiced concern that empirical research has not been properly utilized. While ample research on single-sex education exists, implementing successful single-sex programs has proved challenging. Some proponents argue that research supports specific kinds of educational strategies, but the government's current approach does not consider those strategies.¹⁵¹

C. THE NEED FOR ADDITIONAL RESEARCH

The DOE, while noting considerable academic debate on the subject, acknowledged “educational research [suggesting] that in certain circumstances, single-sex education provides educational benefits for some students.”¹⁵² The validity of single-sex approaches could depend on the demonstrable, empirical benefits of single-sex schooling.¹⁵³ The DOE conducted a meta-analysis of quantitative studies comparing single-sex schooling to co-educational schooling.¹⁵⁴ Unsurprisingly, given the academic discord over the past thirty years, the results were generally mixed.¹⁵⁵ Other individuals and groups have conducted similar comprehensive surveys of the major studies comparing single-sex education to co-education;¹⁵⁶ few were able to find evidence of a significant advantage to single-sex institutions. While self-esteem may improve in

Dep't of Educ., 2022 WL 2791450 (E.D. Tenn. July 15, 2022) (holding that states have standing to challenge the DOE's guidance interpreting Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and enjoining the DOE from enforcing the challenged guidance documents until the case is resolved on the merits); *but see* Enf't of Title IX of the Educ. Amend. of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton Cnty*, 86 Fed. Reg. 32637-01 (effective June 22, 2021) (“Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and to provide the reasons for this interpretation, as set out below.”).

151. See David Sadker & Karen Zittleman, *Single-Sex Schools: A Good Idea Gone Wrong?*, CHRISTIAN SCI. MONITOR (Apr. 8, 2004), <https://perma.cc/5BL6-YQZY>.

152. Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 69 Fed. Reg. 11,276, 11, 276 (Mar. 9, 2004). Later regulations have not added anything new to the discussion of single-sex education or changed the existing regulatory scheme. See, e.g., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 FR 30026-01.

153. Jay Matthews, *These top-flight all-girls public schools are proving the value of single-sex education*, WASH. POST (June 3, 2020 7:00 AM), <https://perma.cc/RLQ7-QVPQ>. There seems to be implicit support for this logic even in federal guidance. See *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. DEP'T OF EDUC., OFF. FOR C.R. (Dec. 1, 2014), <https://perma.cc/NS96-XQZU> (holding that the justification for single-sex education, and the evidence cited, “may not rely on overbroad generalizations about the different talents, preferences, or capacities of either sex”).

154. U.S. Dep't of Educ., *Single-Sex Versus Coeducation Schooling: A Systematic Review* (2005), <https://perma.cc/WH3B-2AG2>.

155. Leonard Sax, *Single-Sex Education Can Work*, CHARLESTON GAZETTE-MAIL (Nov. 21, 2017), <https://perma.cc/37AT-QSM3>.

156. See, e.g., Robinson, Mitton, Hadley, & Kettley, *supra* note 121, at 1.

single-sex contexts, social skills may decrease, and gender stereotypes might increase. For example, research shows that single-sex education does not generate academic success,¹⁵⁷ lacks scientific support,¹⁵⁸ and may lead to increased gender stereotyping.¹⁵⁹ Critics argue that the problem with single-sex education is not that it fails to produce academic improvement but rather that it reduces opportunities for boys and girls to work together purposefully.¹⁶⁰ This assertion reinforces the notion that schooling is not purely academic; it is an important component of an individual's social growth.¹⁶¹ Thus, single-sex education may have harmful, unintended consequences for those who choose to forego the co-educational route.

Other case studies have produced contrary findings regarding academic achievement in the single-gender context. The Irma Lerma Rangel Young Women's Leadership School in Dallas, which opened its doors in 2004, was met with "dazzling" success.¹⁶² Its students far exceeded state and district averages on state standardized tests and received statewide distinction for postsecondary readiness.¹⁶³ In another instance, a Tampa school district chose to establish separate boys' and girls' academies in 2011.¹⁶⁴ From 2018 to 2019, students at the Ferrell Girls Preparatory Academy performed above district averages on standardized tests in reading and math.¹⁶⁵ Testing averages for students at the all-boys' Franklin Middle Magnet fell at or below district averages for reading and math tests in the 2018–2019 school year.¹⁶⁶ Teachers and administrators at the Tampa schools argued that significant differences exist between boys and girls, and that each school offers certain resources and specialized teaching methods in order to

157. See Nicole M. Else-Quest & Oana Peterca, *Academic Attitudes and Achievement in Students of Urban Public Single-Sex and Mixed-Sex High Schools*, 52 AM. EDUC. RSCH. J.L. 693, 696 (2015).

158. See Robinson, Mitton, Hadley, & Kettley, *supra* note 121, at 1, 9.

159. Erin Pahlke & Janet Hyde, *The Debate Over Single-Sex Schooling*, 10 CHILD DEV. PERSPS. 81, 82 (2016).

160. *Id.*

161. The social impact of single-sex education is a topic of popular debate, given the controversy surrounding the alleged high school behavior of Justice Brett Kavanaugh. Critics argue that the culture at the all-male Georgetown Preparatory School, which Justice Kavanaugh attended, was one in which students were "inevitably steered toward" gender reinforcing behavior, including the objectification of women. See Kim Elsesser, *Brett Kavanaugh and the Downside of Single-Sex Schools*, FORBES (Oct. 4, 2018), <https://perma.cc/4NY4-8WFR>.

162. See Christina Hoff Sommers, *The Bizarre, Misguided Campaign to Get Rid of Single-Sex Classrooms*, THE ATLANTIC (Oct. 4, 2013), <https://perma.cc/AZ4P-TCLG>. In 2022, the school was ranked twentieth among high schools in the U.S. and second among Texas high schools by the U.S. News & World Report. See *Irma Lerma Rangel Young Women's Leadership School*, U.S. NEWS & WORLD REPT., <https://perma.cc/P95G-FMQN> (last visited Mar. 2, 2023).

163. 2019–20 SCHOOL REPORT CARD: IRMA LERMA RANGEL YOUNG WOMEN'S LEADERSHIP SCHOOL, TEX. EDUC. AGENCY (2020), <https://perma.cc/C9D9-ELQR>.

164. See Marlene Sokol, *ACLU: Single Gender Schools Discriminate*, TAMPA BAY TIMES (May 14, 2014), <https://perma.cc/F7FP-TYCY>.

165. HILLSBOROUGH COUNTY PUBLIC SCHOOLS, FERRELL MIDDLE MAGNET SCHOOL: 2021-2022 SCHOOLWIDE IMPROVEMENT PLAN (2022), <https://perma.cc/PW7U-ZHUB>.

166. *Id.*

accommodate these differences.¹⁶⁷ However, the Tampa schools have received several complaints from organizations like the ACLU for relying on “junk science” that promotes gender stereotypes.¹⁶⁸

Notwithstanding empirical uncertainty, it is evident that many parents see the option of single-sex education as a welcome alternative to traditional co-educational methods. Parents are pursuing home education and enrollment in charter schools at increasingly high rates: over three million students are currently home-schooled, while over three and a half million attend charter schools.¹⁶⁹ The increased demand for alternative education methods reflects a widespread desire for educational reform. Perhaps the current range of educational options will provide state education boards and the DOE with a more robust empirical foundation on which to judge these methods.

VI. LOOKING TO THE FUTURE

The Court in *Hogan* made clear that although deference is given to “congressional decisions and classifications, neither Congress nor a state can validate a law that denies the rights guaranteed by the Fourteenth Amendment.”¹⁷⁰ Further, any justification for gender-based policies “must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹⁷¹ The “genuine” requirement seems to suggest that claims must have concrete empirical evidence behind them to succeed,¹⁷² and, if current research trends continue, decisive empirical results may never exist.¹⁷³

167. See Sokol, *supra* note 164.

168. See *id.*; ACLU Files Federal Complaint Challenging Single-Sex Class Program Rooted in Stereotypes at Florida’s Second Largest School District, AM. C.L. UNION (May 13, 2014), <https://perma.cc/2P2U-3LDQ>.

169. See Brian D. Ray, *Research Facts on Homeschooling*, NAT’L HOME EDUC. RES. INST. (Sept. 15, 2022), <https://perma.cc/H6EQ-A4EA>; Jamison White, *How Many Charter Schools and Students Are There?*, NAT’L ALL. FOR PUB. CHARTER SCHS. (Dec. 6, 2022, 11:38 AM), <https://perma.cc/46JD-DG82> (as of 2022, there are more than 7,800 charter schools in the U.S. serving around 3.7 million students).

170. *Hogan*, 458 U.S. at 732–33.

171. *Virginia*, 518 U.S. at 533; see *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 75 (2001).

172. See, e.g., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, *supra* note 153, at 8–11.

173. Jose G. Clavel & Darragh Flannery, *Single-Sex Schooling, Gender and Educational Performance: Evidence Using PISA Data*, BRITISH ED. R. J. 2, 3 (2021) (“[W]e find again no evidence of any statistical difference in mathematics or reading performance between those attending single-sex or coeducational schools once we condition for other factors.”); Hyunjoon Park, Jere R. Behrman, & Jaesung Choi, *Do Single-Sex Schools Enhance Students’ STEM (Science, Technology, Engineering, and Mathematics) Outcomes?*, 62 ECON. EDUC. REV. 1, 1 (2018) (“We find significantly positive effects of all-boys schools consistently across different STEM outcomes but not for girls.”); Wang Ivy Wong, Sylvia Yun Shi, & Zhansheng Chen, *Students from Single-Sex Schools are More Gender-Salient and More Anxious in Mixed-Gender Situations: Results from High School and College Samples*, 13 PLOS ONE. 1, 19 (2018) (finding psychological impacts of single-gender education on high school students including increased anxiety about mixed-gender social situations and fewer other gender friendships.); Ramona Obermeier & Michaela Gläser-Zikuda, *Development of Scholastic Well-Being in the Course of the 5th Grade in Secondary Education*, 114 INT’L J. EDUC. RSCH. 1, 11 (2022) (“[S]ome girls might

It is also important to note that trends toward single-sex schooling historically tend to occur in cycles. While many more single-sex opportunities are becoming available at the elementary and secondary levels, many private single-sex postsecondary institutions are struggling to stay afloat. Students have been unsuccessful at legally preventing some lesser-known single-sex institutions from integrating.¹⁷⁴ Even the American Association of University Women, whose groundbreaking research prompted much of the current trend toward single-sex schooling, voiced its skepticism about using single-sex schooling as a response to perceived gender biases in the classroom.¹⁷⁵ Unless significant advantages to single-sex schooling are proven, single-sex elementary and secondary schools may fade away as quickly as they appeared.

Under President Trump's administration, education legislation significantly reduced federal oversight of state policymaking.¹⁷⁶ During his first one hundred days, President Trump signed a congressional resolution to repeal the Obama administration's State Plan and Accountability Rule, which had specified requirements for state accountability plans under ESSA.¹⁷⁷ With the repeal of the rule, Secretary of Education Betsy DeVos seemed to have delivered on her promise to grant states maximum flexibility to implement ESSA—"the Department of Education's newly released state accountability plan application template is shorter and includes fewer requirements than an earlier application released by the Obama administration in November [2016]."¹⁷⁸ While the Trump administration did not directly announce a position on federally funded single-sex education, its emphasis on ensuring state and local flexibility, eliminating "unnecessary burdens," and providing parents with flexibility to choose the best educational opportunities for their children indicate general support towards alternative education arrangements.¹⁷⁹ The Biden administration has not made any significant changes to single-sex education, but the administration did announce significant changes to Title IX's protections including greater protections for students who

benefit from attending a single-sex school, as students in these schools reported lower levels of social problems, worries and physical complaints.")

174. See, e.g., *Dodge v. Trustees of Randolph-Macon Women's Coll.*, 661 S.E.2d 801, 804 (Va. 2008) (holding that female students attending Randolph-Macon Women's college, which began admitting men in 2006, did not have a cause of action when they sued the school alleging an implied contract between the school and its students to remain an all-women's institution); Ava-Joye Burnett, *Students protest Notre Dame of Maryland University's decision to become fully co-ed*, CBS NEWS BALTIMORE (Sept. 16, 2022), <https://perma.cc/39AK-7APG>.

175. See AM. ASS'N OF UNIV. WOMEN, *SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS* (1998).

176. See Michael Hansen, Elizabeth Mann Levesque, & Jon Valant, *Reflecting on education policy during Trump's first 100 days—and predicting what's next*, BROOKINGS INST. (May 2, 2017), <https://perma.cc/J4DP-U2QG>.

177. *Id.*

178. *Id.*

179. See *Letter to Chief State School Officers from Secretary DeVos*, DEP'T OF EDUC. (Feb. 10, 2017); *Understanding the Every Student Succeeds Act: A Parent's Guide to the Nation's Landmark Education Law*, DEP'T OF EDUC. (2018), <https://perma.cc/KNL4-EQNT>.

face discrimination based on their sexual orientation or gender identity. The impact that these changes could have on single-sex education remains to be seen.¹⁸⁰

VII. CONCLUSION

This Article has mapped the legal and social landscape of public single-sex schooling in the United States. Although recent data suggest that single-sex education is becoming more common,¹⁸¹ it is important to remember where the legal challenges began; the Equal Protection Clause of the Fourteenth Amendment remains a strong deterrent against the segregation of students by sex. While it is clear that single-sex schools are permissible under current legislation, at least at the primary and secondary levels, much of their constitutionality depends on a fact-specific inquiry into whether or not boys and girls have equal opportunities and whether gender separation promotes harmful stereotypes. The difficulty of this inquiry is exacerbated by the relative silence of the Supreme Court on sex-based classifications in the area of education. The Court has yet to state explicitly whether the “separate-but-equal” treatment prohibited in *Brown*¹⁸² on the basis of race is in fact allowable in the context of gender. As new data on the effects of single-sex schooling become available, the legislature and the judiciary can make more informed decisions about the best way to achieve legal equity and substantive equality for both sexes.

180. Suzanne Eckes, R. Shep Melnick, & Kimberly J. Robinson, *Reactions to the Biden Administration's Proposed Title IX Changes from Education Law Scholars*, BROOKINGS INST. (June 30, 2022), <https://perma.cc/RLK8-CFSV>.

181. See Chen, *supra* note 114 (“One of the fastest growing trends in 21st-century America is single-sex education.”).

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