THE STUBBORN PERSISTENCE OF SEX SEGREGATION

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INTRODUCTION

Almost fifty years ago, Congress began protecting against sex discrimination in federal statutory law. Almost forty years ago, the Supreme Court expanded constitutional law to include protection from discrimination based on sex. Since then, guarantees against sex discrimination have proliferated in federal and state law, and societal norms of sex equality have become entrenched. Yet, we still live in a society that is highly segregated by sex.

And not just sex segregation in the same way race segregation persists—the de facto race segregation that persists, despite de jure segregation disappearing decades ago, in patterns of housing, education, employment, relationships and other areas of life. Rather, the sex segregation most people encounter on a daily basis is sex segregation that is required by rule.

Despite its predominance, the persistence of sex segregation has been an under-studied and under-theorized phenomenon in the United States. Legal scholars have studied

particular instances of sex segregation, such as in education,[1] the military,[2] restrooms[3] and athletics.[4] However, scholars have paid

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[1] *See, e.g.*, David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135 (2009) [hereinafter Cohen, *No Boy Left Behind?*]; Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455; Kimberly J. Robinson, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953 (2006).

[2] *See, e.g.*, KINGSLEY BROWNE, CO-ED COMBAT: THE NEW EVIDENCE THAT WOMEN SHOULDN'T FIGHT THE NATION'S WARS (2007); Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 815 (2007).

[3] *See, e.g.*, Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us AAbout Equality*, 9 J. CONTEMP. LEGAL ISSUES 1 (1998); Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1 (2007).

[4] *See, e.g.*, EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS (2007); Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEVELAND CLEV. ST. L. REV. 513 (2007); B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107 (2002); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381 (2000).

very little attention to the topic generally, in all of its manifestations.[5]

This Article forms the foundation of a multi-part project that will analyze sex segregation as a systemic issue by exploring the contours of modern American sex segregation and what this phenomenon means for law, feminism, gender and identity. In this Article, I set the stage for the entire project by providing a systematic account of sex segregation in America. In addition, I situate this empirical data within a broader doctrinal and theoretical framework. In a second article, I analyze sex segregation and its implications for masculinity, arguing that sex segregation in its many forms contributes to constricting notions of masculinity that lead to the subordination of women as well as of men who do not conform to traditional notions of masculinity.[6] In a related book chapter, I have also begun to analyze the deleterious consequences sex segregation has for transgendered, intersexed and gender variant individuals.[7] I plan to more fully explore this issue in the future, including sex segregation's important implications for women, people of color and society as a whole. My goal in this piece and the others that will build upon it is to provide a comprehensive framework for thinking and dealing with the problem of sex segregation.

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[5] A small number of scholars have addressed the issue generally, but not as comprehensively as this project does. *See* NANCY LEVIT, THE GENDER LINE: MEN, WOMEN, AND THE LAW 36–63 (1998); Catherine Jean Archibald, *De-Clothing Sex-Based Classifications—Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1 (2009); Chai R. Feldblum et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171 (1986); Kathryn L. Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WISC. L. REV. 55 (1979). For an inquiry into some men-only institutions in Britain, see BARBARA ROGERS, MEN ONLY: AN INVESTIGATION INTO MEN'S ORGANISATIONS (1988).

[6] *See* David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J. L. & GENDER 509 (2010) [hereinafter *Keeping Men "Men"*].

[7] *See* David S. Cohen, *Sex Segregation, Masculinities, and Gender Variant Individuals*, *in* MASCULINITIES AND LAW: A MULTIDIMENSIONAL APPROACH (Frank Cooper and & Ann McGinley eds., forthcoming 2011) [hereinafter *Sex Segregation, Masculinities, and Gender Variant Individuals*].

It is important to be clear about the significance of current sex segregation in the United States. In this project, I in no way intend to equate the way that people are segregated based on sex in today's United States to the way people are segregated by sex elsewhere in the world or to the way people were segregated based on race in American history. As troubling as I will argue modern American sex segregation is, in other parts of the world sex segregation is exponentially worse.[8] Moreover, sex segregation that currently exists in the United States is a markedly different institution than race segregation as it existed throughout much of American history.[9]

However, modern American sex segregation nonetheless has serious implications and effects that need to be studied comprehensively. Sex segregation, as described throughout this Article and the follow-up pieces to come, often limits human expression and self-definition in ways that go to the heart of a person's identity and that reinforce power relations based on sex and gender. Thus, although they are in no way equal to the harms associated with race segregation, the issues related to sex segregation are serious and worthy of study.

This Article analyzes the topic of sex segregation in five parts. First, the Article defines the term "sex segregation." Sex segregation, as I am using the term throughout the project, is the complete exclusion or separation of people based on whether they are biologically a man or a woman. Second, the Article establishes why sex segregation is particularly worthy of study now. Two important developments indicate that sex segregation remains salient and may become even increasingly so: the 2006 change from the Department of Education that gave schools greater authority to segregate students based on sex and the

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[8] *See, e.g.*, HUMAN RIGHTS WATCH, PERPETUAL MINORS: HUMAN RIGHTS ABUSES STEMMING FROM MALE GUARDIANSHIP AND SEX SEGREGATION IN SAUDI ARABIA (2008), *available at* http://www.hrw.org/en/reports/2008/04/19/perpetual-minors.

[9] *See generally* W.E.B. DUBOIS, THE SOULS OF BLACK FOLKS (1903); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 27–284 (1975); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

increased scientific attention to claims that men and women are inherently different.

Third, in the heart of this Article, I provide the empirical evidence related to sex segregation in the United States. Hundreds of laws in the United States segregate based on sex, and this part of the Article describes and categorizes the laws, not based on their subject matter, but rather on how they segregate. This part also details the ways that government institutions and private entities segregate based on sex without explicitly being required or permitted to do so by law. In cataloging sex segregation in the United States, I develop a taxonomy of sex segregation: mandatory, administrative, permissive and voluntary sex segregation.

Fourth, after providing the empirical data, I discuss the way the law addresses sex segregation. For government mandates of sex segregation and government institutions that sex segregate, constitutional equality doctrine poses problems. For both government institutions and private actors that sex segregate, anti-discrimination laws also determine when sex segregation is allowed. Further complicating the analysis, private actors have a constitutional right to freedom of association that enters the legal analysis.

Finally, after establishing the context with respect to sex segregation and current equality law, I will outline six theoretical approaches, most grounded in feminist legal theory, to how law should address sex segregation. Feminist legal theory has many different and divergent understandings of equality, and those various formulations provide different answers to the issue of sex segregation. I will set forth these different approaches and begin the argument in favor of an anti-essentialist theoretical approach that would prohibit all but the most private or necessary forms of sex segregation. As I begin to argue in this Article and build on in the pieces that follow, this anti-essentialist approach, although far from perfect, best responds to the inequalities associated with sex segregation and captures the diversity of people that law and society try to categorize by the labels "man" and "woman." Because of the various ways in which modern sex segregation plays a major role in limiting personal identity and overall equality by forcing people to fit

into a strict sex/gender binary, this theoretical framework is the preferable approach to take with respect to sex segregation.

I. Defining "Sex Segregation"

To understand sex segregation, first the term itself must be defined, and that requires parsing each of the words that constitutes the term. The "sex" in "sex segregation" refers to the apparent biological distinctions between men and women. "Sex" stands in contrast to "gender." Although there are ways in which the two terms are blurred,[10] in legal scholarship the most widely understood and important difference between the two is that "sex" refers to apparent biological distinctions whereas "gender" refers to the attributes society generally associates with biologically different sexes.[11] Thus, when I use the word "sex" throughout this Article and the project as a whole, I am referring to the biological categories of "men" and "women" or "male" and "female" (and, for younger individuals, "boys" and "girls").[12] When I use the word "gender," I am referring to the categories of "masculine" and "feminine," categories that society generally associates with, respectively, men and women.[13]

This distinction between "sex" and "gender" is of utmost importance in the study of segregation, as a simple example makes clear. One of the instances of sex segregation that I cover later in this Article is the federal law that requires "every *male* citizen of the United States, and every other *male* person residing in the United States" to register for the draft between the ages of eighteen and twenty-six.[14] This provision quite

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[10] *See* MELISSA HINES, BRAIN GENDER 4, 213–15 (2004) (arguing that there is no clear distinction between "sex" and "gender").

[11] *See* Cohen, *No Boy Left Behind?*, *supra* note 1, at 135 n.2.

[12] For now, I am leaving aside the issue of intersexed individuals, a topic to which I will return in future research. *See generally* Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151 (2000).

[13] *See* R.W. CONNELL, MASCULINITIES 21–27 (2d ed. 2005) (describing commonly-held notions linking sex and gender).

[14] 50 APP. U.S.C.A. app. § 453(a) (emphasis added).

clearly applies to sex, since it requires people who are biologically men, and not people who are biologically women, to register for the draft.

No one would contend that this provision requires every person who exhibits masculine characteristics (however those characteristics are defined), which would include masculine men *and* masculine women, to register for the draft. Congress certainly could have based the draft requirement on such characteristics and done exactly that—required those people, both biological men and biological women, who exhibit masculine characteristics to register for the draft. If Congress had done so, it would have segregated based on gender. However, Congress chose to base the segregation on sex, as the registration requirement applies based on a person's biological sex, not gender. That said, many of the laws mentioned in this Article incorrectly use the word "gender" in place of "sex,"[15] and the Supreme Court often misuses the two terms as well.[16] All of the types of segregation described and analyzed here concern sex for the simple reason that none of the instances of segregation can reasonably be understood to separate masculine men *and* women from feminine women *and* men.

The second term that needs to be defined is "segregation." By "segregation," I am referring to laws, rules or policies that require complete separation of men and women, or that completely exclude either men or women from participating in

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[15] *See, e.g.*, CAL. EDUC. CODE § 58521; MISS. CODE ANN. § 19-25-71; P.R. LAWS ANN. tit. 24, § 6159a.

[16] Most people attribute this confusion to Justice Ginsburg. When, as an attorney in the 1970s, she was arguing sex discrimination cases to the Supreme Court, she chose to use "gender" instead of "sex" because of concerns about "impressionable minds." Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminine Jurisprudence*, 105 YALE L.J. 1, 9–10 (1995); *The Supreme Court: Excerpts Ffrom Senate Hearing on the Ginsburg Nomination*, N.Y. TIMES, July 22, 1993, at A20. Justice Scalia has urged the Court to properly distinguish between the two, *see* J.E.B. v. Alabama, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting), but the Court has not heeded his call.

an activity.[17] I am not referring to de facto segregation, where no law, rule or policy separates or excludes men or women but for reasons such as societal pressures, historical practices or socialized preferences, the result of an open policy is that only men or only women are present or participate. For instance, if an after-school chess club is open to everyone at the school, but only boys participate, that is de facto segregation and not sex segregation as I am defining it here.[18]

Likewise, I am not referring to situations in which an activity or institution predominantly or overwhelmingly, but not exclusively, consists of either men or women. An obvious example of such sex-imbalance is what sociologists refer to as occupational sex segregation. Occupational sex segregation occurs when a particular job type is performed by predominantly or almost exclusively men or women.[19] Such segregation, although itself a serious concern for a variety of reasons, is not

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[17] This definition tracks the way that the term "segregation" has been used in the context of school desegregation cases, see, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971) ("deliberately [] carry[ing] out a governmental policy to separate pupils in schools solely on the basis of race"), but expands it beyond the context of schools. However, it is even broader in the sense that I am also including deliberate exclusion based on sex, such as the Virginia Military Institute's rule excluding women in *United States v. Virginia*, 518 U.S. 515 (1996), even when there is no comparable entity established for the excluded group.

[18] De facto sex segregation raises important concerns in its own right, but those are beyond the scope of this particular project.., *Ssee, e.g.*, DAVID SADKER & MYRA SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS (1994) (discussing issue in the context of education); H.E. Baber, *Tomboys, Femmes, and Prisoner's Dilemmas*, 9 J. CONTEMP. LEGAL ISSUES 37, 40 (1998) (discussing issue in the context of employment); Vicki Schultz, *Telling Stories AaAbout Women aAnd Work: Judicial Interpretations Oof Sex Segregation iIn tThe Workplace iIn Title VII Cases Raising tThe Lack oOf Interest Argument*, 103 HARV. L. REV. 1749 (1990) (discussing issue in the context of employment)., but those are beyond the scope of this particular project.

[19] Edward Gross first studied this phenomenon. *See* Edward Gross, *The Sexual Structure of Occupations Over Time*, 16 SOC. PROBLEMS. 198 (1968). Sociologists put the dividing line at arbitrary points to indicate predominance, such as "75% or 80% one sex, a one-sex majority, or a percentage point deviation from the sexes' representation in the labor force." Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 244 (1993).

caused by a rule imposed by the employer,[20] nor is it usually complete as even in jobs that are performed mostly by men or mostly by women, there are usually some women or men who buck the trend and work in the field.[21]

Sex segregation is one form of sex classification, as the term is used in constitutional law. From basic equal protection doctrine, a law that contains a sex classification is a law that, on its face, or in its purpose and impact, distinguishes based on sex.[22] Although all forms of sex segregation as I am defining the term involve a sex classification, many forms of sex classifications do not amount to sex segregation. For instance, the sex classification in *Reed v. Reed*, which gave a preference to men over women in deciding who would be the administrator of an estate when two people share the same qualifications,[23] differentiated between men and women by preferring men but did not segregate men and women by separating out the two groups or completely restricting access based on sex. Another example of sex classifications that are not a form of sex segregation are laws that require that a particular government entity have no more than a specific percentage of its membership be people of one sex.[24] Although these laws would certainly qualify as sex classifications under constitutional doctrine because the government is classifying individuals based on sex, they result in sex integration, rather than segregation, so I am not including them in this project.

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[20] Such a rule, unless a bona fide occupational qualification, would be unlawful under Title VII.

[21] *See generally* SUSAN EISENBERG, WE'LL CALL YOU IF WE NEED YOU: EXPERIENCES OF WOMEN WORKING CONSTRUCTION (1998); CHRISTINE L. WILLIAMS, STILL A MAN'S WORLD: MEN WHO DO WOMEN'S WORK (1995); Phyllis Kernoff Mansfield, *The Job Climate for Women in Traditionally Male Blue-Collar Occupations*, 25 SEX ROLES 63 (1991).

[22] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979).

[23] Reed v. Reed, 404 U.S. 71 (1971).

[24] *See, e.g.*, IOWA CODE ANN. § 46.1; KAN. STAT. ANN. § 75-5297; MICH. COMP. LAWS ANN. § 18.405.

This definition of sex segregation limits the focus of this project to the strictest forms of separation or exclusion of individuals based on sex. Other forms of modern sex and gender classifications and de facto segregation are certainly worthy of study. However, this project focuses on this strict notion of sex segregation because such separation or exclusion would seem incompatible with modern anti-discrimination norms. Yet, as this Article demonstrates, sex segregation is alive and well.

II. Why Sex Segregation Still Matters

The broad outlines of legal doctrine related to sex discrimination generally and sex segregation specifically have been largely settled for some time.[25] In 1963, Congress passed the first federal civil rights law covering women, the Equal Pay Act, which required that men and women receive the same pay for the same job.[26] Title VII's prohibition on discrimination in employment based on sex, among other things, came a year later.[27] The 1970s brought Title IX and its prohibition on discrimination based on sex in educational institutions that receive federal funding[28] and an expansion of the Fair Housing Act of 1968 to include a prohibition on sex discrimination.[29] Comparable state provisions prohibiting sex discrimination in employment, public accommodations and other arenas of public life have been on the books for decades in many places.[30] The Supreme Court also took up the mantle of non-discrimination based on sex during the 1970s, finally expanding the coverage of the Fourteenth Amendment's Equal Protection Clause in 1976 to prohibit most forms of government discrimination based on

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[25] I will discuss them in further depth in Part IV of this Article.

[26] 29 U.S.C. § 206.

[27] 42 U.S.C. § 2000e.

[28] 20 U.S.C. §§ 1681–88.

[29] 42 U.S.C. §§ 3604, 3605.

[30] *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

sex.[31] Thus, over the course of thirteen years, women's status under federal law drastically changed, and the changes prompted elimination of some of the most severe forms of sex discrimination.[32]

Yet, certain developments indicate that, despite these decades-old advances, a renewed focus on sex segregation under the law is necessary. In this section, I argue that recent developments in law and science should force scholars to turn their attention once again to sex segregation.[33] In law, the Supreme Court implicitly and the Department of Education explicitly have given schools, both public and private, new authority to segregate students based on sex. In science, popular culture is noticing new developments that claim to support the notion that men and women are inherently different. This "difference science" played a role in the changes related to sex-segregated education, and I argue here that as it continues to expand and gain traction, it will also continue to inform public policy related to sex segregation generally. While noting the possibility of increased sex segregation in the future, we can draw our attention to the current state of sex segregation and its broad effects on equality and identity.

A. Sex-Segregated Education

The first reason for renewed focus on sex segregation is that, in a very important part of American life, sex segregation is increasing. In 1995, only three sex-segregated public education

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[31] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[32] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Taylor v. Louisiana, 419 U.S. 522 (1975).

[33] Sex segregation was part of the concern motivating the reforms of the 1960s and 1970s as well as the proposed Equal Rights Amendment. *See, e.g.*, Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 902–03 (1971); Pauli Murray & Mary Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); James C. Todd, Comment, *Title IX of the 1972 Education Amendments: Preventing Sex-Discrimination in Public Schools*, 53 TEX. L. REV. 103 (1974).

opportunities existed in the United States.[34] By 2002, the number had increased but was still only eleven.[35] As of January 2011, there are, by one estimate, more than 524 public schools in the country segregating their students based on sex, at least 100 of which segregate their entire institution (as opposed to particular classes) based on sex.[36] What happened in those sixteen years to cause such a drastic change in sex segregation in schooling?

Until 1995, sex-segregated education had suffered at the hands of the Supreme Court's expansion of the Equal Protection Clause to include heightened scrutiny of sex discrimination. The first challenge to sex-segregated education in the Supreme Court resulted in a stalemate, as the Court, with Justice Rehnquist recusing himself, divided evenly in a challenge to a Philadelphia magnet high school that admitted only boys.[37] The affirmance without opinion let stand the Third Circuit decision permitting the school to segregate by sex,[38] but a subsequent Pennsylvania state court decision ruled the school unconstitutional.[39] The Pennsylvania court relied in substantial part on developing Supreme Court doctrine under the Equal Protection Clause,[40] in particular on *Mississippi University for Women v. Hogan*.[41] *Hogan* declared a state-run graduate nursing program that admitted only women unconstitutional because it relied on

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[34] *Single-Sex Schools,* NAT'L ASS'N FOR SINGLE SEX PUB. EDUC., http://www.singlesexschools.org/schools-schools.htm (last visited June 10, 2011).

[35] *Id.*

[36] *Id.*

[37] *See* Vorchheimer v. Sch. Dist., 430 U.S. 703 (1977). For more on the history of *Vorchheimer*, *see* ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 121–29 (2003).

[38] Vorchheimer v. Sch. Dist., 532 F.2d 880 (3d Cir. 1976).

[39] Newberg v. Bd. of Pub. Educ., 26 Pa. D. & C.3d 682 (Pa. Comm. Pl.Ct. 1983).

[40] *Id.* at 707.

[41] Mississippi. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

outdated sex stereotypes in the workplace.[42] Following *Hogan*, a district court in Detroit found unconstitutional a sex-segregated public school for African-American boys because it was both over-inclusive (in admitting boys who were not at risk) and under-inclusive (in excluding girls who were).[43]

During this same time period, the Department of Education also worked to stop sex-segregated education. Prior to the Detroit case, the Office of Civil Rights of the Department of Education wrote two memos explaining that Title IX prohibited sex-segregated education.[44] The Department issued both memos in response to school board requests to start sex-segregated educational programs,[45] thus indicating that it was actively discouraging sex segregation. Therefore, although *Hogan* was only about a particular type of graduate education, the lower court decisions were not nation-wide precedent and the Department of Education memos were issued in two isolated controversies, momentum was on the side of restricting sex-segregated education.

In 1996, the situation began to change. In *United States v. Virginia*, the Court delivered what appeared to be another blow to sex-segregated education when it found that the Virginia Military Institute unconstitutionally excluded women.[46] However, the Court's opinion discussed classifications based on sex in a way that hinted that sex-segregated education, done properly, could be constitutional. In a footnote to a sentence

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[42] *Id.* at 725–31.

[43] Garrett v. Bd. of Educ., 775 F. Supp. 1004, 1007–08 (E.D. Mich. 1991) (finding that the state had an important goal in reducing high unemployment, dropout, and homicide rates but that there was not a sufficient link between remedying those problems and excluding girls).

[44] *See id.* at 1009 & n.9.

[45] *Id.*

[46] United States v. Virginia, 518 U.S. 515, 534 (1996).

explaining when sex classifications can be used,[47] Justice Ginsburg's opinion approvingly mentioned some forms of sex-segregated education that various *amici curiae* had urged the Court to consider.[48] Tucked into an opinion finding a sex-segregated educational institution unconstitutional, this nugget suggested that the Court might find that some sex-segregated educational opportunities, even if government supported, would be constitutional.[49]

The movement for sex-segregated education gained momentum with legislative and regulatory changes. In 2001, Senator Kay Bailey Hutchison inserted language into the No Child Left Behind Act that encouraged schools to experiment with sex-segregated education.[50] The Act also ordered the Secretary of Education to issue guidelines implementing this section.[51] In 2002, the Secretary issued a notice of the Department of Education's intent to expand sex-segregated

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[47] The Court wrote that "inherent differences . . . remain cause for celebration" and that "sex classifications may be used . . . 'for particular economic disabilities [women have] suffered,' to 'promot[e] equal employment opportunity,' [and] to advance full development of the talent and capacities of our Nation's people." *Id.* aAt 533 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam), and California Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272, 289 (1987).

[48] "Several amici have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools 'to dissipate, rather than perpetuate, traditional gender classifications.' We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities." *Id.* at 533 n.7 (citing to Brief for Twenty-six Private Women"s Colleges as Amici Curiae at 5).

[49] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,529, 62,534–38 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106) [hereinafter "Final Rule"] (repeatedly using *Virginia* to support argument that sex-segregated education may be constitutional).

[50] 20 U.S.C. § 7215(a)(23) (distributing funds to local educational agencies for "same-gender schools and classrooms").

[51] *Id.* at § 7215(c).

education under Title IX and its regulations.[52] In 2006, after some delay, the Department of Education issued final regulations allowing for expanded sex-segregated education under Title IX.[53] The final regulations permitted schools to sex segregate individual classrooms, provided that the goal was educational diversity or to meet students' particular needs.[54] Such sex segregated educational opportunities must be implemented in an "evenhanded" manner and be "completely voluntary."[55] The regulations also permit entire schools to be sex segregated for any reason[56] as long as there is a "substantially equal" opportunity for the excluded sex.[57]

With the Department of Education at first indicating that it was going to broaden sex segregation in schools and then finally officially adopting such a position, sex segregated schooling expanded. By the end of 2004, 149 public schools offered some form of sex segregated education[58]; as of the end of 2006, there were 253[59]; and at the beginning of 2011, over 524 public schools are either entirely segregated by sex or offer some sex-segregated classes.[60] With this dramatic increase over the past several years, the Department of Education's new regulations have clearly given school administrators the authority to expand sex segregation in education.

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[52] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31,097–99 (proposed May 8, 2002) (to be codified at 34 C.F.R. pt. 106).

[53] Final Rule, *supra* note 4849, at 62,530.

[54] 34 C.F.R. § 106.34(b)(1)(i)(A),(B).

[55] *Id.* at § 106.34(b)(1)(ii),(iii).

[56] *Id.* at § 106.34(c)

[57] *Id.* at § 106.34(c)(1),(3).

[58] *See* Nat'l Ass'n for Single Sex Pub. Educ., *Single-Sex Schools*, http://web.archive.org/web/ 20041218034247 (last visited June 10, 2011)..

[59] *Id.*

[60] *Id.*

B. The Science of Sex Differences

The second reason to re-focus attention on sex segregation is the emergence of new trends in the study of sex differences. When combined with commonly-held popular beliefs about men and women, this science can "reinforce, with all the authority of science, old-fashioned stereotypes and roles."[61] Particularly relevant here, it can also powerfully influence public policy, either as a justification for already existing sex segregation or as a reason to expand it.

The study of sex differences crosses many fields. Researchers have investigated the extent to which men and women differ in personality traits, behavior, cognitive abilities, communication styles, physical traits and abilities, and basic attributes of identity.[62] The media does an excellent job picking up stories about differences between men and women,[63] and popular culture tends to follow.[64] An alternative narrative exists —that men and women are much more similar than different and that only in a few distinct areas are there definite differences

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[61] CORDELIA FINE, DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE 237 (2010).

[62] *See generally* HINES, *supra* note 910, at 1–19 (surveying the differences); WHY AREN'T MORE WOMEN IN SCIENCE?: TOP RESEARCHERS DEBATE THE EVIDENCE (Stephen J. Ceci & Wendy M. Williams eds., 2007) (presenting a variety of views and evidence related to the issue); Miranda McGowan, *Engendered Differences* (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1361196 (summarizing research in various fields).

[63] *See* McGowan, *supra* note 62, at 6–7; DEBORAH CAMERON, THE MYTH OF MARS AND VENUS 17–21 (2007) (describing "soundbite science" that people read or view in the popular press); McGowan, *supra* note 62, at 6–7.

[64] "The idea that men and women 'speak different languages' has itself become a dogma, treated not as a hypothesis to be investigated or a claim to be adjudicated, but as an unquestioned article of faith." CAMERON, *supra* note 63, at 3. Evidence of this "unquestioned article of faith" is the best-selling popularity of the *Men Are From Mars, Women Are From Venus* books by John Gray and similar books from Deborah Tannen. *See, e.g.*, JOHN GRAY, MARS AND VENUS IN THE WORKPLACE (2001); JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS (1992); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION (1990).

between men and women.[65] But this alternative narrative has not permeated the culture.[66]

Part of the reason for the obstinacy of the sex difference myth is the way science has been used to support it. Scientific explanations infuse a sense of inevitability and naturalness into the discussion of sex differences and skew people's perceptions of the validity of gender stereotypes.[67] That science is

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[65] *See* CAMERON, *supra* note 63 (developing a book-length argument against the "myth" that men and women fundamentally differ); ROSALIND BARNETT & CARYL RIVERS, SAME DIFFERENCE: HOW GENDER MYTHS ARE HURTING OUR RELATIONSHIPS, OUR CHILDREN, AND OUR JOBS (2004); Janet Shibley Hyde, *The Gender Similarities Hypothesis*, 60 AM. PSYCHOLOGIST 581 (2005). Moreover, even if there are differences, arguably the most significant question is to what extent they should matter socially and legally.? *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990).

[66] After all, as Nancy Levit has humorously noted, book titles such as MEN ARE FROM MARS, WOMEN ARE FROM VENUS have "a great deal more pizzazz than would a book about gender similarities, entitled perhaps MEN AND WOMEN ARE FROM EARTH." LEVIT, *supra* note 5, at 3.

[67] In a study exposing newspaper readers to stories explaining sex differences based on biology or social causes, researchers found that "[p]articipants exposed to articles that attributed the sex difference to biological causes endorsed more gender stereotypes [] than participants exposed to the articles attributing the sex difference to social factors." Victoria Brescoll & Marianne LaFrance, *The Correlates and Consequences of Newspaper Reports of Research on Sex Differences*, 15 PSYCHOL. SCIENCE SCI. 515, 519–20 (2004) (summarizing study); *see also* Deena Skolnick Weisberg et al., *The Seductive Allure of Neuroscience Explanations*, 20 J. COGNITIVE NEUROSCIENCE 470 (2008) (finding that neuroscience studies tend to unduly interfere with people's evaluations of arguments).

influencing sex equality is nothing new,[68] but the types of science and the evidence mustered in favor of proving that men and women are inherently different is.

Over the past half century, evolutionary biology and its subfield sociobiology, which studies evolutionary biology applied to social behavior,[69] have emerged as very influential fields in the area of sex difference.[70] One theory is that men and women have evolved differently because of their different roles in the sexual selection process: men, seeking to increase their reproductive impact, need to have sex with more women, leading them to be more competitive, aggressive, fit, navigationally-oriented and promiscuous; women, who are constrained to give birth to and care for children, do not need those characteristics, so are instead more passive and nurturing.[71] Another strand of evolutionary biology focuses on the difference between men as hunters and women as gatherers.

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[68] *See* FINE, *supra* note ??, 61, at xxii–xxv (surveying some of the historical connections between science and women's inequality). Nineteenth-century fields such as craniology and phrenology, since discredited, were used to justify arguments about women's role in society. *See, e.g.*, Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 61–62 (1994) (discussing phrenology); Stacey A. Tovino, *Imaging Body Structure and Mapping Brain Function: A Historical Approach*, 33 AM. J. L. & MED. 193, 205 (2007) (discussing phrenology); STEPHEN J. GOULD, THE MISMEASURE OF MAN 104–05 (1981) (discussing craniology). The Supreme Court also has historically relied on science to support women being treated differently in the workplace., *See Muller v. Oregon*, 208 U.S. 412, 421—23 (1908); *see also* Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605. The Supreme Court has also used science to justify, and women being sterilized in the name of eugenics. *See* Buck v. Bell, 274 U.S. 200, 207 (1927); *see also* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL (2008).

[69] EDWARD O. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS (1975).

[70] *See generally* SARAH BLAFFER HARDY, THE WOMAN THAT NEVER EVOLVED (1981); LIONEL TIGER, MEN IN GROUPS (1969).

[71] COLIN HAMILTON, COGNITION AND SEX DIFFERENCES 181–82 (2008) (explaining the theory); LAURIE A. RUDMAN & PETER GLICK, THE SOCIAL PSYCHOLOGY OF GENDER: HOW POWER AND INTIMACY SHAPE GENDER RELATIONS (2008) (explaining the theory). For book-long arguments for of the theory, see DAVID M. BUSS, EVOLUTIONARY PSYCHOLOGY: THE NEW SCIENCE OF THE MIND (2d ed. 2003), and DAVID C. GEARY, MALE, FEMALE, THE EVOLUTION OF HUMAN SEX DIFFERENCES (1998).

This theory suggests that men developed navigational and motor skills so that they could hunt for sustenance, whereas women developed skills related to remembering locations of food and identifying safe food.[72]

Developments in this field are popular fodder for non-scientific media. For example, a widely reported study from 2007 attributed sex differences in color preferences, that men prefer blue and women prefer pink, to the different roles men and women have played in natural selection.[73] The study authors hypothesized that women, as the gatherers, developed a preference for red hues (like pink) because they needed to be able to identify berries and fruit.[74] Alternatively, the authors suggested that women needed to discriminate facial color change in order to empathize more in their role as care-givers.[75] Countless media outlets reproduced the story, depicting men and women as hardwired, based on evolution, to like blue and pink.[76]

This strand of sociobiology is not without its detractors. Empirical study has found some of its basic claims unsupportable. For instance, researchers have not found that sex chromosomes transfer behavioral characteristics from generation to generation and also have not been able to connect male-linked hormones to increased sexual promiscuity.[77] Furthermore, sociobiology's detractors have criticized evolutionary explanations of sex difference as merely post-hoc speculation to

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[72] HAMILTON, *supra* note 71, at 182; Irwin Silverman et al., *The Hunter-Gatherer Theory of Sex Differences in Spatial Abilities: Data from 40 Countries*, 36 ARCHIVES SEXUAL BEHAV. 261, 261–62 (2007).

[73] Anya C. Hurlbert & Yazhu Ling, *Biological Components of Sex Differences in Color Preference*, 17 CURRENT BIOLOGY 623 (2007).

[74] *Id.*

[75] *Id.*

[76] *See, e.g.*, Jia-Rui Chong, *Color Biases May Be Nature, Not Nurture*, L.A. TIMES, Aug. 21, 2007; *Evolutionary Psychology: Sex, Shopping and Thinking Pink*, THE ECONOMIST, Aug. 25, 2007, at 64; *Girls Are Catching Up to Boys in the Fast Lane*, OAKLAND TRIB., Aug. 27, 2007; Coco Masters, *Study: Why Girls Like Pink*, TIME, Aug. 20, 2007.

[77] HINES, *supra* note 10, at 224.

justify current stereotypes.[78] The color preference study is ripe for this kind of criticism as its authors hypothesize two conceptually different explanations for color preferences—are the preferences developed because of differences with respect to care-giving or with respect to food-gathering? There is no way to verify these claims, and they are sufficiently unrelated to one another that they raise the possibility that the researchers just invented plausible-sounding stories. Moreover, the study also justifies as natural what are actually just current stereotypes of men and women. After all, color preferences are historically and culturally contingent.[79]

Sociobiology's explanation of sex differences is not new, but the blossoming field of neuroscience that supposedly bolsters evolutionary theories is. New technologies allow researchers to "visualiz[e] brain function by mapping blood flow, electrical impulses, and other brain functions."[80] Researchers have used this technology to study the brain and its

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[78] *See* Dewey G. Cornell, *Post Hoc Explanation Is Not Prediction*, 52 AMER. PSYCHOL. 1380 (1997) (demonstrating how post-hoc evolutionary explanations could be developed for any pattern of behavior); Alice H. Eagly, *Sex Differences in Social Behavior: Comparing Social Role Theory and Evolutionary Psychology*, 52 AMER. PSYCHOL. 1380 (1997) (noting several weaknesses with the evolutionary biology theory).

[79] *See* HINES, *supra* note 10, at 126 ("For example, in Victorian England pink was considered an appropriate color for boys, and long hair, bows, and flowers were viewed as suitable for boys as well."); MICHAEL KIMMEL, MANHOOD IN AMERICA: A CULTURAL HISTORY 160–61 (1996) (noting that in the United States in the early 1900s, "boys wore pink or red because they were manly colors indicating strength and determination, and girls wore light blue, an airier color, like the sky, because girls were so flighty").

[80] Carlin Meyer, *Brain, Gender, Law: A Cautionary Tale*, 53 N.Y. L. SCH. L. REV. 995, 996 n.3 (2008). The new technologies include fMRI (functional Magnetic Resonance Imaging), PET (position emission tomography), EEG, (electroencephalography), and SPECT (single photon emission computer tomography). *Id. See generally* Teneille R. Brown & Emily R. Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of Criminal Defendant's Past Mental StatesMens Rea*, 62 STAN. L. REV. 1119 (2010) (discussing technology).

relation to sex differences in new ways.[81] They have studied potential sex differences in the volume of different type of brain matter, the efficiency of processing information within the brain, the speed of brain processing and other structural differences.[82] Another area of brain research has delved into the familiar trope that men are right brain oriented, and women are left brain oriented.[83] Researchers have conducted a wide variety of research into the ways in which this may be true.[84]

Despite the excitement around modern brain research, there are many critics of its use with respect to sex difference.[85] A general criticism of the emerging brain science, that it is still in

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[81] Some researchers attribute observed sex differences in brain function to hormonal differences, particularly the heightened presence of testosterone in men and estrogen in women. *See generally* HINES, *supra* note 10 (reviewing hormonal theories of male/female brain difference); HAMILTON, *supra* note 71, at 132–49. This theory, though, is subject to criticism that it overstates the importance of hormones compared to other factors, such as environmental influences. *See* REBECCA JORDAN-YOUNG, BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES (2010) (systematically evaluating and disproving the research on the influence of hormones on differential brain development in men and women); Robert M. Sapolsky, *Testosterone Rules*, *in* THE GENDERED SOCIETY READER 26–31 (Michael S. Kimmel & Amy Aronson eds., 3d ed. 2008); Roslyn Holly Fitch & Heather A. Bimonte, *Hormones, Brain, and Behavior: Putative Biological Contributions to Cognitive Sex Differences*, *in* BIOLOGY, SOCIETY, AND BEHAVIOR: THE DEVELOPMENT OF SEX DIFFERENCES IN COGNITION 79 (Ann McGillicuddy-De Lisi & Richard De Lisi eds., 2002).

[82] DIANE F. HALPERN, SEX DIFFERENCES IN COGNITIVE ABILITIES 193–200 (2000) (surveying the literature); HAMILTON, *supra* note 6971, at 184–86.

[83] *See e.g.*, Larry Cahill et al., *Sex-Related Hemispheric Lateralization of Amygdala Function in Emotionally Influenced Memory: An fMRI Investigation*, 11 LEARNING & MEMORY 261 (2004). This concept has taken on a life of its own in the popular literature. *See e.g.*, ALLAN PEASE & BARBARA PEASE, WHY MEN DON'T LISTEN AND WOMEN CAN'T READ MAPS: HOW WE'RE DIFFERENT AND WHAT TO DO ABOUT IT (2001).

[84] HAMILTON, *supra* note 71, at 186–89 (surveying the literature); HALPERN, *supra* note 82, at 200–15.

[85] *See generally* LISE ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLING GAPS—AND WHAT WE CAN DO ABOUT IT (2009); LISE ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLING GAPS — AND WHAT WE CAN DO ABOUT IT (2009).

its infancy and is very rough,[86] also applies in the context of brain research with respect to sex differences. Research into sex differences in particular suffers from the problem that "interesting individual [brain] differences can occur in the absence of performance differences."[87] In other words, although there may be observed sex differences in the brain, they may not translate to any difference in real-world performance. Moreover, if there is in fact a difference in performance based on sex, it is difficult to directly attribute that difference to any variation in brain structure that may exist.[88] Reports of brain difference also have the potential to be over-interpreted because often the overlap between the sexes is much greater than the variation between the sexes. In fact, many of the studies have found that greater variation occurs within a group of people of the same sex than occurs between the sexes.[89] Finally, some researchers critique the study of sex differences as ignoring the plasticity of brains. Rather than being unchanging organs that are one way and that way forever, brains are continually influenced and changed by the world around them, so any suggestion that brains are inherently one way or the other for a group of people based on sex ignores the way brains really function and develop.[90]

These developing areas of science help shape public policy with respect to sex. For instance, in the area of education, several of the leading proponents of sex segregation in the classroom rely extensively on the developing science behind sex

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[86] *See* Stephen Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397 (2006).

[87] HAMILTON, *supra* note 71, at 188.

[88] *See* Emily C. Bell et al., *Males and Females Differ in Brain Activation During Cognitive Tasks*, 30 NEUROIMAGE 529 (2006) (finding that different brain responses in men and women can be consistent with similar cognitive performance and also that similar brain responses can be consistent with different cognitive performance).

[89] Hyde, *supra* note 65, at 586–87 (showing this point graphically); RUDMAN & GLICK, *supra* note 6971, at 16–17 (showing this point graphically).

[90] *See* Janet Shibley Hyde, *New Directions in the Study of Gender Similarities and Differences*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCIENCE SCI. 259, 262 (2007) (explaining plasticity).

differences. Leonard Sax and Michael Gurian, in particular, regularly use research from evolutionary biology and neuroscience to bolster their argument that boys and girls differ in fundamental ways and therefore must be educated differently and, sometimes, separately.[91] Both Sax and Gurian run organizations with the mission of taking the emerging science of sex differences and translating that to public policy reform in the form of increased sex-segregated education.[92] In other contexts, law professor Kingsley Browne has repeatedly written about the science of sex differences and how it justifies various public policy positions with respect to women's role in science, employment and the military, among others.[93] As the science behind perceived sex differences continues to expand, public policy related to sex segregation will inevitably continue to be informed by it, leading to more arguments to support current forms of sex segregation as well as to expand sex segregation beyond its current forms.

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[91] MICHAEL GURIAN & KATHY STEVENS, THE MINDS OF BOYS: SAVING OUR SONS FROM FALLING BEHIND IN SCHOOL AND LIFE (2005); LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES (2006); Michael Gurian & Kathy Stevens, *With Boys and Girls in Mind*, 62 EDUC. LEADERSHIP 21 (2004); Leonard Sax, *The Promise and Peril of Single-Sex Public Education*, EDUC. WK., Mar. 2, 2005, at 48.

[92] Leonard Sax is the founder and executive director of the National Association for Single Sex Public Education. *See About Leonard Sax MD PhD*, NAT'L ASS'N FOR SINGLE SEX EDUC., http://www.singlesexschools.org/home-leonardsax.htm (last visited May 19, 2011). The National Association for Single Sex Public Education is an organization "dedicated to the advancement of single-sex public education for both girls and boys" and part of its missionng is spreading research about sex and gender to educators. *About NASSPE*, NAT'L ASS'N FOR SINGLE SEX EDUC, http://www.singlesexschools.org/home-nasspe.htm (last visited May 19, 2011). Michael Gurian is the co-founder of the Gurian Institute and "has pioneered efforts to bring neuro-biology and brain science into homes, schools, corporations, and public policy." MICHAEL GURIAN'S HOME PAGE, http://www.michaelgurian.com/ (last visited May 19, 2011); *see also* GURIAN INSTITUTE, http://www.gurianinstitute.com/ (last visited May 19, 2011).

[93] *See e.g.*, BROWNE, *supra* note 2; Kingsley R. Browne, *Women in Science: Biological Factors Should Not Be Ignored*, 11 CARDOZO WOMEN'S L.J. 509 (2005); Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971 (1995); Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L.J. 617 (1984).

III. Sex Segregation in American Law and Society

Sex segregation is not a thing of the past. Congress did not outlaw it in the 1960s or 1970s with its spate of civil rights legislation. The Supreme Court did not kill it in the mid-1970s when it adopted a heightened constitutional standard for analyzing classifications based on sex. Nor is it, as popular spins on the science surveyed in the previous section suggest, merely a concern for the future. Rather, gaps in statutory law and the Court-made doctrine of heightened scrutiny have created enough flexibility that American law and society have continued to sex segregate in myriad ways. The expansion of sex-segregated education discussed in the previous section is only one such way, and advocates for sex segregation already use the scientific developments to justify the sex segregation that currently exists in law and society.

It is today's sex segregation that is the concern of this project. This section catalogs the ways that American law and society continue to segregate people based on sex. With the strict definition of sex segregation I use in this Article—instances of complete separation or exclusion based on whether a person is biologically a man or a woman[94]—one might think that there is little in American law and society that qualifies. However, almost fifty years after federal civil rights laws appeared and forty years after *Reed v. Reed*[95] began the Court's effort to include women in the Fourteenth Amendment, law and society continue to segregate based on sex in a multitude of areas and in a variety of ways.

In describing the current ways law and society segregate based on sex, the following sub-sections introduce a taxonomy of types of current sex segregation based on how the sex segregation is implemented. This taxonomy is not based on the areas of life in which sex segregation occurs, although those areas will be described below in full. Rather, I organize the various forms of sex segregation into four general types of sex segregation: *mandatory*, or sex segregation that is required by

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[94] For the full definition, along with several qualifications and explanation, see *supra* Part I.

[95] Reed v. Reed, 404 U.S. 71 (1971).

law; *administrative*, or sex segregation implemented by government even though not required by law to do so; *permissive*, or sex segregation that law explicitly permits; and *voluntary*, or sex segregation that non-governmental institutions and organizations voluntarily engage in without explicit permission to do so by law.[96]

This section's exhaustive description of currently existing forms of sex segregation is meant to serve as the basis for the rest of this project and any other research scholars wish to undertake related to the subject. As such, it is described here before any analytical framework appears. Following this section, I begin the endeavor of providing this framework by detailing how the Constitution and other positive law treat sex

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[96] It is worth taking a moment to briefly describe the methodology for this research. To find the ways the law segregated based on sex, I have searched Westlaw for all statutes and constitutions, both state and federal, that mention some variation of "men," "women," "male," or "female" with a provision about exclusivity or separation. I chose to exclude federal and state regulations and local laws from the research. I excluded federal and state regulations because they were, upon superficial inspection, generally in the same areas as the statutes. I excluded local laws because they are not easily accessible, and the state laws provided enough variety to get a good sense of how the law segregates based on sex. After excluding laws that were mere classifications based on sex, as described in *supra* Part I, I had a complete collection of American law relating to sex segregation that I then organized into categories based on how the law implemented sex segregation.

Collecting information about segregation outside of constitutions and statutes was more difficult, as there is no database of societal institutions that exist outside the context of statutory law. However, there are cases that have been litigated concerning many of these institutions. *See infra* Part IV. Those cases provided a valuable resource for investigating societal sex segregation. Many societal institutions also are analogous to statutory sex segregation, so I extrapolated from there. Finally, I reviewed literature about sex equality and feminist theory, and I had conversations with others to come up with my final list of societal institutions that segregate based on sex. Admittedly, this is not as systematic a method of finding these institutions as compared with the research into laws that sex segregate. Therefore, I make no representation that this part of the research is a complete list. However, I believe it is thorough and representative of the ways society continues to segregate based on sex.

segregation[97] and then giving various theoretical frameworks for evaluating different types of sex segregation.[98]

A. Mandatory Sex Segregation

Hundreds of laws in this country mandate sex segregation. These laws regulate a wide variety of areas of American life—military, law enforcement, education, athletics, restrooms, prisons, housing and more. This category is the most basic to understand since it covers sex segregation that is required by law.

Possibly the most familiar laws that mandate segregation based on sex occur in the context of the military. Women's roles in the military have expanded since 1948, when Congress passed the Women's Armed Services Integration Act, the first law that gave women a permanent place in the military.[99] From 1948 through 1994, other changes slowly increased the role of women in the military, culminating in the 1994 Department of Defense rule that sets forth current policy: women can be assigned to all positions for which they qualify, but are excluded from "assignments to units below the brigade level whose primary mission is direct ground combat."[100] Women can also be excluded from units that must live with ground combat units, positions for which providing separate living arrangements is too expensive, special operations forces missions or long-range reconnaissance and units whose physical requirements would exclude the vast majority of women.[101] By statute, if the

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[97] *See infra* Part IV.

[98] *See infra* Part V. Readers looking for a theoretical framework before reading the descriptions of sex segregation in this section are encouraged to read Part V before this section.

[99] Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356 (1948).

[100] U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE RANKING MINORITY MEMBER, SUBCOMMITTEE ON READINESS, COMMITTEE ON ARMED SERVICES, U.S. SENATE: GENDER ISSUES: INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION (1998).

[101] *Id.* (providing a detailed history of the policy's evolution).

Department of Defense is considering changing the policy, it must first report to Congress.[102]

[102] 10 U.S.C. § 652. There might be some momentum to change this policy. In 2009, Congress established the Military Leadership Diversity Commission (MLDC) to "conduct a comprehensive evaluation and assessment of policies that provide opportunities for the promotion and advancement of minority members of the Armed Forces." Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, §596(d)(1), 122 Stat. 4476, 4477 (2008). The commission must then submit a report on the study to the President and Congress. *Id.* at §596(e) (1), 122 Stat. at 4478. In January 2011, the commission released a preliminary recommendation that the Department of Defense remove the structural barrier prohibiting women from serving in combat roles. MILITARY LEADERSHIP DIVERSITY COMMISSION, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY, *available at* http://mldc.whs.mil/download/documents/Draft%20Report/MLDC%20Final%20Report%20Predecisional%20Draft%2022DEC2010.pdf. The commission recommended that the Department of Defense and the military services "should take deliberate steps in a phased approach to open additional career fields and units involved in 'direct ground combat' to qualified women." *Id.* The commission is currently in the process of reviewing and discussing the draft before has issued their Final Report submission to the President and Congress. DRAFT FINAL REPORT, MILITARY LEADERSHIP DIVERSITY COMMISSION, (Jan. 4, 2011), *available at* http://mldc.whs.mil/index.php/final-report.

Other parts of federal law also require the military to segregate based on sex. Only men must register for the selective service,[103] and the government imposes various penalties on men who do not.[104] Other statutes provide for sex-segregated housing and latrines for Army, Navy and Air Force recruits in basic training.[105] Another group of statutes requires that only drill instructors of the same sex as the recruits have access to the recruits' living quarters after the end of the training day.[106]

Beyond federal law, many states also require sex segregation with respect to state military operations. Eighteen states and the District of Columbia have provisions in their statutes or constitution (or both) that the state militia shall consist of all "able-bodied male citizens."[107] Five of those states

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[103] 50 App. U.S.C. §453. The Supreme Court upheld this provision against a constitutional challenge in *Rostker v. Goldberg*, 453 U.S. 57 (1981).

[104] *See* 5 U.S.C. § 3328(a)(2) (draft registration is prerequisite to most federal jobs); 50 App. U.S.C. § 462(a) (criminal penalties for failure to register for the draft); 50 App. U.S.C.A. § 462(f) (draft registration is prerequisite to receiving federal educational financial aid). "Currently, 41 states, three territories and the District of Colombia have enacted [] legislation linking a man's eligibilityeligibility for state-funded higher education benefits or state jobs to the federal registration requirement, and/or passed laws linking a man's application for a driver's license or I.D. card with Selective Service registration." SELECTIVE SERV. SYS., OFFICE OF PUBLIC AND INTERGOVERNMENTAL AFFAIRS, STATE/ COMMONWEALTH LEGISLATION, SELECTIVE SERVICE SYSTEM (May 28, 2009) (listing laws and what they provide), *available at* http://www.sss.gov/FactSheets/ FSstateleg.pdf (listing laws and what they provide) (listing laws and what they provide).

[105] 10 U.S.C. §§ 4319 (Army), 6931 (Navy), 9319 (Air Force).

[106] 10 U.S.C.A. §§ 4320 (Army), 6932 (Navy), 9320 (Air Force).

[107] ARIZ. CONST. art. XI, § 1; COLO. CONST. art. XVII, § 1; IDAHO CONST. art. XIV, § 1; IOWA CONST. art. VI, § 1; KAN. CONST. art. VI, § 1; KY. CONST. § 219; MISS. CONST. art. IX, § 214; N.M. CONST. art. XVIII, § 1; S.C. CONST. art. XIII, § 1; S.D. CONST. art. XV, § 1; ALA. CODE §§ 31-2-2, 31-2-5; ARIZ. CONST. art. XI, § 1; CAL. MIL. & VET. CODE § 122; COLO. CONST. art. XVII, § 1; CONN. GEN. STAT. ANN. §§ 27-1; 27-2; D.C. CODE § 49-401 (2011); GA. CODE ANN. § 38-2-3; IOWA CONST. art. VI, § 1; IDAHO CONST. art. XIV, § 1; KAN. CONST. art. VI, § 1; KY. CONST. § 219; MASS. GEN. LAWS ANN. ch. 33, § 33-§ 2; MISS. CONST. art. IX, § 214; N.M. CONST. art. XVIII, § 1; N.M. STAT. ANN. § 20-2-2; N.Y. MIL. LAW § 2; R.I. GEN. LAWS § 30-1-2; S.C. CONST. art. XIII, § 1; S.D. CONST. art. XV, § 1; TENN. CODE ANN. § 58-1-104.

allow women and other men to voluntarily become a part of the state militia, but they must affirmatively do so rather than being a required part of the militia, as all male citizens are.[108] Rhode Island has a unique provision that allows the governor to appoint female citizens to the non-combat branches of the state militia.[109] Nevada has an integrated National Guard (its state militia) that consists of "all able-bodied residents of the State between the ages of 17 and 64 years,"[110] but the state's militia law requires that the Nevada National Guard "provide for personal privacy as between members of the opposite sexes."[111]

Beyond the military, another area of the law that shows significant mandatory sex segregation is in prisons and law enforcement. These laws can be grouped into four main categories: laws that segregate inmate populations in prisons or other correctional institutions based on sex; laws that require transportation of people in the criminal justice system (pre- or post-conviction) to be done by someone of the same sex; laws that require searches of people involved with the criminal justice system (again, both pre- and post-conviction) to be conducted by someone of the same sex; and laws that require sex segregation in correctional institution employment. The first category of these laws is the most obviously sex segregated, as the laws literally require that the people within the institutions be separated or excluded based solely on their sex. These laws range from segregating the inmate population of an entire state's penal system to the jails of particular localities to specifically applying to cells, rooms, apartments, bathing facilities, work opportunities, bathrooms, showers, educational and recreational programs, drug and alcohol rehab programs, death row, waiting

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[108] ALA. CODE §§ 31-2-2, 31-2-5; CAL. MIL. & VET. CODE § 122; CONN. GEN. STAT. ANN. § 27-2; MASS. GEN. LAWS ANN. § ch. 33, §- 2; N.M. STAT. ANN. § 20-2-2.

[109] R.I. GEN. LAWS § 30-1-3.

[110] NEV. REV. STAT. § 412.032.

[111] *Id.* at § 412.117.

areas pre-trial and chain gangs.[112] The laws apply to standard jails and prisons, juvenile facilities, runaway houses, court detention centers, non-violent offender facilities, diagnostic centers, private jails, boot camps, community re-entry centers, chain gangs and industrial farms.[113] The only exception the laws consistently (but certainly not universally) provide for are married couples, who are allowed to be housed together.[114] Otherwise, the people within these covered facilities are separated based on their sex.

The other types of laws concerning prisons and law enforcement that segregate do so in a less obvious way. These

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[112] ALA. CODE §§ 14-3-40, 14-6-13, -93, -103; ARIZ. REV. STAT. ANN. § 31-124; ARK. CODE ANN. §§ 12-41-401,-403; 57 CAL. OP. ATTY. GEN. 276, 6-7-74; CAL. PENAL CODE §§ 2000-3089 (sections within Title 1, "Imprisonment of Male Prisoners in State Prisons"), 3200-3424 (sections within Title 2, "Imprisonment of Female Prisoners in State Institutions"), 4002, 4029; COLO. REV. STAT. § 17-26-106; FLA. STAT. ANN. §§ 944.09, 944.24, 950.061, 951.23, 951.175; GA. CODE. ANN. § 42-5-52; IDAHO CODE ANN. § 20-602; 730 ILL. COMP. STAT. ANN. 125/11; IOWA CODE ANN. § 356.4; KAN. STAT. ANN. §§ 19-1903, 75-52,134; ME. REV. STAT. ANN. tit. 34-A, § 3403; MD. CODE ANN., CORR. SERVS. § 9-503; MASS. GEN. LAWS ch. 125, § 16; MASS. GEN. LAWS ch. 278, § 35; MASS. GEN. LAWS ch. 127, §§ 21, 22; MICH. COMP. LAWS ANN. §§ 791.262c, 801.104; MINN. STAT. ANN. §§ 641.14, 642.08; MISS. CODE ANN. §§ 19-25-71, 47-1-23, 47-1-39, 47-5-121; MO. REVANN. STAT. §§ 217.025, 221.050; N.H. REV. STAT. ANN. §§ 21-H:11, 622:33-a; N.J. STAT. ANN. §§ 30:8-11, -12; N.M. STAT. ANN. § 30-22-15; N.Y. CORRECT. LAW §§ 71, 500-b, 500-n; N.Y. GEN. CITY LAW §§ 94, 97; N.Y. CITY CRIM. CT. ACT § 88; N.C. GEN. STAT. §§ 148-44, 153A-228; N.D. CENT. CODE §§ 12-44.1-09, 12-47-38; OKLA. STAT. ANN. tit. 57, §§ 57, 115; P.R. LAWS ANN. tit. 4, § 1255; R.I. GEN. LAWS § 13-5-2; S.C. CODE ANN. §§ 24-1-140, 24-13-10; S.D. CODIFIED LAWS §§ 24-11-19, -20; TENN. CODE ANN. §§ 41-1-201, -2-109, -4-110, -4-111; UTAH CODE ANN. § 17-22-5; V.I. CODE ANN. tit. 5, § 4504; WASH. REV. CODE ANN. § 35.66.050.

[113] CAL. PENAL CODE §§ 4110, 4111, 6258; CONN. GEN. STAT. ANN. §§ 4b-55, 7-290, 18-81g; D.C. CODE § 24-923; FLA. STAT. ANN. § 985.02; IND. CODE ANN. § 35-38-6-4; KAN. STAT. ANN. § 76-2134; ME. REV. STAT. ANN. tit. 34-A, § 3801; MICH. COMP. LAWS ANN. § 400.1304; MO. REV.ANN. STAT. § 221.097; N.J. STAT. ANN. § 30:4A-14; OKLA. STAT. ANN. tit. 57, § 504.7; OKLA. STAT. ANN. tit. 74, § 192; 8 P.R. LAWS ANN. tit. 8, § 101; R.I. GEN. LAWS § 42-56-20.5; S.C. CODE ANN. § 24-13-10; TENN. CODE ANN. § 37-2-505; WASH. REV. CODE ANN. § 72.19.060; WYO. STAT. ANN. § 14-6-407.

[114] ALA. CODE § 14-6-13; CAL. PENAL CODE § 4002; COLO. REV. STAT. § 17-26-106; KAN. STAT. ANN. § 19-1903; MICH. COMP. LAWS ANN. § 801.104; MISS. CODE ANN. § 19-25-71; N.M. STAT. § 30-22-15; N.Y. CORRECT. LAW § 500-b ; S.D. CODIFIED LAWS § 24-11-20.

laws, which affect searches, transfers and employment, exclude certain people from being in a location or situation based on their sex. In many criminal justice systems, laws require that men search men and women search women.[115] Likewise, for people being transferred within the criminal justice system, there are many laws that require that men transfer men and women transfer women.[116] Finally, some states have laws that require that men guard men and women guard women.[117] Although not as pervasive as laws requiring segregation of the criminal justice system population, these laws nonetheless mandate a different form of sex segregation within the system.

Beyond the military and prisons, laws also frequently mandate sex segregation in restrooms, locker rooms, showers and the like. For simplicity's sake, I will refer to all of these collectively as "restrooms."[118] The laws segregate restrooms in three ways: based on the location of the restroom; based on the presence of both men and women in a particular location; and

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[115] CAL. PENAL CODE §§ 4021, 4030; COLO. REV. STAT. §§ 16-3-405, 17-19-101, -102; CONN. GEN. STAT. ANN. §§ 18-81v, 54-33l; FLA. STAT. ANN. § 901.211; 725 ILL. COMP. STAT. ANN. 5/103-1; IOWA CODE ANN. §§ 804.30, 808.12; KAN. STAT. ANN. §§ 8-1001, 22-2521, 22-2522, 32-1132; ME. REV. STAT. ANN. tit. 5, § 200-G; ME. REV. STAT. ANN. tit. 29-A § 2527; MICH. COMP. LAWS ANN. §§ 764.25a, 764.25b, 791.269a; MO. REVANN. STAT. § 544.193; N.J. STAT. ANN. § 2A:161A-4; OHIO REV. CODE ANN. §§ 2933.32, 5120.421, 5139.251; P.R. LAWS ANN. tit. 25, § 1053; TENN. CODE ANN. § 41-1-102, -4-138; TEX. CODE CRIM. PROC. ANN. art. 18.021; VA. CODE ANN. § 19.2-59.1; WASH. REV. CODE ANN. §§ 9.94A.631, 10.79.100; WIS. STAT. ANN. § 968.255.

[116] CONN. GEN. STAT. ANN. § 6-32d (West 2011); IOWA CODE ANN. § 901.7 ; KY. REV. STAT. ANN. § 605.080; MASS. GEN. LAWS ch. 276, § 53; MINN. STAT. ANN. § 631.412; N.C. GEN. STAT. § 7B-2513; OKLA. STAT. ANN. tit. 43A, § 5-203; WIS. STAT. ANN. § 302.06.

[117] CAL. PENAL CODE § 4021; DEL. CODE ANN. tit. 29, § 8903; FLA. STAT. ANN. §§ 944.24, 951.175; MINN. STAT. ANN. §§ 641.06, 642.08; N.C. GEN. STAT. § 14-208; NEV. REV. STAT. ANN. § 63.500; N.J. STAT. ANN. § 30:8-12; N.Y. EXEC. LAW § 503-a; N.Y. GEN. CITY LAW § 97; N.C. GEN. STAT. § 14-208; R.I. GEN. LAWS § 13-5-5 ; VA. CODE ANN. § 53.1-25.1; WIS. STAT. ANN. § 302.41. *Cf.* N.H. REV. STAT. ANN. § 21-H:14-b.

[118] By grouping them together, I am highlighting the common perceived need for privacy in these locations. However, the privacy varies in different respects in each of these locations because of the different activities that take place in them. For now, these differences are not important, although I will be discuss them in more depth and detail in later stages of this project.

based on the presence of women in a particular location. In the first category, law mandates segregation of certain restrooms. For instance, federal regulation requires that all permanent places of employment have sex-segregated restrooms.[119] State laws also mandate sex-segregated restrooms at specific sites, such as gas stations, mines, schools, restaurants, hotels or swimming pools.[120] In the second category, some state laws mandate segregation in restrooms only if both men and women are present at a location;[121] thus, for example, in Nevada, if an employer employs "five or more males and three or more females," it must provide sex segregated restrooms.[122] The laws do not mandate sex segregation if the condition, that both men and women are present, is not met. In the final category, a small number of state laws mandate segregation in restrooms only if

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[119] 29 C.F.R. § 1910.141(c)(1)(i).

[120] ALA. CODE §§ 16-8-43, 25-8-54; ALASKA STAT. § 18.60.705; ARK. CODE ANN. §§ 11-5-112, -12-104; CAL. BUS. & PROF. CODE § 13651; CAL. HEALTH & SAFETY CODE § 114276; CAL. CIV. PROC. CODE § 216; COLO. REV. STAT. § 25-5-803; CONN. GEN. STAT. ANN. § 19a-437; DEL. CODE ANN. tit. 16, § 7933; D.C. CODE § 36-304.01; FLA. STAT. §§ 381.0091, 553.86; 55 ILL. COMP. STAT. ANN. 5/5-10004; 225 ILL. COMP. STAT. ANN. 710/42, 710/45.65; 410 ILL. COMP. STAT. 37/10; IND. CODE ANN. §§ 8-3-1-21, 16-41-21-13, 16-41-22-10; ME. REV. STAT. tit. 20-A § 6501; ME. REV. STAT. tit. 22, § 1672; MASS. GEN. LAWS ch. 111, § 33; MASS. GEN. LAWS ch. 149, § 133 ; ME. REV. STAT. ANN. tit. 8, § 161; ME. REV. STAT. ANN. tit. 20-A § 6501; ME. REV. STAT. ANN. tit. 22, § 1672; MICH. COMP. LAWS ANN. § 286.642; MINN. STAT. ANN. § 326B.109; MO. REV.ANN. STAT. §§ 292.160, .360; NEB. REV. STAT. ANN. §§ 48-401, -402, 447.130; N.H. REV. STAT. ANN. § 155:40; N.J. STAT. ANN. §§ 34:2-33, :6-119.2, : 9A-38; N.Y. LAB. LAW §§ 293, 295, 378, 381; N.D. CENT. CODE § 23-10-07; OHIO REV. CODE ANN. §§ 3731.11, 4963.02; OR. REV. STAT. ANN. § 366.486 ; 24 PA. STAT. ANN. § 7-740; 35 PA. STAT. ANN. § 676; R.I. GEN. LAWS § 32-7-11; S.C. CODE ANN. §§ 40-81-270, 40-81-290, 58-17-3100; S.D. CODIFIED LAWS § 60-12-7; TENN. CODE ANN. §§ 40-7-116, 68-112-104, -120-503; TEX. ALCO. BEV. CODE ANN. §§ 61.43, 61.71; TEX. CODE CRIM. PROC. ANN. art. 36.21; TEX. LABOR LAB. CODE ANN. § 92.024; TEX. OCC. CODE ANN. §§ 1601.353, 1602.303 ; V.I. CODE ANN. tit. 19, § 1507 (2011); WASH. REV. CODE ANN. § 28A. 640.020; W. VA. CODE ANN. §§ 16-6-13, 21-3-13; WIS. STAT. ANN. § 120.12; WYO. STAT. ANN. § 35-15-107.

[121] ARIZ. REV. STAT. ANN. §§ 3-2051, -2054; ARK. CODE ANN. § 17-20-408; ARIZ. REV. STAT. ANN. §§ 3-2051, -2054; CAL. LAB.OR CODE § 2350; IOWA CODE ANN. § 138.13; NEV. REV. STAT. ANN. § 618.720; W. VA. CODE ANN. § 21-3-12.

[122] NEV. REV. STAT. ANN. § 618.720.

women are present at a particular location.[123] These laws would have a similar effect as the second category, which relies on the presence of men *and* women, but the trigger is different. For instance, in comparison to the Nevada law mentioned above, in Alabama, "[a]ny person owning or controlling a store or shop in which any female is employed as a clerk or saleswoman" must, on penalty of up to a $500 fine, provide separate restrooms "for the use of such females."[124]

The other area with a large number of laws that mandate sex segregation is the medical context. In this context, sex segregation is required in two ways: in segregating those receiving treatment and in requiring that those providing assistance to the patient be of the same sex as the patient. Laws that segregate people receiving treatment based on sex do so based on care received or based on the medical setting, such as institutions for the mentally disabled, nursing homes, and drug and alcohol rehabilitation programs.[125] The other type of medical laws that segregate based on sex do so by requiring that a person caring for another in a medical setting be of the same sex. Most of these laws concern transporting a patient, but others cover general medical care and staff entering particular areas of a facility or treating particular populations.[126]

The rest of the laws that mandate sex segregation do so in a wide range of contexts, but for the most part in only a very limited number of jurisdictions. These laws mandate sex

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[123] ALA. CODE § 25-1-2; N.Y. LAB. LAW §§ 294, 378, 379; 43 PA. STAT. ANN. § 109; TENN. CODE ANN. § 50-1-301.

[124] ALA. CODE § 25-1-2.

[125] 10 U.S.C. § 1074d; ALA. CODE §§ 14-1-12; CAL. PENAL CODE § 6102; CONN. GEN. STAT. ANN. § 19a-550; 20 ILL. COMP. STAT. 1705/46; LA. CHILD. CODE ANN. art. 1409; MONT. CODE ANN. § 53-20-142, -21-142; N.D. CENT. CODE § 25-01.2-03; N.J. STAT. ANN. §§ 30:4-24.2, :4-27.11d, :6D-4, :6D-5, :13-5; P.R. LAWS ANN. tit. 24, §§ 6159a, 6164.

[126] ALASKA STAT. § 18.20.095; DEL. CODE ANN. tit. 24, § 1769B; 210 ILL. COMP. STAT. ANN. 3/35; IOWA CODE ANN. §§ 222.38, 225.18, 227.6; MD. CODE ANN.,, HEALTH-GEN. § 10-807; MINN. STAT. ANN. § 252.07; NEV. REV. STAT. ANN. § 433A.330; N.C. GEN. STAT. § 122C-251; 50 PA. STAT. ANN. § 4421; S.D. CODIFIED LAWS § 27A-11A-20.

segregation in the following areas: outdoor youth programs,[127] boxing matches,[128] specialty commissions, elections,[129] drug and alcohol testing,[130] honors,[131] specialty funding,[132] housing, identification card photography,[133] jury sequestration, massage parlors,[134] nudism,[135] schools, sexual violence programs[136] and support organizations.[137]

Of these, the four areas covered by more than one or two jurisdictions are housing, jury sequestration, specialty commissions and schools. The housing laws require separate living areas for men and women in certain circumstances, such as seasonal farm labor housing, in-patient drug and alcohol rehabilitation, or homes for the indigent.[138] The jury sequestration laws require that if a jury is sequestered overnight, the state must provide sex-segregated lodging for the jurors. These laws specify that, in providing these sex-segregated accommodations, the state is not violating the defendant's

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[127] NEV. REV. STAT. ANN. § 432A.420.

[128] S.C. CODE ANN. § 40-81-270.

[129] LA. REV. STAT. ANN. § 18:443.1.

[130] ARIZ. ST. CODE JUD. ADMIN. § 6-106; IOWA CODE ANN. § 730.5; P.R. LAWS ANN. tit. 29, § 161b; WIS. STAT. ANN. § 16.964.

[131] ALA. CODE § 41-9-552.

[132] TENN. CODE ANN. §§ 55-4-295, -306; WIS. STAT. ANN. § 25.31.

[133] MO. REV.ANN. STAT. § 302.181.

[134] ALA. CODE §§ 45-2-40.11, -13-41.

[135] ARK. CODE ANN. § 5-68-204.

[136] CAL. PENAL CODE § 1203.097; MINN. STAT. ANN. §§ 518B.02, 611A. 21; N.M. STAT. ANN. § 31-12-12.

[137] FLA. STAT. ANN. § 16.616.

[138] CAL. HEALTH & SAFETY CODE § 11757.59; KY. REV. STAT. ANN. § 231.110; N.J. STAT. ANN. §§ 44:1-69, :4-90.

rights.[139] Several states have specialty commissions for the study of issues related to a particular sex-segregated part of the population, such as all women, all men or African American men.[140] The laws relating to schools vary from a California pilot program of sex-segregated education to laws relating to searches in schools being performed by someone of the same sex as the student to laws requiring pregnancy prevention education to be segregated by sex.[141]

B. Administrative Sex Segregation

Laws are not the only form of government-mandated sex segregation. The government also mandates sex segregation in its administrative capacity in government-run institutions and facilities. In many cases, these institutions are required to segregate based on sex by the laws mentioned above. For instance, government-run prisons in many states are required by law to segregate based on sex.[142] However, many government-run institutions are not required to sex segregate by law but nonetheless do so in their operating capacity. Thus, in this category, I do not include state-run facilities or institutions that are required by law to segregate based on sex, but rather only

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[139] ALA. CODE § 12-16-10; CAL. PENAL CODE § 1128; FLA. STAT. ANN. § 40.235; 8 GUAM CODE ANN. tit. 8, § 105.10; MINN. STAT. ANN. § 631.09; MISS. CODE ANN. § 13-5-95; TEX. CODE CRIM. PROC. ANN. art. 35.23.

[140] FLA. STAT. ANN. § 381.04015 (women's health); GA. CODE ANN. § 31-43-1 to-13 (men's health); IND. CODE ANN. § 12-13-12-1 to -13 (black men); MD. CODE ANN., STATE GOV'T § 9-303.2 (black men); N.J. STAT. ANN. § 26:1A-123 to -131 (women's health); OHIO REV. CODE ANN. §§ 4112.12, .13 (black men); OKLA. STAT. ANN. tit. 74, §§ 8101 - 8104 (black men).

[141] CAL. EDUC. CODE §§ 58520-58524; IOWA CODE. ANN. § 808A.2; OKLA. STAT. ANN. tit. 70, § 24-102; R.I. GEN. LAWS § 16-21-10; S.C. CODE ANN. § 59-32-30.

[142] *See* statutes listed *supra* notes 109 & 107–11 (listing statutes that refer to sex segregation in state militias).

those government institutions that segregate based on sex when not required by law to do so.[143]

Most government buildings, from city hall to a neighborhood recreation center to a government office complex, will have some aspect of their structure that falls into this category. These facilities, whether open to the public or not, are likely to segregate based on sex, at the very least, in their restrooms. Beyond this obvious form of administrative sex segregation, some government buildings will, depending on their function, also have sex-segregated locker rooms, dressing rooms or showers for employees or the public. These sex-segregated areas of public buildings will not be required by law, but the government institution will be segregating based on sex in the operation of these facilities.

Many correctional facilities also fall into this category. The previous section detailed the many ways that law requires sex segregation in prisons and law enforcement, but prisons (and their equivalents throughout various levels of government and stages of the criminal justice process) that are not required by law to segregate by sex, nonetheless do so. Various levels of government have tried co-educational prisons and jails on a limited basis in the past,[144] but the standard today is sex-segregated prison populations, regardless of whether the law requires it or not. The same holds true for the other areas of law enforcement identified above.

Sex segregation also prevails in elementary and secondary public schools, which routinely have sex-segregated bathrooms and locker rooms. Some of these areas are segregated according to law, but others are segregated by operation of administrative authority alone. Public universities and colleges do the same, but they also go beyond that in a very important way that affects the day-to-day life of most students. Public universities and colleges also sex segregate in living arrangements—from dorm rooms to

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[143] Unlike the description of mandatory sex segregation in the previous section, the list here is not meant to be exhaustive, as there is no definitive source for this type of sex segregation, but rather merely representative of this type of government sex segregation.

[144] *See* COED PRISON (John Ortiz Smykla ed., 1980).

floors in co-ed dorms to entire dorms to Greek houses that are on public property. Schools of all forms also sex segregate in a large variety of other ways, but these other forms of educational sex segregation are addressed in the next section, as they are specifically permitted by law.[145]

The government also sex segregates in other areas in which it has a particular program that it believes needs sex segregation. For instance, public hospitals may segregate men and women in non-private rooms. Government-run medical research (through public hospitals or government agencies) may segregate men and women to determine the effects of various drugs or procedures. Some local governments provide athletic opportunities through recreational leagues that have sex-segregated athletic teams. Government-run homeless shelters frequently separate men and women for overnight stays. Government-run rehabilitation programs for drug and alcohol addiction or social service programs like those for domestic violence victims or offenders often separate men and women based on different approaches toward recovery. This list is certainly not exclusive, but rather is intended to illustrate various ways that the government can sex segregate based on perceived particular programmatic needs.

C. Permissive Sex Segregation=

Beyond sex segregation that is mandatory under the law or required by the state acting in its administrative capacity, private and public entities engage in a substantial amount of sex segregation that is explicitly permitted by law. This permissive sex segregation differs from the previous forms because, although the law provides for sex segregation, it specifically gives covered entities the option to segregate based on sex. In doing so, the law affirmatively authorizes sex segregation but does not require it.

Two federal laws in particular give private and public entities permission to segregate based on sex: Title VII and Title

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[145] *See* discussion *infra* notes 147–74 and accompanying text.

IX. Title VII of the Civil Rights Act of 1964[146] prohibits covered employers[147] from discriminating "because of . . . sex" in all contexts of employment.[148] However, Title VII has an exception to this prohibition for bona fide occupational qualifications ("BFOQ"):

> [I]t shall not be an unlawful practice for an employer to hire and employ employees . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[149]

This exception is "extremely narrow,"[150] and the Supreme Court has stated that the "job qualification must relate to the 'essence' or to the 'central mission of the employer's business'."[151] Stated differently, the Court cited with approval a circuit court opinion that formulated the test as follows: whether "all or substantially all women [or men] would be unable to

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[146] 42 U.S.C. § 2000e.

[147] Title VII does not apply to employers with fewer than fifteen employees. 42 U.S.C. § 2000e(b). Thus, these small employers can sex segregate as well, provided state law does not cover them.

[148] *Id.* § 2000e(1), (2). The full list of excluded criteria for employment decisions is "race, color, religion, sex or national origin." *Id.*

[149] 42 U.S.C. § 2000e-2(e).

[150] Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

[151] UAW v. Johnson Controls, Inc., 499 U.S. 187, 203 (1991) (quoting *Dothard*, 433 U.S. at 333; Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)).

perform safely and efficiently the duties of the job involved."[152] State statutes have similar BFOQ provisions as well.[153]

Title IX is the other federal law that permits sex segregation; however, unlike Title VII that has just one relevant exception, Title IX has many. Title IX of the Education Amendments of 1972[154] generally prohibits sex discrimination in educational programs that receive federal funds.[155] However, the text of the statute specifically exempts certain programs from

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[152] *Dothard*, 433 U.S. at 333 (citing Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)).

[153] *See* ALASKA STAT. § 18.80.220; ARIZ. REV. STAT. ANN. §§ 41-1463, 1464 (2011); CAL. EDUC. CODE §§ 230, 45277.5 (West 2011); CAL. GOV'T CODE §§ 12940, 12943, 12945 (West 2011); COLO. REV. STAT. §§ 8-17-101, 24-34-402 (2011); CONN. GEN. STAT. §§ 5-219, 31-57c, 46a-60 (2011); DEL. CODE ANN. tit. 19, § 711 (West 2011); FLA. STAT. §§ 110.105, 760.10 (West 2011); GA. CODE ANN. § 45-19-31 (2011); GUAM CODE ANN. tit. 22, § 5201 (2011); HAW. REV. STAT. §§ 378-2.3, -3 (2011); IDAHO CODE ANN. §§ 18-7303, 67-5910 (2011); IND. CODE § 22-9-1-3 (2011); IOWA CODE § 216.6 (2011); KAN. STAT. ANN. §§ 44-1009, 75-2926 (West 2011); KY. REV. STAT. ANN. § 344.080 (West 2011); LA. REV. STAT. ANN. §§ 23:332, :342 (2011); ME. REV. STAT. ANN. tit. 5, §§ 783, 784, 4572-A, 7051 (2011); MD. CODE ANN., STATE GOV'T §§ 20-605, -606 (West 2011); MD. CODE ANN., STATE PERS. & PENS. §§ 2-302, 13-203 (West 2011); MASS. GEN. LAWS ch. 151B, § 4 (2011); MICH. COMP. LAWS § 37.2208 (2011); MINN. STAT. § 363A.08 (2011); MO. REV. STAT. § 213.055 (2011); MONT. CODE ANN. § 49-2-303 (2011); NEB. REV. STAT. §§ 23-2525, -2531, 48-1108, -1115 (2011); NEV. REV. STAT. §§ 281.370, 613.340, .350 (2011); N.H. REV. STAT. ANN. § 354-A:7 (2011); N.J. STAT. ANN. §§ 10:1-10, :5-12 (West 2011); N.M. STAT. ANN. § 28-1-7 (West 2011); N.Y. CIV. SERV. LAW §§ 50, 60 (McKinney 2011); N.Y. EXEC. LAW § 296 (McKinney 2011); N.Y. CT. RULES §§ 25.16, 25.19 (McKinney 2011); N.C. GEN. STAT. §§ 115D-77, 126-16, 126-36 (2011); N.D. CENT. CODE § 14-02.4-08 (2011); OHIO REV. CODE ANN. § 4112.02 (West 2011); OKLA. STAT. tit. 25, §§ 1302, 1306, 1308 (2011); ORE. REV. STAT. § 659A.030 (2011); 43 PA. STAT. ANN. § 955 (West 2011); P.R. LAWS ANN. tit. 29, § 1324 (2011); R.I. GEN. LAWS § 28-5-7 (2011); S.C. CODE ANN. § 1-13-80 (2011); TENN. CODE ANN. §§ 4-21-404, -406 (West 2011); TEX. GOV'T CODE ANN. § 419.103 (West 2011); TEX. LAB. CODE ANN. §§ 21.059, .119 (West 2011); UTAH CODE ANN. § 34A-5-106 (West 2011); VT. STAT. ANN. tit. 21, § 495 (2011); VA. CODE ANN. §§ 2.2-4201, -4311, 15.2-1604 (2011); V.I. CODE ANN. tit. 10, § 64 (2011); V.I. CODE ANN. tit. 24, § 451 (2011); WASH. REV. CODE §§ 28B.110.030, 49.60.180, .200 (2011); W. VA. CODE § 5-11-9 (2011); WIS. STAT. ANN. §§ 111.36, 118.20 (West 2011); WYO. STAT. ANN. § 27-9-105 (2011).

[154] 20 U.S.C. §§ 1681-88.

[155] *Id.* § 1681(a).

Title IX's coverage: elementary and secondary school admissions; certain religious schools; military schools; public undergraduate schools that have traditionally admitted based on sex; social fraternities and sororities; voluntary youth service organizations such as the Girl Scouts and Boy Scouts; American Legion boys and girls state conferences; father/son and mother/daughter activities; and scholarships based on sex-exclusive beauty pageants.[156] Title IX also makes clear that its general anti-discrimination provision does not prohibit schools from "maintaining separate living facilities for the different sexes."[157]

Title IX's regulations also provide a host of more specific exceptions allowing for sex segregation. The regulations have long permitted sex-segregated sports at schools.[158] Schools are allowed to operate sex-segregated athletic teams if participation is based on competitive skill or the sport is a contact sport, such as boxing, wrestling, rugby, ice hockey, football or basketball.[159] Schools are required to let the excluded sex try out for a team in a sport for which there is no team for the excluded sex unless the sport is a contact sport, in which case the person of the excluded sex has no remedy.[160] Athletic scholarships can also be sex segregated, provided they are proportionately distributed among the student athletic body.[161]

The regulations also specify when entire classes or institutions can be segregated based on sex. Contact sports in physical education classes, human sexuality classes and choruses can be segregated by sex.[162] Also, pursuant to amendments that occurred in 2006, other classes and entire schools can be sex

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[156] *Id.* § 1681(a)(1)–(9). Title IX's regulations repeat these exceptions. 34 C.F.R. §§ 106.12–.15 (2011).

[157] 20 U.S.C. § 1686 (2011).

[158] 34 C.F.R. § 106.41(b).

[159] *Id.*

[160] *Id.*

[161] *Id.* § 106.37(c).

[162] *Id.* § 106.34(a).

segregated if substantially equivalent co-educational opportunities are available to the excluded sex.[163] Title IX's regulations also have other exceptions that permit sex segregation in housing,[164] restrooms, locker rooms, showers,[165] scholarships derived from wills or foreign governments that are "designed to provide opportunities to study abroad,"[166] and in the administration of financial assistance established pursuant to wills or by foreign governments.[167] The regulations also contain their own BFOQ provision that is similar to Title VII's but also specifies that recipients can consider sex in employment related to locker rooms and toilet facilities.[168]

State law also covers many of the same areas. Laws permit sex-segregated educational institutions,[169] classes for physical

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[163] *Id.* § 106.34(b) (sex-segregated classes and extracurricular activities); *id.* § 106.34(c) (sex-segregated schools). Both of these provisions do not applyNeither provision applies to vocational schools. *Id.* § 106.34(b)(1), (c)(1). Congress spurred these regulatory changes with a section of the No Child Left Behind Act that encouraged innovative programs such as "single-gender schools and classrooms." 20 U.S.C. § 7215(a)(23) (2011).

[164] *Id.* § 106.32.

[165] *Id.* § 106.33.

[166] *Id.* § 106.31(c).

[167] *Id.* § 106.37(b).

[168] *Id.* § 106.61. Other federal agencies have very similar regulations covering educational programs within their jurisdiction. *See e.g.*, 6 C.F.R. §§ 17.400–.455 (Dep't of Homeland Security).

[169] ARIZ. REV. STAT. § 15-184 (LexisNexis 2011); CAL. EDUC. CODE § 66278 (West 2011); DEL. CODE ANN. tit. 14, § 506 (West 2011); GUAM CODE ANN. tit. 17, § 2102 (2011); 105 ILL. COMP. STAT. 5/34-8 (2011); IND. CODE § 22-9-1-3 (2011); LA. REV. STAT. ANN. § 17:104 (2011); MICH. COMP. LAWS §§ 37.2404, 380.475, 380.1146 (2011); MINN. STAT. ANN. § 363A.23 (West 2011); MO. REV. STAT. § 173.1102 (2011); NEB. REV. STAT. §§ 79-1807 (2011); NEV. REV. STAT. § 386.580 (2011); N.Y. EDUC. LAW §§ 313, 2854 (McKinney 2011); N.Y. EXEC. LAW § 296 (McKinney 2011); 24 PA. STAT. ANN. § 5009 (West 2011); OHIO REV. CODE ANN. § 3313.977 (West 2011); OHIO REV. CODE ANN. § 3314.06 (West 2011); S.C. CODE ANN. §§ 59-145-10, -20 (2011); TENN. CODE ANN. § 49-2-108 (2011); WIS. STAT. ANN. §§ 120.13, 121.51 (West 2011).

education or human sexuality, and athletic teams.[170] Some laws apply more generally and allow all aspects of education to be sex-segregated.[171] Other laws cover school employment,[172] housing,[173] restrooms, beauty pageants and organizations.[174]

As a result of Title IX and this patchwork of state law, students at all levels of education encounter many forms of permissible sex segregation throughout their educational experience. Sex-segregated institutions take the form of public or private elementary schools, high schools and colleges. Co-educational schools have long offered sex-segregated sex education, physical education and chorus classes, but now they are offering a rapidly increasing number of sex-segregated courses in other substantive areas such as math, science or reading. Students encounter sex-segregated bathrooms throughout schools, as well as locker rooms and showers where necessary. Athletic programs are, for the most part, differentiated by sex. Where housing is a part of the educational program, it is frequently segregated by sex, for boarding schools as well as undergraduate and graduate education. In some limited instances, employment opportunities within educational

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[170] ALASKA STAT. §§ 14.18.040, .050 (2011); CAL. EDUC. CODE §§ 221.7, 66271.8 (West 2011); FLA. STAT. ANN. §§ 1000.05(b), (d), 1002.20, 1006.71 (West 2011); GA. CODE ANN. § 20-2-315 (West 2011); HAW. REV. STAT. § 302A-462 (West 2011); 105 ILL. COMP. STAT. 5/27-1 (2011); MINN. STAT. ANN. §§ 121A.04, 126C.45 (West 2011); MINN. STAT. ANN. § 363A.23 (West 2011); MO. ANN. STAT. § 170.015 (West 2011); R.I. GEN. LAWS § 16-38-1.1 (2011); S.D. CODIFIED LAWS § 20-13-22 (2011); TEX. EDUC. CODE ANN. § 28.004 (West 2011); WASH. REV. CODE § 28A.640.020 (2011).

[171] D.C. CODE §§ 2-1402.42, 38-1851.07 (2011); FLA. STAT. ANN. § 1002.311 (West 2011); KY. REV. STAT. ANN. § 344.555 (West 2011); MICH. COMP. LAWS § 37.2404a (2011); MISS. CODE ANN. § 37-11-3 (2011); VA. CODE ANN. § 22.1-212.1:1 (2011); WIS. STAT. ANN. § 118.40 (West 2011).

[172] MD. CODE ANN. EDUC. § 6-104 (West 2011); N.J. STAT. ANN. § 18A: 6-6 (West 2011).

[173] WIS. STAT. ANN. § 38.23 (West 2011); WIS. STAT. ANN. § 106.52 (West 2011).

[174] CAL. EDUC. CODE §§ 231, 66276 (West 2011); GA. CODE ANN. §§ 20-2-315, 49-5-22 (West 2011); IOWA CODE § 216.9 (2011); NEB. REV. STAT. §§ 79-2,124; 85-9,176 (2011); R.I. GEN. LAWS § 16-38-1.1 (2011); S.D. CODIFIED LAWS §§ 20-13-17.1, -22.1 (2011); WIS. STAT. ANN. § 106.52 (West 2011).

institutions may be segregated by sex as well. Though sex segregation is not required, the law explicitly permits it in most instances.

Law permits discrimination by private and public entities in other circumstances as well, mostly the same areas of law covered by the mandatory laws. Some laws permit segregation in housing by exempting certain types of housing from anti-discrimination law under specific conditions.[175] Other states have broad exemptions for sex-segregated entities in their laws that prohibit discrimination in public accommodations.[176] Other laws permit various athletic programs (beyond the educational athletic programs covered above), recreation centers or health clubs within a state to be segregated by sex.[177] Some laws cover prison populations, giving particular institutions the option to

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[175] ALA. CODE § 24-8-7 (2011); CAL. GOV. CODE § 12995 (West 2011); CONN. GEN. STAT. ANN. §§ 46a-64, -64c (West 2011); D.C. CODE § 42-3503.03 (2011); DEL. CODE ANN. tit. 6, § 4607 (West 2011); 775 ILL. COMP. STAT. 5/3-106 (2011); IOWA CODE ANN. § 216.12 (West 2011); KY. REV. STAT. ANN. §§ 344.145, .575, .362 (West 2011); MASS. GEN. LAWS ANN. § 272.92A (West 2011); MICH. COMP. LAWS ANN. § 750.146 (West 2011); N.C. GEN. STAT. ANN. §§ 41A-6, 160A-499.2 (West 2011); N.J. STAT. ANN. § 46:3-23 (West 2011); N.Y. EXEC. LAW § 296 (McKinney 2011); R.I. GEN. LAWS §§ 16-38-1.1, 34-37-4, 45-24.3-12 (2011); S.C. CODE ANN. § 31-21-70 (2011); TENN. CODE ANN. § 4-21-602 (2011); UTAH CODE ANN. § 57-21-3 (West 2011); V.I. CODE ANN. tit. 10, § 64 (2011); WASH. REV. CODE ANN. § 49.60.222 (West 2011); WIS. STAT. ANN. § 106.52 (West 2011).

[176] COLO. REV. STAT. § 24-34-601(3) (2011); KAN. STAT. ANN. § 44-1009 (2011); 775 ILL. COMP. STAT. 5/5-103 (2011); MD. CODE ANN., STATE GOV'T § 20-303 (West 2011); MASS. GEN. LAWS ANN. ch. 272, § 92A (West 2011); MINN. STAT. ANN. § 363A.23 (West 2011); N.J. STAT. ANN. §§ 10:1-3, 46:3-23 (West 2011); N.Y. EXEC. LAW § 296 (McKinney 2011); TENN. CODE ANN. § 4-21-503 (2011).

[177] 36 U.S.C.A. §§ 220522, 220524 (2011); ALASKA STAT. § 18.80.230 (2011); CAL. GOV. CODE § 53080 (West 2011); CONN. GEN. STAT. ANN. § 52-571d (West 2011); GA. CODE ANN. § 10-1-393.2 (2011); MASS. GEN. LAWS ANN. § 272.92A (West 2011); MICH. COMP. LAWS § 37.2302a (2011); MINN. STAT. ANN. §§ 15.98, 273.112 (West 2011); N.C. GEN. STAT. § 165-28 (2011); OKLA. STAT. ANN. tit. 3A § 301 (West 2011).

segregate based on sex.[178] Others cover jury sequestration,[179] the military,[180] medical facilities and treatment,[181] restrooms,[182] agricultural fairs,[183] summer camp,[184] alcohol and drug treatment programs,[185] court testimony by minors,[186] massage therapy[187]

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[178] ALA. CODE § 14-6-88 (2011); ARK. CODE ANN. § 12-28-603 (West 2011); 65 ILL. COMP. STAT. 5/11-4-12 (2011); KY. REV. STAT. ANN. § 344.145 (West 2011); LA. REV. STAT. ANN. § 15:903 (2011); MASS. GEN. LAWS 127 § 21 (2011); MINN. STAT. ANN. §§ 260B.060, .080 (West 2011); MISS. CONST. art. 10, § 225; N.J. STAT. ANN. § 30:4-177.26 (West 2011); N.Y. CT. RULES § 34.0 (2011); OHIO REV. CODE ANN. § 751.08 (West 2011); 16 PA. STAT. ANN. § 8121 (West 2011); TEX. GOV'T CODE ANN. § 494.002 (West 2011).

[179] GA. CODE ANN. § 15-12-142 (2011); MO. REV. STAT. § 58.320 (2011); N.H. REV. STAT. ANN. §§ 519:24, 25 (2011); N.D. CENT. CODE §§ 28-14-18, 29-22-02 (2011); TENN. CODE ANN. § 40-18-115 (2011).

[180] N.J. STAT. ANN. § 18A:35-10 (West 2011); WIS. STAT. ANN. § 321.37 (West 2011).

[181] 42 U.S.C.A. § 290ff-1 (2011); KY. REV. STAT. ANN. § 344.145 (West 2011); N.J. STAT. ANN. §§ 26:4-31, 34:15-68, 43:21-49 (West 2011); OHIO REV. CODE ANN. § 3702.301 (West 2011); WASH. REV. CODE ANN. § 49.60.400 (West 2011).

[182] Many permissive restroom laws exempt restrooms from state anti-discrimination statutes. *See* HAW. REV. STAT. § 489-4 (2011); IND. CODE § 22-9-1-3 (2011); KY. REV. STAT. ANN. § 344.145 (West 2011); MD. CODE ANN., STATE GOV'T § 20-901 (West 2011); MICH. COMP. LAWS ANN. § 750.146 (West 2011); NEV. REV. STAT. § 447.135 (2011); R.I. GEN. LAWS § 11-24-3.1 (2011). Others apply broadly or to specific locations. FLA. STAT. ANN. § 381.0091 (West 2011); 60 ILL. COMP. STAT. 1/155-10 (2011); MONT. CODE ANN. § 49-2-404 (2011); NEV. REV. STAT. §§ 338.180, 444.048 (2011); N.J. STAT. ANN. § 26:4B-1 (West 2011); N.Y. MULT. DWELL. LAW § 76 (McKinney 2011); OHIO REV. CODE ANN. § 3767.34 (West 2011); R.I. GEN. LAWS § 32-7-11 (2011); TENN. CODE ANN. § 4-24-301 (2011); TEX. HEALTH & SAFETY CODE ANN. § 341.068 (West 2011); WIS. STAT. ANN. §§ 66.0919, 106.52 (West 2011).

[183] ALASKA STAT. § 03.20.020 (2011).

[184] N.C. GEN. STAT. § 95-25.14 (2011).

[185] CAL. HEALTH & SAFETY CODE § 11757.59 (West 2011).

[186] GUAM CODE ANN. tit.8, § 45.60 (2011).

[187] N.Y. EDUC. LAW § 7805 (McKinney 2011); N.C. GEN. STAT. § 90-624 (2011); W. VA. CODE § 7-1-3z (2011).

and state interactions with victims of sexual violence.[188] New York has several provisions that allow for sex segregation in elections.[189] Virginia has a provision in its constitution that permits sex segregation generally: "[T]he right to be free from any governmental discrimination upon the basis of . . . sex . . . shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination."[190] These provisions are idiosyncratic to one or a small number of states, but they illustrate the variety of forms of permissive sex segregation.

D. Voluntary Sex Segregation

The phenomenon of voluntary sex segregation broadly affects people's lives. Private institutions and organizations voluntarily[191] sex segregate, without being required or even explicitly permitted to do so by law, in a wide variety of ways. They do so in a number of the areas already covered by the previously-described types of mandatory, administrative and permissive sex segregation, but also in a number of areas not previously covered. The private nature of these voluntarily sex-segregated institutions and organizations makes it impossible to catalog all of them, so here I will offer only broad descriptions of the different types of institutions and organizations that fall within this category.

Many national membership organizations segregate based on sex. For men, organizations like the Lions Club International, the Rotary International, and the Benevolent and Protective

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[188] MINN. STAT. ANN. § 611A.22 (West 2011).

[189] N.Y. ELEC. LAW §§ 2-102, -104, -110, -122 (McKinney 2011).

[190] VA. CONST. art. I, § 11.

[191] In using the word "voluntary," I am referring to whether the organization is required or permitted to do so by law. I am not referring to the organization voluntarily allowing some women or men amidst a larger group of the other sex, as the definition I am using for sex segregation, *see supra* Part I, requires a strict rule of separation or exclusion.

Order of Elks no longer segregate,[192] but other organizations like the Fraternal Order of Eagles, the Loyal Order of Moose, the Knights of Columbus and the Masons continue to have policies that exclude women from joining the main group.[193] For women, the Association of Junior Leagues International, the General Federation of Women's Clubs and Soroptimist International are examples of organizations that consist of only women and exclude men.[194] In addition, countless sex-segregated women's organizations support women in particular professions, religions or other aspects of life.[195] Boys and girls also have similar national membership organizations that restrict membership based on sex, such as the Boy Scouts of America and Girl Scouts

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[192] The Rotary integrated in 1989. *See* Susan Hanf & Donna Polydoros, *Historic Moments: Women in Rotary*, ROTARY INTERNATIONAL (October 1, 2009), http://www.rotary.org/en/MmediaAandNnews/Nnews/Ppages/091001_news_history.aspx (last visited May 19, 2011). The Lions Club integrated in 1986. *See Women in Lions*, LIONS CLUB DISTRICT 4-C1, http://4c1lions.org/ womenmembers.htm (last visited May 19, 2011). The Benevolent and Protective Order of the Elks integrated in 1995. *See Elks Lodge Settles ACLU Lawsuit, Agrees to Admit Women as Members*, ACLU, http://www.aclu.org/ womens-rights/elks-lodge-settles-aclu-lawsuit-agrees-admit-women-members (last visited May 19, 2011).

[193] Fraternal Order of Eagles, *Facts*, FRATERNAL ORDER OF EAGLES, http://www.foe.com/about-us/facts.aspx (last visited May 19, 2011); Loyal Order of Moose, *Moose FAQ*, LOYAL ORDER OF MOOSE, http://www.mooseintl.org/public/FAQ.asp (last visited May 19, 2011); Knights of Columbus, *Join Us*, KNIGHTS OF COLUMBUS, http://www.kofc.org/en/membership/join/join.html (last visited May 19, 2011); Edward L. King, *What About Women?*, http://www.masonicinfo.com/women.htm (last visited May 19, 2011). Some state laws have required local chapters of these organizations to admit women as members, despite the club-wide policy of excluding women. *See* discussion *infra* note 28792 and surrounding text.

[194] *See* ASSOC. OF JUNIOR LEAGUES INT'L, http://www.ajli.org/ (last visited May 19, 2011); GENERAL FEDERATION OF WOMEN'S CLUBS, http://www.gfwc.org/ (last visited May 19, 2011); SOROPTIMIST INTERNATIONAL, http://www. soroptimistinternational.org/ (last visited May 19, 2011).

[195] *See e.g.*, *About AMWA*, AMERICAN MEDICAL WOMEN'S ASSOC., http://www.amwa-doc.org/page3-2/AboutAMWA (last visited May 19, 2011); National Association of Women Judges, *Who We Are*, NATIONAL ASSOCIATION OF WOMEN JUDGES, http://www.nawj. org/who_we_are.asp (last visited May 19, 2011); Episcopal Church Women, *Our History*, EPISCOPAL CHURCH WOMEN, http://ecwnational.org/ ourhistory.htm (last visited May 19, 2011); *About Us*, NATIONAL COUNCIL OF NEGRO WOMEN, INC., http://ncnw.org/about/ index.htm (last visited May 19, 2011).

of the USA, Girls Inc., chapters of the Boys and Girls Clubs of America that are sex-segregated, and the American Legion's Boys and Girls State.[196]

Private facilities also segregate based on sex. Some that open themselves to the public are covered by state public accommodations laws, many of which have exceptions detailed above for bathrooms, locker rooms, dressing rooms or particular activities. However, many private facilities are not covered by these laws and thus voluntarily sex segregate without specific authorization. Some of these facilities are sex segregated for membership, such as golf courses that limit membership to men only[197] or gyms that limit membership to women only.[198] Other facilities, such as private office buildings or co-ed membership organizations, have separate bathrooms, separate locker rooms or separate dressing rooms. They run programs for men or women, such as exercise classes, support groups or socializing opportunities. The options for truly private organizations or facilities to segregate based on sex are virtually limitless.

Sports are another area of private life that are regularly segregated by sex. Some professional sports leagues, such as the

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[196] *See* BOY SCOUTS, http://www.scouting.org/ (last visited May 19, 2011); GIRL SCOUTS, http://www.girlscouts.org/ (last visited May 19, 2011); BOYS' CLUB OF NEW YORK, http://www.bcny.org/ (last visited May 19, 2011); BOYS' CLUB OF ST. LOUIS, http://www.geneslaysboysclub.org/ (last visited May, 19 2011); *Boys State/Nation*, THE AMERICAN LEGION, http://www.legion.org/boysnation (last visited May 19, 2011); *Girls State/Girls Nation*, AMERICAN LEGION AUXILARY, http://www.alaforveterans.org/what_we_do/mission_outreach_programs/Pages/ALA%20GirlsState.aspx (last visited May 19, 2011).

[197] Golf courses also sometimes limit tee times, tournaments, and clubhouse facilities based on sex. *See* Carolyn M. Janiak, Note, *The "Links" Among Golf, Networking, and Women's Professional Advancement*, 8 STAN. J. L. BUS. & FIN. 317, 334 (2003).

[198] DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 135 (2003) [hereinafter BERNSTEIN, YOU CAN'T SAY THAT!] (approximating that two million women belong to women-only health clubs).

Association of Tennis Professionals[199] or the Women's National Basketball Association, are segregated based on sex.[200] National sports teams that engage in international competition, such as the U.S. Ski Team or USA Gymnastics, which are private even though they purport to represent the country, are also segregated based on sex in their team structures and competitions.[201] Most visibly, most Olympic sports teams and competitions are segregated based on sex. Of the thirty-three Olympic sports, only badminton, equestrian, luge, sailing and figure skating have

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[199] The Association of Tennis Professionals administers professional men's tennis competitions. *History*, ATP WORLD TOUR, http://www.atpworldtour.com/Corporate/History.aspx (last visited May 19, 2011). The Women's Tennis Association does the same for women. WTA TOUR, http://www.sonyericssonwtatour.com/page/Home/0,12781,00.html (last visited May 19, 2011).

[200] Many professional sports that are exclusively played by men, such as professional baseball (Major League Baseball), football (National Football League), hockey (National Hockey League), and basketball (National Basketball Association), are not "sex segregated" as I have defined the term because they have no formal rule against women participating. Major League Baseball and the National Hockey League both have provisions in their rules or collective bargaining agreement indicating women would be permitted to play. *See Official Rules,* MAJOR LEAGUE BASEBALL, http://mlb.mlb.com/mlb/official_info/official_rules/definition_terms_2.jsp (last visited May 19, 2011) (stating that any reference to "he" includes "she"); *Collective Bargaining Agreement,* NAT'L HOCKEY LEAGUE, *available at* http://www.nhl.com/cba/2005-CBA.pdf (anti-discrimination provision in section 7.2 includes sex). The National Football League and National Basketball Association have no similar provisions and instead use non-gender-neutral language. *See National Football League Collective Bargaining Agreement*, NFL PLAYERS ASSOC., *available at* http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf (including several references to "wives"); *2005 Collective Bargaining Agreement*, NAT'L BASKETBALL PLAYERS ASSOCIATION, http://www.nbpa.org/cba/2005 (last visited May 19, 2011). There has been at least one woman who has played professionally in all three sports except football. *See* MCDONAGH & PAPPANO, *supra* note 4, at 195–96; Syda Kosofsky, *Toward Gender Equality iIn Professional Sports*, 4 HASTINGS WOMEN'S L.J. 209, 211 (1993). However, these sports are, for all intents and purposes, sex segregated, as the small number of women are the exception, and only men currently and historically have played each sports.

[201] *See e.g., Men's Artistic,* USA GYMNASTICS, http://www.usa-gymnastics.org/men/pages/index.php (last visited May 19, 2011); *Women's Artistic,* USA GYMNASTICS, http://www.usa-gymnastics.org/women/pages/index.php (last visited May 19, 2011).

mixed sex events.[202] On a smaller scale, although affecting a large number of people, local sports clubs and organizations, for children and adults, are often segregated based on sex.

Religious institutions also segregate based on sex. For instance, some religions, such as conservative strands of Judaism and Islam, segregate men and women during prayer, either in completely separate rooms or by a partition within the same room.[203] Some religions also restrict who can receive certain honors, such as reading from the Torah, or who can ascend to certain respected positions within the religion, such as becoming a priest.[204] Religions also frequently have conferences or gatherings just for women or men.[205] Religious schools sex segregate in ways discussed previously about other schools. Convents, monasteries and the like also segregate based on sex in determining who can live where.

Another very visible part of American life that is voluntarily segregated by sex is performing arts award ceremonies. The Academy Awards, Grammy Awards, Tony

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[202] *See Sports*, OLYMPIC GAMES, http://www.olympic.org/en/content/Sports (last visited May 19, 2011).

[203] *See* LESLIE KANES WEISMAN, DISCRIMINATION BY DESIGN: A FEMINIST CRITIQUE OF THE MAN-MADE ENVIRONMENT 35 (1992); Hanna Papanek, *Purdah: Separate Worlds and Symbolic Shelter*, 15 COMPARATIVE COMP. STUDIES STUD.IN SOCIETY SOC'Y & HISTORY HIST. 289, 293 (1973) (discussing the separate spheres inhabited by men and women in traditional Islam); Riv-Ellen Prell, *The Vision of Women in Classical Reform Judaism*, 50 J. AM. ACAD. RELIGION 575, 579 (1982) (discussing traditional customs of separating women from men in synagogues).

[204] JOEL B. WOLOWELSKY, WOMEN'S PARTICIPATION IN SHEVA BERAKHOT, MODERN JUDAISM 157 (1992) (discussing limitations on female participation in conservative Judaism); CONGREGATION FOR THE DOCTRINE OF THE FAITH, GENERAL DECREE REGARDING THE DELICT OF ATTEMPTED SACRED ORDINATION OF WOMEN (2007) (reiterating the Catholic Church's policy that any women ordained priests or any bishops ordaining them are to be punished by automatic excommunication), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20071219_attentata-ord-donna_en.html.

[205] *See e.g.*, BOSTON CATHOLIC MEN'S AND WOMEN'S CONFERENCES, http://www.catholicboston.com/ (last visited May 19, 2011); PROMISE KEEPERS, http://www.promisekeepers.org/ (last visited May 19, 2011).

Awards and others separate men and women performers for many of their most prestigious awards: best actor/actress in different movie roles, best female/male performer in different musical genres and best performance by an actress/actor in different types of theatrical performances.[206] Other awards in different contexts also sometimes segregate based on sex, particularly for sporting awards.[207]

Other types of voluntary sex segregation exist as well. Some parking spaces are sex segregated.[208] Hotels have sex-segregated rooms.[209] There are women-only driving schools[210] and insurance companies that insure only women.[211] Many children spend their summer at sex-segregated camps, either in bunks and activities within a camp that has only boys or girls, or in a camp that serves only boys or only girls.[212]

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[206] *See Academy Awards*, THE ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, http://www.oscars.org/awards/academyawards/index.html (last visited May 19, 2011)http://www.oscars.org/; GRAMMY AWARDS, http://www.grammy.com/ (last visited May 19, 2011); TONY AWARDS, http://www.tonyawards.com/en_US/index.html (last visited May 19, 2011).

[207] *See e.g.*, *Best of the ESPYs*, ESPN.COM, http://promo.espn.go.com/espn/specialsection/espys2009/#/bestof/ (last visited May 19, 2011) (ESPN's awards for athletes).

[208] *See* Meg Nugent, *Heavy Competition Gives Rise to "Stork" and "Stroller" Spaces*, STAR-LEDGER, Apr. 22, 1998, at 23; Patricia Wen, *In Grocery Store Lots, It's Advantage: Parents*, BOSTON GLOBE, Oct. 25, 1997, at B1.

[209] Paul Burhnam Finney, *Female-Friendly Hotels*, N.Y. TIMES, Aug. 5, 2005, at C6.Michelle Krebs, *Building Repeat Business By Putting Drivers In A Ditch*, N.Y. TIMES, Oct. 10, 2001, at H28.

[210] Paul Burhnam Finney, *Female-Friendly Hotels*, N.Y. TIMES, August 5, 2005, at C6. Michelle Krebs, *Building Repeat Business bBy Putting Drivers iIn aA Ditch*, N.Y. TIMES, Oct. 10, 2001, at H28.

[211] *Women Only Car Insurance*, ONLINE INSURANCE PAGE, http://www.onlineinsurancepage.com/women-only-car-insurance.html (last visited May 19, 2011).

[212] *See Girls Summer Camps*, CAMP RESOURCE.COM, http://www.campresource.com/summer-camps/girls-camps.cfm (last visited May 19, 2011); *Boys Summer Camps*, CAMP RESOURCE.COM, http://www.campresource.com/summer-camps/boys-camps.cfm (last visited May 19, 2011).

On a much more micro and informal level, all sorts of small groupings in everyday life also segregate based on sex. Local clubs organized around a particular interest, hobby or affiliation often segregate by sex, such as gatherings of mothers, men's knitting groups and lesbian or gay men's groups. Informal social gatherings also frequently segregate based on sex, such as bachelor or bachelorette parties, girls' or guys' nights out, kids' sleepover parties and sex-segregated poker games. These voluntarily sex-segregated groups or gatherings are part of the everyday landscape of life.

IV. Sex Segregation's Legal Status

As detailed in the previous section, sex segregation, whether mandatory, administrative, permissive or voluntary, is a part of law and society in a wide range of areas, affecting most people's lives in one way or another. Particularly given that race segregation[213] in American law and life has been mostly eradicated for almost half a century, the question arises as to how the law treats the various forms of sex segregation discussed here. This inquiry requires several layers of legal analysis. For mandatory and administrative sex segregation, we have to look to constitutional law to evaluate whether the segregation is consistent with the Fourteenth Amendment's Equal Protection Clause.[214] The Constitution also plays a role in the analysis of government institutions that segregate pursuant to a permissive

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[213] Here I am referring to race segregation using the same definition of "segregation" as I have used throughout this research for sex segregation: complete, rule-imposed separation or exclusion. *See supra* Part I.

[214] U.S. CONST. amend. XIV, § 1. For the federal government, the analysis is pursuant to the Fifth Amendment's Due Process Clause. *See* Schesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) ("Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process'." (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)). State constitutional provisions prohibiting sex discrimination are also relevant, although I do not go through these in detail here. Many simply repeat the analysis of the federal constitutional protection against sex discrimination, but a large number do have more stringent protections against sex discrimination. *See generally* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection aAgainst Sex Discrimination*, 36 RUTGERS L.J. 1201 (2005).

statute. For private institutions that segregate pursuant to a permissive statute or voluntarily, the inquiry is broader and includes both constitutional and statutory considerations. This section reviews these legal considerations for modern sex segregation by providing the doctrinal framework for analyzing sex segregation and then a comprehensive overview of the cases that have applied that framework to current forms of sex segregation.[215]

A. Constitutional Anti-Discrimination Law

Under well-established principles of federal constitutional law, government classifications based on sex, which is what sex segregation (whether mandatory, administrative or permissive) is, are subject to a form of intermediate scrutiny.[216] Supreme Court decisions from the 1970s held that classifications that are based on sex must be substantially related to achieving an important government purpose.[217] The Supreme Court has also sometimes required the government to prove it has an "exceedingly persuasive justification" to classify based on sex.[218] Whether this "exceedingly persuasive justification"

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[215] This section does not review the forms of sex segregation that have existed in the past but are now unconstitutional, unlawful, or non-existent. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994) (prohibiting use of peremptory challenges to sex segregate a jury); Taylor v. Louisiana, 419 U.S. 522 (1975) (finding unconstitutional a ban on women serving as jurors).

[216] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (using, for the first time in Supreme Court case law, the term "intermediate scrutiny" to describe the level of scrutiny for classifications based on "sex or illegitimacy").

[217] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[218] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) ("[P]recedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.").

standard is different from the more traditional "substantially related" and "important government objective" test,[219] the constitutional test for classifications based on sex undoubtedly falls somewhere in between the strict scrutiny test used for classifications based on race, national origin and fundamental rights, and the rational basis test used for other classifications that do not receive any form of heightened scrutiny.[220] Under this test, constitutional challenges to sex classifications have succeeded in the Supreme Court sixty percent of the time.[221]

Challenges to sex segregation in the Supreme Court have also seen mixed results. As detailed earlier,[222] in two challenges to sex segregation in specialized forms of higher education, the Supreme Court struck down sex segregation as unconstitutional. In *Mississippi University for Women v. Hogan*, the Court found that Mississippi's sex-segregated nursing graduate school violated the Constitution.[223] Fourteen years later, in *United States v. Virginia*, the Court found that the Virginia Military Institute, an all-male state-run military college, also violated the

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[219] *Compare* Eng'g Contractors Ass'n v. Metro. Dade County., 122 F.3d 895 (11th Cir. 1997) (holding *Virginia* did not change intermediate scrutiny), *with* Candace Saari Kovacic-Fleischer, United States v. Virginia's *New Gender Equal Protection Analysis*, 50 VAND. L. REV. 845, 870 (1997) (arguing that the Court"s analysis in *Virginia* resembled strict scrutiny and that "[a]n examination of how the majority rejects *Virginia*'s defenses and orders a remedy indicates that Chief Justice Rehnquist and Justice Scalia probably are correct" in their claim that the Court "elevated the midtier test.").

[220] Lisa Baldez & Lee Epstein, *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUDIES STUD. 243, 246–49 (2006) (placing the sex classification analysis, regardless of whether *Virginia* elevated the test, in the context of other levels of scrutiny).

[221] *Id.* at 249 ("Data derived from the United States Supreme Court Judicial Database [shows] that the party alleging sex discrimination prevailed in just slightly more than a majority of the 23 post-1976 suits (60 percent) . . . ."). As noted earlier, see *supra* notes 221–243 and accompanying text, not every constitutional case in the Supreme Court involving sex discrimination fits the definition of sex segregation I am using in this project; thus, this figure does not directly represent the success of sex segregation before the Supreme Court, but it is nonetheless useful in showing how the intermediate standard functions.

[222] *See supra* Part II.A.

[223] Mississippi University. for Women v. Hogan, 458 U.S. 718 (1982).

Constitution.[224] In both cases, the Court reasoned that the sex-segregated institutions were unconstitutional because they relied on overbroad stereotypes about men and women, a prohibited basis for government action under the Equal Protection Clause.[225]

However, when sex segregation is based on what the Court perceives as actual differences between men and women, as opposed to stereotypes of differences, the Court has indicated a willingness to find the segregation constitutional. In *Rostker v. Goldberg*, the Court approved the statute that required men to register for the draft but not women.[226] The decisive fact in the case was that men and women had what the Court perceived to be an actual difference in that men were eligible for combat whereas women were not.[227] By accepting this difference, despite the fact that the combat restriction was legislatively- or policy-created, the Court implied that this classification was emblematic of real, physical differences in the ability of men and women to fight.[228] Relying on this difference created by the combat restrictions, the Court used similar reasoning in an earlier case that permitted the Navy to give women more time to

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[224] United States v. Virginia, 518 U.S. 515 (1996).

[225] *See Hogan*, 458 U.S. at 725 (forbidding government action based on "fixed notions concerning the roles and abilities of males and females"); *Virginia*, 518 U.S. at 541–46 (concluding that Virginia's policy of "women's categorical exclusion [is] in total disregard of their individual merit").

[226] Rostker v. Goldberg, 453 U.S. 57 (1981).

[227] *Id.* at 76 (describing the statutory prohibitions on women's combat engagement in the Navy and Air Force and the established policy prohibitions in the Army and Marine Corps). The male challengers of the draft requirements did not question the sex-based combat restrictions, deeming them "irrelevant to the present case." *Id.* at 77 n.13.

[228] *Id.* at 78 ("Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.").

obtain promotions than men.[229] The Court's perception of actual difference between men and women has been the driving force behind other cases that have upheld sex-based classifications.[230]

The Court has also permitted sex segregation when the purpose behind the segregation is remedial. In *Califano v. Webster*, the Court upheld a congressional scheme that used a more favorable formula for women in calculating social security retirement benefits but excluded men from this favorable treatment.[231] The Court based its conclusion on finding 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 [] an important governmental objective."[232] A statute that is substantially related to this remedial purpose will survive intermediate scrutiny.[233]

Most commentators who have studied the Court's jurisprudence with respect to sex have similarly concluded that the Court is most concerned with "the wrong of stereotyping."[234] For instance, Mary Anne Case calls the Court's quest in sex discrimination cases one for the "perfect proxy": "the

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[229] Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) ("[T]he different treatment of men and women naval officers [reflects] the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service.").

[230] *See, e.g.*, Nguyen v. I.N.S., 533 U.S. 53, 62 (2001) (holding that Congress' citizenship scheme for children born abroad and out of wedlock can constitutionally differ depending on whether the child's father or mother was an American citizen because of the "significant difference" between men and women during the birth of a child); Michael M. v. Superior Court, 450 U.S. 464, 474 (1981) (approving California's statutory rape law that held men criminally liable but not women based on the finding that men and women were not "similarly situated" with respect to "problems and [] risks of sexual intercourse").

[231] Califano v. Webster, 430 U.S. 313 (1977).

[232] *Id.* at 317 (citing *Schlesinger*, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974)).

[233] *Id.* at 317–18.

[234] Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 81 (2002).

assumption at the root of the sex-respecting rule must be true of either all women or no women or all men or no men; there must be a zero or a hundred on one side of the sex equation or the other."[235] When there are perceived actual differences, whether created "by legislation, qualifications, circumstance, or physical endowment," the Court does not require that men and women be treated alike.[236]

For state-sponsored sex segregation, this scheme would seem to construct a very difficult bar. After all, men exhibit a wide variety of behaviors and physical attributes, just as women do. As much as variations may exist in the distribution of those behaviors or physical attributes within either category, it is very hard to find any behaviors or attributes for which sex is a perfect proxy, for which all men or no men are one way and all women or no women are another way.[237] However, as Catharine MacKinnon describes, tension exists between sex, which society nonetheless views as having two distinct categories, and equality doctrine, which presupposes sameness.[238] The Court's jurisprudence exhibits this tension in that the Court is willing to find actual difference when it perceives this difference to exist, whether legislatively,[239] biologically[240] or socially.[241]

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[235] Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449–50 (2000).

[236] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 216–17 (1989).

[237] *See* United States v. Virginia, 518 U.S. 515, 542 (1996) *Virginia*, 518 U.S. at 542 (noting that some women would not want military education, just like some men would not); J.E.B. v. Alabama, 511 U.S. 127, *J.E.B.*, 511 U.S. at 139 n.11 (1994) ("Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination . . . .").

[238] MACKINNON, *supra* note 236, at 216.

[239] Rostker v. Goldberg, 453 U.S. 57 (1981). *Rostker*, 453 U.S. 57.

[240] Michael M. v. Superior Court, 450 U.S. 464 (1981)*Michael M.*, 450 U.S. 464; Nguyen v. I.N.S., 533 U.S. 53 (2001). *Nguyen*, 533 U.S. 53.

[241] Califano v. Webster, 430 U.S. 313 (1977) (per curiam), 430 U.S. 313.

In the lower courts, the constitutional litigation over sex segregation in various contexts has reflected this challenge of differentiating between outmoded stereotypes and actual differences. As already noted, the military cases in the Supreme Court have deferred to Congress' and the military's conclusion that women should be excluded from combat.[242] Lower courts have likewise deferred to this combat exception, using it as the basis for finding constitutional the Army's policy that men, but not women, can enlist with only a GED certificate,[243] that only men have to register given changed circumstances from 1981 (when *Rostker* was decided) to the 2000s[244] and the prohibition on federal employment for men who have not registered for the draft according to law.[245]

In the educational context, as noted above,[246] there have been surprisingly few challenges to sex segregation. The Supreme Court has struck down Mississippi's women-only graduate nursing school[247] and Virginia's men-only military academy[248] but upheld, by an evenly-divided Court without opinion, Philadelphia's boys-only magnet high school.[249] Outside these contexts, the lower courts have found the Citadel, a different Virginia public men-only military college, unconstitutional,[250] as well as a Detroit proposed boys-only Afrocentric public school.[251] Litigants have filed challenges to

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[242] *Rostker*, 453 U.S. 57; Schlesinger v. Ballard, 419 U.S. 498 (1975). *Schlesinger*, 419 U.S. 498.

[243] Lewis v. U.S. Army, 697 F. Supp. 1385 (E.D. Pa. 1988).

[244] Schwartz v. Brodsky, 265 F. Supp. 2d 130, 133–34 (D. Mass. 2003).

[245] Elgin v. United States, 594 F. Supp. 2d 133, 145–48 (D. Mass. 2009).

[246] *See* discussion *supra* Part II.A.

[247] Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[248] United States v. Virginia, 518 U.S. 515 (1996).

[249] Vorchheimer v. Sch. Dist. of Phila., 430 U.S. 703 (1977).

[250] Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995).

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

new sex-segregated schools operating pursuant to the recent change in policy under Title IX's regulations, but these lawsuits are still working their ways through the courts.[252] Given the paucity and lack of clarity within legal rulings on this highly charged subject, it is not a surprise that commentators hold very different views on the constitutionality of sex-segregated educational opportunities.[253]

In the prison context, courts reviewing constitutional challenges related to sex segregation have analyzed the claims under a somewhat relaxed standard that gives latitude to prison administrators in deciding how to treat men and women.[254] The Ninth Circuit described the prevailing standard for prisoner equal protection claims as the Constitution requiring only parity, or in other words substantial equivalence, between men and women.[255] This standard does not require that opportunities for men and women in prison be the same or co-educational.[256] In

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[252] At least three cases have been filed since the 2006 change in Title IX regulations. *Selden v. Livingston Parish Sch.ool Board.*, No. 3:2006cv00553 (M.D. La. filed Aug. 2, 2006), settled. Two others are in active litigation. *See* A.N.A. v. Breckinridge County. Bd. of Educ., No. 3:08-cv-00004-CRS (W.D. Ky. filed May 19, 2008); Jane Doe v. Vermilion Parish Sch. Bd. (D. La. filed Sept. 8, 2009).

[253] *Compare, e.g.*, Robinson, *supra* note 1 (arguing for increasing opportunities for singles-sex schools by modifying constitutional framework to eliminate any indeterminacy), *with* Levit, *Embracing Segregation*, *supra* note 1 (applying the lesson of *Brown* to conclude that separate but equal creates inequality for sex as well as race).

[254] *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217, 228–30 (2005) [hereinafter Cohen, *Title IX*] (describing Equal Protection Clause standard in prison cases compared to Title IX standard); Sarah L. Dunn, Note, *The "Art" of Procreation: Why Assisted Reproduction Technology Allows for the Preservation of Female Prisoners' Right to Procreate*, 70 FORDHAM L. REV. 2561, 2575–82 (2002) (detailing various cases applying standard).

[255] Jeldness v. Pearce, 30 F.3d 1220, 1226–27 (9th Cir. 1994); *see also* Glover v. Johnson, 198 F. 3d 557, 561 (6th Cir. 1999); Canterino v. Wilson, 546 F. Supp. 174, 210 (D.C. Ky. 1982); Glover v. Johnson, 478 F. Supp. 1075, 1079 (D.C. Mich. 1979).

[256] *Jeldness*, 30 F.3d at 1226–27. The court did find, however, that the programs violated Title IX, which contained a more exacting standard for sex discrimination claims. *Id.* at 1228–29.

fact, the Eighth Circuit has clearly held that under this standard "it is appropriate to segregate male and female inmates on the basis of gender."[257] The battlefield under this standard is how it applies to different programs for or treatment of men and women within the sex-segregated system. Since this inquiry into parity is usually very fact-intensive, the lower courts have issued a wide range of rulings on the subject based on the particulars of the challenged prison programs. Some of the differing results, though, turn on whether the courts find men and women in the prison context to be similarly situated. Courts that find that men and women are not similarly situated approve the challenged sex segregation in programs or treatment because they find, along the lines of the Supreme Court cases mentioned earlier, there are actual differences between male and female prisoners.[258]

With respect to sex segregation in sports, courts have, for the most part, approved mandatory, administrative and permissive sex segregation as constitutional. The reasoning behind these decisions is usually that women and men have actual differences with respect to athletic competition, so the Constitution permits them to be treated differently.[259] Specifically, with only a few exceptions, courts have upheld as constitutional separate women's or girls' teams against challenges by men or boys who want to participate on those

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[257] Roubideaux v. N.D. Dep't. of Corrs. & Rehab., 570 F.3d 966, 974 (8th Cir. 2009); Klinger v. Dep't. of Corrs., 107 F.3d 609, 615 (8th Cir. 1997) (calling issue "beyond controversy").

[258] Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002); Pargo v. Elliott, 69 F.3d 280 (8th Cir. 1995); Women Prisoners v. District of Columbia., 93 F.3d 910 (D.C. Cir. 1996).

[259] *See, e.g.*, Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1130 (9th Cir. 1982); Brenden v. Indep. Sch. Dist. 742, 342 F. Supp. 1224, 1233 (D. Minn. 1972).

teams because no equivalent men's or boys' team exists.[260] Courts have done so based on the reasoning that girls need separate teams to remedy past discrimination against girls in athletics and to promote equal opportunity.[261] Federal appellate courts have also universally upheld Title IX's requirement of proportional athletic representation on sex-segregated teams against constitutional challenge by men claiming that the regulations harm their athletic opportunities.[262]

The one area of sports litigation in which courts have chipped away at sex segregation is when women claim that the constitution requires the state to permit them to try out for or participate on a men's team when there is no equivalent women's team. Women have succeeded in constitutional challenges to being denied the opportunity to participate in men's baseball, football, soccer, tennis, cross-country skiing,

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[260] Most cases have found that men or boys cannot try out for women's or girls' teams. *See* Clark v. Ariz. Interscholastic Ass'n, 886 F.2d 1191 (9th Cir. 1989) (volleyball); *Clark*, 695 F.2d 1126 (volleyball); Kleczek v. R.I. Interscholastic League, Inc., 768 F. Supp. 951 (D.R.I. 1991) (field hockey); Petrie v. Ill. High Sch. Ass'n, 394 N.E. 2d 855 (Ill. App. Ct. 1979) (volleyball); Me. Human Rights Comm'n v. Me. Principals Ass'n, No. CV-97-599, 1999 Me. Super. LEXIS 23 (Jan. 21, 1999) (field hockey); B.C. v. Bd. of Educ., 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987) (field hockey); Mularadelis v. Haldane Cent. Sch. Bd., 74 A.D. 2d 248 (N.Y. App. Div. 1980) (tennis); Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734 (R.I. 1992) (field hockey). A small number have found to the contrary. *See* Attorney Gen. v. Mass. Interscholastic Athletic. Ass'n, 393 N.E.2d 284 (Mass. 1979) (finding unconstitutional, under state constitutional provision, general rule prohibiting boys from participating on girls' teams); Commonwealth.. v. Pa. Interscholastic Athletic. Ass'n, 334 A.2d 839 (Pa. Commw. Ct. 1975) (finding unconstitutional, under state constitutional provision, general rule prohibiting girls from competing or practicing against boys).

[261] *See Clark*, 695 F.2d at 1131; O'Connor v. Bd. of Educ., 449 U.S. 1301, 1306 (1980) (Stevens, J., sitting as Circuit Justice).

[262] *See* Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 94–95 (D.D.C. 2003) (listing eight circuit courts that have approved of Title IX's requirements in challenges to the constitutionality or statutory authority of the regulations), *aff'd* 366 F.3d 930 (D.C. Cir. 2004).

wrestling, golf and cross-country running.[263] The key in these cases has been that there were no equivalent women's teams available.[264] However, this success has not been uniform, as women have lost challenges to sex-segregated boxing, basketball and swimming.[265] The courts that have rejected these challenges have relied on, as the Western District of Michigan described them, "the real differences between the male and female anatomy."[266]

Another area litigated, although less frequently, is the constitutionality of sex segregation in bathrooms, locker rooms and dressing rooms. None of the courts addressing this area has found that sex segregation in these facilities violates the Equal Protection Clause.[267] The fact of segregation for people using the facilities has never been questioned, and government facilities that have separate bathrooms are required to have merely "substantially equal" facilities for men and women.[268] However,

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[263] *See* Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975) (Little League); Brenden v. Indep. Sch. Dist., 477 F.2d 1292 (8th Cir. 1973) (tennis, cross-country skiing, cross-country running); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (soccer); Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996) (wrestling); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020 (D. Mo. 1983) (football); Gilpin v. Kan. State High Sch. Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1974) (cross-country); Thomka v. Mass. Interscholastic Athletic Ass'n, No. 051028, 2007 Mass. Super. WL 867084 (Feb. 12, 2007) (golf); Darrin v. Gould, 540 P.2d 882 (Wash. 1975) (football); Israel v. W. Va. Secondary Sch. Activities, 388 S.E.2d 480 (W. Va. 1989) (baseball).

[264] *See, e.g.*, *Brenden*, 477 F.2d at 1294; *Gilpin*, 377 F. Supp. at 1243.

[265] O'Connor v. Bd. of Educ., 645 F.2d 578 (7th Cir. 1981) (basketball); LaFler v. Athletic Bd. of Control, 536 F. Supp. 104, 106 (W.D. Mich. 1982); Bucha v. Ill. High Sch. Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972) (swimming).

[266] *LaFler*, 536 F. Supp. at 106.

[267] Kastl v. Maricopa Cnty. Comm. Coll. Dist., 325 Fed. App'x. 492 (9th Cir. 2009); Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007); Sullivan v. City of Cleveland Heights, 869 F.2d 961 (6th Cir. 1989). Justice Marshall stated what is possibly the reason for judicial reluctance to interfere with sex-segregated restrooms: "A sign that says 'men only' looks very different on a bathroom door than a courthouse door." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 468–69 (1985) (Marshall, J., dissenting).

[268] *Sullivan*, 869 F.2d at 963.

one case has slightly cracked open the sex segregation barrier. In *Ludtke v. Kuhn*, the Southern District of New York held that women reporters could not be banned from locker rooms following a sporting event.[269] As male reporters regularly appeared in the locker room and broadcast images of the players in the locker room, the players' privacy interests were not substantially related to excluding women.[270]

Only a few other areas of mandatory, administrative or permissive sex segregation described in this article have been litigated under the Constitution. Courts have approved the sex segregation of jurors kept overnight during sequestration[271] and the segregation of mental health patients.[272]

B. Statutory Anti-Discrimination Law

The law governing whether sex segregation by non-governmental actors is allowed differs from the law covering governmental actors. Private actors not covered by one of the exceptions to the state action doctrine are free to segregate based on sex without concern for the Equal Protection Clause.[273] Therefore, if there is any legal restriction on the ability of private actors to segregate based on sex, it comes from statutory law, such as federal and state anti-discrimination laws. The analysis here turns on whether the private sex segregation is permissive or voluntary. If the sex segregation is permissive, the inquiry is whether the private actor falls within the scope of the statutory

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[269] 461 F. Supp. 86 (S.D.N.Y. 1978).

[270] *Id.* at 97.

[271] People v. Lloyd, 220 P.2d 10 (Cal. Ct. App. 1950).

[272] Colcy v. Clinton, 479 F. Supp. 1036 (D. Ark. 1979), *aff'd in part, modified in part, vacated in part*, 635 F.2d 1364 (8th Cir. 1980) (on abstention grounds).

[273] *See, e.g.*, Perkins v. Londonderry Basketball Club, 196 F.3d 13 (1st Cir. 1999). In *Perkins*, a girl challenged a youth basketball club's policy of allowing only boys to participate in a tournament. *Id.* at 17. The court denied her claim, finding that the club did not qualify as a state actor under any of the exceptions to the basic constitutional requirement that only state actors are prohibited from acting under the Fourteenth Amendment. *Id.* at 18–23.

permission. Conversely, if the sex segregation is voluntary, the question is whether the private actor is covered by the anti-discrimination law's prohibition.[274]

Private entities that sex segregate act lawfully if their actions fall within statutory provisions that permit sex segregation. On the federal level, the two most common areas of permissive sex segregation come from Title VII and Title IX. Under Title VII's permission of sex segregation in the form of allowing employers to segregate jobs for which sex is a "bona fide occupational qualification" (BFOQ),[275] a wide array of jobs have qualified and thus have been segregated based on sex. Courts, including the Supreme Court, have approved BFOQs in law enforcement settings in which the courts have determined that men are needed to have authority over male inmates or detainees.[276] Courts have also approved BFOQs in privacy-related jobs in labor and delivery rooms, mental hospitals, youth centers, nursing homes, weight-loss centers, health clubs, restrooms and spas.[277] The Equal Employment Opportunity Commission regulation for Title VII's sex-based BFOQ provision allows for sex segregation when required for "authenticity or genuineness," such as for actors or actresses, as

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[274] Public actors that sex segregate will also be held to the requirements of these statutory requirements if they are covered by them.

[275] *See* discussion *supra* notes 149–53 and accompanying text.

[276] *See* Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77, 89–90 (2003) (citing cases); *see also* Dothard v. Rawlinson, 433 U.S. 321 (1977); Everson v. Mich. Dep't. of Corrs., 391 F.3d 737 (6th Cir. 2004).

[277] *See* Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1259–60 (2003) (collecting and citing cases); Susan M. Omilian & Jean P. Kamp, 1 SEX-BASED EMPLOYMENT DISCRIMINATION § 13:2 (2009) (collecting cases); Melissa K. Stull, Annotation, *Permissible Sex Discrimination in Employment Based on Bona Fide Occupational Qualifications (BFOQ) Under § 703(e)(1) of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-2(e)(1))*, 110 A.L.R. FED. 28 (1992) (same); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147 (2004).

explicitly stated in the regulation,[278] or for the position of wet-nurse, as the Ninth Circuit illustratively wrote.[279]

As described above,[280] Title IX has many more exceptions that allow for sex segregation in private education. Both private and public educational institutions have been permitted to have sex-segregated athletics under Title IX's regulations, even if the school provides no equivalent sport for the excluded sex.[281] However, if a school does allow the excluded sex to try out for a previously sex-segregated sport, the school cannot deny that person participation based on his or her sex.[282] Also, within the context of sex-segregated sports, schools must provide equal athletic opportunities for men and women in terms of participation, funding, scheduling and amenities.[283] Although litigated less frequently, the same general principles hold in other educational areas: Title IX permits sex segregation in certain areas, but requires equal treatment within the sex-segregated programs.[284]

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[278] 29 C.F.R. § 1604.2(a)(2) (2011).

[279] Rosenfeld v. S. Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971).

[280] *See* discussion *supra* notes 154–68 and accompanying text.

[281] *See* Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685, 697 (6th Cir. 2000); Barnett v. Tex. Wrestling Ass'n, 16 F. Supp. 2d 690 (N.D. Tex. 1998); Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996).

[282] Mercer v. Duke Univ., 190 F.3d 643 (4th Cir. 1999).

[283] McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275 (2d Cir. 2004); Chalenor v. Univ. of N.D., 291 F.3d 1042 (8th Cir. 2002); Boucher v. Syracuse Univ., 164 F.3d 113 (2d Cir. 1999); Beasley v. Ala. St. Univ., 966 F. Supp. 1117 (M.D. Ala. 1997); Landow v. Sch. Bd. of Brevard Cnty., 132 F. Supp. 2d 958 (M.D. Fla. 2000); Daniels v. Sch. Bd. of Brevard Cty., 985 F. Supp. 1458 (M.D. Fla. 1997); *see also* 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (three-part test used by the Department of Education for assessing equal athletic opportunity).

[284] This issue has come up repeatedly in the context of prisons. *See* Klinger v. Dep't of Corr., 107 F.3d 609, 614–15 (8th Cir. 1997); Jeldness v. Pearce, 30 F.3d 1220, 1226–27 (9th Cir. 1994); Women Prisoners v. D.C., 899 F. Supp. 659 (D.D.C. 1995); Canterino v. Wilson, 546 F. Supp. 174, 210 (W.D. Ky. 1982).

Most of the state court litigation that has surrounded sex segregation by private entities falls within the category of voluntary sex segregation rather than permissive, as with Title VII and Title IX. Organizations that voluntarily sex segregate can do so as long as they do not fall within a federal or state anti-discrimination law. Since no federal law prohibits sex discrimination in public accommodations,[285] the litigation has focused on state statutes that prohibit discrimination based on sex in public accommodations or housing.[286] As a representative sample, country clubs, private membership organizations, mosques, health clubs and gyms, golf courses, local Franco-American fraternal clubs, and fishing and hunting clubs have had to litigate whether they were permitted to segregate based on sex under state anti-discrimination laws.[287]

C. Constitutional Rights of Private Associations

The application of a state public accommodations statute to private organizations that engage in voluntary sex segregation brings constitutional issues back into the picture. The Supreme Court has decided a series of cases that limits when a state can apply its public accommodations statute to a private group, which would include a private organization engaging in

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[285] Title II does not apply to sex discrimination. 42 U.S.C. § 2000a (2010).

[286] A comprehensive list of state public accommodations laws, at least as they existed in 1996, appears in Singer, *supra* note 30.

[287] *See, e.g.*, Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (2d Cir. 1986) (national membership organization); U.S. Jaycees v. Iowa Civil Rights Comm'n, 427 N.W.2d 450 (Iowa 1988) (national membership organization); Maine. Human Rights Comm'n v. Le Club Calumet, 609 A.2d 285 (Me. 1992) (local Franco-American club); Donaldson v. Farrakhan, 762 N.E. 2d 835 (Mass. 2002) (mosque using city-owned theater); Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination, 524 N.E. 2d 1364 (Mass. 1988) (fishing and hunting club); Borne v. Haverhill Golf & Country Club, Inc., 791 N.E.2d 903 (Mass. App. Ct. 2003) (golf course); Foster v. Back Bay Spas, Inc., No. 9607060, 1997 WL 634354 (Mass. Super. Ct. Oct. 1, 1997) (health club); LivingWell (North) Inc. v. Pa. Human Relations Comm'n, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992) (reading privacy defense into state anti-discrimination statute for health club facilities); Beynon v. St. George-Dixie Lodge #1743, 854 P.2d 513 (Utah 1993) (national membership organization); Fraternal Order of Eagles v. Grand Aerie of Fraternal Order of Eagles, 59 P.3d 655 (Wash. 2002) (national membership organization); Barry v. Maple Bluff Country Club, 586 N.W. 2d 182 (Wis. Ct. App. 1998) (country club).

voluntary sex segregation. In fact, that is exactly what the first three cases in this line addressed.[288]

In those cases, the Court identified two related constitutionally-protected rights relevant to applying state public accommodation laws to private organizations: the freedom of intimate association[289] and the freedom of expressive association.[290] If application of a public accommodations statute infringes upon either of these rights, the statute violates the Constitution. To determine whether a statute infringes upon the right of intimate association, the Court noted that "factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[291] Thus, the more an organization looks like a "large business enterprise," the more likely the state is not interfering with the right of intimate association by requiring it to accept members it does not want; the more an organization resembles a "family relationship," the more likely the state is interfering with the right of intimate association.[292]

For the right to expressive association, three elements must be present in order for a violation to exist: the organization must engage in protected First Amendment expressive activity, the state law must be a form of infringement on that activity and there must not be a compelling state reason for the infringement "unrelated to the suppression of expression."[293] The Court found that forcing a group to accept members it does not want is a clear infringement on expression but that "eradicating discrimination

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[288] New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

[289] *Roberts*, 468 U.S. at 618–20 (drawing on Fourteenth Amendment due process liberty cases in discussing the right to intimate association).

[290] *Id.* at 622–23 (drawing on First Amendment freedom of speech cases and principles in discussing the right to expressive association).

[291] *Id.* at 620.

[292] *Id.* at 619–20.

[293] *Id.* at 622–24.

against [] female citizens" can be a compelling state interest if admitting women does not impede expressive activity.[294]

Under this framework, in the 1980s the Court decided three cases finding that a public accommodations law did not unconstitutionally infringe on an organization's rights. After Minnesota applied its public accommodations law to the Jaycees, a young men's civic organization whose regular memberships were for men only,[295] the Court held that application of the law did not infringe on the Jaycees' rights because they were a large, unselective group and they could continue to engage in their expressive activity with women as members.[296] The Court then used almost identical reasoning in upholding the application of California's public accommodations act to the Rotary Club, a national service organization with an exclusively male membership.[297] The Court also found constitutional against a facial attack by a group of 125 private clubs and associations the New York City law requiring any public accommodation that "has more than four hundred members, provides regular meal service, and regularly receives payment from nonmembers for the furtherance of trade or business"[298] to have admissions policies that do not discriminate based on race, creed or sex.[299]

Lower courts have used this framework to assess whether voluntary sex segregated organizations can be forced to admit

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[294] *Id.* at 623–27.

[295] *Id.* at 612–13.

[296] *Id.* at 621–22, 627–28.

[297] Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544–49 (1987).

[298] New York State Club Ass'n v. City of New York, 487 U.S. 1, 6 (1988).

[299] *Id.* at 11–15. The Court noted that a particular organization may have a constitutional claim in an as as-applied challenge, rather than this broad facial challenge. *Id.* at 12–14.

women.[300] Courts have found no constitutional violation in state statutes that require the integration of women into the Boys Club,[301] the Bohemian Club,[302] a local fishing and hunting club,[303] Elks and Moose Lodges,[304] the Fraternal Order of Eagles,[305] a college fraternity[306] and a private golf club.[307] On the other hand, under this line of Supreme Court case law, no court has found that a public accommodations law that requires

[300] In two later cases before the Supreme Court involving groups rejecting participation based on sexual orientation rather than sex, the Court found that application of a public accommodations statute was unconstitutional because allowing gay people to participate in the Boston Irish-American parade and the Boy Scouts would infringe on the groups' expressive rights. *See* Boy Scouts of Am.erica v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995). For a critical look at the way these cases changed the law with respect to public accommodations laws and freedom of association, see generally ANDREW KOPPELMAN, A RIGHT TO DISCRIMINATE? HOW THE CASE OF BOY SCOUTS OF AMERICA V. DALE WARPED THE LAW OF FREE ASSOCIATION (2009).

[301] Isbister v. Boys' Club of Santa Cruz, Inc., 707 P.2d 212 (Cal. 1985).

[302] Bohemian Club v. Fair Employment & Housing Comm'n, 187 Cal.App.3d 1 (1986).

[303] Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination, 524 N.E. 2d 1364 (Mass. 1988).

[304] Franklin Lodge of Elks v. Marcoux, 825 A.2d 480 (N.H. 2003); Elks Lodges No. 719 v. Dep't of Alcoholic Beverage Control, 905 P.2d 1189 (Utah 1995). *Cf.* Human Rights Comm'n v. Benevolent & Protective Order of Elks, 839 A.2d 576 (Vt. 2003) (requiring further factual development to determine if rights are infringed).

[305] Fraternal Order of Eagles, Inc. v. City of Tucson, 816 P.2d 255 (Ariz. App. Ct. 1991); Lahmann v. Grand Aerie of Fraternal Order of Eagles, 121 P.3d 671 (Or. Ct. App. 2005).

[306] Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ., 502 F.3d 136 (2d Cir. 2007).

[307] Warfield v. Peninsula Golf & Country Club, 896 P.2d 776 (Cal. 1995).

women to be admitted to a sex segregated organization violates the constitutional rights of the organization.[308]

V. Theoretical Approaches to Sex Segregation

With such a wide variety of sex segregation still existing in the United States and varying analyses from different types of law and jurisdictions, the issue becomes how should law and society view sex segregation. Should it be allowed in all its current forms because the reprehensible and unequal forms of the past have been eliminated and what we are left with today reflects the truth that men and women are inherently different? Should it be expanded because current law and societal norms have taken sex equality too far, intruding into people's private choices about with whom they want to associate? Should more or all sex segregation be eliminated to achieve greater women's equality or gender blindness? Or is there reason to land somewhere in between?

The purpose of this Article's introduction to current forms of sex segregation is not to give a final answer to these questions. Rather, in this concluding section of this Article, I sketch six possible theoretical approaches to sex segregation that provide different, although overlapping, answers to the questions raised by sex segregation. Most, but not all, of the theoretical approaches discussed here are drawn from feminist legal theory. Loosely labeled, the theories I will discuss are: libertarianism, equal treatment, difference feminism, anti-subordination, critical

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[308] In *Donaldson v. Farrakhan*, 762 N.E.2d 835 (Mass. 2002), the Massachusetts Supreme Judicial Court found that application of the public accommodations law would infringe on the religious organization's rights to free expressive association. *Id.* at 839–41. However, that conclusion followed the court finding that the event was *not* subject to the public accommodations law. *Id.* at 841 ("The admittance of male members of the public to an otherwise nonpublic mosque meeting does not bring the event within the scope of the Massachusetts public accommodation law."). The court did not find that, although the law applied by its statutory terms, it was unconstitutional in its application.

race feminism and anti-essentialism.[309] These sketches are, by necessity, merely superficial descriptions of theories that have complex histories, often overlap and are vehemently contested. As I continue this project, for reasons that I have articulated before[310] and will develop further, I will approach sex segregation largely through the lens of anti-essentialism, but all of the approaches discussed here are important in thinking through sex segregation in its modern forms.

A. Libertarianism

Central to libertarianism are choice and free will. Under a libertarian approach to law, the law should stand back from regulating people's choices, allowing them to exercise their autonomy by freely choosing whatever path they wish.[311] Some feminists have adopted libertarianism as their preferred way of thinking about women's role in the law. Libertarian feminists "believe individuals, including women, make the best decisions for themselves and encourage women to 'vigorously oppose all special protections of women . . . as inherently infantilizing'."[312] This view of feminism could be grounded in the ideals of the free market[313] or in a natural rights philosophy that views women as having a natural right to autonomy that gives a woman the right to make choices "without the interference of others, including governmental entities who might try to deter

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[309] I do not intend or pretend to be exhaustive with this list of theoretical approaches. Feminist legal theory has almost as many strands of thought as writers in the field. *See* Cohen, *Title IX*, *supra* note 254, at 259 n.291; *see also* NANCY LEVIT & ROBERT R. M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 8 (2006) ("It is important to keep in mind that these are loose categories that help feminists manage discussion, not memberships into particular clubs.").

[310] *See* Cohen, *No Boy Left Behind?*, *supra* note 1.

[311] *See generally* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998).

[312] Ashlie Warnick, *Ifeminism*, 101 MICH. L. REV. 1602, 1608 (2003) (quoting LIBERTY FOR WOMEN: FREEDOM AND FEMINISM IN THE TWENTY-FIRST CENTURY 28 (Wendy McElroy ed., 2002)).

[313] Richard Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191 (1989).

her, provided her actions do not interfere with the rights of others and do not harm anyone."[314]

Important to libertarianism is that choices are made by autonomous individuals and that the government should not be concerned with the reasons behind the choices. Whatever background forces lead to a person's choice to pursue a certain interest or career, whether those forces are individual differences, societal norms or past discrimination, the person's choice is given the highest priority. As Justice Scalia noted dissenting from the Supreme Court's holding that a private affirmative action program to employ women in an industry that previously had none was permissible under Title VII, expanding anti-discrimination law into "the alteration of social attitudes, rather than the elimination of discrimination" is an enormous and unwarranted leap.[315] Libertarian legal scholars agree, arguing that men and women naturally make different choices, and the law should not try to change that.[316]

Libertarian feminism is not the most popular form of feminism in the legal academy since it is most linked to political conservativism, which is often at odds with feminism, but I put it here first because it has the most straightforward answer to one of the most pervasive forms of sex segregation. For voluntary sex segregation, libertarianism says that the government should not regulate how private entities sex segregate or how private individuals choose to group themselves. In other words, if men want to socialize, play sports or exchange business tips with other men to the exclusion of women, and if women want to do the same with other women to the exclusion of men, the government should not prohibit it.

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[314] Bernie D. Jones, *Single Motherhood by Choice, Libertarian Feminism, and the Uniform Parentage Act*, 12 TEX. J. WOMEN & L. 419, 446 (2003).

[315] Johnson v. Transp. Agency, 480 U.S. 616, 668 (1987) (Scalia, J., dissenting).

[316] *See* Richard A. Epstein, *Liberty, Patriarchy, and Feminism*, 1999 U. CHI. LEGAL F. 89 (1999); Warnick, *supra* note 312, at 1609 ("Women make choices as individuals, not as groups.").

For instance, David Bernstein argues that while sex segregation in private organizations causes real harms, freedom of association should be more important because, among other reasons, it enhances autonomy, is important to other liberties, benefits women as much as men and limiting it through anti-discrimination laws often creates more harm than benefit.[317] He uses the example of women's health clubs to illustrate his point. Millions of women are members of such clubs for a variety of personal reasons,[318] and an anti-discrimination law applied to them would mean that men would be permitted to join the clubs, disrupting women's ability to choose to exercise outside the presence of "ogling" men and without any real benefit served by integrating these clubs.[319] Libertarians thus argue that public accommodations laws should be read narrowly when applied to sex segregating organizations or, to take the position to the extreme, that such laws should not exist at all to prohibit sex segregation.

The same approach would lead to libertarians approving of permissive sex segregation. Although permissive sex segregation involves the government acting through affirmatively permitting sex segregation, libertarians would view this type of sex segregation in the same way. After all, permissive sex segregation gives people the choice of how to organize their interactions and relations, the ultimate goal of a libertarian approach.

Beyond this straightforward answer to voluntary and permissive sex segregation, libertarianism can overlap with other theories with respect to government action in the form of mandatory and administrative sex segregation. Libertarian feminists argue, as do equal treatment theorists described below,

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[317] David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 180–92 (1999).

[318] "Women frequently join women-only health clubs to avoid unwanted male attention, such as ogling, while they exercise. Abuse survivors, women who have had mastectomies, overweight women, and women with religious objections to working out in front of men are particularly receptive to single-sex facilities." *Id.* at 189.

[319] *Id.* at 189-92; BERNSTEIN, YOU CAN'T SAY THAT!, *supra* note 198, at 135–37.

that all law should do with respect to sex discrimination is ensure that it treats similarly situated men and women the same.[320] Of course, determining when men and women are "similarly situated" is the key and to the extent that libertarianism often overlaps with conservative theories of sex and gender, a libertarian view of sex segregation could sanction many forms of sex segregation as reflecting natural differences between men and women.[321] But that is not necessarily nor always the case, since libertarians and other types of feminists sometimes side with each other when it comes to government action that does not involve tricky questions of freedom of association, speech or religion.[322]

B. Equal Treatment

Equal treatment theory, sometimes also called formal equality, often works in conjunction with the libertarian view described above. Equal treatment theory draws on the liberal philosophy that government should treat likes alike.[323] Applied to feminism, the theory says that women and men should be treated the same by the government when they are similarly situated.[324] Also, group-based generalizations of how women are should not be the basis for treating individual women in a particular way.[325]

Equal treatment theory has been the dominant approach taken by the law with respect to women's issues. The theory was developed and applied to feminist issues by practitioners in the

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[320] Warnick, *supra* note 312, at 1608–09.

[321] *See, e.g.*, Epstein, *supra* note 316; Posner, *supra* note 313.

[322] The most common example is the opposition of laws relating to reproductive choice. *See* LIBERTY FOR WOMEN, *supra* note 312.

[323] As Catharine MacKinnon has summarized the theory, "[i]f one is the same, one is to be treated the same; if one is different, one is to be treated differently." CATHARINE A. MACKINNON, SEX EQUALITY 5 (2d ed. 2007).

[324] *See* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 79 (2006).

[325] LEVIT & VERCHICK, *supra* note 309, at 16.

1970s who were actively litigating the important cases of that era as well as reshaping statutory law to better reflect women's equality.[326] Then-attorney Ruth Bader Ginsburg led the way in arguing for the Supreme Court to adopt strict scrutiny, the same standard used for race discrimination, as the standard for analyzing sex discrimination under the Constitution. Although she never won that battle,[327] the Court's adopted standard of intermediate scrutiny attacks the problem of sex discrimination using the same basic theory—that men and women should be treated the same as long as they are similarly situated. The constitutional cases described above in which the Court allowed different treatment of men and women all relied on the proposition that men and women were not similarly situated.[328] Though those cases are controversial in that they allowed sex-based classifications under the Constitution and in that many dispute the premise that men and women were not similarly situated,[329] they are consistent with formal equality theory as their goal was to treat likes alike; they just found men and women were not alike in those contexts.

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[326] *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 35 (2d ed. 2003).

[327] She came close in *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which four members of the Court voted in favor of strict scrutiny. *See id.* at 687 (Brennan, J., plurality) ("With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."). However, they were never able to obtain the necessary fifth vote for the standard, and the Court ultimately adopted what has become known as intermediate scrutiny. *See* discussion *supra* notes 216–21 and accompanying text.

[328] *See* discussion *supra* notes 226–30 and accompanying text.

[329] *See* Rostker v. Goldberg, 453 U.S. 57, 86 (1981) *Rostker*, 453 U.S. at 86 (Marshall, J., dissenting) ("The Court today places its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women'." (quoting Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring)); Michael M. v. Superior Court, 450 U.S. 464, 496 (1981) (Brennan, J., dissenting) ("[T]he gender classification in California's statutory rape law was initially designed to further these outmoded sexual stereotypes, rather than to reduce the incidence of teenage pregnancies . . . .").

Of course, that is the central question in equal treatment theory and liberal feminism—when are men and women alike so that they should be treated alike? Conversely, when are men and women different so that they can be treated differently?[330] Equal treatment theory takes much different treatment off the board, but not all. In the context of sex segregation, now-Justice Ginsburg clearly displayed this tension in her opinion for the Court in *United States v. Virginia*. She stated that "supposed 'inherent differences'" are no longer accepted as a reason for discriminating based on race or national origin; however, for sex, there are "physical differences between men and women [that] are enduring" and that these "inherent differences" are "cause for celebration" and can be the basis for certain types of government action.[331] They can be used to remedy past discrimination, promote equality and "to advance full development of the talent and capacities of our Nation's people."[332] However, she did not list which differences between men and women fit into this category of differences that can be the basis for different treatment.

Stated in this form, equal treatment theory and liberal feminism leave a lot of space for sex segregation. The worst forms of sex segregation under law have been eradicated with the constitutional, statutory and societal changes of the 1960s and 1970s. Beyond that, mandatory and administrative sex segregation can remain as long as it is based on these "enduring" and "celebrat[ed]" physical differences between men and women and exist to further people's "talent and capacities." Though equal treatment theory may continue to question some of the current forms of mandatory and administrative sex segregation as inaccurately portraying men and women as different when

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[330] *See* HALLEY, *supra* note 324, at 79 ("For liberal feminists, the hard part is deciding what constitutes a legitimate purpose [for treating men and women differently].").

[331] United States v. Virginia, 518 U.S. 515, 533 (1996).

[332] *Id.*

they really are not,[333] the theory would largely accept the various forms of mandatory and administrative sex segregation that exist today.

As for permissive and voluntary sex segregation, equal treatment theory, in many ways, merges with libertarianism. As adopted by the Supreme Court, equal treatment theory is not concerned with non-government action, as the government is not acting in those situations.[334] Liberal feminism certainly would be more concerned with private sex segregation in important business areas as well as social areas that have expansive influence on people's lives, and liberal feminists have been strong proponents of anti-discrimination laws that reach public accommodations. But, they would not question the failure of these laws to reach too far into today's sex segregated world.

C. Difference Feminism

In response to equal treatment theory and liberal feminism, many feminists noted that gender-neutral laws and social norms did not result in equality for women. These feminists argued that women and men are inherently different in many important ways, from biology to psychology to morality, and that sex-neutral laws masked those differences, resulting in systems of discrimination continuing under the guise of equality.[335] The most widely associated theorist with difference feminism is educational sociologist Carol Gilligan, who wrote an influential book arguing that women have a "different voice" than men in that they have a more caring moral foundation.[336] Difference feminism also points to differences in women's biological roles as those who menstruate, are penetrated during heterosexual

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[333] The military's combat exclusion policy continues to come under attack by liberal feminists. *See, e.g.*, Martha McSally, *Women in Combat: Is the Current Policy Obselete?*, 14 DUKE J. GENDER L. & POL'Y 1011 (2007).

[334] *See* Cohen, *Title IX*, *supra* note 25442, at 260–62 (discussing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979), in the context of equal treatment theory).

[335] *See* LEVIT & VERCHICK, *supra* note 309, at 18–19.

[336] CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 69–71 (1982).

procreative sex, give birth and nurse newborns.[337] Gender-neutral laws that ignore these critical differences between men and women not only ignore women's unique role in society but also act to exclude women from participation in the larger world. Furthermore, according to difference feminism, these critical differences are to be celebrated because the theory is "dedicat[ed] to the propositions that women's feminine attributes amount to a consciousness or culture, that their consciousness or culture is improperly devalued, and that the reform goal is to revalue it upwards."[338]

The prime example of the distinction between difference feminism and equal treatment theory has come in the context of how the law should treat pregnancy. After the Supreme Court ruled in 1974 that discrimination based on pregnancy is not discrimination based on sex,[339] Congress responded by enacting the Pregnancy Discrimination Act of 1978 (PDA).[340] The PDA adopts an equal treatment approach to pregnancy, as it requires employers to treat pregnant women only as well (or as poorly) as the employer treats other disabled workers.[341] Without taking account of any unique burdens pregnancy may pose on workers, the PDA can inhibit pregnant workers and make it nearly impossible for them to stay employed if the employer's sex-neutral leave policy is insufficient.[342]

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[337] Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2–3 (1988).

[338] HALLEY, *supra* note 324, at 59.

[339] *See* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (describing "[Discrimination based on pregnancy as dividesing people] "into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.").

[340] 42 U.S.C. § 2000e (2011). The Pregnancy Discrimination Act applies only to Title VII employment discrimination cases, not to constitutional cases, so it does not overrule *Geduldig*'s constitutional holding.

[341] *Id.*

[342] *See* Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L. J. 929, 932–33 (1985).

In the wake of the PDA, California tried a different approach, requiring employers to give unpaid pregnancy leave and then reinstate workers who take the leave.[343] The challenge to California's law that reached the Supreme Court divided feminists, as equal treatment feminists lined up against the law while difference feminists lined up in favor of the law. The equal treatment feminists argued that treating women differently than men would continue inequality in the workplace because women would be seen as inferior. The difference feminists countered that ignoring the special needs of pregnant women was the true discrimination that would continue inequality because a significant number of women would be excluded from the workplace.[344]

This distinction between equal treatment theory and difference feminism has important implications for sex segregation. Difference feminism is more likely to see some forms of sex segregation as justified by women's inherent differences. Obviously discriminatory sex segregation that excludes women based on old-fashioned notions of women's role in society would still be prohibited, but other forms of segregation, whether mandatory, administrative, permissive or voluntary, that take account of women's differences and work toward equality through separation would be acceptable.

In fact, under difference feminism, some forms of sex segregation would be necessary to ensure women's equality. The clearest example of such necessary sex segregation according to difference theory would be in athletics. Although some scholars have argued that sex segregated athletics hamper women's desire to improve and ultimately compete with men,[345] many others have argued that such segregation, especially in the form of Title IX's allowance of sex segregated athletics in high schools and colleges, is the only way to ensure that women have the opportunity to participate in sports and receive all the benefits

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[343] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 276 (1987).

[344] *See* Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 280–81 (1998).

[345] *See, e.g.*, MCDONAGH & PAPPANO, *supra* note 4.

that come from athletic activity.[346] These scholars rely on difference feminism to make this claim that the path to women's equality is through understanding women's differences and that segregation under the law is part of the longer road to equality.

D. Anti-subordination

Whereas equal treatment theory and difference feminism battle over whether equality will be better attained by treating men and women the same or differently, anti-subordination theory looks at the problem through a different lens: power. Under this theory, most famously expounded upon by Catharine MacKinnon, the key inquiry in anti-discrimination law should be whether women are being subordinated to men:

> In this approach, an equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality, from the standpoint of what it is going to take to get it, is at root a question of hierarchy.[347]

This approach to equality would not only prohibit the state from creating hierarchy but also inquire whether actions the state takes further preexisting hierarchies that may not have been created by the state.[348]

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[346] *See, e.g.*, Michael A. Messner, *Sports and Male Domination: The Female Athlete as Contested Ideological Terrain*, *in* WOMEN, SPORT, AND & CULTURE 65, 75 (Susan Birrell & Cheryl L. Cole eds., 1990); Virginia P. Croudace & Steven A. Desmarais, Note, *Where the Boys Are: Can Separate Be Equal in School Sports*, 58 S. CAL. L. REV. 1425 (1985); O'Connor v. Bd. of Educ., 449 U.S. 1301, 1306 (1980) (Stevens, J., sitting as Circuit Justice).

[347] CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 40 (1987).

[348] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004) (noting that the antisubordination principle contains "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups").

Anti-subordination theory questions important concepts such as consent, choice and objectivity. Because these concepts, all vital to liberal theory, can be influenced by and abused based on power relations, anti-subordination theory rejects pleas to structure law around them. Instead, anti-subordination theory is concerned with ensuring that law remove inequalities and not structure itself around these abstract principles of liberal theory.[349] In that vein, anti-subordination theory would view actions taken to advantage women, the subordinated group, favorably, even if that requires disadvantaging men, the subordinating group.[350]

Early Supreme Court cases dealing with sex did not rely on anti-subordination principles, but more recently the Supreme Court has come closer to adopting this approach. In the sex segregation context, the Court's opinion in *United States v. Virginia* was grounded in part in anti-subordination theory. The Court noted that sex classifications can be used to compensate women for past discrimination but may not be used "to create or perpetuate the legal, social, and economic inferiority of women."[351] The Court also quoted favorably from a 1968 book about the academy stating that all-male colleges are difficult to defend because they are "likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay."[352] Scholars have written that *Virginia* marked a possible turn in the Court's

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[349] CHAMALLAS, *supra* note 326, at 47–49.

[350] *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1060–66 (1986) (arguing that courts should consider the impact of a sex classification to determine if it is remedial).

[351] United States v. Virginia, 518 U.S. 515 (1996).

[352] *Id.* at 535 n.8 (quoting C. JENCKS & D. RIESMAN, THE ACADEMIC REVOLUTION 297–98 (1968)).

sex discrimination jurisprudence by focusing on the way that discrimination against women results in subordination.[353]

Anti-subordination theory presents a relatively straightforward framework for evaluating sex segregation in any of the forms described in this article: does the segregation create or perpetuate the subordination of women? Sex segregation that does so should be forbidden, whereas sex segregation that does not, or better yet, sex segregation that works to counter the subordination of women, should be permissible. Although the framework is stated clearly, its application becomes difficult. For example, under this framework, scholars have argued about whether sex-segregated education is consistent with anti-subordination principles. Some scholars concerned with subordination have argued that sex-segregated education allows women and girls an opportunity to learn outside the confines of a repressive male environment and to make up for sex inequalities in education and society,[354] while others argue that it in fact just reinforces subordination by inevitably treating women and girls unequally.[355] Military sex segregation would also raise anti-subordination issues as the exclusion of women reinforces the denigration and subordination of women in other parts of the military as well as society as a whole.[356] Anti-subordination theory could also justify sex-segregated employment practices and athletics, as well as all-female organizations.[357]

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[353] *See, e.g.*, Denise C. Morgan, *Anti-Subordination Analysis After* United States v. Virginia*: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. L. FORUM 381, 415–17 (1999); Valorie Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women From Combat*, 57 ALA. L. REV. 303, 312–15 (2005).

[354] Morgan, *supra* note 353, at 453–58.

[355] Cynthia F. Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and The Citadel*, 4 DUKE J. GENDER L. & POL'Y 101, 101 (1997); Case, *supra* note 2523, at 1475–76.

[356] Vojdik, *supra* note 253, at 323–49.

[357] *See, e.g.*, Elisabeth Holzleithner, *Mainstreaming Equality: Dis/Entangling Grounds of Discrimination*, 14 TRANSNAT'L L. & CONTEMPORARY CONTEMP. PROBLEMS. 927, 939 (2005); Amy H. Nemko, *Single-Sex Public Education After VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 47–49 (1998); Feldblum, *supra* note 5, at 172–73.

E. Critical Race Feminism

Critical race feminism developed in response to the twin perceptions that feminism was leaving out race concerns and critical race theory was leaving out gender concerns.[358] Critical race feminists focus on the experiences of women of color, noting that other theoretical perspectives have left them out of the analysis. This theory challenges the notion that there is one essential conception of "woman" and critiques many feminist theories as paying "insufficient attention to the central role of white supremacy's subordination of women of color, effectuated by both white men and women."[359] Critical race feminism draws on other critical legal theories that challenge the idea that laws are neutral and objective and instead posits that laws "are actually ways that traditional power relationships are maintained."[360]

Framed this way, it might be hard at first to understand what critical race feminism has to say about sex segregation. After all, the sex segregation at the center of this project differentiates solely based on sex. Men of all different races are separated from women of all different races. By their very nature, these laws and societal institutions do not differentiate among, for instance, black and white men or Asian and Latina women.

However, critical race feminism requires the interrogation of what appears at first to be universal and forces us to focus on how sex segregation has different meanings, histories and effects based on race, particularly for women of color. This important insight is most apparent in the context of sex-segregated education. In fact, sex-segregated education in the Northern

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[358] Adrien Katherine Wing, *Introduction* to CRITICAL RACE FEMINISM: A READER 2 (Adrien Katherine Wing ed., 2d ed. 2003) (describing critical race feminism as developing because "existing legal paradigms have permitted women of color to fall between the cracks, so that they become, literally and figuratively, voice-less and invisible under so-called neutral law or solely race-based or gender-based analyses").

[359] *Id.* at 7.

[360] LEVIT AND VERCHICK, *supra* note 309, at 27.

parts of the United States has its origins in race, class and immigration based concerns, as "single-sex schools [originally emerged to] assuage[] nativist fears about mixing with immigrants and middle-class aversion to the 'rough' ways of poor boys and girls."[361]

Sex segregation in education also has a more modern link to race segregation. That *Brown v. Board of Education*[362] led the way toward the evisceration of Jim Crow is well-known. What is less known, however, is the relationship between the end of race-segregated schools and sex segregation. Serena Mayeri has written a lengthy history of the connection between the two, explaining how, in the wake of court-ordered desegregation, many school districts implemented sex segregation as a way of maintaining white supremacy.[363] The districts did so in part out of fear of interracial sex and marriage.[364] The fear was largely driven by the concern of protecting white females from black males, but the fear also was influenced by negative stereotypes of black females who, with their "hypersexuality," needed to be kept away from white males.[365] These stereotypes of men and

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[361] Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J. L. & HUMAN. 187, 257 n.338 (2006) (citing DAVID TYACK & ELIZABETH HANSOT, LEARNING TOGETHER: A HISTORY OF COEDUCATION IN AMERICAN PUBLIC SCHOOLS 95 (1992)).

[362] 347 U.S. 483 (1954).

[363] *See* Mayeri, *supra* note 361.

[364] *Id.* at 193.

[365] *See* Verna C. Williams, *Reform or Retrenchment?: Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 68; Note, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296, 300 (1970) (noting that one of the purposes of race segregation was the "desire to keep black men from white women, and, to a lesser extent, white men from black women").

women of color are at the heart of a critical race feminist response to sex segregation.[366]

Critical race feminists are also acutely aware of the inequalities visited upon women of color in the name of sex segregation. Verna Williams has demonstrated how the rhetoric and implementation of modern sex-segregated education has focused on improving the lives of black men while at the same time blaming black women for the problems black men face.[367] In fact, Detroit's ignoring of the problems faced by black girls was one of the reasons the federal district court found the city's proposed all-boy Afrocentric academies unconstitutional.[368]

Thus, critical race feminism has an important insight to add to theorizing a response to sex segregation. Mandatory or administrative sex segregation needs to be closely scrutinized to determine whether it merely perpetuates race-based inequalities and stereotypes and to determine if particular harms are being visited upon women of color. Moreover, permissive and voluntary sex segregation would be subject to a similar inquiry into whether such segregation is a more socially palatable way to continue the separation of the races and to maintain inequalities.

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[366] *See* Jack M. Balkin, *Is There a Slippery Slope From Single-Sex Education to Single-Race Education?*, 37 J. OF BLACKS IN HIGHER EDUC. 126, 127 (2002) (noting that sex-segregated education in urban populations "can also unwittingly become a method of preserving traditional gender roles for women"); Cohen, *No Boy Left Behind?*, *supra* note 1, at 158 ("[T]he stories about the educational reforms also play into the stereotype of the aggressive African-American male.").

[367] Williams, *supra* note 365, at 68–71.

[368] Garrett v. Bd. of Educ., 775 F. Supp. 1004, 1007–08 (E.D. Mich. 1991) ("There is no evidence that the educational system is failing urban males because females attend schools with males. In fact, the educational system is also failing females."); *see also* Devon W. Carbado, *Introduction* to BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 1, 7 (Devon W. Carbado ed., 1999) (describing the ways in which these academies, by focusing on making "strong Black men" ignored "the degree to which Black girls are [similarly troubled]").

F. Anti-essentialism

One of the key theoretical moves contributed by critical race feminism is to attack what is called essentialism. Critical race feminism claims that other forms of feminism rely on the idea that the category "woman" represents all women, without taking into account any differences of race, class, sexual orientation or other identity factors.[369] In that sense, critical race feminism is a form of anti-essentialism.[370]

However, for the purposes of this analysis, the anti-essentialism that I am referring to here, and largely adopting as this project digs deeper into sex segregation,[371] goes further and argues that sex and gender categories fail to take account of the complexity and multiplicity of human identity and difference. In fact, it is the existence and imposition of these categories that work to construct identity and difference, rather than merely reflecting difference.[372] Anti-essentialism relies on the observation that *within* the socially-determined categories of "men" and "women," there is more variation than exists *between* the two constructed categories.[373] By confining people to those categories, societal institutions and discourses work to constrain identity and limit freedom.

Anti-essentialism is not merely a theory about identity but is also about how societal forces work to impose identity upon people in ways that further hierarchy. Through subtle forms of differentiation in society and law, sex and gender hierarchies are created, perpetuated and normalized. These essentialist

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[369] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 589–90 (1990).

[370] Wing, *supra* note 358, at 7.

[371] *See* Cohen, *Keeping Men "Men,"* *supra* note 6.

[372] MARY J. FRUG, POSTMODERN LEGAL FEMINISM 18 (1992) (discussing how identity is "multiplicitous, shifting, socially constructed"); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1050 (1996) ("Feminists drawing on postmodernism want to avoid unitary truths and acknowledge multiple identities.").

[373] *See* Hyde, *supra* note 65.

conceptions of gender tend to reinforce power differentials between men and women as well as "patriarchal assumptions about women as a group."[374] They also work to reinforce power differentials among men, so that certain types of men, those that hew to a dominant form of masculinity, are empowered, and other men, those who challenge or fail to conform to this dominant masculinity, are pressured into conforming or, if they do not, are ostracized and/or persecuted.[375]

Disaggregating the concepts of sex and gender is key to anti-essentialism.[376] Under an essentialist view of sex and gender, men are or should be masculine and women are or should be feminine. Biology determines behavior, so the link is required. Anti-essentialism disentangles the concepts, even going so far as to challenge the idea that there is any one masculinity or femininity that exists.[377] Anti-essentialism views characteristics of individuals as just that, individual characteristics; the characteristics should not be labeled as more appropriate for one sex than the other. In this sense, anti-essentialism might sound very similar to equal treatment theory

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[374] Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 99 n.47–48 (1996).

[375] *See* Cohen, *No Boy Left Behind?*, *supra* note 1, at 168–74.

[376] *See* Case, *supra* note 16; Francisco Valdés, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALF. L. REV. 1 (1995).

[377] Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305, 1317 (1998) ("Separate gendered spheres, however open to persons of both sexes, increase the risk of reifying current definitions of masculine and feminine, which I would prefer had more room to develop, even to disappear.").

and the quest to break down sex-based stereotypes.[378] However, unlike equal treatment theory, which accepts some differences between men and women, anti-essentialism calls into question virtually all stereotypes and categories associated with sex and gender as the product of socially-imposed categorization. Anti-essentialism ultimately argues that this socially-imposed categorization not only restricts identity but also furthers hierarchy.

Under anti-essentialism, sex segregation becomes almost irredeemably suspect. A form of anti-essentialism that focuses exclusively on the government's role in creating and maintaining distinctions based on sex and gender would urge the government to get out of the business of sex segregating in almost all circumstances.[379] Mandatory and administrative sex segregation in prisons, bathrooms, schools, athletics, the military and elsewhere has the same effect of creating and reinforcing notions of sex and gender essentialism and of sorting individuals into two categories that have different abilities to access power. Broader forms of anti-essentialism would look deeper into societal institutions that also function this way, through permissive or voluntary sex segregation, and urge government to withdraw its permission for sex segregation and instead prohibit many of the current voluntary forms. Though not the government segregating people by sex, these institutions wield similar power to construct and limit people's identities based on

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[378] Anti-essentialism has been criticized in this vein as having "no limiting principles to prevent minority groups from being deconstructed until all that remains are disunited and atomized individuals themselves." Sumi Cho & Robert Wesley, *Critical Race Coalitions: Key Moments that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1416 (2000); *See also* Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 42 (2001) (stating that a "feminist theory that destabilizes the category of women until it has become entirely indeterminate in theory sacrifices the ability to locate and contest existing societal standards adapted to fit the profile of men"). To escape this problem, Maxine Eichner recommends a legal theory that, instead of denying that a socially-understood category "women" exists, focuses "on both reducing the import of gender and on creating the legal conditions that ensure that people are offered an array of identities that depart from dominant gender images." *Id.* at 47.

[379] *See, e.g.*, David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002).

sex and gender distinctions that do not accurately map onto people's true identities.[380]

CONCLUSION

Despite major advances in sex equality law and norms, sex segregation is not a thing of the past in this country. In fact, as I have argued in this article, thanks to changes in the law allowing more sex segregation in education as well as new scientific developments that have been used to justify viewing men and women as inherently and irremediably different, sex segregation should once again be at the forefront of a feminist agenda for equality.

The various ways in which law and society continue to sex segregate that are catalogued in this article affect people in almost every aspect of their lives. Though much of our life is integrated based on sex, we routinely encounter institutions, spaces, events and organizations that sex segregate, reminding us that anatomy matters. Whether it should matter and to what extent it should matter is the subject of vigorous debate within various theories of equality and feminist thought. Though I do not reach any definitive answers with respect to sex segregation in this article, in future works I adopt the framework of the anti-essentialist position sketched above. As concluding thoughts for this Article, I sketch here some of my ideas, both developed and to-be-developed, about what this anti-essentialist position means for sex segregation.

In another article, I have argued that modern sex segregation is one of the central ways that law and society define and construct who is a man and what it means to be a man.[381] In this vein, sex segregation sends two important messages: one, that there are distinct categories of people based on reproductive anatomy and that these anatomical distinctions are a legitimate way of organizing and sorting people; and two, that people with the reproductive anatomy labeled "male" are supposed to behave in a certain way. These messages produce distinct harms for

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[380] *See* Cohen, *No Boy Left Behind?*, *supra* note 1, at 185–86.

[381] *See generally* Cohen, *Keeping Men "Men,"* *supra* note 6.

women, who are often subordinated to men based on these differences and characteristics, as well as men, both men who conform and do not conform to the expected notions of masculine behavior. Ultimately, using anti-essentialist theory as it relates to gender and masculinity, I argue that the various forms of sex segregation detailed in this article help create and perpetuate a particular form of dominant masculinity, what theorists call hegemonic masculinity. They also substantially contribute to the dominance of men over women and non-hegemonically masculine men, what other theorists call the hegemony of men. In both ways, sex segregation contributes to an essentialized view of what it means to be a man—both in the attributes associated with an idealized manhood and the power ascribed and available to men.

Sex segregation thus has serious ramifications for liberty and equality. This is true in other contexts as well. For transgender, intersex and gender non-conforming individuals, the world of sex segregation can be a troubling and dangerous place to live.[382] Men and women who do not fit gender norms, either in a particular way they carry themselves or in their sex-ambiguous genitalia or in their efforts to change from one sex to the other, are often misclassified, fired, abused or worse. These individuals acutely feel the sting of a system that relies on essentialist notions of how men and women are supposed to be. Much more work needs to be done to explore issues related to gender variance and sex segregation, but the basic principles of anti-essentialist theory provide clear guidance about the problems.

Women are often excluded from particular activities and subject to stereotypes about their interests and abilities; however, at the same time, women frequently take advantage of sex segregation as a way to fight against past discrimination, showcase their own talents without competition from men, or to escape from patriarchy and the violence and discrimination associated with it. People of color face different issues with sex segregation as well, as there is a long history connecting sex

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[382] *See* Cohen, *Sex Segregation, Masculinities, and Gender Variant Individuals*, *supra* note 7.

segregation to race segregation. Moreover, sex segregation raises issues of stereotyping based on the intersection of race and sex.

Because of its dual attack on inequality and stereotyping, the anti-essentialist approach to understanding and responding to sex segregation can best capture the various ways that sex segregation touches on people's lives. As I and hopefully other scholars explore this topic further, this approach may not prove to have all the answers, but I believe it will point us in the right direction for many of the questions.

But this Article is more modest at this point, as it tries to lay the groundwork for these future endeavors. Without first understanding the extent and context of sex segregation in the United States, we cannot fully explore and answer these other important issues, nor can we reach a definitive conclusion about sex segregation's status under the law.