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Single-Sex Classes in Public Secondary Schools: Maximizing the Value of a Public Education for the Nation's Students

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NOTES

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I. INTRODUCTION

Throughout the United States, school districts are struggling to educate their students in the face of drug problems, violence, and deteriorated home situations that permeate the lives of large numbers of today's teenagers.[1] Many parents likewise face a daunting battle in helping their children attain an education that will enable those children to move beyond what their parents achieved financially.[2] Additionally, recent economic downturns mean states have even less

1. *See* KAREN STABINER, ALL GIRLS: SINGLE-SEX EDUCATION AND WHY IT MATTERS 44 (2002) (citing the real problems in one inner city neighborhood facing the students, including "overcrowded classes, battle-weary teachers, and the vocabulary of the streets: drugs, gang fights, weapons, teenage pregnancy").

2. *Id.* Stabiner cites a mother of a girl at an inner city all-girls public school as believing that the discrimination she experienced was economic; that because they were poor, her children never got an even break. *Id.* Without a "decent" education, her daughters would stay poor; with it, they had the chance to break the cycle. *Id.*

money to spend on education, forcing the quality of education in some already inadequate schools to fall further.[3] Meanwhile, studies show that American children have fallen behind many of their foreign counterparts in academic evaluations.

In light of these issues, many parents and schools are exploring alternative methods of educating students. Perhaps the best-known initiative is the school voucher movement in Cleveland, which the Supreme Court recently upheld.[4] Charter schools, too, are becoming more popular with parents dissatisfied with their children's public school educations.[5] Additionally, parents are becoming more likely to teach their children at home.[6] Legislators and others interested in traditional public schools cite smaller class sizes and higher teacher salaries as ways of promoting achievement.[7]

One recently revived possibility for improving secondary education is the creation of single-sex classes and schools.[8] Proponents

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3. *See* Press Release, National Education Association, Corporate Tax Handouts Harm Public Schools, NEA Report Shows (Jan. 22, 2003) (noting that "policymakers in many states are searching for ways to deal with the worst budget crisis since World War II while providing public schools with the funding they need to insure that all children receive a quality education"), http://www.nea.org/nr/nr030122.html.

4. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002). Cleveland's program was based on an Ohio law that provided for "assistance to families in any Ohio school district that is or has been 'under federal court order requiring supervision and operational management of the district by the state superintendent.'" *Id.* at 644-45 (quoting Ohio Rev. Code Ann. § 3313.975(A) (Anderson 1999 & Supp. 2000)). The assistance could be in the form of tuition aid to attend a participating public or private school, or in the form of tutorial aid if the student remained in his or her present public school. *Id.* at 645.

5. Vaishali Honawar, *Ehrlich Bill Would Open Way for More Charter Schools*, WASH. TIMES, Feb. 3, 2003, at B01 (noting that charter schools attract many students in failing school systems, and that 2,400 charter schools have opened in the United States since 1992); *see also* US Charter Schools, Overview (noting that Charter school enrollment increased 40 percent between 1999 and 2003), http://www.uscharterschools.org/pub/uscs_docs/o/index.htm (last visited June 2, 2004). Charter schools have been described as "nonsectarian public schools of choice that operate with freedom from many of the regulations that apply to traditional public schools. The 'charter' establishing each such school is a performance contract detailing the school's mission, program, goals, students served, methods of assessment, and ways to measure success." US Charter Schools, *supra*.

6. *See* Nat'l Home Educ. Research Inst., Fact Sheet IIIb (noting that the number of children being educated at home increases at a rate of 7 percent to 15 percent a year), *at* http://www.nheri.org/modules.php?name=Content&pa=showpage&pid=19 (last visited May 10, 2004).

7. *See, e.g.*, Rep. Ben Lujan, *Commentary: Solons Share Governor's Aims for State*, THE SANTA FE NEW MEXICAN, Jan. 22, 2003, at A-7 (listing as educational priorities for New Mexico House Democrats: "Smaller class sizes. Mentoring for beginning teachers. Continued support for full-day kindergarten. Develop reform for improving high-school graduation rates. Adequate teacher salaries with advanced training and certification for teachers. Criteria-referenced testing tbat shows how well children learn and accountability in the way teachers teach.").

8. *See* Karen Uhlenhuth, *Single Sex, Singular Education?*, KAN. CITY STAR, Dec. 17, 2002 (noting that the idea of single-sex education, while not a new idea, is "experiencing a resurgence

argue that single-sex education decreases classroom discrimination, improves educational experiences for both boys and girls, and gives parents more choices from which to select the system of education that works best for their children.[9] Proponents also believe that separating students by sex could increase the options available to poor and minority children, whose parents may not otherwise be able to afford the single-sex education traditionally offered only in private schools.[10]

Opponents contend that single-sex education presents the same legal issue as did *Brown v. Board of Education*: state-endorsed segregation of students.[11] Segregation by gender, in opponents' eyes, threatens to erase the gains women have made over the past century.[12] Opponents fear that men who have attended a single-sex

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of sorts," with increases in the single-sex schools, both public and private); Nat'l Ass'n for Single Sex Pub. Educ., *Single-sex Public Schools in the United States* (noting that "[t]en years ago, only three public schools in the United States offered single-sex educational opportunities. Right now (spring 2004), there are at least **97** public schools in the United States offering some form of single-sex public education."), *at* http://www.singlesexschools.org/schools.html (last visited June 2, 2004).

9. *See* CORNELIUS RIORDAN, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? xii, 8, 10 (1990). Riordan noted that "all-girls schools consistently have provided a more effective educational environment *for girls* than have mixed-sex schools," that studies indicate that females do better academically in single-sex schools across a variety of cultures, and that scholars have argued that there is a "chilly classroom climate" in American coeducational colleges which "puts women students at a significant disadvantage," while "students at women's colleges report higher self-confidence, greater involvement in both classroom and extracurricular activities, greater satisfaction with their college experiences, and higher occupational expectations." *Id.*; *see also* STABINER, *supra* note 1, at 3. Stabiner notes that most families do not get the luxury of choosing whether their girls will achieve the most at a single-sex school, as "they have to work with their neighborhood public school or find a way around it." *Id.* While some studies indicate girls from poor minority communities are most helped by a single-sex environment, their parents generally do not have that choice. *Id.*; *see also* Kay Bailey Hutchison, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 AM. U. L. REV. 1075, 1076 (2001) (arguing that "To save our public schools, we must be more creative and expand the options for such schools—to give parents more choices to fit the needs of each child.").

10. *See* STABINER, *supra* note 1, at 44-45. Stabiner quotes one of the mothers of a girl at a New York inner city, all-girls public school as asking in response to the legal challenges from the New York Civil Liberties Union and the New York Civil Rights Coalition, as well as the National Organization for Women, "Why shouldn't my girl have what the rich girls have?" *Id.*

11. *But see* Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 764 (2002) (noting that the Court "has explicitly avoided making any judgments about the constitutionality of sex-segregated public education under conditions of material parity, strongly suggesting that it believes that this form of sex-based state action presents a difficult constitutional question").

12. *See* RIORDAN, *supra* note 9, at xi (noting the argument that "single-sex education is an overly risky step backwards . . . a step in reverse"); *see also* NATIONAL ORGANIZATION FOR WOMEN, COMMENTS OF THE NATIONAL ORGANIZATION FOR WOMEN ON THE DEPARTMENT OF EDUCATION'S NOTICE OF INTENT TO REGULATE ON SINGLE-SEX EDUCATION [hereinafter NOW COMMENTS], http://www.now.org/issues/education/single-sex-education-comments.html (last visited May 10, 2004). NOW argues that "OCR's proposal to introduce sex segregation into the public schools contradicts the bedrock principles articulated in *Brown*." *Id.*

school, and thereby have lacked contact with talented women, will be unable to recognize such women as equals. Likewise, girls in a single-sex environment and girls dealing with boys from a single-sex environment may find themselves limited to stereotypical gender roles.[13]

Before states and school districts can begin to address the social desirability of single-sex education, the legality and constitutional legitimacy of such programs must be resolved. Current Title IX regulations place limits on the ability of schools to restrict student access to classes on the basis of sex.[14] Any state-sponsored sex discrimination also raises Equal Protection questions under the Fourteenth Amendment.[15] While single-sex schools are permissible under the current regulations interpreting Title IX, school districts nervous about expensive lawsuits challenging the constitutionality of the schools often avoid them.[16]

While the constitutionality of single-sex programs has been addressed by multiple commentators, several important issues have been neglected. Single-sex schools have received the bulk of the scholarly attention. Single-sex classes are either lumped under the heading of single-sex education or not addressed at all.[17] This Note details the strengths of single-sex classes. It then goes a step beyond establishing that single-sex programs in secondary schools can he constitutional to recommending steps that local governments and districts should take to comply with the mandates established by the

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13. STABINER, *supra* note 1, at 314 (noting the argument of critics that single-sex education could "nudge children back into limiting stereotypes"); *see also* NOW COMMENTS, *supra* note 12 (arguing that "[d]epriving boys and girls of the opportunity to interact daily as peers in the classroom during their formative years will adversely affect gender relations in the adult workplace and in their lives. . . . [C]ollaborative interaction between girls and boys in primary and secondary schools should be fostered, not eliminated.").

14. 34 C.F.R. §§ 106.15(c)-(d), .34 (2003).

15. *See* United States v. Virginia, 518 U.S. 515 (1996) (applying equal protection analysis to the context of single-sex education); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

16. School districts are seemingly more comfortable now that the Department of Education has officially announced that single-sex schools are consistent with Title IX. *See* Office for Civil Rights; Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102, 31,102 (May 8, 2002). Single-sex classes, however, are still proscribed under the regulations. *Id.* Under the proposed regulations, single-sex classes would be permitted in limited circumstances. *See infra* notes 50-52 and accompanying text.

17. *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. LEGAL F. 381; Kimberly M. Schuld, *Rethinking Educational Equity: Sometimes, Different Can Be an Acceptable Substitute for Equal*, 1999 U. CHI. LEGAL F. 461; Kristen J. Cerven, Note, *Single-Sex Education: Promoting Equality or an Unconstitutional Divide?*, 2002 U. ILL. L. REV. 699 (2002); Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741 (1992).

Supreme Court in *Mississippi University for Women v. Hogan* and *United States v. Virginia.*

The remainder of this Note will proceed as follows. Part II describes the legislative and regulatory position of single-sex education. While single=sex classes are currently illegal, proposed regulations currently under consideration or other legislative or regulatory changes will likely allow more flexibility for implementing single-sex education in coming years. Part III examines constitutional limits on the ability of Congress and the Department of Education to institute policies regarding single-sex education. Part III also discusses the standard of review employed by the Court in *United States v. Virginia* and concludes that classifications based on sex continue to be subject to the intermediate scrutiny standard, which requires the classifications to be substantially related to an important state interest. Part IV applies this standard and concludes that single-sex education is permissible because it is substantially related to promoting the important government interests of preventing discrimination, improving educational opportunities, and offering diverse educational opportunities to students and their parents. Finally, Part V addresses ways in which states and school districts can best ensure the constitutionality of their programs. This Part concludes that single-sex programs can more easily satisfy the constitutional test when they consist of single-sex classes rather than single-sex schools, and when they are in primary or secondary schools rather than in higher education. Part V also suggests that districts should offer single-sex classes to both boys and girls, rather than to only one sex, and recommends that participation be voluntary rather than mandatory.

II. THE STATUTORY AND REGULATORY BACKGROUND

A. Title IX Regulations

The primary statutory backdrop against which single-sex education must be evaluated is Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in federally funded programs.[18] The Supreme Court has recognized that the statute was enacted both to "avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens

18. 20 U.S.C. § 1681 (2000). The statute provides that no one can "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" on the basis of sex. *Id.*

with effective protection against those practices."[19] The current regulations regarding single-sex schools and classrooms in secondary and elementary schools stem from Title IX.[20] Although regulations have been proposed, they have not yet been adopted and the current regulatory framework remains the old rules.[21]

The regulations under Title IX generally prohibit classes or educational programs open to only one sex.[22] However, some exceptions exist to this broad limitation. Separation by ability, even if the ability roughly correlates to sex, is acceptable in physical education classes.[23] Separation of students by sex within physical education classes is also permitted when the class is participating in a sport which has, either as its purpose or characteristic, a large amount of bodily contact.[24] Additionally, portions of classes in elementary and secondary schools that concern the treatment of human sexuality can be separated by sex, and choral groups may segregate based on vocal range or quality requirements which have the effect of limiting a chorus to one sex.[25] Finally, separation of students by sex is allowed under the regulations if it constitutes remedial or affirmative action.[26] These exceptions are fairly narrow. Thus, most classes cannot be offered as single-sex opportunities.

The regulations treat single-sex schools differently than single-sex classrooms. Title IX applies to admissions only for institutes of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.[27] The regulations interpreting Title IX were drafted accordingly and do not apply to the admissions policies of elementary and secondary schools. School districts can limit the enrollment of such schools to members of one sex as long as they offer to each person, "pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and

19. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

20. Office for Civil Rights; Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. at 31,102.

21. *See infra* Part II.C.

22. 34 C.F.R. § 106.34 (2003) (stating that "a recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses").

23. 34 C.F.R. § 106.34(b); *see also* Office for Civil Rights; Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102.

24. 34 C.F.R. § 106.34(c).

25. § 106.34(e)-(f).

26. § 106.3(a)-(b).

27. 20 U.S.C. § 1681 (2000).

facility offered in or through such schools."[28] The longstanding interpretation of the Department of Education's Office of Civil Rights (Office of Civil Rights), the office within the Department of Education responsible for ensuring equal access to education, has been that the comparable educational opportunity for the other sex also has to be provided in a single-sex school.[29]

Due to the limited legality of single-sex classrooms, the only way for a secondary school system to successfully comply with the current Title IX regulations and still provide interested students the opportunity to learn in a single-sex environment is to construct entirely separate schools.[30] Brighter Choice Charter Schools in Albany, New York, for example, has established, within one school building, two "separate" schools that operate as different legal entities with separate bank accounts.[31] Although the students effectively attend the same school with the same teachers, the requirements of the regulations have forced the fiction of two separate schools in order to offer single-sex classes.[32] As this example illustrates, school systems face significant regulatory barriers to establishing single-sex education, particularly when those systems wish to offer single-sex classes.

B. No Child Left Behind Act

In January 2002, Congress passed the No Child Left Behind Act of 2001 ("Act"), a collection of extensive amendments to the Elementary and Secondary Education Act of 1965.[33] These amendments were collectively called the No Child Left Behind Act of 2001. The express purpose of the Act, proposed by President George W. Bush, was to ensure that "all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement

28. § 106.35(b).

29. Office for Civil Rights; Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102, 31,103 (May 8, 2002); *see also* Office for Civil Rights, Overview of the Agency, http://www.ed.gov/about/offices/list/ocr/index.html (last visited June 2, 2004).

30. *Id.* at 31,102 (noting that the current Title IX regulations prohibit single-sex classes and activities, but that the Title IX statute exempts the admissions practices of non-vocational elementary and secondary schools).

31. Michelle Davis, *Department Aims to Promote Single-Sex Schools*, EDUC. WK., May 15, 2002, at 24, 24.

32. *Id.*

33. *See* Pub. L. No. 107-110 (2002) (codified at 20 U.S.C. §§ 6301-7916).

standards and state academic assessments."[34] President Bush's four basic reform principles are reflected in the Act: more accountability for results, increased flexibility and control for local school boards, greater options for parents, and a focus on using scientifically proven teaching methods.[35] Part of the increased control given to state governments and school districts includes more flexibility regarding how to spend federal education dollars.[36]

A brief but highly important amendment to the No Child Left Behind Act allows federal funds to be used for innovative programs, including "[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)."[37] Senator Kay Bailey Hutchison, a Republican from Texas, cosponsored the amendment with Senator Susan Collins, a Republican from Maine, and with Democratic Senators Hillary Clinton of New York and Barbara Mikulski of Maryland. Their stated purpose in passing the amendment was to facilitate education reform programs through same-sex schools and classrooms, as long as comparable educational opportunities are offered to both sexes.[38] The amendment also directed the Department of Education to issue guidelines on current regulations within 120 days of passing the Act so as to guide local schools in implementing such programs while being "consistent with applicable law."[39]

Senator Hutchison, a long-time advocate of single-sex schools, said the amendment was merely intended to make it easier for a school system or local government to provide the option of single-sex schools where requested by parents.[40] Senator Hutchison has argued that saving public schools requires that society "be more creative and expand the options for such schools—to give parents more choices to fit the needs of each child."[41] Senator Hutchison's amendment was approved by a unanimous vote in the Senate.[42]

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34. 20 U.S.C. § 6301 (2000).

35. Dep't of Educ., No Child Left Behind, *at* http://www.ed.gov/nclb/landing.jhtml; *see also* § 6301 (summarizing the means of achieving the desired end of high-quality education, including providing "greater decisionmaking authority and flexibility to schools and teachers in return for greater responsibility for student performance").

36. 147 CONG. REC. S13366 (daily ed. Dec. 18, 2001) (statement of Sen. Bunning).

37. § 7215(a)(23).

38. 147 CONG. REC. S5943 (daily ed. June 7, 2001) (statement of Sen. Hutchison).

39. § 7215(c). At present, the primary legal constraints on single-sex programs are Title IX and the Fourteenth Amendment.

40. 147 CONG. REC. S5943 (daily ed. June 7, 2001) (statement of Sen. Hutchison).

41. Hutchison, *supra* note 9, at 1076.

42. Press Release, *Senate Passes Education Bill, Senator Hutchison's Single-Sex Education Amendment Included,* http://hutchison.senate.gov/prl334.htm (June 14, 2001).

C. Proposed Title IX Regulations To Provide More Flexibility to Local and State Governments

On May 8, 2002, the Office for Civil Rights issued two important releases. The first, in response to the congressional mandate in Senator Hutchison's amendment, summarized the current legal constraints on the ability of public elementary and secondary schools to offer single-sex schools and classrooms.[43] The second, and ultimately more important, offered public notice of the intent of the Office for Civil Rights to amend the regulations interpreting Title IX to allow local governments and school boards greater flexibility to implement single sex schools.[44] The release noted that single-sex classes and schools could be "important and legitimate efforts to improve educational outcomes for all students."[45] According to the Office for Civil Rights, this increased flexibility was not based on the idea that the sexes need to be educated differently because of the limitations of one sex, but instead was based on the belief that all children could benefit from having the option of single-sex education.[46]

The Office for Civil Rights therefore declared its intent to permit "appropriate latitude" for schools to use "innovative efforts to help children learn and to expand the choices parents have for their children's education consistent with Title IX and the Constitution."[47] The Office for Civil Rights recognized that one purpose of the No Child Left Behind Act was to give parents the opportunity to choose a program that best fit their children's needs through enabling educators to provide a wider variety of options.[48] So long as the regulations were consistent with Title IX's goal of equal opportunities for both sexes, the Office for Civil Rights believed that more freedom with regard to single-sex education would be consistent with the requirements of Title IX and would effectuate the purposes of the No Child Left Behind Act.[49]

On March 9, 2004, the Office for Civil Rights released proposed regulations for Title IX. Noting that "educational research has suggested that in certain circumstances, single-sex education provides

43. Office for Civil Rights; Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102, 31,102 (May 8, 2002).

44. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31,098 (May 8, 2002); *see also* Title IX, §§ 1681-1688.

45. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. at 31,098.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

educational benefits for some students," the Office concluded that additional flexibility for single-sex educational options is appropriate, so long as appropriate safeguards exist.[50] The Office for Civil Rights proposed changing the strict limitations on the provision of single-sex classes in the context of secondary schools, although coeducational postsecondary schools would remain limited to the narrow areas of single-sex classes allowed by the current regulations.[51] The proposed regulations would allow nonvocational single-sex classes as long as the following requirements were met: (1) Each single sex class must be based either on the objective of providing a diversity of educational options to parents and students, or on the objective of meeting the particular, identified educational needs of its students; (2) the district must offer a substantially equal coeducational class in the same subject; and (3) the objective must be implemented in an evenhanded manner.[52] If these regulations are adopted, single-sex classes will become a much more realistic possibility for school districts.

D. The Statutory and Regulatory Future of Single-Sex Classes and Schools

Perhaps because single-sex classrooms are illegal under the current Title IX regulations, most of the academic debate has revolved around the permissibility of single-sex schools. Single-sex schools are not subject to the same regulatory bar and thus present immediate possibilities for school districts if constitutional standards are met.[53] Additionally, while local residents not attending a single-sex private school are likely to be aware that it admits only boys or only girls, they are probably unaware of the internal gender divisions between classes in a coeducational school. Because single-sex schools are more visible, they may inspire more popular and academic debate than do single-sex classrooms. Because single-sex classes are currently illegal, local governments and school districts seeking to experiment focus on single-sex schools.

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50. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Proposed Rules, 69 Fed. Reg. 11,275, 11,276-77 (proposed March 9, 2004) (to be codified at 34 C.F.R. pt. 106) [hereinafter Proposed Regulations].

51. *Id.* at 11278 (Proposed 34 C.F.R. § 106.34(b)). Vocational schools, which are, under Title IX, subject to the Title IX admissions requirements, would also continue to be prohibited from offering single-sex classes. *Id.*

52. *Id.* at 11284-85 (proposed 34 C.F.R. § 106.34(b)(1). The regulations further note that a recipient providing a single-sex class may be required to provide a substantially equal single-sex class for the other sex, and describes factors that will be considered in determining substantial equality. *Id.* (Proposed 34 C.F.R. § 106.34(b)(2)-(3)).

53. *See* sources cited *supra* note 17.

Even before the passage of the No Child Left Behind Act, Rosemary Salomone predicted that the Title IX regulations might have to be reinterpreted or rewritten in light of the decision by the Supreme Court in *United States v. Virginia*. The newly energized school choice movement and the increased desire of families, particularly in the inner city, to shape their children's education would also push the agency and Congress to action.[54] Salomone argues that a reinterpretation of the regulations that allowed more flexibility in single-sex education would be consistent with Title IX, as Congress never intended a total ban on single-sex education.[55] Senator Hutchison's amendment only made this reinterpretation more likely, as the amendment's sponsors intended to remove regulatory barriers to single-sex education.[56] Removal of these barriers would allow public schools to institute single-sex classrooms as long as the schools did not step back from the goals of equal opportunity embedded in Title IX or violate the Fourteenth Amendment's Equal Protection Clause.[57] Senator Hutchison has noted that an earlier, temporary amendment she proposed, similar to that enacted in the No Child Left Behind Act, "sent the unmistakable signal that single-sex public school programs are legal and acceptable."[58]

The Proposed Regulations are consistent with the ideas of more flexibility supported by Professor Salomone and Senator Hutchison. Even if these proposed changes are not adopted, public support could still push Congress to change Title IX or its interpretation. In response to the No Child Left Behind Act, about six single-sex, public secondary schools opened in Fall 2002 and eight more in Fall 2003.[59] This response indicates that parents and educators desire to have such schools and that they perceive the actions of Congress and the

54. Rosemary Salomone, *Education and the Constitution: Shaping Each Other in the Next Century: Rich Kids, Poor Kids, and the Single-Sex Education Debate*, 34 AKRON L. REV. 209, 210, 222 (2000); *see* United States v. Virginia, 518 U.S. 515 (1996).

55. Salomone, *supra* note 54, at 225.

56. 20 U.S.C. § 7215(a)(23) (2000); *see also* 147 CONG. REC. S5943 (daily ed. June 7, 2001) (statement of Sen. Hutchison). Senator Hutchison stated that the amendment intended to remove barriers and red tape associated with opening a public school to only one sex, and to make it easier for a school system or local government to provide the option of single sex schools if parents requested such schools. *Id.*

57. 147 CONG. REC. S5943 (daily ed. June 7, 2001) (statement of Sen. Clinton) (describing the work of herself and the other senators as attempting to find a compromise that would "further the ability of our school districts around the country to develop and implement quality single-sex educational opportunities as a part of providing a diversity of public school choices to students and parents but . . . doing it in a way that in no way undermines title IX or the equal protection clause of the Constitution").

58. Hutchison, *supra* note 9, at 1081.

59. Nat'l Ass'n for Single-Sex Pub. Educ., *supra* note 8.

Department of Education as clearing the way.[60] Thus, even if the Department does not ultimately legalize single-sex classes, Congress should, and very well may, legislate to do so. The legal bar to single-sex classes would then disappear, leaving only the constitutional concerns to be considered.

III. CONSTITUTIONAL LIMITATIONS ON THE ACTIONS OF THE OFFICE FOR CIVIL RIGHTS AND THE CONGRESS

Neither the congressional legislation nor the regulations of the Office for Civil Rights are written on a blank slate.[61] In two major cases, the Supreme Court has struck down particular single-sex postsecondary schools as unconstitutional violations of the Fourteenth Amendment's guarantee of equal protection.[62] Therefore, any regulations that increase the flexibility of local boards to offer single-sex schools will likely raise equal protection questions.[63]

The Supreme Court's first involvement with single-sex education came in *Vorchheimer v. School District of Philadelphia*.[64] In that case, the Court affirmed without opinion the Third Circuit's decision to uphold the constitutionality of Philadelphia's single-sex high schools.[65] The Court first provided an extensive analysis of the constitutional questions raised by single-sex education in the 1982 case *Mississippi University for Women v. Hogan (MUW)*.[66] The Court examined the constitutionality of the all-female nature of Mississippi University for Women's (MUW) nursing school and ultimately found that maintenance of the school violated the Equal Protection Clause.[67]

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60. Melanie Markley, *Back to School: Where the Boys Are: Not a Girl in Sight as New Charter School Opens Its Doors in Houston*, HOUSTON CHRON., Aug. 20, 2002, at A13.

61. *See* Proposed Regulations, *supra* note 50, at 11277 n.4 (noting that the OCR had considered Supreme Court decisions including United States v. Virginia, 518 U.S. 515 (1996), and Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), in developing the proposed new regulations).

62. *See Virginia*, 518 U.S. at 515; *Miss. Univ. Women*, 458 U.S. at 718. Beyond the constitutional question, the regulations could also be struck down if they were contrary to an unambiguously expressed intent of Congress or were an impermissible construction of a statute that was ambiguous or silent as to the question at hand. Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 842-43 (1984). However, this possibility is beyond the scope of this Note.

63. *See, e.g.*, NOW COMMENTS, *supra* note 12. NOW argues that OCR's proposal is contrary to the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), and that it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution. NOW COMMENTS, *supra* note 12.

64. 430 U.S. 703 (1977).

65. Vorchheimer v. Sch. Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977).

66. 458 U.S. 718 (1982).

67. *Id.* at 731.

The Court's second major single-sex education case was *United States v. Virginia*.[68] In *Virginia*, the Court considered the all-male Virginia Military Institute (VMI), along with its parallel institution, the Virginia Women's Institute for Leadership (VWIL).[69] The Court found that VMI was a unique educational experience and that VWIL was substantially inferior to VMI.[70] Thus, the Court concluded that the maintenance of VMI as an all-male school was unconstitutional.[71]

A. Vorchheimer*: Setting the Stage*

In *Vorchheimer*, the Third Circuit considered Philadelphia's maintenance of two academic high schools, one of which was all-male and one of which was all-female.[72] The plaintiff, a female student, did not like Girls High, the all-female academic school, and wished to enroll instead in Central High School, the all-male academic school. The plaintiff complained that her comprehensive school did not set high enough standards for its students.[73] The district court found that the two schools were "academically and functionally equivalent," but nonetheless concluded that there was not a "fair and substantial relationship" between the gender-based classification and the state's legitimate interest.[74] Therefore, it concluded that the division of the sexes in these schools was unconstitutional.[75]

On appeal, the Third Circuit reversed, finding no evidence that Congress had intended to require all public schools to be coeducational.[76] The court took the finding of equivalency to establish that the plaintiff wanted to enroll at Central High due to a personal

68. 518 U.S. 515 (1996).

69. *Id.*

70. *Id.* at 519.

71. *Id.*

72. Vorchheimer v. Sch. Dist., 532 F.2d 880, 881 (3d Cir. 1976). The court described the Philadelphia School District as having four types of senior high schools: academic, comprehensive, technical, and magnet. *Id.* The comprehensive schools had a wide range of courses, including college preparatory classes, and advanced placement classes available. *Id.* There were three single-sex comprehensive schools; two were all male and one was all female. *Id.* Academic high schools had high admission standards and offered only college preparatory courses. *Id.* Philadelphia had two academic high schools; one was all male and one was all female. *Id.* Plaintiff at the time of the suit was enrolled in a coeducational comprehensive school and desired admission to the all-male academic school. *Id.*

73. *Id.* at 882.

74. *Id.*

75. *Id.*

76. *Id.* at 885. The court cited the legislative history of the Equal Educational Opportunity Act of 1974 and concluded that the inconsistent inclusion and exclusion of sex as a category meant that the legislation was ambiguous towards the existence of single-sex schools. *Id.* at 884. The legislature's primary focus in debate and intent was the issue of busing. *Id.*

preference rather than an objectively better educational opportunity.[77] Thus, the plaintiff had not alleged that she was receiving an unequal education and there was no discrimination. If there were detriments to the single-sex construction of the academic schools, they affected both boys and girls equally.[78]

While committed to the concept that "there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment," the court concluded that "there are differences between the sexes which may, in limited circumstances, justify disparity in law."[79] A legitimate educational policy could be served through single-sex high schools, and therefore "[m]easures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance."[80] While the effectiveness of single-sex schools in serving an educational policy was not universally accepted, the idea was respected.[81] The Third Circuit declined to rule on the issue of whether a rational relationship or substantial relationship test was appropriate for this sort of gender-based classification, since utilizing single-sex high schools would satisfy either test.[82] To find such schools unconstitutional would "stifle the ability of the local school board to continue with a respected educational methodology" and deny freedom of choice to parents and students desiring a public, single-sex school.[83] In a 4-4 decision, the Supreme Court affirmed the decision of the Third Circuit without giving guidance as to the appropriate reasoning or test to apply.[84]

B. Mississippi University for Women

In *Mississippi University for Women*, the Supreme Court first presented extensive reasoning on the constitutionality of a school's exclusion of students on the basis of sex.[85] Mississippi University for Women was established in 1884 by the Mississippi Legislature as the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi.[86] At the time of the decision, MUW

77. *Id.* at 882.
78. *Id.* at 886.
79. *Id.*
80. *Id.* at 887-88.
81. *Id.* at 888.
82. *Id.*
83. *Id.*
84. Vorchheimer v. Sch. Dist., 430 U.S. 703 (1977).
85. 458 U.S. 718 (1982).
86. *Id.* at 719-20.

was the oldest state-supported all-female college in the country.[87] Mississippi did not have any other single-sex public university or college, so the court was not faced with the question, presented to the Third Circuit in *Vorchheimer*,[88] of whether a state could have "separate but equal" schools for men and women.[89] Instead, the narrow question presented to the Court was whether a state-supported professional nursing school that excluded males violated the Fourteenth Amendment.[90]

The plaintiff in *MUW* was a male registered nurse who did not hold a baccalaureate degree in nursing.[91] He applied for admission to the MUW School of Nursing but was refused admission because of his sex.[92] He was told that he could audit classes but could not enroll for credit.[93] He subsequently filed an action in United States District Court, claiming that the single-sex admissions policy violated the Fourteenth Amendment.[94]

In ruling in favor of the State, the District Court asked whether the "maintenance of MUW as a single-sex school bears a rational relationship to the State's legitimate interest" in providing educational options to the female students in Mississippi.[95] Since providing single-sex schools was consistent with a respected theory of educational benefits, the admissions policy was not arbitrary.[96]

The Fifth Circuit reversed and rejected the "rational relationship" test in favor of a test stating that "gender-based classifications must be substantially related to important governmental objectives in order to withstand constitutional challenge."[97] Although the State did have a significant interest in providing educational opportunities to all its students, the Fifth Circuit found that the State had failed to show that providing a

87. *Id.*

88. 532 F.2d 880 (3d Cir. 1975), *aff'd by an equally divided court*, 430 U.S. 703 (1977). *Vorchheimer* is discussed in more depth *supra* Part III.A.

89. *Miss. Univ. for Women*, 458 U.S. at 720 n.1.

90. *Id.* at 719.

91. *Id.* at 720.

92. *Id.* at 720-21.

93. *Id.* at 721.

94. *Id.* Plaintiff sought both injunctive and declaratory relief and compensatory damages. *Id.*

95. *Id.*

96. *Id.*

97. Hogan v. Miss. Univ. for Women, 646 F.2d 1116, 1118-19 (5th Cir. 1981). Without mentioning the term intermediate scrutiny, the court notes that sex discrimination gets a lower level of scrutiny than does race discrimination, but gives the test quoted above as the proper test instead of a rational relationship test. *Id.* at 1118.

unique opportunity for females, but not for males, was substantially related to that interest.[98]

The Supreme Court, affirming the judgment of the Fifth Circuit, held that any policy expressly discriminating among applicants on the basis of gender is subject to scrutiny under the Equal Protection Clause, regardless of whether it discriminates against males or females.[99] The Court further held that any party seeking to uphold a statute classifying people on the basis of gender must show an "exceedingly persuasive justification" for the classification.[100] This burden can only be met by showing that "the classification serves 'important government objectives'" and that the State's means are "substantially related to the achievement of those objectives."[101] The Court recognized that the statutory objective itself must be free of "archaic and stereotypic notions."[102] If the objective is to exclude or "protect" members of one gender due to a supposed inherent handicap or innate inferiority, then the objective itself is invalid.[103]

The Court rejected the State's argument that the single-sex policy served the important government interest of compensating for past discrimination against women.[104] The Court recognized that a gender-based classification could be justified if it "intentionally and directly assists members of the sex that is disproportionately burdened."[105] The Court would still perform the same searching analysis of the classification in such a situation, however. Scrutiny of the factual circumstances revealed that women did not lack opportunities to obtain nursing training or reach leadership positions, either when the School of Nursing was opened or when the case was decided.[106] In fact, women were overrepresented in the field of nursing, receiving more than 94 percent of the baccalaureate nursing degrees nationwide.[107] Therefore, MUW's policy of excluding males,

98. *Id.* at 1119.

99. *Miss. Univ. for Women*, 458 U.S. at 723.

100. *Id.* at 724.

101. *Id.* (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)). As in *Virginia*, the two competing standards—"exceedingly persuasive justification" and "substantially related to the achievement of [important government] objectives"—lead to some confusion. As the latter, traditional formulation is clearer in application, with the former only being defined in terms of the latter, this Note will generally use that test. *See infra* Part III.D.

102. *Miss. Univ. for Women*, 458 U.S. at 725.

103. *Id.* at 724-25.

104. *Id.* at 727.

105. *Id.* at 728.

106. *Id.* at 729.

107. *Id.* at 729 n.14.

rather than helping women into a field that had been closed to them, furthered the stereotypical view of nursing as a job for women.[108]

The Court also found that the all-female policy violated the second prong of the announced test because there was no showing that the gender-based classification was "substantially and directly related" to the compensatory objective.[109] Because men were allowed to audit classes, the State could not plausibly argue that it was achieving the benefits of a school where women were not adversely affected by the presence of men.[110] Since neither the interest nor the relationship between the interest and the means satisfied the Court's standards, the Court held that the all-female policy violated the Equal Protection Clause.[111] The State fell short of proving an "exceedingly persuasive justification" for the maintenance of the school[112] While Mississippi defended its classification scheme on the grounds that Congress had intended, through Title IX, to explicitly exclude from its coverage colleges that had historically been all-female, the Court found that Congress did not have the power to change the guarantees of the Fourteenth Amendment.[113] To the extent that single-sex education failed to fulfill the substantial relationship test necessary to justify the gender-based classification, Congress could not legislatively permit it. Similarly, if single-sex secondary schools or classes are unconstitutional, the fact that Congress or an agency desires to expressly permit them is irrelevant.

C. Virginia Military Institute

The Supreme Court's second consideration of the constitutionality of single-sex schools came in response to a challenge to the all-male Virginia Military Institute.[114] At the time of the case, VMI, which was financially supported by the State of Virginia, was the only single-sex school out of the fifteen public institutions of

108. *Id.* at 729 & n. 14.

109. *Id.* at 730.

110. *Id.* at 730-31.

111. *Id.* at 731

112. *Id.*

113. *Id.* at 732. The Court quotes *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966), as holding that Congress's power under section 5 of the Fourteenth Amendment, which allowed Congress hroad power to enforce the Amendment, was "limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, ahrogate, or dilute these guarantees." While Congress deserved deference in decisions and classifications, Congress could not validate a law denying the rights guaranteed by the Fourteenth Amendment. *Miss. Univ. for Women*, 458 U.S. at 732-33.

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

higher learning in Virginia.[115] VMI attempted to prepare men for leadership in both civilian and military life through a unique training program with an "adversative method" modeled on English public schools.[116] This method included "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."[117] Reflecting VMI's high status, its alumni included military generals, members of Congress, and business executives. The school's prestigious graduates had created the largest per-student endowment of any public undergraduate school in the United States.[118]

Upon a challenge from a female high school student who wished to be admitted to VMI, the District Court followed *Mississippi University for Women* and looked for an "exceedingly persuasive justification" for government action based on sex.[119] It described this test as a consideration of whether "the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives."[120] The District Court found that some changes would have to be made to the school's program if women were admitted, including the addition of allowances for personal privacy and alterations of the physical education requirements to accommodate the women.[121] These changes constituted sufficient constitutional justification for a single-sex program, as adding women to the unique educational experience would fundamentally alter that experience.[122]

The Court of Appeals for the Fourth Circuit vacated this judgment, finding that a "policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."[123] The court thus proposed three permissible courses of action: 1) admit women to VMI;

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115. *Id.* at 520.

116. *Id.*

117. *Id.* at 522. The adversative method is further characterized by Spartan living conditions with constant surveillance and no privacy; uniforms; all cadets eating together in the mess hall; regular participation in drills; the "rat line," comparable to Marine boot camp, which bonds cadets to their fellow sufferers; a hierarchical "class system" of privileges and responsibilities; a senior class mentor assigned to each entering class "rat"; and a strict honor code. *Id.*

118. *Id.* at 520.

119. *Id.* at 523-24.

120. *Id.* (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

121. *Id.* at 524 (citing United States v. Virginia, 766 F. Supp. 1407, 1412-13 (W.D. Va. 1991)).

122. *Id.*

123. *Id.* at 525 (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992)).

2) establish parallel institutions or programs; or 3) terminate state support and allow VMI to proceed as a private school.[124]

In response, Virginia elected to establish a parallel program for women called the Virginia Women's Institute for Leadership.[125] The program would share VMI's mission of producing "citizen-soldiers," but it would have different academic offerings, methods of education, and financial resources.[126]. Virginia agreed to provide equal funding for students at each of the schools, and the VMI Foundation offered to give the VWIL program a $5.4625 million endowment.[127] The VMI Alumni Association also agreed to give VWIL graduates access to a network of employers interested in VMI graduates.[128]

VWIL was designed to have methods of instruction that would be appropriate for "most women."[129] The task force appointed from among Mary Baldwin faculty and staff to design the program parallel to VMI conceded that it would be easier both to develop a program at VWIL that more closely paralleled the one at VMI and to defend such a program in litigation. The task force decided, however, that such a program would be "a paper program, with no real prospect of successful implementation," since it would not be well-suited to the different needs of female students.[130] Both the District Court and the Court of Appeals approved the plan, with the Court of Appeals finding that the adversative method used at VMI could not be used in a coeducational environment.[131] The Court of Appeals held that the

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124. *Id.* at 525-26.

125. *Id.* at 526. VWIL would be located at Mary Baldwin College, a private, all-female, liberal arts school, and was initially to be open to twenty five to thirty female students. *Id.*

126. *Id.* The district court found that Mary Baldwin was ultimately inferior to VMI in several ways. The average combined SAT score of entrants at Mary Baldwin was about one hundred points lower than at VMI. *Id.* The faculty at Mary Baldwin had fewer Ph.D.s and lower salaries. *Id.* While VMI had degrees in liberal arts, the sciences, and engineering, Mary Baldwin offered only bachelor of arts degrees; students in the Virginia Women's Institute for Leadership could get an engineering degree by attending Washington University in St. Louis, a private school, at their own expense for two years. *Id.*

127. *Id.* at 527. VMI had a $131 million endowment, while Mary Baldwin's was $19 million. *Id.*

128. *Id.*

129. *Id.* at 526-27 (quoting United States v. Virginia, 852 F. Supp. 471, 476 (W.D. Va. 1994)). VWIL would be different in several specific ways from VMI. While VWIL students would participate in ROTC programs and a "largely ceremonial" Virginia Corps of Cadets, there would not be a military format to the VWIL House, and there would be no requirement to eat meals together or to wear uniforms to school. *Id.* at 527. The adversative method unique to VMI would be replaced with a "cooperative method which reinforces self-esteem." *Id.* VWIL students would take classes in leadership, do an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series. *Id.*

130. United States v. Virginia, 44 F.3d 1229, 1234-35 (4th Cir. 1995).

131. *Virginia*, 518 U.S. at 528.

appropriate test was whether the men at VMI and the women at VWIL would receive "substantively comparable benefits at their institution" and ultimately found the educational opportunities of the two schools to be "sufficiently comparable."[132]

The Supreme Court approved the basic standard of review, that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[133] It further agreed that the State had to show important governmental objectives and means that were substantially related to achieving those objectives.[134] The justification could not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females."[135] While supposed, inherent differences are unacceptable justifications for classifying people on the basis of race or national origin, physical differences between men and women indicate that sex is not a completely proscribed classification.[136] Classifications cannot be used, however, "to create or perpetuate the legal, social, and economic inferiority of women."[137]

The Court specifically noted that, similar to *Mississippi University for Women*, the case concerned an educational opportunity that was unique and available only at VMI, and thus presented no "separate but equal" question.[138] Upon examining the State's proffered objective, pursuit of diversity in higher education, the Court found that the "alleged objective" was not the actual purpose of the classification.[139] Because all of the other public college and universities in Virginia had become coeducational, it did not seem realistic to believe that the State was truly aiming to offer diversity.[140]

The State's second major argument was that VMI's unique method could not be made available without alterations to accommodate women.[141] The lower court had made findings of fact

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132. *Id.* at 529.

133. *Id.* at 531.

134. *Id.* at 533.

135. *Id.*

136. *Id.*

137. *Id.* at 534.

138. *Id.* at 536 n.7; *cf.* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720 n.1 (1982) (recognizing that unlike *Vorchheimer*, this case did not present a question of "separate but equal").

139. *Virginia*, 518 U.S. at 536; *cf. Miss. Univ. for Women*, 458 U.S. at 730 (finding that the alleged objective, compensating for former discrimination against women, did not match the actual purpose behind the discriminatory classification since there was not actually discrimination against women in the field of nursing).

140. *Virginia*, 518 U.S. at 539.

141. *Id.* at 540.

concerning the differences between male and female "tendencies."[142] While these findings were not challenged, the Court noted that it had repeatedly told courts to take a "hard look" at generalizations or "tendencies" such as those suggested here.[143] State actors could not constitutionally exclude some individuals from opportunities based on "fixed notions concerning the roles and abilities of males and females."[144] Regardless of the proportion of women who wanted to attend VMI, the Court said, it still had to consider whether Virginia could "constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."[145] The Court cited several examples where people had assumed women were unqualified for fields in which they later excelled.[146] In questioning whether the admission of women would actually diminish VMI's reputation and destroy the adversative system, the Court held that this fear was not an "exceedingly persuasive" justification.[147] The great goal of Virginia, to create citizen-soldiers, was not, in the Court's view, a goal that was substantially advanced by the categorical exclusion of women.[148]

The Court further rejected the proposed parallel institute, the VWIL, finding it to be inferior to VMI in "tangible and intangible facilities."[149] VMI's famous adversative method would be denied to women because the VWIL intended to utilize a "cooperative method" that would reinforce self-esteem.[150] While the task force that designed the VWIL determined that the method used at VMI would be inappropriate for most women, there was no assertion that it was appropriate even for most men.[151] Citing various other differences, the Court held that VWIL could not be considered a "comparable single-gender women's institution," but was a "pale shadow" of VMI.[152] As in *Sweatt v. Painter*, where the Court rejected separate law schools

142. *Id.* at 541. These differences included such beliefs as "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere." *Id.* The experts testified that while there were certainly exceptions to these generalizations, educational experiences had to be designed around the rule, rather than the exception. *Id.*

143. *Id.*

144. *Id.* (quoting *Miss. Univ. for Women*, 458 U.S. at 725).

145. *Id.* at 542.

146. *Id.* at 543-45.

147. *Id.* (citing examples of past gender discrimination including the move to exclude women from the practice of law, the practice of medicine, and the field of police work).

148. *Id.* at 545-46.

149. *Id.* at 547.

150. *Id.* at 548.

151. *Id.* at 550.

152. *Id.* at 551-553 (citing United States v. Virginia, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting)). For a list of tbe noted differences, see *supra* notes 126-127.

for black and white students, the most important differences in the allegedly parallel programs were in the "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."[153] In the context of VMI and VWIL, the Court saw no substantial equality in any of these areas.

In dissent, Justice Scalia criticized the majority for the lack of clarity in the phrase "exceedingly persuasive justification" and for what he viewed as a virtual abandonment of the traditional language of intermediate scrutiny, which required only that a gender classification be "substantially related to an important government objective."[154] In light of the constitutional principles announced by the majority, Justice Scalia argued that

> regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials . . . . No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.[155]

Some opponents of single-sex education cite Justice Scalia's dissent as proof that the *Virginia* decision completely precludes such schools.[156] However, other commentators believe that he overstated the Court's holding and that a case less extreme than *Virginia*, in which Virginia limited perhaps the most traditionally male field to only men, would result in a different conclusion.[157] Justice Scalia himself noted that

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153. *Virginia*, 518 U.S. at 554; *see also* Sweatt v. Painter, 339 U.S. 629 (1950).

154. *Virginia*, 518 U.S. at 570-71 (Scalia, J., dissenting).

155. *Id.* at 596-97.

156. *See* NOW COMMENTS, *supra* note 12 (arguing that the proposal to establish single-sex schools or classes in public primary and secondary schools is unconstitutional in part because "[a]s Justice Scalia acknowledged, such an effort cannot survive equal protection scrutiny").

157. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) (arguing that "it would be incorrect to conclude, as Justice Scalia does in his dissent, that the Court has by its rationale committed future courts to invalidation of all educational programs, public and private, that separate the sexes"); *see also* William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27, 44 (1997) (arguing that "[w]hile many of Justice Scalia's blows on the majority are well deserved, this one hits too hard. The Court made no such sweeping pronouncement, nor does its opinion necessarily imply such a result. On the contrary, the majority went out of its way to emphasize that its decision turned on the unique nature of VMI, and that no per se condemnation of single-sex public education was implied."); Pherabe Kolb, Comment, *Reaching for the Silver Lining: Constructing a Nonremedial yet "Exceedingly Persuasive" Rationale for Single-Sex Educational Programs in Public Schools*, 96 NW. U. L. REV. 367, 374 (2001) (noting the argument of many scholars that VMI only invalidated that particular program, and arguing

the Court may still decide not to apply the *VMI* principles to future cases, including those cases involving challenges to the provision of federal funds to private single-sex schools.[158] Rather, he hoped that the Court would narrowly read *Virginia* as applying to a "uniquely prestigious all-male institution, conceived in chauvinism."[159] Justice Ginsburg, author of the *Virginia* majority opinion, lends support to this prediction in a later speech, noting that

> the VMI case was not really about the military. Nor did the Court question the value or viability of single-sex schools. Instead, VMI was ahout a State that invested heavily in a college designed to produce business and civic leaders, that for generations succeeded admirably in the endeavor, and that strictly limited this unparalleled opportunity to man.[160]

The ultimate reach of the *Virginia* rationale is therefore unclear.

D. Scrutiny of Sex-Based Classifications after Mississippi University for Women *and* Virginia

The *MUW* and *Virginia* majorities both use the phrase "exceedingly persuasive justification" to describe the test for upholding a gender classification.[161] In *Virginia*, the majority opinion refers to applying "skeptical scrutiny" when a court examines government classifications based on sex.[162] Each case explains the test by noting that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[163] However, Justice Scalia's dissent in *Virginia* cites the phrase "exceedingly persuasive justification" to argue that, regardless of what the Court said, the majority had effectively heightened the standard of review beyond the intermediate scrutiny standard.[164]

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in their support that "it should be noted that *Virginia* never implies there are no acceptable justifications for gender classifications"); Linda L. Peter, Note, *What Remains of Publie Choice and Parental Rights: Does the VMI Decision Preclude Exclusive Schools or Classes Based on Gender?*, 33 CAL. W. L. REV. 249, 251 (1997) (concluding that "Justice Scalia's concern over the end of single-gender education is unfounded").

158. *Virginia*, 518 U.S. at 600 (Scalia, J., dissenting).

159. *Id.*

160. Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School October 19, 2002*, 102 COLUM. L. REV. 1441, 1447 (2002).

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

162. *Virginia*, 518 U.S. at 531.

163. Craig v. Boren, 429 U.S. 190, 197 (1976); *see Virginia*, 518 U.S. at 523-24; *Miss. Univ. for Women*, 458 U.S. at 724.

164. *Virginia*, 518 U.S. at 524 (holding that "a party seeking to uphold government action hased on sex must establish an 'exceedingly persuasive justification' for the classification", and further explaining that "[t]o succeed, the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives' "); *id.* at 570-71

Commentators disagree as to whether the Court, in changing its terminology, raised the standard that the state must meet to justify a gender classification.[165]

For several reasons, this Note will continue to apply the intermediate scrutiny standard, rather than a higher, "exceedingly persuasive justification" standard, when evaluating the constitutionality of gender-based classifications. First, the Supreme Court has unanimously adopted an intermediate scrutiny standard for discriminatory classifications based on sex.[166] In the context of single-sex education, the Court continues to define its approach by reference to the intermediate scrutiny standard, which requires that the challenged gender classification be substantially related to achieving important governmental objectives.[167] While commentators have been somewhat justified in asserting that the Court, in the *Virginia* opinion, uses language that implies that the standard for justifying classifications based on sex has been raised above intermediate scrutiny,[168] unanimously accepted precedent presumably remains unchanged until explicitly disavowed. Second, the Court, in *Virginia*,

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(Scalia, J., dissenting) (arguing that the majority fails to apply the appropriate test, because "we evaluate a statutory classification based on sex under a standard that lies 'between the extremes of rational basis review and strict scrutiny.' We have denominated this standard 'intermediate scrutiny' and under it have inquired whether the statutory classification is 'substantially related to an important governmental objective.' ")

165. *Compare* Christopher H. Pyle, *Women's Colleges: Is Segregation by Sex Still Justifiable After* United States v. Virginia*?*, 77 B.U. L. REV. 209, 233 (1997) (arguing that "Justice Ginsburg's opinion came as close to strict scrutiny as possible without actually embracing it"), *and* Sunstein, *supra* note 157, at 73, 75 (noting that "*Virginia* heightens the level of scrutiny and brings it closer to the 'strict scrutiny' that is applied to discrimination on the basis of race. . . . After *United States v. Virginia* . . . [s]tates must satisfy a standard somewhere between intermediate and strict scrutiny."), *with* Hurd, *supra* note 157, at 49 (arguing that "[w]hile the majority may conceivably include one or more justices who, if given their druthers, would ratchet up the level of scrutiny for sex-based classifications, the written opinion sbows no consensus for such a change. Sex-based classifications are still to be judged by intermediate scrutiny, and intermediate scrutiny still means what it meant before. The *VMI* decision did not turn on how the majority viewed the law, but on how they viewed—or refused to view—the facts"); *see also* Elizabeth M. Schneider, *A Postscript on VMI*, 6 AM. U. J. GENDER & L. 59, 60-61 (1997) (discussing the ambiguous phrases used in the majority opinion and the possible interpretations of each).

166. Clark v. Jeter, 486 U.S. 456, 461 (1988).

167. *See, e.g.*, *id.* at 461 (holding, for a unanimous Court, that "[b]etween these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy"). Both *Clark* and the dissent of Justice Scalia in *Virginia* cite multiple cases using this approach. *See Virginia*, 518 U.S. at 571 (Scalia, J., dissenting); *Clark*, 486 U.S. at 461.

168. The Court, for example, refers to its test as "skeptical scrutiny" and recognizes that the Court "thus far" has reserved strict scrutiny for race and national origin, seemingly implying that strict scrutiny may some day apply beyond its present bounds. *Virginia*, 518 U.S. at 531, 532 n.6.

quotes the standard of intermediate scrutiny, and, despite using the term "exceedingly persuasive justification" throughout the opinion, defines that term only by reference to the traditional intermediate scrutiny test.[169] Finally, the Court notes that, unlike race or national origin, sex does implicate real differences among people.[170] Accordingly, the Court concluded that sex is not a proscribed classification in the same way that race is and that classifications based on gender need not be considered under the same standard of scrutiny.[171]

Such statements seem to imply an unwillingness on the part of the Court to treat classifications based on sex in the same way as classifications based on race. While it is possible that the Court will, in future cases, explicitly declare classifications based on sex to be subject to a higher standard than intermediate scrutiny, *Virginia* alone does not support abandoning the intermediate scrutiny test. Therefore, this Note will analyze single-sex education under the traditional intermediate scrutiny standard.

IV. THE APPLICATION OF INTERMEDIATE SCRUTINY TO SINGLE-SEX EDUCATION

Single-sex education is substantially related to the promotion of three separate important government interests.[172] First, single-sex education, particularly for girls, can decrease discrimination that students face in the classroom. Second, single-sex education has the potential to improve academic achievement, although commentators

169. *Id.* at 524 (stating as the test that "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification. To succeed, the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.' " (citations omitted)).

170. *Id.* at 533.

171. *Id.*

172. *See* Proposed Regulations, *supra* note 50, at 11278. The Office for Civil Rights describes two important governmental objectives that are recognized under the proposed regulations. The first, "to provide a diversity of educational options to students and parents," parallels the third important interest I address. *Id.* The second objective recognized by the Office for Civil Rights, "to meet the particular, identified educational needs of its students," seems broad enough to address both educational needs to learn in an environment free from discrimination and educational needs that are a part of academic achievement more broadly. *Id.*; *see also id.* at 11279 (noting that under this objective, a state could, "using reliable information and sound educational judgment, determine that a single-sex class in a given subject is likely to provide some students educational benefits." Even to the extent these regulations, if adopted, were read more narrowly, Congress will always retain the ability to relax its requirements for the state's objective to the constitutional limits. Each of the three interests I describe is within the constitutional framework the Supreme Court has created. *See infra* Parts IV.A, B, C.

and researchers disagree on whether and to what extent this is true. Finally, single-sex education provides parents with more choices among educational opportunities.

A. Preventing Discrimination in the Classroom

Many commentators agree that discrimination exists in secondary-school classrooms, although they disagree as to whether girls, boys, or both face this discrimination.[173] The Supreme Court has recognized that preventing discrimination against women is an important government interest.[174] A policy discriminating against men is not exempt from scrutiny. In fact, a classification that discriminates against men is analyzed under the same standard of review as a classification that discriminates against women.[175] As education is "perhaps the most important function of state and local governments" and is a "right which must be available to all on equal terms,"[176] the prevention of sex-based discrimination in public secondary schools, whether against boys or girls, is an important interest of the state government.

To satisfy the standard of scrutiny set forth in cases where a classification is made on the basis of sex, not only must the government's objective be important, but the classification must also be substantially related to that important interest.[177] Thus, a state must establish both the existence of discrimination based on sex in its classrooms and that the maintenance of single-sex schools or classes is substantially related to the government's interest in preventing that discrimination.

1. Discrimination Against Girls

There is a great deal of evidence that girls experience discrimination in a coeducational school setting. The classic

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173. *See infra* Parts IV.A.1-.2.

174. Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987). *Rotary Club* characterizes preventing discrimination against women as a compelling state interest, *id.*, so this interest certainly achieves the lesser standard of "important" in intermediate scrutiny. *See also* Lisa Denise Gladke, Note, *The Fate of Women's Colleges: An Anti-Subordination Analysis*, 18 B.C. THIRD WORLD L.J. 195, 210 (1998) (noting two forms "exceedingly persuasive justifications" by women's colleges can take: remediation for past discrimination and diversity of educational opportunities).

175. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982).

176. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

177. *See Virginia*, 518 U.S. at 524; *supra* Part III.D.

statement of the problem came from Myra and David Sadker, whose research led them to conclude that

> [t]eachers interact with males more frequently, ask them better questions, and give them more precise and helpful feedback. Over the course of years the uneven distribution of teacher time, energy, attention, and talent, with boys getting the lion's share, takes its toll on girls . . . . Girls are the majority of our nation's schoolchildren, yet they are second-class educational citizens. The problems they face—loss of self-esteem, decline in achievement, and elimination of career options—are at the heart of the educational process. Until educational sexism is eradicated, more than half our children will be shortchanged and their gifts lost to society.[178]

While girls perform better than or equal to boys on almost all standardized tests in the early grades, by the time girls graduate from high school or college, they have fallen behind boys on standardized test scores. They are also much less likely to be awarded state and national college scholarships.[179] When they later apply to graduate schools, girls generally score lower than boys on admissions tests such as the LSAT and the MCAT.[180]

Psychologist Mary Pipher has described girls in early adolescence by saying that "[t]hey lose their resiliency and optimism and become less curious and inclined to take risks. They lose their assertive, energetic, and 'tomboyish' personalities and become more deferential, self-critical and depressed. They report great unhappiness with their own bodies."[181] Dr. Pipher finds that "junior highs are not user-friendly for adolescent girls."[182] She maintains that most teachers are well-intentioned and unaware that they discriminate against girls. Nonetheless, after considering the research on teachers' differential treatment of the sexes, she discovered ways that she herself discriminated in the classroom.[183] As a result, Dr. Pipher argues that "girls do better in cooperative environments and in all-girl Math and Science classes."[184]

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178. MYRA & DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 1 (1993).

179. *Id.* at 13-14.

180. *Id.*; *see also* AM. ASS'N OF UNIV. WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS—THE AAUW REPORT: A STUDY OF MAJOR FINDINGS ON GIRLS AND EDUCATION 3 (1992) (finding that girls and boys enter school roughly equal in measured ability, but that twelve years later, girls have fallen behind male classmates in areas such as higher level mathematics and measures of self-esteem).

181. MARY PIPHER, REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS 19 (1994).

182. *Id.* at 289.

183. *Id.* at 289-90.

184. *Id.* at 290. Dr. Pipher's conclusion is very similar in a sense to that of the task force in the *Virginia* case. Like that group, she concludes that women in the aggregate do better in more cooperative environments. *Id.* Presumably, however, even the absolute proof of this tendency would not change the Supreme Court's opinion, as they are concerned not about whether the

Not all researchers agree, however, that single-sex or cooperative environments are the answer. In 1992, the American Association of University Women ("AAUW") published a landmark report detailing the problems that girls face in education.[185] The report cites studies and polls that found reductions in girls' self-esteem and self-confidence as they moved from childhood to early adolescence.[186] It found, for example, that in the early grades, girls of low socioeconomic status have better test scores than do boys of a like background but, by high school, this difference disappears.[187] The AAUW also published a follow-up report, stressing that the deficits and strengths identified in the original report were not *innately* male or female.[188] Instead, the report argued that "opportunities and expectations are shaped by social phenomena, notably the idea that there are two genders, with oppositional characteristics."[189] In 1998, the AAUW concluded, after a review of research studies conducted over two decades, that single-sex education was not the solution to gender inequity in the classroom.[190] Despite the different conclusions reached by Dr. Pipher and the AAUW as to the desirability of single-sex opportunities, both agree that girls face discrimination in the classroom and that this discrimination affects their performance and happiness.[191]

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tendency is accurate but about whether acting on the tendency harms those girls who do not fit its assumptions.

185. AM. ASS'N OF UNIV. WOMEN, *supra* note 180, at ix-xi.

186. *Id.* at 19. These studies most often focused on white, middle-class girls. *Id.* A survey of the AAUW in 1990 found that only 29 percent of high school girls reported being "happy the way I am"; this was in contrast to 60 percent of elementary school girls and 46 percent of high school boys. *Id.*

187. *Id.* at 25.

188. AM. ASS'N OF UNIV. WOMEN, GENDER GAPS: WHERE SCHOOLS STILL FAIL OUR CHILDREN 5 (1998).

189. *Id.*

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

191. PIPHER, *supra* note 181, at 289-90. This conclusion spans the political spectrum, from strong opponents of single-sex schooling to the strongest proponents. *See, e.g.*, Bernice Sandler, Symposium, *Panel II: Constitutional, Statutory, and Policy Issues Raised by All-Female Education: Publicly-Supported Single-Sex Schools and Policy Issues*, 14 N.Y.L. SCH. J. HUM. RTS. 61, 77-80 (1997) (noting that girls are not treated the same as boys in coed schools, but concluding that the problem is in the way coed schools are operated, and the lack of programs to train teachers not to discriminate and boys to respect women, and that single-sex schools are not a solution to that systemic problem). *But see* Salomone, *supra* note 54, at 210-11 (noting the arguments of proponents of single-sex schools that girls suffer from a "hidden curriculum" that encompasses a "subtle but nonetheless harmful institutionalized program of male dominance, differential teacher expectations, and attitudes that prepare students for gender-specific roles in society.").

The mere existence of discrimination, however, does not justify a classification based on sex unless the classification is substantially related to the prevention of discrimination. Discrimination occurs both in single-sex and coeducational schools.[192] To some extent, it is necessarily of different forms. While coeducational schools show "gender domination and active discrimination against females," some studies have shown that single-sex schools perpetuate "conventional behaviors or styles typically associated with being male or female" and promote the often subconscious sexism of linguistic uses and visual displays.[193] While it is obviously impossible for teachers to call on boys more in an all-female class, nothing prevents a teacher from actively discriminating against female students by telling them that they are not able to compete in male-dominated fields or that their primary role must or should be as a mother. Some commentators thus believe that the best solution is for schools to pursue active anti-discrimination programs or policies rather than to institute a limited number of single-sex schools.[194] These authors, however, often disclaim solutions that might work, such as single-sex schooling, in favor of the ideal, the complete elimination of discrimination in society. Reliance on the achievement of this ideal to improve girls' educational experiences renders any improvement in those experiences virtually impossible.[195]

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192. *See* AM. ASS'N OF UNIV. WOMEN, SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS 6 (1998) (arguing that "creating a single-sex environment, or selecting a single-sex school, does not necessarily mean that the environment will be free of sexism—that is, a presumption of male superiority—or chosen for reasons of gender equity"). Individual researchers participating in the AAUW report also described sexism as "rampant" or "persistent" in single-sex classrooms. *Id.*

193. Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 495 (1999).

194. Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 94 (1997) (noting as possible other solutions to gender bias sending girls to summer conferences on math and science, which has been shown to increase their interest; or using such techniques as "pausing before calling on students, which encourages girls to volunteer, or advising students to take a minute to consider a question before responding, which similarly increases girls' participation."); *see also* Kristen J. Cerven, Note, *Single-Sex Education: Promoting Equality or an Unconstitutional Divide?*, 2002 U. ILL. L. REV. 699, 703 (quoting Gael Sherwin, former president of NOW, as saying in response to the argument that girls should be placed in single-sex schools to avoid discrimination that "[i]t'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."); NOW COMMENTS, *supra* note 12 (suggesting that "investing resources in sexual harassment and sex-equity training for students and teachers would be a much more constructive and effective method of providing a long-term solution to this very real problem [of harassment and discrimination]").

195. Vojdik, for example, proposes that

> [g]iven the availability of successful alternatives to single-sex schools, it is difficult to argue persuasively that the state must resort to segregating girls in order to offer them an education free of discrimination. The problem is not with the girls; the

Other authors believe that even teachers with the best of intentions cannot completely avoid behaviors that negatively impact one sex in a coeducational classroom.[196] Coeducation may be unable to provide a sex-equitable classroom, while a single-sex environment may be able to eliminate many of the forms of discrimination that women face.[197] It is somewhat easier to ensure that teachers do not have open prejudices against girls or boys than it is to ensure that they do not subconsciously call on boys more. It would be rare for a teacher who dislikes girls or thinks of them as unqualified to voluntarily teach a class of only girls. Finally, the kind of open discrimination that would still be a concern in an all-female class would be somewhat easier to monitor, as girls are much more likely to note that their teacher tells them they cannot do math than they are to note that their teacher more frequently calls on boys. Even beyond affecting the actions of teachers, all-female classes actively empower girls by putting them in a position to be the "leaders, movers, and doers."[198]

Perhaps most importantly, while single-sex schools may not limit all forms of discrimination against girls, coeducational schools do not seem to limit any of the possible forms of discrimination against girls. One researcher, for example, reports hearing of a coeducational classroom where the teacher told a female student who asked about the lack of female inventors that a man's job was to invent, while a woman's job was to "look beautiful so she can inspire him."[199] Coeducational schools offer the risk of conscious and substantial sexism, such as this comment, which could be present in all-female classes, as well as the risk of the well-meaning teacher who does not

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> problem is with the classroom and the school system. As argued below, to segregate girls is to give up on them and to send the message that the responsible adults in society are unable (or unwilling) to prevent discrimination in our public schools. That is very disempowering indeed.

Vojdik, *supra* note 194, at 94. Responsible adults are, unfortunately, certainly unable to prevent all discrimination in our public schools, as in society at large. Educating girls in an environment free of discrimination, wherever that environment might be, gives girls the opportunity to learn while being encouraged to fully participate and achieve, rather than being limited by discrimination or by norms that put the boys in the positions of responsibility. Surely this is itself empowering.

196. *See, e.g.*, PIPHER, *supra* note 181, at 297.

197. RIORDAN, *supra* note 9, at 11 (quoting Jennifer Shaw as observing that "whereas coeducation in principle offers equality of opportunity but in fact reduces the opportunity of equality, single sex schools may offer genuine equality of opportunity in the highly unequal society in which we live").

198. Whitney Ransome & Meg Milne Moulton, *Why Girls' Schools? The Difference in Girl-Centered Education*, 29 FORDHAM URB. L.J. 589, 598 (2001).

199. SADKER, *supra* note 178, at 7.

realize that she responds more to boys.[200] The offering of single-sex girls' classes, then, is substantially related to decreasing discrimination against girls in the classroom.[201] The opportunity to compete for the teacher's attention absent subconscious gender biases is sufficiently important to warrant state action, even if some forms of discrimination may persist.

2. Discrimination Against Boys

While scholars have historically focused on educational discrimination against girls, there are certainly scholars who believe that it is boys, not girls, who are falling behind in the classroom.[202] Often, this discussion focuses on low-income, minority boys and on addressing the problems of substance abuse and crime in the inner cities.[203] Christina Hoff Sommers has argued that a boy today has the following experience:

> The allegedly silenced and neglected girl sitting next to him is likely to be a better student. She is not only more articulate, she is probably a more mature, engaged, and well-balanced human being. He may be uneasily aware that girls are more likely to go on to college. He may believe that teachers prefer to be around girls and pay more attention to them. At the same time, he is uncomfortably aware that he is considered to be a member of the unfairly favored "dominant gender."[204]

Boys are behind girls in reading and writing, are less committed to school, and are increasingly less likely to go to college.[205]

Many commentators disagree with the idea that coeducational systems discriminate against boys. They argue that "coeducational classrooms . . . enhance male achievement . . . reflect the values, perspectives, and practices of the dominant male culture . . . favoring men's participation and perpetuating male dominance."[206] Such commentators argue that boys could not be any more advantaged in a

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200. *Id.* at 5.

201. See RIORDAN, *supra* note 9, at 61 (arguing that "sex bias in single-sex schools will be minimized" and that "beyond questions of admission, single-sex schools obviously do not discriminate by sex in providing educational opportunity"); *see also* Gladke, *supra* note 174, at 215 (arguing that women's colleges provide women with a curriculum controlled by women, a mode of learning that gives everyone a chance to succeed, female mentors and role models, and an environment that produces female leaders).

202. *See* CHRISTINE HOFF SOMMERS, THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN (2000).

203. *See* Salomone, *supra* note 54, at 214-15; *see also id.* at 228 (citing the studies of Cornelius Riordan for the proposition that it is poor, African-American and Hispanic females that benefit the most in single-sex schools, with slightly diminished effects for poor, African-American and Hispanic males).

204. SOMMERS, *supra* note 202, at 43.

205. *Id.* at 14.

206. Gladke, *supra* note 174, at 221.

single-sex classroom than they already are in a coeducational classroom.[207] Sommers argues that this perspective fails to understand boys and the problems they face, whereas looking to other countries, such as Great Britain and Australia, can show the United States how to begin addressing these problems.[208] Other developed countries have taken action to consider the problems boys face more quickly than has the United States.[209] Australia has begun a parliamentary investigation into boys' education.[210] The British government has commissioned a report on gender differences, performance, and achievement.[211] Germany has established boys programs outside of school, and Japan has focused on "men's studies."[212]

Sommers is not alone in her belief that an increasing focus should be put on boys, although many scholars who agree with some of what she says nonetheless believe that some legitimate discrimination exists that harms girls.[213] Several clinical psychologists argue, however, that "the structure and behavioral expectations of most coeducational schools, particularly elementary schools, tend to favor female students."[214] Carol Gilligan, an educational psychologist who was a primary source of difference feminism,[215] has noted recently that her research results "do not lend themselves to simple statements such as 'Girls are thriving' or 'Girls are at risk.' . . . Girls and boys are strong and vulnerable, although in somewhat different ways."[216]

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207. *Id.*

208. SOMMERS, *supra* note 202, at 15. Sommers notes that the British government has introduced a program in primary schools intended to help boys catch up with girls, and that the British are experimenting with male single-sex classes in coeducational schools. *Id.* She quotes the British Education Minister as having said, while a Member of Parliament, that "If we do not start to address the problem young men and boys are facing we have no hope." *Id.* at 16. In contrast, she claims that no groups in the United States are addressing hoys' problems, as the mood in the United States is "contentious and Ideological and shaped by the girl advocates." *Id.*

209. Rosemary C. Salomone, Same, Different, Equal 81-82 (2003).

210. *Id.*

211. *Id.*

212. *Id.*

213. *See id.* at 79 (citing Diane Ravitch, who has been a critic of the AAUW's "phony crisis," yet believes that "social and economic inequities continue to burden women")

214. *Id.* at 81 (summarizing DAN KINDLON & MICHAEL THOMPSON, RAISING CAIN: PROTECTING THE EMOTIONAL LIFE OF BOYS (1999) and WILLIAM POLLACK, REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD (1998)).

215. *See id.* at 53-54 (describing Gilligan's basic two points as "women differ from men in their fundamental orientation to life" and that "existing psychological theories devalued women's orientation"). Salomone describes Gilligan's view as inspiring a school of thought that "rather than women accommodating to the male norm, social institutions would bave to change to accommodate women's lives." *Id.* at 56.

216. *Id.* at 82 (quoting Gilligan).

While not all commentators agree that boys face discrimination in the classroom, historical discrimination against girls does not authorize ignoring problems boys may face. The state has an interest in ensuring that neither sex faces discrimination, and that the educational system serves the needs of each sex. If an all-male environment helps to prevent the discrimination against boys that occurs when a teacher shows preference to girls, does not expect achievement and college attendance out of many boys, or is unable to run the class in a way that best serves boys, then providing boys the option of an all-male environment can be constitutional.

B. Providing a Better Education for Students

A second important governmental objective that might be served by single-sex schools is the improvement of the academic education received by students.[217] Across the nation, school districts are failing their students and struggling to provide a basic education.[218] As noted above, providing education is a vitally important role of state and local governments.[219] Education is crucial to performing basic public responsibilities, being a good citizen, appreciating cultural values, being prepared for professional training, and adjusting normally to the surrounding environment.[220] Education is crucial to success in life.[221]

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217. To some extent, this overlaps with the prevention of discrimination. When teachers call on girls less and expect less of them, the lowered attention and expectations can obviously affect the girls' academic experience. However, improvement of academic experience also constitutes a separate problem. Rather than focusing on the lowered academic performance that results from treating boys and girls differently, it focuses on the academic value to students of being educated in ways that studies show have tended to work for more members of their sex, rather than attempting to teach all students in the same way.

218. *See, e.g.*, Alexa Aguilar, *Tax Boost for Schools Is Essential, Education Funding Panel Advises; But Governor's Office Says Blagojevich Has No Plans to Push for Such a Move*, ST. LOUIS POST-DISPATCH, Feb. 19, 2003, at B1 (citing the former state superintendent of Illinois as saying that Illinois must increase sales and income taxes if it hopes to save the failing Illinois school system); Ronnie Lynn, *Numbers Crunch; Watch out, Utah: 100,000 more students are coming; Schools Face Onslaught*, SALT LAKE TRIB., Jan. 12, 2003, at A1 (citing the State Superintendent Steve Laing as estimating that at least 60 percent of Utah's public schools could be considered failing under the federal education standards).

219. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see supra* Part IV.A.

220. *Id.*

221. *Id.*; *see also* Daniel Gardenswartz, *Public Education: An Inner-City Crisis! Single-Sex Schools: An Inner-City Answer?*, 42 EMORY L.J. 591, 595 (1993) (citing tbe following three basic themes behind the operation of the public school system: "(1) the desire to train individuals to be 'good citizens' in a democratic society; (2) the desire to bolster the economic viability of the cities and state that fund the public school systems; and (3) the desire to promote social harmony and economic equality").

The extent to which single-sex education improves the quality of the educational experience for students is a matter of great debate. In *Virginia*, the Supreme Court recognized at least some value to single-sex education, noting that "single-sex education affords pedagogical benefits to at least some students . . . and that reality is uncontested in this litigation."[222] Many commentators, however, argue that the effects of a single-sex environment on the learning process remain unclear.[223] Perhaps the most extensive catalogue of existing studies was compiled by Nancy Levit. She concluded that, for girls, more recent evidence suggests that there are no educational benefits from single-sex education, a conclusion that contradicted earlier studies.[224] Levit also concluded that existing studies show that single-sex schools have impacts on boys that are at best neutral and at worst negative. She notes findings of sexism in all-boys' schools.[225] The fear of sexism in all-male schools is a common theme among many critics.[226] Additionally, many commentators believe that schools such as the Young Women's Charter School in Chicago succeed more because of their increased monetary resources than because of their single-sex nature.[227] Similarly, the self-selection of students, who choose to participate in experimental education programs designed to enhance their educational experience, may also be a factor.[228]

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222. United States v. Virginia, 518 U.S. 515, 535 (1996).

223. Ellen Goodman, *Single-Sex Schools Are Not the Solution; Beware the Pitch for 'Flexibility,' as Backsliding Is Not Innovation*, PITTSBURGH POST-GAZETTE, May 22, 2002, at A-27.

224. Levit, *supra* note 193, at 485-92.

225. *Id.* at 499-500 (citing studies finding that "the severest sexism was found in boys' schools"; an expert witness from the Citadel litigation who helieved that the all-male atmosphere could create a "hypermasculine ethos" and men who felt superior to women; a possibility of stereotypic views regarding innate abilities in particular subjects; an "institutional structure" that "may encourage the view of male exclusivity and dominance"). Single-sex classes would presumably have the same problem, as they would still have the all-male atmosphere that could lead to the "hypermasculine ethos." There is some possibility—which we do not have the evidence to fully consider—that the presence of women in the building, though in different classes, might limit the likelihood that boys would perceive the subject areas they studied as all-male preserves, as they would be aware of female enrollment in the same classes.

226. NOW COMMENTS, *supra* note 12 (arguing that "all-boys schools promote sexism and feelings of superiority toward women"). Again, presumably this feeling is consistent for most opponents of all-male education even in the context of single-sex classes. While some commentators might draw a distinction, there are certainly many who seem to believe that all-male education is, in whatever form, negative.

227. Greg Toppo, *White House at Odds with Groups over Single-Sex Schools*, DESERT NEWS, Sept. 17, 2002, at A05.

228. AM. ASS'N OF UNIV. WOMEN, *supra* note 192, at 5 (citing Cornelius Riordan as crediting positive outcomes of single-sex schools to the characteristics of students that attend such schools; e.g., the pro-academic choice they make to go there).

There are also numerous voices supporting the conclusion that single-sex environments improve the educational experience, however. In countries where more single-sex schools exist, such as England and New Zealand, studies have found increased academic achievement in single-sex schools.[229] Proponents argue that single-sex education not only limits distractions, provides discipline and role models, and fosters positive reinforcement, but also deals with the cognitive differences between boys and girls without labels and stereotypes.[230] To some researchers, empirical evidence seems to favor single-sex schools for academic outcomes.[231] Additionally, individuals who actually attended single-sex schools, as well as their parents, testify that girls are happier and more successful in single-sex schools.[232]

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229. Press Release, National Foundation for Educational Research, The Impact of School Size and Single-sex Education on Performance (July 9, 2002) (finding, in a study of secondary schools in England, that "girls' schools help to counter traditional sex-stereotyping in subject choices; girls in single-sex comprehensive schools perform better than girls in mixed comprehensives; boys with low prior attainment achieve slightly better results at GCSE in boys' schools than in mixed comprehensives"), http://www.nfer.ac.uk/research/pub_template.asp?theID=289; *see also* Jadwiga S. Sebrechts, *Single-Sex Education: Expecting More, and Getting It*, SEATTLE POST-INTELLIGENCER, July 21, 2002, at E1.

230. Kelley Beaucar Vlahos, *Separate, But Not Equal, Say Some Single-Sex Education Opponents* (Fox News Channel broadcast, Sept. 24, 2002); *see also* RIORDAN, *supra* note 9, at 39 (noting as possible benefits claimed by single-sex education advocates role modeling; promotion of traditional masculine and feminine needs of students; less channeling of students into fields traditionally thought suitable for them; teacher-student interaction in the classroom; less occurrence of sex-stereotypes in peer interaction; minimization of obsession with physical attractiveness and heterosexual popularity; control and discipline; satisfaction of parents for whom religious grounds demand separation); Ransome & Moulton, *supra* note 198, at 596. Ransome and Moulton cite a study done by Goodman Research Group of girls' school alumnae. *Id.* The data reflected that "alumnae placed an enormous value on their education at girls' schools. They remained confident in their abilities. They identified themselves as academic achievers. They credited their girls' schools as the places where they learned to recognize and harness their talents and potentials." *Id.*; *see also* Erin a. McGrath, Note, *The Young Women's Leadership School: A Viable Alternative to Traditional Coeducational Public Schools*, 4 CARDOZO WOMEN'S L.J. 455, 476-77 (1998) (describing some of the academic achievements of the all-female Young Women's Leadership School in East Harlem).

231. RIORDAN, *supra* note 9, at 61. Riordan notes that "girls in single-sex schools, especially, seem to obtain higher cognitive outcomes than their counterparts in mixed-sex schools." *Id.*

232. NBC News, Matt Lauer, co-host, *Education Today: Professor Diane Ravitch of New York University and Norman Siegel of the New York Civil Liberties Union Debate the Issue of Single-Sex Public Schools* (NBC broadcast, Aug. 27, 1997). NBC interviewed Nikki Lessner, an 8th grade student at the Young Women's Leadership School in New York City, who said that "[i]f I was called on in class, asked something and I got it wrong, boys would put you down, they'll tease you and make fun of you. But the girls, they don't do that, because they don't—if you don't know something, they'll help you instead of teasing you." *Id.* Cydnee Couch, another 8th grade student, said "Since there aren't boys in the class, we learn more, the classes were more fun." *Id.* A third student, Lauren Labiosa, said "A lot of us won't feel as intimidated as we were in our previous schools." *Id.* Couch's aunt said that Cydnee's grades increased, as did her interest in school and her self-esteem; Labiosa's mother said that "I am thrilled and feel very fortunate that my daughter is part of it." *Id.*

Increasing public interest in single-sex schools further reflects their positive reputation.[233]

Reconciling the opposing views of commentators on single-sex education is beyond the scope of this Note. In effect, the "truth," if such a thing exists, of the value of single-sex programs is not determined with enough accuracy to gain a reasonable consensus, as evidenced by the disagreement over the issue.[234] At least one commentator has argued that "whether single-sex classes and schools ultimately are upheld as constitutional probably will turn on the social science evidence justifying their efficacy."[235] The National Organization for Women ("NOW") has argued that the constitutional inquiry requires more evidence of the efficacy of single-sex education.[236] On the other hand, a Department of Education official argued that "[i]t's difficult to study these things with any real scientific basis until you've got a body of evidence."[237] Rosemary Salomone also argues that it is irrational and circular to refuse to allow single-sex education merely because there is insufficient evidence supporting its benefits yet at the same time maintain legal constraints on its exercise that effectively prevent the gathering of supporting evidence.[238]

Even if the Supreme Court could draw a conclusion from the available studies, it is debatable whether the Court's reconciliation of extensive and complicated studies should rise to the level of a constitutional pronouncement. In *Brown v. Board of Education*, the

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233. *See* Stefanie Weiss, *Sex and Scholarship; Across the Country, Educators Are Asking If Boys, Girls, and Learning Don't Mix*, WASH. POST, July 21, 2002, at W18. Weiss notes that in the fall of 2002 there were sixteen public single-sex schools, in contrast to only eleven in 2001. *Id.* She further notes that the National Coalition of Girls' Schools claims a 23.5 percent increase in enrollment in a fixed number of girls' schools from 1991 to 2001, while the National Association of Independent Schools notes no change. *Id.* The U.S. Department of Education has data showing an increase of 5 percent for girls and 7 percent for boys in 1999-2000 over the previous two years. *Id.* Additionally, Weiss notes that three Washington area single-sex private schools have claimed large increases in applicants over the past decade: National Cathedral School (18 percent), Madeira (28 percent), and Gonzaga College High School (doubled in the past eight years). *Id.*

234. It is important to note that there does not need to be a "truth" that single-sex schools or classes are "good" for students in order for them to be a good policy option; if it is true that they are good for *some* students, that is sufficient to authorize the states pursuing them as an option for parents to consider.

235. Levit, *supra* note 193, at 454.

236. *See generally* NOW Comments, *supra* note 12.

237. Toppo, *supra* note 227.

238. Salomone, *supra* note 54, at 228-29; *see also* SOMMERS, *supra* note 202, at 177 (arguing that "at this time we simply don't know whether single-sex classes are the key to a better pedagogy for boys. Nor are we likely to find out in the near future so long as girl-partisan organizations effectively discourage research and debate on the same-sex solution to the problem of lagging boys.").

court relied in part on the psychological authority of the time to illustrate the detrimental effect of state racial segregation in public education.[239] NOW argues that separation by sex, like separation by race, develops a sense of inferiority in girls, the "traditionally subordinated group."[240] Such a conclusion might render single-sex schools indistinguishable from the racially segregated schools held unconstitutional in *Brown*.[241] In *Brown*, however, the Court had found general agreement in the psychological literature that racial segregation was harmful to black children.[242] One scholar commented that it was "background knowledge of educated men who live[d] in the world" that segregation was intended to keep blacks inferior.[243] In contrast, in the context of single-sex education, the Court would be required to sort through a myriad of conflicting studies to try to draw a conclusion on the basis of studies that seem inconclusive to those whose expertise is in drawing such conclusions. In such a case, deference to the educational institution seems appropriate.

A recent example of such deference is found in *Grutter v. Bollinger*.[244] While the majority of *amici* who were educators filed briefs supporting the University of Michigan Law School, other *amici*

239. Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954). The court quoted the district court as having found that

> [s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater where it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id. at 494.

240. NOW COMMENTS, *supra* note 12, at 2.

241. *See* Levit, *supra* note 193, at 517 (arguing that "separation on the basis of Identity characteristics creates feelings of inadequacy and instills beliefs about group hierarchy. Government separation of equals sends the message that something is contaminative about the presence of the opposite sex."). *But see* Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) (arguing, in the context of race, tbat the psychological effect on members of a particular race is "irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause").

242. *See Brown*, 347 U.S. at 494 & n.11.

243. Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424-26 (1960); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 741 n.9 (1982) (Powell, J., dissenting) (arguing that "sexual segregation in education differs from the tradition . . . of 'separate but equal' *racial* segregation. It was characteristic of racial segregation that segregated facilities were offered, not as alternatives to increase the choices available to blacks, but as the *sole* alternative.").

244. 539 U.S. 306 (2003).

favored the plaintiff's position.[245] One *amicus* attacked the claims of the value of diversity to education and argued that

> common sense and classroom experiences demonstrate that "viewpoint diversity" and "academic diversity" in the classroom are not affected by the racial composition of a student body. . . . [R]acial diversity is not required to foster a full discussion of issues and viewpoints in the classroom. . . . Even if one were to hypothesize that a compelled increase in racial diversity would increase educationally valuable viewpoint diversity to some degree, it would also generate educationally detrimental stigma and hostility based on precisely the same type of stereotyping regarding race employed hy the University.[246]

In considering the constitutionality of the University of Michigan Law School's affirmative action program, however, the Court cited *amici* who supported the program, noting that

> the educational benefits that diversity is designed to produce . . . are substantial. . . . [The] admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables students to better understand persons of different races." . . . "[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." . . . [N]umerous studies show that student body diversity promotes learning outcomes . . . .[247]

The Court, while resolving this social science debate in favor of the University, also indicated that its resolution was at least somewhat based on the Court's deference to the University's educational judgment:

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.[248]

If the Court is willing to find strict scrutiny satisfied through deference to "complex educational judgments," the complex educational judgments of educators that single-sex education is valuable should surely satisfy the lower standard of intermediate scrutiny. On the other hand, the *Grutter* Court seemingly concluded that the evidence available supported the conclusion that diversity has educational benefits, rather than simply deferring to the Law School's

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245. *See* Brief of Amici Curiae Law Professors Larry Alexander et al., Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241); Brief of Amicus Curiae the Michigan Ass'n of Scholars, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

246. Brief of Amici Curiae Law Professors Larry Alexander et al. at 12-13, 15, *Grutter* (No. 02-241).

247. *Grutter*, 539 U.S. at 330.

248. *Id.*

conclusion.[249] Thus, the Court may still attempt to reconcile the available studies on single-sex education into a conclusion on its efficacy that is not necessarily sufficiently supported by the evidence, rather than simply deferring to the judgment of the school.

If, however, lower courts and the Supreme Court are willing to concede either that the effectiveness of single-sex schooling is yet undetermined or that single-sex schooling is of value to some students, then experimentation itself, by aiding the states in pursuing conclusive evidence regarding the effectiveness of single-sex schooling, can be substantially related to the state's goal of providing a better education. The Supreme Court has indicated its policy of deference toward educational experimentation, noting that

> the ultimate wisdom as to . . . [certain] problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues . . . [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.[250]

If the claims of the most positive studies are to be believed, then the goal of better education is directly and substantially served by the creation of single-sex educational opportunities. If those studies are wrong, the goal of better education is ultimately served by discovering that now, for the benefit of both public and private schools. That there is a lack of sufficient evidence to make a conclusive determination should preclude a Court-imposed ban on single-sex classes.[251]

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249. *See Grutter*, 539 U.S. at 328 (noting that the Law School's assessment of the educational benefits of diversity was supported by that of the amici); *see also id.* at 330 (noting that "[i]n addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.' ").

250. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973).

251. *See id.* at 42-43. The court in *Rodriguez* held that

> [i]n addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. On even the most basic questions in this area the scholars and educational experts are divided.

C. Offering Choice or Diversity in Educational Opportunities

The government's third important interest, which also is served by allowing single-sex classes, is the provision to parents of diverse educational options for their children. The No Child Left Behind Act was designed in part to create such options.[252] Senator Hutchison, the drafter of the single-sex schooling provision in the Act, has argued that single-sex education should exist to give parents more options to fulfill their children's needs.[253] While diversity of educational opportunities was rejected as a possible justification for the all-male nature of VMI, the Court said that it did not generally question the ability of the State "evenhandedly to support diverse educational opportunities."[254] Providing the option of enrolling in a single-sex program—while not requiring it—obviously gives parents an additional choice for their children. The Court has seemingly recognized that provision of a diversity of educational choices as an important state interest, even though it refused to believe diversity of educational opportunities was the true aim of Virginia with VMI.[255]

Opponents of single-sex education argue that it does not promote diversity. Instead, groups such as NOW argue that when children are segregated by sex, they do not have the benefit of a diverse educational environment, with both boys and girls.[256] While a single-sex class is clearly not diverse in the sense of offering both male and female voices, this type of diversity is just as clearly not the sort of diversity that proponents of single-sex education would present as a state interest. Instead, proponents of single-sex education argue that single-sex schools, while not right for all students, may be good for some, and that parents should have an opportunity to choose from many diverse educational institutions rather than being limited to only one type, which may not work well for their child.

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252. Dep't of Educ., *supra* note 35.

253. Hutchison, *supra* note 9, at 1076.

254. United States v. Virginia, 518 U.S. 515, 534 n.7 (1996); *see also* Elizabeth A. Douglas, Note, United States v. Virginia*: Gender Scrutiny Under an "Exceedingly Persuasive Justification" Standard*, 26 CAP. U. L. REV. 173, 198 (1997) (arguing that "[t]he Court clearly is willing to accept diversity as an important government interest despite the fact that, in this particular case, VMI maintained its single-sex status not to diversify educational opportunities, but to carry on the long-established tradition of favoring men over women. Single-sex institutions need not be a thing of the past: If an all-male school and an all-female school were established simultaneously and enjoyed equal funding and facilities, each institution could withstand an equal protection challenge based on the important government interest in diversity of educational choices.").

255. *Virginia*, 518 U.S. at 534 n.7.

256. NOW COMMENTS, *supra* note 12.

V. TECHNIQUES FOR ASSURING THE CONSTITUTIONALITY OF SINGLE-SEX EDUCATIONAL OPPORTUNITIES

While single-sex education is substantially related to important government interests, limits nonetheless exist on how single-sex opportunities can be constitutionally instituted. Single-sex education is both more practical and easier to defend when implemented through single-sex classes in coeducational schools rather than through single-sex schools.[257] The vast differences between secondary and postsecondary schools strengthen the case for single-sex education at the secondary school level.[258] Justifying single-sex secondary education is in many ways easier than justifying postsecondary, specialized programs, which were at issue in *Virginia* and *Mississippi University for Women*. Single-sex education is also more easily justified under the Constitution when single-sex opportunities are offered to both sexes.[259] Finally, single-sex programs offered as an option, rather than as a requirement, are more likely to be considered constitutional.[260]

A. A Note on Comparability

Comparable educational opportunities for both sexes are required both by Title IX and its regulations, and by the Constitution, through case law.[261] In noting that it did not address "separate but equal" institutions, the *Virginia* Court avoided the question of whether perfectly comparable institutions could constitutionally separate the sexes.[262] It is clear, however, that the Court considers the provision of vastly unequal programs for boys and girls or men and

257. *See infra* Part V.B.

258. *See infra* Part V.C.

259. *See infra* Part V.D.

260. *See infra* Part V.E.

261. 34 U.S.C. § 106.35(b) (2000); Office for Civil Rights; Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102 (May 8, 2002); Proposed Regulations, *supra* note 50, at 11279 (noting that "a single-sex nonvocational class may be provided only if a substantially equal coeducational class is provided to the other sex in the same subject. A recipient may also choose to provide a substantially equal single-sex class for the other sex in the same subject."). The proposed regulations, in addressing the comparability requirement for single-sex schools, attempt to adopt the Supreme Court's standards, replacing the word "comparable" with the phrase "substantially equal," used by Justice Ginsburg in *Virginia*, and describing factors such as the "quality and range of extracurricular offerings, qualifications of faculty and staff, geographic accessibility, and quality, accessibility, and availability of facilities and resources." Proposed Regulations, *supra* note 50, at 11281-82; *see supra* Part III.C.

262. United States v. Virginia, 518 U.S. 515, 534 n. 7 (1996).

women to violate the Constitution.[263] The Court cited the dissenting opinion from the Fourth Circuit's consideration of *Virginia*, which argued that parallel institutions should have "substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services . . . faculty, and library resources."[264] However, the majority failed to clarify whether meeting this standard is sufficient to render parallel institutions constitutional. Chief Justice Rehnquist, on the other hand, explicitly noted that the majority's statement of the requirements of comparability of parallel institutions, if read as an exclusive requirement, was "too stringent."[265] Chief Justice Rehnquist rejected the implication of the majority that the State of Virginia could only prevent a constitutional violation by making VMI coeducational:

> the Court necessarily implies that the only adequate remedy would he the admission of women to the all-male institution . . . . I would not define the violation in this way; it is not the 'exclusion of women' that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any—much less a comparahle—institution for women.[266]

Therefore, an appropriate remedy, in Chief Justice Rehnquist's eyes, would be for the State to provide a comparable single-sex environment for women, thus showing as strong of a desire to effectively educate women as was shown with regard to educating men.[267] Chief Justice Rehnquist envisions that such a solution would not "require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, and the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber."[268] A truly comparable institution would be sufficient to cure what would otherwise be a constitutional deficiency.

Because the *Virginia* majority did not specify whether a separate but equal school is actually sufficient, the mere existence of a comparable program may not save single-sex secondary education programs. However, the absence of a comparable program will

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263. *See, e.g., id.* at 547 (noting that "[f]or women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangihle and intangihle facilities").

264. *Id.* at 547 n. 17.

265. *Id.* at 563 (Rehnquist, C.J., concurring). While the Court seems to find the perfect comparahility (in the sense of the same programs, facilities, and offerings) of two single-sex institutions to be necessary, but not necessarily sufficient, to their constitutionality, Chief Justice Rehnquist seems to find satisfaction of such a strong standard of comparability sufficient, but not necessary. *Id.*

266. *Id.* at 565.

267. *Id.*

268. *Id.*

certainly bother the Court, a majority of which at least implies support of a stronger conception of comparability than Chief Justice Rehnquist's conception. For example, if an all-girls school offered no Math or Science courses but had a great English department, while a supposedly comparable boys school offered no humanities classes, but great Math and Science classes, the majority's focus on avoiding stereotypes of boys' and girls' abilities would seem to force the conclusion that the program was unconstitutional. A majority of the Court would likely reach this conclusion even if the overall quality of education was equal and thus satisfied Chief Justice Rehnquist.[269] Designing the two programs to be as similar as possible, while still retaining the benefits of separate programming, provides the best chance for single-sex education to be constitutionally upheld.

It is also important to note that if the Court adopts Justice Scalia's approach and focuses on the traditional intermediate scrutiny test for classifications based on sex, then the presence or absence of a parallel institution for the other sex is irrelevant to satisfying the standard of scrutiny on its face.[270] The standard only requires that the classification by sex serve an important government interest. Many government interests, such as the interest in preventing discrimination against girls in the classroom, could be served absent a comparable single-sex offering for boys.[271] However, a majority of the Court seems committed to the necessity of comparable opportunities for both sexes. Apparently, the Court is committed to a single-sex environment for both if such an environment exists for either.

Even assuming that the focus stays on the intermediate scrutiny test, however, as programs become less comparable—e.g., the program for boys gets substantially better than the one for girls—single-sex education no longer seems to be serving the important government objectives that justify it. The important state interest of preventing discrimination against girls is not being served at the point where the education that is being offered to girls is substantially

269. *Id.* at 541 (noting that states may not rely on "fixed notions concerning the roles and abilities of males and females" to exclude qualified individuals). The Chief Justice does not disagree with this, instead noting that states can consider overall interest when determining curricula if they offer single-sex schools. *Id.* at 565-66 (Rehnquist, C.J., concurring). However, decision making regarding class offerings can evaluate the interests of its students without basing those decisions on stereotypes, and assuming a priori that there would be no interest in a women's school of civil engineering or a men's school of nursing. *Id.*

270. *See Virginia*, 518 U.S. at 570-71 (Scalia, J., dissenting); Craig v. Boren, 429 U.S. 190, 197 (1976) (recognizing that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

271. *See infra* Part V.D, discussing the pitfalls of offering single-sex opportunities to only one sex.

inferior to the education being offered to boys. Neither is the state interest in improving educational experience furthered, at least for the girls; the state cannot have an important government interest in improving the education of one sex at the expense of the other. Finally, when the classes offered to one sex provide an education inferior to that provided to the other sex, the state is still successfully giving parents and students some "choice," but the choice provided to the sex choosing between a coeducational program and a weak single-sex program is not the quality choice that parents want or deserve. Therefore, parallel institutions offering single-sex opportunities strengthen their case for constitutionality by offering programs to both sexes that are as "comparable" as possible.

B. Single-Sex Classes: A More Appealing Constitutional Option, Despite the Current Regulatory Bar

The constitutionality of single-sex secondary schools has been extensively addressed by commentators, receiving the lion's share of attention given to single-sex education.[272] However, single-sex classrooms, if allowed by a revision of the Title IX regulations such as that proposed by the Office for Civil Rights, provide a more appealing alternative to single-sex schools, both in terms of practicality and constitutionality. Single-sex schools may require constructing new schools or shifting students from school to school, and may necessitate children from the same family going to different schools to receive a single-sex education. Single-sex classrooms, on the other hand, provide many of the benefits of single-sex schools without requiring as significant of a financial investment by local school districts.[273] In some cases, single-sex classrooms could be instituted without any increase in available resources. For example, rather than offering six coeducational English classes to a given grade, a school could simply revise its offerings to have the same teacher teach one all-girls class, one all-boys class, and four coeducational classes; two all-girls classes, two all-boys classes, and two coeducational classes; or any other combination that best serves the interests of the school and the student body.[274]

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272. *See supra* Part II.D (arguing the different legal status of single-sex schools and classes, as well as the more obvious single-sex nature of single-sex schools, accounts for the focus of the scholarship).

273. *See* SOMMERS, *supra* note 202, at 177 (arguing that "[s]ingle-sex classes do not cost substantially more than mixed classes").

274. Instituting classes in some disciplines could result in smaller classes and hence greater cost. For example, seventy-five students could be divided into three coed classes of twenty-five students; if twenty opt for an all-female class and twenty for an all-male class, the thirty-five

Additionally, single-sex classrooms can more easily be designed to meet the *Virginia* standards than can single-sex schools. Because the Court has not been clear on the extent to which schools must be comparable in order for the classification to be constitutional, schools are best-served by providing all students with as comparable an education as possible. This can often be a difficult task. If, for example, single-sex schools are instituted in existing buildings, one of which has a substantially better science lab then the other, assigning one lab to girls and one lab to boys will necessarily lead to one sex having an inferior facility, unless substantial resources are expended to equalize the facilities.[275] The problem in *Virginia*—the existence of a high caliber all-male institution and the impossibility of creating a copy of it—is similar to this example. When the comparison, however, is within one school, which has the same resources and facilities available to both sexes, the difficult problems of comparability become at least somewhat less difficult, as many of the tangible and intangible features are not only comparable, but necessarily equivalent.

Single-sex secondary schools, as opposed to schools with single-sex classrooms, also face hard questions if, for example, there is insufficient demand for a particular class in one of the single-sex schools. If there is not enough demand to constitute a class among boys either for Advanced Placement Calculus or for Advanced Placement English, while both exist at the girls' school, the school system needing to provide a comparable education will have difficulty doing so. What might make for a very difficult constitutional problem in a single-sex *school*—where the boys have no opportunity to enroll in Advanced Placement classes in Calculus or English, while the girls have that opportunity—could be more easily remedied in a single-sex classroom environment. The school could simply make its highest classes, with the lowest demand, coeducational.[276] Similarly, while both the all-boys school and the all-girls school might have too few

students remaining would probably need to be split into two coed classes. Thus, offering single-sex classes would require an increase in resources, as the school would have to offer four classes rather than three. Overall, however, this increase in resources would prohably not be substantial, and certainly not as substantial as the increase in resources required by the construction of a new school.

275. *See* Sandler, *supra* note 191, at 71.

276. It seems likely that Chief Justice Rehnquist, while he would not mind comparable single-sex public universities excelling in different disciplines, might view differently a secondary school which offered an advanced Math class to males and not to females. *Virginia*, 518 U.S. 515, 562-63, 565 (1996) (Rehnquist, C.J., concurring). While different colleges can excel in different areas and attract people interested in those areas, secondary schools, as the only provider of public education in their geographic area, need to offer to both sexes quality options in major disciplines. *Id.*

interested students to offer a particular class, a coeducational school with single-sex classes could make that advanced class available as a coeducational class. In this situation, the boys and the girls would then get a better education than would have been possible in a strictly single-sex school.

C. Single-Sex Classes in Secondary Schools: A More Constitutionally Sound Option that those in Institutions of Higher Education

Virginia and *MUW* both concerned the admissions policies of postsecondary schools. Specifically, the program in each case was highly specialized. VMI focused on a military education with a unique method of teaching, while MUW focused on a nursing education. Secondary schools, while still meriting similar constitutional scrutiny, differ in three primary ways from postsecondary institutions. Overall, these differences alleviate some of the concerns that opponents have about the risk of allegedly "separate but equal" educational programs not actually being equal.

1. Comparability of Opportunities

The first difference between programs in secondary schools and those in colleges and universities is that most secondary schools in a given geographic area offer substantially similar curricula. With some exceptions, such as magnet or specialized interest schools (schools of fine arts, for example, or of Math and Science), secondary schools target a basic core education that includes Math, English, Science, and Social Science.[277]

The similarity in the basic curricula of secondary schools simplifies the tasks of creating and judicially evaluating the comparable opportunity mandated in *Virginia*. Clearly, not all secondary schools are equal. *Newberg v. Board of Public Education*, a State court case considering the schools at issue at *Vorchheimer*, provides a good example of two secondary schools serving the same

277. *See, e.g.*, NAT'L CTR. FOR EDUC. STATISTICS, HIGH SCHOOL ACADEMIC CURRICULUM AND THE PERSISTENCE PATH THROUGH COLLEGE: PERSISTENCE AND TRANSFER BEHAVIOR OF UNDERGRADUATES 3 YEARS AFTER ENTERING 4-YEAR INSTITUTIONS 3 (2001) (citing NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK (1983)), *at* http://nces.ed.gov/pubsearch/pubsinfo.asp?pubId= 2001163. The National Center for Education Statistics set as the lowest threshold of a high school academic curriculum the core New Basics curriculum set forth in A NATION AT RISK: Four years of English, three years of Mathematics, three years of Science, three years of Social Studies, and one-half year of Computer Science. *Id.*

basic area but having vastly different resources.[278] However, secondary schools are also much less likely to offer a highly specific, unique educational opportunity, such as an "adversative method," or to have a highly specialized program in a field, such as nursing, than are institutions of higher learning. It is extremely difficult to compare an outstanding engineering school to one known for its business programs, or a college known for its teaching of technical skills to a liberal arts school.[279] In contrast, most high schools merely require comparisons of variations on the same programs rather than comparisons between different programs entirely. That is, while VMI and MUW offered programs that were not attainable anywhere else nearby—for VMI an intensive military education and for MUW a nursing program—the schools in *Newberg* were different in only library size, campus resources, and teacher qualifications.[280]

Some differences more difficult to value do exist among secondary school programs. For example, in *Newberg*, Central High had a four-year Russian language program not offered at Girls' High, while Girls' High had advanced courses in French and Spanish not offered at Central High.[281] Generally, however, enough easily comparable facts—such as the quality or depth of the schools' offerings in core subjects, the expertise of the teachers in those fields, and the success of its students on national standardized tests—are available for a meaningful comparison. Thus, comparing programs will often be easier in the context of secondary schools, where most schools serve a geographic market of those with varying interests rather than serving an interest market. This difference makes the maintenance of parallel secondary programs less worrisome than the maintenance of parallel universities.

278. Newberg v. Bd. of Pub. Educ., 26 Pa. D. & C.3d 682, 703 (C.P. 1983). The court found that the all-male school had 2.7 times as many faculty Ph.D.'s and 1.5 times as many teachers with twenty-one years or more of teaching experience than did the all-female school; that the boys' campus was three times as large as the girls' campus; that the boys' school had a library almost twice as large as the girls' library; that only the boys' school had a computer room; and that the average SAT score at the boys' school was higher in both the verbal and math components than the SAT scores at the girls' school. *Id.* The court concluded that incomplete or no evidence of these facts had been produced in the earlier litigation. *Id.*

279. Chief Justice Rehnquist gives some indication that he would consider two such schools comparable if they were of the same overall quality. *Virginia*, 518 U.S. at 565 (Rehnquist, C.J., concurring). However, when two schools offer substantially different programs, it is not only unclear whether other members of the Court would consider these schools comparable, but also unclear how one would measure whether the programs were of substantially the same caliber in their individual fields.

280. *Newberg*, 26 Pa. D. & C.3d at 703.

281. *Id.* at 688.

2. The Lack of Choice Among Secondary Schools

The second important difference between primary and secondary schools, on one hand, and colleges and universities, on the other, is that public primary and secondary schools are "generally obligated by law to educate all students who live within defined geographic boundaries."[282] The constitution of nearly every State guarantees its citizens the right to a free primary and secondary education.[283] In contrast, at most universities, even public ones, students who wish to attend must pay for their educational expenses and have only limited government funding available.[284]

The implication of this guarantee of basic education is that while students have wide choices as to what public university to attend (although often constrained by cost, location, and other factors), primary and secondary school students rarely choose which school to attend. The state's first concern is supplying all of its residents with a suitable primary and secondary education rather than offering options of schools to suit each person's individual desires. The lack of choice residents have over where to attend primary and secondary school could result in more concern over single-sex programs in such schools.

Single-sex classes must therefore be scrutinized with an eye to the fact that the students who disapprove of the single-sex education method may have no option of selecting another school.[285] In this sense, secondary schools may be more constitutionally worrisome than are colleges. While Virginia may have been able to defend VMI if the State had a school for women that offered similar opportunities (such that VMI was not a unique institution), the state, when providing secondary schools, must offer boys and girls comparable opportunities within the same district.[286] The Court may not always be willing to

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282. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting).

283. *Id.* Justice Kennedy cited to the specific state constitutional provisions in seventeen states. *Id.*

284. *See* Mary Leonard, *College Tuition, Fees Rise by 9.6%*, BOSTON GLOBE, Oct. 22, 2002, at A2 (stating that the average tuition for a public, four-year college rose to $4,081 in Fall 2002).

285. This is true, albeit to a lesser extent, even if, as argued *infra* Part V.E, school districts offer coed classes as well as single-sex classes, since single-sex classes that promote any notion of inferiority of one sex will undoubtedly disturb concerned parents, even if their children are taking the coed classes, because of the attitude that the single-sex classes promote at the school where their children are enrolled.

286. *See* United States v. Virginia, 518 U.S. 515, 534 n.7 (1996) (noting that the Court does not address the state's ability "evenhandedly to support diverse educational opportunities," but addresses only a "unique" opportunity, available only at Virginia's premier military institute, its only single-sex public university or college). To the extent that Virginia had offered single-sex education that also provided exceptional opportunities for women, comparable to those that were offered at VMI, the case would have presented a different issue, even if the opportunity for

look statewide, even in the context of colleges; in *MUW*, the court found that even the existence of a nursing school elsewhere in the state was insufficient to justify the exclusive nature of the University.[287] However, the implication in *Virginia* was that if it had been possible to construct a truly comparable all-female school, it could have been located anywhere in the state. The opinion speaks in terms of the educational opportunities in the state of Virginia rather than in more local terms.[288] In the context of secondary schools, the comparison will never be more than district wide. It is therefore desirable for school districts to offer options other than single-sex schools and classes, so that students are left with a choice as to whether to enroll in a single-sex program at all.[289] Whether the increased concern over the lack of choice is enough to make single-sex classes in secondary programs more worrisome than those single-sex classes in postsecondary schools will depend on the analysis of the relative ease of comparability, the lack of choice, and the strength of the government interest served by the single-sex option.

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women was in a different part of the state. *But see id.* at 590 (Scalia, J., dissenting) (arguing that the absence of an all-female analogue to VMI is irrelevant, and that in *Mississippi University for Women v. Hogan* the Court had attached no significance to the absence of an all-male nursing school). It may be less important to members of the Court whether there is actually a comparable all-female institution than it is to evaluate whether the state is genuinely and sincerely serving an important government interest; in *Virginia*, the absence of a comparable all-female institution undermined the state's sincerity.

287. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) (noting that although the plaintiff could have attended another nursing school, that would have required considerable travel, and a similarly situated female would not have been forced to deal with that inconvenience to get an education).

288. *Virginia*, 518 U.S. at 539-40 (noting that Virginia's policy cannot satisfy equal protection when Virginia's claimed goal of "diversity" serves the men of the state, without the state making any provision for women). The Court does not necessarily seem to believe that a counterpart institution could have been created that would have had the same tangible and intangible qualities. However, rather than focusing on the location of Mary Baldwin College, the Court only noted that the program at the VWIL was insufficient to satisfy equal protection because it was "different in kind from VMI and unequal in tangible and intangible facilities." *Id.* at 547. The Court may be assuming that, in contrast to Mississippi University for Women, the demand for the education at VMI is very small, and thus prospective students cannot reasonably maintain an expectation of such a school existing within the convenient distance required of a comparable nursing school in *MUW*. Additionally, the required dorm life at VMI differs from the commute while maintaining a full-time job conceived by MUW. *See id.* at 522; *Miss. Univ. for Women*, 458 U.S. at 723 n.8; *see also Virginia*, 518 U.S. at 563 (Rehnquist, C.J., concurring) (stating that if Virginia had made a genuine effort to devote comparable resources to a facility for women, it might well have avoided an equal protection violation).

289. For discussion of the appropriateness of requiring students to take single-sex classes, see *infra* Part V.E.

3. The Strength of Government Interests

The final important difference between primary and secondary schools, on the one hand, and universities, on the other, is that evidence of differences in how boys and girls learn is more compelling with respect to younger children, as are arguments regarding the distraction created by the presence of the opposite sex.[290] The time when these problems are most serious—in primary and secondary schools—is the time when single-sex education can have the greatest positive effect. Therefore, in the early years of education, a stronger connection exists between the important government interest of improving educational outcome and the gender classification. Thus, shifting the context to primary and secondary schools strengthens the case that single-sex education supports the important government interest of improving the quality of education.

Likewise, discrimination against one sex is presumably more of a problem at a younger age. Mary Pipher, for example, stresses the difficulties that girls face in early adolescence.[291] It is during this time that they begin to try to understand the culture around them and deal with the different society that many girls now face in middle schools.[292] Particularly in highly objective disciplines, such as mathematics, the college student who encounters a discriminatory professor will likely be better able to recognize when the professor is simply biased than will a younger student. Older students are more discerning, given that they have had more time and education through which to evaluate their own proficiency in the subject. In contrast, younger students possess less self-awareness and thus are more likely to be discouraged by a teacher's criticism or lack of encouragement.[293]

Finally, the focus on choice, a focus so critical to the No Child Left Behind Act, is especially strong in the context of primary and secondary schools. Since students at primary and secondary schools are much less likely to have a choice as to which school to attend, they are limited to very few options regarding their education. Effectively, parents of such children can attend a different school only by moving

290. Hutchison, *supra* note 9, at 1080.

291. PIPHER, *supra* note 181, at 11-13.

292. *Id.* at 12-13.

293. *See id.* (arguing that adolescent girls "know that something is very wrong, but they tend to look for the source within themselves or their families rather than in broader cultural problems. I want to help them see their lives in the context of larger cultural forces."). While Dr. Pipher is referring in this passage largely to the broader problems of girls, it seems to logically fit with an idea that girls tend to be more likely to try to figure out what is wrong with *them* if the teacher does not seem to think they are smart or value what they say rather than appreciating that it may be the teacher's preconceived beliefs that are guiding his or her statements.

to another district. Therefore, it is even more important that the public school system attempt to offer choices to its students within the system. What appears to be a tougher constitutional task for primary and secondary schools to overcome—the reality that they are effectively forcing students who live in their district to accept the education offered—also strengthens the case for adding a single-sex education option to the curriculum.[294]

4. The Overall Impact of the Change in Context

The distinctions between primary and secondary schools and colleges and universities affect the constitutional validity of a single-sex program in each setting differently. Some differences seemingly make single-sex programs more easily justified in primary or secondary schools, while other differences, such as the inability to choose another school if you do not like single-sex education suggest that a single-sex program is less constitutionally troublesome in a college or university. Focusing on single-sex programs for younger age groups, however, should ultimately make it easier for a public school district to stay within the limits of the Supreme Court's interpretation of the Equal Protection Clause. Still, the lack of educational choice faced by children in primary and secondary schools makes it even more important to ensure that none of the negative effects that allegedly follow from single-sex education actually occur. This can simply be seen as a warning to districts to be careful in their construction of single-sex programs. To the extent that single-sex classes are offered as an option, the overall choice parents have increases, even thought they lose the option of being at a school that has single-sex education at all, an option available to postsecondary students. The other differences between primary and secondary schools and colleges and universities—the increased similarity of primary and secondary curricula across schools and the fact that primary and secondary schools educate boys and girls at an age where their learning differences are more pronounced—affect whether it is possible or plausible to meet the intermediate scrutiny standard at all.

The school district that offers single-sex programs at a younger age is more clearly serving each of the important government interests that support the classification based on sex, and can more easily construct equal, parallel institutions. Therefore, the district that carefully creates effective programs and comparable institutions

294. *See infra* Part V.E (noting that offering single-sex education programs can only increase choice if the students have the choice of staying with a coeducational program).

should be seen as complying with the requirements of the Fourteenth Amendment. Although institutions of higher learning do have an advantage in that students have other options, those sorts of options were not sufficient to save VMI or MUW. Thus, a state is better able to justify single-sex programs for younger students.

D. Providing Single-Sex Opportunities to Both Sexes

Another important consideration for schools and districts desiring to institute single-sex programs is whether such programs must be provided to both sexes if they are provided for one. If single-sex classes are specifically instituted to remedy past discrimination, in a given area where discrimination is shown, a school could offer single-sex classes only to the sex which faced the discrimination. In contrast, when single-sex classes serve other objectives, a district will have difficulty justifying its action without providing single-sex programs for both sexes, as most other government objectives, if pursued honestly, would support the same approach for both sexes.

1. Remedial Objectives

States can constitutionally differentiate based on gender to benefit members of a sex that has traditionally been discriminated against in a particular field.[295] Title IX requires recipients of federal financial assistance to "take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."[296] Some commentators appear to believe that remedial objectives are applicable only to all-female classes, as women historically have been discriminated against in education.[297] If a state presents evidence both of the extent to which girls have faced discrimination in classrooms and of girls' need to be assisted to achieve in the fields studied in those classrooms, a state could meet the remedial exception currently included in Title IX and recognized

295. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982) (holding that a State can evoke a compensatory justification for an otherwise discriminatory justification, hut only if it benefits the gender that has suffered a disadvantage related to the classification).

296. 34 C.F.R. § 106.3 (2003).

297. *See, e.g.*, Deborah L. Brake, *Reflections on the VMI Decision*, 6 AM. U. J. GENDER & L. 35, 41-42 (1997). There are certainly areas in which females are traditionally considered to be superior, such as English and other humanities. However, the most common concern among researchers has been for the treatment of girls in the classroom, and it is their math performance that has fallen most behind. *See supra* Part IV.A; *see also* SOMMERS, *supra* note 202, at 171 (citing Judith Shapiro, president of Barnard College, as arguing that "[i]n a society that favors men over women, men's institutions operate to preserve privilege, women's institutions challenge privilege and attempt to expand access to the good things of life").

in *MUW*. Under some circumstances, evidence would exist to support at least some single-sex classes for girls on a remedial basis, even absent such classes for boys.[298]

Providing single-sex classes only for boys seems more problematic. Attempting to persuade a court that a school's motivation in constructing single-sex classrooms was to make up for the discrimination boys have felt seems less likely to be successful.[299] It is not totally unsupported, however, as some commentators have argued that our society does not favor boys and certainly does not favor those underprivileged boys who are barely literate.[300] It may, therefore, be possible to use remedial arguments to justify some narrow range of all-male classes, even if comparable, all-female classes are not created. However, consensus among social scientists and other commentators as to the existence of discrimination against boys is weaker than is consensus that girls face discrimination.[301] Thus, remedial grounds will most likely not be suitable as a basis for widespread creation of all-male classes alone.

In *MUW*, the State tried to argue that MUW served a state interest in assisting women who, unlike men, had been the victims of discrimination.[302] However, this argument was unpersuasive to a Court that saw the State assisting women to enter a field that was traditionally considered appropriate only for women.[303] Thus, the Court appears amenable to remedial arguments only where a state assists boys or girls in entering a field traditionally reserved for the opposite sex.[304] In the context of primary and secondary schools, such fields as Math and Science are generally perceived as those where boys excel, while English is perceived as a subject in which girls excel. Therefore, the interest in remedying past discrimination is most likely going to be effective in justifying all-girls classes in subjects such as Math and Science and all-boys classes in subjects such as English.

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298. However, if the classes are in an area where females have not traditionally faced discrimination, the general history of discrimination may not he sufficient. *See Miss. Univ. for Women*, 458 U.S. at 729 & n. 14.

299. *But see supra* Part IV.A.2.

300. SOMMERS, *supra* note 202, at 172.

301. *Id.* at 178 (arguing that "boys are still not on the agenda" of either the government or the educational establishment). *But see* Levit, *supra* note 193, at 521 (noting that boys fall behind girls in many ways in school). Levit concludes that for boys, the research generally concludes that single-sex education gives boys a less favorable social experience, creates a "hypermasculine ethos," and has no compensatory academic advantages. *Id.*

302. *Miss. Univ. for Women*, 458 U.S. at 727.

303. *Id.* at 729-30.

304. *See id.*

2. Outside the Realm of Remedial Action

Regardless of whether there is a remedial objective and whether the gender being provided a single-sex opportunity is male or female, not all commentators agree that single-sex opportunities for both sexes are constitutionally necessary.[305] Professor Rosemary Salomone argues that the Court's core concern in *Virginia* was the allocation of equal resources to each sex and the avoidance of promotion of stereotypical notions of group capabilities that might limit life opportunities.[306] Therefore, she believes a state should only have to prove, if it has an all-girls school, that it offers equal opportunities to boys in a coeducational school with the same admissions criteria and "substantially equal" educational offerings and facilities.[307] It should likewise be acceptable to offer single-sex classes in a coeducational school as long as the classes for each sex use the same admissions criteria and "substantially equal" choices and facilities.[308]

However, as discussed *supra* Part V.A, the majority of the Court has expressed interest in the presence and quality of comparable institutions. In *Garrett v. Board of Education*, one lower court rejected a school district's attempt to institute a single-sex program for boys only.[309] The State in *Garrett* aimed to improve the education of boys in a failing school—an important state interest. The court was troubled, however, by the fact that the educational system was failing both sexes, yet the district attempted a solution only for boys.[310] The court took the school board's approach to indicate that its members believed girls were the problem with the school system. The court refused to accept that the means chosen, which effectively focused only on addressing the problems facing boys, could be substantially related to the government interest of improving education for boys. With a similar opportunity for girls, the court may have been more persuaded of the connection between the means chosen and the objective of improving education.[311] Instead, the

305. *See, e.g.*, Rosemary Salomone, *Single-Sex Schools*, NAT'L L.J., July 22, 2002, at A25.

306. *Id.* (citing United States v. Virginia, 518 U.S. 515, 541-42 (1996)).

307. *Id.*

308. *Id.*

309. *See generally* 775 F. Supp. 1004 (E.D. Mich. 1991).

310. *Id.* at 1008.

311. *Id.* at 1007-08. The court noted that there were no comparable girls' academies. *Id.* at 1006 n.4.

court's decision led the district to abandon its plan to pursue this sort of innovative approach to improving inner-city education.[312]

In general, many of the motivations for single-sex schools, like the improvement of education seen in *Garrett*, apply equally to boys and girls. Thus, when these motivations drive the creation of single-sex classes, the classes need to be available to both sexes, as acting sincerely on these motivations would require opportunities to be made available for both sexes. In a case like *Virginia*, where a remedial purpose does not exist, a court may not be persuaded that the state with single-sex programs for only one sex has proposed interests that meet the requirements of the Equal Protection Clause. A court might be persuaded, however, if the "diversity" rationale is applied to creating programs for both sexes.[313] To succeed in creating a special program for only one sex, a school would need to prove either a specific remedial purpose or some other purpose that applies only to one sex.

Schools wishing to institute single-sex classes, then, should establish such classes for both sexes to avoid battles over whether remediation is actually the goal of any given program and, even if it is the goal of the program, whether remediation is truly necessary. Such questions would seemingly be too factually dependent to be easily disposed of by summary judgment and would thus cost districts money many districts can ill afford to lose.[314]

E. Offering Choice of Whether To Enroll in Single-Sex Classes

Mandating single-sex classes as opposed to providing an option for such classes presents additional problems for a school district, and would be barred under the proposed Title IX regulations.[315] The first problem posed by a requirement is that the district risks forcing all girls or all boys into a classroom that is run in a way that relies on gender stereotypes and is, therefore, less effective for those children who do not fit the stereotype. If, for example, a coeducational class would better serve a particular child, forcing that child into a single-sex class undermines the goal of improving education. The second risk is that "separate but equal" will become less equal if each sex is banned from pursuing any other type of education. Before *Brown*, segregated school districts lacked any incentive to ensure the quality

312. *See* Gardenswartz, *supra* note 221, at 611.

313. *See* United States v. Virginia, 518 U.S. 515, 557 (1996).

314. *Cf. Virginia*, 518 U.S. at 570-71 (Scalia, J., dissenting) (arguing that state officials will not risk high-cost litigation by instituting single-sex programs after *Virginia*.

315. Proposed Regulations, *supra* note 50, at 11279 (noting that the proposed amendment would require that student participation in single-sex classes be on a voluntary basis).

of schools for black students because those students were forced to stay in the segregated schools whether they were good or not.[316] Similarly, classes for girls (the general area of concern) are more likely to fall behind boys' classes if the girls have no option of leaving them for better classes. Competition between classes, therefore, serves to ensure equality. Additionally, mandatory, single-sex classes undermine one of the strongest arguments for single-sex education advocates—that parents should be able to elect what is best for their children. This is further supported by the connection of single-sex educational opportunities to the No Child Left Behind Act. President Bush supported the Act, in large part, to offer greater options for parents in providing education to their children.[317] While, to proponents of single-sex classes, requiring single-sex classes may seem preferable to required coeducational classes, required classes, regardless of their type, do not give parents more choices.

1. The Generalization Problem

Perhaps the most worrisome risk of single-sex education is that the cries of "girls learn differently" will disguise an underlying assumption that "girls learn less."[318] All-girl schools often teach differently, based on the belief that girls learn differently than boys.[319] For example, all-girls schools may educate based on research finding that girls need to be encouraged that they are doing well and that girls

316. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 741 n.9 (1982) (Powell, J., dissenting) (noting that racially segregated facilities were the sole option for blacks, not an additional one).

317. *See* GEORGE W. BUSH, NO CHILD LEFT BEHIND 1-6 (2001), http://www.ed.gov/nclb/overview/intro/presidentplan/proposal.pdf.

318. *See* Cerven, *supra* note 194, at 703 (citing Leora Tanenbaum, *"Safe Space" Not the Greatest Idea in Education*, FORT WORTH STAR-TELEGRAM, Sept. 5, 1999, at 5) (noting the argument that single-sex environments may encourage the belief that women cannot think like men and that they are too weak to handle confrontation or intellectual challenge).

319. *See, e.g.*, Ransome & Moulton, *supra* note 198, at 598. The authors cite several teaching methods that are adapted to the needs of girls at all-girls schools:

> They counter mass-media influences on female students by giving girls strengthening havens where they can effectively navigate the troubling image of girls in today's media with balance and self-assurance. . . . They incorporate research indicating that team problem-solving works well for girls by providing extensive opportunities for collaborative learning. . . . They sustain a predominantly female culture whose hallmarks are caring, challenge, collaboration, competition, connection in the interest of developing each girl to her fullest potential and to develop a moral context that will serve them all their lives. In so doing, girls' schools honor women's voices, their female perspective, their female way of doing things.

Id. at 598-99.

benefit from group work.[320] This risks both creating a belief that girls cannot learn without a "special system" and undermining opportunities for those girls who learn better in a more competitive environment.[321] Allowing more cooperative activities may result in girls who would have had low self-esteem or little confidence in, for example, their math and science abilities, feeling better about themselves and thus having more confidence. Those girls who would have thrived in a competitive atmosphere, however, may end up feeling patronized and coddled, and may never achieve as much as they would have had they been challenged in a more combative or confrontational way by their teachers.[322] This is not, of course, to say that either way of education is better. Rather, the key point is that each way is better for some individuals. Unfortunately, the debate sometimes becomes, at least implicitly, "all girls learn better in cooperative environments" and "all boys learn better with competition." However, different people learn differently. There is evidence that shows that, whether as a product of society or genetics, girls *tend* to learn better in certain ways, and boys *tend* to learn better in different ways.[323] However, these tendencies have clear and numerous exceptions, and the courts have indicated an unwillingness to let stereotypes of tendencies limit the opportunities of either sex.[324]

For this reason, requiring single-sex classes should invite increased concern. To the extent that a school's justification for a single-sex environment is that "boys and girls just learn differently," the reasonable conclusion is that the school is teaching the boys' classes differently than the girls' classes. This may work well on the average, especially if teaching methods are flexible as to both particular students in the class and changes over time. But, creating a system that convinces girls that they learn in a certain way and that

320. *See* Nat'l Ass'n for Single Sex Pub. Educ., What are some differences in how girls and boys LEARN?, http://www.singlesexschools.org/differences.html (last visited June 10, 2004).

321. While, of course, there is no theoretical justification for defining the way coeducational classes are currently run as the norm, and defining all-girls schools or classes as being "special," it seems unavoidable that if there is a new, different system of educating given to the girls, that will be perceived as the "special" system.

322. This is similar to the experience of girls who had the "will and capacity" to desire the "training and attendant opportunities that VMI uniquely affords." *Virginia*, 518 U.S. at 542. While "most" women may not have chosen VMI, that does not answer the concerns for those women who would have. *Id.*

323. NOW COMMENTS, *supra* note 12 (noting that some differences exist between "all boys" and "all girls", but that they are much smaller than the differences between girls as a whole or boys as a whole).

324. *Virginia*, 515 U.S. at 541-42 (stating that courts should take a "hard look" at generalization or "tendencies" of the type that Virginia proposed to justify limiting the opportunities of women).

they need to have a certain type of education risks taking a large step backward to a point where girls believe that they have to *be* a certain way. This is exactly what concerned the Court in *Virginia*. The majority feared that overbroad generalizations could "create or perpetuate the legal, social, and economic inferiority of women," who are limited by those generalizations.[325] Allowing girls and boys to be separated—but not mandating that they be separated—allows teachers to tailor their instruction toward the majority's learning style, without requiring all students to learn in those ways. Overall, the chances that an individual student will be able to learn in the ways that she or he learns best are increased.

2. The Inequality Problem

A second problem with requiring single-sex classes is the increased risk that classes for one sex will be inferior, either in resources or opportunities for academic achievement. With the "long and unfortunate history of sex discrimination" in this country, the concern is generally that females will suffer.[326] NOW argues that the experience in athletics, where women's coaches still make far less than men's coaches, illustrates that separation by sex will never be good for women.[327] The Court in *Brown v. Board of Education* declared that segregation of children by race deprived the children in the minority group of equal educational opportunities.[328] It is not implausible for opponents of single-sex education to fear that girls, who, like black students, have faced historical discrimination, would ultimately get weaker schools than the boys.

Where single-sex classes are an option, and not a requirement, however, the risk that educational opportunities for one sex will be

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325. *Id.* at 534.

326. *Id.* at 531 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)); *see also* RIORDAN, *supra* note 9, at xi (noting the argument of many opponents that all-girls schools were historically inferior to all-boys schools, but arguing that, while all-boys schools have had superior resources, they have also provided an inferior overall academic climate).

327. NOW COMMENTS, *supra* note 12. This argument, in the form NOW expresses it, is weakened by its failure to take account of the differing revenues of men's and women's sports.

328. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). One of the key reasons people worried that all-black schools in a segregated school system would likely never be truly equal was that white officials controlled the money and the black students were banned from the white schools. Richard W. Riley et al., Education Reforms and Students at Risk: A Review of the Current State of the Art ch. 1: Separate and Unequal (Robert Rossi & Alesia Montgomery eds., 1994), http://www.ed.gov/pubs/EdReformStudies/EdReforms/chap1b.html. Without any options, the black students had nowhere to go if they were unhappy with the education they received. *Id.* Therefore, no check existed on the ability of officials to create schools that were not only separate, but unequal. *Id.*

superior to those available to the other is largely checked by the existence of a coeducational option for girls who become dissatisfied with the single-sex classes. If the girls' classes are consistently inferior to the boys', or even just less well-thought of, at least some girls will stop taking them and take the coeducational option. For the girl who challenges the constitutionality of a school system where the boys receive a much better education than do the girls, the fact that a substantially higher percentage of the girls than the boys choose coeducational classes would lend credence to the plaintiff's claim, and help the court evaluate the nature of the school's offerings. If, on the other hand, a similar percentage of boys and girls enrolled in the coeducational classes, a court could more easily conclude that the school's offerings were fairly equal. To the extent that the coeducational classes are inferior to the all-male classes, this is checked by the ability of the boys to elect to enroll in coeducational or all-male classes. If a court questioning the constitutionality of a school system finds that most of the girls have fled the single-sex classes to enroll in the coeducational classes and most of the boys have fled the coeducational classes to enroll in single-sex classes, then a prima facie case has arguably been made that the opportunities for boys and girls are not comparable.

This provides, both for the court and for the school district, an analytically useful way of evaluating the equality of the educational opportunities offered to boys and girls at the school. Thus, the court should largely be able to avoid the struggle, recognized in *Sweatt v. Painter*, of evaluating "those qualities which are incapable of objective measurement but which make for greatness" in a school, such as the "reputation of faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."[329] Additionally, the element of choice makes it hard for a school to hide the fact that its classes are unequal. Most parents will try to enroll their children where they will get the best education. Only when the quality of education between single-sex and coeducational classes is at least similar will the presence or absence of the other sex generally influence parents' decisions.

3. The Lack of Choice Problem

Another, perhaps less troubling but nonetheless important, problem with required single-sex classes is that a mandate undermines one of the best arguments in favor of single-sex schools.

329. Sweatt v. Painter, 339 U.S. 629, 634 (1950).

Congress enacted the No Child Left Behind Act to give parents and school districts a *choice* as to what works best for their children.[330] In President Bush's push for improved education, he has said that he wants parents whose children are in "persistently failing schools" to have options.[331] The amendment to the No Child Left Behind Act allowing federal funding for single-sex programs was intended by its sponsors not to mandate a new kind of education, but to allow flexibility to school districts and parents to choose the best option for their students.[332]

The desire for choice was a significant argument presented in *Virginia*. The State argued that VMI served a State interest in providing a diversity of educational opportunities. VMI offered interested male students an opportunity to get an educational experience that they could not get anywhere else. Although the argument failed to justify the all-male school, the idea of an interest in diversity of options and choice was not necessarily rejected.[333] The Court was unwilling to accept that justification when VMI was the only single-sex school which existed, as that undermined the sincerity of the argument.[334]

However, when used correctly (i.e., not to provide options for only one subset of the students, such as those males interested in the military or females interested in nursing), diversity could be a valid state interest. It would, therefore, help a state withstand intermediate scrutiny of its provision of single-sex classes. If a school district forces all of its students into single-sex classes, no substantial relationship exists between the means applied and the objective of increasing choice. The district has not added an opportunity in an attempt to

330. *See* Dep't of Educ., No Child Left Behind (listing President Bush's four reform principles as more accountability for results, increased flexibility and control for local school hoards, greater options for parents, and a focus on providing teaching methods), bttp://www.nochildleft behind.gov/next/overview/index.html (last visited May 10, 2004).

331. President George W. Bush, Radio Address (Jan. 4, 2003), http://www.whitehouse. gov/news/releases/2003/01/20030104.html. Senator Hutchison has seconded this, arguing that "[w]e must give parents and students the chance to escape bad schools that cannot guarantee a decent education, personal safety, or the individualized environment each student needs." Hutchison, *supra* note 9, at 1082.

332. 20 U.S.C.S. § 7215(a)(23) (2002). Senator Kay Bailey Hutchison said the amendment was intended to make it easier for local governments or schools systems to provide single-sex education *if parents requested such options*. Hutchinson, *supra* note 9, at 1082.

333. United States v. Virginia, 518 U.S. 515, 533 n.7 (1996) (noting the argument of *amici curiae* that diversity in educational opportunities is a legitimate state goal, that single-sex schools can contribute to such diversity, and responding by saying that it "do[es] not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities").

334. *Id.* at 535 (stating that "Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth").

help more students, but has replaced the current opportunity—coeducational classes—with a different one—single-sex classes. If students are given a choice, however, the state has supported a justification for its differentiation between genders by providing an additional educational opportunity.

VI. CONCLUSION

Single-sex classrooms may not be a perfect solution to the problems with the education system in this country but, as Rosemary Salomone has recognized, "this is not an ideal world, particularly for urban minority students."[335] While single-sex advocates cannot prove, at this point, that single-sex education is better for students, it is also not clear that single-sex education is ineffective at improving education for students. All that is clear is that the current public education system fails many students and that wealthier parents have a greater opportunity to enroll their children in a single-sex environment (or any other environment not available in the public school system) if they feel their child would be better served. At the individual school level, students and parents report positive results from their single-sex schools and question why the theoretical idea that such schools are bad is allowed to override their real-life experience.

Single-sex education is substantially related to the important state interests of preventing discrimination in the classroom and of increasing diversity of educational opportunities available to students. Additionally, many researchers believe that, if the states are allowed to experiment with single-sex classes, studies will definitively show improved academic achievement, at least for some students. Regardless of whether future studies will, in fact, yield this result, experimentation will certainly improve our understanding of the way that our children are best educated.

Particularly when single-sex classes are utilized instead of single-sex schools, many of the constitutional worries are minimized without decreasing either educational choice or the opportunity to avoid discrimination. If schools offer comparable and voluntary classes to both sexes, concerns about inequality are further minimized. States have an important interest in ensuring that their education systems best serve their citizens. Allowing some experimentation

335. Salomone, *supra* note 54, at 228.

furthers the goal of uncovering the best solution to the problems that plague the current system.

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