ARE BLUE AND PINK THE NEW BROWN? THE PERMISSIBILITY OF SEX-SEGREGATED EDUCATION AS AFFIRMATIVE ACTION

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INTRODUCTION

Over fifty years ago, in the landmark decision of *Brown v. Board of Education*,[1] the United States Supreme Court ruled that racially segregated public schools are "inherently unequal."[2] For rejecting the "separate but equal" logic of *Plessy v. Ferguson*,[3] *Brown* is considered "a great moral victory"[4] and is warmly remembered as "'the single most honored opinion in the Supreme Court's corpus.'"[5] For its part, *Plessy*, which upheld the segregation of public school students on the basis of race, is said to "represent[ ] the worst understanding of race that America has to offer."[6]

In recent years, the Supreme Court has addressed the extent to which race may be used in other aspects of public education, most notably race-based affirmative action policies, which generally provide applicants from underrepresented minority groups with preferences in

1 Brown v. Bd. of Educ., 347 U.S. 483, 485 (1954).

2 *Id.* at 495.

3 Plessy v. Ferguson, 163 U.S. 537, 540 (1896).

4 Paul Finkelman, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973, 973 (2005).

5 *Id.* at 974 (quoting Jack M. Balkin, Brown v. Board of Education*: A Critical Introduction*, *in* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3, 4 (Jack M. Balkin ed., 2001)).

6 Ronald S. Sullivan Jr., *Multiple Ironies:* Brown *at 50*, 47 How. L.J. 29, 31 (2003).

admissions in order to secure the benefits of a sufficiently racially diverse school.[7] Members of the Court have expressed their discomfort with affirmative action. Justice Anthony M. Kennedy, for example, stated, "Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."[8] Even when approving of a race-conscious affirmative action policy in 2003, Justice Sandra Day O'Connor warned that such plans "are potentially so dangerous" that they must be limited in duration.[9] Clearly, segregation of students and affirmative action remains controversial and sensitive when considered through the lens of race.

This Article examines segregation and affirmative action in a different context—that of gender. Title IX of the Education Amendments of 1972 ("Title IX")[10] prohibits discrimination on the basis of gender in education programs or activities that receive federal financial assistance.[11] The regulations implementing Title IX, however, explicitly permit recipients of federal funding to offer single-sex schools, classes, and extracurricular activities.[12] The regulations also permit recipients to "take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."[13]

This Article discusses whether and to what extent the affirmative action provision of Title IX permits recipients of federal financial assistance to offer single-sex educational programs. It addresses primarily two questions: If, as the Court declared in *Brown*, "in the field of public education the doctrine of 'separate but equal' has no place,"[14] is it nonetheless permissible under Title IX to segregate students on the basis of gender for affirmative action purposes?[15] If so, what requirements may guide institutions, legal practitioners, and the courts in determining

7 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

8 *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); *see also* League of United Latin Am. Citizens v. Perry, 126 S.Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) ("It is a sordid business, this divvying us up by race.").

9 *Grutter*, 539 U.S. at 342.

10 20 U.S.C. § 1681 (2000).

11 34 C.F.R. § 106.1 (2007).

12 *Id.* § 106.34(b)–(c).

13 *Id.* § 106.3(b).

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

15 *See* Frances Elizabeth Burgin, Note, *Fire Where There Is No Flame: The Constitutionality of Single-Sex Classrooms in the Commonwealth*, 13 WM. & MARY J. WOMEN & L. 821, 825 (2007) (stating that it is unclear "whether the principle of 'separate as inherently unequal' would also implicate gender-segregated classrooms"). *But see* Laura Fortney, Comment, *Public Single-Sex Elementary Schools: "Separate But Equal" in Gender Fifty Years After* Brown v. Board of Education, 35 U. TOL. L. REV. 857 (2004) (arguing that single-sex education

whether such single-sex programs are established in a manner consistent with existing law?

Part I argues that single-sex education as affirmative action is permitted under Title IX, based on an analysis of the text and purpose of Title IX and its implementing regulations,[16] relevant Supreme Court jurisprudence, government statements, and other sources. This Article reaches a result that may seem surprising or contradictory to some: that segregated education, while constitutionally prohibited and socially revolting when based on race, is permissible when based on gender. Part II enumerates several conditions that should help single-sex affirmative action educational programs survive a legal challenge.[17] The final section is a conclusion.

As a preliminary matter, it is important to note that this Article does not purport to assess the merits of implementing single-sex education to compensate for discrimination or to achieve any other pedagogical objective.[18] Moreover, this Article will not speculate as to why "single-sex education [is not] as troublesome [to legal scholars or society at large] as single-race education,"[19] or about why gender-based classifications are

established on the basis of gender is inconsistent with *Brown* and a broader principle of equality).

16 These are contrasting interpretive tools emphasized by Justices Antonin Scalia and Stephen Breyer, respectively. *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (1997) (stating that "[t]he text is the law, and it is the text that must be observed"), *with* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85 (2005) (arguing, with respect to interpretive aids, that judges should place greater emphasis on "statutory purpose and congressional intent").

17 Courts have listed factors under which race-conscious affirmative action admissions policies should be evaluated. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 17 (1st Cir. 2005) (enumerating "a four-part narrow tailoring inquiry" that the Supreme Court used in the context of race-based affirmative action); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1180 (9th Cir. 2005) (identifying the Supreme Court's "five hallmarks of a narrowly tailored affirmative action plan"), *rev'd on other grounds*, 127 S. Ct. 2378 (2007). Some scholars have attempted to decipher factors applicable to gender-based affirmative action; however, the articles present factors that are either stale or erroneously grounded. *See infra* notes 20–22 and accompanying text.

18 The benefits of single-sex education have been discussed in other circles. *See, e.g.*, *Separate Class Needed for Boys*, BBC NEWS, May 29, 2005, *available at* http://news.bbc.co.uk/2/hi/uk_news/england/cambridgeshire/4591653.stm; Peg Tyre, *Boy Brains, Girl Brains: Are Separate Classrooms the Best Way to Teach Kids?*, NEWSWEEK, Sept. 19, 2005, at 59, *available at* http://www.newsweek.com/id/104472; *see also* Pherabe Kolb, *Reaching for the Silver Lining: Constructing a Nonremedial Yet "Exceedingly Persuasive" Rationale for Single-Sex Educational Programs in Public Schools*, 96 NW. U. L. REV. 367, 369 (2001) (arguing that "empirical research, bolstered by both statistical data and in-depth case studies, must undergird any assertion that gender-specific programs and policies are beneficial for some students"). For purposes of this Article, it is presumed that the benefits of single-sex education have been sufficiently well-established that, absent legal restraints, school boards would have the discretion to conclude that same-sex offerings would benefit certain students.

19 Jack Balkin, *Is There a Slippery Slope from Single-Sex Education to Single-Race Education?*, 37 J. OF BLACKS IN HIGHER EDUC. 126, 126–27 (2002), *available at* http://www.yale.edu/lawweb/jbalkin/opeds/singlesexeducation1.htm (contending that that certain "histori-

not as prominent a part of the American culture war as issues involving race, especially race-conscious affirmative action.

To date, legal scholars have paid scant attention to the threshold question of whether, and if so, when, a single-sex affirmative action program under Title IX is compatible with the Constitution. Indeed, no federal court has squarely addressed what circumstances render a sex-segregated educational program permissible,[20] nor has the U.S. Department of Education's ("DOE's") Office for Civil Rights ("OCR"), the government authority responsible for enforcing Title IX, issued formal policy on the subject.[21] Little discussion exists on this topic in academic literature,[22] and the few articles on point either do not reflect recent de-

cal facts tend to suggest why single-sex education carries very different freight than single-race education"); *see also* Bennett L. Saferstein, Note, *Revisiting* Plessy *at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 646–47 (1993) (advancing thoughts as to why "[s]ex discrimination does have some significant differences from racial discrimination, particularly in the context of education").

[20] In fact, only two published federal court opinions cite to 34 C.F.R. § 106.3(b). *See* Coal. for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1518 (N.D. Cal. 1996) (discussing whether 34 C.F.R. § 106.3(b) "require[s] preemption of a state law that prohibits affirmative action"), *vacated*, 110 F.3d 1431 (9th Cir. 1997); Garrett v. Bd. of Educ., 775 F. Supp. 1004, 1009 (E.D. Mich. 1991) (deferring to an opinion of the U.S. Department of Education, Office for Civil Rights, that "all male public elementary and secondary school programs violate Title IX").

[21] As will be noted in Part I, an oft-quoted OCR resolution letter on sex-segregated opportunities is not a formal statement of OCR policy. *See also* Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102, 31,102–03 (May 8, 2002) (informing local educational agencies, or LEAs, that they "may offer a single single-sex school if such an action constitutes remedial or affirmative action," but failing to provide any further guidance, suggesting only, and obviously, that the LEAs "should be aware of constitutional requirements in this area," as "LEAs may be challenged in court litigation on constitutional grounds").

[22] *See* Grace-Marie Mowery, *Creating Equal Opportunity for Female Coaches: Affirmative Action Under Title IX*, 66 U. CIN. L. REV. 283, 296–97 (1997) (discussing affirmative action under Title IX in the context of employment); Isabelle Katz Pinzler, *Separate But Equal Education in the Context of Gender*, 49 N.Y.L. SCH. L. REV. 785, 789 (2005) ("*Brown* is never cited by the Supreme Court in discussion of these issues, nor has 'separate but equal' ever been held constitutionally impermissible in the context of sex."); Rosemary Salomone, *Rich Kids, Poor Kids, and the Single-Sex Education Debate*, 34 AKRON L. REV. 209, 221 (2000) (noting only that "the question [exists] as to whether single-sex classes can be initiated only for remedial purposes" and that "the regulations, adopted in the mid-1970s to specifically address discrimination against girls, remain unclear on" whether single-sex classes can be established for boys, particularly "non-minority boys"); Galen Sherwin, *Single-Sex Schools and the Antisegregation Principle*, 30 N.Y.U. REV. L. & SOC. CHANGE 35, 53 n.112 (2005) ("[A] consideration of how Title IX's affirmative action exception might apply to single-sex colleges or professional schools is beyond [the Article's] scope.") (citing 34 C.F.R. § 106.3).

velopments in the law[23] or are inaccurate in critical respects.[24] Moreover, the topic rests on an uncertain and unclear legal landscape.[25]

That gender discrimination persists in American society, including in academia[26] and in the workplace,[27] is beyond dispute. As a consequence, the need for remedies persists, including remedies that may be implemented through the educational system. Educational administrators urgently need guidance on how they may legally implement compensatory educational opportunities for the disadvantaged gender.[28] Reliable guidelines should assist the educational and legal communities in distinguishing legally sound single-sex affirmative action programs from those that lose their character as constitutionally protected educational initiatives.

23 *E.g.*, Fred Von Lohmann, Note, *Single-Sex Courses, Title IX, and Equal Protection: The Case for Self-Defense for Women*, 48 STAN. L. REV. 177, 183–87 (1995) (addressing "Affirmative Remedial Action Under Title IX Regulations" without the benefit of significant judicial and administrative developments from the intervening years, including, but not limited to, *United States v. Virginia*, 518 U.S. 515, 531–533 (1996), and OCR's release of regulatory amendments permitting single-sex education).

24 For example, Maryam Ahranjani and Monica J. Stamm suggest that three conditions must be met for a single-sex school established under 34 C.F.R. § 106.3(b) to be permissible. Maryam Ahranjani, Mary Daly v. Boston College*: The Impermissibility of Single-Sex Classrooms within a Private University*, 9 AM. U. J. GENDER SOC. POL'Y & L. 179, 197 (2001); Monica J. Stamm, Note, *A Skeleton in the Closet: Single-Sex Schools for Pregnant Girls*, 98 COLUM. L. REV. 1203, 1217 n.93 (1998). In formulating these conditions, however, Ahranjani and Stamm rely on information with no precedential value. Ahranjani, *supra* note 24, at 197; Stamm, *supra* note 24, at 1217 n.93. The conditions themselves, thus, do not reliably elucidate the requirements that a recipient should satisfy to properly implement sex-segregated education under 34 C.F.R. § 106.3(b).

25 *See* Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 455 (1999).

26 *See* MARTHA S. WEST & JOHN W. CURTIS, AAUP FACULTY GENDER EQUITY INDICATORS 2006 4 (2006), *available at* http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf ("Women hold only 24 percent of full professor positions in the U.S., despite the overwhelming presence of women students on campus for the past twenty-five years. Women are obtaining doctoral degrees at record rates, but their representation in the ranks of tenured faculty remains below expectations, particularly at research universities.").

27 *See Want to Return to Your Career?*, MSNBC, May 18, 2007, http://www.msnbc.msn.com/id/18726931 ("It's been over 20 years since the Wall Street Journal first coined the phrase "glass ceiling" and yet today only 12 of all Fortune 500 companies are run by a female CEO and the average woman still makes 80 cents for every dollar a man makes.").

28 *See* Kay Bailey Hutchison, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 AM. U. L. REV. 1075, 1081 (2001) (arguing that, due to the lack of clarity on the legality of single-sex education programs, "[s]chool officials had been unwilling to risk being subjected to a discrimination complaint or enforcement action, which could include the complete loss of all federal funds").

I. SINGLE-SEX AFFIRMATIVE ACTION EDUCATIONAL PROGRAMS ARE GENERALLY PERMISSIBLE UNDER TITLE IX AND THE U.S. CONSTITUTION

A. TITLE IX GENERALLY PERMITS INSTITUTIONS TO OFFER SINGLE-SEX AFFIRMATIVE ACTION EDUCATIONAL PROGRAMS

1. *Text of Title IX and Its Implementing Regulations*

The Title IX statute generally prohibits discrimination on the basis of sex in all educational programs or activities receiving federal financial assistance.[29] A version of Title IX that passed in the House of Representatives "would have required that all single-sex schools, primary and secondary, public and private, become coeducational."[30] But Title IX, as enacted, only required some institutions to be coeducational. In particular, Title IX's prohibition against discrimination in admission applies only to "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."[31] As a result, schools in these specific sectors of education may not restrict enrollment to a single sex for any other purpose, even for affirmative action.[32] Put another way, "[g]raduate, vocational, and professional education," as well as public undergraduate education, "seem to be clearly identified by law as requiring coeducational admissions policies."[33] The statute itself establishes a significant limitation on the universe of single-sex education a recipient may provide.[34]

Conversely, the statute's prohibition in admissions does not apply to non-vocational elementary and secondary institutions or to private undergraduate institutions.[35] As a result, "private single-sex colleges would

29 20 U.S.C. § 1681(a) (2000).

30 Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880, 883 (3rd Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977) (per curiam).

31 20 U.S.C. § 1681(a)(1).

32 *See* Jones *ex rel.* Michele v. Bd. of Educ., 632 F. Supp. 1319, 1320 (E.D.N.Y. 1986); Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 2025 n.379 (2006) (observing that 20 U.S.C. § 1681(a)(1) "prohibit[s] discrimination on the basis of sex in admissions to vocational education programs.").

33 Amy H. Nemko, *Single-Sex Public Education After VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 46 n.184 (1998).

34 20 U.S.C. § 1681(a)(1). A Title IX regulation provides that "[a] recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient." 34 C.F.R. § 106.35 (2007). This provision mirrors the Title IX statute, whose prohibition against discrimination on the basis of gender in admissions applies to "institutions of vocational education." 20 U.S.C. § 1681(a)(1).

35 *See* Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 79 n.89 (2004) ("Title IX does not apply to admissions policies in nonvocational elementary and secondary schools." (citing Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276, 11,281 (Mar. 9, 2004) (to be codified at 34 C.F.R. pt.

not be prohibited, and public primary and secondary schools would not be prohibited under Title IX."[36]

While the statute carves out an exception for recipients to implement certain single-sex schools, the statute does not specify satisfactory justifications for single-sex schools.[37] The statute does not mention remedial or affirmative action at all. Therefore, the statute does not clearly indicate whether single-sex non-vocational elementary and secondary, and private undergraduate schools can be created for affirmative action purposes. At this stage, scholarship on this topic can only certify that (1) the statute has eliminated the possibility that single-sex schools may be created in vocational education, professional education, and graduate higher education, or in public undergraduate settings, and (2) the statute has provided an area within which single-sex schools may be created. Other sources will have to reveal the legitimate purposes for which administrators may establish single-sex education.

The Title IX regulation explicitly refers to remedial and affirmative action. Title 34, section 106.3(a) of the Code of Federal Regulations provides that "[i]f the Assistant Secretary [for Civil Rights in DOE] finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination."[38] In addition, 34 C.F.R. § 106.3(b) provides, in pertinent part, that "[i]n the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."[39]

Taking these two provisions together, a recipient *must* take remedial action where OCR's Assistant Secretary has determined that the recipient

106))). *See also* Sherwin, *supra* note 22, at 53 ("[A]s far as admissions are concerned, [Title IX] notably does not cover either private undergraduate institutions or schools below the undergraduate level, like public secondary schools.").

36 Jolee Land, Note, *Not Dead Yet: The Future of Single-Sex Education After* United States v. Virginia, 27 STETSON L. REV. 297, 322 (1997). This article does not address what differentiates a public institution from a private one for purposes of Title IX nor, in particular, for the applicability of the statutory prohibition against discrimination in admissions. For information on that subject see, for example, Karla Cooper-Boggs, Note, *The Link Between Private and Public Single-Sex Colleges: Will Wellesley Stand or Fall with the Citadel?*, 29 IND. L. REV. 131, 132 (1995), which examines "three legal theories which could be used to challenge the legality of the admissions policies of private women's colleges."

37 *See* Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880, 883 (3rd Cir. 1976) (recounting how the Senate rejected a version of the statute that "would have required that all single-sex schools, primary and secondary, public and private, become coeducational").

38 34 C.F.R. § 106.3(a).

39 *Id.* § 106.3(b).

has discriminated on the basis of gender,[40] but a recipient *may* also undertake action without such a determination as a means to compensate for conditions that have resulted in limited opportunities for individuals of a particular gender.[41] Put another way, 34 C.F.R. § 106.3(a) mandates action and is triggered by a finding of discrimination, whereas 34 C.F.R. § 106.3(b) permits voluntary action and merely requires that the "effects of conditions" that have "resulted in limited participation" of members of one gender exist.[42]

Both 34 C.F.R. § 106.3(a) and 34 C.F.R. § 106.3(b) do not specify whether single-sex education may suffice as a form of remedial or affirmative action under the Title IX regulations. A common rule providing for the enforcement of Title IX by several federal agencies, however, suggests that single-sex programs are permissible, depending on the circumstances, under 34 C.F.R. § 106.3:

> Several comments inquired about the viability of single-sex programs such as an educational science program targeted at young women and designed to encourage their interest in a profession in which they are underrepresented. Such courses may, under appropriate circumstances, be permissible as part of a remedial or affirmative action program as provided for by . . . these Title IX regulations.[43]

Moreover, a convincing argument can be made that a textual interpretation of 34 C.F.R. § 106.3(b) contemplates the use of single-sex education. As Fred Von Lohmann argues in the *Stanford Law Review*:

> [T]he language of [34 C.F.R. §] 106.3(b) explicitly permits covered institutions to take voluntary affirmative action even in the absence of an administrative finding of discrimination. The plain meaning of the words "affirmative action" in this context authorizes the use of

[40] *See* Mowery, *supra* note 22, at 297 ("[Subdivision (a) of 34 C.F.R. § 106 applies to] a situation in which the Director of the OCR finds that the recipient has discriminated on the basis of sex. In this situation, the recipient 'shall' take remedial action as deemed necessary by the Director to overcome the effects of the discrimination.").

[41] *Id.* at 298 ("In [a situation involving 34 C.F.R. § 106(b)], the Director has not found discrimination. According to the regulations, the recipient in this situation 'may' still take affirmative action to overcome the effects of conditions which caused limited participation by the members of a particular sex . . . .").

[42] *Id.*; *see also* Cohen v. Brown Univ., 101 F.3d 155, 172 (1st Cir. 1996) (noting that "a remedy flowing from a judicial determination of discrimination" in violation of Title IX does not mean "the remedy constitutes 'affirmative action'").

[43] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858, 52,861 (Aug. 30, 2000) (to be codified at 49 C.F.R. pt. 25).

> gender-based classifications designed to assist the historically-disadvantaged gender. Indeed, any other reading would render the provision superfluous, as remedial measures employing non-gender classifications would not fall within the purview of Title IX at all. Congress's inclusion of [34 C.F.R. §] 106.3(b) thus should be read to permit some deviation from the general requirement that institutions administer their educational programs and activities in a "sex-blind" manner.[44]

The Department of Justice (DOJ) supports Von Lohmann's conclusion, that 34 C.F.R. § 106.3(b) provides for a "deviation" from the general prohibition against taking gender into account in a recipient's programs and activities. In a brief submitted to the Supreme Court in *United States v. Virginia*, the DOJ, on behalf of the United States, argued, "Affirmative action that was designed to remedy sex discrimination . . . addresses harms that are by their nature class-based."[45] If 34 C.F.R. § 106.3(b) permits recipients to address discriminatory conditions, and those discriminatory conditions are gender-based, then, as the United States contends, gender-based measures must compensate recipients.[46]

The affirmative action must necessarily take gender into account not only because of the nature of class-based discriminatory conditions, but also to preserve the integrity of the regulations. Otherwise, a gender-neutral affirmative action would essentially violate the general prohibition against discrimination on the basis of gender, rendering it a complete nullity.

With the only exception of 20 U.S.C. §1681(a)(1), nothing in the text of the statute or the regulations suggests that the gender-based remedies should exclude single-sex schools, classes, or activities. As a result, the Title IX affirmative action provision, 34 C.F.R. § 106.3(b), must be interpreted to allow for class-based (for example, gender-based) compensatory measures that include single-sex schools, classes, and activities, except for the single-sex schools prohibited by 20 U.S.C. § 1681(a)(1).[47]

44 Von Lohmann, *supra* note 23, at 185.

45 Reply Brief for the Petitioner at 12 n.11, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-1941) [hereinafter Reply Brief]; *accord* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982).

46 *See* Califano v. Webster, 430 U.S. 313 (1977) (upholding a provision of the Social Security Act that permitted women, who, as a class, were subject to economic discrimination, to eliminate low-earning years in calculating their retirement); *cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738, 2768 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *id.* at 2797 (Kennedy, J., concurring in part and in the judgment) ("The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward.").

47 *See* Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880, 885 (3rd Cir. 1976) ("Judicial zeal for identity of educational methodology should not lead us to presume that

2. *Purpose of Title IX*

While the probative value of legislative history as a means of inferring congressional intent is often subject to debate,[48] the United States Supreme Court has repeatedly turned to the principal author of Title IX, Senator Birch Bayh, for guidance on the statute's meaning.[49] The Court has indicated that it gives considerable weight to Senator Bayh's testimony, noting that "statements by individual legislators should not be given controlling effect, but, at least in instances where they are consistent with the plain language of Title IX, Senator Bayh's remarks are 'an authoritative guide to the statute's construction.'"[50] Accordingly, in the context of Title IX, there is significant justification for discussing the statements of Senator Bayh, made during the consideration of Title IX.

Senator Bayh clearly expressed that two important policies underlay Title IX. One was preventing recipients of federal financial assistance from discriminating against women, and the second was to extend the protections of Title VI of the Civil Rights Act of 1964 ("Title VI") to gender discrimination:

> [O]ne of the great failings of the American education system is the continuation of corrosive and unjustified discrimination against women . . . . [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds . . . . Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by Title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of Title VI.[51]

Congress would impose such limitations upon the nationwide teaching community by equivocation or innuendo. Congress spoke clearly enough on single-sex schools in 1972 when it chose to defer action in order to secure the data needed for an intelligent judgment.").

48 *Compare* FCC v. NextWave Personal Commc'ns Inc., 537 U.S. 293, 305 (2003) (opinion authored by Scalia, J.) (criticizing the dissent for relying in part on "ever-available snippets of legislative history" in discerning the purpose of a statute), *with id.* at 314–15 (Breyer, J., dissenting) (contending that "the statute's history"—including Senate Reports, House Reports, and statements from the floor of the House—"demonstrates an anti-discriminatory objective").

49 *See, e.g.*, Grove City Coll. v. Bell, 465 U.S. 555, 566–67 (1984); N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 537 (1982); Cannon v. Univ. of Chi., 441 U.S. 677, 696 n.19 (1979).

50 *Grove City*, 465 U.S. at 567 (quoting *N. Haven*, 456 U.S. at 527).

51 118 CONG. REC. S5803–07 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh).

Regarding admissions, Senator Bayh noted that "discrimination affects the greatest number of women . . . [in] admissions to undergraduate, graduate, professional, and vocational institutions of education."[52] The Senator continued:

> The discriminatory effect of sex segregation in vocational education is that many fields which are designated for females such as cosmetology or food handling are less technical and therefore less lucrative than fields such as TV repair and auto mechanics "reserved" for males. And yet it is only tradition which keeps women out of these fields . . . . If women can receive agricultural, electronic, or mechanical training in some programs, they should be able to receive that same training in all programs.[53]

Given Senator Bayh's remarks, one would expect the statute's prohibition against discrimination to actually apply to "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."[54]

The House version of the bill was far more expansive and "would have required that all single-sex schools, primary and secondary, public and private, become coeducational."[55] The Senate, however, narrowed the scope of the House bill. Senator Bayh, who sponsored a "limiting amendment,"[56] stated candidly that, "no one even knows how many single-sex schools exist on the elementary and secondary levels or what special qualities of the schools might argue for a continued single-sex status."[57] As a result, he contended that a "study is needed on the question of requiring them to admit students of both sexes . . . . After these questions have been properly addressed, then Congress can make a fully informed decision on the question of which—if any—schools should be exempted."[58] Consequently, the prohibition against discrimination in admission applied only to institutions where discrimination was clearly documented, and did not apply to others where further inquiry was

[52] *Id.* at 5805 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh). Senator Bayh cited Massachusetts as an example, where "there are 17 secondary vocational schools for boys and [comparatively only] three secondary vocational schools for girls." *Id.* at 5806 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh).

[53] *Id.* at 5806 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh).

[54] 20 U.S.C. § 1681(a)(1) (2006).

[55] Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880, 883 (3rd Cir. 1976).

[56] Sherwin, *supra* note 22, at 54–55 n.113.

[57] 118 CONG. REC. S5803, 5804 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh).

[58] *Id.* at 5807 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh). Senator Bayh predicted that "many of these exemptions [for some types of schools, based on feasibility,] will not be supportable after further study and discussion." *Id.* (daily ed. Feb. 28, 1972) (statement of Sen. Bayh).

needed. The lack of information available to Congress regarding individual institutions was effectively a safe harbor within which single-sex education could operate.

The legislative history of Title IX regarding affirmative action is extremely limited,[59] perhaps because Title IX was intended to track Title VI. Specifically, Title VI contained a voluntary affirmative action provision, which the Title IX drafters adopted nearly verbatim.[60] In light of the fact that Title IX essentially mirrors the voluntary affirmative action provision of Title VI, it is perhaps unsurprising that 34 C.F.R. § 106.3(b) was inserted with little fanfare. It appears logical that the Title IX drafters would find the remedial measures envisioned by the Title VI drafters to be equally attractive.

Despite the sparseness of Title IX's history, Senator Bayh's remarks clearly indicate that Title IX was intended to address "the continuation of corrosive and unjustified discrimination against women."[61] As a result, "the heart" of Senator Bayh's legislation "is a provision banning sex discrimination in educational programs receiving Federal funds."[62] The Title IX affirmative action provision, 34 C.F.R. § 106.3(b), permits recipients to "take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex." Importantly, a recipient need not wait for a finding by a formal body of discrimination before it addresses the effects of discriminatory conditions.[63] Under 34 C.F.R. § 106.3(b), recipients with the ability to combat gender discrimination sooner rather than later. By providing recipients with a tool to be proactive in remedying discrimination, 34 C.F.R. § 106.3(b) furthers Title IX's fundamental purpose to eradicate the discriminatory conditions that limit the educational opportunities of women.

In addition, the discriminatory conditions themselves need not rise to the level of conclusive discrimination for those conditions to be addressed.[64] Regulation 34 C.F.R. § 106.3(b) enables recipients to address

59 *See* Von Lohmann, *supra* note 23, at 183 ("The legislative history of Title IX does not indicate a clear congressional intention regarding affirmative action.").

60 *See* 34 C.F.R. § 100.3(b)(6)(ii) (2007) ("Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.").

61 118 CONG. REC. S5803 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh).

62 *Id.*

63 *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 290 (1986) (O'Connor, J., concurring in part and concurring in judgment) (recognizing "this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law'â' (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 364 (1978)).

64 *See* Wessmann v. Gittens, 160 F.3d 790, 815 (1st Cir. 1998) ("[A]n entity should not have to wait for its own liability to minorities to be proved conclusively in litigation before it

discriminatory conditions before conditions are entrenched in the recipient's practices, or socially widespread. Without the affirmative action provision of Title IX, recipients could remedy gender discrimination when compelled to do so, which would only be when discrimination is so severe that it is legally actionable. Regulation 34 C.F.R. § 106.3(b) helps to prevent the perpetuation and expansion of gender-based discriminatory conditions by enabling recipients to take remedial steps before the conditions are beyond correction.

If 34 C.F.R. § 106.3(b) advances the purpose of Title IX by permitting recipients to address limited educational opportunities for women, the *methods* that recipients may use under 34 C.F.R. § 106.3(b) must further the purpose of Title IX as well. As one commentator theorized, "a vocational education class in auto mechanics" for women would be "justified" where it was "shown that women had been barred from pursuing that vocation, and that having a class consisting predominantly of men could discourage women from taking the class or result in women dropping out due to harassment or other forms of sex discrimination."[65] A single-sex class for women in this instance appears to further Senator Bayh's vision for Title IX in that women are provided with an opportunity in an educational area that they were, as a class, barred or discouraged from pursuing.

To better appreciate the argument that single-sex education is a means of achieving Title IX goals, it is helpful to examine an actual single-sex affirmative action program. In 2001, DOE published a report that "identif[ed] promising and exemplary programs that promote gender equity in and through education."[66] Out of over one hundred reviewed programs, the report recommended eleven—one considered "exemplary" and ten "promising."[67]

The *only* exemplary program identified in the report was a single-sex vocational education program that was "designed to assist socioeconomically disadvantaged women to explore and successfully enter high-wage careers in nontraditional fields in which they have been under-represented," including construction, manufacturing, transportation, protective services, and web-design.[68] According to the report, "The purpose of the program was to help participants," who included incarcerated women and women on welfare, "overcome multiple barriers

could undertake remedial action." (citing *Wygant*, 476 U.S. 267, 291 (O'Connor, J., concurring in part and concurring in judgement)).

65 Sara Mandelbaum, *Constitutional, Statutory, and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 81, 91 (1997).

66 GENDER EQUITY EXPERT PANEL, U.S. DEP'T OF EDUC., PUBL'S NO. ORAD 2001-1000, EXEMPLARY & PROMISING GENDER EQUITY PROGRAMS 2000 (2001).

67 *Id.* at 1-2.

68 *Id.* at 6.

and become economically self-sufficient."[69] Participation in the program was voluntary.[70] The report praised the completion rate of program participants, the ability of the program to place participants into the workforce or into further training programs, and the decrease in the participants' rate of recidivism.[71] The report also noted that the program was "successfully replicated in multiple sites" and that it has "excellent potential for use by others."[72] This program, along with the other programs given high ratings, shows that single-sex affirmative action can advance the purpose of Title IX.

Based on the preceding analysis of text and purpose, single-sex affirmative action programs are permissible under the Title IX statute and its implementing regulations, with the sole exception that single-sex vocational education, professional education, graduate, and public institutions of undergraduate schools may not be established pursuant to the Title IX statute, at 20 U.S.C. § 1681(a)(1).

3. *A Response to Garrett*

Before proceeding further, it is necessary to address two aspects of a ruling by the United States District Court for the Eastern District of Michigan in *Garrett v. Board of Education*.[73] In *Garrett*, the plaintiffs claimed a public school district's proposed "establishment of male-only academies" violated the Equal Protection Clause of the Fourteenth Amendment, Title IX, and other state provisions.[74] The plaintiffs moved "to enjoin the [school board] from taking any further steps to implement the male academies."[75]

With respect to the legality of the male-only academies under Title IX, the school board argued that the Title IX statute "excludes from coverage, admission plans in kindergarten through grade twelve." The court thus was forced to interpret the meaning of the Title IX statute, at 20 U.S.C. § 1681(a)(1), which applies its prohibition against discrimination in admissions to "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education" and thus permits single-sex education in institutions not covered by this provision. The court "view[ed] this ex-

69 *Id.*

70 *Id.*

71 *Id.* at 8. It is important to note that the report focused on the program's effectiveness and did not address whether and to what extent it complied with prevailing constitutional or statutory law. *See id.* at 7 ("Those interested in replicating the . . . program must ensure that it is operated consistently with Title IX . . . , and with the Title IX regulation [34 C.F.R §] 106.34 (access to course offerings) and [34 C.F.R §] 106.3 (remedial and affirmative action).").

72 *Id.* at 15.

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

74 *Id.* at 1005.

75 *Id.*

emption for admissions as applicable primarily to historically *pre-existing* single sex schools," not as "authorization to establish new single-sex schools."[76]

The school board noted, in part, that the male-only academies were authorized under the affirmative action provision of the Title IX regulation, 34 C.F.R. § 106.3(b).[77] The court, however, deferred to a 1988 OCR statement that ostensibly held that "all male public elementary and secondary school programs violate Title IX."[78]

First, the district court interpreted 20 U.S.C. § 1681(a)(1) to exempt from Title IX's coverage admissions "to historically pre-existing single sex schools."[79] As a result, the district court concluded that this statutory provision "is not viewed as authorization to establish new single sex schools."[80]

To the extent that the district court's 1991 interpretation has any merit, the recent actions of the DOE functionally supersede and should rebut any residual notion that the Title IX statute does not permit the establishment of new single-sex schools. In particular, the DOE amended Title IX regulations to clarify that recipients could offer single-sex classes and schools, as long as this was done in a non-discriminatory manner and in compliance with Title IX regulations.[81] The regulation, at 34 C.F.R. § 106.34(c)(1), provides that "a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school." A regulation that aims to "*expand flexibility* for recipients to provide single-sex education"[82] and then provides a requirement for recipients to implement single-sex schools in particular[83] surely contemplates the creation of new single-sex schools.

Interpreting the statute to prohibit the creation of new single-sex schools would also appear to conflict with 34 C.F.R. § 106.3, which implicates compensatory action that may take place in the future—i.e., remedial action in response to a finding of discrimination and affirmative action even in the absence of such a finding. As a result, the district

76 *Id.* at 1009 (emphasis added).

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,529 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106).

82 *Id.* at 62,531 (emphasis added).

83 *See* 34 C.F.R. § 106.34(c)(1) (2007).

court's view of 20 U.S.C. § 1681(a)(1) does not appear to be a reasonable construction of the statute.

Second, in rejecting the recipient's claim that a single-sex school was authorized by 34 C.F.R. § 106.3(b), the district court deferred to an OCR "ruling" that ostensibly held that "all male public elementary and secondary school programs violate Title IX."[84] To the extent that this OCR case had any precedential value, OCR's subsequent actions demonstrate that it no longer follows the "ruling" described in the district court opinion.[85] Indeed, the 2006 single-sex regulatory amendments, which allow for single-sex schools provided that a substantially equal single-sex school is also offered,[86] suggest strongly that DOE does not consider single-sex schools to be prohibited by Title IX.[87]

It is now appropriate to turn to the constitutionality of single-sex education established pursuant to the affirmative action provision of Title IX.

B. SINGLE-SEX AFFIRMATIVE ACTION PROGRAMS ARE CONSTITUTIONAL, DEPENDING ON THE CIRCUMSTANCES

1. *Overview of Constitutional Analysis of Gender-Based Classifications Generally*

A party challenging the legality of single-sex schools, classes, or activities established pursuant to Title IX, at 34 C.F.R. § 106.3(b), will likely bring claims under the Equal Protection Clause of the Fourteenth Amendment, which prohibits states from denying to any person equal protection of the laws,[88] as well as under Title IX. As Title IX is "coextensive with the Equal Protection Clause, the test for determining liability under [Title IX] is the same as the test for determining liability under the Equal Protection Clause."[89] Indeed, the leading Supreme Court cases in this subject proceed under an equal protection analysis.[90]

84 *Id.*

85 Another commentator has suggested that, in any case, the OCR "ruling" discussed in *Garrett* is of little value because the court did not provide any insight into OCR's legal reasons for its conclusion. *See* Von Lohmann, *supra* note 23, at 194 ("The court in *Garrett* did not explain OCR's rationale for opposing all-male academies, nor did the court express an opinion regarding the applicability of § 106.3(b). As a result, *Garrett* does not shed much light on the appropriate Title IX analysis for gender-based affirmative action initiatives.").

86 34 C.F.R. § 106.34(c)(1) (2006).

87 An exception, of course, is the statutory prohibition against discrimination in admissions that applies to vocational, professional, graduate, and public undergraduate institutions. *See* 20 U.S.C. § 1681(a)(1) (2007).

88 U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person . . . the equal protection of the laws.").

89 William E. Thro, *Judicial Paradigms of Educational Equality*, 174 EDUC. LAW REP. 1, 17 n.56 (April 24, 2003).

90 *See* United States v. Virginia, 518 U.S. 515 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

According to the Supreme Court's equal protection jurisprudence, a "party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification."[91] Single-sex schools, classes, or activities, which by their nature classify applicants and/or students on the basis of gender, are inherently gender-based classifications and thus require an "exceedingly persuasive justification" to survive constitutional muster.[92]

To satisfy the burden of showing an "exceedingly persuasive justification," "the defender of the challenged classification 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.'"[93] As a result, the party seeking to preserve a single-sex program in court first must proffer an "important governmental objective" for the gender-based classification, here a single-sex school, class, or activity. As part of this test, the party must demonstrate that the classification "intentionally and directly assists members of the sex that is disproportionately burdened"[94] and that "members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[95]

The defender of the gender-based classification must pass this constitutional hurdle even if the classification is allegedly based on benign justifications.[96] A searching examination into the actual purposes of the gender-based classification enables the courts to "'smoke out' illegitimate uses" of gender to ensure that "there is little or no possibility that the motive for the classification was illegitimate . . . prejudice or stereo-

91 *Hogan*, 458 U.S. at 724 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979). The requirement of an "exceedingly persuasive justification" appears to be interchangeable with, and does not seem to alter or add to, what is commonly known as "intermediate scrutiny." *See Virginia*, 518 U.S. at 559 (Rehnquist, C.J., concurring) (commenting that the phrase "'exceedingly persuasive justification' . . ais best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself"); Eng'g Contractors Ass'n of South Fla. Inc. v. Metro. Dade County, 122 F.3d 895, 907–08 (11th Cir. 1997) ("[A]lthough the phrase 'exceedingly persuasive justification' has more linguistic verve than conventional descriptions of intermediate scrutiny, it does not necessarily follow that a new constitutional standard for judging gender preferences is embodied in that phrase.").

92 *See Virginia*, 518 U.S. at 531–46 (evaluating the constitutional merits of the all-male Virginia Military Institute based on this standard).

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

94 *Hogan*, 458 U.S. at 728.

95 *Id.*

96 *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.").

type."[97] Accordingly, single-sex schools and classes, even if offered to compensate for discriminatory conditions, as contemplated by 34 C.F.R. § 106.3(b), nevertheless must contend with the "exceedingly persuasive justification" standard.[98]

2. *Application of the Equal Protection Framework to Voluntary Affirmative Action*

Federal courts have understood and embraced the bifurcated structure of 34 C.F.R. § 106.3; there is a difference between remedial efforts in response to a formal finding of discrimination,[99] on one hand, and voluntary affirmative action in the absence of such a finding on the other.[100] With respect to the latter, the focus of this Article, the courts have recognized that a formal finding of discrimination is not a prerequisite for voluntary affirmative action.[101]

In addition, federal courts have held that voluntary affirmative action measures are generally permissible under the Constitution and Title IX. The Supreme Court, for example, has observed that, "Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered.'"[102] Moreover, the U.S. Court of Appeals for the First Circuit, citing to 34 C.F.R. § 106.3, held that "voluntary affirmative action to overcome the effects of gender discrimination are permitted under the Title IX regulations,"[103] while the Second Circuit similarly noted that "voluntary affirmative action measures to overcome effects of historical conditions that have limited participation by members of one sex are authorized by the [Title IX] regulation."[104]

In respect of the two-pronged "exceedingly persuasive justification" standard, the Supreme Court has suggested that undertaking measures to compensate one gender for historical or identifiable discrimination is an "important governmental objective." For example, in *Califano v. Webster*, the Court upheld a provision on the Social Security Act, noting that

97 *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J., plurality opinion) (explaining why the Court applies strict scrutiny to race-based classifications, even where benign justifications are put forth for the classifications).

98 *See Hogan*, 458 U.S. at 730–31.

99 *See* 34 C.F.R. § 106.3(a) (2007).

100 *See id.* § 106.3(b); *see also supra* note 39 and accompanying text.

101 *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 289 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[A] contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan.").

102 United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)).

103 *See* Cohen v. Brown Univ., 101 F.3d 155, 171 n.11 (1st Cir. 1996).

104 McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 297 n.20 (2nd Cir. 2004) (citing Policy Interpretation, 44 Fed. Reg. 71,416 (Dec. 11, 1982) (to be codified at 45 C.F.R. pt. 86)).

"[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective."[105] As to the substantial relationship between the gender-based classification and the important objective, the *Webster* Court remarked approvingly that the statute under review "operated directly to compensate women for past economic discrimination."[106]

In the context of education, two seminal Supreme Court cases have addressed whether single-sex education complies with the requirement of an "exceedingly persuasive justification." In both cases, the Supreme Court struck down the single-sex schools at issue, holding that they violated the equal protection promise of the Constitution. In invalidating the single-sex schools, the cases provide doctrinal rules that may apply to other single-sex opportunities created pursuant to 34 C.F.R. § 106.3(b). As these cases explain why the single-sex programs must fall, they serve as indispensable guidance in determining when single-sex education affirmative action programs may be implemented in a manner consistent with the Equal Protection Clause and Title IX.

The first of the critically important cases was brought by Joe Hogan, a male who "was denied admission to the [Mississippi University for Women] ("MUW")] School of Nursing solely because of his sex."[107] MUW, a public institution, "limited its enrollment to women."[108] Hogan's ensuing suit claimed this single-sex admissions policy violated the Equal Protection Clause.[109] The United States District Court for the Northern District of Mississippi, applying a "rational relationship test," denied plaintiff relief.[110] The U.S. Court of Appeals for the Fifth Circuit reversed, holding that intermediate scrutiny governed the court's review of the admissions policy and that, under this standard, "[t]he policy of MUW that excludes Hogan because of his sex denies him the equal protection of the law as guaranteed by the fourteenth amendment."[111]

In defending its single-sex admissions policy before the Supreme Court, MUW attempted to satisfy the first prong of the equal protection rubric by arguing that its single-sex admissions policy "compensate[d]

105 *Webster*, 430 U.S. at 317 (1977) (citing Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974)). The Court in *Schlesinger* upheld a statutory provision that responded to the "demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." 419 U.S. at 508. Note, however, that the statute at issue was reviewed under the Due Process Clause of the Fifth Amendment. *See id.* at 506.

106 *Webster*, 430 U.S. at 318.

107 Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720–21 (1982).

108 *Id.* at 720.

109 *Id.* at 721.

110 *Id.*

111 Hogan v. Miss. Univ. for Women, 646 F.2d 1116, 1119 (5th Cir. 1981).

for discrimination against women and, therefore, constitute[d] educational affirmative action."[112] As noted above, the mere recitation of a compensatory purpose does not excuse the challenged classification from a searching inquiry into the actual bases for said classification. Accordingly, the Court examined the proffered compensatory justification and determined that MUW had "made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities."[113] The Court concluded that MUW had not only failed to meet its burden of demonstrating that sufficient discriminatory conditions existed to justify a single-sex admissions policy, but also that the policy *further entrenched* archaic and stereotypical views of female roles in society.[114] In short, not only did MUW fail to adequately prove that women were in need of affirmative action, but worse, it's admission policies perpetuated the harmful notion that nursing is only a woman's job.

With respect to the second prong of the equal protection analysis, the Court found that the single-sex admissions policy was not substantially related to the stated objective of compensating women for limited educational opportunities, as "MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men."[115] In other words, it is incongruous to argue that the single-sex admissions policy is designed to provide only females with opportunities they have been denied when men are permitted to avail themselves of those same opportunities, albeit on a non-degree basis. As MUW did not satisfy the equal protection test, the Supreme Court affirmed the judgment of the Fifth Circuit.[116]

In the second seminal case, the United States filed suit against the Commonwealth of Virginia and the Virginia Military Institute ("VMI")—an all-male public undergraduate institution, and Virginia's only single-sex school of higher learning, whose mission was to "produce 'citizen-soldiers'"[117]—contending that VMI's "exclusively male admission policy" was invalid on equal protection grounds.[118] The district court "rejected the equal protection challenge pressed by the United

112 *Hogan*, 458 U.S. at 727.

113 *Id.* at 729.

114 *See id.* ("Rather than compensate for discriminatory barriers faced by women, [Mississipi University for Women's] policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.").

115 *Id.* at 730.

116 *Id.* at 732.

117 United States v. Virginia, 518 U.S. 515, 520 (1996).

118 *Id.* at 523.

States."[119] The U.S. Court of Appeals for the Fourth Circuit reversed, holding 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."[120] The Fourth Circuit remanded the case and "assigned to Virginia . . . responsibility for selecting a remedial course."[121] The circuit court offered three options to Virginia: "[a]dmit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution."[122] Virginia selected the second option and proposed to create the Virginia Women's Institute for Leadership ("VWIL"), an all-female institution that "share[s] VMI's mission—to produce 'citizen-soldiers.'"[123] The district court and the Fourth Circuit subsequently approved Virginia's plan to set up VWIL, with the latter court taking a deferential look at Virginia's stated objective but looked into the means employed with "greater scrutiny."[124] The Supreme Court granted certiorari in 1995 to resolve two questions: whether VMI's single-sex admissions policy violated the Equal Protection Clause, and if so, what "remedial requirement" was required under the Constitution.[125]

Before assessing whether Virginia's challenged gender-based classification was permissible under the Equal Protection Clause, the Court clarified the Equal protection test itself.[126] The Court disapproved of the Fourth Circuit's deferential examination of Virginia's stated governmental objective, noting that a "reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'"[127] The Court elaborated, explaining that the "burden of justification is demanding" and that "it rests entirely on the State."[128]

In respect of the first prong of the equal protection analysis, Virginia attempted to justify VMI's single-sex admissions policy by arguing that: (1) "single-sex education provides important educational benefits" and "the option of single-sex education contributes to diversity in educa-

119 *Id.*

120 *Id.* at 524–25 (quoting United States v. Virginia, 976 F.2d 890, 892 (4th Cir. 1992), *aff'd*, 518 U.S. 515 (1996)).

121 *Id.* at 525.

122 *Id.* at 525–26.

123 *Id.* at 526.

124 *Id.* at 527–28 (discussing United States v. Virgina, 852 F. Supp. 471, 476–77 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 518 U.S. 515 (1996) and *Virginia*, 44 F.3d at 1236). *See also id.* at 530–31 (summarizing the two questions the Court set to resolve in the case).

125 *Virginia*, 518 U.S. at 530–31.

126 *Id.* at 532.

127 *Id.* at 533.

128 *Id.*

tional approaches," and (2) VMI's "adversative approach[ ] would have to be modified were VMI to admit women."[129] Acknowledging that "[s]ingle-sex education affords pedagogical benefits to at least some students" and that "diversity among public educational institutions can serve the public good," the Court determined that Virginia nevertheless did not "show[ ] that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth."[130] Indeed, "A purpose genuinely to advance an array of educational options . . . is not served by VMI's historic and constant . . e plan to 'affor[d] a unique educational benefit only to males.'"[131]

As to Virginia's argument that "VMI's adversative method . . . cannot be made available, unmodified, to women,"[132] the Court, in an opinion authored by Justice Ruth Bader Ginsburg, unearthed expert witness statements made below and stated that *some* women "have the will and capacity" to attend VMI.[133] As a result, the Court was compelled to address whether Virginia could constitutionally deny *all* women the "the training and attendant opportunities that VMI uniquely affords."[134]

The Court noted preliminarily that the government "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females,'"[135] or "rely on 'overbroad' generalizations to make 'judgments about people that are likely to . . . perpetuate historical patterns of discrimination.'"[136] The Court ultimately rejected the idea that admitting female cadets would be incompatible with VMI's adversarial nature: "The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophec[ies],' once routinely used to deny rights or opportunities."[137] Accordingly, the Court concluded, rather sharply, that "the Commonwealth's great goal is not substantially advanced by wo-

129 *Id.* at 535 (internal quotation marks and citations omitted).

130 *Id.* The Court observed that it was reaching a result similar to *Hogan*, in that there was "no close resemblance between 'the alleged objective' and 'the actual purpose underlying the discriminatory classification.'" *Id.* at 536 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730).

131 *Id.* at 539–40 (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992), *aff'd*, 518 U.S. 515 (1996)).

132 *Id.* at 540.

133 *Id.* at 542.

134 *Id.*

135 *Id.* at 541 (quoting *Hogan*, 458 U.S. at 725).

136 *Id.* at 541–42 (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994)).

137 *Id.* at 542–43 (quoting *Hogan*, 458 U.S. at 730 (1982)).

men's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier 'citizen-soldier' corps."[138]

Disposing of the first question posed to it, and answering that Virginia's categorical exclusion of women from VMI failed to comply with the Equal Protection Clause's guarantee, the Court turned its attention to the "remedial course" that received the imprimatur of the lower courts, specifically the creation of VWIL. The Court disagreed with the district and circuit courts that VWIL was an adequate remedial measure, holding that establishing VWIL was not a sufficient remedy for the constitutional violation because "VWIL does not qualify as VMI's equal" in several important respects, including its faculty and course offerings.[139]

With respect to the government's views on the subject, DOJ, arguing on behalf of the United States, has contended in briefs submitted to the Supreme Court that single-sex education can further the important governmental interest of compensating for existing discriminatory conditions related to gender.[140] In *Virginia*, for example, DOJ claimed, "The exclusion of one sex from a program reserved for the other . . . can be a means to achieve an important (or compelling) governmental goal, such as eradication of the effects of discrimination in the existing educational system."[141] Indeed, quoting *Mississippi University for Women v. Hogan*, DOJ argued that, "public single-sex education may be permissible based on a 'compensatory purpose' if it were shown that 'members of the gender benefited by the classification actually suffer a disadvantage related to the classification.'"[142] DOJ, however, cautioned that single-sex education cannot be used to advance stereotypical views of either gender.[143] During oral argument before the Supreme Court, the DOJ advocate stated, "[I] don't think that you can have single sex education that offers to men a stereotypical view of this is what men do."[144] Offering a hypothetical reminiscent of the facts of *Hogan*, the DOJ official noted, "[W]hat you can't do . . . is say we're going to have a single sex school for men which is the engineering school, and it's the only engineering

138 *Id.* at 545–46.

139 *Id.* at 551 (finding that "VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network.").

140 Brief for Petitioner at 45 n.32, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-1941) [hereinafter Opening Brief].

141 *Id.*

142 *Id.* (quoting *Hogan*, 458 U.S. at 728).

143 *See id.* at 18 ("[Virginia's proposed corrective action] was designed, defended, and approved through the use of impermissible sex-stereotypes and overgeneralizations about the capacities and aspirations of 'most' men and 'most' women. Equal protection precludes reliance on such stereotypes and generalizations to foreclose individual opportunity.").

144 Transcript of Oral Argument at 14, United States v. Virginia, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107).

school we have . . . and we're going to have a single sex school for women which is a nursing school."[145]

As for the means used for a legitimate compensatory end, DOJ cited approvingly to *Califano*, noting that "[a] class-based response . . .e may . .e be necessary" for "harms that are by their nature class-based."[146] DOJ also argued that the Court previously upheld the gender-based classification in *Califano* because it "'was deliberately enacted to compensate for particular economic disabilities suffered by women' in the job market, and it 'work[ed] directly to remedy some part of the effect of past discrimination.'"[147]

In *Virginia*, DOJ argued that the "remedial course" proposed by Virginia, namely the creation of VWIL, an all-female academy that paralleled VMI, was insufficient.[148] More specifically, DOJ contended that VWIL cannot be the "only alternative for women who are ready and willing to compete alongside men without it."[149] Moreover, as the "Court has never approved an affirmative action plan as a justification for excluding qualified women . . . from a non-affirmative-action alternative," according to DOJ, the establishment of VWIL did not cure the constitutional injury, namely the exclusion of women from VMI, because some women were willing and able to attend VMI and endure its adversarial method.[150]

3. *Single-Sex Affirmative Action Programs Can Serve an Important Governmental Objective*

As the Supreme Court announced in *Hogan*, gender-based classifications must have an "exceedingly persuasive justification;" in other words, the gender-based classification must have "important governmental objectives" and "the discriminatory means employed" must be "substantially related to the achievement of those objectives."[151] Single-sex education programs, which classify applicants or students on the basis of gender, are inherently gender-based classifications that are amenable to the "exceedingly persuasive justification" standard.

145 *Id.* at 15.

146 Reply Brief, *supra* note 45, at 12 n.11.

147 *Id.* (quoting Calfino v. Webster, 430 U.S. 313, 318, 320 (1977)).

148 *See id.* at 1–2.

149 *Id.* at 4 n.6.

150 *Id.*; *see also id.* at 12 n.11.

151 Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

The Supreme Court has repeatedly recognized that compensating one gender for discrimination is an important governmental objective.[152] In *Webster*, the Court stated that "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective."[153] In the educational context, the Court noted in *Hogan* that, "a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."[154]

A recipient that implements a single-sex education program, however, must ensure that it follows the Court's guidance in *Hogan*—i.e. that the gender-based classification "intentionally and directly assists members of the sex that is disproportionately burdened"[155] and that "members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[156] Put another way, the important governmental objective for the gender-based classification may not serve as a guise for a clandestine, invidious purpose, such as perpetuating stereotypes about the social roles or abilities of males or females.[157]

Accordingly, a recipient implementing a single-sex affirmative action program may argue that the program directly benefits women who were historically steered into certain professions. For example, a single-sex carpentry class may benefit women because women have been historically directed away from carpentry educational or vocational programs.[158] A recipient hoping to implement a similar single-sex education program should not argue that the program directly compensates for discriminatory conditions when the program itself reinforces

152 The proposition has also been supported by the federal circuit courts. *See* McCormick v. Mamaroneck School Dist. 370 F.3d 275, 297 n.20 (2004); Cohen v. Brown Univ., 101 F.3d 155, 171–72 n.11 (1st Cir. 1996).

153 Califano v. Webster, 430 U.S. 313,317 (1977) (citing Schlesinger v. Ballard, 419 U.S. 498 (1975) and Kahn v. Shevin, 416 U.S. 351 (1974)). The Court in *Schlesinger* upheld a statutory provision that responded to the "demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." 419 U.S. at 508. Note, however, that the statute at issue was reviewed under the Due Process Clause of the Fifth Amendment.

154 *Hogan*, 458 U.S. at 728.

155 *Id.*

156 *Id.*

157 *See* United States v. Virginia, 518 U.S. 515, 541–42 (1996); J.E.B. v. Alabama, 511 U.S. 127, 139 n.11 (1994); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); *Hogan*, 458 U.S. 718, 728 (1982); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("[W]e nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority.").

158 *See* Mandelbaum, *supra* note 65, at 91.

stereotypical views of women. This was the situation in *Hogan*, which invalidated an all-female nursing program where there was no evidence that women were denied opportunities in nursing and the program actually served to perpetuate the wrongful notion that nursing is an all-female occupation.[159] This was also the case in *Virginia*, which invalidated an all-male military institution, in part because the recipient argued that the institution's adversarial system could not be offered unmodified to women where there was evidence that women, in fact, had the ability and desire to attend the institution and participate in its adversarial program.[160]

Simply because the Supreme Court has invalidated the only two single-sex education programs which have come before it does not suggest, by any means, that single-sex programs as a general matter are disfavored by the Court or can never be implemented in a manner consistent with the Equal Protection Clause. The recipients in *Hogan* and *Virginia*, however, committed fatal errors that, in retrospect, are fairly obvious and may be avoided with relative ease. In any case, in *Webster*, the Court upheld a gender-conscious affirmative action policy, even though it was not in the educational context.[161] Provided that a recipient is mindful of the cautionary tales of *Hogan,* and its progeny, single-sex education as an affirmative action program can satisfy the first prong of the "exceedingly persuasive justification" standard as set forth in *Hogan*.

4. *Single-Sex Affirmative Action Programs Can be Substantially Related to the Important Governmental Objective*

A gender-based classification must not only further an important governmental objective, but the program itself must be "substantially related to the achievement" of the objective.[162] Accordingly, a single-sex education program instituted to compensate for the discriminatory conditions that have limited the opportunities of members of one gender must be substantially related to the achievement of that compensatory objective.[163]

In the "exceedingly persuasive justification" analysis, the second prong is difficult and misunderstood as a constitutional issue. Indeed, a number of commentators have not fully grasped the nature of the conditions such a program must meet in order to be substantially related to a compensatory objective.

159 *Hogan*, 458 U.S. at 729.

160 *Virginia*, 518 U.S. at 545–46.

161 Califano v. Webster, 430 U.S. 313, 332 (1976).

162 *Hogan*, 458 U.S. at 724 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980).

163 *See id.* at 724–26.

First, Maryam Ahranjani and Monica J. Stamm suggest that for a single-sex affirmative action program to be permissible, the three conditions described in a Government Accounting Office ("GAO") report must be satisfied.[164] In that report, released in 1996 and entitled, "Public Education: Issues Involving Single-Gender Schools and Programs," the GAO endeavored to "identify the major educational and legal issues involved with public single-gender education and to cite some examples of recent public single-gender education programs."[165] One of these programs was a single-gender mentoring club established for boys in response to "a report on African American male achievement."[166] A complaint challenging the legality of the mentoring program under Title IX was filed with the OCR.[167] According to the GAO report:

> OCR noted that single-gender clubs would comport with Title IX in meeting affirmative action standards only if (1) those who have experienced conditions resulting in a limited opportunity to participate in the district's programs due to their gender are the targeted beneficiaries, (2) less discriminatory alternatives have been considered and rejected, and (3) the evidence demonstrates that comparable gender-neutral means could not be reasonably expected to produce the results desired.[168]

The report claimed that OCR had concluded that, "despite the laudable goals of the district's program, it did not appear that the means to achieve those goals had been tailored to comply with the Title IX regulation."[169]

In an appendix to the report, the GAO, citing 34 C.F.R. § 106.3(b), noted that, "a recipient may take affirmative action to overcome the effects of conditions that have limited participation by gender."[170] The appendix to the report, seemingly referring to the second prong of the Equal Protection Clause analysis, continued, "Regarding affirmative action, in particular, the classifications that result in single-gender classes must be directly related to the reasons for the institution of the single-gender classes."[171] The GAO then proceeded to list conditions that a single-sex program must satisfy in order to meet this standard and this list mirrors the factors established by OCR in the mentoring club case:

164 *See* Ahranjani, *supra* note 24, at 197; *see also* Stamm, *supra* note 24, at 1217.

165 *See* U.S. GOV'T ACCOUNTING OFFICE, PUBL'N NO. GAO/HEHS-96-122, PUBLIC EDUCATION: ISSUES INVOLVING SINGLE-GENDER SCHOOLS AND PROGRAMS 1 (1996).

166 *Id.* at 11.

167 *Id.* at 10.

168 *Id.* at 11.

169 *Id.*

170 *Id.* at 22.

171 *Id.*

> This means that the (1) beneficiaries of the single-gender classes or programs must have had limited opportunities to participate in a school's programs or activities due to their sex, (2) less restrictive or segregative alternatives that may have accomplished the goals of the single-gender classes or programs must have been considered and rejected, and (3) there must be evidence that comparable sex-neutral means could not be reasonably expected to produce the results sought through the single-gender classrooms or programs.[172]

Currently, OCR takes the position that each resolution letter is fact-specific and cannot be relied upon as a statement of formal binding policy. The OCR case that the GAO report discusses—and which Ahranjani and Stamm rely upon in providing guidance on the legality of single-sex affirmative action programs in education—is *not* a formal statement of OCR policy and as such cannot be relied upon as precedent.[173] More specifically, OCR stated in an e-mail response to my inquiry:

> The GAO report language that you cited appears to be based upon an OCR case resolution letter. These letters are fact-specific statements of the investigative findings and dispositions in individual cases and are not formal statements of OCR policy. *They should not be relied on or cited as formal policy.*[174]

Therefore, the OCR factors reproduced in the GAO report, and the Ahranjani and Stamm articles, are not reliable guidance as to how a recipient may permissibly implement a single-sex affirmative action program under 34 C.F.R. § 106.3(b).

Secondly, Sara Mandelbaum, an attorney with the American Civil Liberties Union, has claimed that, in addition to reviewing the "goals" and "procedures" of a single-sex affirmative action program, a court also should ask: "Are there less restrictive alternatives? Are there sex-neutral means for achieving the same objectives, such as teacher training, mentoring programs, after-school programs, and the like?"[175] However, neither of these conditions is required for single-sex educational program established pursuant to 34 C.F.R. § 106.3(b).[176]

172 *Id.* at 22–23.

173 Email from OCR to Dawinder Sidhu (June 21, 2007) (on file with author).

174 *Id.* (emphasis added).

175 *See* Mandelbaum, *supra* note 65, at 92.

176 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,a426 F.3d 1162, 1180 (9th Cir. 2005) (stating that a narrowly-tailored race-based affirmative action program must demonstrate "serious, good-faith consideration of race-neutral alternatives").

In reference to an OCR case, the GAO has suggested that consideration of "less discriminatory alternatives" and "gender-neutral means" are required for single-sex affirmative action programs.[177] As noted above, however, the OCR case cited to in the GAO report is not a formal statement of OCR policy and has no binding effect.

Currently, OCR does not mandate the consideration of less-restrictive alternatives or gender-neutral means, as evidenced by the promulgation of the Title IX amended regulations.[178] Regulation 34 C.F.R. § 106.34 enumerates several factors that a recipient must satisfy in order to establish the legality of single-sex schools, classes, and extracurricular activities.[179] Importantly, none of these require consideration of less-restrictive alternatives or a gender-neutral means of implementation. Moreover, as the DOJ has argued, it would seem bizarre to require a recipient to consider less-restrictive alternatives or gender-neutral means when 34 C.F.R. § 106.3(b) permits recipients to address a gender-based problem that necessitates a gender-based solution.[180] It is also noteworthy that the Supreme Court, in approving the single-sex policy at issue in *Webster*, did not require consideration of less-restrictive alternatives or gender-neutral means.

Third, Von Lohmann, drawing upon the Supreme Court cases *United Steelworkers of America, AFL-CIO-CLC v. Weber*[181] and *Johnson v. Transportation Agency, Santa Clara County, California*,[182] offers three conditions for voluntary single-sex affirmative action programs: (1) "the purposes of the affirmative action efforts [must] mirror[ ] those of the [Title IX] statute;" (2) "the affirmative action efforts [must not] unnecessarily trammel[ ] the rights" of the gender that did not have limited opportunities; and (3) "affirmative action measures should not outlast the targeted discrimination."[183]

Von Lohmann's broad suggestion that the purposes of the single-sex program must parallel the purposes of the Title IX statute attempts to ensure that a recipient's single-sex program is "designed to remedy lim-

177 *See* U.S. GOV'T ACCOUNTING OFFICE, *supra* note 165, at 1.

178 *Cf.* Mandelbaum, *supra* note 65, at 92.

179 *See* 34 C.F.R. § 106.34(b)–(c) (2006).

180 Reply Brief, *supra* note 45, at 12 n.11. The argument that a gender-based problem requires a gender-based remedy also explains why two of the other factors of a constitutional race-conscious affirmative action program—a holistic consideration of the applicants and students, and the absence of quotas—is not applicable in the gender-conscious affirmative action context. *See Parents*, 426 F.3d at 1180–81. Individualized consideration in a single-sex affirmative action program is not necessary because the goal of a single-sex program, under 34 C.F.R. §106.3(b), is not related to diversity. *See id.* Moreover, a single-sex program is, by its very nature, 100% male or female. Thus, requiring a program to be free of quotas is not pertinent. *See id.*

181 *See* United States Steelworkers of America v. Weber, 443 U.S. 193 (1979).

182 *See* Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616 (1987).

183 Von Lohmann, *supra* note 23, at 196–98.

ited participation" resulting from gender discrimination.[184] As a result, the first element of Von Lohmann's guidance reflects the requirement that the single-sex affirmative action program genuinely advance the objective of compensating for the discriminatory conditions which have limited the opportunities of members of one gender. The second element would mandate an "inquiry [into] the alternatives available to the excluded group,"[185] while the third would ensure that the gender-based classification exists no longer than the factual circumstance give rise to the necessity of an affirmative action program.

These three factors are critical to a permissible single-sex educational program instituted under 34 C.F.R. § 106.3(b). These factors, however, are still only *part* of the constitutional puzzle. Therefore, further elaboration on the factors and a discussion of the remaining pieces are in order.

II. GUIDANCE ON THE IMPLEMENTATION OF SINGLE-SEX EDUCATION UNDER 34 C.F.R. § 106.3(b)

In order to withstand a constitutional challenge, a single-sex school, class, or extracurricular activity, established pursuant to the affirmative action provision of the Title IX regulation, 34 C.F.R. § 106.3(b), must comply with several conditions. The single-sex program must meet the "exceedingly persuasive justification" test.[186] Moreover, the single-sex program must serve "important governmental objectives" and "the discriminatory means employed" must be "substantially related to the achievement of those objectives."[187]

A. IMPORTANT GOVERNMENT OBJECTIVE

1. *The Single-Sex Affirmative Action Program Must Not Perpetuate Archaic Gender Stereotypes*

With respect to the first prong of the "exceedingly persuasive justification" rubric, the Supreme Court has previously found that compensating members of one gender for discrimination is an important governmental objective.[188] Thus, the implementation of a single-sex education program for affirmative action purposes has been held to be an important governmental objective.

An appellate court, however, will examine the program to "'smoke out' illegitimate uses" of gender, and to ensure that "there is little or no

184 *Id.* at 197.

185 *Id.* at 198.

186 *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

187 *See id.* (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

188 *See* Califano v. Webster, 430 U.S. at 318; *see also* United States v. Virginia, 518 U.S. 515, 533 (1996); Opening Brief, *supra* note 140, at 45 n.32.

possibility that the motive for the classification was illegitimate . . . prejudice or stereotype."[189] A single-sex program will thus fail if a searching inquiry into the program reveals that the program embodies "fixed notions concerning the roles and abilities of males and females"[190] or "creates or perpetuates the legal, social, and economic inferiority of women."[191]

2. *The Single-Sex Affirmative Action Program Must Intentionally and Directly Assist a Disadvantaged Gender in a Manner Related to that Disadvantage*

The Court, in *Hogan*, clarified how a legitimate single-sex program can be distinguished from one that perpetuates archaic gender-based stereotypes.[192] In particular, for an institution to successfully defend its objective in establishing a single-sex affirmative action program, a recipient must show that the program "intentionally and directly assists members of the sex that is disproportionately burdened" and that "members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[193] For example, a single-sex affirmative action nursing school for women, where there was no evidence that women had limited opportunities in nursing, would not meet this requirement.[194] However, an all-female welding course designed to compensate women for historically being discouraged from such vocational programs would have better chances of surviving a constitutional attack.[195]

B. SUBSTANTIAL RELATIONSHIP TO THE OBJECTIVE

The second prong of the "exceedingly persuasive justification" standard requires the means to be "substantially related to the achievement"

189 *See* Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989).

190 *See Hogan*, 458 U.S. at 724–25.

191 *See Virginia*, 518 U.S. at 534; *see also* Denise C. Morgan, *Anti-Subordination Analysis After* United States v. Virginia*: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 384 (1999) ("[D]efenders of a single-sex school must show that the school does not serve to perpetuate traditional gender identities or roles, and that it does not worsen women's political or economic standing compared to men . . . .").

192 *See* Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under* United States v. Virginia*'s Exceedingly Persuasive Justification Standard*, 86 CAL. L. REV. 1169, 1184 (1998).

193 *See Hogan*, 458 U.S. at 728. The evidentiary threshold necessary to justify an affirmative action program is an unresolved question. *See also* Contractors Ass'n v. Philadelphia, 6 F.3d 990, 1010 (3rd Cir. 1993) (noting that "[f]ew cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in" the context of voluntary affirmative action based on gender, and "[t]he Supreme Court gender-preference cases are inconclusive" in this regard). It would seem reasonable to contend, though, that a party could rely on less evidence in enacting a gender preference than a racial preference. *Id.*

194 *See Hogan*, 458 U.S. at 728.

195 *See* Mandelbaum, *supra* note 65, at 91.

of the end,[196] such as to compensate "for the effects of conditions which resulted in limited participation."[197] The amended Title IX regulations of 34 C.F.R. § 106.34 permit recipients to offer single-sex schools, classes, and extracurricular activities for educational (not remedial or compensatory) purposes. Such programs are thus a useful starting point for ensuring that single-sex programs, established pursuant to 34 C.F.R. § 106.3(b), are sufficiently tailored to its compensatory objective. As a result, before discussing the parallels between 34 C.F.R. § 106.34 and 34 C.F.R. § 103(b), it is necessary to briefly review what the amended regulations provide.

The regulations, at 34 C.F.R. § 106.34, permit recipients to provide non-vocational sex-segregated classes or extracurricular activities if:

The single-sex classes or extracurricular activities are based on the important objective:

> First, 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;
>
> Second, to 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.[198]

Concerning whether the programs are substantially related to one of these objectives under the amended regulations, a recipient can establish a non-vocational single-sex affirmative action class or activity if: (1) The objective is implemented "in an evenhanded manner,"[199] which may require the recipient to "provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex."[200] The amended regulations also list factors that the DOE may consider in determining whether a "substantially equal" class or extracurricular activity has been offered. These factors include, but are not limited to:

> [T]he policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and tech-

196 *See Hogan*, 458 U.S. at 724 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980).

197 *See* 34 C.F.R. § 106.3 (b) (2007).

198 *See* C.F.R. §106.34(b)(1)(i)(A)(B) (2007).

199 *Id.* § 106.34(b)(1)(ii).

200 *Id.* § 106.34(b)(2).

> nology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty;[201]

(2) "Student enrollment in a single-sex class or extracurricular activity is completely voluntary;"[202] (3) "The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity;"[203] and (4) "The recipient . . . conduct[s] periodic evaluations to ensure that":

> [The] single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex[,] and
>
> [T]hat any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.[204]

As for schools, the amended regulations provide that, "a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school."[205] But, a "non-vocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school."[206] Accordingly, a substantially equal school is not required for these charter schools.

1. *A Recipient Offering a Single-Sex Affirmative Action Program Must Offer a Co-Educational Alternative Open to the Disadvantaged Gender*

The first 34 C.F.R. § 106.34 factor, that the recipient must implement its objective in an evenhanded manner, is based on DOE's view that the Supreme Court "would uphold the evenhanded provision of single-sex public educational opportunities, among a diversity of educa-

201 *Id.* § 106.34(b)(3).
202 *Id.* § 106.34(b)(1)(iii).
203 *Id.* § 106.34(b)(1)(iv).
204 *Id.* § 106.34(b)(4).
205 *Id.* § 106.34(c)(1).
206 *Id.* § 106.34(c)(2).

tional opportunities."[207] DOE cited to the Court's opinion in *Virginia*, in which the Court stated that it "do[es] not question the State's prerogative evenhandedly to support diverse educational opportunities."[208] Since the Court's discussion relates only to the objective of providing diverse educational opportunities, and not to a compensatory objective, the "even-handed" requirement does not appear to be applicable to ensuring that a single-sex affirmative action program is substantially related to the compensatory objective.

Although the first factor is not necessary for a single-sex affirmative action program, the third factor that a recipient "provide[ ] to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity"[209] is pertinent.

In *Virginia*, DOJ, arguing on behalf of the United States, contended that the creation of VWIL, an all-female military institution, *even as an affirmative action measure*, was not an adequate constitutional remedy for the unconstitutional exclusion of women from VMI, an all-male military institution, because "[t]he notion that some women may need an affirmative action program does not mean that such a program can be the only alternative for women who are ready and willing to compete alongside men without it."[210] DOJ reminded the Supreme Court that it "has never approved an affirmative action plan as a justification for excluding qualified women or minority-group members from a non-affirmative-action alternative"[211] and that "the kinds of affirmative action that th[e] Court has upheld, unlike VMI's exclusionary admissions policy do not completely foreclose to one group the opportunities that are affirmatively extended to another."[212]

Accordingly, in *Virginia*, if VWIL were established as a single-sex affirmative action institution, a co-educational alternative would have to be created because some women "have the will and capacity" to attend VMI.[213] Consequently, the Court held that Virginia could not constitutionally deny all women the "the training and attendant opportunities that VMI uniquely affords."[214]

207 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,529 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106).

208 *Id.* (quoting United States v. Virginia, 518 U.S. 515, 534 n.7 (1996)).

209 34 C.F.R. § 106.34(b)(1)(iv) (2007).

210 Reply Brief, *supra* note 45, at 4 n.6.

211 *Id.*

212 *Id.* at 12 n.11.

213 *Virginia*, 518 U.S. at 542.

214 *Id.*

To recap, although a gender-based affirmative action program may help members of one gender overcome the effects of discriminatory conditions, a recipient cannot presume that all members of that gender need such assistance. In other words, the single-sex program may not be the only option available, as some members of that gender may be able to participate along with the non-disadvantaged gender, despite the existence of effects of discriminatory conditions. Confining members of one gender to a single-sex affirmative action program may not only limit the educational opportunities, but may also perpetuate the wrongful notion that members of that gender can succeed academically only when members of the non-disadvantaged gender are not present. In short, a recipient offering a single-sex education program must simultaneously offer a co-educational alternative to the single-sex program. The co-educational alternative must be equal in relevant respects to the single-sex program.[215]

2. *Enrollment in the Single-Sex Affirmative Action Program Must Be Completely Voluntary*

The third factor of 34 C.F.R. § 106.34(b)(1) helps explain why the second factor is also necessary for single-sex affirmative action programs. The third factor requires the single-sex program to be "completely voluntary."[216] The Equal Educational Opportunities Act of 1974 ("EEOA") prohibits public schools from assigning students to a school "other than to the school closest to the student's home if the effect is to increase the degree of segregation on the basis of . . . sex" and "to the school nearest the student's home if the purpose is to segregate students on the basis of . . . sex."[217] The Act thus appears to permit only voluntary assignment of students to single-sex public schools.

Indeed, the U.S. Court of Appeals for the Fifth Circuit rejected a public school district's sex-segregated student assignment plan, noting in reference to the EEOA, that "all students in the system are *assigned* to

215 *See Virginia*, 518 U.S. at 551 ("VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network."); *see also* Sweatt v. Painter, 339 U.S. 629, 633–34 (1950) (comparing a law school that refused to admit African-Americans with a law school that would admit African-Americans, based on, among other things, "number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities" and "qualities which are incapable of objective measurement but which make for greatness in a law school," including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige").

216 34 C.F.R. § 106.34(b)(1)(iii) (2007).

217 Patricia Werner Lamar, Comment, *The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Education Amendments of 1972*, 32 EMORY L.J. 1111, 1143 n.117 (1983).

sexually segregated schools at every level, from entry through graduation."[218] The Fifth Circuit distinguished its case from a Third Circuit ruling upholding a single-sex school program involving "two, *voluntary*, sexually segregated high schools."[219] Accordingly, at least with respect to public schools, assignment cannot be made with a view towards placing students in single-sex educational programs. Although the reach of the EEOA extends only to public schools, a debate exists in academic literature regarding the distinction between public and private institutions that has been blurred.[220]

In any case, as a recipient offering a single-sex affirmative action program is required, based on the analysis above, to additionally provide an equal co-educational alternative, it would be impermissible for the recipient to determine whether a particular member of the disadvantaged gender is to enroll in the single-sex or the co-educational option. Some members of the disadvantaged gender may want to avail themselves of the unique benefits that a single-sex program affords, whereas others may be interested in participating in the curriculum or activity alongside members of the non-disadvantaged gender.[221] It would be highly inappropriate for a recipient to decide on its own who would be more comfortable in the single-sex program and who is prepared for the co-educational experience.

Moreover, the existence of an equal co-educational alternative ensures that "the affirmative action efforts [do not] unnecessarily trammel[ ] the rights" of the non-disadvantaged gender.[222] Members of the non-disadvantaged gender are not suffering the effects of discriminatory conditions and thus are not in need of distinct efforts to compensate for limited educational opportunities in a particular subject or activity. They are, however, still able to participate in and benefit from an equal program.[223]

218 U.S. v. Hinds County Sch. Bd., 560 F.2d 619, 624–25 n.7 (5th Cir. 1977) (emphasis added).

219 *Id.* (emphasis added) (discussing Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880 (3rd Cir. 1976)).

220 *See* Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 822–23 n.370 (2000) (citing several articles that discuss "the general erosion of the distinction between private and public in our antidiscrimination law," including Mark Tushnet, *Public and Private in Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43 (1991) and Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 342–59 (1993)).

221 United States v. Virginia, 518 U.S. 515,a542 (1996).

222 Von Lohmann, *supra* note 23, at 196.

223 Carolyn B. Ramsey, *Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools*, 8 TEX. J. WOMEN & L. 1, 7 (1998) ("[G]irls-only math classes should not run afoul of the law as long as they are optional and substantially equal to those offered to boys.").

3. *The Single-Sex Affirmative Action Program Must Not Include Members of the Non-Disadvantaged Gender*

Although members of the disadvantaged gender must be permitted to participate in an equal co-educational alternative, members of the non-disadvantaged gender are not allowed to participate in the single-sex school, class, or activity. A single-sex educational program, established for the objective of "overcom[ing] the effects of conditions which resulted in [the] limited participation" of members of one gender,[224] is designed solely for the gender that has limited opportunities. Accordingly, it would make little sense to implement a program for the benefit of a disadvantaged gender and simultaneously permit the non-disadvantaged gender to participate in that identical school, class, or activity. Indeed, permitting the non-disadvantaged gender to join the single-sex affirmative action program would degrade, if not eliminate, the program's character as a method of overcoming the discriminatory conditions that have limited the opportunities of one gender.

The Supreme Court in *Hogan* stated that an all-female nursing school established for affirmative action purposes "fail[ed] the second part of the equal protection test," namely the requirement that the single-sex means be substantially related to the achievement of the compensatory objective, because the recipient's "policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men."[225] In sum, a single-sex affirmative action program must contain only students of the gender that has suffered a disadvantage related to that program, and may not include, on a degree- or non-degree basis, students of the non-disadvantaged gender.

4. *Dual Single-Sex Affirmative Action Programs in the Same Subject or Activity Are Impermissible*

The Title IX regulations require the objectives of 34 C.F.R. § 106.34 to be implemented in an "evenhanded" manner.[226] Regulation 34 C.F.R. § 106.34(b)(2) provides that "A recipient that provides a single-sex class or extracurricular activity . . . may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex" in order to satisfy the evanhandedness requirement.

While 34 C.F.R. § 106.34(b)(2) requires schools experimenting with single-sex opportunities to provide a "substantially equal single-sex class or extracurricular activity for students of the excluded sex," this is

224 34 C.F.R. § 106.3(b) (2007).
225 United States v. Hogan, 458 U.S. 718, 730 (1981).
226 *See* 34 C.F.R. § 106.34(b)(1)(ii) (2007).

not an appropriate requirement for single-sex programs established under 34 C.F.R. §106.3(b). A single-sex program is intended to compensate for the effects of conditions that have limited the opportunities of members of one gender.[227] For example, a recipient may be interested in establishing an all-female construction class in which women have been steered away from vocational education programs. But, it is unlikely that men have been directed away from vocational education programs on account of their gender too. Thus, the factual predicate supporting the need for an affirmative action construction program for men would not exist. Since it is improbable for both genders to be discouraged from pursuing the same educational opportunities on the basis of their gender, it is virtually impossible for a recipient to offer programs to compensate both genders for limited opportunities resulting from discriminatory conditions in the same subject or activity. In short, only one gender is likely to be disadvantaged with respect to a given subject or activity. Since single-sex programs would only be permitted, under 34 C.F.R. § 106.3(b) for the disadvantaged gender and not the non-disadvantaged gender, single-sex programs for both genders in the same subject or activity would be impermissible.[228]

This is not to say that dual single-sex schools, classes, or extracurricular activities would not be permissible for other purposes. For example, in *Vorchheimer v. School District of Philadelphia*, the U.S. Court of Appeals for the Third Circuit upheld a dual single-sex school system that was established for a pedagogical purpose, namely "to furnish an education of as high a quality as is feasible."[229] Single-sex schools for males and females based on the "theory that adolescents may study more effectively in single-sex schools,"[230] however, is a different constitutional ballgame from implementing single-sex schools for the purpose underlying 34 C.F.R. § 106.3(b). Accordingly, this discussion does not suggest that dual single-sex programs based on the important governmental objectives outlined in 34 C.F.R. § 106.34(b)(1)(i) cannot be offered.[231]

227 *See id.* § 106.3(b).

228 Please note that this discussion applies to dual single-sex programs *in the same subject or activity*, such as medicine, mathematics, or auto repair. A different situation results when different subjects or activities are contemplated. For example, a recipient may provide a single-sex nursing school for men or a single-sex welding course for women, where men and women were limited in their opportunities to pursue these respective subjects.

229 Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880, 888 (3rd Cir. 1976).

230 *Id.*

231 An interesting question, one to be explored more fully in another forum, is whether it is permissible for a recipient to establish a dual single-sex program, in which one of the single-sex school, class, or activity is implemented pursuant to 34 C.F.R. § 106.34, while the other single-sex school, class, or activity is implemented pursuant to 34 C.F.R. § 106.3(b)—e.g., if a public school district created an all-male carpentry class in light of evidence that academic achievement for males in vocational education programs increases when the program is single-sex, and the school district created an all-female carpentry class based on evidence of the

5. *The Single-Sex Affirmative Action Program Must Last No Longer than the Discriminatory Conditions*

In *Grutter v. Bollinger*, the Supreme Court held that "race-conscious admissions policies must be limited in time."[232] Although *Grutter* was concerned with race-based affirmative action, a durational requirement in the gender-based affirmative action education context appears to be necessary as well.

The purpose of a single-sex program established pursuant to 34 C.F.R. § 106.3(b) is to compensate for the limited opportunities of members of a particular gender resulting from discriminatory conditions. When the effects of the discriminatory conditions have dissipated, the justification for the single-sex program under the Title IX regulation simultaneously disappears. In other words, a single-sex affirmative action program that lasts longer than the effects of the discriminatory conditions no longer enjoys the legal imprimatur of the Title IX regulation, at 34 C.F.R. § 106.3(b), and would be invalidated in a legal challenge.[233]

Accordingly, a recipient implementing a single-sex program under 34 C.F.R. § 106.3(b) should follow the instructions of the *Grutter* court, which stated that "the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[234] Note that the Title IX regulation, at 34 C.F.R. § 106.34(b)(4), similarly requires recipients to "conduct periodic evaluations to ensure that single-sex classes or extracurricular activities are based upon genuine justifications[.]"[235]

* * *

In sum, even in the absence of a finding of discrimination on the basis of sex, Title IX and 34 C.F.R. § 106.3(b) permit the establishment

effects of conditions resulting in the limited opportunities of females in vocational education. This Article does not address whether such a dual-system would be unconstitutional. The only suggestion made here is that a dual single-sex program in the same subject or activity—with both classes established for affirmative action purposes—would not withstand constitutional scrutiny.

232 Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

233 *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 17 (1st Cir. 2005) (citing *Grutter*, 539 U.S. at 342).

234 *Grutter*, 539 U.S. at 342.

235 Though a geographical limitation on the discriminatory conditions that a recipient can address is not specified in the regulations, it would seem reasonable to argue that the school board may consider principally the conditions within its own jurisdiction, though regional or national conditions may serve as secondary, though not exclusive, considerations in determining whether the factual predicate justifying affirmative action programs exists. Indeed, the requirement of periodic review compels the recipient to evaluate the continuing need for the single-sex program, which as a practical matter, given the limited administrative resources available to a recipient, would entail a mainly local, not a broader or completely national, inquiry.

of a single-sex school, program, or activity, for affirmative action purposes, if the following conditions are satisfied:

> Each single-sex class or extracurricular activity is based on the recipient's important objective of intentionally and directly compensating members of the disadvantaged gender for the effects of conditions which resulted in their limited participation in a manner related to the limited participation;
>
> The single-sex program does not perpetuate gender stereotypes regarding the roles and abilities of men and/or women;
>
> An equal co-educational alternative, open to members of both sexes, is offered in the same subject or activity;
>
> Enrollment in the single-sex program is completely voluntary and is completely limited to members of the disadvantaged gender;
>
> A single-sex school, class, or activity in the same subject or activity is not offered, as affirmative action, for members of the non-disadvantaged gender; and
>
> The single-sex program is limited in duration and, more specifically, lasts only as long as the effects of the discriminatory conditions limiting the opportunities of the members of a particular gender.

CONCLUSION

This discussion aimed to explore two particular questions: (1) whether it is permissible, under Title IX, for a recipient of federal financial assistance to segregate students on the basis of gender for affirmative action purposes, and (2) if so, what concrete factors can guide the educational and legal communities in ensuring that single-sex education programs are implemented in a manner consistent with applicable constitutional and federal principles. It appears that single-sex education as a means to overcome the conditions resulting in the limited participation of members of one gender is permissible both under the Equal Protection Clause of the Fourteenth Amendment and Title IX and its implementing regulations. Moreover, drawing on recent jurisprudential and regulatory developments and on the helpful comments of various legal scholars, this Article has also attempted to provide a list of six factors that a recipient's single-sex educational affirmative action program should comply with in order to withstand a challenge in court.

Racial segregation of students is a deplorable practice that, thankfully, occupies a place in this nation's past and that no longer enjoys the protection of our laws. The extent to which race should continue to be involved in the educational context in other, less invidious forms, such as preferences in admissions or assignment to schools, is an issue that rightfully holds a prominent place in the American culture wars because of *Brown* and the knowledge that the use of race in education has the power to stigmatize, marginalize, and subjugate, even though such classifications may have the ability to dispel preconceived notions, improve interracial collegiality, and move our nation's classrooms closer towards resembling the American melting pot.

This duality, although most apparent in race-based classifications in educational settings, exists in single-sex education as well. Accordingly, as American society resumes its debate over the merits of race-based classifications in education, the public may similarly desire to give due consideration to the purported virtues of single-sex education, including the promise of enhanced educational opportunities, and the potential for such classifications to harm a particular gender, such as the perpetuation of archaic stereotypes regarding the proper social roles of women.

Whether single-sex education, as a normative matter, is advantageous for the American educational system, or whether the elected officials should amend the law to facially invalidate such programs, are areas of concern that are properly reserved for the people and their representatives. These questions must seek resolution in non-judicial processes and venues.

While the debate goes on, and as recipients continue to experiment with single-sex education programs, it is critically important for the courts to ensure in the meantime that challenged single-sex affirmative action programs are established in a manner consistent with law and that the rights of students are protected to the fullest extent of the law. This Article has hopefully assisted recipients, legal practitioners, and the courts in understanding the present legal bounds within which this social dialogue and educational experimentation may take place.