SINGLE-SEX EDUCATION: PROMOTING EQUALITY OR AN UNCONSTITUTIONAL DIVIDE?

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The United States Supreme Court has examined the constitutionality of single-sex public schools in the context of higher education on two occasions, finding both times that the institutions at issue violated the Equal Protection Clause of the Fourteenth Amendment. The standard of review applicable to gender classifications such as that involved in single-sex education is "intermediate scrutiny," which requires the State to articulate an important governmental objective, and to show that the single-sex program is substantially related to achieving that objective. In light of this standard, the author examines the constitutionality of several modern day single-sex public elementary and secondary schools across the United States, and provides recommendations as to how those institutions may be able to survive any future constitutional challenges.

I. INTRODUCTION

Public education segregated by either race or gender is commonly thought to be a thing of the past. Sociologists, educators, and feminists, however, have vigorously taken up the issue of single-sex education in recent years.[1] In large metropolitan cities such as New York, Detroit, Chicago, and Denver, single-sex learning environments are springing up in the public-school setting in various formats.[2] Ranging from single-sex classrooms within coed schools to single-sex schools with no equivalent school for the excluded gender, these new environments are becoming the subjects of heated constitutional and social debate as they appear with increasing frequency across the country.

1. *See generally* Judith Kleinfeld, *Student Performance: Males Versus Females*, PUB. INT., Jan. 1, 1999, at 3 (discussing the recent swell in favorable public opinion toward single-sex education, particularly for females, and whether such sentiment is well founded); Lee Lewin, *Single-Gender Education Reduces Conflict, Raises Excitement*, SANTA FE NEW MEXICAN, Aug. 13, 2000, at B-28 (setting forth various educational and behavioral justifications for single-sex learning environments).

2. *See* Steve Chapman, *Separating Boys and Girls in the Classroom*, CHI. TRIB., Oct. 3, 1999, at 21; *In Chicago, Girls Get a Public School of Their Own*, N.Y. TIMES, Aug. 27, 2000, § 1, at 16; Brian Weber, *ACLU Probes Single-Sex Classrooms, Group Wants to Determine Whether Practice Is Harmful*, DENV. ROCKY MOUNTAIN NEWS, Mar. 26, 1999, at 4A.

Critics have invariably raised questions as to the constitutionality of such gender restrictions;[3] however, the Supreme Court has not yet specifically addressed the validity of single-sex public schools for grades K–12.[4] Although *Brown v. Board of Education* made it clear that a "separate but equal" standard in education would not pass constitutional muster in terms of racial equality,[5] such a standard may be acceptable in a gender milieu. Furthermore, the Supreme Court has examined gender restrictions in the context of higher education,[6] but secondary and elementary education remain an open question. If and when the Supreme Court considers the constitutionality of single-sex public elementary and secondary schools, it is unclear whether the Court will adopt a standard similar to that applied to higher education or if it will craft a whole new approach to the analysis.

The background section of this note contains a brief look at the preeminent sociological arguments underlying both sides of the current controversy. Then, Part A of the analysis begins an examination of somewhat analogous case law that is helpful in determining the constitutionality of emerging educational models. No Supreme Court decision is directly on point, so analogy to similar cases is essential. In Part B, the note will set out a few of the various models school boards have instituted in cities across the United States, and examine these in light of the constitutional standards and underlying social considerations previously set forth. Finally, the note will suggest possible constitutional solutions to the current gender concerns facing public schools today.

II. BACKGROUND—THE LINES ARE DRAWN

Although the concept of separate education for men and women has been a familiar one in this country since the first all-female academies appeared in the early 1800s,[7] single-sex education has taken a new place at the forefront of educational and psychological research and scholarly discussion in the past decade.[8] This phenomenon is largely attributable to a 1992 report by the American Association of University Women (AAUW) entitled, *How Schools Shortchange Girls: A Study of Major Findings on Girls and Education*.[9] The report was widely publi-

3. *See generally* Fred Kaplan, *Storm Gathers over a School in Flower; Rights Groups Oppose Girls-Only Policy*, BOSTON GLOBE, Feb. 23, 1998, at A1 (discussing critics' allegations of the illegality of the Young Women's Leadership School in East Harlem, New York).

4. *Id*. (quoting Harvard Law School Professor Laurence Tribe, "The Constitution is up in the air.").

5. 347 U.S. 483, 493 (1954).

6. *See* United States v. Virginia, 518 U.S. 515 (1996).

7. *See* Wendy Kaminer, *The Trouble with Single-Sex Schools*, ATLANTIC MONTHLY, Apr. 1998, at 22 (noting that these new academies "reflected a commitment to traditional gender roles, which reserved the public sphere for men, they reinforced a nascent view of women as potentially reasonable human beings—endowed with the attributes of citizenship").

8. *See* Kleinfeld, *supra* note 1, at 3.

9. *Id*.

cized and created a stir among parents and educators alike, and "[w]hile a few voices challenged the report's findings . . . the mainstream media for the most part ignored dissenting views."[10]

The 1992 report contained three principal findings: first, in the areas of science and mathematics, girls lag behind boys; second, girls behave passively in classrooms (and are "silenced"), whereas boys actively participate; and third, the self-esteem of girls tends to decline during adolescent years while that of boys rises.[11] The report found gender discrimination by teachers, textbooks, and male students.[12] The AAUW Executive Summary of the report states, "The educational system is not meeting girls' needs. Girls and boys enter school roughly equal in measured ability. Twelve years later, girls have fallen behind their male classmates in key areas such as higher-level mathematics and measures of self-esteem."[13]

The 1992 report became the impetus for reform in elementary and secondary education, and public schools in such states as New York, Virginia, Maine, New Hampshire, Illinois, and California began creating single-sex classes or all-girls schools.[14] These schools defend their existence by specific findings in the AAUW report that teachers tend to pay more attention to boys than girls and that girls do not receive the same encouragement as their male counterparts.[15]

Loud voices cry out on both sides of the controversy. Some support giving girls a place of their own while others demand that kids of both genders stay together. Both camps justify their positions on legal, sociological, and pedagogical grounds. This note will examine the preeminent arguments on each side.

A. What the Supporters Are Saying

Proponents of single-sex education, particularly for girls, focus on the increased opportunities for leadership that such schools offer.[16] The argument goes like this: males in a mixed-gender classroom tend to participate more often and more enthusiastically than girls; teachers permit and perhaps encourage this behavior, which may even be considered "over-participation"; the girls continue to become more and more marginalized throughout the elementary and secondary education stages, gradually losing the desire to participate in academic discourse or excel

10. *Id*. at 4.
11. *Id*.
12. *See* Tamar Lewin, *All-Girl Schools Questioned as a Way to Attain Equity*, N.Y. TIMES, Mar. 12, 1998, at A12.
13. *See* Kleinfeld, *supra* note 1, at 4.
14. *See* Lewin, *supra* note 12.
15. *See* Connie Leslie & Claudia Kalb, *Separate and Unequal?*, NEWSWEEK, Mar. 23, 1998, at 55.
16. *Id.*

as academic leaders.[17] The balance of power evens out, however, when girls get their own playing field.[18] "[G]irls also get to lead. They get 'floor' time, feedback, coached leadership practice, and exposure to female spokespersons."[19] In fact, all the school leaders, from class president to soccer team captain, are girls by necessity.[20]

Other supporters contend that girls need particular attention and direction during their adolescent years, a time when many may have questions or concerns about their own development.[21] In a mixed-gender environment, girls tend to withhold such curiosities.[22] An all-girls classroom allows girls to give each other guidance in an open and uninhibited fashion.[23] The girls become more confident in themselves as they mature into adulthood.[24] As a result, instead of being worried that boys will not ask them out because they are too smart, girls feel free to participate in class and let their intelligence shine.[25]

Furthermore, underprivileged families see single-sex public schools as a chance for their children to receive the same educational opportunities as children in wealthy families.[26] The single-sex system has existed for years in the private school context, but high costs prevent many young people from attending.[27]

B. A Few Words from the Opposition

Meanwhile, avid opponents of single-sex schools, including individuals and organizations such as the National Organization for Women (NOW) and the American Civil Liberties Union, have a number of arguments against single-sex schools.[28] Some critics draw parallels between gender segregation and racial segregation, finding the former no more

17. *See* Catherine G. Krupnick, *Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 155, 161 (1997).

18. *See id.* at 162.

19. *Id*. (comparing the reactions of female students in a mixed-gender class with those in a single-sex class when approaching the dinosaur exhibit in the lobby of the Museum of Natural History in New York: in the coed class, girls stood on the outside of the class group and whispered to each other; in the all-girls class, the girls' reactions were more similar to those of the boys in the coed class—engaged, speculative, and enthusiastic).

20. *See* Leslie & Kalb, *supra* note 15, at 55.

21. *See* Lela Garlington, *Campus's Single-Sex Classrooms Engender Overall Early Delight*, COM. APPEAL, Feb. 12, 2001, at A1.

22. *Id*.

23. *Id*.

24. *Id.*

25. *See* Richard Vara, *Just Us Girls; Parents, Educators and Even ACLU Debating Merits of Single-Gender Schools*, HOUS. CHRON., Oct. 19, 1997, (Lifestyle), at 1.

26. *See* Kaminer, *supra* note 7, at 25 (noting, however, that children of the rich may not actually benefit from this form of education: "[T]he tendency of some affluent parents to choose single-sex schools is not evidence that single-sex education provides advantages for girls. The traditions of the rich, such as coming-out parties, are not necessarily progressive.").

27. *See id.* at 22–25.

28. Christine B. Whelan, *Singles*, NAT'L REV., Sept. 14, 1998, at 34–36.

acceptable than the latter.[29] Gael Sherwin, former president of NOW, found a parallel of her own—rape.[30] In response to the argument that girls should be taken out of coed schools to avoid gender discrimination, she responded, "It's like when a woman is raped on the street, some people say, 'Don't walk on the street.' The real answer is to make the streets safe." [31]

Others point to specific adverse effects an isolated, single-sex environment may generate for women. First of all, "it promotes the idea that all women share a common experience" and cannot think like or relate to men around them.[32] This line of thinking tends to undermine the positions advocated by women struggling for gender equality.[33] Secondly, single-sex classrooms create the appearance "that women are too weak to handle confrontation and intellectual challenge—which only reinforces sexist ideas about women's inferior intellect."[34] A third argument against sex separatism is that it may inadvertently lead to increased sexual objectification of women.[35] When men interact with women (or boys with girls) in situations where both work together as colleagues, they are less likely to view women as mere objects of desire.[36] If the element of classroom mingling is removed, however, men may have fewer opportunities to see women as intelligent equals.[37]

Michael Meyers, former executive director of the New York Civil Rights Coalition, points to another problem in some single-sex environments—the self-fulfilling prophecy.[38] When girls are singled out and educated in a school with pink walls, then taught how to sip tea and eat croissants, as happens in the Young Women's Leadership School in East Harlem, New York, the gap between boys and girls artificially widens.[39] Boys are discouraged from wanting to be a part of this environment while girls are herded into it.[40] A researcher observing the Harlem school found a unique sort of sexism being perpetuated—"academic dependence and nonrigorous instruction."[41] For example, in a girls' chemistry class, "undue attention was paid to neatness and cleanliness as well as to drawing parallels between domesticity and chemistry activities."[42]

29. Kaplan, *supra* note 3.
30. *Id*.
31. *Id*.
32. Leora Tanenbaum, *'Safe Space' Not the Greatest Idea in Education*, FORT WORTH STAR-TELEGRAM, Sept. 5, 1999, at 5.
33. *Id*.
34. *Id*.
35. Kaminer, *supra* note 7, at 36.
36. *Id*.
37. *Id*.
38. Michael Meyers, Editorial, *All-Girls, All-Boys Schools Are Not the Answer*, BOSTON GLOBE, Mar. 23, 1998, at A13.
39. *Id*.
40. *See id*.
41. Kaminer, *supra* note 7, at 34.
42. *Id*. (quoting Valerie Lee, professor of education at the University of Michigan).

Critics say the all-girls school system instills "stereotypical notions of femininity . . . [and] discourage[s] competition with males."[43] In turn, it "encourage[s] heterosexual women and girls to separate their social and intellectual lives, reinforcing the dissonance bred into many achievement-oriented females."[44]

C. Recent Developments

The already fiery debate heated up when the AAUW released a follow-up report in 1998.[45] The new report, *Separated by Sex: A Critical Look at Single-Sex Education for Girls*, was meant to create an informed, national discussion on single-sex education.[46] The foundation brought together sixteen of the most outstanding researchers in the country and examined two decades worth of research studies, eventually concluding "that single-sex education is not the solution to gender inequity in school."[47]

According to the new study, girls can succeed in coed schools when the elements of good education are present: teachers include and engage all students, curriculum is challenging, class sizes are small, parents are involved, and teachers are inspired and work collaboratively.[48] The report found that boys could succeed in the same environment.[49] Furthermore, "[a]lthough many girls apparently prefer [all-girls math and science] classes, and report greater confidence and better attitudes about those traditionally male subjects, they do not emerge with measurably better skills."[50] According to the report, "[s]ome studies, in fact, report diminished achievement."[51] Any higher level of achievement that *was* found by researchers in single-sex settings involved all-girls schools, not merely a single-gender class in a coed school.[52]

Maggie Ford, former president of the AAUW Educational Foundation, has pointed out that the 1992 report did not advocate single-sex education, despite many interpretations of the report to that effect.[53] At

43. *Id*.

44. *Id*.

45. *See* Leslie & Kalb, *supra* note 15, at 55.

46. *See* Maggie Ford, Editorial, *Gender-Bias Study Does Not Advocate Single-Sex Education*, WASH. TIMES, May 19, 1999, at A18.

47. *See id*. (attempt by the president of the AAUW Educational Foundation to clarify misconceptions about the 1998 report).

48. *See* Leslie & Kalb, *supra* note 15, at 55; *see also* Lauren Cowen, *A Class of Their Own*, CHI. TRIB., Oct. 1, 2000, § 10 (Magazine), at 12.

49. *See* Leslie & Kalb, *supra* note 15, at 55; *see also* Cowen, *supra* note 48.

50. Lewin, *supra* note 12.

51. Gale Holland, *All-Girl Classrooms Don't Help, Women's Group Says*, USA TODAY, Mar. 12, 1998, at 1A.

52. *See* Leslie & Kalb, *supra* note 15, at 55. *But see* Lewin, *supra* note 12 (noting that the higher results for all-girls schools could generally be explained away when considerations such as prior academic achievements, family socioeconomic status, curriculum difficulty level, and admissions requirements of the particular school were taken into account).

53. Ford, *supra* note 46.

the time, the AAUW was merely open to the idea of experimentation in the arena of single-sex education.[54] Although the foundation still supports experimentation, since the release of the 1998 report, the AAUW seems to be focusing on both genders and the improvement of coed public schools for all students.[55]

In October 1998, the AAUW issued a third report relevant to this controversy.[56] The report, *Gender Gaps: Where Schools Still Fail Our Children*, was meant to evaluate the progress that had been made since the issuance of the 1992 report.[57] Researchers reported that although the gap between boys' and girls' achievements in math and science had narrowed, girls continued to lag behind in computer usage and computer courses taken, creating a "technology gap."[58]

Between the 1992 and 1998 reports, high school girls' enrollment increased in honors and advanced placement calculus and chemistry, but boys were still more likely to take advanced courses.[59] In addition, by 1998, girls and boys were taking approximately the same number of math and science classes, but boys were more likely to take all three core science courses—chemistry, physics, and biology—during high school.[60]

Despite the modest gains in the areas of math and science, the report found that girls lag tragically behind in the number of computer science and computer design courses taken.[61] Even when girls do take a computer course, it tends to be a word processing or data entry class.[62] The report pointed to a lack of female role models in the field as part of the problem.[63] Although the report did not attempt to solve this new wave of gender problems plaguing schools today, it did argue that "gender equity is crucial to achievement for all students. . . . Adopting high standards for all students must go hand in hand with realizing equity in the classroom."[64]

While the foregoing brief treatment has, by necessity, left out the viewpoints of dozens of researchers and educators, it does reflect the main contentions of those on both sides of the single-sex education debate. The resolution, however, does not lie in the hands of these parties alone; constitutional and statutory law also play key roles. Thus, it is necessary to introduce these elements into the mix and examine cur-

54. Holland, *supra* note 51.
55. *See id*.
56. *See* Monica C. Fountain, *New Gender Gap Emerges in Schools: Girls Do Not Compute*, CHI. TRIB., Nov. 1, 1998, Womanews, at 1.
57. *See id*.
58. *Id.*
59. *Id*. (noting also that boys regularly score higher and pass the advanced-placement exams in most subjects in higher numbers than girls).
60. *Id*.
61. *See id*.
62. *See id*.
63. *See id*.
64. *Id*.

rently used single-sex education models in light of the legal and social considerations they implicate.

III. ANALYSIS

A. Developing a Body of Law

In *Brown v. Board of Education*, the Supreme Court examined the practice of racial segregation in public schools, in light of the Equal Protection Clause of the Constitution, when substantially equal educational facilities were available for all races.[65] The Court noted, "Here, . . . there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[66] Nonetheless, despite the apparently equal learning environments, the Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place," and that such segregation is contrary to the mandate of equal protection of the laws.[67] But despite the sweeping language of the Court in *Brown*, subsequent courts have limited its application to racial segregation.[68]

In *Heaton v. Bristol*, plaintiffs were women who were qualified academically, morally, and physically to obtain admission to the Agricultural and Mechanical College of Texas, but were denied admission because they were female.[69] Plaintiffs sought admission to the all-male school because it was more convenient and less expensive than other state-supported institutions of higher learning.[70] The court used a rational relationship standard to determine if the gender-based classification could

65. 347 U.S. 483 (1954). The Equal Protection Clause, Amendment XIV, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

66. *Brown*, 347 U.S. at 492.

67. *Id*. at 495.

68. *See* Vorchheimer v. Sch. Dist., 430 U.S. 703 (1977), *aff'g* 532 F.2d 880, 886 (3d Cir. 1976) ("We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law.").

69. 317 S.W.2d 86, 87 (Tex. Civ. App. 1958). The court found inconsequential the finding that the existence of educational opportunities at a women's university in Texas "forms no rational reason for exclusion" from the Agricultural and Mechanical College of Texas. *Id*. at 89. The court also reached its decision despite the finding that the "exclusion of women . . . does not in any wise promote the welfare of the people of Texas . . . , but on the contrary it discriminately deprives half of the citizens of Texas of an education at the third largest State supported institution of higher learning in the State of Texas." *Id*.

70. *See id*. at 92–93.

withstand scrutiny under the Equal Protection Clause.[71] Because the plaintiffs indisputably had opportunities to attend seventeen other state-supported institutions, the court found "conclusively that appellees' exclusion from the College was not violative of any of their constitutional rights."[72] In its analysis, the court pointed out the drastic reorganization of facilities that would be necessary, along with the overcrowding and other "vexing problems" the Board of Directors would face if the school was required to admit women.[73]

In *Reed v. Reed*, the Supreme Court examined the constitutional validity of an Idaho statute giving males preference over females to serve as administrators of a deceased child's estate.[74] The preference operated without reference to an individual male or female's qualifications to be an estate administrator.[75] The Court held that "the arbitrary preference established in favor of males by . . . the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction."[76] The standard used by the Court was a modified and more detailed rational relationship test.[77] Although the Court found that the statute served a legitimate state objective by reducing the burden involved in the resolution of administrator appointment cases, the statute furthered that objective in a manner inconsistent with the Equal Protection Clause.[78] "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ."[79]

By 1975, a number of standards for determining the validity of sexual classifications had emerged, most of which were variations of the rational basis test.[80] The opinion issued by the United States District Court for the Eastern District of Pennsylvania in *Vorchheimer v. School District*

71. *See id.* at 99. Under the rational relationship standard, a law "will be sustained by the courts unless it is wholly without any reasonable basis." Middleton v. Tex. Power & Light Co., 185 S.W. 556, 561 (Tex. 1916).

72. *Heaton*, 317 S.W.2d at 99.

73. *See id*. at 98.

74. 404 U.S. 71, 72–73 (1971).

75. *See id*. at 74.

76. *Id*.

77.

> The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Id. at 75–76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

78. *Id.* at 76.

79. *Id*.

80. *See infra* note 82 and accompanying text.

of Philadelphia is illustrative of the murky water in which sexual classification was immersed.[81] The court summarized the uncertainty as follows:

> One interpretation . . . is that sexual classifications cannot be used merely to achieve administrative efficiency or economy, but they may be used to further other, more substantive state interests. . . . A second possible interpretation is that the Court will impose the "strict rationality" standard in any case in which a classification along sexual lines is challenged, and will uphold such classifications only if the state is able to show that they in fact further a legitimate state interest. . . . A third possibility is that the Court is not applying a uniform standard in reviewing sexual classifications, but will apply a different standard depending on whether the classification is viewed as beneficial or adverse to women. . . . When reviewing a sexual classification whose effect was seen as harming women, the Court would apply a strict rationality test, . . . but when the classification is seen as alleviating the oppressed status of women in society, the Court will apply the permissive "rational relationship" test.[82]

B. The Modern Formulation Emerges

The Supreme Court ended confusion over the correct application and interpretation of the rational basis test in 1976 in *Craig v. Boren*.[83] In that case, the Court articulated a new standard of "intermediate scrutiny" for use in analyzing gender-based classifications.[84] Under intermediate scrutiny, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[85] Modern day legal inquiries into the constitutionality of gender-based distinctions continue to utilize the intermediate level of scrutiny.[86]

Mississippi University for Women v. Hogan involved a male student, Hogan, who sought admission to an all-female state-funded nursing school.[87] Although the school would allow Hogan to audit classes, he was not allowed to take classes for credit because of his sex.[88] Except for his gender, he met the school's admission criteria.[89] Hogan brought suit in the United States District Court for the Northern District of Mississippi,

81. 400 F. Supp. 326, 341–42 (E.D. Pa. 1975).

82. *Id*. at 341.

83. 429 U.S. 190, 191–92 (1976) (finding unconstitutional an Oklahoma statute permitting beer sales to women who had reached age eighteen but permitting sales to men only if they were twenty-one or older).

84. *See id*. at 197.

85. *Id*.

86. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Garrett v. Bd. of Educ., 775 F. Supp. 1004, 1008 (E.D. Mich. 1991).

87. 458 U.S. at 719–21.

88. *Id.* at 720–21.

89. *Id.* at 720.

claiming the admissions policy at the school violated the Equal Protection Clause of the Fourteenth Amendment.[90] The district court dismissed his claim, finding that the admissions policy was not arbitrary and was based on a respected educational theory.[91] The court of appeals, however, found that the district court had utilized the wrong constitutional test.[92] In accordance with the intermediate scrutiny test, the appellate court considered whether the gender-based classification was substantially related to an important governmental interest, and found no such relationship.[93]

The Supreme Court affirmed the judgment of the court of appeals, finding that the discriminatory policy of the school constituted a violation of the Equal Protection Clause.[94] The Court applied an intermediate level of scrutiny in its analysis and found that the state interest fell short of establishing the "'exceedingly persuasive justification'"[95] needed to sustain gender-based segregation.[96] The Court noted that a two-part inquiry was necessary: the University had the burden of "showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[97]

In its analysis, the Court pointed out that the test was not to be applied in the context of "fixed notions concerning the roles and abilities of males and females."[98] In fact, the Court announced in dicta that if the classification reflects stereotypic notions and is intended to isolate one gender due to its innate inferiority, the classification scheme would be invalid.[99]

The Court rejected the University's purported justification of compensating for prior discrimination against women—"educational affirmative action."[100] The Court found that such a justification would be valid only "if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[101] Because Mississippi made no showing that women lacked educational opportunities in the nursing field in Mississippi or elsewhere, the Court felt that the classification actually served to perpetuate preexisting stereotypes related to women in the field of nursing.[102] This case now stands as a stumbling

90. *Id.* at 721.
91. *Id.*
92. 646 F.2d 1116, 1118 (5th Cir. 1981).
93. *Id.* at 1118–20.
94. *Hogan*, 458 U.S. at 733.
95. *Id.* at 724 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979)).
96. *See id.* at 727, 730.
97. *Id.* at 724 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).
98. *Id.* at 724–25.
99. *Id*.
100. *Id.* at 727.
101. *Id*. at 728.
102. *Id*. at 729–30 ("By assuring that Mississippi allots more openings in its state-supported nursing school to women than it does to men, MUW's admissions policy lends credibility to the old view

block in front of those wishing to use past discrimination as a justification for current gender-based distinctions. Although the Court seemed to validate such a justification in some situations, a State wishing to make this argument must bear the heavy burden of showing causation.[103]

In *Garrett v. Board of Education*, the plaintiffs sought a permanent injunction restraining the Board of Education of the School District of the City of Detroit (the Board) from opening three all-male public academies as was scheduled.[104] The plaintiffs consisted of several female students attending Detroit public schools, and their parents.[105] The academies were designed to accommodate 250 urban boys ranging from preschool through fifth grade, and included such features as "a class entitled 'Rites of Passage', an Afrocentric (Pluralistic) curriculum, futuristic lessons in preparation for 21st century careers, an emphasis on male responsibility, mentors, Saturday classes, individualized counseling, extended classroom hours, and student uniforms."[106] The Board developed the all-male schools to combat a range of issues facing young African-American males, including high homicide, unemployment, and dropout rates.[107]

Defendants argued that the schools served a compensatory purpose, pointing to notably lower achievement levels among urban males than among urban females.[108] "The primary rationale for the Academies [was] simply that co-educational programs aimed at improving male performance have failed."[109]

The plaintiffs, on the other hand, contended first that the schools ignored the similar troubles facing urban females in Detroit.[110] Girls in urban areas, like boys, are at risk of dropping out or getting involved in criminal activities.[111] Plaintiffs further asserted that the curriculum of the new schools, emphasizing young *men's* needs to acquire life skills, created a divide between the genders that was unnecessary.[112] The plaintiffs' third argument maintained that the absence of girls in the classroom was

that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.").

103. *See id.*

104. 775 F. Supp. 1004, 1005 (E.D. Mich. 1991).

105. *Id*.

106. *Id*. at 1006.

107. *Id*. at 1007. "[T]he establishment of male academies is critical to expeditiously determine what curriculum and training programs will work to keep urban males out of the City's morgues and prisons." *Id*. at 1008.

108. *See id.* at 1007.

109. *Id*.

110. *Id*.

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

112. "[T]he Rites of Passage curriculum teaches that 'men need a vision and a plan for living,' 'men master their emotions,' and 'men acquire skills and knowledge to overcome life's obstacles.'" *Id*. (quoting proposed curriculum for the academies).

not necessary to achieve the objectives of the Board.[113] The court agreed with this contention—females attending schools with males were not the cause of the educational problems faced by urban males.[114]

The court applied the two-part intermediate scrutiny test set out in *Hogan*.[115] The test requires a showing, first, that the gender-based classification serves important governmental interests, and second, that the discriminatory scheme employed is "substantially related" to realization of those interests.[116] The court held that the defendants had failed to show how the absence of females was necessary or even substantially related to their objective of curtailing unemployment, and thus that the defendants were not likely to succeed against a constitutional challenge.[117] The court granted the plaintiffs' motion for a permanent injunction, and in its opinion, the court noted, "dangerous is the prospect that should the male academies proceed and succeed, success would be equated with the absence of girls rather than any of the educational factors that more probably caused the outcome."[118]

Although the Supreme Court has not applied the *Hogan* decision to scrutinize any single-sex secondary educational formats, it has examined the constitutionality of military higher education.[119] In doing so, the Court provided new insight into the current quandary.

C. United States v. Virginia

United States v. Virginia is the most recent Supreme Court case thoroughly utilizing the two-part intermediate scrutiny standard,[120] and is thus the most pertinent equal protection case for purposes of modern exercises of gender-based classification. *United States v. Virginia* examined the constitutionality of the male-only admissions policy at the Virginia Military Institute (VMI).[121]

Although VMI's curriculum is similar to that of other public institutions,[122] the Commonwealth of Virginia established VMI with a unique mission[123] of producing "citizen-soldiers" through the use of an adversa-

113. *Id.*
114. *See id*. at 1008.
115. 458 U.S. 718, 724 (1982).
116. *Id*.
117. *Garrett*, 775 F. Supp. at 1008.
118. *Id*. at 1007.
119. *See infra* Part III.C.
120. 518 U.S. 515, 533 (1996).
121. *Id*. at 519.
122. *See id*. at 521 (stating that liberal arts, sciences, and engineering constitute the available academic offerings at VMI).
123. The school's mission provides that VMI attempts:
"'to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.'"

tive method and an emphasis on character development.[124] VMI strives to instill discipline, a sense of accomplishment, and moral fortitude in its cadets.[125] A further distinguishing characteristic of VMI is its success-studded pool of alumni.[126] The school's alumni recognize the value of their VMI education and reflect this by maintaining the "largest per-student endowment of all public undergraduate institutions in the Nation."[127]

Enrollment in VMI is characterized by "'physical rigor, mental stress, . . . [and] minute regulation of behavior.'"[128] VMI's adversative model mandates that cadets live in barracks, participate in drills, and lose all sense of privacy; a hierarchical system of privileges and duties and an honor code further the intensity and effectiveness of the system.[129] However, "'[w]omen [had] no opportunity anywhere to gain the benefits of [the system of education at VMI].'"[130]

After the Court of Appeals of the Fourth Circuit ruled that none of the state policies offered by Virginia justified denying this educational opportunity to women,[131] the State of Virginia sought to cure the constitutional defects of the school by proposing a parallel program for women.[132] The proposed school, Virginia Women's Institute for Leadership (VWIL), would be similar to VMI in its mission to produce "citizen-soldiers," but would differ in such areas as academic offerings, educational methodology, outside financial resources, and alumni support.[133] The day-to-day atmospheres of the two schools would also largely differ; at VWIL, cadets would neither eat meals together as cadets do at VMI, nor wear uniforms.[134] The military model and adversative method of

Id. at 520–21 (quoting United States v. Virginia, 766 F. Supp. 1407, 1425 (W.D. Va. 1991) (quoting Missouri Study Committee of the VMI Board of Visitors, Report (May 16, 1986))).

124. *Id*. at 520 (citations omitted).

125. *Id*.

126. *See id.*

127. *Id*.

128. *Id*. at 522 (quoting *Virginia*, 766 F. Supp. at 1421).

129. *Id*.

130. *Id.* at 523 (last alteration in original) (quoting *Virginia*, 766 F. Supp. at 1421). It was undisputed that some women were capable, physically and otherwise, of performing all of the activities of a VMI cadet. *See id.* Furthermore, the Commonwealth of Virginia recognized that a number of women would be interested in attending the school if given the opportunity—perhaps bringing the female enrollment to at least ten percent with the help of recruitment. *See id*.

131. *See* United States v. Virginia, 976 F.2d 890, 892 (4th Cir. 1992) (rejecting the Commonwealth's proffered justification of increased diversity of educational opportunities).

132. The court of appeals offered three suggestions to the Commonwealth regarding alternative courses of action: first, allow women to enroll in VMI; second, institute a parallel school or program designed exclusively for women; third, terminate state funding of VMI and allow it to continue as a private all-male institution. *Id*. at 900.

133. United States v. Virginia, 518 U.S. 515, 526 (1996). Virginia planned to provide equal financial resources to in-state cadets attending VMI and VWIL; however, VWIL would not have been able to match the alumni-donation figures that VMI enjoyed. *See id*.

134. *Id*. at 527.

VMI would be replaced by a cooperative method, which focuses on self-esteem and community service.[135]

Justice Ginsburg, writing for the Supreme Court, utilized the intermediate scrutiny standard set out in *Hogan*,[136] requiring an "exceedingly persuasive" justification for a gender-based classification.[137] Justice Ginsburg noted, "The burden of justification is demanding and it rests entirely on the State. . . . The State must show 'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'"[138]

The Court pointed out that gender classification is not wholly proscribed, but rather may be justified in certain circumstances—for example, to compensate women for economic unfairness or to provide equal employment opportunities.[139] "But such classifications may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women."[140] The Court held that Virginia had failed to demonstrate an "'exceedingly persuasive justification'" for the categorical exclusion of women from the unique educational opportunities available at VMI, and that such exclusion therefore violated the Equal Protection Clause of the Fourteenth Amendment.[141]

In its own defense, Virginia asserted two justifications for the exclusion of women.[142] The Commonwealth first contended that single-sex education provides benefits such as diversity of educational opportunities, essentially claiming that the existence of an all-male institution expanded the types of educational opportunities available in the state.[143] The second justification offered was an assertion that the unique VMI character would have to be adapted to meet the needs of women cadets, to the detriment of the institution.[144]

The Court began its assessment of these justifications by iterating a general principle that must be respected by any purported state interest: "'[B]enign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."[145] In other words, the Court will look at the Commonwealth's purpose in excluding females from the outset, not at a purpose

135. *See id*.
136. 458 U.S. 718, 723–27 (1982).
137. *See Virginia*, 518 U.S. at 533.
138. *Id*. (alterations in original) (quoting *Hogan*, 458 U.S. at 724 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980))).
139. *See id*.
140. *Id*. at 534 (internal citations omitted).
141. *Id*. (quoting *Hogan*, 458 U.S. at 731).
142. *Id.* at 535.
143. *See id.*
144. *See id*.
145. *Id*. at 535–36.

that the Commonwealth merely finds tenable in the present day. The Court pointed out that higher education was not considered appropriate for women in 1839, at the time VMI was established.[146] In fact, higher education was thought to be dangerous for women, and the first state-supported institution admitting women in Virginia did not appear until 1884.[147] Under this framework, the Court concluded that VMI's categorical exclusion of females did not, in fact, further any state interest in diversity.[148] The Court pointed out that the effect of the admissions policy was merely to offer unique and diverse opportunities for males only.[149]

The Court then turned to the Commonwealth's second justification for the exclusion of women—that the modifications necessary to accommodate women would essentially destroy the long-standing educational program at VMI.[150] Although the Court acknowledged that some modifications would indeed be necessary at VMI if women enrolled as cadets,[151] the Court was quick to point out that the existing core educational methodology at VMI was suitable for females.[152] The Court also took a hard line approach against the Commonwealth's expert testimony regarding the tendency of women to thrive in a cooperative, rather than adversarial, atmosphere.[153] The Court cautioned against the use of broad generalizations concerning the abilities and capacities of one gender or the other; such generalizations have the hidden effect of perpetuating stereotypes and gender discrimination.[154]

Even when the Court made the assumption that most women would not elect an adversarial method of education such as that offered by VMI, the Court found that the Commonwealth had not shown an exceedingly persuasive justification for excluding those women with the desire and ability to enroll as cadets.[155] A categorical exclusion like that provided by VMI's admissions policy failed to account for the individual merit of those women who truly were qualified and willing to succeed at VMI.[156] The Court also pointed to the successful integration of women

146. *Id*. at 536–37.

147. *Id*. at 536–38. In 1884, the Commonwealth of Virginia established Farmville Female Seminary. *Id.* at 537.

148. *See id*. at 539.

149. *See id*. at 540 ("However 'liberally' this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.").

150. *Id*.

151. VMI's physical training, lack of privacy, general adversative approach, and certainly the housing accommodations would be materially affected by the admission of women to the school. *Id.*

152. *See id*.

153. *See id.* at 541 ("'I'm not saying that some women don't do well under [the] adversative model . . . undoubtedly there are some [women] who do'; but educational experiences must be designed around the rule . . . 'and not around the exception.'" (alterations in original) (quoting VMI's expert on educational institutions).

154. *See id*. at 541–42.

155. *See id*. at 542, 550 (pointing out that many men would also be disinclined to enroll in a school similar to VMI).

156. *See id.* at 541, 546.

into other military arenas, including all of the federal military academies as well as the military forces themselves, and noted, "Virginia's fears for the future of VMI may not be solidly grounded."[157]

The Court turned to the remedial all-women's program that was proposed by Virginia as a cure for the unconstitutional effects of VMI.[158] Because VMI's male-only admissions policy constituted a violation of the Equal Protection Clause, the Commonwealth needed to demonstrate that the alternate proposal "'directly address[ed] and relate[d] to' the violation."[159] A remedial measure must operate so as to put those who are disadvantaged by an exercise of discrimination in a position where such discrimination is absent and where they can be assured that such discrimination will not reoccur in the future.[160]

Although Virginia described VWIL as a "parallel program" with goals and missions similar, if not identical, to those of VMI,[161] the Court found that VWIL did not qualify as VMI's equal and thus did not remedy the constitutional violation.[162] "[T]he Commonwealth has created a VWIL program fairly appraised as a 'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence."[163] The Court noted that the Fourth Circuit erred in examining VMIL under a "substantive comparability" inquiry rather than under heightened scrutiny.[164] The Equal Protection Clause guarantees that those women qualified and willing to experience the educational benefits and opportunities provided by the Commonwealth of Virginia through VMI will be offered nothing less.[165]

In a long and bitter dissent, Justice Scalia bemoaned the Court's decision and expressed a need for deferring to tradition as well as democratic processes.[166] According to Scalia, there is no precedent to support "the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance."[167] Scalia read the Court's opinion broadly to produce the following result:

> [W]henever a State's ultimate objective is "great enough to accommodate women" (as it always will be), then the State will be held to

157. *Id.* at 544–45.

158. *Id.* at 546–56.

159. *Id*. at 547 (alterations in original) (quoting Milliken v. Bradley, 433 U.S. 267, 282 (1977)).

160. *See id*.

161. *See id*. at 548.

162. *Id.* at 551 (noting differences in curriculum, faculty, facilities, and caliber of student body, along with intangibles such as strong history and prestige).

163. *Id.* at 553 (quoting United States v. Virginia, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting)).

164. *See id*. at 555.

165. *See id*.

166. *See id*. at 566–70 (Scalia, J., dissenting) (noting that the Commonwealth of Virginia could effect a change through its elected representatives if the people so desired).

167. *Id.* at 574 (Scalia, J., dissenting). Scalia considered the alternate position the Court adopted—that if *some* women are capable, the all-male format is unconstitutional—to constitute strict scrutiny and an improper analysis. *See id*. at 579 (Scalia, J., dissenting).

> have violated the Equal Protection Clause if it restricts to men even one means by which it pursues that objective—no matter how few women are interested in pursuing the objective by that means, no matter how much the single sex program will have to be changed if both sexes are admitted, and no matter how beneficial that program has theretofore been to its participants.[168]

Scalia summarized the effects, in his mind, of the Court's decision: "Under the constitutional principles announced and applied today, single-sex public education is unconstitutional."[169]

Perhaps the Court will not apply *United States v. Virginia* as expansively as Scalia predicted. Since 1996, however, the Court has neither returned to the issue nor given any clue as to how it will rule when it does. We are left with only the opinion of the Court and our best guesses as to how the next case will be decided.

D. Summary of the Law as It Now Stands

A brief summary of the correct constitutional inquiry will likely be helpful at this juncture. The appropriate level of scrutiny for this task is "intermediate" or "heightened scrutiny" as set out by the Supreme Court in 1976 in *Craig v. Boren*.[170] Under the intermediate scrutiny test, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[171] The first prong of the test, the objectives of the government, carries with it a number of caveats, which make the government's burden weightier.[172] First, the stated objective of the government must be the same objective the government had at the time of instigating or initiating the educational form; in other words, a post hoc or litigation-induced purpose is irrelevant for this inquiry.[173] Second, the "classifications may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women." [174] Third, the "mere recitation of a benign, compensatory purpose" does not prevent "inquiry into the actual purposes underlying [the] statutory scheme."[175]

The second prong of the test requires that the gender classification substantially relate to the accomplishment of an important state objective.[176] "Thus, . . . the state must show not that a single-sex school substantially relates to a beneficial end for the class advantaged by the classi-

168. *Id*. at 587 (Scalia, J., dissenting).
169. *Id*. at 595 (Scalia, J., dissenting).
170. 429 U.S. 190, 197 (1976).
171. *Id*.
172. *See Virginia*, 518 U.S. at 531–34.
173. *Id.* at 533.
174. *Id*. at 534.
175. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).
176. Craig v. Boren, 429 U.S. 190, 197 (1976).

fication, but instead, that excluding one sex from the benefit substantially relates to its goal."[177]

E. Constitutionality of Currently Used Single-Sex Educational Models

Now that the relevant legal standards and considerations have been established, this note will turn its attention to analyzing the legality of specific single-sex educational institutions across the United States.

1. Young Women's Leadership School in Harlem

a. Background of the School

In September 1996, the Young Women's Leadership School (YWLS) opened its doors to seventh-grade girls in East Harlem, New York.[178] The school, a part of New York's public school system, "was designed to provide high-achieving, low-income girls with an education free of the pressures and obstacles often found in a coed classroom."[179] The school was founded and partly funded by Ann Rubenstein Tisch and her husband, Andrew Tisch, chairman of the Loews Corporation management committee.[180] YWLS focuses on math and science and stresses a collaborative, noncompetitive educational approach.[181] Despite immediate opposition from the New York Civil Liberties Union (NYCLU) and even NOW, the school had virtually no difficulty filling its vacancies and even had to resort to a wait list when the applicant pool swelled beyond the tiny school's capacity.[182] After the first year, YWLS began instruction for eighth-grade students as well, with plans to eventually expand into a full-service high school.[183]

The school emerged shortly after the 1992 AAUW report sparked public enthusiasm about the potential benefits of single-gender education.[184] As mentioned in Part II, the 1992 report, *How Schools Shortchange Girls: A Study of Major Findings on Girls and Education*, claimed, among other things, that "girls participate less often than boys in class" and are "silenced" in a mixed-gender environment.[185] YWLS responded to the report by setting up camp in Spanish Harlem and cater-

177. Carrie Corcoran, Comment, *Single-Sex Education After* VMI*: Equal Protection and East Harlem's Young Women's Leadership School*, 145 U. PA. L. REV. 987, 1012 (1997).

178. Stephanie Gutmann, *Class Conflict*, NEW REPUBLIC, Oct. 7, 1996, at 12.

179. Annette Fuentes, *We Don't Need No Coeducation*, IN THESE TIMES, Nov. 2, 1997, at 5.

180. Kaminer, *supra* note 7, at 22.

181. Fuentes, *supra* note 179.

182. *See* Corcoran, *supra* note 177, at 991–92; *see also* Gutmann, *supra* note 178, at 12 ("[YWLS] has a waiting list of about 100 girls, and school organizers say they've been getting calls and letters from parents of fourth-graders and fifth-graders trying to secure places many years in advance.").

183. *See* Corcoran, *supra* note 177, at 990.

184. *See* Monica C. Fountain, *New York Girls Are Happy with a School of Their Own*, CHI. TRIB., Sept. 6, 1998, Womanews, at 1.

185. Kleinfeld, *supra* note 1, at 4.

ing primarily to African-American and Latina students from the neighborhood and throughout the city.[186] Since its commencement, the school has received much praise and publicity for improving girls' test scores and general attitudes toward education.[187] In 1998, YWLS boasted the highest attendance rates of any public school in New York City.[188] Every classroom in the school has a computer, and every student has an e-mail account; the students, faculty, and even the principal are on a first-name basis; and the girls are very proud of their school.[189]

Not everyone supports the school, however, and many critics believe the school stands on shaky ground, both constitutionally and sociologically.[190] In 1996, when the school first opened, NOW, the New York Civil Rights Coalition, and the New York Chapter of the American Civil Liberties Union banded together to file a complaint with the U.S. Department of Education (the Department), claiming the school is illegal and should be forced to admit boys.[191] The Department's Office of Civil Rights issued a tentative finding in September 1997 that the school discriminates against boys in violation of Title IX, and suggested that the school could either admit boys or open an equivalent school for boys.[192]

186. *See* Fountain, *supra* note 184.

187. *See* Cowen, *supra* note 48.

188. Barbra Murray, *Girls' Classes Get a Bad Mark*, U.S. NEWS & WORLD REP., Mar. 23, 1998, at 28.

189. Fountain, *supra* note 184.

190. *See generally* Kleinfeld, *supra* note 1, at 7 (noting that although males may have an advantage over females on standardized math and science tests, females outperform males in the areas of reading and writing); John Leo, *Boys on the Side*, U.S. NEWS & WORLD REP., Aug. 5, 1996, at 18 (commenting on the inherent dangers of justifying an all-girls school based on a victim compensatory theory).

191. Susan Edelman, *No Boys Allowed at All-Girls School: Ed Board Prez*, N.Y. POST, Feb. 11, 1998, at 10.

192. *See id*. In 1972, Congress passed Title IX of the Education Act Amendments, prohibiting federally funded education programs from excluding any person on the basis of sex. 20 U.S.C. § 1681 (2000). This note will not discuss the validity of single-sex education in light of Title IX provisions, but will focus instead on constitutional equal protection concerns. Because the two potential grounds for challenging educational institutions often go hand-in-hand, however, a brief summary of Title IX will facilitate a thorough understanding of the current controversy over single-sex education.

The statute provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." *Id.* § 1681(a). The implementing regulations to that title provide that "a recipient [of federal financial assistance] shall not, on the basis of sex . . . [p]rovide different aid, benefits, or services or provide aid, benefits, or services in a different manner." 34 C.F.R. § 106.31(b)(2) (2001).

The implementing regulations also provide a procedure whereby "any person who believes [that he] or any specific class of individuals" is being discriminated against in violation of Title IX may file a written complaint with the Department of Education. *Id.* § 100.7. A Department official will conduct a "prompt investigation," consider the circumstances surrounding the alleged violation, and determine if further action is warranted. *Id*. § 100.7(c). The official will notify the financial assistance recipient as well as the complainant in writing if no action is warranted; however, if noncompliance is found, the situation will be resolved by informal means or action will be taken against the recipient. *Id.*

It is important to keep in mind that the prohibitions of Title IX and the constitutional guarantees of equal protection are distinct grounds for complaint, and what is a violation of one may not be a violation of the other. It follows that an activity that survives scrutiny under Title IX is not thereby exempted from equal protection analysis. *See* Ridgefield Women's Political Caucus, Inc. v. Fossi, 458 F.

Nonetheless, the schools chancellor, Rudy Crew, as well as the Board of Education president, Bill Thompson, refused to alter their plan to operate a single-sex school.[193]

Then, in February 1998, without issuing a final decision, former Assistant U.S. Secretary of Education in the Office for Civil Rights, Norma Cantu, met with the parties involved in the dispute and said, "If this could provide an educational benefit for the girls, then let them enjoy that benefit."[194] Cantu suggested the school could exist "as an exception to federal anti-discrimination rules" by billing itself "as an affirmative-action 'remedy.'"[195] The school has now been in operation for nearly five full years, and the Department has yet to complete its "prompt" investigation under Title IX.[196] But in May 2000, the Department did issue a written statement regarding single-sex schools in general.[197] According to the Department, single-sex charter schools do not constitute a civil rights violation.[198]

Thus far, the YWLS has managed to stay out of court. If the Department issues a formal notice of violation against the YWLS, however, the school will have to go to federal court to fight the decision.[199] The school could also end up in court if a male student is denied admission and then files suit on equal protection grounds, but this has not yet happened. In the event an equal protection claim does arise out of the exclusionary policies of YWLS, the intermediate scrutiny standard from *Hogan*[200] would likely be called into play. The school could make a number of arguments in its own defense, and an analysis of the strength of these potential arguments will be illustrative of how future claims may play out in court.

b. Surviving a Potential Equal Protection Challenge

The first prong of the constitutional inquiry involves an examination of the legitimacy of the government's objective.[201] Janet Gallagher, director of the Women's Rights Project for the American Civil Liberties Union, contends that the school justifies its existence based on "[t]he

Supp. 117, 122 (D. Conn. 1978) ("Congressional authorization of federal funding to private organizations that restrict membership on the basis of gender cannot validate governmental action that violates the Fourteenth Amendment.").

193. *See* Edelman, *supra* note 191.

194. Susan Edelman, *Exception-al Ruling May OK All-Girls School*, N.Y. POST, Feb. 12, 1998, at 26.

195. *Id*.

196. *See* Letter from Joan Hall, attorney for the Young Women's Leadership Charter School in Chicago, to author (Feb. 26, 2001) (on file with the University of Illinois Law Review).

197. Cowen, *supra* note 48.

198. *Id*.

199. *See* Jacques Steinberg, *Crew Says No to Compromise on All-Girls Middle School*, N.Y. TIMES, Sept. 25, 1997, at B3.

200. 458 U.S. 718, 724 (1982).

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

idea that girls and boys inevitably distract each other."[202] According to Gallagher, these ideas of "immutable sex differences" cross the line into Justice Ginsburg's notion of proscribed generalizations based on gender.[203] In *United States v. Virginia*, Justice Ginsburg articulated, "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[204] If New York's objective in establishing YWLS is indeed to accommodate the inherent tendencies of either gender, the school will not likely survive a constitutional challenge.

Nonetheless, it remains a distinct possibility that the school was created in response to notions of past and current discrimination against girls in mixed-gender public education, as suggested by former Assistant U.S. Secretary of Education Norma Cantu.[205] In *United States v. Virginia*, Justice Ginsburg acknowledged the validity of a governmental interest in compensating women for past economic disabilities.[206] This possibility, however, assumes that young women have in fact been disadvantaged or treated discriminatorily in the context of public coeducation, a point more and more sociologists are beginning to dispute.[207]

A third possible objective of YWLS is that of furthering diversity of educational opportunities for students in New York. In *United States v. Virginia*, the Commonwealth of Virginia proffered a diversity rationale to justify the continued existence of its single-sex military academy.[208] Although the Supreme Court dismissed the rationale as a litigation-oriented pretext, the Court acknowledged that "it is not disputed that diversity among public educational institutions can serve the public good."[209] Furthermore, Justice Ginsburg cited with approval several amici urging that "diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity."[210] Thus, it appears the Court is not inherently opposed to the diversity rationale and the pedagogical benefits cited by its proponents, and may find such a rationale persuasive under the right circumstances.

Where Virginia stumbled, New York may have stronger footing. The creators of YWLS seemed legitimately interested in widening the

202. Gutmann, *supra* note 178, at 12.
203. *See id*.
204. 518 U.S. 515, 533 (1996).
205. *See* Edelman, *supra* note 194.
206. 518 U.S. at 533.
207. *See generally* Kleinfeld, *supra* note 1, at 16 ("[T]he research on classroom interaction does not show any pattern of consistent teacher favoritism toward either boys or girls. . . . [W]e have no clear evidence that boys get more academic attention, and we have no clear evidence that talking in class boosts academic achievement.").
208. 518 U.S. at 524–25.
209. *Id*. at 535.
210. *Id*. at 534 n.7.

diversity of educational offerings within the school district.[211] In fact, the school emerged in District Four, a district that houses more than fifty experimental schools and has a goal of "providing an adequate and successful education to the city's youth."[212] Although it is not clear that this rationale would work for New York, for now it suffices to say that the state may indeed have an important and legitimate government interest for purposes of the first prong of the intermediate scrutiny analysis.[213]

YWLS must also survive the second prong of the constitutional inquiry, requiring that the classification scheme be substantially related to the accomplishment of an important state objective.[214] Thus, New York must show that the exclusion of young men is somewhat necessary to accomplishing its objective of compensating women. This prong of the test seems to give YWLS the most difficulty.

The premise of the argument in favor of single-sex education is that females are significantly underrepresented in the fields of science and mathematics, and that a kinder learning environment will encourage girls to explore these subjects at a young age.[215] In order for the YWLS gender policy to survive, New York must demonstrate that it cannot resolve the inequities to women by either compensating young women for past discrimination or providing diverse educational opportunities without simultaneously excluding young men. Proponents of the school take the position that many girls cannot reach their academic potential in a coeducational environment, whereas boys can.[216] Consequently, by providing girls with a separate learning environment, District Four is in fact providing equivalent educational opportunities.[217] This position, however, depends on the validity of the previously discussed research relied upon by educators in their findings that girls indeed cannot reach their potentials in a coeducational environment.[218]

On the other hand, critics of all-girls schools are quick to point to other means of increasing the proportion of women in the fields of math and science that do not involve excluding young men.[219] For example, the gap between male and female enrollment in high school math and science classes, present in the 1980s, closed when high school graduation requirements increased.[220] By 1994, physics was the only science or math course in which male enrollment exceeded that of females, and females

211. *See* Amy B. Bellman, *The Young Women's Leadership School: Single-Sex Public Education After V.M.I.*, 1997 WIS. L. REV. 827, 858–59.
212. *Id*. at 859.
213. *See id.* at 858–59.
214. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).
215. *See* Corcoran, *supra* note 177, at 989–90.
216. *See* Bellman, *supra* note 211, at 864.
217. *See id*. at 863.
218. Leslie & Kalb, *supra* note 15, at 55.
219. *See* Kleinfeld, *supra* note 1, at 3.
220. *Id.* at 10.

actually enrolled in higher percentages than their male counterparts in chemistry, algebra, geometry, precalculus, and biology.[221]

Furthermore, the Court in *United States v. Virginia* found that some women would do well in an adversative environment, even though such a model is suitable primarily for men.[222] The Court noted that "estimates of what is appropriate for *most women* . . . no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[223] Just as categorical exclusion of women, with no regard for their unique characteristics, is a violation of equal protection,[224] categorical exclusion of all boys merely because most boys do not learn as well in a cooperative learning environment also would likely constitute an equal protection violation. Thus, the fate of YWLS rests on a court determination that boys—not boys as a class, but all boys individually—would in fact not benefit from a similar situation.[225] Such a determination depends entirely on the validity that the court assigns to the competing schools of thought and research.

2. Young Women's Leadership Charter School in Chicago

a. Background of the School

In August 2000, the Young Women's Leadership Charter School in Chicago (YWLCS) followed the lead of YWLS in New York and began classes for an all-female student body, becoming only the fourth public all-girls school in the nation.[226] The Chicago school, modeled after her New York counterpart, is emphasizing math and science and recruiting students from the poorest neighborhoods in the city.[227] High academic standards, internship and mentoring programs, community service requirements, collaborative classroom problems in lieu of traditional lectures, and an emphasis on college preparation all characterize YWLCS.[228] The school is even set on a campus to help the girls envision themselves in college.[229] In its inaugural year, the school admitted 150 sixth- through ninth-graders, and plans to expand each year until grades six through twelve are taught.[230]

Because YWLCS is a charter school, it is not subject to many of the restrictions that tie the hands of administrators at other Chicago public

221. *Id*.
222. 518 U.S. 515, 550 (1996).
223. *Id*.
224. *See id.*
225. *See id.*
226. Cowen, *supra* note 48. Other all-girls schools have long existed in Philadelphia and Baltimore. *See* Kaplan, *supra* note 3.
227. Cowen, *supra* note 48.
228. *Id*.
229. *Id*.
230. *Id.*

schools.[231] Charter schools have been permitted in Chicago for just over three years, and have been sprouting up around the city ever since.[232] These schools "are public in the sense that they are partly funded by taxpayer dollars and are accountable to a governing body. But they are imagined, created and run like a private school . . . ."[233] Thus, the school receives about $5,000 per student from public funds but must come up with the remainder of the costs in other ways.[234] When the New Trier District near Chicago, for example, is spending $13,500 per student, the serious funding challenges of YWLCS become apparent.[235]

b. Constitutional Considerations

Thus far, the YWLCS has avoided legal complaints. Although the primary legal obstacles the Chicago school could potentially face are the very same as those the New York school may encounter, the organizers of the Chicago school believe there are key differences between the schools that will shield the Chicago school from lawsuits.[236] For instance, the Chicago school does not screen applicants or have an admissions policy that excludes boys; however, no boys have applied to the school.[237] Organizers also contend that comparable opportunities exist for boys throughout the city.[238] "Substantial comparability," however, was *not* the test pronounced by the Court in *United States v. Virginia*.[239] The school will be held to the same heightened scrutiny requirements as other institutions exercising gender classifications and will have the burden of demonstrating an exceedingly persuasive justification for excluding boys.[240] "Comparable opportunities" for boys may get the school past a Title IX claim,[241] but that will not solve the constitutional difficulties, especially since there are no opportunities for boys in the city to attend an all-boys public school.

3. Pairs of Single-Gender Academies in California

a. Background of the Schools

In 1996, California embarked upon a different approach to single-sex education.[242] The governor at that time, Pete Wilson, initiated a pilot

231. *See id.*
232. *Id*.
233. *Id*.
234. *Id*.
235. *Id*.
236. *Id.*
237. *Id*.
238. *Id*.
239. 518 U.S. 515, 529, 533 (1996).
240. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).
241. *See supra* note 192 and accompanying text.
242. *See* Kate Folmar, *Same-Sex School a Learning Experience*, L.A. TIMES, Mar. 12, 2000, at B1.

program of single-gender academies throughout the state in his State of the State Address.[243] He offered $500,000 each to six districts that submitted proposals to get the program up and running.[244] Each district in the program was to use the money to set up parallel institutions—one for boys and one for girls—for students in grades seven through twelve.[245] Expectations and enthusiasm ran high at the outset, but after two years, spirits waned as public funding dried up.[246] Today, only two of the original six pairs remain, and even those schools, especially those for girls, are not filling their enrollment capacities.[247]

The schools that remain, in Fountain Valley and East Palo Alto, create opportunities that are nearly identical for the separated genders—the academies have the same classrooms, same materials, and same curriculum, but at different times.[248] The California schools have drawn a wide array of students—some bright enough for college, others that can barely read—but most of those students had behavioral problems at their former schools or had even dropped out for some reason.[249] The hope for these schools is "to nurture girls whose voices were muted in math and science classes and provide a calming influence on boys thinking of abandoning school for the streets. Both sexes could benefit from the opportunity to read literature and program computers free of the typical teen temptations to flirt and primp."[250] The number of students who go on to college or successfully return to their former high school has encouraged school officials; they say the program is worth continuing.[251]

b. Legal Considerations

After the schools' inception, then-Governor Pete Wilson touted the diversity of school choice that they offered to parents and the expansion of public school options that resulted.[252] The academies were not developed to benefit primarily one gender or the other, and both boys and girls have had equal opportunities to utilize the schools' resources.[253] The schools have managed to avoid political or legal controversy and lost their public funding only because of the many other requests for state education dollars, not because of any discrimination charges or con-

243. *Id*.
244. Tamar Lewin, *A Class of Their Own an Old Idea—Single-Sex Education—Is in the Midst of a Renaissance*, CHI. TRIB., Nov. 2, 1997, at 3B.
245. *See* Folmar, *supra* note 242.
246. *See id*.
247. *Id*.
248. *Id*.
249. *Id*.
250. *Id.*
251. *Id*.
252. Lewin, *supra* note 244.
253. *See id.*

cerns.[254] The possible constitutional ramifications of this setup differ widely from those of the Chicago or New York girls-only schools.

To begin with, the single-gender academy system does not represent an affirmative action remedy for girls, or boys for that matter.[255] In *Hogan*, the Court acknowledged that educational affirmative action could be a permissible justification for gender-segregated schools if the benefited gender actually suffered a disadvantage.[256] Because California does not contend that rectifying past discrimination against any group is the important government interest involved, the State, unlike New York and potentially Chicago, does not need to rely on the inconclusive findings of sociologists and researchers to validate its single-sex schools' existence.[257]

Furthermore, in *United States v. Virginia*, although the Court dismissed Virginia's argument that VMI's all-male status expanded the diversity of educational opportunities within the commonwealth, the Court did acknowledge that "diversity among public educational institutions can serve the public good."[258] The Court did not dismiss the Commonwealth's diversity justification because such a justification would never constitute an important governmental objective, but rather because the Court found no evidence that the school truly did further any policy of diversity.[259] In California, the diversity justification appears to be more than mere pretext. The academies offer students and their parents an optional educational format in lieu of coeducation—an option especially helpful for troubled or disadvantaged teens—and unlike at VMI or the Chicago or New York all-girls schools, the diverse opportunities are available to students of both genders.[260] California's objective behind starting the schools will likely survive the first prong of the intermediate scrutiny analysis requiring an important governmental interest.[261]

The second prong of the test requires a showing that the discriminatory means are substantially related to governmental objectives.[262] Thus, California would have to show that the gender divisions are structured to meet the interests of diversity. In *United States v. Virginia*, the Court found that a proposed parallel female institution could not offer students benefits comparable to those available at VMI.[263] Unlike in the VMI/VWIL dichotomy, there is no reason to think that the two Califor-

254. Folmar, *supra* note 242.

255. *See* Lewin, *supra* note 244.

256. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 727–28 (1982).

257. *See supra* note 205–07 and accompanying text.

258. 518 U.S. 515, 535 (1996).

259. *Id*. at 539.

260. *See* Lewin, *supra* note 244; *see also Virginia*, 518 U.S. at 540 (noting that a program that affords "a unique educational benefit only to males" does not serve the purpose of advancing educational options: "However 'liberally' this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.").

261. *See Hogan*, 458 U.S. at 724.

262. *See id*.

263. 518 U.S. at 553 (finding the VWIL program to be a "'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence").

nia academies in each of the two remaining pairs of single-sex schools are not comparable in every way: the facilities are identical; the funding is even; and the teachers are not only similar, but are exactly the same.[264] One institution does not enjoy a long-standing reputation or an influential alumni pool that the other must do without. Thus, the extent of the gender classifications is merely to group boys and girls together—nothing else. This appears to further the state interest of offering diverse educational opportunities to boys and girls and affording to both the advantages of a classroom all their own, without conferring unnecessary burdens or advantages on one group or the other. If any individual attempted to challenge the academies on the grounds of equal protection, California would likely prevail.

IV. RESOLUTION

Although the New York and Chicago schools at least arguably afford some pedagogical and social benefits to those girls who attend, this fact alone will not validate what otherwise appears to be the unconstitutional exclusion of boys. If research showing a disadvantage to girls in education was more conclusive, a justification based on affirmative action might be in order. In the absence of conclusive findings to that effect, however, it seems unlikely that any important state objective justifies denying similar opportunities to boys. These schools do not present evidence that boys would not similarly benefit from a school of their own with small classes and individualized attention. Thus, failing to offer boys the benefit of this unique educational format appears to be a violation of the Fourteenth Amendment.

The California system, on the other hand, has gotten it right. Along with acknowledging that a single-sex learning environment may be beneficial for some students, the State has chosen to offer the opportunities to all students, not just one gender or the other. In *United States v. Virginia*, the Court rejected Virginia's contention that offering the same opportunities to women would diminish the benefits to men.[265] California, however, unlike New York and Chicago, has correctly acknowledged that making single-gender education available to both boys and girls in no way diminishes the benefits to girls of having a school of their own. Although the California schools have faced financial difficulties and thus cannot hype their successes the way the New York school has done, that does not diminish the fact that the California schools offer pedagogical benefits to those students who choose to take advantage of them, or the reality that the State is likely meeting an important state interest and equally protecting its sons and daughters.

264. Folmar, *supra* note 242.

265. 518 U.S. at 540 (summarizing and contesting Virginia's argument that accommodating women would destroy VMI's program).

An additional benefit provided by the California system is that of school choice. Parents can choose to send their children to a single-sex school or opt not to do so, sending their children to one of the traditional coeducational schools instead. Such a system caters to the interests of those parents opposed to single-sex classrooms as well as those in favor. A school district composed entirely of single-gender learning environments, on the other hand, does not successfully promote "diversity" of educational opportunities because it eliminates entirely the opportunity to learn in a coeducational setting. Furthermore, a system such as the one utilized by the YWLS in East Harlem that allows only the best and brightest students admission to the school denies the claimed pedagogical benefits to those students that lag behind and likely need the most assistance. To provide a *real choice* for all parents, single-sex schools need to provide choices for all students—boys as well as girls, overachievers as well as underachievers.

V. CONCLUSION

Although none of the single-sex educational institutions discussed in this note have been challenged on equal protection grounds, the YWLS in New York and the YWLCS in Chicago will almost certainly be considered a violation of the Fourteenth Amendment if and when such a challenge ensues. The current constitutional deficiencies plaguing those schools at this time can be remedied, however, by adding a similar institution for boys, bringing those programs up to par with the California system. As Harvard Law School Professor Laurence Tribe has noted, "[i]t would be a little bit scary" to validate a school for girls by adding a school for boys; "I wouldn't want to see a whites-only school made legitimate by a blacks-only school . . . ."[266] Nonetheless, this seems to be the only way to assure the girls schools that they can keep their doors open. If these schools want to stay around long enough to figure out if single-sex public education truly does benefit adolescents the way they believe it does, they had better come up with a way to include everyone—even boys.

266. Kaplan, *supra* note 3.