

TURNING BACK THE CLOCK:

How the Department of Education's 2006 amendments violate the Constitution and undermine the purpose of Title IX

By Lory Stone¹

I. INTRODUCTION

*"We may be on the verge of an explosion."*²

President Bush signed the No Child Left Behind Act of 2001 ("NCLB") into law on January 8, 2002. One provision of NCLB permits local educational agencies to use federal funds to provide same-gender schools and classrooms consistent with applicable law.³ It further required the Education Department (ED) to issue guidelines for single-sex programs. These guidelines were issued in 2002. However, without being asked by Congress, the Bush Administration also issued a notice indicating its desire to change the Title IX regulations relating to single-sex education. The Administration issued official proposed amendments to the 1975 Title IX regulations for comment in 2004, and final amendments in October 2006 ("2006 amendments"). The 2006 amendments were issued because the Administration wanted greater flexibility, indeed, unchecked flexibility, to create single-sex schools and classrooms. Such flexibility conflicts with the comprehensive 1975 regulations interpreting Title IX, and is in violation of the Equal Protection Clause of the U.S. Constitution. By amending the longstanding Title IX

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² Mark O'Keefe, *Single-sex school debate rekindled*, CHICAGO TRIBUNE, Oct. 13, 2002 (quoting Leonard Sax, a physician who founded the National Association for Single Sex Public Education, discussing the legal threat that looms over school districts that would like to implement single-sex schools and are just waiting for a "green light" from the Bush administration).

³ 20 U.S.C. § 7215(a)(23) (2004) (parentheticals used in the original).

regulations that allowed for only limited single-sex education, the Administration was attempting to legalize the NCLB provision and impact all federal financial assistance for education in order to permit single-sex education on a much larger scale.⁴

In its notice of proposed rulemaking, the Government stated that the proposed changes would “increase the flexibility for school districts that offer single-sex schools by allowing the school district to decide whether the equal education opportunity offered for the excluded sex should be single-sex or co-ed – as long as the opportunities for both sexes are substantially equal.”⁵ Single-sex classes in co-ed schools would also be permitted “if they are part of an evenhanded effort to provide a range of diverse educational options for male and female students, or if they are designed to meet particular, identified educational needs of students.”⁶ The proposed regulations were announced on March 3, 2004, and were published in the *Federal Register* with a 45-day public comment period to follow.⁷ The Department of Education received approximately 5,860 comments on the proposed regulations, of which only approximately 100 were supportive.⁸ Over two years later, on October 25, 2006, the Department of Education published its final regulations in the *Federal Register*. Amidst much opposition, the regulations took effect on November 24, 2006. The new regulations are nearly identical to those proposed by OCR in 2004, and place emphasis on a “substantially equal” standard in the creation of single-sex schools and classrooms.⁹

⁴ *Notice of Proposed Rulemaking*, Amendments to 34 C.F.R. 106, Mar. 3, 2004, available at <http://www.ed.gov/legislation/FedRegister/proprule/2004-1/030904a.html> (last visited Dec. 11, 2006).

⁵ Website commentary to *Notice of Proposed Rulemaking*, Amendments to 34 C.F.R. 106, Mar. 3, 2004, available at <http://www.ed.gov/news/pressreleases/2004/03/03032004.html> (last visited Nov. 13, 2006).

⁶ *Id.*

⁷ *Notice of Proposed Rulemaking*, Amendments to 34 C.F.R. 106, Mar. 3, 2004, at 2, available at <http://www.ed.gov/legislation/FedRegister/proprule/2004-1/030904a.html> (last visited Dec. 11, 2006).

⁸ *Id.* at 7.

⁹ 34 C.F.R. § 106.34(b)-(c); *Analysis of Comments and Changes*, Amendments to 34 C.F.R. 106, Oct. 25, 2006, at 4, available at <http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.html> (last visited Nov. 13, 2006).

This paper will evaluate the constitutional, statutory, and policy-related issues emanating from the new regulations, and argue that they are in violation of Title IX and unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Part II of this paper will provide background for evaluating the 2006 amendments by tracing the evolution of a legal standard for determining the constitutionality of single-sex programming. Part III will show that the 2006 amendments are unlawful because (1) they are not a reasonable interpretation of Title IX and therefore are in violation of Title IX; and (2) even if they are a reasonable interpretation of Title IX, they violate the Equal Protection Clause of the Fourteenth Amendment because the creation of single-sex schools is not substantially related to the objectives the Government sets forth in its amendments.

II. THE EVOLUTION OF A STANDARD

“It is not that girls have not ambition . . . but it is asserted that [education is] a cost to their strength and health which . . . incapacitates them for the adequate performance of the natural functions of their sex.”¹⁰

Women have traditionally been denied access to public education. The tradition of sex-exclusivity in education “is a legacy that is tied inextricably to the exclusion of women from public and professional life.”¹¹ The legacy of separate spheres reflects and perpetuates gender stereotyping and discrimination that is present in society today. In light of this legacy, the Supreme Court has given an increasingly stricter level of review to sex discrimination cases. The modern standard for sex discrimination evolved over a period of three decades, as the existence and impact of sex discrimination in society was made more apparent and became less tolerable. The following cases illustrate sex

¹⁰ H. MAUDSLEY, *SEX IN MIND AND IN EDUCATION* 17 (1874) (as quoted in *United States v. Virginia*, 518 U.S. 515, n.9 (1996) (hereafter referred to as “*VMF*”) (stating that when the Virginia Military Institute was established, higher education was considered dangerous for women); see also *Bradwell v. State*, 83 U.S. 130, 141 (1872) (revealing the Court’s – and indeed society’s – attitude towards women in the late nineteenth century: “The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”).

¹¹ Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 *Geo. Wash. L. Rev.* 451, 454 (1999).

discrimination in the educational context and the role of courts in attempting to remedy it. These cases reveal that the issues surrounding sex discrimination in public education are still present and controversial, and that instead of loosening regulations to promote single-sex schooling, as OCR has done, Title IX must be rigorously enforced.

A. THE EARLY CASES

In *Kirstein v. University of Virginia* (“UVA”), the first case to address sex exclusivity in admissions policies, the District Court for the Eastern District of Virginia held that despite a tradition of separation by sex of educational institutions, “it seems clear to us that the Commonwealth of Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state.”¹² The Equal Protection Clause of the Fourteenth Amendment was the basis for the Court’s decision, as it found that denying women a right to education equal to that of men constituted sex discrimination.¹³ Because the Court held that the University of Virginia was “the most prestigious institution of higher education in Virginia,”¹⁴ it did not extend its decision to whether “separate but equal” schools for each sex would be constitutional since the other state schools were so obviously inferior.¹⁵

In the same year as the *UVA* case, the District Court in South Carolina decided a single-sex school case, *Williams v. McNair*, involving male plaintiffs attempting to gain admissions to Winthrop College, an all-women’s college. Using rational basis review, the court upheld Winthrop’s admissions policy.¹⁶ This case is of limited precedential value for several reasons. First, the court based its reasoning on traditional sex

¹² *Kirstein v. University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970).

¹³ *Id.* at 187.

¹⁴ *Id.* at 186.

¹⁵ *Id.* at n.1 (stating that “[w]e need not decide on the facts of this case whether the now discountenanced principle of ‘separate but equal’ may have lingering validity in another area – for the facilities elsewhere are not equal with respect to these plaintiffs”).

¹⁶ *Williams v. McNair*, 316 F. Supp. 134, 136 (D.S.C. 1970) (citing *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)), *aff’d*, 401 U.S. 332 (1975).

stereotypes, stating that although the trend in education was toward coeducation, single-sex education had a long “history and tradition” and consequently was not “wholly wanting in reason.”¹⁷ Men could attend the Citadel, an all-male military school, and women could attend Winthrop, a school designed for young ladies and offering “many courses thought to be specially helpful to female students,” including “sewing, dressmaking, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex.”¹⁸

Second, because *Williams* was decided several years before *Craig v. Boren*, a Supreme Court case which announced that sex-based classifications must be “substantially related” to an “important governmental purpose,”¹⁹ only rational basis review was used to uphold the admissions policy at Winthrop.²⁰ The *Williams* court stated, “[i]t is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause.”²¹

In post-*Craig* 1977, the shift in standard for sex discrimination found effect in the educational context. In *Vorchheimer v. School District of Philadelphia*, a female student brought a suit which challenged a school district that had created two sex-segregated senior high schools for academically gifted students.²² The female student wanted to attend Central, the all-boys’ schools, because of its superior reputation and academic atmosphere.²³ The Third Circuit held that “the educational opportunities offered to girls

¹⁷ *Id.* at 137.

¹⁸ *Id.* at 137, n.3. See Levit, *supra* note 9, at 456 (discussing the early decisions in the lower courts).

¹⁹ 429 U.S. 190, 198 (1976).

²⁰ Note that the standard used in *UVA* is also of limited precedential value as a pre-*Reed* decision.

²¹ *Williams* at 136 (citing *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

²² *Vorchheimer v. Sch. Dist. of Phila.*, 400 F. Supp. 326 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977).

²³ *Vorchheimer*, 532 F.2d 880, 881-82.

and boys are essentially equal,” and thus “the regulations establishing admission requirements to Central and Girls High School based on gender classification do not offend the Equal Protection Clause of the United States Constitution.”²⁴ Furthermore, attendance at the single-sex high schools was “voluntary, not mandatory.”²⁵ As per *Craig*, the Third Circuit applied an intermediate standard of review, finding the existence of studies concluding that single-sex education was meritorious was enough to create a substantial relationship to state interest in furthering quality education.²⁶

In his dissent, Judge Gibbons argued vigorously that substituting the word “race” for “sex” in this situation directly implicated *Plessy v. Ferguson*: “The majority opinion, in establishing a twentieth-century sexual equivalent to the *Plessy* decision, reminds us that the doctrine can and will be invoked to support sexual discrimination in the same manner that it supported racial discrimination prior to *Brown*.”²⁷ Additionally, he found the “voluntary” aspect of the majority’s opinion unpersuasive:

The majority opinion ironically emphasizes that Vorchheimer’s choice of an academic high school was “voluntary.” It was “voluntary”, but only in the same sense that Mr. Plessy voluntarily chose to ride the train in Louisiana. The train Vorchheimer wants to ride is that of a rigorous academic program among her intellectual peers. Philadelphia, like the state of Louisiana in 1896, offers the service but only if Vorchheimer is willing submit to segregation. Her choice, like Plessy’s, is to submit to that

²⁴ *Id.* at 881, 888.

²⁵ *Vorchheimer*, 532 F.2d at 886.

²⁶ *Id.* at 887-88. The sex-segregated schools considered in *Vorchheimer* returned to court in *Newberg v. Board of Public Education*. In this case, the plaintiffs had more comprehensive evidence of the differences between the boys and girls schools. Consequently, the Court held that the separate boys and girls academies did not provide the same academic, extra-curricular, and career opportunities; and as such were in violation of the Equal Rights Amendment of the Pennsylvania Constitution. 478 A.2d 1352 (Pa. Super. Ct. 1984); see LENORA M. LAPIDUS ET AL., *THE RIGHTS OF WOMEN* (4th ed., forthcoming) (manuscript at 7, on file with authors).

²⁷ *Id.* at 889; *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954).

segregation or refrain from availing herself of the service.²⁸

The majority rejected the comparison to race, stating that “there is no fundamental difference between the races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law.”²⁹ The similarities and differences between the race and sex, and their respective levels of scrutiny in legal evaluation, is a debate that continues to this day in the context of educational equity, and will be discussed further *infra* in Part III.B.3.

B. THE MODERN STANDARD: *Hogan* and *VMI*

The U.S. Supreme Court first directly addressed the issue of single-sex education in *Mississippi University for Women v. Hogan*.³⁰ In *Hogan*, a male sought access to the Mississippi University for Women (MUW) because a baccalaureate degree in nursing would enable him to obtain specialized training and to earn more.³¹ There was no similar school located within a reasonable distance.³² MUW argued that it should be permitted to continue prohibiting males from enrolling for credit because MUW had traditionally allowed only women and because the prohibition of men served to remedy past educational discrimination against women, which would entitle it to “exception” status under Title IX.

In beginning its analysis, the Court stated that “[b]ecause the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.”³³ MUW must have an “exceedingly persuasive justification” for the classification which must serve “important governmental objectives” and be “substantially related to the achievement of those objectives.”³⁴ The Court held that MUW failed to meet this burden. Particularly, the

²⁸ *Id.*

²⁹ *Id.* at 886.

³⁰ 458 U.S. 718 (1982).

³¹ *Hogan*, 458 U.S. at 720-21.

³² *Id.*

³³ *Id.* at 723-4 (citing *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

³⁴ *Id.*

Court found that MUW's emphasis on tradition failed because it was not "free of fixed notions concerning the roles and abilities of males and females . . . if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."³⁵ This led to the second failure of MUW's argument. MUW argued that it served a remedial purpose in compensating women for historically limited access to higher education. The Court disagreed:

Rather than compensating for discriminatory barriers faced by women, MUW's policy tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi 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.³⁶

In his dissent, Justice Blackmun argued that the majority's ruling sounded a death knell for single-sex schooling. He stated that the ruling "placed in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant."³⁷

Fourteen years later the Supreme Court again addressed the issue of single-sex education in *United States v. Virginia* ("VMI"), the most recent and influential of Supreme Court cases to address single-sex education.³⁸ VMI was Virginia's sole single-sex school among fifteen public institutions of higher learning, and limited its admission to males. VMI's distinctive mission was to produce "citizen-soldiers" for leadership in civilian life and military service.³⁹ VMI's alumni include military generals, members of

³⁵ *Id.* at 725.

³⁶ *Id.* at 729-30. Note that the majority did not consider "equality" of opportunities for men in its analysis.

³⁷ *Hogan*, 458 U.S. at 734.

³⁸ 518 U.S. 515 (1996).

³⁹ *Id.* at 520.

Congress, and business executives.⁴⁰ The school's endowment was the largest per-student endowment of any public undergraduate institution in the nation.⁴¹

It is interesting to note the reaction of VMI's alumni when the suit was brought. The thought of women attending the school "galled most cadets and alumni," who collaboratively raised more than \$100 million in an attempt to thwart coeducation by buying the college from the State of Virginia.⁴² David Zirkle, a senior at VMI, stated "We were burned during the Civil War and shelled by the Union. We'll endure this, too."⁴³ A sportswear shop near the school produced a hot selling t-shirt which bore the words "Better Dead Than Coed."⁴⁴ Needless to say, VMI and its alumni were anything but thrilled at the prospect of women invading its ranks.

On the case's first journey through the judicial system, VMI argued that the University "brought diversity to an otherwise coeducational Virginia system, and that diversity was enhanced by VMI's unique method of instruction."⁴⁵ The Court of Appeals for the Fourth Circuit relied on *Hogan* to find that "[t]he Commonwealth of Virginia has not...advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women."⁴⁶ It remanded and assigned to VMI responsibility for selecting a remedial course. The Fourth Circuit gave VMI these possible options: "[a]dmit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to

⁴⁰ *Id.* at 520 (however only about 15 percent of VMI cadets enter career military service).

⁴¹ *Id.* at 520.

⁴² Mike Allen, *Defiant V.M.I. to Admit Women, But Will Not Ease Rules for Them*, THE N.Y. TIMES, Sept. 22, 1996.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *United States v. Virginia*, 766 F. Supp. 1407, 1415 (W.D. Va. 1991).

⁴⁶ *United States v. Virginia*, 976 F.2d 890, 892 (4th Cir. 1992).

pursue its policies as a private institution.”⁴⁷ Virginia reacted by creating the Virginia Women’s Institute for Leadership (VWIL), an attempt at “a parallel program for women.”⁴⁸ In reality, however, VWIL was very different from VMI. For example, instead of VMI’s adversative method, VWIL favored “a cooperative method which reinforces self-esteem,” created after experts in educating women at the college level deemed that a military model would be “wholly inappropriate” for VWIL.⁴⁹

Because of the apparent inequities between the schools, VMI once again ended up in court defending itself. The District Court approved the remedial plan, stating that the “controlling legal principles...do not require the Commonwealth to provide a mirror image VMI for women.”⁵⁰ It anticipated that VMI and VWIL would “achieve substantially similar outcomes,” stating that “[i]f VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination.”⁵¹ In a 2-1 opinion, the Court of Appeals narrowly affirmed, holding that single-gender college education may be considered a legitimate aspect of a public system of higher education.⁵² It found that the different methods of teaching at VMI and VWIL were not fatal, for the adversative method was not designed to exclude women. It further noted that women could not be accommodated in the VMI program because female participation in VMI’s adversative training “would destroy...any sense of decency that still permeates the relationship between the sexes.”⁵³

⁴⁷ *Id.* at 900.

⁴⁸ *United States v. Virginia*, 518 U.S. at 526.

⁴⁹ *United States v. Virginia*, 852 F. Supp. 471, 476 (W.D. Va. 1994).

⁵⁰ *Id.* at 484.

⁵¹ *Id.*

⁵² *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995).

⁵³ *Id.* at 1239.

The Fourth Circuit denied rehearing en banc,⁵⁴ and the Supreme Court agreed to hear the case.

The Supreme Court set forth “exceedingly persuasive justification” as the new modern standard for sex discrimination in VMI.⁵⁵ Under this standard, the defendant must show “at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”⁵⁶ The Court held that VMI fell short in showing an important objective for excluding women, and that VWIL did not “cure the constitutional violation” by providing equal opportunity for women.⁵⁷ First, in reaction to VMI’s diversity argument, the Court held that “[a] purpose genuinely to advance an array of educational options...is not served by VMI’s historic and constant plan – a plan to afford a unique educational benefit only to males. However liberally this plan serves the Commonwealth’s sons, it makes no provision whatever for her daughters. That is not *equal* protection.”⁵⁸ Second, the Court found that the differences between VMI and VWIL offered no “substantial equality” because of inequities in faculty, course offerings, facilities, prestige, alumni networks, and endowments.⁵⁹

While the Court purported to reserve the question of whether strict scrutiny should apply to gender classifications, this new “exceedingly persuasive justification” standard has been lauded by some and condemned by others as giving the restrictions on

⁵⁴ *United States v. Virginia*, 52 F.3d 90 (1995). Judge Motz filed a dissenting opinion asking: “how can a degree from a yet to be implemented supplemental program at Mary Baldwin be held ‘substantively comparable’ to a degree from a venerable Virginia military institution that was established more than 150 years ago?” *Id.* at 93.

⁵⁵ *United States v. Virginia*, 518 U.S. at 533-34.

⁵⁶ *Id.* at 524 (quoting *Hogan*, 458 U.S. at 724).

⁵⁷ *Id.*

⁵⁸ *Id.* at 540 (internal quotations omitted).

⁵⁹ *Id.* at 547.

gender discrimination “the teeth, if not the name, of strict scrutiny.”⁶⁰ Justice Scalia evaluated the standard in his dissent, stating that “[i]ntermediate scrutiny has never required a least-restrictive-means analysis, but only a ‘substantial relation’ between the classification and the state interests that it serves.”⁶¹ Under true intermediate scrutiny, Justice Scalia argued, “Virginia’s election to fund one public all-male institution and one on the adversative model – and to concentrate its resources in a single entity that serves both these interests in diversity – is substantially related to the Commonwealth’s important educational interests.”⁶² Justice Scalia argued that the majority’s sweeping decision effectively “ensures that single-sex public education is functionally dead.”⁶³

Despite Justice Scalia’s concerns, prior to the 2006 amendments, single-sex education had not been completely eliminated as unconstitutional. Some single-sex public and private schools are lawful under Title IX. First, the constitutional principles of Equal Protection that were applied to VMI, a government-run institution, do not apply to private institutions. As Justice Scalia pointed out in his dissent, several schools receive funding from the federal government or have students receiving federal aid.⁶⁴ Nonetheless, these schools have the option of forgoing federal funds to maintain single-sex programming. Second, gender-based classifications can still exist in limited

⁶⁰ Deborah L. Brake, *Reflections on the VMI Decision*, 6 AM. UNIV. JOURNAL OF GENDER & THE LAW 35, 35 (Fall 1997); see Carey Olney, *Better Bitch than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 Buff. Women’s L.J. 97, 139 (2000/2001) (arguing that VMI sets forth “intermediate plus: a standard not quite as strong as strict scrutiny, but with more teeth than pre-VMI intermediate scrutiny.”); Rosemary Salomone, *Education and the Constitution: Shaping Each other and the Next Century: Rich Kids, Poor Kids, and the Single-Sex Education Debate*, 34 AKRON L. REV. 209, 218 (2000) (arguing that VMI “appears to add more teeth to [the standard used in prior gender discrimination cases]. It talks about courts applying ‘skeptical scrutiny,’ taking a ‘hard look,’ at ‘generalizations and tendencies’ based on gender. And once a violation is found, the remedy must closely fit it, placing the claimants in ‘the position they would have occupied in the absence of discrimination.’”) (citing *VMI*, 518 U.S. at 554); Kathryn A. Lee, *Intermediate Review “With Teeth” in Gender Discrimination Cases: The New Standard in United States v. Virginia*, 7 TEMP. POL. & CIV. RTS. L. REV. 221, 224 (1997) (arguing that VMI creates a fourth tier of review that consists of “intermediate review with teeth”).

⁶¹ *United States v. Virginia*, 518 U.S. at 573.

⁶² *Id.* at 579.

⁶³ *Id.*

⁶⁴ *Id.* at 598.

circumstances where the classification “directly assists members of the sex that is disproportionately burdened” and promotes equal employment opportunity.⁶⁵ Finally, since VWIL was deemed inferior, the Court did not reach the issue of separate but truly equal educational institutions. This is still an open and widely-debated question. The Court alludes to it in a subtle yet intriguing footnote in *VMI*: “We do not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities.”⁶⁶ The Government has adapted the language in this footnote in its 2006 amendments⁶⁷ As will be examined, *infra*, many argue that in light of the history of gender discrimination and the continuing inequities between the sexes in educational institutions, separate cannot be truly equal.

III. THE 2006 AMENDMENTS VIOLATE TITLE IX AND ARE UNCONSTITUTIONAL UNDER EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The evolution of legal doctrine regarding single-sex education has created a very high standard for school districts wishing to implement single-sex programs – a standard which Justice Scalia deemed impossible to meet.⁶⁸ Because Congress intended to keep single-sex programming to a minimum under Title IX, this section will first argue that the proposed amendments are not a reasonable interpretation of Title IX and are therefore unlawful.⁶⁹ Part B will then argue that even if the proposed amendments are a permissible interpretation of Title IX, they fail to meet *VMI*’s “exceedingly persuasive justification” standard and are consequently unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

⁶⁵ *Hogan*, 458 U.S. at 728 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

⁶⁶ *United States v. Virginia*, 518 U.S. at n.7.

⁶⁷ 34 C.F.R. § 106.34.

⁶⁸ *United States v. Virginia*, 518 U.S. at 579.

⁶⁹ 34 C.F.R. Part 106 at 1.

A. TITLE IX PROHIBITS SINGLE-SEX EDUCATION EXCEPT IN LIMITED CIRCUMSTANCES

The 2006 amendments do not represent a reasonable interpretation of Title IX, and are thus unlawful. Fundamental Supreme Court doctrine provides that when a court reviews an agency's construction of the statute which it administers, it must first ask whether Congress has directly spoken to the precise question at issue.⁷⁰ If the intent of Congress is clear, that is the end of the matter and the Court and agency "must give effect to the unambiguously expressed intent of Congress."⁷¹ On the other hand, if the court determines that Congress has not directly addressed the precise question at issue, but is silent or ambiguous with respect to the specific issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁷² Under this standard, the Government cannot legally amend the regulations implementing Title IX unless it finds "sufficient interpretive room in the Title IX law to justify amending the regulations....Otherwise the Court could strike them down on the grounds that the agency has overstepped its bounds."⁷³

In discerning Congress' intent in enacting Title IX, the plain language of the statute must first be considered.⁷⁴ Title IX states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."⁷⁵ The 1975 Title IX regulations further state that, "[e]xcept

⁷⁰ *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

⁷¹ *Id.*

⁷² *Id.*

⁷³ ROSEMARY SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* 174 (Yale University Press 2003).

⁷⁴ *Chevron*, 467 U.S. at 842-843; *see Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (evaluating whether regulations issued by the Department of Health and Human Services which limited the ability of Title X fund recipients to have abortions were a permissible interpretation of Title X).

⁷⁵ 20 U.S.C. § 1681(a) (2004).

as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex.”⁷⁶ Before the Administration added its 2006 amendments to the regulations, the regulations provided exceptions for physical education classes, human sexuality classes, and choruses. These exceptions remain unchanged. There were also exceptions for limited circumstances where the classification “directly assists members of the sex that is disproportionately burdened” and promotes equal employment opportunity.⁷⁷ These exceptions likewise still exist. Title IX’s principal purpose is to avoid use of federal resources to support discriminatory practices and to provide individual citizens effective protections against those practices.⁷⁸ Given the legislative history behind the implementation of Title IX, as well as the limited exceptions for single-sex classes already provided for prior to the Government’s 2006 amendments, the 2006 amendments are inconsistent with the purpose of Title IX and therefore must be struck down as unlawful.

The legislative history and debate surrounding Title IX’s enactment help determine Congress’ intent in enacting the statute. Unfortunately, there was no accompanying House or Senate Report on Title IX.⁷⁹ However, when Senator Birch Bayh introduced the legislation in 1972, he made a telling remark. He stated that federal agencies enforcing the law could permit “differential treatment by sex” only in “very unusual cases” and only where such treatment was “absolutely necessary to the success

⁷⁶ 34 C.F.R. § 106.34(a).

⁷⁷ *Hogan*, 458 U.S. at 728 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

⁷⁸ 20 U.S.C.S. § 1681 (2004); see *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (citing *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (stating that Title IX directs recipients of federal funding to refrain from discriminating, and that a private action can be brought to enforce Title IX)).

⁷⁹ Salomone, *supra* note 72 at 168-69.

of the program.”⁸⁰ In light of these remarks, Title IX has been interpreted by the Department of Education to allow for single-sex schooling only in carefully controlled situations which address sex discrimination in education and remedy the effects of past discrimination.⁸¹ Compared to the limited exceptions in the 1975 regulations, the Government’s 2006 amendments fail to conform with the purpose of Title IX because they allow for an unprecedented broadening of single-sex programming under the false impression that sex discrimination is a disappearing phenomenon.⁸² Additionally, they provide ineffective safeguards against the sex discrimination that Title IX was enacted to eliminate. For instance, the Government’s 2006 amendments provide for single-sex programming in situations where “individual students and their parents” seek it based on “educational research suggest[ing] that single-sex education may provide benefits to some students under certain circumstances.”⁸³ Under the 2006 amendments, Murdock Middle School in Charlotte, North Carolina, proposed single-gender classes in which the girls classes focus on “more and deeper discussions” because girls are thought to be more organized and better able to understand consequences, while boys classes would be more competitive based on the notion that boys are less able to control their impulses.⁸⁴

⁸⁰ 118 CONG. REC. S3937 (Feb. 15, 1972) (statement of Sen. Bayh).

⁸¹ 34 C.F.R. § 106.3 (2004) (stating that if a public school has discriminated based on sex, it may take remedial action to overcome the discrimination. If there is no discrimination, a school may take affirmative action to overcome the effects of conditions that resulted in limited participation by persons of a particular sex). In addition to remedial efforts, current Title IX regulations allow for schools to group students by sex in physical education classes, sexual education classes, and choir classes. *Id.*

⁸² *Analysis of Comments and Changes*, Amendments to 34 C.F.R. 106, Oct. 25, 2006, at 5, available at <http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.html> (last visited Nov. 13, 2006). To be discussed further, *infra*.

⁸³ *Analysis of Comments and Changes*, Amendments to 34 C.F.R. 106, Oct. 25, 2006, at 7, available at <http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.html> (last visited Nov. 13, 2006).

⁸⁴ Anna Scott, Charlotte may try single-sex classes, Herald Tribune, Nov. 30, 2006, available at <http://www.heraldtribune.com/apps/pbcs.dll/article?Date=20061130&Category=NEWS&ArtNo=611300449&SectionCat=&Template=printart> (last visited Dec. 11, 2006).

Parents are already wondering what this means for children who do not fit the stereotype.⁸⁵

The Government argues that its new 2006 amendments are within the purview of Title IX because the need for Title IX has been largely eliminated in the thirty years since its passage.⁸⁶ It argues that while discrimination against females was widespread when Title IX was enacted in 1972, “the situation has changed dramatically.”⁸⁷ The Government therefore concludes that the 2006 amendments are appropriate.⁸⁸ The Government is correct in its observation that with Title IX has come progress. In the wake of Title IX’s passage, opportunities for women and girls sprung up across the nation. Title IX prohibits discrimination by sex in the distribution of financial aid, and consequently programs have developed to provide assistance to women seeking higher education.⁸⁹ In 2004, women earned 57 percent of all bachelor’s degrees, 59 percent of all masters degrees, and 48 percent of all doctoral degrees.⁹⁰

Even with these gains, sex discrimination is still prevalent in the classroom. Professor Levit illuminates the continuing problem:

Despite the promising attention to gender bias, coeducation schools are still “male-dominated and male-controlled cultural institutions.” Numerous researchers continue to document that females at all education levels experience “microinequities” – behaviors and actions on the part of teachers and peers so small that they are difficult to discern individually, yet which cumulatively exclude females from equal participation in the classroom. An extensive body of research supports...conclusions...that a “chilly climate” continues to exist in classrooms from preschool to post-

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ American Civil Liberties Union, *ACLU Single-Sex Notice of Intent Comments to the Department of Education* (July 8, 2002), available at www.aclu.org/news/NewsPrint.cfm?ID=10481&c=174 (last visited Dec. 11, 2006).

⁹⁰ National Center for Education Statistics, U.S. Department of Education, *Title IX*, available at <http://nces.ed.gov/fastfacts/display.asp?id=93> (last visited Feb. 3, 2007).

graduate school. This research is echoed by collections of anecdotal stories of individual experience.⁹¹

Additionally, there continues to be bias in standardized tests, curriculum materials and class coverage, in which females are often ignored or stereotyped.⁹² Females continue to be underrepresented in math, science and high technology programs, and they continue to be overwhelmingly enrolled in programs that are “traditionally female” and lead to low wage jobs.⁹³ The Feminist Majority reports that “[e]lementary education majors are more likely to be female today than they were a decade ago, while the percentage of male computer science majors has grown from 65 percent to 75 percent over the past 10 years. The gender-segregated college majors set the stage for the wage gap that follows graduation.”⁹⁴ In light of this evidence, the Government is unpersuasive in its argument that today’s schools are largely devoid of sex discrimination and therefore

⁹¹ See Levit, *supra* note 9, at 467 (citing LEARNING TO LOSE: SEXISM AND EDUCATION (Dale Spender & Elizabeth Sarah eds. 1988) (giving critiques of sexism in the classroom, curriculum, and educational system); Lyn Yates, THE EDUCATION OF GIRLS: POLICY, RESEARCH AND THE QUESTION OF GENDER 35-40 (1993) (finding that despite similar levels of achievement to men, women are less likely to choose courses or careers in math or science); Roger Clark et al., *Of Caldecotts and Kings: Gendered Images in Recent American Children's Books by Black and Non-Black Illustrators*, 7 GENDER & SOC'Y 227, 232-40 (1993) (noting increased but still unequal visibility of female characters in prize-winning children’s books between 1967 and 1991); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 1-100 (1994) (observing the poorer academic ranking and higher levels of alienation experienced by women at the University of Pennsylvania Law School between 1987 and 1992); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 311-30 (1994) (explaining that more female than male law students self-report problems with sexual harassment, sexual and racial discrimination, and lack of role models); Catherine G. Krupnick, *Women and Men in the Classroom: Inequality and Its Remedies, On Teaching & Learning*: J. HARV.-DANFORTH CTR., May 1985, at 18 (stating that male students talk as much as two-and-a-half times as long as female students in classes at Harvard College); Mid-Atlantic Center for Sex Equity, *Cost of Sex Bias in Schools: The Report Card*, in SEX EQUITY IN EDUCATION: READINGS AND STRATEGIES 25-26 (Anne O’Brien Carelli ed. 1988) (stating that “Girls are more likely to be invisible members of the classrooms. They receive fewer academic contacts, less praise, fewer complex and abstract questions, and less instruction on how to do things for themselves.”); Myra Sadker et al., *Gender Equity in the Classroom: The Unfinished Agenda*, C. BD. REV., Winter 1993/94, at 14, 17 (finding that girls in elementary and secondary school “are eight times less likely to call out comments” and, when they do, are often chastised for not raising their hands while the boys are not similarly disciplined)).

⁹² *Id.* See, e.g., *Girls Make up Only 35% of National Merit Scholars*, FORT WORTH STAR-TELEGRAM, May 26, 1993, at 13.

⁹³ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from the National Women’s Law Center (NWLC), July 8, 2002, at 2.

⁹⁴ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from the Feminist Majority Foundation (FMF), July 8, 2002 (citing *Title IX at 30: Report Card on Gender Equity*, 23-24 (2002)).

Title IX regulations should be relaxed. In fact, the evidence shows that sex discrimination in education is ongoing, so rather than relaxing Title IX regulations, the Government should be vigorously enforcing them. Supporters and critics of the 2006 amendments agree that the amendments are a “major reinterpretation of antidiscrimination laws, some 50 years after the Supreme Court discredited racial segregation in ‘separate but equal’ schools as inherently unequal, and almost 35 years after Title IX extended the concept to sex.”⁹⁵ The Government’s interpretation of Title IX fails in its unprecedented broadness, as the new regulations allow for single-sex programming “in a virtually standardless way, based on [recipients’] own unchecked assessments or simple assertions of educational benefit.”⁹⁶ Indeed, the 2006 amendments require periodic evaluations of single-sex classes only one time every two year period.⁹⁷ The 2006 amendments are in direct conflict with the narrow, purpose-based exceptions Congress has allowed since the Title IX regulations were issued in 1975, and are inconsistent with Congress’ desire to allow for single-sex education only in carefully controlled situations. The 2006 amendments are incompatible with the intent of Title IX, and the Government’s justifications for the regulations are unsupportable. Because “administrative agencies cannot promulgate regulations that are inconsistent with statutes,” the Government’s amendments to the regulations “must be regarded ultra vires and void.”⁹⁸

⁹⁵ Diana Jean Schemo, *Administration Proposes Same-Sex-School Option*, N.Y. TIMES, Mar. 4, 2004.

⁹⁶ National Women’s Law Center, *The Administration’s Proposed Single-Sex Regulations Endanger Equal Opportunity for Young Women in the Nation’s Schools*, available at

<http://www.nwlc.org/pdf/ProposedSingleSexRegs.pdf> (last visited Dec. 11, 2006).

⁹⁷ 34 C.F.R. 106.34(b)(4).

⁹⁸ *Chrysler Corp. v. Brown*, 411 U.S. 281, 302 (1979).

B. THE PROPOSED AMENDMENTS ARE UNCONSTITUTIONAL UNDER THE “EXCEEDINGLY PERSUASIVE JUSTIFICATION” STANDARD SET FORTH IN *VMI*

Even if the Government’s interpretation of Title IX is permissible under the statute, the 2006 amendments to the 1975 regulations violate the Equal Protection Clause of the Fourteenth Amendment because they fail to meet the “exceedingly persuasive justification” standard set forth in *VMI*. Because the Equal Protection Clause creates an exceedingly strong presumption against gender-based classifications, any administrative retreat by regulation or policy from this constitutional standard would itself be unconstitutional.⁹⁹ In its 2006 amendments, the Government identifies the following as valid justifications for single-sex education:

To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or...[t]o meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective.¹⁰⁰

The Government’s objectives – diversity and meeting particular, identified educational needs – fail to satisfy the *VMI*’s “exceedingly persuasive” standard because single-sex programming is not substantially related to the stated objectives.¹⁰¹

1. *The Government’s objective of creating diverse educational opportunities is not “important”*¹⁰²

⁹⁹ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from the New York Civil Liberties Union (NYCLU), July 3, 2002.

¹⁰⁰ 34 C.F.R. § 106.34(b)(1).

¹⁰¹ See American Civil Liberties Union, *ACLU Single-Sex Notice of Intent Comments to the Department of Education* (July 8, 2002), available at www.aclu.org/news/NewsPrint.cfm?ID=10481&c=174 (last visited Dec. 11, 2006).

¹⁰² 34 C.F.R. § 106.34(b)(1).

The Government argues that, in light of *VMI*'s dicta that “diversity among public educational institutions can serve the public good,” giving students the choice to attend either a single-sex or co-ed public school is ideal in the name of educational diversity.¹⁰³ The Government’s argument fails, however, because diversity through the creation of single-sex schools, classes and extracurricular activities is not an “important governmental objective,” a requirement mandated by *VMI*.¹⁰⁴ Rather than creating educational success, the Government’s goal of diversity through single-sex classes and schools fosters and even encourages gender discrimination by failing to address and remedy the issue directly.

For instance, “diversifying” schools to provide for single-sex options would foster discrimination by creating an educational climate that is inherently unequal. Evidence shows that single-sex public education often “advances sex stereotypes, discriminates against women, and builds upon the historic sexism that has denied all students truly equal opportunity, access, and treatment in American education.”¹⁰⁵ For example, in 2005, an all-girls public primary school in Ohio was teaching values stereotypical of white middle class America, such as restaurant table etiquette, to African American girls.

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Some studies reveal that the negative impact of single-sex schooling on boys is especially pronounced. While there are no statistically significant academic advantages

¹⁰³ *United States v. Virginia*, 518 U.S. at 535; see *Regents of the University of California v. Bakke*, 438 U.S. 265, 314 (1978); see Susan McDermott, Single-Sex Education and the First Amendment: Sex-Based Exclusion From Public school on the Basis of Time, Place, or Manner Restrictions, 12 WIS. WOMEN’S L.J. 207, 209 (Fall 1997); but see Analysis of Comments and Changes, Amendments to 34 C.F.R. 106, Oct. 25, 2006, at n.17, available at <http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.html> (last visited Nov. 13, 2006).

¹⁰⁴ *United States v. Virginia*, 518 U.S. at 524 (quoting *Hogan*, 458 U.S. at 724).

¹⁰⁵ American Civil Liberties Union, *ACLU Single-Sex Notice of Intent Comments to the Department of Education* (July 8, 2002), available at www.aclu.org/news/NewsPrint.cfm?ID=10481&c=174 (last visited Dec. 11, 2006).

¹⁰⁶ HANDBOOK FOR ACHIEVING GENDER EQUITY THROUGH EDUCATION (Sue Klein et al. eds., 2nd ed. forthcoming Spring 2007).

to all-boys' schools, these studies show that students are less likely to be concerned with social justice issues, find less satisfaction in non-academic school events, and be less comfortable in mixed gender and coeducational settings.¹⁰⁷ Some scholars state that all-male environments “engender homophobia, racism, and sexism.”¹⁰⁸

In addition to promoting sex stereotypes, single-sex schools attempt to alleviate the “problems” and “distractions” of coeducation by simply removing the victims, not by resolving the underlying issues.¹⁰⁹ For instance, in the realm of sexual harassment, Senator Kay Bailey Hutchison of Texas, a staunch supporter of single-sex education, believes single-sex schooling solves the problem of sexual harassment. Senator Hutchison referred to a “Sixty Minutes” interview in support of her belief: “A student named Cyndee Couch... cited harassment by boys as one of her reasons for attending the [Young Women’s] Leadership Academy. She told Mr. Safer: ‘As long as I’m in this school and I’m learning, and no boys are allowed in the school, I think everything is going to be okay.’”¹¹⁰ Effectively, Senator Hutchinson is illuminating a much larger problem – she is citing the problem U.S. schools have with sexual harassment. Despite the fact that federal courts have routinely ruled that Title IX prohibits sexual harassment of students by teachers and other students, sexual harassment continues to be a significant problem in schools.¹¹¹ In a study conducted by the AAUW in 2001, more than 80% of

¹⁰⁷ See Levit, *supra* note 9, at 498 (citing Valerie E. Lee & Helen M. Marks, *Sustained Effects of Single-Sex Secondary Attitudes, Behaviors, and Values in College*, 82 J. Edu. Psychol. 578, 585-86 (1990)).

¹⁰⁸ See McDermott, *supra* note 113, at 218.

¹⁰⁹ It should be noted that some single-sex schools are established to counteract sex stereotyping, especially those focused on helping girls achieve in math, science and leadership roles. As discussed *supra*, schools with an affirmative focus were permitted under the pre-2006 amendments Title IX standard.

¹¹⁰ The Honorable Kay Bailey Hutchison, United States Senator, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 AM. U. L. REV. 1075, 1077 (2001) (quoting *Sixty Minutes: School or Scandal?* (CBS television broadcast, June 8, 1997)).

¹¹¹ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (holding that a school district is liable for student-student harassment when a school official has actual notice of the student’s misconduct and acts with deliberate indifference); *Gebser*, 524 U.S. at 274 (holding that a school district is liable for damages in teacher-student harassment when a school official with actual knowledge about the teacher’s conduct is

girls in the eighth through eleventh grades reported being the victim of sexual harassment.¹¹² Rather than instructing schools in efforts to prevent sexual harassment, Senator Hutchison is condoning Cyndee's view that boys are a threat, and single-sex schools are the solution. The National Organization for Women (NOW) argues that "[r]emoving girls to a separate environment...fails to address the motivations and misconceptions that cause male students and teachers to engage in harassing behavior."¹¹³ NOW continues, "since all-female programs are not likely to be available universally, those female students who remain in a coeducational environment that fails to address the causes of harassment directly are even more likely to be mistreated."^{114 115}

Finally, single-sex schools fail to prepare students for the "real world." Separating the sexes deprives children of the opportunity to learn social skills necessary for functioning in the work force and beyond. NOW advises that the Government "should seriously consider how a man could ever accept, and thrive under, the leadership of women in the workplace, if he has had no exposure to girls in this setting during his formative years."¹¹⁶ NOW goes on to explain that "[t]o eliminate the glass ceiling that hinders women in the workplace, collaborative interaction between girls and boys at the elementary and secondary levels should be encouraged. OCR's

deliberately indifferent to the teacher's misconduct).

¹¹² AAUW Educational Foundation, *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* (1993).

¹¹³ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from NOW, June 26, 2002, *available at* <http://www.now.org/issues/education/single-sex-education-comments.html> (last visited Dec. 11, 2006).

¹¹⁴ *Id.*

¹¹⁵ It is important to note that same-sex sexual harassment is also a reality. In fact, some have suggested that same-sex bullying and sexual harassment is just as prevalent in single-sex schools as in mixed-sex schools. *See HANDBOOK FOR ACHIEVING GENDER EQUITY THROUGH EDUCATION* (Sue Klein et al. eds., 2nd ed. forthcoming Spring 2007).

¹¹⁶ *Id.*

[amendments] takes the exact opposite approach, thus threatening to perpetuate workplace inequity.”¹¹⁷

The effects of single-sex schooling permeate all interactions between the sexes, including those beyond the workplace. One woman wrote the Department of Education in opposition to the amendments, stating:

Many of the women and men I know who attended same sex schools most of their lives express difficulties in seeing those of the opposite sex as simply other human beings. Some felt uncomfortable with the opposite sex in any situation for many years, or still do at age 50. Many men and women (including myself) only knew how to relate to the opposite sex as potential romantic partners. I had to learn how to be ‘just friends’ or a co-worker with men; I’d guess I learned ten years ago, around age 35.¹¹⁸

Indeed, “[w]e live in a coed world; we work in it. A generation of coed schools and dorms and workplaces has produced more equality between men and women, not less,” writes Ellen Goodman in a *Washington Post* editorial.¹¹⁹ She continues, “[w]e are likely to see each other as ‘other,’ less likely to separate our work and personal lives.” If a child does not have an initial experience in a gender-integrated environment, that child will be disadvantaged by not having a complete view of the other gender: “sex-segregation, like race segregation, forces people to know each other only through stereotypes, not as intelligent, competent people who can perform a variety of tasks and roles.”¹²⁰ This has significant repercussions for both sexes in and beyond the K-12 years. For these reasons, the Government’s interest in “diversity” in educational opportunity – really meaning segregation – cannot be an “important government objective” as required by *VMI*. Rather, it is detrimental and counterproductive to the constitutional mandate of equal protection before the law.

¹¹⁷ *Id.*

¹¹⁸ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from individual (name redacted), May 14, 2002.

¹¹⁹ Ellen Goodman, *Back to Separate But Equal*, THE WASH. POST, May 18, 2002, at A23.

¹²⁰ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from FMF, July 8, 2002.

2. ***The Government does not fulfill its second objective: “to meet particular, identified educational needs” of students***¹²¹

Secondly, the Government submits that single-sex programming may be used to “meet particular, identified needs” of students.¹²² A school district receiving federal funds may decide to implement single-sex programming based on “reliable information and sound educational judgment” that some students may benefit from the segregation.¹²³ But single-sex programming is not sufficiently tailored to the goal of meeting students’ needs because there is no requirement for scientific or empirical evidence.¹²⁴ Consequently, this objective is not in accordance with equal protection standards. The purpose of the equal protection test is to make sure the “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.”¹²⁵ As such, the relationship between single-sex programming and educational outcomes must be proven through evidence, and is largely dependent on research and evaluations that meet high standards such as those used for other federally supported education improvement efforts and mandated in specific ED legislation. Professor Levit concludes that the constitutionality of these programs “may depend on research in sociology, psychology,

¹²¹ *Notice of Proposed Rulemaking*, Amendments to 34 C.F.R. 106, Mar. 3, 2004, at 19, available at <http://www.ed.gov/legislation/FedRegister/proprule/2004-1/030904a.html> (last visited Dec. 11, 2006). As a side note, it seems that focusing on “particular, identified” needs of students could be done independently of the student’s sex. Indeed, it seems that an evaluation of particular needs should focus on the individual student, and could best be addressed on a case-by-case basis rather than by grouping students by sex.

¹²² *Id.*

¹²³ *Notice of Proposed Rulemaking*, Amendments to 34 C.F.R. 106, Mar. 3, 2004, at 19, available at <http://www.ed.gov/legislation/FedRegister/proprule/2004-1/030904a.html> (last visited Dec. 11, 2006).

¹²⁴ *Id.* See National Women’s Law Center, *The Administration’s Proposed Single-Sex Regulations Endanger Equal Opportunity for Young Women in the Nation’s Schools*, available at <http://www.nwlc.org/pdf/ProposedSingleSexRegs.pdf> (last visited Dec. 11, 2006).

¹²⁵ *Hogan*, 458 U.S. at 726; see American Civil Liberties Union, *ACLU Single-Sex Notice of Intent Comments to the Department of Education* (July 8, 2002), available at www.aclu.org/news/NewsPrint.cfm?ID=10481&c=174 (last visited Dec. 11, 2006).

and economics regarding the benefits and detriments of sex-exclusive education.”¹²⁶ And, as the Government candidly admits in its 2006 amendments, a debate exists as to “the effectiveness of single-sex education” as compared to mixed-sex education.¹²⁷ In fact, no clear evidence exists to prove that single-sex education is better than mixed-sex education. In the 1970s and 1980s, many studies found academic advantages for girls who attended single-sex schools.¹²⁸ In the 1990s, however, this evidence was called into question. In more recent data, variables other than sex are credited with the apparent advantage of a single-sex classroom.¹²⁹ Once these variables are controlled, “measurable differences disappear.”¹³⁰ Without conclusive evidence of the effectiveness of specific carefully tailored single-sex education, the Government cannot prove its case under intermediate scrutiny.

Many studies indicate that the alleged successes of single-sex education are not dependent upon sex segregation. For instance, research collected and published by the American Association of University Women (AAUW) reveals that single-sex

¹²⁶ See Levit, *supra* note 9, at 453 (stating that courts have deemed social science evidence important in decisions evaluating the constitutional validity of single-sex education).

¹²⁷ *Analysis of Comments and Changes*, Amendments to 34 C.F.R. 106, Oct. 25, 2006, at Section 106.34, available at <http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.html> (last visited Nov. 13, 2006).

¹²⁸ See Levit, *supra* note 9, at 486 (citing Cornelius Riordan, *Girls and Boys in School: Together or Separate?* 111 tbl.5.7 (1990) (demonstrating that minority boys and girls in single-sex schools outperform their coeducational counterparts); Emmanuel Jimenez & Marlaine E. Lockheed, *Enhancing Girls' Learning Through Single-Sex Education: Evidence and a Policy Conundrum*, 11 EDUC. EVALUATION & POL'Y ANALYSIS 117, 123, 125 (1989) (determining that among a sample of eighth graders in Thailand, girls in single-sex schools achieved higher scores on math tests than girls in coeducational schools, but that boys in coeducational environments scored higher than did boys in single-sex schools).

¹²⁹ *Id.*

¹³⁰ *Id.* In support of this argument, Professor Levit tackles the issue of exclusively female colleges. She argues that while women's colleges have produced many women cited for career achievements in *Who's Who of American Women*, many did not have much choice but to attend a single-sex college when they applied. Harvard, Yale, and many others did not admit women at all. Additionally, the “Seven Sister Schools” – Barnard, Bryn Mawr, Mount Holyoke, Radcliffe, Smith, Vassar, and Wellesley, were attended by women who “came from privileged backgrounds, had tremendous resources, and . . . were going to succeed no matter where they went.” See Beth Willinger, *Single Gender Education and the Constitution*, 40 LOY. L. REV. 253, 268 (1994). After controlling for these differences, the differences between non-Seven Sisters women's colleges and coeducational institutions disappeared. Thus, the results of these studies should not be extrapolated to modern day public schools and classrooms.

programming is not the key to educational success.¹³¹ Rather, educational success comes from factors including smaller class size, better teachers, parental involvement, more funding, more emphasis on core academic subjects, and a clear code of behavior.¹³²

Among these elements, small class size is especially important:

Single-sex schools haven't been shown to produce better results. Smaller schools have. It's proven....Just last month, the Journal of School Health published a study that reinforced previous research: As school size increases, so does students alienation....In smaller schools, students are likely to have a positive relationship with at least one adult in the school – which can often be the difference between sticking around and dropping out....The federal government might be ignoring the research, but local districts aren't. When DeWitt Clinton High School in the Bronx subdivided into small learning communities, attendance rose by almost 20 percent and the on-time graduation rates by nearly 50 percent. Patterson High School in Baltimore subdivided into smaller units and saw math scores rise 20 percent and writing scores 12 percent.¹³³

Once variables have been accounted for, these studies suggest that sex is not the dispositive factor in improved educational outcomes. In fact, sex segregation can be counterproductive and negative,¹³⁴ as demonstrated by the California experiment of the late 1990s. In this experiment, California experimented with single-sex dual academies with the goal of advancing gender equity.¹³⁵ The State authorized the creation of twelve single-sex academies and studied them over a course of three years.¹³⁶ Students were given a “gender neutral” curriculum. However, “poor planning, inadequate funding for staff development and monitoring, and a failure to clearly articulate a gender-equity

¹³¹ American Association of University Women Educational Foundation (AAUW), *A Critical Look at Single-Sex Education for Girls 4-5* (1998); see American Civil Liberties Union, *ACLU Single-Sex Notice of Intent Comments to the Department of Education* (July 8, 2002), available at www.aclu.org/news/NewsPrint.cfm?ID=10481&c=174 (last visited Dec. 11, 2006).

¹³² *Id.*

¹³³ Ryan, *supra* note 66.

¹³⁴ This topic will be discussed further in Part C, *infra*.

¹³⁵ Amanda Datnow et al., *Is Single Gender Schooling Viable in the Public Sector?: LESSONS FROM CALIFORNIA'S PILOT PROGRAM* 74 (2001); see American Civil Liberties Union, *ACLU Single-Sex Notice of Intent Comments to the Department of Education* (July 8, 2002), available at www.aclu.org/news/NewsPrint.cfm?ID=10481&c=174 (last visited Dec. 11, 2006).

¹³⁶ See Elizabeth Zwerling, *California Study*, WOMEN'S E NEWS, June 3, 2002, available at www.womensenews.org/article.cfm/dyn/aid/571/context/cover.

purpose” contributed to substantial differences in instructive and disciplinary methods for each sex.¹³⁷ Instruction for boys was “more regimented and concepts were related using traditional male roles and interests such as being the bread-winner and liking hunting and fishing.”¹³⁸ Girls were likewise taught among gender-stereotype lines: “the girls were taught sewing and quilting.”¹³⁹ Disciplinary actions against girls focused on “respect, reason, and communication while boys received harsh reprimands and were sent to detention.”¹⁴⁰ Furthermore, “educators commonly thought that girls and boys required disparate treatment because of inherent characteristics of each sex.”¹⁴¹ The experiment revealed problems stemming from sex-based distinctions, and was deemed a failure and “a grave misuse of public funds.”¹⁴²

Finally, under the 1975 Title IX regulations, local school districts already had the ability to address sex discrimination in education by enacting remedial and affirmative initiatives. Thus it is inappropriate to weaken Title IX regulations constraining single-sex programming.¹⁴³ The pre-existing Title IX regulations allowed for single-sex programming in physical education classes, classes that deal exclusively with human

¹³⁷ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from Rosemary Salomone, July 8, 2002 (quoting A. Datnow, L. Hubbard, & E. Woody, *IS GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR?: LESSONS FROM CALIFORNIA’S PILOT PROGRAM* 74 (May 2001)).

¹³⁸ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from the California Women’s Law Center, July 8, 2002.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Nanette Asimov, *State Closer to Single-Sex Public Schools*, S.F. CHRON, July 14, 1997, at A1. The California experiment is often contrasted with the Young Women’s Leadership School of East Harlem in New York. See Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from Rosemary Salomone, July 8, 2002. Critics of the school caution that if the same factors that make the school successful were implemented in a coeducational school, the results would likewise be positive. See Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from the AAUW, July 8, 2002.

¹⁴³ See *Hogan*, 458 U.S. at 728 (explaining that in limited circumstances where single-sex classifications directly benefit members of a sex that have been unduly burdened, they may sustain constitutional scrutiny); American Civil Liberties Union, *ACLU Single-Sex Notice of Intent Comments to the Department of Education* (July 8, 2002), available at www.aclu.org/news/NewsPrint.cfm?ID=10481&c=174 (last visited Dec. 11, 2006) (citing 34 C.F.R. §106.3 (2002) (finding that if a public school has discriminated based on sex, remedial action may be exercised and a school may take affirmative action to overcome the effects of the discrimination)).

sexuality, and separation of students by sex for “remedial” or “affirmative action” purposes.¹⁴⁴ Thus, recipients could, under the pre-existing regulations, establish single-sex programming if good research rationale supported single-sex intervention as a necessary way to address educational inequities.¹⁴⁵

In conclusion, while improving educational outcomes is an important government interest, the expansion of single sex education is not substantially related to that objective. The 2006 amendments do not meet the 1975 allowable exception of experimenting with single sex education for remedial or affirmative purposes to advance the key purpose of Title IX: ending sex discrimination and gender gaps in desired education outcomes. Further, research does not demonstrate a clear connection between single-sex education and improved educational outcomes, and often reveals negative results from single-sex education. By greatly expanding the exceptions for allowing single-sex education, the Department of Education is proposing to allow gambling with federal funding of education programs and activities, indeed, a multi-million-dollar gamble that would have dire consequences for educational equity and equality between the sexes.¹⁴⁶ The ACLU cautions that “[b]eyond the unconstitutional nature of single-sex schools, there is a grave danger in promoting single-sex schools as the key to improving

¹⁴⁴ 34 C.F.R. §106.3 (20046).

¹⁴⁵ Sue Klein, Ed.D., of the Feminist Majority explains that this means if boys, as compared with girls, are doing poorly in a writing class, and the recipient can show this with credible evidence, then the recipient may create a single-sex writing class for boys. However, under the 2006 amendments, Dr. Klein explains, OCR offers no way to account for the successes or failures of “purposeful discrimination.” It is unlikely, Dr. Klein explains, that some girls would not have similar writing needs as the boys and also benefit from their class, so the girls should not be excluded. OCR must require clear evidence that single-sex intervention works better than coeducational education, and there must be a timeline for developing this evidence. [Conversations between Dr. Sue Klein and Lory Stone, author, on Mar. 14, 2004, and February 4, 2007].

¹⁴⁶ American Civil Liberties Union, *ACLU Single-Sex Notice of Intent Comments to the Department of Education* (July 8, 2002), available at www.aclu.org/news/NewsPrint.cfm?ID=10481&c=174 (last visited Dec. 11, 2006) (quoting President George Bush, *Remarks on Signing to No Child Left Behind Act*, in WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 38, Issue 2, Jan. 14, 2002).

public education without sufficient research. In such instances, the changes could produce more harm than good.”¹⁴⁷

3. *The Government’s 2006 amendments fail to ensure against “nondiscrimination”*¹⁴⁸

Finally, the Government proposes that its 2006 amendments will be implemented in such a manner that ensures nondiscrimination on the basis of sex. Specifically, it mandates that institutional recipients evaluate their single-sex education every two years to ensure the interventions are based upon genuine justifications and do not rely on overly-broad generalizations about the different talents or capacities of male and female students.¹⁴⁹ The Government leaves to the recipient the discretion to choose what types of information are useful and appropriate for this evaluation, and what standards to use to decide if it is accomplishing the mandated purposes.¹⁵⁰

The Government cannot ensure nondiscrimination using this approach. As a preliminary matter, as previously discussed in part (B)(2), it is unprecedented under the 1975 standards to allow recipients to evaluate their schools absent any definitive standards by which to do so. Furthermore, what incentive would recipients have to deem their programs ineffective, especially if there is parental pressure from the community to create single-sex schooling?¹⁵¹ Second, history and the current status of women in society dictate that separate but equal generally does not work, and existing Title IX

¹⁴⁷ American Civil Liberties Union, *ACLU Single-Sex Notice of Intent Comments to the Department of Education* (July 8, 2002), available at www.aclu.org/news/NewsPrint.cfm?ID=10481&c=174 (last visited Dec. 11, 2006).

¹⁴⁸ *Analysis of Comments and Changes*, Amendments to 34 C.F.R. 106, Oct. 25, 2006, at 20, available at <http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.html> (last visited Nov. 13, 2006).

¹⁴⁹ *Id.* at 6.

¹⁵⁰ *Notice of Proposed Rulemaking*, Amendments to 34 C.F.R. 106, Mar. 3, 2004, at 24, available at <http://www.ed.gov/legislation/FedRegister/proprule/2004-1/030904a.html> (last visited Dec. 11, 2006).

¹⁵¹ Sue Klein, Ed.D., *Research and Evaluation Options to Learn about the Effectiveness of Single-sex Education Interventions*, Address at the American Educational Research Association Annual Meeting in Chicago, (Apr. 27, 2003), *printed notes provided by author* (stating that “lawyers point out that schools districts are unlikely to use the remedial action justification since they wouldn’t want to incriminate themselves by admitting that their school has been discriminating against male or female students”).

regulations already allow single-sex programming only in limited instances where there is a measurable remedial effect. Separate but equal historically fails because there exists a history of sex discrimination, and in consideration of this history, separate cannot suddenly be void of discriminatory connotations and implications.¹⁵² The Supreme Court has acknowledged that the nation has had “a long and unfortunate history of sex discrimination.”¹⁵³ For several decades women were disenfranchised, and until *Reed v. Reed*, opportunities could be withheld from women so long as any “basis in reason” existed to justify the discrimination.¹⁵⁴ Sex discrimination continues to this day. In 1998, for every dollar earned by men, women still earned only 76 cents for comparable work.¹⁵⁵ Sociologists approximate that “as much as 75% of the gender wage gap is attributed to sex segregation.”¹⁵⁶ Women are barely visible in business and politics, which are still dominated by men. Women are but 13% of the U.S. Senate and 17% of the House of Representatives, and 1.1% of the CEOs of Fortune 1000 companies.¹⁵⁷

In this context, NOW, along with many other organizations, argues that the 2006 amendments should be analyzed in light of *Brown v. Board of Education*: “[a]lthough the Government’s proposal concerns segregation on the basis of gender instead of race, it must be evaluated against the backdrop of *Brown v. Board* which signaled the end of our country’s shameful history of racial segregation.”¹⁵⁸ Eleanor Smeal, President of the Feminist Majority Foundation, stated, “[i]t is appalling that in the year that marks the

¹⁵² Levit, *supra* note 9, at 516.

¹⁵³ *Fronteiro v. Richardson*, 411 U.S. 677, 684 (1973).

¹⁵⁴ 404 U.S. 71 (1971) (striking down Idaho Code that gave father preference over mother for becoming administratrix of deceased son’s estate because the Code stated that “males must be preferred to females.” The Court held that the classification was arbitrary and forbidden by the Equal Protection Clause of the Fourteenth Amendment.); *see, e.g., Goesaert v. Cleary*, 335 U.S. 464, 467 (rejecting challenge to law denying bartender licenses to females).

¹⁵⁵ *See* Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL’Y & L. 581, 597 (1997).

¹⁵⁶ Levit, *supra* note 9, at 513.

¹⁵⁷ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from FMF, July 8, 2002.

¹⁵⁸ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from NOW, June 26, 2002.

50th anniversary of *Brown v. Board of Education*, the case that taught us that separate is never equal, the Department of Education has issued proposed regulations that plan to separate the sexes and does not even promise us equality.”¹⁵⁹ The Supreme Court has highlighted the similarities between race and sex discrimination, stating that “[w]hile the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, ‘overpower those differences.’ ”¹⁶⁰ The Supreme Court has indicated that education is one of those “contexts” in which differences are overpowered:

The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges....The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority – assumptions for which women must eventually pay.¹⁶¹

Sex-segregated education is often a form of state sponsored segregation which “perpetuates the mistaken belief that women are inherently different from men, not only in their cognitive abilities but in temperament, personality, and psychology.”¹⁶² In a society that is not equal, this separation is accompanied by a stigma, and the exclusion of a subordinate group from association with the dominant group emphasizes the difference in power between them. If the government separates schools and classrooms on the basis of sex, it is explicitly stating that the problem is the presence of the opposite sex.¹⁶³

Empirical evidence demonstrates that this social separation creates feelings and attitudes

¹⁵⁹ *Department of Education Cuts Back on Title IX Protections*, FEMINIST DAILY NEWS WIRE, Mar. 5, 2004, available at <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=8312> (last visited Dec. 11, 2006).

¹⁶⁰ *J.E.B. v. Alabama*, 511 US 127, 135 (1994).

¹⁶¹ *United States v. Virginia*, 518 U.S. at n.8 (quoting C. Jencks & D. Riesman, *THE ACADEMIC REVOLUTION* 297-98 (1968)).

¹⁶² Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make The Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 70 (1997); see Levit, *supra* note 9, at 517.

¹⁶³ Levit, *supra* note 9, at 517.

of inferiority and superiority.¹⁶⁴ School segregation failed to eliminate racial discrimination, here it fails to alleviate sex discrimination.

IV. CONCLUSIONS

*“Coeducation is not the problem. Education is.”*¹⁶⁵

The 2006 amendments to Title IX regulations do not survive scrutiny under the Equal Protection Clause because there is no proof that single-sex education is substantially related to improving educational outcomes or addressing educational needs; and the amendments do not promote diversity nor safeguard against or decrease discrimination. The 2006 amendments are also in conflict with Title IX and undermine its purpose. They create increased flexibility where limited constitutionally-prescribed flexibility is already lawful. Additionally, they encourage sex stereotyping while failing to solve real problems in our nation’s schools such as sexual harassment. By segregating the sexes, the Government fails to prepare children for working life where the sexes are integrated. If children are unable to learn to work together in coeducational environments, how are men and women expected to work together as adults? The 2006 amendments threaten to backtrack on the successes of Title IX. Rather than enforcing these amendments, the Government’s goal should be to create a successful coeducational school system free from sex discrimination. One of the Government’s purported objectives in the 2006 amendments is to meet students’ “particular, identified educational

¹⁶⁴ *Id.* (citing Rosabeth Moss Kanter, MEN AND WOMEN OF THE CORPORATION 206, 242 (1977); Walter G. Stephan & Cookie White Stephan, INTERGROUP RELATIONS 10-12, 21-23, 61-88, 98-99, 102-06, 122-30, 144-46 (1996); Philip Brickman & Ronnie Janoff Bulman, PLEASURE AND PAIN IN SOCIAL COMPARISON, IN SOCIAL COMPARISON PROCESSES: THEORETICAL AND EMPIRICAL PERSPECTIVES 149, 158, 166-67 (Jerry M. Suls & Richard L. Miller eds. 1977); Sylvia R. Lazos Vargas, *Deconstructing Homogeneous Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1567-75 (1998); see also *Brown*, 347 U.S. at 494 (stating that “[a] sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children”); Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN’S RTS. L. REP. 361, 365-66 (1992) (finding that “most educators now appreciate” that preservation all-male educational institutions sends messages of “male superiority”).

¹⁶⁵ Goodman, *supra* note 126.

needs.”¹⁶⁶ This objective seems to mandate that students be evaluated not by their sex, but by their individual abilities, talents, and shortcomings. It is through individual analysis, not sex stereotyping, that the most successful educational reform can be achieved. It makes far more educational sense to group children by ability than by gender.¹⁶⁷ While women have gained much in terms of equality over the last few decades, the history of discrimination has been anything but eliminated. Education and educational opportunity is a precious key to equality. The Government must continue to safeguard the rights of both sexes to equal education by strictly enforcing Title IX and striking down the 2006 amendments as unlawful.

¹⁶⁶ *Analysis of Comments and Changes*, Amendments to 34 C.F.R. 106, Oct. 25, 2006, at 14, *available at* <http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.html> (last visited Nov. 13, 2006).

¹⁶⁷ Public commentary to Notice of Intent to Regulate, 67 FR 31,098, from Bernice Sandler, Senior Scholar at the Women’s Research and Education Institute, July 3, 2002.