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# Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools

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# CONSTITUTIONAL LESSONS FOR THE NEXT GENERATION OF PUBLIC SINGLE-SEX ELEMENTARY AND SECONDARY SCHOOLS

KIMBERLY J. JENKINS\*

## ABSTRACT

*Single-sex public elementary and secondary schools are making a comeback. School districts are structuring these schools in a variety of ways, including by providing a single-sex public school for only one sex or by offering single-sex schools for both sexes. These disparate structures of single-sex schools create distinct potential harms, risks, and benefits for students. This Article contends that the constitutional framework applied to single-sex schools should be systematically modified to recognize the different potential harms, risks, and benefits of these single-sex schools in a manner that will create optimal conditions for creating single-sex public schools. The proposed modifications address the shortcomings of other scholarly proposals and minimize the current indeterminacy in the constitutional case law that could create unnecessary barriers to the development of single-sex public schools.*

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## INTRODUCTION

Public single-sex elementary and secondary schools are experiencing a renaissance that appears likely to continue in the coming years, given the anticipated increased flexibility in the federal laws that regulate such schools.<sup>1</sup> The U.S. Department of Education's Office for Civil Rights (OCR) is scheduled to release new regulations that provide additional flexibility under Title IX of the Education Amendments of 1972 (Title IX)<sup>2</sup> for public single-sex schools and classrooms.<sup>3</sup> The No Child Left Behind Act of 2001 permits local educational agencies to use some funds to support single-sex schools and classrooms consistent with applicable law.<sup>4</sup> In 1995, only three public high schools had all-female student bodies.<sup>5</sup> For

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1. See Martha Minow, Remarks, *Fostering Capacity, Equality, and Responsibility (And Single-Sex Education): In Honor of Linda McClain*, 33 HOFSTRA L. REV. 815, 817 (2005) (noting the 2004 publication of the Office for Civil Rights' proposed changes to federal regulations that govern single-sex schools and that "by publishing the proposed rule, the federal government has clearly signaled a green light for experiments"); 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, 389 ("[I]n recent years there has been a resurgence of interest in single-sex schooling—particularly on the K-12 level."); Tal Barak, *Number of Single-Sex Schools Growing: N.Y.C.-Based Network Opens Schools for Girls in Urban Districts*, EDUC. WK. (Bethesda, Md.), Oct. 20, 2004, at 33 (discussing the recent growth in single-sex public education and noting that "the interest in single-sex education stems from a friendlier climate in Washington under the Bush administration"); Jane Gross, *Dividing the Sexes, for the Tough Years: A Coed School Offers Boys and Girls Separate Classes in Grades 6-8*, N.Y. TIMES, May 31, 2004, at B1 (discussing the proposed amendments to federal law on single-sex public schools that would encourage development of these schools); Todd Silberman, *Girls Charter School Would Be N.C.'s First; Raleigh Backers Follow National Trend*, NEWS & OBSERVER (Raleigh, N.C.), June 14, 2004, at A1 (discussing how the number of single-sex schools and classes could rise significantly because of proposed changes to the federal law that regulates single-sex public education).

2. Title IX prohibits discrimination on the basis of sex in any program or activity that receives federal financial assistance. See 20 U.S.C. § 1681 (2000).

3. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276 (proposed Mar. 9, 2004) (to be codified at 34 C.F.R. pt. 106).

4. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 5131(a)(23), 115 Stat. 1425, 1782 (2001) (to be codified at 20 U.S.C. § 6301) (providing that innovative program funds may be used for "[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)").

5. See Nat'l Ass'n for Single-Sex Pub. Educ., *Single-Sex Public Schools in the United States*, <http://www.singlesexschools.org/schools.html> (last visited Apr. 4, 2006) [hereinafter NASSPE, Schools]. The three public single-sex high schools in 1995 were Western High

the 2005-06 school year, the National Association for Public Single-Sex Education (NASSPE) reports that forty-four public elementary and secondary schools in the United States are single-sex and that thirteen of these schools opened or became single-sex in the 2005-06 school year.<sup>6</sup> In light of these developments and growing public demand for single-sex public schools, educators and scholars are focusing increased attention on this educational option.<sup>7</sup>

The emergence of a new generation of public single-sex elementary and secondary schools raises several novel constitutional questions because some of these schools have unique characteristics that distinguish them from other types of sex<sup>8</sup> classifications, including the potential for voluntary decisions by students (or their parents) to be classified based on sex—by attending the school—and the provision by some schools or districts of similar educational opportunities to both sexes. When looking for answers to these constitutional questions, educators and courts will find mixed signals in the Supreme Court's case law on sex classifications, including its two single-sex public education cases, both of which involved postsecondary schools.<sup>9</sup> On the one hand, in *United*

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School in Baltimore, Maryland, Philadelphia High School for Girls, and Spectrum High Schools for Girls in Milwaukee, Wisconsin. NASSPE defines a single-sex school as a school "in which all grades offer ONLY single-sex classes" and excludes correctional schools. *Id.*

6. *See id.*

7. *See* Minow, *supra* note 1, at 830-31 ("With clear encouragement at the federal level and strong interests in the states, I predict that distinctive educational programs for girls and single-sex educational settings will be expanding."); Ashley E. Johnson, Note, *Single-Sex Classes in Public Secondary Schools: Maximizing the Value of a Public Education for the Nation's Students*, 57 VAND. L. REV. 629, 665 (2004) ("Increasing public interest in single-sex schools further reflects their positive reputation."); Alexa Aguilar, *School District Finds Success with Single-Sex Classrooms*, ST. LOUIS POST-DISPATCH, Mar. 16, 2005, at B1 (discussing the "growing number of public schools nationwide that are moving to single-sex schools or offering single-sex classes within a coed school").

8. Although many distinctions can be drawn between sex and gender, the terms are used interchangeably in this Article. *See generally* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1-2 (1995) (discussing the differences between the terms and noting "[s]ex is regarded as a product of nature, while gender is understood as a function of culture. This disaggregation of sex from gender represents a central mistake of equality jurisprudence").

9. Additionally, in 1977, the Supreme Court affirmed a Third Circuit opinion that found two comparable single-sex public high schools constitutional. *See Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880, 881 (3d Cir. 1976), *aff'd by an equally divided court per curiam*, 430 U.S. 703 (1977).

*States v. Virginia*<sup>10</sup> and *Mississippi University for Women v. Hogan*,<sup>11</sup> the Court held, respectively, that the single-sex admissions policies at the Virginia Military Institute (VMI) and the Mississippi University for Women (MUW) were unconstitutional under intermediate scrutiny, which requires a sex classification to be substantially related to an important governmental interest.<sup>12</sup> The Court held in both cases that the State failed to demonstrate a substantial relationship between the State's purported objective and the single-sex admissions policy.<sup>13</sup> On the other hand, Justice Ginsburg, writing for the Court in *Virginia*, went so far as to state that the Court did "*not question* the Commonwealth's prerogative evenhandedly to support diverse educational opportunities" in response to arguments from amici that single-sex schools can increase the variety of educational options.<sup>14</sup>

While the Court did not question the State's prerogative to support diverse educational opportunities in an evenhanded manner, the rigor with which intermediate scrutiny was applied in *Virginia* prompted many to suggest that intermediate scrutiny is becoming increasingly indistinguishable from strict scrutiny.<sup>15</sup> In fact, Justice Scalia found the Court's scrutiny to be so exacting that he proclaimed single-sex education "functionally dead."<sup>16</sup> While

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10. 518 U.S. 515 (1996).

11. 458 U.S. 718 (1982).

12. See *Virginia*, 518 U.S. at 533; *Hogan*, 458 U.S. at 724.

13. *Virginia*, 518 U.S. at 536; *Hogan*, 458 U.S. at 730.

14. *Virginia*, 518 U.S. at 534 n.7 (emphasis added). The Court in both *Virginia* and *Hogan* explicitly noted that the facts before it involved a unique single-sex institution that existed for only one sex, as opposed to similar single-sex institutions for each sex. See *id.*; *Hogan*, 458 U.S. at 720 n.1.

15. See, e.g., *Virginia*, 518 U.S. at 596 (Scalia, J., dissenting) ("And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny."); *Low-Income Women of Tex. v. Bost*, 38 S.W.3d 689, 705 (Tex. App. 2000) (Yeakel, J., dissenting) ("The Supreme Court possibly heightened the federal review standard somewhat in *United States v. Virginia* ...."), *rev'd sub nom. Bell v. Low Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) ("The Court [in *Virginia*] did not merely restate the intermediate scrutiny test but pressed it closer to strict scrutiny."). But see David K. Bowsher, Note, *Cracking the Code of United States v. Virginia*, 48 DUKE L.J. 305, 338 (1998) ("[T]he MESSAGE of *United States v. Virginia* is the same as the MESSAGES of the Court's earlier gender-based equal protection cases: gender classifications are subject to intermediate scrutiny.").

16. See *Virginia*, 518 U.S. at 596 (Scalia, J., dissenting).

some have agreed with Justice Scalia and have contended that public single-sex schools are not likely to survive constitutional scrutiny after *Virginia*,<sup>17</sup> others have argued that ample room remains under the Constitution for such schools to exist and even thrive.<sup>18</sup> Because new single-sex public schools open each year, the contentious debate continues today over the constitutionality of single-sex public elementary and secondary schools.<sup>19</sup>

Attempting to provide some answers to the constitutional questions surrounding public single-sex schools, scholars have principally turned to two theories of gender equity to address how courts would or should apply intermediate scrutiny to these schools: formal equality and antisubordination. Formal equality determines the constitutionality of single-sex schools by examining whether girls and boys are provided substantially equal opportunities.<sup>20</sup> In

17. See, e.g., ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 2* (2003) (noting that the National Organization for Women and the New York Civil Liberties Union “questioned how any publicly supported single-sex school could possibly survive the Court’s recent decision in the VMI case”); Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 813 (2000) (“While same-sex schooling has not been found per se unconstitutional, the Court’s rulings suggest that it will be difficult indeed for such educational policies to pass muster under the Equal Protection Clause.”); Valorie K. Vojdik, *Girls’ Schools After VMI: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL’Y 69, 96 (1997) (“While VMI does not per se prohibit public girls’ schools, it is nevertheless doubtful that New York school officials will be able to demonstrate that public schools for girls serve an ‘exceedingly persuasive justification.’”).

18. See, e.g., Morgan, *supra* note 1, at 383 (“Nor is there any reason to believe the ‘exceedingly persuasive justification’ language in *Virginia* necessarily spells the end of the new generation of single-sex public schools.”); Cass Sunstein notes that

*Virginia* certainly does not invalidate the state’s decision to separate men and women in the interest of ensuring equal opportunity.... If the state reached its decision deliberatively and without infection from stereotypes about gender roles, and the decision promoted rather than undermined equal opportunity, the Court might uphold the program.

Sunstein, *supra* note 15, at 76; see also MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 571 (4th ed. 2002) (“Various commentators concluded that the decision sounded the death knell for single-sex education, but others countered that school districts could provide such programs so long as they offered a sufficiently compelling justification.”).

19. See Minow, *supra* note 1, at 816 (“The topic of some urgency is single-sex education in kindergarten through high school, not college-level education.”); Morgan, *supra* note 1, at 458 (“Rather than resolving the quandary, the Supreme Court’s decision in *United States v. Virginia* left important questions unanswered.”); Sunstein, *supra* note 15, at 76 (“The Court did not decide a number of future questions about same-sex programs ....”).

20. See *infra* text accompanying notes 261-65.



contrast, antisubordination focuses on whether the single-sex opportunities harm or perpetuate the inferiority of girls and women.<sup>21</sup> This Article explains why these theories, as currently formulated, should not be adopted as the sole theoretical guideposts for applying intermediate scrutiny to single-sex public elementary and secondary schools.

This Article then proposes a modification and systematization of intermediate scrutiny that, on balance, will achieve results superior to the Court's current intermediate scrutiny jurisprudence and these scholarly approaches. The new generation of single-sex public schools may benefit some students and create pitfalls for others.<sup>22</sup> The optimal constitutional standard applied to these schools should allow educators, parents, and schoolchildren to harvest the benefits while avoiding or minimizing the pitfalls. The new approach outlined in this Article for assessing the constitutionality of single-sex schools seeks to achieve the appropriate balance between the potential advantages and disadvantages of single-sex public schools. It works within the existing intermediate scrutiny framework and case law when doing so would achieve the best possible results. However, this Article also proposes that the Court modify and systematize intermediate scrutiny when the current framework would result in adverse outcomes or where the Court has yet to explore the constitutional ramifications of single-sex public schools.

At the heart of this Article's approach is the contention that two factors determine the nature of the potential harm presented by single-sex public schools: (1) voluntary attendance at the schools and (2) the provision of substantially equal single-sex schools for each sex. Analysis of these two factors results in dividing single-sex public schools into two categories that present distinct potential harms: (1) dual, voluntary schools, in which each sex may attend substantially equal schools, and students attend the schools voluntarily; or (2) solitary or involuntary schools, in which one sex is provided with a single-sex school that the other sex is not

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21. See *infra* text accompanying notes 284-86.

22. See Leonard Sax, *The Promise and Peril of Single-Sex Public Education: Mr. Chips Meets Snoop Dogg*, EDUC. WK. (Bethesda, Md.), Mar. 2, 2005, at 48 (describing the success of some single-sex schools and the problems encountered by others).

provided, or in which students attend a single-sex school involuntarily.

Traditionally, to apply intermediate scrutiny to single-sex schools, a district would have to show that its single-sex admissions policy serves an important governmental interest and that the policy is substantially related to the achievement of that interest.<sup>23</sup> However, the Court has applied the substantial relationship component of intermediate scrutiny in an inconsistent manner, sometimes requiring a very tight fit between means and ends and sometimes permitting a rather loose fit.<sup>24</sup> The variety of possible interpretations of intermediate scrutiny could have a detrimental impact on the development of single-sex public schools because courts could unnecessarily constrain educators' options for developing innovative single-sex programs, or courts might fail to require adequate safeguards to protect schoolchildren from the potential adverse effects of single-sex schools. In addition, the uncertainty in the constitutional standard could chill the opening of such schools by educators who fear the risk of litigation. The proposal in this Article seeks to avoid these adverse results by systematizing how voluntary attendance and the provision of substantially equal benefits should modify the substantial relationship component of intermediate scrutiny.

The identification of and focus on these two factors for assessing whether single-sex schools have a substantial relationship to their important objective mirrors the Court's systematization of strict scrutiny in *United States v. Paradise*, in which the Court identified the key factors that determine whether a program is narrowly tailored to achieve its compelling governmental interest.<sup>25</sup> By applying disparate interpretations of intermediate scrutiny depending on the potential harms of single-sex schools, this Article's approach builds on the Supreme Court's decision in *Grutter v. Bollinger*.<sup>26</sup> As discussed briefly below, in *Grutter*, the Court modified its past requirements for strict scrutiny so that the

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

24. See *infra* Part II.A-B.

25. *United States v. Paradise*, 480 U.S. 149, 171 (1987) (noting that when the Court determines if a program is narrowly tailored the Court examines "several factors").

26. 539 U.S. 306 (2003).

standard recognized the unique characteristics of the University of Michigan Law School's admissions policy, distinguishing it from other racial classifications.<sup>27</sup> Similarly, this Article acknowledges that the distinct characteristics of some single-sex schools neither present the same potential harm nor should be subject to the same constitutional hurdles as some of the sex classifications that the Court has considered in the past.

This Article develops its proposal in five parts. Part I.A briefly examines the causes of the recent resurgence in single-sex public elementary and secondary schools, including the search for effective alternatives to address the needs of girls and boys and the proposed increased flexibility for such schools under Title IX. Part I.B considers the objectives of single-sex schools and includes a short overview of the literature regarding the possible benefits of single-sex schools, and Part I.C describes the success of some modern day single-sex public schools. Part I.C concludes with a recognition that single-sex schools may present potential harms, as evidenced by concerns that have arisen in more recent single-sex public schools and the history of single-sex schools in the United States.

Part II considers the Supreme Court's disparate interpretations of intermediate scrutiny, explaining how intermediate scrutiny's indeterminacy renders it ineffective as a constitutional standard for single-sex schools. Part III presents the two existing theories that dominate the scholarship on single-sex schools and argues that these theories alone should not be adopted. Part IV's analysis of *Grutter v. Bollinger* sets the stage for this Article's proposal by analyzing how the Court revised the requirements of the Equal Protection Clause to address the particular circumstances of the state action before the Court. Part IV also identifies the two unique characteristics of some public single-sex schools that support modification of the existing constitutional framework. Part IV then proposes how intermediate scrutiny should be applied to dual, voluntary single-sex schools and to solitary or involuntary single-sex schools. Part V presents some concluding thoughts and explains some of the benefits of adopting this proposal, including a discussion

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27. See *infra* Part IV.A.

of how the proposal, if adopted, would systematize and clarify intermediate scrutiny's application to single-sex public schools.<sup>28</sup>

## I. THE RENAISSANCE OF PUBLIC SINGLE-SEX ELEMENTARY AND SECONDARY SCHOOLS

### *A. Why Single-Sex Public Elementary and Secondary Schools Are Reemerging in the United States*

In the 1990s, educators and researchers began focusing on public single-sex education as one possible avenue to address gender equity concerns in coeducational schools, even though single-sex public schools were virtually extinct in the United States by the late 1980s.<sup>29</sup> Gender bias within coeducational schools was uncovered and highlighted beginning in the late 1970s, initially focusing on the bias that girls faced in K-12 coeducational settings.<sup>30</sup> These concerns included findings that in coeducational schools, particular subjects became identified with one gender; for example, English and foreign languages were considered feminine or "girl subjects," while science

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28. This Article does not separately address the racial implications of developing single-sex schools, particularly within urban areas. For articles addressing these issues, see, for example, Kevin D. Brown, *The Dilemma of Legal Discourse for Public Educational Responses to the "Crisis" Facing African-American Males*, 23 CAP. U. L. REV. 63 (1994); Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15.

29. See SALOMONE, *supra* note 17, at 70-71; Amanda Datnow & Lea Hubbard, *Introduction to GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING* 3 (Amanda Datnow & Lea Hubbard eds., 2002) [hereinafter *GENDER IN POLICY AND PRACTICE*] ("Public schools in at least fifteen U.S. states have recently responded to calls for the improvement of education more generally, or to gender equity concerns, through experiments with single-sex education, most often in the form of separate math or science classes for girls."); Whitney Ransome & Meg Milne Moulton, *Why Girls' Schools? The Difference in Girl-Centered Education*, 29 FORDHAM URB. L.J. 589, 589-90 (2001) (discussing a revived interest in single-sex education in the 1990s); NASSPE, *Schools*, *supra* note 5 (listing single-sex public schools within the United States and listing only two such schools in existence by the late 1980s).

30. See SALOMONE, *supra* note 17, at 70-71 (discussing studies on gender bias in the classroom from the late 1970s and 1980s); Datnow & Hubbard, *supra* note 29, at 2-3 (noting that "many studies over the past twenty-five years have documented gender bias against females in coeducational classrooms both at the K-12 and higher education levels"); Ransome & Moulton, *supra* note 29, at 591 (noting that the "chilly classroom climates" that permeated co-educational institutions were almost non-existent in girls' schools" (footnote omitted)).

and math were seen as masculine or "boy subjects."<sup>31</sup> Research also indicated that girls did not feel as comfortable speaking in class as boys did and that they received less attention than boys.<sup>32</sup> In addition, starting in the middle school years, teachers gave boys more feedback, and "boys were more confident in learning math and science and perceived these subjects to be more useful."<sup>33</sup> For example, a 1992 study by the American Association of University Women (AAUW) entitled *How Schools Shortchange Girls* revealed disconcerting findings on girls in coeducational schools, including the finding that girls "often are not expected or encouraged to pursue higher-level mathematics and science courses."<sup>34</sup>

A 1999 report by the AAUW entitled *Gender Gaps: Where Schools Still Fail Our Children* further documented the complexity of gender equity concerns in the classroom.<sup>35</sup> The report indicated that the practice of tracking students affects the course-taking patterns of girls and boys in different ways:

Girls are more likely than boys to have their abilities overlooked in math and science—a pattern that limits their future opportunities. On the other hand, girls are also more likely than boys to be identified at a young age for gifted programs. However, girls fall off this gifted track at a higher rate than boys, particularly once they reach high school. There, peer pressure tells many girls to hide their intelligence and be quiet.<sup>36</sup>

Others have echoed the AAUW's much-publicized findings on the negative treatment that girls experience in school. For example, some have contended that adverse treatment in the classroom discourages girls from speaking during the class discussions, adversely affects their self-confidence, and discourages them from pursuing careers in subjects such as math and science.<sup>37</sup> Two

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31. See SALOMONE, *supra* note 17, at 71.

32. See Datnow & Hubbard, *supra* note 29, at 3 ("Females have historically received less attention than boys [and] feel less comfortable speaking out in class ....").

33. See SALOMONE, *supra* note 17, at 71.

34. See AM. ASS'N OF UNIV. WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS* 147 (1992).

35. See AM. ASS'N OF UNIV. WOMEN, *GENDER GAPS: WHERE SCHOOLS STILL FAIL OUR CHILDREN* 61 (1998).

36. *Id.* at 30.

37. See Vojdik, *supra* note 17, at 86; Beth Willinger, *Single Gender Education and the*

experts on the disparate treatment of girls in the classroom, David and Myra Sadker, describe this phenomenon in their book entitled *Failing at Fairness: How America's Schools Cheat Girls*, in which they contend 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.”<sup>38</sup> The Sadkers maintain that this disparate treatment may result not only in the “loss of self-esteem,” but also in lower achievement and the elimination of professional options.<sup>39</sup> In addition, research indicates that girls experience more harassment in schools, including sexual harassment.<sup>40</sup> These and other factors have led educators and researchers to conclude, within the past couple of decades, that factors within and outside of schools negatively influenced the attitudes, achievement, course enrollment, and career choices of girls in coeducational schools.<sup>41</sup>

While concerns about gender equity in schools have often focused on girls, many have contended more recently that how boys fare is the real problem, and some have challenged the research on harm to girls.<sup>42</sup> For example, in her 2000 book entitled *The War Against Boys: How Misguided Feminism Is Harming Our Young Men*, Christina Hoff Sommers explains how boys lag substantially behind girls in reading and writing, and she contends that “it is boys, not girls, who are languishing academically” on a variety of measures, including lower educational aspirations, lower grades, and less

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*Constitution*, 40 LOY. L. REV. 253, 275 (1994) (noting that evidence exists that teachers discriminate against girls in math and science classes).

38. MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS* 1 (1994).

39. *Id.*

40. See AM. ASS'N OF UNIV. WOMEN, *supra* note 35, at 85 (finding that eighty-five percent of girls and seventy-six percent of boys had experienced sexual harassment); MICHAEL GURIAN ET AL., *BOYS AND GIRLS LEARN DIFFERENTLY!* 55 (2001); Datnow & Hubbard, *supra* note 29, at 3.

41. See SALOMONE, *supra* note 17, at 71.

42. See GURIAN ET AL., *supra* note 40, at 63-66; SALOMONE, *supra* note 17, at 4; Datnow & Hubbard, *supra* note 29, at 3; Ann Hulbert, *Boy Problems: The Real Gender Crisis in Education Starts with the Y Chromosome*, N.Y. TIMES, Apr. 3, 2005, (Magazine), at 13, 13-14 (discussing the fact that girls outperform boys in verbal test scores, college enrollment, and degrees earned).

rigorous academic programs.<sup>43</sup> Sommers and others have also challenged the Sadkers' research and some of the AAUW research as being intentionally biased against boys, having "factual errors," and being motivated by a strategy to secure benefits for females.<sup>44</sup>

Other research echoes Sommers's concerns about boys, such as their lower language and reading scores, their higher referral rates to special education, and their greater likelihood to be involved in violent crime and drug and alcohol use.<sup>45</sup> For instance, Judith Kleinfeld contends that girls are generally thriving in education and boys are the ones experiencing harmful treatment in the classroom and adverse educational outcomes.<sup>46</sup> A 2005 report by a group of Duke University researchers examines a number of indicators of well-being, including educational attainment, material wealth, and material/spiritual well-being, finding that the well-being of girls and boys tracked fairly closely, with girls showing advantages in more indicators than boys.<sup>47</sup> The report concludes that girls are not disadvantaged in their educational attainment; instead, "[i]f anything, it is boys who are falling behind, particularly at the higher levels of education."<sup>48</sup> Others have also noted a recent surge in studies and research that reveals "greater gender bias ... against boys" in educational settings.<sup>49</sup>

The totality of the research suggests that in recent decades both sexes have experienced discrimination, undesirable educational outcomes, and stereotyping in distinct ways.<sup>50</sup> Furthermore, current

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43. CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* 14, 24 (2000).

44. See GURIAN ET AL., *supra* note 40, at 63-66; JUDITH KLEINFELD, *THE MYTH THAT SCHOOLS SHORTCHANGE GIRLS: SOCIAL SCIENCE IN THE SERVICE OF DECEPTION* 1-2 (1998); SOMMERS, *supra* note 43, at 22-23.

45. See Datnow & Hubbard, *supra* note 29, at 3; Hulbert, *supra* note 42, at 13-14 (discussing the recent focus of educators on the educational problems plaguing boys); Cornelius Riordan, *Gender Gap Trends in Public Secondary Schools: 1972 to 1992*, at 2 (Aug. 21, 1998) (unpublished paper presented at the Annual Meetings of the American Sociological Association in August 1998).

46. See KLEINFELD, *supra* note 44, at 3.

47. See Sara O. Meadows et al., *Assessing Gilligan v. Sommers: Gender Specific Trends in Child and Youth Well-Being in the United States, 1985-2001*, 70 SOC. INDICATORS RES. 1, 44 (2005) (noting that the study does not track indicators such as self-esteem).

48. See *id.* at 44.

49. GURIAN ET AL., *supra* note 40, at 54 (emphasis omitted).

50. See *id.* at 54-57 (summarizing research on specific areas in which both girls and boys experience advantages and disadvantages in education); Datnow & Hubbard, *supra* note 29,

achievement data reveal a complex picture in which neither sex consistently outperforms the other. Instead, “[r]ecent reports have now confirmed that both boys *and* girls are on the unfavorable side of the gender gap in education and developmental matters.”<sup>51</sup> In November 2004, the National Center for Education Statistics (NCES) released a report that compiles a “wide range of published and unpublished statistical materials” on academic outcome measures disaggregated by sex.<sup>52</sup> The NCES summarizes this data as revealing that

in elementary and secondary school and in college, females are now doing as well as or better than males on many indicators of achievement and educational attainment, and ... large gaps that once existed between males and females have been eliminated in most cases and have significantly decreased in other cases.<sup>53</sup>

The report provides the most recent comprehensive examination of instances in which girls outperform boys, instances in which boys continue to outperform girls, and situations in which performance outcomes may be similar or may fluctuate depending on grade and assessment year. For example, boys scored higher than girls on geography, calculus, and science exams.<sup>54</sup> While both elementary and secondary school girls and boys use computers to the same extent, boys constitute eighty-six percent of the students who took the Advanced Placement computer science exam, and their average test scores were higher than the average scores for girls.<sup>55</sup> However, “[a]lthough there is a common perception that males consistently outperform females in mathematics, [National Assessment of Education Progress] mathematics scores have not shown this.... In

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at 3 (“Gender bias is now seen as affecting both girls and boys, because neither group is immune to societal pressures and expectations.”).

51. Cornelius Riordan, *What Do We Know About the Effects of Single-Sex Schools in the Private Sector?: Implications for Public Schools*, in GENDER IN POLICY AND PRACTICE, *supra* note 29, at 10, 27; see NANCY S. COLE, EDUC. TESTING SERV., THE ETS GENDER STUDY: HOW FEMALES AND MALES PERFORM IN EDUCATIONAL SETTINGS 10 (1997) (discussing studies that reveal that gender differences in performance cut both ways).

52. See CATHERINE E. FREEMAN, NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEPT OF EDUC., TRENDS IN EDUCATIONAL EQUITY OF GIRLS AND WOMEN: 2004, at 1 (2004).

53. *Id.*

54. See *id.* at 6, 32.

55. See *id.* at 7-8.



mathematics, the gap between average scale scores has been quite small and fluctuated only slightly between 1990 and 2003.<sup>56</sup> The disparities in science achievement varied depending on grade level and across time,<sup>57</sup> and the remaining gender gaps in science are shrinking.<sup>58</sup> Research also reveals that more males score among the highest and lowest scores on standardized tests and that this pattern increases with age.<sup>59</sup> Girls and boys also have similar abilities and behavior patterns on a variety of other measures.<sup>60</sup>

Girls also outperform boys, or achieve more favorable outcomes than boys, on many measures. For instance, girls consistently outscore boys in reading and writing assessments at the fourth-, eighth-, and twelfth-grade levels, and they have done so since the early 1990s.<sup>61</sup> Other research indicates that girls consistently receive higher grades than boys.<sup>62</sup> The NCES report reveals that girls repeat a grade at lower rates than boys<sup>63</sup> and are less likely to drop out of school.<sup>64</sup> Elementary school girls are less likely than boys to be identified as having a learning disability, emotional disturbance, or a speech impediment.<sup>65</sup> Boys also are more likely to engage in violent behavior while on school property<sup>66</sup> and to engage in risky behavior, such as alcohol or other drug use.<sup>67</sup> These disparities in conduct may be important later in life because “[d]own the road, there is evidence that poorer ‘noncognitive skills’ (not academic

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56. *Id.* at 6.

57. *See id.* at 30.

58. *See id.* at 7.

59. *See* COLE, *supra* note 51, at 18.

60. *See* Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 471 (1999); *see also* FREEMAN, *supra* note 52, at 32 (discussing data that reveal that no differences existed between the sexes in U.S. history scores).

61. *See* FREEMAN, *supra* note 52, at 28; Thomas Newkirk, *The Quiet Crisis in Boys' Literacy*, EDUC. WK. (Bethesda, Md.), Sept. 10, 2003, at 34 (discussing how boys lag substantially behind girls in reading and writing).

62. *See* COLE, *supra* note 51, at 18; Levit, *supra* note 60, at 472; Christina A. Samuels, *Report: Boys' and Girls' 'Well-Being' Tracks Closely*, EDUC. WK. (Bethesda, Md.), Mar. 23, 2005, at 8 (noting Judith Kleinfeld's contention that while girls previously had only a trivial gap in superior grades, today that “gap is fundamentally different”).

63. *See* FREEMAN, *supra* note 52, at 40.

64. *See id.* at 56.

65. *See id.* at 42.

66. *See id.* at 52-53.

67. *See id.* at 54-55.

capacity but work habits and conduct) may be what hobbles males most.<sup>68</sup> At the undergraduate and graduate school levels, the complexity of the gender disparities continues. Since the mid-1980s, women have earned more than half of all bachelor's degrees and now earn more than half of all graduate degrees; however, women still earn some graduate degrees consistent with historical gender patterns, including obtaining more advanced degrees than men in education, psychology, and health sciences.<sup>69</sup>

This achievement data, along with the research contending that both girls and boys experience adverse treatment in the classroom, illustrates the modern-day complexity of educational outcomes and experiences along gender lines. Unfortunately, this research indicates that both sexes experience discrimination, misidentification, and undesirable educational outcomes in distinct ways. This complex array of gender equity concerns has led some educators to consider single-sex public education as one possible way to address the disparate experiences and outcomes of girls and boys.<sup>70</sup>

In addition to examining single-sex education as an option to address gender equity issues, urban educators in particular began exploring single-sex education as a way to address some of the concerns plaguing their districts.<sup>71</sup> “[U]rban school districts and parents from New York to California cautiously looked toward single-sex schooling both to address the much-publicized needs of adolescent girls across the economic spectrum and to resolve the compelling problems confronting inner-city boys.”<sup>72</sup> Single-sex education may be particularly appealing to urban districts because the research of one prominent single-sex researcher, Cornelius Riordan, contends that the benefits of single-sex schools for student achievement are “limited to students of lower socioeconomic status and/or students who are disadvantaged historically—females and

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68. Hulbert, *supra* note 42, at 14.

69. See FREEMAN, *supra* note 52, at 78, 82. Women earn forty-six percent of all first-professional degrees in fields such as law, dentistry, and medicine. See *id.* at 82.

70. See AM. ASS'N OF UNIV. WOMEN, SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS 1-3 (1998); SALOMONE, *supra* note 17, at 4-5; Datnow & Hubbard, *supra* note 29, at 2-3; Morgan, *supra* note 1, at 389-90.

71. See Minow, *supra* note 1, at 823 (“It is striking how much of the advocacy for single-sex public education—for boys as well as for girls—occurs as people try to improve failing inner city schools.”).

72. SALOMONE, *supra* note 17, at 4-5.

racial/ethnic/religious minorities (both males and females).<sup>73</sup> Because urban school districts have higher concentrations of poor and minority students than suburban or rural schools, single-sex schools could help educators improve achievement where other reforms too often have failed.

Finally, as noted in the Introduction, the No Child Left Behind Act of 2001 authorized school districts to use some funds for single-sex schools and classrooms.<sup>74</sup> The OCR announced in May 2002 that it was planning to amend the regulations under Title IX that govern these schools.<sup>75</sup> In March 2004, the OCR published its proposed revisions to these regulations and signaled its intention to abandon its prior interpretation of Title IX, under which a district that offered a single-sex public school was required to provide a comparable single-sex public school for the other sex.<sup>76</sup> Instead, the proposed regulations would allow a district to offer a single-sex school to one sex while providing “substantially equal educational opportunities in a single-sex school, *single-sex education unit*, or *coeducational school*” to the excluded sex.<sup>77</sup> If this interpretation is included in the final regulation, the elimination of the federal regulatory requirement to open two comparable single-sex schools will make single-sex schools a more attractive option for some educators. The increased flexibility in the federal requirements will also increase educators’ focus on understanding their constitutional obligations for such schools.

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73. Riordan, *supra* note 51, at 14. Riordan concludes that single-sex schools benefit some students because the schools “provide an avenue for students to make a proacademic choice, thereby affirming their intrinsic agreement to work in the kind of environment we identify as effective and equitable.” *Id.* at 28.

74. See Pub. L. No. 107-110, § 5131(a)(23), 115 Stat. 1425, 1782 (2001) (to be codified at 20 U.S.C. § 6301).

75. See 20 U.S.C. § 1681 (2000); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31,098 (proposed May 8, 2002) (to be codified at 34 C.F.R. pt. 106); Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102 (proposed May 8, 2002) (to be codified at 34 C.F.R. pt. 106).

76. Compare Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276-77 (proposed March 9, 2004) (to be codified at 34 C.F.R. pt. 106), with Guidelines, 67 Fed. Reg. at 31,103 (describing the prior “longstanding interpretation, policy, and practice to require that the ‘comparable school’ must also be single-sex”).

77. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. at 11,285 (emphasis added).

Educators may decide to open single-sex public elementary and secondary schools to achieve one or more of several objectives. Those objectives are examined next.

### *B. The Objectives of Single-Sex Public Schools*

Educators develop and maintain single-sex public schools for a variety of reasons. The four objectives examined in this section are the following: (1) to improve educational outcomes for students; (2) to offer students and parents a diverse array of educational options; (3) to compensate students for past or present discrimination; and (4) to conduct an educational experiment. To satisfy intermediate scrutiny, the objective must be sufficiently important to support a sex classification and the objective must have actually motivated the governmental actor.<sup>78</sup> Therefore, the objectives for single-sex schools should be based on evidence about the current educational problems, needs, and barriers that educators are attempting to address.

#### *1. To Improve Educational Outcomes for Students*

Scholars and educators debate whether existing research on single-sex schools establishes that single-sex public education will benefit students.<sup>79</sup> Several scholars, researchers, and panels of

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78. See *Craig v. Boren*, 429 U.S. 190, 197-98 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648-49 (1975).

79. Those who contend that research does not provide evidence that single-sex education benefits students include the following: Pamela Haag, *Single-Sex Education in Grades K-12*, in *THE JOSSEY-BASS READER ON GENDER IN EDUCATION* 647, 661-64 (Elisa Rassen ed., 2002) (discussing studies concluding that differences in outcome between single-sex education and coeducation cannot be attributed to school type); Brian Johnson, *Admitting that Women's Only Public Education Is Unconstitutional and Advancing the Equality of the Sexes*, 25 T. JEFFERSON L. REV. 53, 75-85 (2002); Levit, *supra* note 60, at 489, 503 (contending that "[n]umerous studies, both in the United States and abroad, find no significant differences between the impact of coeducational and of single-sex schools on student performance and achievement" and that "[t]he touted 'general consensus' about positive education and socialization effects of single-sex education simply does not exist"); Vojdik, *supra* note 17, at 93. Others argue that the research establishes that single-sex education benefits students. See Brown-Nagin, *supra* note 17, at 803-06; Morgan, *supra* note 1, at 397-401, 453; Ransome & Moulton, *supra* note 29, at 596-99; Amanda E. Koman, Note, *Urban, Single-Sex, Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America's Young Women*, 39 WM. & MARY L. REV. 507, 526-27 (1998).

experts have undertaken a comprehensive analysis of the existing research and literature on single-sex schools.<sup>80</sup> Some scholars, however, have indicated that additional research on single-sex public education is both needed and desirable.<sup>81</sup>

This Article describes some of the research on single-sex education that a court could find sufficiently persuasive to establish that single-sex education benefits some students<sup>82</sup> and thus conclude that the objective of a single-sex school is sufficiently important to justify a sex classification. For example, research indicates that single-sex environments appear to decrease the likelihood that girls and boys will view certain subjects as typically masculine or feminine.<sup>83</sup> Students also perceive single-sex environments as providing higher levels of organization, order, and control.<sup>84</sup> Single-sex schools also may focus students' attention on academics and away from popularity and attractiveness for girls, and athletics for boys, which may distract many students from academics in coeducational schools.<sup>85</sup> For instance, several studies found that students in single-sex schools devoted more time to homework, had

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80. See generally AM. ASS'N OF UNIV. WOMEN, *supra* note 70; 1 OFFICE OF EDUC. RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUC., SINGLE-SEX SCHOOLING: PERSPECTIVES FROM PRACTICE AND RESEARCH (Debra K. Hollinger ed., 1993); SALOMONE, *supra* note 17, at 188-236; Patricia B. Campbell & Jo Sanders, *Challenging the System: Assumptions and Data Behind the Push for Single-Sex Schooling*, in GENDER IN POLICY AND PRACTICE, *supra* note 29, at 31, 31-46; Haag, *supra* note 79, at 647-76; Riordan, *supra* note 51, at 10-30; Levit, *supra* note 60, at 464-526; Fred A. Mael, *Single-Sex and Coeducational Schooling: Relationships to Socioemotional and Academic Development*, 68 REV. EDUC. RES. 101 (1998). One problem with some of the research is the tremendous difficulty in separating out the impact of the single-sex environment from other attributes of the single-sex environment. See Minow, *supra* note 1, at 827.

81. See SALOMONE, *supra* note 17, at 235-36; Riordan, *supra* note 51, at 13; Isabelle K. Pinzler, *Separate but Equal Education in the Context of Gender*, 49 N.Y.L. SCH. L. REV. 785, 804-05 (2004).

82. See AM. ASS'N OF UNIV. WOMEN, *supra* note 70, at 2; 1 OFFICE OF EDUC. RESEARCH & IMPROVEMENT, *supra* note 80, at ii (finding that "single-sex education provides educational benefits for some students"); SALOMONE, *supra* note 17, at 198-227, 235; Haag, *supra* note 79, at 664-70 (noting that some "[s]tudies that have discovered positive achievement outcomes attributable to the single-sex environment have all dealt with single-sex schools rather than classes," and that research does reveal a consensus on the benefits of single-sex education on some indicators); Mael, *supra* note 80, at 117.

83. See SALOMONE, *supra* note 17, at 235; Haag, *supra* note 79, at 653-54; Mael, *supra* note 80, at 111. *But see* SALOMONE, *supra* note 17, at 208 (noting several studies with contrary results).

84. See Haag, *supra* note 79, at 655.

85. See SALOMONE, *supra* note 17, at 198-200.

higher aspirations for their academic and educational achievement, and wanted to be remembered for their scholastic abilities, rather than for their leadership in student activities or popularity.<sup>86</sup> Studies that find positive effects in single-sex schools emphasize that the characteristics of students' peer groups, including more academically oriented peers, and peer influence may affect outcomes and be indirectly related to the school's composition.<sup>87</sup>

Studies also reveal a consensus that girls educated in single-sex environments show a greater preference for science, technology, and math than girls educated in coeducational environments.<sup>88</sup> In addition, more positive attitudes of girls toward science and math in single-sex schools may influence course enrollment and decisions in their careers; however, research is mixed on whether a more positive attitude improves achievement in these subjects.<sup>89</sup> Studies have consistently found that while girls in coeducational schools may draw their self-concept from their physical appearance, "girls in single-sex schools may draw greater confidence from academic competence."<sup>90</sup> Furthermore, girls are subjected to harassment from the opposite sex more than boys, and single-sex schools reduce the opportunities for this type of harassment to occur.<sup>91</sup> Some conclude, however, that the positive impact of single-sex education for girls depends on the relationships, values, and environment within the school.<sup>92</sup>

The research on the impact of single-sex education on boys is less conclusive. Some researchers and scholars conclude that boys perform better in coeducational environments and that single-sex

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86. See *id.* at 199; Mael, *supra* note 80, at 107.

87. See Haag, *supra* note 79, at 669.

88. See SALOMONE, *supra* note 17, at 207-08, 235; Haag, *supra* note 79, at 653; Levit, *supra* note 60, at 493; Mael, *supra* note 80, at 108-09, 111. *But see* Levit, *supra* note 60, at 494 (noting one study that did not find a positive effect on girls' attitudes regarding math).

89. Compare SALOMONE, *supra* note 17, at 207 ("Research from more developed countries has generally found that although girls tend to have less gendered and more positive attitudes toward math and science in single-sex schools, which may influence their subsequent course enrollment and career choices, that advantage does not necessarily pay off in the short run in achievement gains."), with Mael, *supra* note 80, at 108-09 (discussing several studies that found higher achievement for girls in math or science in single-sex schools).

90. Haag, *supra* note 79, at 670.

91. See Mael, *supra* note 80, at 115. Single-sex schools do not eliminate the possibility for sexual harassment to occur because students may be harassed by students of the same sex.

92. See Campbell & Sanders, *supra* note 80, at 36.

schools disadvantage boys.<sup>93</sup> For example, Nancy Levit contends that "the majority of research suggests that boys are served best, academically and socially, in coeducational environments. The effects of single-sex education for boys thus are at best, neutral, and at worst, negative."<sup>94</sup> Other research suggests that some boys, particularly disadvantaged boys, benefit from single-sex education.<sup>95</sup> For example, Cornelius Riordan's research indicates that "[s]ingle-sex schools do not greatly influence the academic achievement of affluent or advantaged students, but they do for poor disadvantaged students.... [W]hite middle-class (or affluent) boys and girls do not suffer any loss by attending a single-sex school.... At worst, they realize a neutral outcome ...."<sup>96</sup> One researcher has contended that the disparate research outcomes for girls and boys in single-sex schools result from the overwhelming focus of researchers on girls.<sup>97</sup>

The parties in *United States v. Virginia* that challenged the Virginia Military Institute's single-sex admissions policy did not contest that "[s]ingle-sex education affords pedagogical benefits to at least some students."<sup>98</sup> Given the research supporting this conclusion, the Court is unlikely to reject it in the near future. Improved educational outcomes also typically underlie the objectives of single-sex public schools discussed below.

## 2. To Offer Diverse Educational Opportunities

Offering single-sex and coeducational schools can increase diversity in educational institutions because it allows students and parents to choose the school that best fits a student's educational and developmental needs.<sup>99</sup> For example, in developing a pilot study of single-sex schools in California, the California Department of Education made clear that the principal purpose was to increase the

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93. See SALOMONE, *supra* note 17, at 220 (noting that the conclusion that "coeducation might better serve boys" is a "general theme running through the literature").

94. Levit, *supra* note 60, at 500.

95. See SALOMONE, *supra* note 17, at 235.

96. Riordan, *supra* note 51, at 18.

97. See Mael, *supra* note 80, at 117.

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

99. See Brown-Nagin, *supra* note 17, at 867-68; Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 251-52 (1994).

options for public school students.<sup>100</sup> Proponents of increasing school choice contend that such choice can empower families to select the most effective schools for their children and can increase the educational options for low-income children, who are typically denied the choices that upper income children routinely exercise.<sup>101</sup> Proponents also contend that school choice will encourage competition between public and private schools that may cause both public and private schools to improve and that school choice can be used to promote equal educational opportunity.<sup>102</sup> While diversity in educational opportunities only contributes value if the additional educational opportunities offered are “educationally beneficial,”<sup>103</sup> the research evidence discussed above supports the contention that single-sex education will benefit some students.<sup>104</sup>

The Court’s opinion in *Virginia* strongly supports the conclusion that the Court will find increasing diversity of educational options a sufficiently important objective for single-sex schools, at least when such diversity is offered to both sexes. The Court indicated that it did “*not question* the Commonwealth’s prerogative *evenhandedly* to support diverse educational opportunities,” in response to arguments from amici about the potential benefit of single-sex

100. See AMANDA DATNOW ET AL., IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR?: LESSONS FROM CALIFORNIA’S PILOT PROGRAM 6 (2001); SALOMONE, *supra* note 17, at 228-29. This is also one of the goals of the proposed amendments to the Title IX regulations for single-sex schools. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31,098 (proposed May 8, 2002) (to be codified at 34 C.F.R. pt. 106).

101. See Howard Fuller, *The Continuing Struggle for School Choice*, in EDUCATIONAL FREEDOM IN URBAN AMERICA: BROWN V. BOARD AFTER HALF A CENTURY 1, 2-4 (David Salisbury & Casey Lartigue, Jr. eds., 2004) [hereinafter EDUCATIONAL FREEDOM IN URBAN AMERICA].

102. See Paul E. Peterson, *The Meaning of Zelman and the Future of School Choice*, in EDUCATIONAL FREEDOM IN URBAN AMERICA, *supra* note 101, at 53, 66; Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice?: A Legal and Policy Perspective*, 45 HOW. L.J. 281, 335 (2002) (“It would better serve our nation and its schoolchildren if we discover innovative ways to use school choice as a means to achieve desegregation, integration, nondiscrimination, and equal educational opportunity.”).

103. Morgan, *supra* note 1, at 398-99.

104. *But see* Jenny L. Matthews, Comment, *Admission Denied: An Examination of a Single-Sex Public School Initiative in North Carolina*, 82 N.C. L. REV. 2032, 2056 (2004) (arguing that offering a diversity of educational options is not an important governmental interest because it is not an end, but rather a means, to achieve the important goal of successfully educating all students).



schools.<sup>105</sup> The Court concluded that Virginia could not establish that it adopted the single-sex policy at VMI to promote diverse educational opportunities because Virginia's history of single-sex and coeducational public schools revealed that VMI's exclusion of women was not adopted for this purpose.<sup>106</sup> Nevertheless, Virginia's failure to make this showing will not preclude a school district from establishing a genuine interest in providing a variety of educational opportunities in single-sex and coeducational schools in the future.<sup>107</sup>

### 3. *To Remedy Discrimination*

Single-sex schools also may be developed to address past or present discrimination in coeducational schools.<sup>108</sup> Such discrimination may include sexual harassment and disparate treatment that may harm the achievement of girls.<sup>109</sup> Past discrimination against girls and women may affect not only educational outcomes, but it may also affect the career aspirations and choices that girls

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105. *United States v. Virginia*, 518 U.S. 515, 534 n.7 (1996) (emphasis added); cf. *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (upholding the Cleveland, Ohio, voucher program that allowed students to choose among public and private schools).

106. See *Virginia*, 518 U.S. at 535.

107. For example, a genuine interest in offering choice could be demonstrated by a district offering students a variety of educational options, such as specialized schools that focus on particular subject areas like math or science. See SALOMONE, *supra* note 17, at 13 (discussing the fact that the neighborhood in which New York City opened its first single-sex school already included a number of educational options for students).

108. See SOMMERS, *supra* note 43, at 171 (quoting the argument made by Deborah Brake of the National Women's Law Center that the network of programs and scholarships for girls and women may be legitimate, "[i]n light of the history of discrimination against women in education and the barriers that female students continue to face based on their gender"); Willinger, *supra* note 37, at 273-75, 278 (noting that some argue that "all-girls schools or all-girls classrooms are necessary as a response to gender discrimination in the classroom. There is widespread evidence of the prevalence of such discrimination, and increasingly this evidence forms the basis of arguments in favor of single-sex education for girls").

109. See *supra* notes 29-41 and accompanying text.

make if they perceive a field to be unwelcoming or unavailable.<sup>110</sup> Schools also could identify and address discrimination against boys.

The Court acknowledged in *Mississippi University for Women v. Hogan* that “[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.”<sup>111</sup> However, a state actor that adopts a sex classification to remedy discrimination must demonstrate that “members of the gender benefited by the classification actually suffer a disadvantage related to the classification.”<sup>112</sup> Therefore, a school district could only develop a single-sex school to address discrimination if it identified ways in which girls or boys had been harmed by discrimination and tailored the program to address that harm.<sup>113</sup> For example, some contend that the Young Women’s Leadership School (YWLS) in Harlem, which emphasizes math and science, was established to address past discrimination against girls and women, including the discrimination that girls experienced in coeducational schools and the low participation rates of women in math and science occupations.<sup>114</sup> A district that establishes a single-sex school for remedial purposes should also present evidence that it is attempting to address past or present discrimination in its coeducational schools,

110. See AM. ASS’N OF UNIV. WOMEN, *supra* note 35, at 117 (“Despite the many programs and guidelines devoted to reducing bias and efforts by counselors, the media, and others involved in education, occupational sex-role socialization still pervades and inhibits the career exploration process.”); see also Pat Galloway, “Bad Idea. You’ll Flunk Out,” *TIME*, Mar. 7, 2005, at 58-59 (describing the author’s persistent efforts to overcome the repeated discouragement she encountered when she expressed her interest in becoming an engineer as a young woman and throughout her engineering career).

111. 458 U.S. 718, 728 (1982).

112. *Id.*

113. Although the Court has previously upheld sex classifications that remedy past discrimination against girls and women, some might question whether the historical discrimination that girls and women experienced remains a sufficient justification for a sex classification in today’s schools, particularly because the Supreme Court has not addressed such a classification in recent years. However, examining this issue is beyond the scope of this Article. For the purposes of this Article, the assumption is made that past discrimination against girls and women remains an important governmental interest that would support a sex classification today.

114. See Elizabeth M. Schneider, *A Postscript on VMI*, 6 AM. U. J. GENDER & L. 59, 63 (1997); Carrie Corcoran, Comment, *Single-Sex Education After VMI: Equal Protection and East Harlem’s Young Women’s Leadership School*, 145 U. PA. L. REV. 987, 990-91 (1997). But see Vojdik, *supra* note 17, at 97 (“[I]t is not clear that New York City school officials agreed to create YWLS to redress past discrimination in public education.”).

because a failure to do so could undermine an argument that the district is actually attempting to remedy discrimination.

#### *4. To Conduct an Educational Experiment*

Another possible objective of single-sex schools is to conduct an experiment that examines the outcomes of such schools. An experiment may assess if and when single-sex public schools result in unique benefits for students, which students benefit from single-sex schools, and how to increase the benefits and reduce any negative ramifications of such schools. Such an experiment could address some of the deficiencies in the existing research on single-sex schools by attempting to control for factors that may have influenced past results.<sup>115</sup> Courts could conclude that an educational experiment on the benefits of single-sex public education is sufficiently important to support a sex classification.<sup>116</sup>

In light of the potential objectives that could serve as an important governmental interest for establishing single-sex schools, the next section describes some of the recent successes and shortcomings of single-sex schools and briefly examines the history of single-sex schools.

#### *C. The Successes and Failures of Present and Past Single-Sex Public Schools*

The growth in single-sex education over the last decade, particularly in recent years, has been tremendous and has resulted in numerous successes, as well as some failures. Although only three single-sex public schools existed in this country in 1995 (excluding schools for pregnant girls), by April 2006 the NASSPE identified forty-four single-sex public elementary and secondary schools that operated in the United States during the 2005-06 school year.<sup>117</sup> Eleven single-sex public schools opened or became single-sex in the

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115. See SALOMONE, *supra* note 17, at 235-36; Pinzler, *supra* note 81, at 805-06.

116. The Ninth Circuit previously upheld educational research on how to improve education in urban public schools as a compelling state interest that justified the use of race as a factor in admissions to an elementary school in California. See *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1064 (9th Cir. 1999).

117. See NASSPE, *Schools*, *supra* note 5.

2004-05 school year and thirteen additional public schools became single-sex in the 2005-06 school year.<sup>118</sup> In addition to sex-segregated schools, the NASSPE reported that 165 schools offered one or more single-sex classes as of April 2006.<sup>119</sup> In sum, at least 209 schools offered some form of single-sex education by April 2006.<sup>120</sup>

The new generation of single-sex public schools is typically composed of either solitary institutions or pairs of similar schools with one school for each sex. Of the forty-four single-sex public schools on the NASSPE's website, for the 2005-06 school year, eighteen appear to be "dual academies," or two single-sex schools that provide similar educational opportunities to girls and boys, although a careful assessment of the nature and location of these schools would be necessary to determine if students are in fact provided similar opportunities.<sup>121</sup> Although the structure of dual academies may vary from state to state, such schools typically serve both sexes in the same or nearby facilities, separating students into single-sex classrooms.<sup>122</sup> At some dual academies, girls and boys may participate together in extracurricular activities, lunchtime, or even some academic subjects, and they may interact before and

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118. *See id.*

119. *See* Nat'l Ass'n for Single-Sex Pub. Educ., Single-Sex Classrooms, <http://www.singlesexschools.org/schools-classrooms.htm> (last visited Apr. 4, 2006) [hereinafter NASSPE, Classrooms].

120. *See id.*; NASSPE, Schools, *supra* note 5.

121. *See* NASSPE, Schools, *supra* note 5. The schools in the 2004-05 school year that appeared to offer similar opportunities and grade levels to boys and girls are the following: the San Francisco 49ers Academies in East Palo Alto, California; the Jefferson Leadership Academies in Long Beach, California; Thurgood Marshall Elementary School in Seattle, Washington; Brighter Choice Charter School in Albany, New York; FitzSimons High School in Philadelphia, Pennsylvania; the Southern Leadership Academies in Louisville, Kentucky; Withrow University High School in Cincinnati, Ohio; Westwind Middle School Academy in Phoenix, Arizona; Lincoln and Stewart Elementary Schools in Toledo, Ohio; James Irwin Middle School in Colorado Springs, Colorado; Mount Scott Learning Centers in Portland, Oregon; Pepper Middle School in Philadelphia, Pennsylvania; the Crossroads Preparatory Academy and the Harte School in Columbus, Ohio; the Chase Academy for Communication Arts in Columbus, Ohio; Minneapolis Academy in Minneapolis, Minnesota; Capitol Pre-College Academy for Girls and Capitol Pre-College Academy for Boys in Baton Rouge, Louisiana; The Langston Charter Middle School in Greenville, South Carolina; the Athena School of Excellence for Girls and the Alpha School of Excellence for Boys in Youngstown, Ohio; and the Charles Drew Elementary School and Duncan Elementary School in Gary, Indiana. To reach nineteen schools that have offered similar opportunities for both sexes, this Article counts separate schools that appeared paired together to offer single-sex opportunities to each sex as one school. *See id.*

122. *See* SALOMONE, *supra* note 17, at 227-28.

after school.<sup>123</sup> For example, at the Brighter Choice Charter Schools (BCCS) in Albany, New York, girls and boys share the same building, teachers, and learning resources.<sup>124</sup> The school has a unique "Learning Guarantee" through which the school will pay for tuition to a private school if a student with good attendance for three years fails any statewide reading, science, or math exam.<sup>125</sup> The students are primarily African Americans and Hispanic Americans, and the school only admits students whose family income is below the poverty line.<sup>126</sup> The school has shown promising results since opening in 2002, including student math and reading scores that are substantially higher than those for other economically disadvantaged students nationwide.<sup>127</sup>

The Thurgood Marshall Elementary School in Seattle, Washington, achieved noteworthy success after it separated the sexes into different classrooms.<sup>128</sup> While none of the girls passed the math portion of the state exam in the year before the change, fifty-three percent of the girls passed in the year after the change.<sup>129</sup> The boys' scores on the reading portion of this test improved "from the 10th percentile to the 66th percentile."<sup>130</sup> Discipline referrals that were at thirty per day before the change dropped to fewer than two per day after the change.<sup>131</sup> Similarly, ninety-five percent of the students at Withrow University High School in Cincinnati, Ohio, passed the state reading proficiency test in 2003-04, while only forty-five percent passed the test before the school became single-sex.<sup>132</sup>

In addition to dual academies or pairs of single-sex schools, some school districts offer a single-sex school for only one sex. Through the 2005-06 school year, a review of the forty-four single-sex schools listed on the NASSPE website revealed that at least eight single-sex

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123. *See id.* at 228.

124. *See id.* at 233-34.

125. *See* NASSPE, *supra* note 5.

126. *See* Riordan, *supra* note 51, at 25.

127. *See* SALOMONE, *supra* note 17, at 233-34; Gains in Student Performance at Brighter Choice Charter Schools, 4th-Grade Cohort (Nov. 29, 2005), <http://www.brighterchoice.org/TestScores.pdf>.

128. *See* Sax, *supra* note 22.

129. *See id.*

130. *Id.*

131. *See id.*

132. *See* NASSPE, Schools, *supra* note 5.

girls' schools appeared to exist without a similar school for boys serving the same grades and geographic region, and at least five boys' schools did not have a similar school for girls serving the same grades and geographic region.<sup>133</sup>

Two of the girls' schools, the Philadelphia High School for Girls and Western High School in Baltimore, opened in the mid-1840s and have since remained all girls' schools.<sup>134</sup> These schools also have achieved considerable success. The Philadelphia School for Girls serves over fifteen hundred predominantly poor students in grades nine through twelve.<sup>135</sup> The magnet school has rigorous admissions standards and the students have a ninety-eight percent acceptance rate to college.<sup>136</sup> The school is one of three Philadelphia high schools with a zero percent dropout rate, and it consistently scores among the top schools in the city on statewide math, reading, and writing tests.<sup>137</sup> Similarly, Western High School has a very high statewide test score passage rate, a high college placement rate, and

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133. *See id.* In the 2005-06 school year, the eight girls' schools that did not appear to have a similar school for boys serving the same grades and geographic region were the following: Western High School in Baltimore, Maryland; Philadelphia High School for Girls in Philadelphia, Pennsylvania; Spectrum High School for Girls in Milwaukee, Wisconsin; Young Women's Leadership School in New York, New York; Young Women's Leadership Charter School in Chicago, Illinois; Middle College High School in Guilford County, North Carolina; Irma Rangel Young Women's Leadership School in Dallas, Texas; and Charity Adams Earley Academy for Girls in Dayton, Ohio. *Id.* The five boys' schools that did not appear to have a similar school for girls serving the same grades and geographic region are Pro-Vision in Houston, Texas; William A. Lawson Institute for Peace and Prosperity Preparatory Academy for Boys in Houston, Texas; Middle College at North Carolina A&T in Guilford County, North Carolina; Bedford Stuyvesant Preparatory Charter School for Excellence in Brooklyn, New York; and Edgar Evans Elementary School in Indianapolis, Indiana. *Id.* For a thoughtful analysis of why Middle College High School and Middle College at North Carolina A&T do not provide substantially equal opportunities for girls and boys, see Matthews, *supra* note 104, at 2043.

Assessing whether six of the eight single-sex schools in New York City provide substantially equal opportunities for girls and boys is difficult. These schools are the Eagle Academy for Young Men; the Urban Assembly Academy for History and Citizenship for Young Men; Girls Prep; the Young Women's Leadership School, Queen's Campus; the Urban Assembly School of Business for Young Women; and the Young Women's Leadership School of the Bronx. *See* NASSPE, Schools, *supra* note 5. Therefore, these schools have been excluded from the analysis about whether schools are substantially equal or solitary single-sex schools.

134. *See* Riordan, *supra* note 51, at 24-25.

135. *Id.* at 25.

136. *Id.*

137. SALOMONE, *supra* note 17, at 31.

a low dropout rate.<sup>138</sup> The school educates over one thousand students, who are mostly African American, and about forty percent of the students qualify for free and reduced-price lunches.<sup>139</sup>

A more recently opened single-sex public school is the YWLS in New York City's East Harlem, which serves predominantly poor African American and Hispanic American students.<sup>140</sup> The school opened in the fall of 1996 and graduated its first class, consisting of thirty-two students, in 2001.<sup>141</sup> YWLS emphasizes math, science, technology, leadership, and the humanities, providing a middle and high school education.<sup>142</sup> Teachers and staff give students "intense and personalized attention," and class size is smaller than classes in most other New York City public schools.<sup>143</sup> Rosemary Salomone describes the school in her thought-provoking book on single-sex education entitled *Same, Different, Equal: Rethinking Single-Sex Schooling* as "an oasis of excellence and hope in a desert of poverty, crime, and despair."<sup>144</sup> The school's success in its first few years has been noteworthy. All of the students in the first two graduating classes were admitted to college, and the students' academic achievement continues to improve.<sup>145</sup> In math and reading, the students typically score "[thirty] percent higher than average for students in other New York City coeducational schools."<sup>146</sup>

Finally, at least five boys' schools on NASPPE's website do not appear to have a similar school for girls serving the same grades and geographic region.<sup>147</sup> For example, in Houston, Texas, two schools are limited only to boys. The William A. Lawson Institute for Peace and Prosperity Preparatory Academy for Boys serves sixth through eighth grade boys.<sup>148</sup> Its academic program focuses on activities, provides mentors in academic subjects, integrates math and science technology, and addresses student behavior

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138. *Id.* at 34.

139. *Id.* at 32-33; NASSPE, Schools, *supra* note 5.

140. See Riordan, *supra* note 51, at 24.

141. SALOMONE, *supra* note 17, at 10, 13.

142. *Id.* at 13; Riordan, *supra* note 51, at 24.

143. SALOMONE, *supra* note 17, at 21.

144. *Id.* at 18.

145. *Id.* at 24.

146. Riordan, *supra* note 51, at 24.

147. See NASSPE, Schools, *supra* note 5.

148. See Houston Indep. Sch. Dist. (HISD), HISD Charter Schools, <http://dept.houstonisd.org/charterschools/charterlist.htm> (last visited Mar. 28, 2006).

management through a student court system.<sup>149</sup> The other school, Pro-Vision, is a small all-boys' residential school that focuses on at-risk youth.<sup>150</sup>

Not all single-sex schools have experienced the success of the schools noted above.<sup>151</sup> For example, two middle schools, one in Newport, Kentucky, and one in Idaho Falls, Idaho, abandoned all single-sex classrooms after one year when they failed to achieve significant grade or test score improvement.<sup>152</sup> At Newport Middle School, discipline referrals for the boys soared.<sup>153</sup> In addition, a 2001 study of a California pilot program, in which six districts opened single-sex academies for each sex, found that "[t]raditional gender stereotypes were often reinforced in the single gender academies."<sup>154</sup> These stereotypes still existed, even though a focus of the legislation and policymakers "was to ensure equality of the boys' and girls' academies."<sup>155</sup> The study concluded that educators focused on equality of resources, while failing to "adequately reflect upon the hidden or overt gender biases (to the disadvantage of both boys and girls) that often existed in their organizational, pedagogical, and curricular practices."<sup>156</sup> For example, one district taught America's early history by teaching boys about survival skills, while girls learned about sewing and quilting.<sup>157</sup> Even more troubling was the finding that the separation of "boys and girls on the same campus led to a dichotomous understanding of gender, where girls were seen as 'good' and boys were seen as 'bad.'"<sup>158</sup>

These problems echo some of the early shortcomings of single-sex public education in the United States, and they remind those who are currently considering this option of the potential misuses and dangers of single-sex public schools. Single-sex education has a troubled history in the United States.<sup>159</sup> Initially, only boys were

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149. *See id.*

150. *See* NASSPE, Schools, *supra* note 5.

151. *See* Sax, *supra* note 22.

152. *Id.*

153. *Id.*

154. DATNOW ET AL., *supra* note 100, at 7.

155. *Id.* at 22.

156. *Id.* at 6.

157. *See id.* at 40.

158. *Id.* at 7.

159. "[P]ublic education in America began as single-sex schooling and very unequal single-sex schooling at that." Patricia B. Campbell & Ellen Wahl, *Of Two Minds: Single-Sex*



offered education in most instances; girls were provided limited opportunities in summer schools or after the boys had left school.<sup>160</sup> Financial constraints and convenience, rather than concerns about pedagogy or child development, drove the move toward coeducational schools, particularly in rural areas.<sup>161</sup>

Beyond the elementary grades, teachers initially taught girls and boys the same subjects; however, industrialization and rapid migration prompted schools to focus on preparing students for the practical realities of their traditional roles in society—that is, girls as homemakers and boys as breadwinners.<sup>162</sup> High schools began to focus on vocational education that offered different opportunities to the sexes, including secretarial skills and homemaking for girls, and auto mechanics and woodworking for boys.<sup>163</sup> These gender distinctions affected some academic courses that were viewed as more suitable for boys or for girls.<sup>164</sup> In some areas, including cities such as New York and Boston, girls were provided a secondary education in single-sex schools that generally had a more limited curriculum and less funding per student than boys' schools.<sup>165</sup> Eventually, most of the single-sex public schools closed, and by 1900, ninety-eight percent of the public secondary schools in the United States were coeducational.<sup>166</sup> Nevertheless, limited instances of single-sex education, along with their attendant stereotypes and inferior opportunities for women, persisted into the twentieth century.<sup>167</sup>

The stereotyping and shortcomings of past and present single-sex schools, and the success of some of the new single-sex schools, confirm that single-sex education must be handled with great care.

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*Education, Coeducation, and the Search for Gender Equity in K-12 Public Schooling*, 14 N.Y.L. SCH. J. HUM. RTS. 289, 290 (1997).

160. DAVID TYACK & ELIZABETH HANSON, *LEARNING TOGETHER: A HISTORY OF COEDUCATION IN AMERICAN PUBLIC SCHOOLS 13-20* (1992).

161. See SALOMONE, *supra* note 17, at 66-67; TYACK & HANSON, *supra* note 160, at 47, 58; Jill E. Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 802-03 (2002).

162. See SALOMONE, *supra* note 17, at 66, 68.

163. See *id.* at 69.

164. See *id.*

165. See *id.* at 67; TYACK & HANSON, *supra* note 160, at 8.

166. See SALOMONE, *supra* note 17, at 67; Riordan, *supra* note 51, at 10; Mael, *supra* note 80, at 102.

167. See Hasday, *supra* note 161, at 795-806.

Single-sex schools may be beneficial or harmful to students, depending on how they are operated. The constitutional framework for analyzing such schools should take into account the potential benefits and harms that different structures of single-sex schools may cause. Parts II and III examine how neither the Supreme Court's interpretation of intermediate scrutiny nor scholarly approaches to single-sex public schools effectively address these concerns.<sup>168</sup>

## II. THE MANY FACES OF INTERMEDIATE SCRUTINY

In light of the potential benefits of single-sex public schools, it is important that educators have clear guidance on their constitutional obligations, so that they are not lost in a constitutional labyrinth that discourages experimentation. Educators also should not face constitutional hurdles to such schools that do not enhance the value of these schools. However, the constitutional requirements should include adequate safeguards that protect children from the potential dangers of such schools, including harmful stereotypes. Courts that adjudicate the constitutionality of single-sex public schools should reach similar conclusions when evaluating similar schools. Unfortunately, neither educators nor courts will find in the existing Supreme Court case law on sex classifications the constitutional clarity, relevance, and consistency that would create optimal conditions for the development of single-sex public schools.

Since the Supreme Court's 1976 decision in *Craig v. Boren*, the Court has subjected sex classifications to intermediate scrutiny, which requires that a sex classification serve an important governmental objective and be substantially related to the achievement of

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168. As the number of single-sex schools increases, single-sex schools may be more likely to spur litigation. For the moment, this new generation of single-sex public schools has not yet resulted in substantial litigation, although one court prevented the opening of a single-sex school for African American boys in Detroit. See *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1014 (E.D. Mich. 1991) (holding that the important purpose of the academies in addressing the crises facing urban males was "insufficient to override the rights of females to equal opportunities"). Also, the New York City chapter of the National Organization for Women and other civil liberties groups filed a complaint in 1996 with OCR against YWLS that has not yet been resolved. SALOMONE, *supra* note 17, at 15-18. Apparently, some schools avoid litigation by not having an official single-sex admissions policy. See *id.* at 32, 34-35.

that objective.<sup>169</sup> The requirement of a substantial relationship between the sex classification and the government's objective has been described as "[t]he most important difference between heightened scrutiny and rational basis review."<sup>170</sup> The substantial relationship test considers whether a sex-neutral alternative would serve the state's objective as well as, or sometimes better than, the sex classification.<sup>171</sup> The Court typically does not permit the state to utilize a sex-based classification when the state could achieve its objective through a sex-neutral classification.<sup>172</sup>

To withstand the substantial relationship test, the state's evidence must also demonstrate how the sex differential furthers the state's objective—that is, why males and females should be treated differently to achieve the state's objective.<sup>173</sup> Different treatment of those who are similarly situated with respect to the legislation's purpose undermines the state's argument that the classification significantly furthers the stated objective.<sup>174</sup> Furthermore, even when a sufficiently valuable objective is at stake and this objective can arguably be achieved through a sex classification, the Court typically invalidates classifications that rest on

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

170. *Nguyen v. INS*, 533 U.S. 53, 77 (2001) (O'Connor, J., dissenting).

171. *See, e.g., Orr v. Orr*, 440 U.S. 268, 283 (1979) (stating that when the state's objective is "as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex"); *see also Nguyen*, 533 U.S. at 78 (O'Connor, J., dissenting) ("[T]he availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification.").

172. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150-52 (1980) (holding that a sex classification that sought to provide for needy spouses by paying benefits to all female surviving spouses, while requiring men to prove dependency, did not substantially further an important objective because the needs of both female and male survivors could be served by granting benefits either to those who demonstrate need or to all survivors); *Orr*, 440 U.S. at 281-83 (holding an Alabama state statute unconstitutional that required alimony to be paid to women, but not to men, because the state conducted individualized hearings to assess the financial circumstances of the spouses, and these hearings provided a more accurate assessment of an individual's needs). As noted in Part II.A-B, the Court has not consistently enforced this requirement.

173. *See Craig*, 429 U.S. at 203-04 (holding a law unconstitutional that prohibited the selling of 3.2% alcohol content beer to men until they reached twenty-one years of age, while permitting the selling of the same beer to women after they turned eighteen because, although the statistics demonstrated an increase in driving under the influence of alcohol, they did not relate this trend to the "age-sex differentials" before the Court).

174. *See Wengler*, 446 U.S. at 150-52; *Craig*, 429 U.S. at 201-04; *Reed v. Reed*, 404 U.S. 71, 77 (1971).

overbroad generalizations<sup>175</sup> or that reflect or perpetuate stereotypes about gender roles.<sup>176</sup> Laws based on such overbroad generalizations or stereotypes are generally unconstitutional, even if some empirical evidence supports them.<sup>177</sup>

Although these guidelines appear within the Court's intermediate scrutiny cases, the Court's interpretation of the substantial relationship component has not been consistent. Instead, the Court's opinions reflect a range of interpretations of the substantial relationship requirement in which the requirement is sometimes quite demanding and sometimes substantially less demanding. This Part analyzes these disparate interpretations of the substantial relationship component of intermediate scrutiny and identifies some of the problems these interpretations could create for single-sex public schools.

### *A. The Most Demanding Interpretation of the Substantial Relationship Test*

Although the Court in *United States v. Virginia* and *Mississippi University for Women v. Hogan* used much of the same language that it used in other sex classification cases,<sup>178</sup> the Court's application of the intermediate scrutiny standard essentially required the state to demonstrate that the state could not achieve its objective unless it excluded the other sex. In *Hogan*, the Supreme Court held in a five-to-four decision that Mississippi lacked an "exceedingly persuasive justification" for maintaining a single-sex nursing school

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175. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994); see also Norman R. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 221-22 (2003) ("In a series of cases, the Court has struck down classifications as being based on stereotypical overbroad generalizations that a woman's place is in the home, women are less capable than men, and women are financially dependent on men.").

176. See *Craig*, 429 U.S. at 198-99; *Frontiero v. Richardson*, 411 U.S. 677, 689 & n.23 (1973); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 731-33 (2d ed. 2002).

177. See *Wengler*, 446 U.S. at 150-52; *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977); see also *Nguyen v. INS*, 533 U.S. 53, 76 (O'Connor, J., dissenting) ("[O]verbroad sex-based generalizations are impermissible even when they enjoy empirical support.").

178. See Denise C. Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women's Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95, 105-06 (1997).

for women.<sup>179</sup> Although Mississippi claimed that the all-female admissions policy addressed past discrimination against women, the State failed to demonstrate that women did not have avenues to pursue nursing training or to obtain leadership positions in nursing either when the school opened or when the policy was challenged.<sup>180</sup> In fact, the females-only admissions policy perpetuated a stereotype that the nursing profession is only for women.<sup>181</sup> Because the classification was not actually adopted to achieve the alleged objective, the Court held the policy invalid.<sup>182</sup>

In addition, Mississippi failed to demonstrate that the classification was directly and substantially related to the alleged objective.<sup>183</sup> The Court held that the university's policy of allowing men to audit classes "fatally undermine[d] [Mississippi's] claim that women, at least those in the School of Nursing, are adversely affected by the presence of men."<sup>184</sup> The record revealed that allowing men to attend the school would not affect the academic performance of women at the school or the style in which classes were taught.<sup>185</sup> Furthermore, "men in coeducational nursing schools do not dominate the classroom."<sup>186</sup> In light of the lack of evidence to prove any adverse effect on women from the presence of men at the school, the Court held that denying admission to men was clearly not "necessary to reach any of MUW's educational goals."<sup>187</sup>

Similarly, in *Virginia*, by rejecting Virginia's argument that the single-sex nature of VMI was essential to train citizen-soldiers,<sup>188</sup> the Court required a single-sex environment to be necessary to train citizen-soldiers.<sup>189</sup> Justice Ginsburg, writing for the Court's seven-to-

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179. 458 U.S. 718, 731, 733 (1982). The Mississippi University for Women was Mississippi's only single-sex institution of higher education; therefore, the Court did not address whether Mississippi could offer "separate but equal" undergraduate institutions for males and females." *Id.* at 720 n.1.

180. *See id.* at 727-29.

181. *Id.* at 729.

182. *Id.* at 730.

183. *Id.*

184. *Id.*

185. *See id.* at 731.

186. *Id.*

187. *Id.* (emphasis added).

188. "Citizen-soldiers" is the term that VMI uses to describe its graduates. *See United States v. Virginia*, 518 U.S. 515, 521-22 (1996).

189. *See id.* at 540-46.

one majority,<sup>190</sup> held that Virginia could not exclude women from the unique educational benefits provided at VMI.<sup>191</sup> Virginia offered two justifications for excluding women from VMI: (1) the benefits of single-sex education and the contribution of single-sex education to diverse educational approaches would be lost if women were admitted; and (2) admission of women would require Virginia to modify the “adversative method”<sup>192</sup> VMI adopted to develop character and train leaders.<sup>193</sup> No party in the litigation contested the notion that some students receive pedagogical benefits from single-sex education or the suggestion that “diversity among public educational institutions can serve the public good.”<sup>194</sup> Instead, a review of Virginia’s history of excluding women from higher education, providing them an inferior education, and converting schools to coeducational institutions,<sup>195</sup> resulted in the Court finding the first justification lacking because Virginia had not demonstrated “that VMI was established, or ha[d] been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.”<sup>196</sup>

The Court also rejected Virginia’s evidence of “gender-based developmental differences”—including the contention that although men thrive in a more adversative atmosphere, women need a more cooperative environment—as a justification for excluding women from VMI.<sup>197</sup> The Court concluded that gender-based developmental differences could not justify the exclusion of women from VMI because the record revealed that some women had the will, capacity, and interest to fulfill all of the demands facing VMI cadets.<sup>198</sup> In light of this evidence, “neither the goal of producing citizen soldiers,’

190. Justice Ginsburg delivered the Court’s opinion in which Justices Stevens, O’Connor, Kennedy, Souter, and Breyer joined. Justice Rehnquist wrote a separate concurring opinion. Justice Scalia dissented, and Justice Thomas took no part in the decision. *Id.* at 518.

191. *See id.* at 519, 523, 553.

192. VMI’s adversative method employs “[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values” to prepare the cadets to be “citizen-soldiers.” *Id.* at 522 (alteration in original) (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

193. *See id.* at 535.

194. *Id.*

195. *See id.* at 536-38.

196. *Id.* at 535.

197. *Id.* at 541-43.

198. *See id.* at 520, 540-42.

VMI's *raison d'être*, 'nor VMI's implementing methodology [was] inherently unsuitable to women."<sup>199</sup> Furthermore, because some women could satisfy the demands of VMI's methodology, the prediction that the presence of women would downgrade VMI's stature and destroy the adversative method was no more worthy of credence than past predictions that the admission of women to the practice of law or medicine would destroy those professions.<sup>200</sup> If the Commonwealth could still achieve its goal of training citizen-soldiers after abandoning the single-sex admissions policy, achievement of its goal was "not substantially advanced by women's categorical exclusion ... from the Commonwealth's premier 'citizen-soldier' corps."<sup>201</sup> In short, Virginia's fears about the adverse effects of admitting women were not grounded in reality, and these unfounded fears certainly did not meet the demanding "exceedingly persuasive" standard required for sex classifications.<sup>202</sup> This conclusion indicates that VMI's admissions policy was invalidated because Virginia failed to demonstrate that excluding women was necessary to achieve its goal.<sup>203</sup>

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199. *Id.* at 541 (quoting *United States v. Virginia*, 976 F.2d 890, 899 (4th Cir. 1992)).

200. *See id.* at 543-45.

201. *Id.* at 546.

202. *Id.* at 534.

203. *See* Candace S. Kovacic-Fleischer, *United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 880-82, 893 (1997) (arguing that Virginia's requirement that VMI make institutional alterations for privacy is consistent with a standard that "only necessary differential treatment is permissible. If there is a less discriminatory way in which the institution can achieve its result, then unequal treatment is unnecessary." (emphasis added)); Minow, *supra* note 1, at 830 (noting that the Court in *Virginia* "rejected the arguments that single-sex education was necessary because of the physical training, absence of privacy, and adversative method used at VMI" (emphasis added)); Kristen J. Cerven, Note, *Single-Sex Education: Promoting Equality or an Unconstitutional Divide?*, 2002 U. ILL. L. REV. 699, 721 (contending that to survive the substantial relationship test, YWLS "must show that the exclusion of young men is somewhat necessary to accomplishing its objective of compensating women" (emphasis added)); Monica J. Stamm, Note, *A Skeleton in the Closet: Single-Sex Schools for Pregnant Girls*, 98 COLUM. L. REV. 1203, 1223-24 (1998) (arguing that Justice Ginsburg "rejected the arguments of VMI's defenders that the presence of women would so change the institution as to deny all its students the kind of distinctive education they might have hoped to get there. In so doing, Ginsburg analyzed whether the exclusion of women from VMI was necessary for the military college to obtain its objectives." (second emphasis added) (footnote omitted)). *But see* Morgan, *supra* note 1, at 411 ("[T]he Court has never interpreted intermediate scrutiny to require that sex-based classifications be the most narrowly tailored means available to achieve a government objective. Whether or not alternative means are available, if the sex-specific legislation furthers the government objective and passes an anti-

The adoption of a requirement that a sex classification must be necessary to achieve its important objective was particularly noteworthy because this least-restrictive-means analysis is typically reserved for strict scrutiny of suspect classifications,<sup>204</sup> such as those based on race, which are only permitted when they are, among other things, “necessary to further a compelling governmental interest.”<sup>205</sup> Nevertheless, the Court’s demanding interpretation<sup>206</sup>

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subordination test, the Court has upheld the use of those classifications.” (footnote omitted); Sharon E. Rush, *Diversity: The Red Herring of Equal Protection*, 6 AM. U. J. GENDER & L. 43, 44-45 (1997) (arguing that the Court applied intermediate scrutiny in *Virginia* and did not apply strict scrutiny, which would have required “Virginia to demonstrate that the exclusion of women is necessary to achieve its compelling interest in having diverse educational opportunities for its male citizens”).

204. See *Virginia*, 518 U.S. at 573-74 (Scalia, J., dissenting) (arguing that the majority adopted a least-restrictive-means test because “[t]here is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance”); Kovacic-Fleischer, *supra* note 203, at 883 (“[B]y requiring VMI to make institutional adjustments to admit qualified women, the Court has elevated equal protection analysis to the level of the least-restrictive-means analysis of strict scrutiny.”); Steven A. Delchin, Comment, *United States v. Virginia and Our Evolving “Constitution”: Playing Peek-a-Boo with the Standard of Scrutiny for Sex-Based Classifications*, 47 CASE W. RES. L. REV. 1121, 1132 (1997) (noting that in contrast to the analysis in *Virginia*, generally “intermediate scrutiny is not governed by a least-restrictive-means analysis or some ‘perfect fit’ paradigm”). *But see* Mary A. Case, “The Very Stereotype the Law Condemns”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) (“For a sex-respecting rule to withstand constitutional scrutiny by the Court, it seems to be at least necessary and usually sufficient that it embody some perfect proxy.”).

205. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (concluding that “[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test”).

206. The Court’s demanding interpretation of intermediate scrutiny in *Virginia* left many confused regarding the meaning and proper application of the intermediate scrutiny standard. *See, e.g.*, Sunstein, *supra* note 15, at 75 (“After *United States v. Virginia*, it is not simple to describe the appropriate standard of review. States must satisfy a standard somewhere between intermediate and strict scrutiny.”); Jeffrey A. Barnes, Case Note, *The Supreme Court’s “Exceedingly [Un]persuasive” Application of Intermediate Scrutiny in United States v. Virginia*, 31 U. RICH. L. REV. 523, 523 (1997) (“The Court’s apparent heightening of the level of scrutiny applied to gender-based classifications from the previously used intermediate scrutiny to an ambiguous standard ... equivalent to strict scrutiny, will further inhibit legislatures from classifying or treating individuals differently based upon their gender.”); Delchin, *supra* note 204, at 1131, 1134 (arguing that “[t]he statements, formulations, and descriptions in the VMI majority opinion may presage the Court’s final ‘evolution’ to strict scrutiny for sex-based classifications”); 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, 375 (2001) (“Although most



of the substantial relationship test was appropriate given what was at stake in both *Virginia* and *Hogan*. In *Virginia*, women were denied access to a premier military institution with a training philosophy and methodology that were unparalleled by any other university in the Commonwealth.<sup>207</sup> Virginia tried to remedy its constitutional violation by creating a parallel institution—the Virginia Women’s Institute for Leadership (VWIL) at Mary Baldwin College, an all-women’s institution.<sup>208</sup> However, the Supreme Court rejected this remedy as insufficient because VWIL lacked VMI’s famed adversative method.<sup>209</sup> In addition, VWIL and VMI were not substantially equal in terms of tangible benefits, such as the student body, faculty, course offerings, and facilities, nor in the intangible benefits of VMI’s long history, including its prestigious and extensive alumni network.<sup>210</sup> While scholars have noted the difficulty in meeting the standard applied in *Virginia*,<sup>211</sup> the Court appropriately viewed Virginia’s proffered justifications with great skepticism and found them lacking because the exclusion of women was not necessary to achieve Virginia’s educational goals.<sup>212</sup>

Similarly, in *Hogan*, the Court appropriately applied a requirement that the sex classification be necessary to achieve the State’s goal.<sup>213</sup> The male applicant could not attend a nursing school without driving a considerable distance nor could he obtain credit for his degree from on-the-job training, as his female counterparts could.<sup>214</sup> The Court correctly concluded that this burden should only

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courts since *Virginia* have applied the exceedingly persuasive justification standard in much the same way as they applied intermediate scrutiny, many courts are still unclear as to whether *Virginia* heightened, or simply re-iterated, the standard of review for gender classifications.” (footnote omitted)). *But see* Sunstein, *supra* note 15, at 75 (“The revision of the standard of review is unlikely to produce different results from those that would have followed under the intermediate scrutiny standard, which has operated quite strictly ‘in fact.’”).

207. *Virginia*, 518 U.S. at 548-54.

208. *Id.* at 546.

209. *Id.* at 548-50.

210. *Id.* at 546-51.

211. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 845 (6th ed. 2000); Brown-Nagin, *supra* note 17, at 813.

212. See *Virginia*, 518 U.S. at 539-40.

213. See *supra* notes 178-87 and accompanying text.

214. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.8 (1982); see also YUDOF ET AL., *supra* note 18, at 556 (“For Joe Hogan, the practical consequence of the MUW admissions standard was to compel him to choose between his home and vocation.”).

be placed on the plaintiff in *Hogan* if the State could not achieve its objective through other means.<sup>215</sup>

The Court has also held other sex classifications unconstitutional because an effective, sex-neutral alternative would serve the state's interest, thereby rendering the sex classification unnecessary. For example, in *Wengler v. Druggists Mutual Insurance Co.*, the Court invalidated a statute that provided benefits to widows without proof of need, but required widowers to prove dependence or incapacitation, because a sex-neutral alternative would have served Congress's objective.<sup>216</sup> The availability of either individualized determinations or the provision of benefits to all surviving spouses rendered the sex classification unnecessary.<sup>217</sup>

The Court's application of the substantial relationship test in cases such as *Virginia* and *Hogan* stands in sharp contrast to the Court's less demanding interpretation of the substantial relationship test in other cases, as described next.

### *B. The Least Demanding Interpretation of the Substantial Relationship Test*

The Court has found some sex classifications to be substantially related to the state's objective if the classification merely helps the governmental actor achieve its objective, rather than being necessary or essential to achieving that objective. For example, the Court's 2001 decision in *Nguyen v. INS* upheld a law that required fathers, but not mothers, of children born out of wedlock outside of the United States to take one of three steps to establish the child's U.S. citizenship.<sup>218</sup> The Court allowed a rather loose fit between

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215. See *Hogan*, 458 U.S. at 725-26. This denial is similar in some ways to Missouri's unconstitutional attempt to force the petitioner in *Missouri ex rel. Gaines v. Canada* to attend a law school for African Americans in a nearby state. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 343-44 (1938).

216. 446 U.S. 142, 151 (1980).

217. See *id.* at 151-52; see also *Orr v. Orr*, 440 U.S. 268, 281-83 (1979) (invalidating a requirement that only husbands must pay alimony because the state provided for individualized hearings to determine need, and thus, a gender-neutral classification served the state's interest); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (invalidating a "gratuitous" gender-based distinction because "without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids").

218. 533 U.S. 53, 62, 73 (2001).

means and ends, as Justice O'Connor noted in her dissent.<sup>219</sup> For example, the Court in *Nguyen* acknowledged, and then dismissed out of hand, the sex-neutral alternatives available to Congress to ensure that a child born out of wedlock and its citizen parent had a demonstrated opportunity to develop a relationship between the United States, the child, and the citizen parent.<sup>220</sup> Therefore, the sex classification certainly was not necessary to achieve the government's objective.

Furthermore, the Court has often permitted a loose fit between means and ends when it has shifted its focus from whether the classification will achieve its objective most of the time, as it permitted in *Nguyen*,<sup>221</sup> to whether it will achieve its objective in virtually every instance, as the Court required in *Virginia*.<sup>222</sup> The Court in *Nguyen* stated that "[n]one of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance."<sup>223</sup> The Court thereby accepted the classification's inability to serve the intended purpose in some instances, and thus indicated its approval of a rather imperfect fit between the classification and the objective. In contrast, the Court in *Virginia* did not focus on the needs of most women, as it assumed that most women would not want to attend VMI.<sup>224</sup> Instead, the Court focused on whether VMI could deny admission to those women "who have the will and capacity" to satisfy VMI's rigorous requirements.<sup>225</sup> By focusing on these women, the Court required the classification to serve its objective in virtually every instance.<sup>226</sup>

A similarly imprecise fit between means and ends was upheld in *Kahn v. Shevin*, in which the Court upheld a \$500 property tax

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219. See *Nguyen*, 533 U.S. at 80-89 (O'Connor, J., dissenting) (arguing that the majority did not require a sufficiently tight fit between means and ends).

220. See *id.* at 69 (noting that Congress could have required an actual relationship between the child and the citizen parent or exempted from the statutory requirements the parent and child who had an established relationship).

221. *Id.* at 70.

222. See *United States v. Virginia*, 518 U.S. 515, 542 (1996).

223. *Nguyen*, 533 U.S. at 70.

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

225. *Id.*

226. This requirement prompted Justice Scalia's dissenting comment that "[t]here is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance." *Id.* at 574 (Scalia, J., dissenting).

benefit for widows, but not for widowers.<sup>227</sup> The Court claimed that the question was not whether the “[l]egislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely.”<sup>228</sup> Instead, the Court alleged that the State was not required to draw precise lines for taxation schemes.<sup>229</sup> However, the imprecision of the admissions policy in *Virginia*, as demonstrated by its exclusion of those women who could succeed at VMI, contributed to its invalidation.<sup>230</sup> Furthermore, the sex-neutral alternatives available to address the problem in *Kahn*, such as the inclusion of a financial means test that would exclude those widows who did not need the tax exemption,<sup>231</sup> also establishes that the sex classification was not essential to achieving the State’s objective.

The Court also placed its imprimatur on a loose fit between means and ends in *Rostker v. Goldberg*, in which it upheld a male-only draft registration because only men were permitted to serve in combat, and the purpose of registration was to develop a pool of individuals who could serve as combat troops.<sup>232</sup> Even if the Court believed that deference to the military in determining that women could not serve in combat was appropriate,<sup>233</sup> combat-ineligible men were required to register as well,<sup>234</sup> disproving that combat eligibility was essential for an individual to be included in the draft. Furthermore, the military includes countless noncombat positions

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227. 416 U.S. 351, 352, 355-56 (1974).

228. *Id.* at 356 n.10.

229. *See id.* at 355, 356 n.10.

230. *See Virginia*, 518 U.S. at 541-42.

231. *See Kahn*, 416 U.S. at 360 (Brennan, J., dissenting) (contending that a “financially independent heiress” would qualify for the exemption and that the State had not explained “why inclusion of widows of substantial economic means was necessary to advance the State’s interest in ameliorating the effects of past economic discrimination against women”).

232. 453 U.S. 57, 78-79 (1981). Although some have argued that the Court did not state the intermediate scrutiny standard in *Rostker*, *see* CHEMERINSKY, *supra* note 176, at 727, the Court cited cases such as *Craig v. Boren* in reaching this decision and thereby made clear that it applied intermediate scrutiny in *Rostker*. *See Rostker*, 453 U.S. at 79.

233. CHEMERINSKY, *supra* note 176, at 735 & n.101 (“Of course, the assumption that women cannot serve in combat is itself open to serious question and can be challenged as being based in stereotypes.”); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in MODERN CONSTITUTIONAL THEORY: A READER 530 (John H. Garvey & T. Alexander Aleinikoff eds., 3d ed. 1994) (noting that some feminists felt that arguing for the unconstitutionality of a male-only draft was important, while others felt that this position would betray women and support what is “least acceptable about the male world”).

234. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1573 (2d ed. 1988).

for which women could be drafted.<sup>235</sup> Therefore, the distinction between men and women in registration certainly was not necessary to achieve the government's interest in raising troops for combat, despite the Court's holding that the classification was "closely related to Congress' purpose in authorizing registration."<sup>236</sup> Not surprisingly, the tenuous fit between the purpose of registration and the exclusion of women from registration that the Court approved in *Rostker* provoked substantial criticism<sup>237</sup> and vigorous dissents.<sup>238</sup> Although some contend that this decision has been dismissed as limited in application because of the Court's special deference in military cases,<sup>239</sup> the Court undoubtedly permitted a much looser fit between the sex classification and its objective than was required in either *Virginia* or *Hogan*.<sup>240</sup>

Undoubtedly, many of the Court's opinions exist between these two extremes. For example, in *Craig v. Boren*, the Court rejected a sex-age differential for the sale of beer because the State failed to present evidence that sex represented a "legitimate, accurate proxy for the regulation of drinking and driving."<sup>241</sup> Even if the State could have demonstrated a closer correlation between the age-sex differential and its laws regulating drinking, a sex classification would not be necessary to address traffic safety because a law prohibiting both sexes from drinking until a certain age would address the State's concerns just as effectively. The Court's examination of the State's evidence on the age-sex differential suggests that it would have found the sex classification acceptable if the "gender-based distinction closely serve[d] to

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235. See *Rostker*, 453 U.S. at 101 (Marshall, J., dissenting).

236. *Id.* at 79 (majority opinion).

237. See *TRIBE*, *supra* note 234, at 1572-74; *Williams*, *supra* note 233, at 531.

238. See *Rostker*, 453 U.S. at 86 (Marshall, J., dissenting) ("The Court today places its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women.'"); *id.* at 83 (White, J., dissenting) ("I perceive little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled with combat-ready men. Common sense and experience in recent wars, where women volunteers were employed in substantial numbers, belie this view of reality.").

239. See *TRIBE*, *supra* note 234, at 1573.

240. *United States v. Virginia*, 518 U.S. 515, 573 (1996) (Scalia, J., dissenting) (citing *Rostker* as one of several cases in which the Court permitted a looser fit than required in *Virginia*).

241. 429 U.S. 190, 204 (1976).

achieve that objective,<sup>242</sup> rather than only permitting the classification if it was necessary to achieve the objective.

The disparate interpretations of intermediate scrutiny render it ineffective as a constitutional framework because its requirements have become unreliable and inconsistent. Determining what constitutes a substantial relationship between a classification and an objective invites a wide variety of opinions. Justice Rehnquist correctly foreshadowed these concerns with intermediate scrutiny in *Craig v. Boren*, in which he criticized the majority for adopting it by asking: "How is [the Court] to determine whether a particular law is 'substantially' related to the achievement of [its] ... objective, rather than related in some other way to its achievement?"<sup>243</sup> He wisely argued that the "phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation."<sup>244</sup> Unlike strict scrutiny, under which very little is upheld, and rational basis, under which most things pass constitutional muster,<sup>245</sup> intermediate scrutiny currently is sufficiently indeterminate that the only thing consistent about it is that it is inconsistently interpreted and applied.<sup>246</sup>

Intermediate scrutiny's indeterminacy has also been repeatedly acknowledged by scholars, who contend that it represents no more than "*ad hoc* judgments based upon Justices' perceptions of the gender classification at issue in each case."<sup>247</sup> Kathleen Sullivan colorfully captures intermediate scrutiny's indeterminacy in this way: "No amount of bureaucratic lingo in the formulas of intermedi-

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242. *Id.* at 200.

243. *Id.* at 221 (Rehnquist, J., dissenting).

244. *Id.*

245. DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 292 (2d ed. 1998).

246. See CHEMERINSKY, *supra* note 176, at 647 ("[I]t is argued that in some cases intermediate scrutiny is applied in a very deferential manner that is essentially rational basis review, while in other cases intermediate scrutiny seems indistinguishable from strict scrutiny.")

247. NOWAK & ROTUNDA, *supra* note 211, at 834; see George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1375 (1993) ("The intermediate-scrutiny test ... is a much more malleable test that permits judges' subjective preferences to come into play."); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 325 (1998) ("[T]he Court's use of intermediate scrutiny makes it vulnerable to charges of *ad hoc* decisionmaking.")

ate scrutiny ... can wholly dispel that Lochnerian feeling one can get from intermediate scrutiny's shifting bottom line."<sup>248</sup> The indeterminacy and subjectivity of intermediate scrutiny is reflected in the wide spectrum of criticisms of this standard. Although some constitutional frameworks are consistently criticized as too strict or too lenient, intermediate scrutiny is criticized for being both. On the one hand, some contend that intermediate scrutiny is a rather permissive standard that is no different than rational basis review;<sup>249</sup> on the other hand, some contend that the Court has applied intermediate scrutiny in ways that make it virtually indistinguishable from strict scrutiny.<sup>250</sup> Thus, while the Supreme Court has been applying intermediate scrutiny for more than thirty years, "the Court has always been much less clear about what that standard allows and what it prohibits."<sup>251</sup>

### *C. The Implications of the Court's Disparate Interpretations of Intermediate Scrutiny for Single-Sex Public Schools*

The indeterminacy of intermediate scrutiny could result in several potential negative outcomes for single-sex public schools. Courts considering the range of interpretations of the substantial relationship test could apply different requirements for how tight the means and ends must be when deciding the constitutionality of single-sex schools, and thus reach different outcomes on the constitutionality of similar single-sex schools.<sup>252</sup> The disparate interpretations of intermediate scrutiny could also result in courts

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248. Kathleen M. Sullivan, *Post Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 301 (1992).

249. See Deutsch, *supra* note 175, at 221; Hlavac, *supra* note 247, at 1376.

250. See Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Classifications*, 6 SETON HALL CONST. L.J. 953, 957-58 (1996); Sunstein, *supra* note 15, at 75.

251. Hasday, *supra* note 161, at 756; see also NOWAK & ROTUNDA, *supra* note 211, at 834 (arguing that "the meaning of this test is less than clear").

252. For example, courts could reach different outcomes in adjudicating the constitutionality of single-sex schools because, while a solitary single-sex school may serve the needs and interests of most members of one sex, many students of the other sex may share those same needs and interests. Under *Virginia* and *Hogan*, the needs and interests of the excluded sex would trump the needs and interests of the majority, while under *Nguyen, Kahn*, and *Rostker* the classification's inability to serve its objective all of the time would not be dispositive.

adopting either a too demanding or too permissive interpretation of intermediate scrutiny for single-sex schools. If courts applied the most demanding interpretation of intermediate scrutiny from *Virginia* to all single-sex schools, courts could chill the development of single-sex schools because establishing that single-sex education is necessary to improve student outcomes would be difficult.<sup>253</sup> This would be undesirable, given the considerable success of some single-sex schools<sup>254</sup> and the need for educational reforms.<sup>255</sup>

Alternatively, a very permissive interpretation of intermediate scrutiny would fail to identify the potential harms that could exist in a single-sex school, just as lower courts applying intermediate scrutiny have sometimes failed to emphasize sufficiently the substantial harms of sex discrimination.<sup>256</sup> The indeterminate nature of intermediate scrutiny leaves courts “a lot more room to import their own prejudices and biases in determining the existence of a relationship and the importance of the state interest involved.”<sup>257</sup> A permissive standard may also not require a sufficiently persuasive justification for denying a single-sex school to one sex, thereby permitting educators to focus on one sex while neglecting the needs of the other with impunity.

The possible application of disparate interpretations may also discourage experimentation with single-sex schools, as educators remain in the dark about their constitutional obligations for opening such schools.<sup>258</sup> Few school districts may be willing to undertake the

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253. If this were to occur, Justice Scalia's prediction that the Court's opinion in *Virginia* left no constitutional room for such schools would be proven correct. See *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting).

254. See *supra* notes 127-32, 136-38, 145-46 and accompanying text.

255. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., OVERVIEW AND INVENTORY OF STATE EDUCATION REFORMS: 1990 TO 2000, at 1-2 (2003), available at <http://nces.ed.gov/pass2005/2003020.pdf> (discussing the events that have highlighted the need for education reform within the United States).

256. See Elizabeth Schneider, Professor of Law, Brooklyn Law Sch., Panel Discussion at the Washington College of Law of American University (Apr. 8, 1996), in *Centennial Panel: Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women*, 6 AM. U. J. GENDER & L. 1, 24 (1997) [hereinafter *Centennial Panel*].

257. Deborah Brake, Senior Counsel, Nat'l Women's Law Ctr., Panel Discussion at the Washington College of Law of American University (Apr. 8, 1996), in *Centennial Panel*, *supra* note 256, at 22.

258. See Brake, *supra* note 250, at 958; Sunstein, *supra* note 15, at 76; Wexler, *supra* note 247, at 325, 341.



risks of litigation involved in opening a single-sex school.<sup>259</sup> The small (but growing) number of single-sex schools may reflect the ambiguity of legal obligations in this area, rather than a lack of demand for such schools.

These concerns demonstrate that intermediate scrutiny's current formulation is inadequate to achieve optimal results for single-sex public schools. Before presenting a proposal to address these concerns, this Article examines how other scholars have proposed applying the Constitution to single-sex public schools. Their theories, and why those theories alone are unpersuasive or insufficient to address these concerns, are presented in the next Part.

### III. SCHOLARLY INTERPRETATIONS OF INTERMEDIATE SCRUTINY AND WHY THEY SHOULD BE REJECTED IN THEIR CURRENT FORMULATIONS TO DETERMINE THE CONSTITUTIONALITY OF SINGLE-SEX PUBLIC SCHOOLS

Scholars typically turn to two sex equity theories when assessing whether single-sex public elementary and secondary schools are constitutional: formal equality and antistatutory subordination.<sup>260</sup> This Part identifies some of the weaknesses of these two theories and argues that they should not be used to determine the constitutionality of single-sex public schools.

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259. See *United States v. Virginia*, 518 U.S. 515, 597 (1996) (Scalia, J., dissenting) (“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.”); Tod Christopher Gurney, Comment, *The Aftermath of the Virginia Military Institute Decision: Will Single-Gender Education Survive?*, 38 SANTA CLARA L. REV. 1183, 1221-22 (1998) (arguing that in *Virginia*, the Court “failed to answer important questions which need to be answered in order to give school officials guidance when implementing single-gender schools”).

260. See Minow, *supra* note 1, at 818 (noting that the debates over single-sex schools “reflect the debates over whether gender equality calls for treating males and females the same, or instead attending to differences between them”). No single article can address every theory presented in the existing literature on single-sex schools. In addition, some of the articles defy existing categories. This Article seeks to address the two most common theories underlying scholarship about the constitutionality of single-sex schools and explain why these theories are ineffective approaches to single-sex public schools.

### A. Formal Equality

The theory of formal equality requires similar treatment for similarly situated individuals.<sup>261</sup> In applying formal equality to single-sex public schools, some argue that single-sex schools are unconstitutional because they are inherently unequal.<sup>262</sup> Often, these arguments focus on the history of sex-segregated schools in the United States, arguing, for example, that “in United States education, separate has never been equal. From the first Public-Free Schools to the Citadel, single-sex male schools have had more money, more resources and more status than single-sex female schools.”<sup>263</sup> Others contend that single-sex schools are unconstitutional under the standard announced in *Virginia* because single-sex educational environments perpetuate sex-based stereotypes and roles, and “can reinforce antagonistic feelings toward the opposite sex.”<sup>264</sup> These arguments reflect a formal equality model because equality of the sexes, in terms of opportunities and the roles that students occupy, remains the central litmus test for the constitutionality of single-sex schools.<sup>265</sup>

Although some who would hold single-sex public schools unconstitutional rely on a formal equality model, many who believe that some room remains for constitutional single-sex schools also embrace this model. For instance, some scholars contend that two equal single-sex schools, one for each sex, will be required or will easily be upheld as constitutional.<sup>266</sup> Although this view lacks

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261. See KATHARINE T. BARTLETT ET AL., GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 117 (3d ed. 2002); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 588 (1983). Depending on the theory's formulation, it may require similar treatment between individuals or groups. See BARTLETT ET AL., *supra*, at 117.

262. See SALOMONE, *supra* note 17, at 2; Johnson, *supra* note 79, at 88; Lucille M. Ponte, *United States v. Virginia: Reinforcing Archaic Stereotypes About Women in the Military Under the Flawed Guise of Educational Diversity*, 7 HASTINGS WOMEN'S L.J. 1, 68 (1996).

263. Campbell & Wahl, *supra* note 159, at 309 (footnote omitted); see also Levit, *supra* note 60, at 526 (“At this juncture, state-sponsored sex exclusivity is unlikely to vest segregation with new meaning. Sex segregation with connotations of inequality is of too recent vintage—indeed, it never left us.”).

264. Levit, *supra* note 60, at 521; see also Johnson, *supra* note 79, at 87.

265. See BARTLETT ET AL., *supra* note 261, at 117.

266. See Michael Heise, *Are Single-Sex Schools Inherently Unequal?*, 102 MICH. L. REV. 1219, 1244 (2004); William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POLY 27, 49 (1997); Gary J. Simson,

precedential value, some support for it is found in the Supreme Court's equally divided decision in 1977 in *Vorchheimer v. School District of Philadelphia*, which affirmed without an opinion a decision that upheld the constitutionality of two comparable single-sex high schools at which attendance was voluntary in a district of coeducational schools.<sup>267</sup>

Examination of each of these formal equality arguments reveals substantial weaknesses. Although some contend that single-sex schools are inherently unequal, promote stereotyping, and reinforce antagonistic feelings between the sexes, coeducation also does not necessarily ensure equal opportunity for both sexes or prevent the stereotyping of either sex.<sup>268</sup> Research reveals that both single-sex and coeducational schools can stereotype women or promote their inferiority.<sup>269</sup> The history of coeducational and single-sex schools demonstrates that “[s]ome of the same mechanisms of inferiority can function in both sex-segregated and coeducational public schools.”<sup>270</sup> For example, both coeducational schools and sex-segregated schools historically steered women toward marriage and motherhood, or toward low-paying jobs that limited their employment opportunities.<sup>271</sup> In fact, “the history of coeducational public education vividly illustrates that this kind of role confinement can flourish even in schools where female and male students officially have access to the same resources and the same curriculum.”<sup>272</sup>

The history of education in this country suggests that how the school is operated, rather than the sex of the students, determines whether a single-sex or coeducational school reinforces stereotypes or subordinates women.<sup>273</sup> Indeed, “the historical record reveals that

*Separate but Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 451 (2005); Tara Boland, Comment, *Single-Sex Public Education: Equality Versus Choice*, 1 U. PA. J. CONST. L. 154, 171 (1998).

267. *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880, 888 (3d Cir. 1976), *aff'd by an equally divided court per curiam*, 430 U.S. 703 (1977). As an opinion by an equally divided court, this opinion lacks precedential value. See *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 263-64 (1960).

268. See Hasday, *supra* note 161, at 758.

269. See AM. ASS'N OF UNIV. WOMEN, *supra* note 70, at 3; Hasday, *supra* note 161, at 758.

270. Hasday, *supra* note 161, at 758.

271. See *id.* at 793.

272. *Id.* at 794.

273. See Campbell & Wahl, *supra* note 159, at 305 (“[T]he issue of gender difference in learning outcomes appears more as a question of classroom treatments and teacher expertise

differences of form like that between sex-segregated and coeducational public education can actually prove relatively unimportant in terms of their substantive impact on women's status."<sup>274</sup> Research on single-sex public schools in the last decade confirms the historical experience that the operation of the school, not the sex of the students, determines how both sexes are treated.<sup>275</sup> For instance, the 2001 California pilot study of public single-sex academies quotes one expert as saying that "[s]ex segregated education can be used for emancipation or oppression. As a method, it does not guarantee an outcome. The intentions, the understanding of people and their gender, the pedagogical attitudes and practices, are crucial, as in all pedagogical work."<sup>276</sup> Therefore, in either a single-sex or coeducational environment, the risk of stereotyping exists.

Because pedagogical attitudes and practices within a school shape its outcomes, single-sex public schools that adopt a comprehensive approach to gender equity that includes efforts to uncover and debunk stereotyping, and to encourage positive perceptions about the excluded sex, should be able to effectively address the inequality and stereotyping that exists in some single-sex schools.<sup>277</sup> Similarly, the suggestion that sex segregation reinforces negative feelings between the sexes, as evidenced in part by negative comments about the excluded sex by single-sex students,<sup>278</sup> can also be addressed

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than of school gender context per se." (alteration in original) (internal quotation marks omitted) (footnote omitted)); Haag, *supra* note 79, at 648 ("The structure of single-sex education, in other words, does not in and of itself ensure any particular outcomes, positive or negative, because it has multiple inspirations and forms."); Morgan, *supra* note 178, at 98-101 (arguing that single-sex schools are not inherently inferior and that the school's context and operation must be examined to determine if it maintains the "dominance of a relatively empowered group over a relatively subordinated group").

274. Hasday, *supra* note 161, at 794.

275. A 2002 book that includes a review of single-sex research by many experts in the field concludes that, "perhaps most important, many of the authors find that both single-sex and coeducational schooling can provide possibilities or constraints to students' achievement or future opportunities, and these outcomes depend to a great degree on how these forms of schooling are implemented." Datnow & Hubbard, *supra* note 29, at 7.

276. DATNOW ET AL., *supra* note 100, at 74; *see also* Datnow & Hubbard, *supra* note 29, at 7 ("[N]umerous studies reported in this volume find that a commitment to gender equity must be explicit in an organization's practices for it to be realized.").

277. *See* DATNOW ET AL., *supra* note 100, at 73-76 (recommending that single-sex schools develop a strong theory of gender equity in their schools and work to dismantle stereotypes).

278. *See* Levit, *supra* note 60, at 521.

through thoughtful pedagogical approaches that encourage cooperation and respect, rather than antagonism, between the sexes. Although one alternative to attempting to address these concerns is to prohibit all single-sex public schools, that approach would eliminate a potentially successful avenue for meeting the educational needs of students. The wiser approach recognizes that, on balance, the potential benefits of single-sex public schools outweigh these concerns when single-sex schools are subject to a constitutional standard that appropriately addresses the potential harms that such schools may generate.

Having responded to those who would rely on a formal equality model to prohibit all single-sex schools, the question remains whether a formal equality model should be adopted under which only two substantially equal single-sex public schools for each sex should be permitted, and all disparities in single-sex schools would be forbidden. The answer is that this approach would be too restrictive to reach optimal results for single-sex schools.<sup>279</sup> As discussed further in Part IV.C, girls and boys have more similarities than differences; however, this does not mean that all disparate treatment in single-sex schools should be prohibited. Intermediate scrutiny's application to single-sex public schools should leave room for the development of persuasive research regarding when disparate treatment would result in optimal outcomes for single-sex public schools.<sup>280</sup>

Furthermore, a formal equality theory that only permits two substantially equal single-sex schools for each sex could also leave in place some aspects of intermediate scrutiny that would undermine the development of single-sex public schools. For example, courts considering the constitutionality of two single-sex public schools would still have to decide whether such schools should be permitted only if they are necessary to achieve their important government interest, whether such schools only have to help the government achieve its interest, or if some standard between these two extremes should be applied.<sup>281</sup> Two substantially equal single-

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279. A formal equality approach under which two substantially equal single-sex schools are automatically upheld also should not be adopted because a minimal review of such schools could cause courts to overlook stereotyping within these schools.

280. See *infra* Part IV.C.

281. See *supra* Part II.A-B (discussing the various Supreme Court interpretations of

sex schools would also be in constitutional jeopardy if they did not produce superior academic or other outcomes when compared to coeducational schools with similar students because the Court often invalidates sex classifications when a sex-neutral alternative would serve the state's interest as well as or better than the sex classification.<sup>282</sup> Single-sex schools presently appear to operate under the shadow of this requirement, as evidenced by Rosemary Salomone's research revealing that "[p]ublic pressure constantly weighs on these schools to prove that they are academically 'better' than coeducational schools serving similar students."<sup>283</sup> Therefore, even when two equal single-sex schools exist, courts could still require these schools to outperform coeducational schools and shut them down if they fail to do so. This pressure could have a chilling effect on those considering opening such schools.

The problems that would remain if formal equality were adopted as currently formulated and the weaknesses of this approach warrant development of an alternative approach to govern the constitutionality of single-sex schools. Before turning to the approach proposed in this Article, the next section examines the argument that the constitutionality of single-sex schools should be assessed under an antisubordination theory of gender equity.

### *B. Antisubordination*

An antisubordination theory of sex equity explicitly or implicitly underlies many arguments both for and against the constitutionality of single-sex public schools. Antisubordination theories "make[] the relevant inquiry not whether women are like, or unlike, men, but whether a rule or practice serves to subordinate women to men."<sup>284</sup> For example, some contend that single-sex schools are unconstitutional because they harm girls or women and/or perpetuate sex-based stereotypes about girls or women.<sup>285</sup> Similarly, those who would uphold the constitutionality of single-sex schools

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intermediate scrutiny).

282. See *supra* notes 171-72 and accompanying text.

283. SALOMONE, *supra* note 17, at 9.

284. BARTLETT ET AL., *supra* note 261, at 533.

285. See Cynthia F. Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and The Citadel*, 4 DUKE J. GENDER L. & POL'Y 101, 101 (1997).

focus on the benefits of such schools for girls or women, often distinguishing the new generation of single-sex schools from prior generations.<sup>286</sup> These types of arguments rest on an anti-subordination approach because they consider the harm or benefit to girls or women as the central question of their analysis.

In applying an antisubordination approach, some would uphold the constitutionality of a girls' single-sex school when the district does not provide a boys' single-sex school but typically would not permit a boys' single-sex school without a girls' single-sex school.<sup>287</sup> For example, Sharon Rush argues that "[v]oluntarily created all-female schools should be constitutional because they promote the equal citizenship of women without damaging the equal citizenship stature of men."<sup>288</sup> In contrast, she argues that "[m]ale-only state schools create a hierarchy where men's citizenship stature is valued more than women's citizenship rights."<sup>289</sup>

Similarly, Denise Morgan argues for an antisubordination approach to single-sex public schools.<sup>290</sup> She contends that "shifting the emphasis of [the intermediate scrutiny] test from fit to anti-subordination focuses the judicial inquiry on the most important question in sex equality jurisprudence: whether government use of sex-based classifications works explicitly or implicitly to perpetuate the hierarchy of men over women."<sup>291</sup> In applying this analysis, Morgan's focus on potential harm to girls leads her to argue that a boy denied admission to a single-sex school such as YWLS would not have suffered a constitutional violation, and that "if none of the other small high-quality co-educational middle schools in the school district catered to his particular interests and needs, he and his parents should work to convince other parents and teachers in the school district to set up a school that does."<sup>292</sup> However, she also allows a single-sex school for boys to be found constitutional if it does not adversely affect "the life chances of girls within the

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286. See, e.g., Amy H. Nemko, *Single-Sex Education After VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 46, 59-62, 76-77 (1998).

287. See Hasday, *supra* note 161, at 759, 808-09; Nemko, *supra* note 286, at 67.

288. Rush, *supra* note 203, at 57-58.

289. *Id.* at 55.

290. Morgan, *supra* note 1, at 459.

291. *Id.*

292. Morgan, *supra* note 178, at 121.

community.”<sup>293</sup> Others also support an antisubordination approach, but for different reasons.<sup>294</sup>

Scholars have pointed to statements by the Court that arguably support the antisubordination approach.<sup>295</sup> An antisubordination approach is consistent with some of the Court’s existing case law because it allows sex classifications to remedy harm to women.<sup>296</sup> Nevertheless, except when the Court finds that a sex classification is addressing past discrimination, the Court is unlikely to adopt an antisubordination approach because it has repeatedly eschewed such asymmetrical approaches. The Court has required state actors to “not rely on overbroad generalizations about the different talents, capacities, or preferences of *males and females*.”<sup>297</sup> Indeed, men who sought the treatment or benefit accorded to women have brought many of the Court’s successful equal protection cases.<sup>298</sup> As this Article seeks to propose an approach that the Court should adopt, the unlikelihood that the Supreme Court would adopt an anti-subordination approach is one strike against that approach.

Moreover, although the antisubordination approach advanced by scholars such as Denise Morgan is among the more sophisticated

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293. Morgan, *supra* note 1, at 457.

294. See Brown-Nagin, *supra* note 17, at 861-62, 869 (arguing that a rational relationship test should apply to single-sex charter schools for minorities and girls, but a more demanding standard should apply to single-sex schools for white boys, given the history of male domination and white resistance to integrated schools); Hasday, *supra* note 161, at 756 (arguing that “the historical record of a practice can inform an investigation into whether, when, and why that practice is consistent with women’s ‘full citizenship stature’ or operates to perpetuate their ‘legal, social, and economic inferiority’”).

295. See Hasday, *supra* note 161, at 756; Morgan, *supra* note 1, at 384.

296. The Court has repeatedly recognized this country’s “long and unfortunate history of sex discrimination.” *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); see also *United States v. Virginia*, 518 U.S. 515, 531 (1996). Recognizing this history, the Court has upheld several classifications that compensate women for past discrimination when such classifications could not be adopted to benefit men. See, e.g., *Califano v. Webster*, 430 U.S. 313, 317-20 (1977) (per curiam) (“Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective.”); *Craig v. Boren*, 429 U.S. 190, 198 n.6 (1976) (noting that prior decisions upheld gender classifications that remedied “disadvantageous conditions suffered by women in economic and military life” (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974))); see also *CHEMERINSKY*, *supra* note 176, at 731, 735-36; *NOWAK & ROTUNDA*, *supra* note 211, at 834 (noting that laws favoring women are permitted to make up for “past economic discrimination”).

297. *Virginia*, 518 U.S. at 533 (emphasis added).

298. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979).



and persuasive approaches to assessing the constitutionality of single-sex public schools, the Court, even if it were willing to adopt this approach, would be ill-advised to do so for several reasons. The primary reason is that the theory would not effectively address the modern gender equity concerns facing our schools. It is undeniable that intermediate scrutiny was adopted to address this country's history of pernicious discrimination against women<sup>299</sup> and that the United States still has a substantial distance to go to overcome that history.<sup>300</sup> Nevertheless, the present-day differences in achievement outcomes for girls and boys that are described in Part I.A present a complex picture that does not consistently favor either sex, and thus defies categorical treatment, including categorical treatment that focuses primarily on girls' educational needs.<sup>301</sup>

The achievement data is clear—neither sex is ahead on all measures and, along with lingering areas in which girls lag behind boys, boys lag behind girls in several critical areas, such as reading, writing, and college graduation rates.<sup>302</sup> Similarly, both sexes may also experience adverse treatment, but in different ways.<sup>303</sup> Undoubtedly, “[s]hort-term test scores and even longer term college admissions may not capture what equality in education should mean.”<sup>304</sup> Yet, one should also be careful not to embrace a constitutional theory that could encourage educators to neglect the educational needs of boys when their performance is declining in important areas.<sup>305</sup> Instead, one should try to make certain that constitutional standards help the country ensure that all children

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299. See *Virginia*, 518 U.S. at 531.

300. See, e.g., LORRAINE DUSKY, *STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA* 407-13 (1996) (summarizing findings of sex discrimination in many aspects of the criminal justice system); SADKER & SADKER, *supra* note 38, at 1 (discussing how girls and boys are treated differently in the classroom); U.S. GEN. ACCOUNTING OFFICE, *WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN THE DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS* 9 (2003) (finding that “[a]fter accounting for factors affecting earnings, women earned an average of [eighty] percent of what men earned in 2000”).

301. See *supra* notes 50-69 and accompanying text.

302. See *supra* notes 50-69 and accompanying text.

303. See *supra* notes 29-49 and accompanying text.

304. Minow, *supra* note 1, at 820.

305. Some, such as Christina Sommers and Judith Kleinfeld, contend that boys' educational needs are not currently being met and are even being neglected. See KLEINFELD, *supra* note 44, at 3-4; SOMMERS, *supra* note 43, at 14; see also Samuels, *supra* note 62, at 8.

are given opportunities to reach their full intellectual potential.<sup>306</sup> For that reason, the constitutional theory applied to single-sex schools should recognize the complexity of modern-day gender disparities in education, and thus reject antisubordination's exclusive focus on the effect that a single-sex school has on girls. Fortunately, education is not a zero-sum game. Both boys and girls may be provided single-sex opportunities without undermining the opportunities provided to girls.<sup>307</sup>

In addition to not effectively addressing modern-day gender equity concerns, boys who are denied a single-sex school that is provided to girls should not bear the responsibility for organizing other students and parents to open a single-sex school because the constitutional obligation to provide equal protection of the laws rests on the state actor, typically the school district, rather than on that state's citizens. The Court made this clear in *Virginia* when it stated that when reviewing a sex classification, "[t]he burden of justification is demanding and it rests *entirely* on the State."<sup>308</sup> The antisubordination approach would lift this burden from the state and place it on boys' shoulders, thereby placing a heavy burden on boys to police their own rights, while the state focuses its energy and resources on girls and any harm to them or their status.

Those who support an antisubordination approach may not be concerned about placing such a heavy burden on boys because they believe that men continue to hold more power and greater status in society, and thus, boys should be able to convince a school board to open a boys' school if they would benefit from one.<sup>309</sup> However, the growing evidence that boys' educational needs are being overlooked and that their achievement is lagging<sup>310</sup> suggests that boys in elementary and secondary schools may not have the ability to

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306. See Pinzler, *supra* note 81, at 788.

307. In addition to its other shortcomings, an antisubordination approach also fails to recognize the humanity that boys share with the girls who are the focus of the approach. However, "when we fail to 'treat likes alike'—we not only limit individual liberty and destroy some social tradition, but we also, in effect, *excommunicate*: we declare some people to be not worthy, and thus not 'like us,' and therefore not 'of us.'" ROBIN L. WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* 150 (2003). Thus, antisubordination's excommunication of boys based on the hierarchy of men over women should be avoided whenever possible.

308. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (emphasis added).

309. See Morgan, *supra* note 178, at 121.

310. See *supra* notes 42-49, 61-67 and accompanying text.

protect their interests as the antisubordination approach presumes. Boys also sometimes may lack the influence to obtain a single-sex school for themselves, and those in power may not be focused on their interests. Consider the single-sex schools in New York City as one example. Until 2004, no boys' schools existed in New York City, while the YWLS and its students have thrived since the school opened in 1996.<sup>311</sup> While New York City now has two boys' schools (and five girls' schools), boys' needs in New York City are unlikely to be dramatically different now from their needs when YWLS opened in 1996, and thus, those boys who would have benefited from boys' schools during the interim did not have their needs met. Therefore, even though men continue to hold substantially more power and influence in American society, boys may sometimes lack the ability, resources, or insight into the potential benefits of a single-sex school for boys to convince a school board to open a school for them, even when one would benefit them.<sup>312</sup>

Although antisubordination seems to imply that women's interests may not be adequately protected unless they are given special solicitude, this may not remain true in many instances.<sup>313</sup> In the realm of single-sex public schools, girls' interests may be adequately championed by groups such as the Young Women's Leadership Foundation, which has opened five single-sex schools for girls and one for boys,<sup>314</sup> just as others have focused on and opened schools for boys.<sup>315</sup> In the realm of influence to open single-sex schools, neither sex appears to consistently lack the ability to obtain

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311. See *supra* text accompanying notes 140-46.

312. The philanthropist and former journalist Ann Rubenstein Tisch initiated plans for the YWLS in 1995, but did not open its doors until the fall of 1996. To launch the school, she hired a legal team, obtained consulting services, and met with many top education officials and parents. See SALOMONE, *supra* note 17, at 11-12; Riordan, *supra* note 51, at 24. Undoubtedly, such a philanthropist and former journalist will have available more financial resources and professional and personal connections to obtain results quickly than will most boys and their families in New York City. The Court has already established that the rights protected by the Equal Protection Clause are "rights which are personal and *present*." *Sweatt v. Painter*, 339 U.S. 629, 634-35 (1950) (emphasis added). Therefore, even if a boy could work to develop such a school, the delay in his enjoyment of his rights denies him the equal protection of the laws today.

313. See FARBER ET AL., *supra* note 245, at 318 (discussing John Hart Ely's argument that "women are today more than capable of being heard politically").

314. See Barak, *supra* note 1, at 33.

315. See Minow, *supra* note 1, at 817 (discussing how some advocate for girls' schools and against boys' schools, while others advocate for boys' schools).

a school that will benefit them. However, the excluded sex in districts that lack a substantially equal school for their sex may lack the means to obtain a school that would benefit them.<sup>316</sup>

The proposal presented in the next Part seeks to address the shortcomings of the formal equality and antisubordination approaches.<sup>317</sup>

#### IV. CONSTITUTIONAL GUIDEPOSTS FOR THE NEW GENERATION OF PUBLIC SINGLE-SEX ELEMENTARY AND SECONDARY SCHOOLS

Two factors should serve as guideposts that direct how the substantial relationship component of intermediate scrutiny should be applied to single-sex public schools: whether attendance is voluntary and whether substantially equal opportunities are given to both sexes. These two characteristics can be used to divide single-sex public schools into two categories that present distinct potential risks and benefits, and thus warrant different constitutional requirements. If both voluntary attendance and substantially equal opportunities for both sexes are present, schools should be placed into the dual, voluntary category. If either voluntary attendance or substantially equal opportunities is absent, single-sex schools should be placed into the solitary or involuntary category. The substantial relationship test should be calibrated to be more demanding when assessing solitary or involuntary schools and less demanding when assessing dual, voluntary schools.

This proposal's details are set forth below. Par IV.A sets the stage for modifying intermediate scrutiny by analyzing how the Supreme Court recently modified its interpretation of the Equal Protection Clause in *Grutter v. Bollinger*. Part IV.B explains why the presence of substantially equal opportunities and voluntary attendance results in two distinct categories of single-sex public schools that represent different potential harms. Part IV.C proposes how these two factors should be analyzed and how the substantial relationship

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316. See *supra* note 133 and accompanying text.

317. In taking this position, this Article does not suggest that antisubordination is an approach that should not be adopted generally. Instead, this Article argues that antisubordination would not result in optimal outcomes if applied to single-sex public schools for the reasons outlined in Part III.B. However, an antisubordination approach may produce the best possible results in other areas.

requirement should be calibrated for each of the two categories of schools. Finally, Part IV.D articulates how the deference given to the two categories of schools should differ.

*A. The Supreme Court's Modification of Equal Protection in Grutter v. Bollinger*

In analyzing the threshold question of whether intermediate scrutiny should be modified when applied to single-sex public schools, examining how the Supreme Court recently modified its equal protection doctrine in *Grutter v. Bollinger* is helpful. In *Grutter*, the Court upheld the constitutionality of the University of Michigan Law School's admissions policy that sought to achieve diversity by considering an applicant's race as one factor among many admission factors.<sup>318</sup> Although the Court required a government actor seeking to remedy past discrimination to present evidence of discrimination in the geographic area in which the remedy is sought,<sup>319</sup> the Court in *Grutter* did not limit its consideration of evidence of the benefits of diversity to what happened at the law school. Instead, the Court briefly considered evidence from the law school itself and ultimately relied heavily on evidence from numerous amici, including General Motors, 3M, and high-ranking military officers, who all presented arguments regarding the importance of diversity in U.S. businesses and the military.<sup>320</sup> This modification appropriately customized strict scrutiny's application to diversity because the value of diversity is not limited to the particular institution before the Court, or even to educational institutions generally, but instead extends beyond educational institutions to the occupations and society for which students are prepared and trained.<sup>321</sup>

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318. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

319. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504-05 (1989).

320. See *Grutter*, 539 U.S. at 330-31. In *Bakke*, Justice Powell also relied on evidence from Harvard University to establish the nature of diversity that he found sufficiently compelling to support consideration of race at the Medical School of the University of California at Davis. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17 (1978).

321. See *Grutter*, 539 U.S. at 331-32; see also Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1363 (1996) ("[T]he Court's present refusal to rely on evidentiary findings drawn from other jurisdictions is inappropriate in a case concerning diversity in higher education." (footnote omitted)).

The Court also deferred to the law school's educational judgments in determining whether diversity was a compelling interest.<sup>322</sup> The Court explained that this deference was appropriate in light of past decisions that gave "deference to a university's academic decisions, within constitutionally prescribed limits."<sup>323</sup> Such deference is noticeably absent from cases in which the Court considered race-conscious programs adopted by such important representative bodies as Congress or state and local legislatures.<sup>324</sup> The Court has also modified its constitutional framework in other contexts.<sup>325</sup> In short, modifying a constitutional standard is permissible and may more effectively protect the constitutional rights at stake.<sup>326</sup>

*B. Constitutional Guideposts that Determine the Nature of the Potential Harm Created by Single-Sex Public Schools: Voluntary Attendance and Substantially Equal Opportunities for Both Sexes*

The Supreme Court astutely observed in *Jenness v. Fortson* that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."<sup>327</sup> This principle holds true in considering not only how governments should treat people, but also how courts and educators should view the

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322. *Grutter*, 539 U.S. at 328.

323. *Id.*

324. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 238 (1995); *Croson*, 488 U.S. at 498-501.

325. See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 665-66 (1995) (upholding suspicionless drug testing of student-athletes against a Fourth Amendment challenge and explaining that a public school may exercise considerable control over public schoolchildren even though the same degree of control cannot be constitutionally exercised over free adults); see also James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1346-69 (2000) (analyzing how the Supreme Court has tailored schoolchildren's constitutional search, due process, and speech rights "to fit the school context").

326. Some might contend that the Court specifically rejected any modification of intermediate scrutiny in *Hogan*. In that case, Justice O'Connor noted that Justice Powell argued in dissent that "a less rigorous test should apply because Hogan does not advance a 'serious equal protection claim.'" *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982) (quoting *Hogan*, 458 U.S. at 742 (Powell, J., dissenting)). The prior discussion of the inconsistencies in the Court's intermediate scrutiny cases demonstrates that the Court's statement that its analysis of intermediate scrutiny remains the same is inaccurate. See *supra* notes 178-242 and accompanying text.

327. 403 U.S. 431, 442 (1971).

constitutional doctrines and tests that the Court has developed in applying the Equal Protection Clause.<sup>328</sup>

As noted in the Introduction, the Supreme Court systematized its application of strict scrutiny in *United States v. Paradise*, in which the Court listed several factors that guide strict scrutiny's narrow tailoring inquiry.<sup>329</sup> Similarly, this Article seeks to systematize how intermediate scrutiny's application of the substantial relationship test to single-sex public schools takes "relevant differences into account."<sup>330</sup> The proposal in this Article modifies the substantial relationship test because the most difficult question in assessing the constitutionality of single-sex public schools will depend upon how the Court applies the often difficult and opaque substantial relationship test.<sup>331</sup>

The substantial relationship component of the intermediate scrutiny test represents the most challenging inquiry in any analysis of whether a sex classification is constitutional.<sup>332</sup> The Court itself has admitted in a plurality opinion that "[t]he question whether a statute is *substantially* related to its asserted goals is at best an opaque one."<sup>333</sup> The difficulty of applying the substantial relationship test is particularly troubling because the fit between means and ends is also the most important distinction between intermediate scrutiny and the rational basis standard.<sup>334</sup> Therefore,

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328. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); see also THE CIVIL RIGHTS PROJECT, HARVARD UNIV., REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES: A JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS 23 (2003) (arguing that differences in the settings and interests advanced in elementary and secondary education may "weigh against a reliance on *Grutter* and *Gratz* [*v. Bollinger*]" in determining whether other interests should be considered sufficiently compelling to support a racial classification).

329. See *United States v. Paradise*, 480 U.S. 149, 171 (1987) (noting that when the Court determines if a program is narrowly tailored, the Court examines "several factors").

330. *Grutter*, 539 U.S. at 327 (internal quotation marks omitted).

331. See Willinger, *supra* note 37, at 277-78 (arguing that while a number of governmental interests exist that may be sufficiently important to support single-sex education, the "very difficult" question is whether single-sex education is substantially related to achieving those interests). But see Morgan, *supra* note 1, at 418-19 ("The evolution of traditional justifications for single-sex education makes it likely that many of the single-sex public schools that have been established in recent years will survive the fit element of intermediate scrutiny." (footnote omitted)).

332. See Brake, *supra* note 257, at 14.

333. *Michael M. v. Superior Court*, 450 U.S. 464, 474 n.10 (1981) (plurality opinion).

334. See *Nguyen v. INS*, 533 U.S. 53, 77 (2001) (O'Connor, J., dissenting).

a failure to apply this test properly may result in intermediate scrutiny failing to protect adequately against sex discrimination by not requiring a sufficiently tight fit between means and ends.

Single-sex public elementary and secondary schools involve two unique characteristics that determine the nature of the potential harm created by single-sex schools, and these characteristics should guide the application of the substantial relationship component of intermediate scrutiny. These characteristics not only distinguish some single-sex schools from other sex classifications, but their presence or absence also affects the risk that single-sex schools will harm students, the burden that single-sex schools may impose on individuals, and the need for judicial skepticism of single-sex schools. Consistent analysis of these factors will appropriately calibrate the rigor with which the substantial relationship test is applied to the potential harms and risks of single-sex public schools.

The first factor is whether the school district provides substantially equal opportunities to both sexes. If the district provides such opportunities, the absence of a denial of an opportunity or benefit to one sex should serve as a guidepost that distinguishes some single-sex schools from others. In identifying this as an important factor that should drive the constitutional analysis of single-sex schools, remembering that intermediate scrutiny is designed to review state action that grants an opportunity or benefit to only one sex, or that imposes a burden on only one sex, is important.<sup>335</sup> For example, the Court in *Virginia* stated that “the Court ... has carefully inspected official action that *closes a door* or *denies opportunity* to women (or to men).”<sup>336</sup> The Court has explained that it is “[l]egislative classifications which *distribute benefits and burdens* on the basis of gender

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335. See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (accepting only male students at VMI, a state school); *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981) (statute giving husband, but not wife, “the unilateral right to dispose of [joint marital property] without his spouse’s consent”); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147 (1980) (statute limiting situations in which a husband, but not a wife, may collect death benefits after the other spouse’s death); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (statute requiring husbands, but not wives, to make alimony payments); *Califano v. Goldfarb*, 430 U.S. 199, 204 (1977) (considering disparate Social Security survivors’ benefits for widows and widowers); *Stanton v. Stanton*, 421 U.S. 7, 8 (1975) (statute “specifying for males a greater age of majority than it specifies for females”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-38 (1975) (Social Security Act provision granting survivors’ benefits to a deceased man’s wife and children, but only to a deceased woman’s children).

336. *Virginia*, 518 U.S. at 532 (emphasis added).



[that] carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection.<sup>337</sup>

Although all single-sex schools classify students on the basis of sex, some single-sex schools do not involve the denial of an opportunity or benefit to one sex. Instead, each sex may receive the same or substantially equal benefits. This occurs in dual academies that provide a single-sex school for each sex with similar curricula, teaching methods, materials, and sometimes even the same teachers and facilities,<sup>338</sup> as well as in some pairs of single-sex schools that educators design to provide both sexes similar educational opportunities.<sup>339</sup> In these circumstances, the state has adopted a sex classification by separating boys and girls on the basis of sex, but it has not denied either sex a benefit or an opportunity. Such a separation should remain subject to intermediate scrutiny,<sup>340</sup> but the absence of a denial of a benefit or opportunity to one sex warrants modification of the intermediate scrutiny standard because this subset of single-sex schools generally places less of a burden on either sex than when one sex is excluded from certain benefits. Substantially equal opportunities for each sex reduce the likelihood that either sex is harmed because disparate treatment is minimized. Minimizing disparate treatment between girls and boys is appropriate because girls and boys are typically similarly situated.<sup>341</sup> Thus, the provision of substantially equal opportunities helps to ensure that educators are not shortchanging the needs of either girls or boys, and such single-sex schools should be subject to a less demanding interpretation of the substantial relationship test.

In contrast, when a student is denied a single-sex school, the student will miss out on a benefit that the school would have provided her or him. As described in Part I.C, some single-sex public schools, such as YWLS in Harlem, which provides its students

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337. *Orr*, 440 U.S. at 283 (emphasis added).

338. See SALOMONE, *supra* note 17, at 227-28.

339. See *id.* at 228-32 (describing the California pilot study that focused on giving students equal resources).

340. *But see* Simson, *supra* note 266, at 451 (arguing that when two coordinate single-sex schools are provided, "[a]lthough the state is obviously taking sex into account in establishing such schools, it is not treating anyone any better or worse on the basis of sex. No sex classification exists, and therefore the higher level of scrutiny triggered by sex classifications does not come into play.").

341. See Campbell & Wahl, *supra* note 159, at 306-07.

“intense and personalized attention,” are providing valuable and unique opportunities to their students and achieving substantial success.<sup>342</sup> Students excluded from these opportunities are being denied the potential to reap these important benefits. This denial should influence the constitutional analysis of the schools.

The second factor is whether attendance at a single-sex school is voluntary.<sup>343</sup> Voluntary schools are less likely to inflict harm on students of either sex for two reasons. First, students who do not attend the school can obtain substantially equal benefits in a coeducational school. Second, students who attend the school are not being forced to attend and could entirely avoid the sex classification. The choice to attend the school reduces the likelihood that the students are harmed by the school because any perceived harm to, or inferior opportunities for, students in single-sex schools will cause parents and students to select a different school. For this choice to be exercised in an informed manner, parents and students will have to be given information about their available options, including the potential advantages and disadvantages of these options. Voluntary attendance should help to assure educators and courts that those students who choose to attend the single-sex school, rather than a substantially equal coeducational school, believe that the school’s single-sex composition will help them achieve their educational goals.<sup>344</sup> Therefore, voluntary attendance at a single-sex school accomplishes some of the work that intermediate scrutiny was created to achieve.<sup>345</sup>

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342. See *supra* text accompanying notes 140-46.

343. See Morgan, *supra* note 1, at 391 (“Attendance is voluntary at all of these new [single-sex] schools.”). For children in elementary and secondary schools, parents rather than the students will typically be exercising the choice. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (affirming that the state cannot unreasonably interfere with “the liberty of parents and guardians to direct the upbringing and education of children under their control”). However, this does not change the fact that those making the decision to attend the school could choose otherwise.

344. See SALOMONE, *supra* note 17, at 16 (discussing why some parents chose to send their daughters to YWLS).

345. The ability to exercise a choice to attend a single-sex school should also have a policing effect on educators as they design single-sex public schools because parents and students who identify any stereotyping or other harmful effects in single-sex schools will decide to attend substantially equal coeducational schools. Certainly, parents and students should not be the only policing mechanism because they may overlook sex discrimination or share educators’ stereotypes, or the school’s harmful effects may only be evident over time. Thus, voluntary single-sex public schools should remain subject to intermediate scrutiny, including an analysis

On the other hand, involuntary attendance increases the risk of harm to students. When students attend a single-sex school involuntarily, the state may be forcing a sex classification on a student that the student would rather avoid. In addition, an involuntary classification also carries a greater risk of harm because it could convey a negative message about the capacity of the sex that is educated in the single-sex environment, namely that those students can only succeed when the other sex is absent.<sup>346</sup> Therefore, whether attendance at the school is voluntary or involuntary should influence the constitutional analysis of single-sex public schools.

*C. How the Guideposts Should Modify the Substantial Relationship Test Applied to Public Single-Sex Elementary and Secondary Schools*

Part C first explains how substantial equality and voluntary attendance should be analyzed. This Article then uses these guideposts to determine how the substantial relationship test should be applied to single-sex public schools.

*1. Analyzing Whether a Single-Sex School Provides Substantially Equal Opportunities for Girls and Boys and Whether Attendance Is Voluntary*

To determine how the substantial relationship component of intermediate scrutiny should be applied, a court should first assess whether the district provides substantially equal single-sex schools to both sexes and whether students attend the schools on a voluntary basis.<sup>347</sup> The answers to these two questions determine which interpretation of the substantial relationship test should be applied. Courts should apply a more demanding interpretation of the

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of whether the schools promote stereotyping. However, voluntary attendance should be one of the factors that guides the constitutional analysis of single-sex schools.

346. See Minow, *supra* note 1, at 822 (arguing that careful attention should be paid to the voluntariness of single-sex education because it could “convey assumptions about the vulnerability and incapacity of girls to compete fully with boys at least in the world as currently constructed”).

347. If courts adopt this approach, educators would also follow these steps. Because this proposal is largely aimed at courts, this Article will speak of courts conducting the analysis.

substantial relationship test when a school district provides a solitary or involuntary single-sex school. Conversely, courts should apply a less demanding interpretation of the substantial relationship test when a school district provides dual, voluntary schools.

Courts should examine several factors to assess whether public single-sex schools offer each sex substantially equal opportunities, such as whether the schools serve similar grade levels and geographic areas. In addition, courts should assess whether the schools offer similar opportunities and benefits, such as similar curricula, resources, staffs, and teachers.<sup>348</sup> The Supreme Court's opinions in cases such as *United States v. Virginia* and *Sweatt v. Painter* provide thorough discussions of what must be equal for two schools to be substantially equal.<sup>349</sup> For example, in holding that VMI and VWIL were not substantially equal,<sup>350</sup> the Court approvingly quoted the dissent of Judge Phillips of the Fourth Circuit, who had compared VMI and VWIL to a paradigm that he contended "could survive equal protection scrutiny": single-sex schools with 'substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, ... faculty[,] and library resources.'<sup>351</sup>

Creating and maintaining substantial equality in both tangible and intangible ways may prove difficult for educators. As one expert on single-sex schools has noted, "[s]chools differ from each other in subtle and not so subtle ways that are not quantifiable, from their curriculum to the instructional materials and approaches used, to their educational philosophy, academic expectations, teacher experience, and overall climate."<sup>352</sup> Undoubtedly, the substantial equality standard established in *Virginia* is a difficult one; nevertheless, the Court's use of "substantial equality," rather

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348. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276, 11,285 (proposed Mar. 9, 2004) (noting items that must be similar for two schools to be considered substantially equal).

349. See *United States v. Virginia*, 518 U.S. 515, 547-51 (1996) (discussing the constitutional requirements for an all-female parallel program to an all-male military academy and Virginia's failure to meet these requirements); *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950) (finding no substantial equality between the University of Texas Law School and the then newly-created Texas State University law school for African Americans).

350. See *Virginia*, 518 U.S. at 554.

351. *Id.* at 547 n.17 (omission and alteration in original) (quoting *United States v. Virginia*, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting)).

352. SALOMONE, *supra* note 17, at 9.

than perfect equality, suggests that it will permit limited differences to exist between such schools, while still finding them to be substantially equal. For example, the Brighter Choice Charter Schools in Albany, New York, permit teachers to vary the pace at which they teach girls and boys the same curriculum.<sup>353</sup> In addition to allowing some tangible differences between single-sex schools for each sex, courts should also have some tolerance for intangible differences that are beyond educators' control, such as the success of an alumnus that brings notoriety to a school. A greater harm would be inflicted by ending the single-sex policy of one school that differs in minor ways from its counterpart than would be gained by the students who are denied those intangible benefits.<sup>354</sup>

Courts and educators should be mindful not to transform a standard that requires substantially equal single-sex schools into one that requires identical single-sex schools. Elementary and secondary schools typically will have more similarities than the postsecondary institutions that the Court has previously compared,

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353. ROSALIND BARNETT & CARYL RIVERS, *SAME DIFFERENCE: HOW GENDER MYTHS ARE HURTING OUR RELATIONSHIPS, OUR CHILDREN, AND OUR JOBS* 242, 244 (2004) (arguing that "single-sex schools may create as many problems as they solve" and that single-sex schools may result in an inferior education for girls, reinforce stereotypes, and leave sexism unchallenged in boys' schools); *see id.* at 234. Currently, researchers debate whether biological differences exist between the brains of the sexes and whether this impacts learning. Compare LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 1-32 (2005) (arguing that significant biological differences exist between girls and boys in how their brains and visual systems are organized, how they learn, how they hear, and on other measures), and GURIAN ET AL., *supra* note 40, at 35-38, 44-52 (examining how biological dissimilarities influence learning at the elementary, middle school, and high school levels), with BARNETT & RIVERS, *supra*, at 240 (arguing that differences do not exist regarding how the sexes learn and noting that "[w]omen's ways of knowing appear to be exactly like men's ways of knowing"). The resolution of this debate, including whether this research should or should not influence how single-sex schools are structured, is not necessary to advance the legal argument in this Article; therefore, an examination of this debate and its ramifications is beyond the scope of this Article.

354. *See Caplice, supra* note 99, at 290 ("Single-sex educational environments are a large part of educational reforms in urban areas and constitutional stumbling blocks placed in their paths could be devastating. Undeniably, the need for successful educational reform at every level of schooling is urgent.") Undoubtedly, the intangible and uncontrollable benefits in a single-sex school for one sex could become so overwhelming that the schools no longer remain substantially equal. For example, unique opportunities, such as the extensive alumni network of the Philadelphia High School for Girls, *see SALOMONE, supra* note 17, at 30, could render a new boys' high school in Philadelphia inferior to the girls' school. Nevertheless, this Article cautions courts against finding inequality too quickly based on disparities that are beyond the control of educators.

which traditionally develop a unique faculty, reputation, ranking, and alumni network.<sup>355</sup> Additionally, two elementary and secondary public schools within a school district are more likely to be substantially equal in their curriculum today because the adoption of statewide standards in recent years has increased the similarities in curricular offerings among schools.<sup>356</sup>

A court would then assess whether students attend the single-sex school(s) on a voluntary basis.<sup>357</sup> Currently, no district exists that has only single-sex public schools. However, this alone does not ensure that students attend single-sex schools on a voluntary basis. Instead, several factors should be evaluated to determine if students voluntarily choose to attend a single-sex school. First, if a student can only receive the educational curriculum, teaching methods, resources, or other important educational benefits at the single-sex school, students may have chosen to accept a single-sex environment to receive the unique educational opportunities, even though the single-sex format is less than desirable.<sup>358</sup> For example, if a single-sex school has the only specialized math and science or foreign culture and language-focused curriculum in the school district, a student may prefer a coeducational environment, but may

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355. Most elementary and secondary schools will lack some of the characteristics that postsecondary institutions possess, such as extensive alumni networks, research centers, or prestige within the community. See Ryan, *supra* note 325, at 1380. In those instances when single-sex schools possess some of these unique characteristics, such as the alumni network of the Philadelphia High School for Girls, see SALOMONE, *supra* note 17, at 30, such benefits should be considered when determining if two single-sex schools are substantially equal.

356. See, e.g., Douglas A. Archbald & Andrew C. Porter, *Curriculum Control and Teachers' Perceptions of Autonomy and Satisfaction*, 16 EDUC. EVALUATION & POLY ANALYSIS 21, 21 (1994) (discussing how the development of statewide standards in the 1980s resulted in "unprecedented assertion of state control over school and classroom curriculum decision making," including the use of such means as "prescriptive curriculum policy"); Rodney T. Ogawa et al., *The Substantive and Symbolic Consequences of a District's Standards-Based Curriculum*, 40 AM. EDUC. RES. J. 147, 157 (2003) (discussing the use of a districtwide curriculum).

357. Scholars and others have recommended that single-sex schools remain voluntary. See Morgan, *supra* note 1, at 427; Pamela J. Smith, *Looking Beyond Traditional Educational Paradigms: When Old Victims Become New Victimizers*, 23 HAMLINE L. REV. 101, 170 n.268 (1999) (discussing Senator Kay Bailey Hutchinson's proposal to allow public schools to offer voluntary single-sex schools and classrooms); Sax, *supra* note 22, at 35.

358. A Third Circuit judge made a similar argument in his dissent from the opinion that upheld two single-sex high schools in Philadelphia. See Vorchheimer v. Sch. Dist., 532 F.2d 880, 889 (3d Cir. 1976) (Gibbons, J., dissenting), *aff'd by an equally divided court per curiam*, 430 U.S. 703 (1977).

be unwilling to forego the specialized curriculum to avoid the single-sex environment. Consequently, at a minimum, for attendance to be voluntary, the district must provide a coeducational school that is substantially equal to the single-sex school, irrespective of the students' sex.<sup>359</sup>

Second, the context in which students and parents exercise choice also determines whether attendance is voluntary. Educators, such as teachers and administrators, may exert pressure on students and parents to attend a single-sex school or fail to provide students and parents the opportunity to decline to attend a single-sex school.<sup>360</sup> When students and parents are not provided the opportunity to decline to attend a single-sex school, attendance is effectively involuntary.<sup>361</sup>

Finally, voluntariness often exists along a continuum, rather than as a dichotomy. For example, if the district offers a coeducational program that is quite similar, but not substantially equal, to a single-sex program, attendance at the single-sex school is more voluntary than attendance at a single-sex school in which a unique program is offered. The substantial degree of voluntariness in attending such a single-sex school would entitle the school to be evaluated under the less demanding interpretation of the substantial relationship test.

## 2. *Dual, Voluntary Single-Sex Public Schools*

If a school district offers substantially equal single-sex schools to both sexes, and students attend the schools on a voluntary basis, courts should apply a less demanding interpretation of the substantial relationship test.<sup>362</sup> As noted above, voluntary attendance and

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359. See Willinger, *supra* note 37, at 277 (noting that students have free choice between schools when there are two comparable single-sex schools and a comparable coeducational school).

360. See DATNOW ET AL., *supra* note 100, at 33 (noting that the choice to attend some of the single-sex schools in the California pilot student was "not a fully democratic choice for students and parents").

361. See Justin Blum, *Scores Soar at D.C. School with Same-Sex Classes*, WASH. POST, June 27, 2002, at A1 (noting that in Washington, D.C., an elementary school split all of the classes up by sex without informing the superintendent or anyone else). Courts should also be mindful that involuntary assignment of students to single-sex schools violates the Equal Educational Opportunities Act. See 20 U.S.C. §§ 1701-1703 (2000).

362. Cf. Minow, *supra* note 1, at 822 ("Thus, single-sex education could be far more

the provision of substantially equal opportunities for both sexes likely renders the schools less harmful than other schools, and thus, they should be subject to a less demanding constitutional threshold. A district that offers dual, voluntary schools should have to establish that the single-sex nature of the schools *helps* the district achieve its educational goals.<sup>363</sup>

The district also should be required to establish that dual, voluntary single-sex schools are as effective as similarly situated coeducational schools<sup>364</sup> in achieving their objectives, after educators are permitted a reasonable timeframe for understanding how best to administer such schools.<sup>365</sup> When examining the outcomes of single-sex schools,<sup>366</sup> courts should consider a variety of outcomes, such as test scores, graduation rates, the attitudes of students toward their studies, and students' career prospects. The Court in *Grutter* recognized a variety of student learning outcomes as important to its approval of the race-conscious admissions program at the University of Michigan Law School, including upholding the lower court's findings that the policy "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"<sup>367</sup> The Court should follow a similar course in its approach to single-sex schools by acknowledging that student learning may be improved in a variety of ways in single-sex schools, such as by reducing the

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defensible where offered on an entirely voluntary basis than where it is mandated by law. If available on an entirely voluntary basis, single-sex education could well convey the social message of expected excellence and invitation to full striving.").

363. See *supra* notes 218-40 and accompanying text (discussing cases in which the Court adopts this interpretation of the substantial relationship component of intermediate scrutiny).

364. When measuring the performance of dual, voluntary single-sex schools, or a solitary or involuntary school, it is important that courts compare similarly situated schools. If single-sex schools accept students that were the lowest performers at coeducational schools, courts should recognize that this difference will affect the academic and other outcomes that occur at such schools.

365. Courts should permit educators a reasonable amount of time to determine how best to administer single-sex public schools because single-sex public schools are relatively new to the educational landscape, and educators will need time to understand how to harness the benefits of the single-sex environment.

366. This examination of the outcomes from public single-sex schools agrees with Rosemary Salomone's contention that the "exceedingly persuasive justification" ... implicitly requires not only a rationale based on students' needs but also some confirmation on the outputs end." SALOMONE, *supra* note 17, at 188.

367. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (alteration in original).



perception that girls do not excel at math or that boys do not excel at foreign languages, and that these benefits are also important for the country's schoolchildren.<sup>368</sup>

The requirement that single-sex schools should be as effective as similarly situated coeducational schools in achieving their objectives recognizes that any important objective for a single-sex school would involve benefiting the students attending the school. Therefore, evidence that the school is adversely affecting student outcomes would undermine an argument that the school's existence is substantially related to its objective of benefitting students. If single-sex schools are harming students, the costs of single-sex schools become too great.<sup>369</sup>

Some have suggested that single-sex schools must outperform coeducational schools to be constitutional—that is, they must produce superior academic or other outcomes.<sup>370</sup> Indeed, as noted above, public pressure on single-sex schools to prove that they are more effective than coeducational schools<sup>371</sup> may reflect the Court's presumption against sex classifications when other sex-neutral alternatives are available.<sup>372</sup> In light of this presumption, courts applying intermediate scrutiny to single-sex public schools understandably could require single-sex schools to outperform coeducational schools. However, if courts rendered single-sex schools unconstitutional because coeducational schools would also serve the school district's objective, courts would undermine the ability of educators to experiment with single-sex schools, denying schoolchildren the substantial benefits of some single-sex public schools.<sup>373</sup> A legal requirement that single-sex schools must outperform

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368. See *supra* notes 82-92 and accompanying text (discussing some of the benefits of single-sex schools).

369. When applying this requirement, it is important to remember that those single-sex schools that are developed to promote a diversity of educational options may have inferior outcomes while still fulfilling their objective of giving students a choice in where they attend school. Similarly, an educational experiment may be more likely to experience inferior outcomes than single-sex schools that have been in operation for several years because educators may need time to understand how to maximize the benefits of the single-sex environment.

370. See, e.g., Morgan, *supra* note 1, at 456.

371. See SALOMONE, *supra* note 17, at 9.

372. See *supra* notes 171-72 and accompanying text.

373. See *supra* notes 82-97, 127-32, 136-46 and accompanying text (discussing the research on the benefits of single-sex schools and the success of some single-sex schools).

coeducational schools would also eliminate the ability of parents and students to choose the school that they believe will best serve their needs.<sup>374</sup>

Applying a less demanding interpretation of the substantial relationship test to dual, voluntary schools does not remove these schools from constitutional scrutiny. In addition to requiring a school district to show that the single-sex nature of the schools *helps* the district achieve its educational goals and that the schools are as effective as coeducational schools, all single-sex schools should be examined to determine if they are perpetuating stereotypes or the inferiority of either sex.<sup>375</sup> The examination of dual, voluntary schools for stereotyping recognizes that all sex classifications carry the risk that the state's effort to develop educational programs has relied on "overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>376</sup> Stereotypes harm both sexes<sup>377</sup> and may be based on mistaken assumptions about those excluded from a school, such as the stereotypes about women that led VMI to exclude them<sup>378</sup> or assumptions about those included in the school, such as the exclusion of men from MUW that perpetuated the view that the nursing profession was solely for women.<sup>379</sup>

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374. See SALOMONE, *supra* note 17, at 244.

375. See Hasday, *supra* note 161, at 808-09; Morgan, *supra* note 1, at 456-57 (arguing that the all-male school proposed by the Detroit Board of Education was unconstitutional because it perpetuated stereotypes about the place that men should occupy in society).

376. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

377. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147, 150-52 (1980); *Orr v. Orr*, 440 U.S. 268, 281-83 (1979).

378. *Virginia*, 518 U.S. at 540-45.

379. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982). In fact, the burden on the sex included in a single-sex school could be so great that the school could be found unconstitutional based on the potential harm to the included sex alone, even when no member of the excluded sex alleged harm from the school. For example, vocational education had been an area in which sex stereotyping was particularly rampant when Title IX was passed and in which discrimination continues today. See NAT'L WOMEN'S LAW CTR., TITLE IX AND EQUAL OPPORTUNITY IN VOCATIONAL AND TECHNICAL EDUCATION: A PROMISE STILL OWED TO THE NATION'S YOUNG WOMEN 3 (2002); Carolyn E. Staton, *Sex Discrimination in Public Education*, 58 MISS. L.J. 323, 333 (1988). Therefore, even if Title IX did not forbid single-sex vocational schools, a court could invalidate a single-sex vocational school because the risk of stereotyping in such schools may be so high that such schools should not be permitted in light of the continued sex-based disparities and discrimination in educational opportunities in this area. See 20 U.S.C. § 1681(a)(1) (2000) (prohibiting discrimination on the basis of sex in admissions to vocational education programs).

By recommending that courts examine all single-sex schools to determine if they perpetuate stereotypes, the proposal advanced in this Article recognizes that the risk of stereotyping remains real today. The stereotyping described in Part I.C, which was uncovered in the California schools that were carefully structured to provide the same educational programs to boys and girls,<sup>380</sup> reveals that providing similar resources or benefits to both sexes is no guarantee that stereotyping will not exist. Jill Hasday astutely argues in her article on single-sex schools that courts should make a thorough “particularized investigation” of the operation of “separate but equal” single-sex schools to determine whether they deny equal citizenship status, rather than assuming that separate but equal schools automatically satisfy a school district’s obligation to provide equal protection of the laws.<sup>381</sup> It is doubtful that anyone would contend that the perpetuation of stereotypes is substantially related to the achievement of an important state objective.<sup>382</sup> Hence, careful attention and monitoring will be necessary to avoid stereotyping in all single-sex schools.<sup>383</sup>

### 3. *Solitary or Involuntary Single-Sex Public Schools*

A solitary or involuntary single-sex school should be subject to a more demanding interpretation of the substantial relationship test than should a dual, voluntary school because involuntary attendance or the denial of a single-sex school to one sex increases the risk of harm to students, as noted in Part IV.B. Given the potential harms and burdens on students from solitary or involuntary single-

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380. See *supra* notes 154-58 and accompanying text.

381. Hasday, *supra* note 161, at 808-09.

382. See *Miller v. Albright*, 523 U.S. 420, 452 (1998) (O’Connor, J., concurring in the judgment) (“It is unlikely ... that any gender classifications based on stereotypes can survive heightened scrutiny ....”).

383. The authors of the study of California’s pilot program on single-sex schools recommended a number of actions that educators could take to address stereotyping, including making deliberate efforts to dismantle gender stereotypes and ensuring that a strong theory of gender equity drives such schools. Such efforts could include statewide guidance that provides local districts with information on issues of gender bias and financial assistance for professional development regarding gender equity. DATNOW ET AL., *supra* note 100, at 6, 73-76; see Sax, *supra* note 22, at 48 (noting that “[p]rofessional development appears to play a crucial role” in the success of single-sex education).

sex schools, the school district should be required to demonstrate that involuntary attendance or the exclusion of one sex is *necessary* to achieve its objective, as the Court required the state to show in *Virginia* and *Hogan*.<sup>384</sup> To make this showing, the school district must demonstrate that the sex-neutral alternative of a coeducational school, including a coeducational school that requires some modification of its program, will not achieve the state's objective.<sup>385</sup> If a coeducational school is equally effective at achieving the objective, then the school district should be required to achieve its objective in a coeducational school. Like dual, voluntary schools, a solitary or involuntary school should also be examined to ensure that it does not perpetuate stereotypes.

In addition, if the school district provides a solitary school, the district should also be required to establish an exceedingly persuasive justification for its denial of a single-sex school to one sex. Scholars and others have offered several reasons that they contend should be sufficiently persuasive to justify a district's decision to deny one sex a single-sex school, including inadequate demand.<sup>386</sup> For example, Justice Scalia noted in *Virginia* that the district court had found that a VMI-type program in Virginia for women would attract an insufficient number of participants.<sup>387</sup>

However, lack of demand should not serve as an exceedingly persuasive justification for denying a single-sex school to one sex for several reasons. Demand does not exist in a vacuum; instead, opportunity and circumstances shape demand. For instance, demand cannot be accurately assessed for a single-sex school that has never been provided to the excluded sex, while the school district or others have undertaken extensive recruitment efforts for the included sex.<sup>388</sup> Disparities in interest under these circum

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384. See *supra* Part II.A (discussing the requirements of *Virginia* and *Hogan*).

385. See Kovacic-Fleischer, *supra* note 203, at 883 (arguing that after *Virginia*, "courts faced with gender equal protection challenges will need to consider whether institutions can make changes, even in practices not intentionally discriminatory, before ruling that the exclusion of one or the other gender is permissible").

386. See Hurd, *supra* note 266, at 35; Kimberly M. Schuld, *Rethinking Educational Equity: Sometimes, Different Can Be an Acceptable Substitute for Equal*, 1999 U. CHI. LEGAL F. 461, 485-88.

387. *United States v. Virginia*, 518 U.S. 515, 578 (1996) (Scalia, J., dissenting).

388. At the elementary and secondary school levels, the Young Women's Leadership Foundation, which founded YWLS, "is stimulating interest and supporting local efforts to

stances may reflect the stimulation of interest in one sex. School districts that maintain a single-sex school for only one sex may also influence demand by discouraging the excluded sex from attending such schools and directing them elsewhere.<sup>389</sup> Thus, any alleged lack of demand among one sex should be examined very carefully to ensure that it is not simply the result of the past denial of opportunity or of the school district or community members discouraging demand among the excluded sex. Also, demand may increase as single-sex opportunities are created, and thus, measuring the demand of either sex before a single-sex school is offered may generate inaccurate data.<sup>390</sup>

Finally, the Court should adopt an approach to assessing the validity of the lack of demand argument for single-sex schools that is similar to its approach to such an argument in its race jurisprudence. The Court rejected an argument that insufficient demand among African Americans for a law school justified Missouri's denial of such a school to the petitioner in the 1938 decision of *Missouri ex rel. Gaines v. Canada*.<sup>391</sup> Similarly, the Court should also reject a lack of demand argument as an exceedingly persuasive justification

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establish a national network of exemplary public girls' schools in other large cities." SALOMONE, *supra* note 17, at 18. The first offspring, the Chicago Young Women's Leadership School, opened in 2000 and is a charter school for middle and high school girls that was designed by prominent female corporate leaders and attorneys. *See id.* The foundation has opened five single-sex public schools for girls and one for boys. Barak, *supra* note 1, at 33. The absence of boys' schools in Chicago does not mean that boys and their parents do not have an interest in single-sex education in that city. Instead, it may merely reflect the foundation's focus on girls in that city.

389. *See* SALOMONE, *supra* note 17, at 32, 34-35 (describing how officials at Western High School in Baltimore, Maryland, and Philadelphia High School for Girls have directed interested boys to other schools).

390. *See, e.g.,* SALOMONE, *supra* note 17, at 21 (stating that in New York, the demand to attend the YWLS has "grown exponentially. For the 2002-3 year there were more than 550 applications for the 60 openings in the seventh grade and a waiting list of 1,200 for 3 ninth-grade slots."); Brown-Nagin, *supra* note 17, at 809 ("[T]he interest in single-sex education continues to be high, especially within working-class, poor, and minority communities."); Caplice, *supra* note 99, at 285 (arguing that "it could well be that there is substantial latent demand for single-sex schools currently hidden by the unavailability of affordable single-sex schools to serve that demand"); Morgan, *supra* note 1, at 389 (noting a recent "resurgence of interest in single-sex schooling").

391. 305 U.S. 337, 350-51 (1938).

for the denial of a single-sex school to one sex once a school district provides that opportunity to the other sex.<sup>392</sup>

In addition to rejecting lack of demand as a sufficient justification for denying a single-sex school to one sex, some contend that providing a single-sex school to one sex and the same benefits in a coeducational school to the other sex should satisfy a school district's equal protection obligations.<sup>393</sup> For example, when school board officials opened YWLS, they alleged that offering comparable science, math enrichment, and leadership programs in a coeducational setting would ensure the school's constitutionality.<sup>394</sup> Others contend that a single-sex school for one sex increases the options available for that sex without limiting the coeducational options of the other sex.<sup>395</sup>

On this question, the Court should also follow a course consistent with past precedent on a statutory sex discrimination claim, which held that the nondiscriminatory provision of some benefits does not cure the discriminatory denial of other benefits.<sup>396</sup> Likewise, the denial of a single-sex school to one sex should not be upheld solely on the basis that the same educational programs and opportunities provided in the single-sex school are provided in a coeducational school.<sup>397</sup> The school's single-sex nature typically would benefit some students of the excluded sex,<sup>398</sup> and thus, this denial should not be permitted without an exceedingly persuasive justification for why a single-sex school is not provided to the excluded sex.

Ultimately, a solitary single-sex public school should only be permitted under limited circumstances for two reasons. First, equal

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392. See Brake, *supra* note 257, at 21.

393. See SALOMONE, *supra* note 17, at 237 ("As long as the program has academic merit, does not promote sex stereotypes or rely on 'overbroad generalizations' concerning the abilities or preferences of girls or boys, and does not offer a 'unique' or 'extraordinary' opportunity that is not available to the other sex in a 'substantially equal' setting, then it will pass constitutional muster.").

394. See *id.* at 15.

395. Morgan, *supra* note 1, at 419.

396. *Ariz. Governing Comm. v. Norris*, 463 U.S. 1073, 1074, 1081 n.10 (1983) (holding that an employer program that provided lower payments to women violated Title VII and stating that "[a]n employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis" (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 n.8 (1982))).

397. See Pinzler, *supra* note 81, at 799.

398. See *supra* notes 82-97 and accompanying text.

protection of the laws is determined by what the state initially chooses to provide—that is, the decision maker may either choose not to provide particular benefits or to provide equal benefits to those who are similarly situated. However, once the initial decision is made to provide the benefits, the decision maker cannot deny what it provides to one on the basis of a specific trait, without sufficient justification.<sup>399</sup>

Second, girls and boys are more similar in elementary and secondary education than they are different. This is evident in the fact that “[a]nalyzes of *thousands* of studies have found that gender differences in cognitive and affective areas are *actually quite small*.”<sup>400</sup> In fact, when one considers boys and girls as separate groups, the differences within each of these groups “are much, much larger than differences *between* girls as a group and boys as a group.”<sup>401</sup> The data summarized in Part I.A reveals that girls’ and boys’ educational performances are similar and that the gaps between them are closing in many areas.<sup>402</sup> In addition, research also indicates that “[t]here are many boys who learn better in the cooperative, relational styles commonly associated with girls, and many girls who learn better in the competitive and individualistic style often associated with boys.”<sup>403</sup> In light of strong evidence that girls and boys are typically similarly situated in elementary and secondary education, different treatment should be the exception, rather than the norm.

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399. See *Frontiero v. Richardson*, 411 U.S. 677, 688-91 (1973) (invalidating a statute that treated similarly situated men and women differently); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (“By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.”); NOWAK & ROTUNDA, *supra* note 211, at 635 (“Equal protection is the guarantee that similar people will be dealt with in a similar manner.”); Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. Rev. 693, 710-11, 714 (2000).

400. Campbell & Sanders, *supra* note 80, at 36 (emphasis added); see also Campbell & Wahl, *supra* note 159, at 306-07 (“In fact, however, girls and boys are more similar than they are different. Researchers have known for many years that the differences among individual boys and among individual girls are far greater than any average differences between girls and boys.” (footnote omitted)).

401. Campbell & Sanders, *supra* note 80, at 36 (emphasis added); see BARNETT & RIVERS, *supra* note 353, at 222 (“Boys often differ more from one another in their temperaments and styles of play, than they do from girls.”).

402. See *supra* notes 51-69 and accompanying text.

403. Campbell & Sanders, *supra* note 80, at 37 (citation omitted).

This leads to the important question of when a school district should be permitted to provide a solitary single-sex school. This Article proposes that if a district can establish that persuasive educational research shows that the sex excluded from a single-sex school would not benefit from the educational opportunities in a single-sex setting, the district would have established an exceedingly persuasive justification for denying a single-sex school to one sex.<sup>404</sup> Such research could include consistent evidence, rather than a single study, that a single-sex environment disadvantages one sex, as some have contended is the case for boys.<sup>405</sup> However, the district should still be required to provide the excluded sex those educational opportunities beyond the single-sex setting that are provided to the included sex. This would limit the denial of benefits to the opportunity to receive these benefits in a single-sex setting, rather than the totality of the benefits.

Such a narrow avenue for different single-sex opportunities is consistent with the Court's opinion in *Virginia*, which implicitly suggested that when an educational opportunity is "inherently unsuitable" for one sex<sup>406</sup>—that is, that sex would not benefit from the opportunity—a persuasive case might be made for denying such an opportunity. As the number of single-sex schools continues to grow in the United States, ongoing experience in single-sex schools may develop a body of research that suggests that single-sex schools that focus on a particular subject area or methodology do not benefit one sex. If such research develops in the future, school districts should not be forced to provide a particular type of single-sex school to a sex that would not benefit from that specialized school. In the interim, if the existing solitary schools have not developed such research, they lack a sufficient justification for denying a substantially equal single-sex school to the excluded sex.

Finally, in addition to having a possible justification based on research demonstrating that one sex will not benefit from the single-sex opportunities, a school district that seeks to remedy past

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404. Cf. Cerven, *supra* note 203, at 726 (arguing that some single-sex schools for girls "do not present evidence that boys would not similarly benefit from a school of their own with small classes and individualized attention" and that "failing to offer boys the benefit of this unique educational format appears to be a violation of the Fourteenth Amendment").

405. See *supra* text accompanying notes 93-94.

406. *United States v. Virginia*, 518 U.S. 515, 541 (1996).



or present discrimination against one sex would have a sufficient justification for denying a single-sex school to one sex.<sup>407</sup> Thus, single-sex schools for girls typically enjoy a potential justification that single-sex schools for boys do not—that is, those who operate such schools should be permitted to demonstrate that this country's history of sex discrimination against women and girls adversely affects the classroom experience of girls in schools today. However, educators should be required to identify within their district sufficient probative evidence of the discrimination that they seek to rectify, rather than assuming that past discrimination is influencing their classrooms.<sup>408</sup> Furthermore, to rely on this justification, educators must also demonstrate that this remedial justification actually motivated them either in starting the school or in maintaining the school as a single-sex school.<sup>409</sup>

#### *4. Different Levels of Deference to the Judgments of Educators Should Be Applied to Each Category of Single-Sex Schools*

When applying these modifications to the substantial relationship test to dual, voluntary schools and to solitary or involuntary schools, a court must decide when it should defer to educational judgments regarding single-sex schools. Several scholars have argued that courts should defer to the decisions of local educators to offer single-sex schools, and thus, generally should not interfere with efforts to provide such opportunities.<sup>410</sup> The Supreme Court has long recognized that "local autonomy of school districts is a vital national tradition."<sup>411</sup> To uphold this autonomy, the Court often defers to the judgments of educators because educators are better equipped to make educational decisions than federal judges, who typically lack the expertise to make such decisions.<sup>412</sup>

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407. See Corcoran, *supra* note 114, at 1032.

408. See Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County, 122 F.3d 895, 910-11 (11th Cir. 1997).

409. See *supra* note 182 and accompanying text.

410. See Brown-Nagin, *supra* note 17, at 832, 848-49; Morgan, *supra* note 1, at 423; Kolb, *supra* note 206, at 398-400.

411. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977); see Edwards v. Aguillard, 482 U.S. 578, 583 (1987) ("States and local school boards are generally afforded considerable discretion in operating public schools.").

412. See New Jersey v. T.L.O., 469 U.S. 325, 342 n.9 (1985).

Although deference to the judgments of educators may be appropriate in some circumstances, the Supreme Court's opinions lack adequate guidance for equal protection cases regarding when it should defer to the judgments of educators and when it should reject them. For example, the Court in *Virginia*, in no uncertain terms, chastised the Fourth Circuit for reviewing the VWIL plan under a deferential analysis by stating that "[t]he Fourth Circuit *plainly erred* in exposing Virginia's VWIL plan to a deferential analysis, for all 'gender-based classifications today' warrant 'heightened scrutiny.'"<sup>413</sup> The Court was also critical of the district court's reliance on "'findings' on 'gender-based developmental differences'" that "restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female 'tendencies.'"<sup>414</sup> The Court rejected these findings, noting that it had previously cautioned lower courts to examine statements closely regarding the tendencies of women and men, such as those proffered by Virginia and accepted by the district court.<sup>415</sup> The Court's unequivocal rejection of these findings reveals that deference to educational judgments may not always be consistent with protecting the equal protection rights of those who may not fall within the typical paradigm for their sex, but who nevertheless must receive the same protection of their right to be treated as an individual.

The strong rebuke of the Fourth Circuit in *Virginia* and the lack of deference to VMI's judgments stands in sharp contrast to the deference the Court in *Grutter v. Bollinger* gave to the University of Michigan Law School's "educational judgment that ... diversity is essential to its educational mission."<sup>416</sup> The Court applied strict scrutiny in *Grutter*,<sup>417</sup> an even more demanding standard than intermediate scrutiny; nevertheless, the Court deferred to the law school's judgment and explained that deference is consistent with its practice of deferring to the academic decisions of university officials,

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413. *United States v. Virginia*, 518 U.S. 515, 555 (1996) (emphasis added).

414. *Id.* at 541 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1434-45 (W.D. Va. 1991)).

415. *See id.*

416. 539 U.S. 306, 328 (2003).

417. *Id.* at 326-27.

as long as those decisions are consistent with constitutional guarantees.<sup>418</sup>

Both the *Virginia* and *Grutter* decisions evaluate educational judgments of university officials, which traditionally have "a special niche in our constitutional tradition" because of the important goals of public education and the extensive rights to freedom of speech and thought at the postsecondary level.<sup>419</sup> However, the Court's deference to educational judgments has also extended to the elementary and secondary level.<sup>420</sup> Other courts reviewing such decisions will likely remain confused about when it is appropriate to defer to the judgments of educators under the Equal Protection Clause, as the Court did in *Grutter v. Bollinger*, and when to reject educational judgments, as the Court did in *Virginia*. Surely, the deference cannot turn on whether an individual's constitutional rights were violated, because the degree of deference will often be determinative of that question.

A comprehensive development of how courts have and should determine when deference to educational judgments is appropriate is beyond the scope of this Article.<sup>421</sup> In applying this Article's proposal, the degree of deference should vary according to the structure of the single-sex schools. Considerable deference should be given to the decision of a school district to offer dual, voluntary single-sex schools because these schools are less likely to harm either sex, and the structure of such schools achieves some of the work of intermediate scrutiny. Deference is also appropriate in such circumstances because single-sex education has received continuing support as an appropriate pedagogical approach,<sup>422</sup> and the school district is not requiring that any child be classified on the basis of sex. Instead, the student or parent volunteers to be classified based

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418. *See id.* at 328.

419. *Id.* at 329.

420. *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985).

421. For possible approaches, see Ryan, *supra* note 325, at 1426, which contends that the Supreme Court's approach to determining when courts should defer to school officials requires a court "to identify the core, universal function of schools, and to use this function as a guide to determine the circumstances in which schools will be granted deference," and Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 471-72 (1998), which proposes a model for an appropriate level of judicial deference for educational decisions.

422. *See supra* notes 82-98 and accompanying text.

on the student's sex. The opportunity to attend substantially equal single-sex schools on a voluntary basis provides greater assurance that the "school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution."<sup>423</sup> Therefore, judicial deference to such decisions will provide adequate flexibility for beneficial educational programs, while still providing sufficient oversight to uncover harmful stereotyping.

In contrast, less deference should be given to educational judgments when the school district denies one sex the opportunity to attend a single-sex school or when attendance at a single-sex school is involuntary. Deference is less appropriate for solitary schools because the denial of a benefit to one sex is more likely to be based on the types of overly broad generalizations that the Court has found unconstitutional in other sex discrimination cases.<sup>424</sup> Similarly, an involuntary sex classification runs a higher risk that the classification will not serve its purpose in some instances than a voluntary classification that may be avoided by the student or parents. Therefore, less deference for involuntary single-sex schools is appropriate.

In conclusion, Part V explores how adopting this proposed modification to intermediate scrutiny will result in optimal results for single-sex public schools.

#### V. MODIFYING AND SYSTEMATIZING INTERMEDIATE SCRUTINY TO ACHIEVE OPTIMAL RESULTS FOR PUBLIC SINGLE-SEX ELEMENTARY AND SECONDARY SCHOOLS

Single-sex public elementary and secondary schools currently exist in over one-third of the states.<sup>425</sup> Increased flexibility at the federal level for single-sex public schools and the growing interest in single-sex education create conditions in which single-sex public schools will increasingly become more common in the United

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423. *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).

424. *See supra* notes 175-77 and accompanying text.

425. *See Minow, supra* note 1, at 818. A tally of the states with single-sex schools listed on the NASSPE website indicates that eighteen states have single-sex public schools. *See NASSPE, Schools, supra* note 5.

States.<sup>426</sup> In light of the growing number of single-sex schools, it is important for educators and the Supreme Court to have clear and consistent constitutional standards with which to evaluate these schools.<sup>427</sup>

Clear standards are presently lacking because the Court's intermediate scrutiny jurisprudence is subject to a variety of disparate interpretations that could be interpreted too restrictively or too permissively to ensure the best possible results for single-sex public schools.<sup>428</sup> A very restrictive interpretation would stifle the development of single-sex schools, while a permissive standard could allow educators to favor the needs of one sex over the other. Scholars have also not provided effective proposals that would ensure that school districts appropriately address the educational needs of both sexes, while ending the confusion in the Supreme Court's case law.

This Article's proposal seeks to address these concerns by modifying and systematizing intermediate scrutiny when applied to single-sex public schools, thereby providing clear guidance on the constitutional obligations of these schools.<sup>429</sup> By systematizing intermediate scrutiny's application to single-sex public schools, its current indeterminacy is minimized. The increased consistency is desirable because, as Cass Sunstein perceptively observes, "[t]he Chancellor's foot is not a promising basis for antidiscrimination law."<sup>430</sup> The proposal's clarity and consistency should place intermediate scrutiny's application to single-sex public schools within clear parameters that are more characteristic of the rule of law. As a result, courts are more likely to reach similar conclusions in

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426. See Minow, *supra* note 1, at 830-31; Michael A. Fletcher, *Single-Sex Education Gets Boost*, WASH. POST, May 9, 2002, at A1.

427. See Minow, *supra* note 1, at 816 ("The topic of some urgency is single-sex education in kindergarten through high school .... For we are in the midst of a not-so-explicit policy shift: now is the time to raise attention and honestly assess it.").

428. See *supra* 243-59 and accompanying text.

429. See Brake, *supra* note 257, at 14 (arguing that "we need a constitutional standard that is clear for the lower courts").

430. Sunstein, *supra* note 15, at 78; see NOWAK & ROTUNDA, *supra* note 211, at 834 (arguing that intermediate scrutiny is no more than "*ad hoc* judgments based upon Justices' perceptions of the gender classification at issue in each case"); Deutsch, *supra* note 175, at 188 (arguing that the results in intermediate scrutiny cases "turn on how the Court and the individual Justices view the underlying facts and policies, rather than on the verbalization of the standard of review").

assessing such schools, thereby preventing the variation of equal protection rights from school district to school district and from state to state.

In contrast to other proposals, this Article's proposal recognizes that the structure of single-sex schools affects the need for judicial skepticism of single-sex schools. More skepticism and a higher constitutional hurdle are appropriate when a school district provides a solitary or involuntary school because such schools increase the risk of harm to students. The proposed modifications thereby ensure that the greatest scrutiny is applied when a school district is more likely to be denying the equal protection rights of schoolchildren by treating girls and boys differently or by forcing an individual to be classified on the basis of sex. In contrast, when a school district provides dual, voluntary schools, schoolchildren who want to avoid the sex classification have the option to do so. In modifying the level of judicial skepticism based on the structure of single-sex schools, this Article's proposal achieves some of the same benefits of the Court's three-tiered approach to equal protection that tries "to ensure that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work."<sup>431</sup>

By also requiring districts to examine how they structure single-sex schools, the proposal ensures that a school district will develop such schools based on evidence about the current educational problems, needs, and barriers that educators are attempting to address, and about how educators can best address those needs through single-sex schools.<sup>432</sup> Under the proposal, districts that consider offering single-sex schools must examine whether both sexes will benefit from single-sex schools and must establish an exceedingly persuasive justification for not offering substantially equal single-sex schools to both sexes. This ensures that the constitutional requirements for such schools do not permit disparate treatment of girls and boys, absent a persuasive justification for that treatment because girls and boys are typically similarly situated with respect to educational matters. Currently, a substan-

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431. Sunstein, *supra* note 15, at 78.

432. See Wexler, *supra* note 247, at 334 (arguing that intermediate scrutiny forces legislators to examine the justifications for adopting a certain justification and to consider whether and how well the proposed solution will work).

tial percentage of the single-sex schools do not provide similar opportunities to both sexes;<sup>433</sup> however, whether these districts have a sufficiently persuasive reason for denying a single-sex school to only one sex remains to be seen.

Adoption of this proposal by the courts would put educators on notice that a solitary or involuntary single-sex school must have a much tighter nexus between the ends and means adopted, and be more effective than other sex-neutral alternatives. On the other hand, the more permissive interpretation of intermediate scrutiny's substantial relationship test for dual, voluntary schools allows educators to develop substantially equal single-sex schools for both sexes with less fear of such schools being found unconstitutional. When assessing the constitutionality of dual, voluntary schools, the proposal in this Article also avoids applying an unnecessarily heavy presumption in favor of coeducational schools, in light of evidence that coeducation does not necessarily prevent the subjugation of either sex.<sup>434</sup>

This Article's proposal is designed to minimize any obstacles to its adoption by the Supreme Court by drawing on existing Supreme Court jurisprudence when appropriate. Thus, it builds on the Court's recent modification of its equal protection jurisprudence in *Grutter v. Bollinger*, which implicitly recognized the appropriateness of modifying a constitutional standard when the classification under review demands a deviation from past standards to reach optimal results. When appropriate, the proposal is also consistent with *United States v. Virginia*, while recognizing that "Virginia left important questions unanswered."<sup>435</sup> For example, the Court noted in *Virginia* that "[s]everal amici [had] urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity."<sup>436</sup> The Court responded that it does "not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities."<sup>437</sup> The later statement may indicate that

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433. See *supra* notes 121, 133 and accompanying text.

434. See *supra* notes 268-76 and accompanying text.

435. See Morgan, *supra* note 1, at 458.

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

437. *Id.* (emphasis added).

the Court will view the separate distribution of substantially equal educational benefits in single-sex schools for both boys and girls with much less skepticism than it viewed Virginia's denial of educational opportunities to females.

In contrast, the Court's demanding interpretation of the intermediate scrutiny test in *Virginia* also reveals that the Court will look with tremendous skepticism upon disparities in single-sex educational opportunities, and that the same skepticism and demanding interpretation of the substantial relationship test present in *Virginia* will and should be required in a case in which a single-sex school is denied to only one sex.<sup>438</sup> A school district's provision of a single-sex school to address an educational need would not be substantially related to addressing that need if it failed to meet the needs of students of the other sex who are similarly situated—that is, if their needs also would be met in a single-sex school.<sup>439</sup> However, this Article's proposal would not apply this demanding interpretation of the substantial relationship test to all single-sex public schools because that would undoubtedly deter educators from opening such schools.

This Article's proposal also seeks to strike the proper allocation of constitutional responsibility between educators, who have the greatest expertise in making educational judgments, and judges, who have more expertise in determining when disparate treatment is unwarranted. By allowing greater constitutional latitude for dual, voluntary single-sex schools, the proposal recognizes that courts may lack sufficient competence to second guess the judgment of educators that such educational opportunities are beneficial and thus, the courts will share with educators and families the responsibility for protecting the constitutional rights of schoolchildren.<sup>440</sup> In

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438. See *Virginia*, 518 U.S. at 545-46.

439. See *Califano v. Westcott*, 443 U.S. 76, 89 (1979) ("Congress may not legislate 'one step at a time' when that step is drawn along the line of gender, and the consequence is to exclude one group of families altogether from badly needed subsistence benefits.").

440. By encouraging educators and courts to share responsibility for protecting the rights of schoolchildren, the proposal in this Article incorporates the wisdom of Richard Fallon who argued that

the Court must assess the competence of courts to conduct particular kinds of inquiries; the costs that particular tests are likely to engender ... ; and the political fairness of having courts resolve different kinds of questions on more or less deferential bases in the face of reasonable disagreements among the



contrast, when a school district provides an involuntary or solitary single-sex school, the application of a demanding standard focuses the courts' attention on the likelihood that educators may not be treating similarly situated students in a similar manner. The application of the more demanding standard does not prohibit all efforts to provide distinct educational opportunities to boys and girls; instead, it merely requires educators to provide exceedingly persuasive justifications for why they are not providing similar single-sex opportunities for boys and girls who are similarly situated.<sup>441</sup> While judiciaries lack the educational expertise to overrule the judgment of some educators that single-sex schools benefit students, courts can and should closely scrutinize cases in which school districts offer disparate opportunities to similarly situated girls and boys.

Ultimately, the foundation for this Article's proposal rests on several principles regarding the nature of equal protection. It embraces the theory that government should have greater latitude to permit citizens to recognize their sex—when they believe that it may benefit them—than government should have to deny citizens benefits or opportunities on the basis of sex or to classify citizens on an involuntary basis.<sup>442</sup> In addition, neither courts nor educators should casually stray from the bedrock principle that the govern-

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citizenry ....

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When judicial competence is lacking or the costs of particular forms of judicial involvement would be great, the Court does not necessarily betray its obligation of constitutional fidelity if it fails to craft judicially enforceable rules that fully protect constitutional norms. The Court can share responsibility for implementing the Constitution with other institutions. Conversely, when judicial enforcement seems practically necessary, and a bright-line prophylactic rule will work most effectively at relatively low cost, not every doctrine that "over-enforces" constitutional norms reflects a constitutional betrayal.

Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 66 (1997) (footnotes omitted).

441. See *supra* notes 386, 399-406 and accompanying text.

442. Martha Minow has observed that "[e]specially when used by decisionmakers who award benefits and distribute burdens, traits of difference can carry meanings uncontrolled and unwelcomed by those to who they are assigned. Yet denying those differences undermines the value they may have to those who cherish them as part of their own identity." Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 12 (1987).

ment must treat citizens as equals,<sup>443</sup> even as society tries to remedy those instances in which equality has been historically denied. At bottom, the proposal wisely fears any potential danger from offering similar, voluntary opportunities for single-sex schools for girls and boys far less than it fears disparate or involuntary single-sex opportunities.<sup>444</sup> Society is collectively harmed when a girl or a boy is denied an opportunity from which she or he would benefit simply because of her or his sex. “[I]nequalities prevent people from developing their potentials and hence deprive society of innumerable benefits.”<sup>445</sup> Greater constitutional latitude for equal treatment recognizes that “the entire society is affected by the educational opportunities and achievements of each new generation, and that no one can be wasted.”<sup>446</sup>

Undoubtedly, no approach to determining the constitutionality of single-sex public schools will achieve perfect outcomes. This Article’s approach is no exception because it will prohibit some single-sex public schools that would benefit some students. However, on balance, the approach achieves superior results compared to the two principal scholarly approaches and the variety of disparate approaches that can be drawn from the Supreme Court’s current intermediate scrutiny jurisprudence. The proposal also raises some questions of its own, such as whether the modifications could be applied to other sex classifications. Those questions do not undermine the fact that the proposed modifications are a substantial step toward clarifying a vague and indeterminate standard.

By allowing some room within the Constitution’s confines for single-sex schools, this Article agrees with those who contend that what was once used to subjugate women may be used to empower them.<sup>447</sup> This country’s history of sex discrimination, including the operation of single-sex and coeducational schools that focused on

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443. See *TRIBE*, *supra* note 234, at 1437-38 (noting that the Equal Protection Clause requires the government to treat similarly those who are similarly situated and to acknowledge relevant distinctions when persons are differently situated).

444. Erwin Chemerinsky has observed that “human experience strongly suggests that the danger of erroneous discrimination incomparably exceeds the danger of erroneous uniformity.” Chemerinsky, *supra* note 261, at 590.

445. *Id.* at 587.

446. Martha Minow, *Reforming School Reform*, 68 *FORDHAM L. REV.* 257, 282 (1999).

447. See Morgan, *supra* note 1, at 459.

preparing girls for marriage, motherhood, or poorly paid positions, should not prevent the citizenry or a state actor from acknowledging sex when that acknowledgment may enable individuals to achieve their full potential.<sup>448</sup> While some argue that single-sex schools for girls will always be inferior, some of the newest single-sex schools for girls have achieved remarkable results in urban areas where educators have struggled for years to improve outcomes.<sup>449</sup> When these schools increase the graduation rates for girls, improve their academic performance, and focus their attention on their professional goals, rather than their popularity with boys, these schools can empower, rather than subjugate, girls and women. The shackles of the country's history with single-sex schools should not limit the opportunities for those girls or boys who would benefit from single-sex education today.<sup>450</sup> The modifications proposed in this Article permit educators to develop single-sex schools among the array of public school choice reforms, while maintaining a commitment to equality.<sup>451</sup>

The country should neither water down constitutional obligations in the name of improving educational outcomes, nor erect an impenetrable barrier in the way of efforts to improve educational achievement. Equal protection seeks to ensure that the government "treat[s] each individual with equal regard as a person,"<sup>452</sup> which requires the government to treat similarly those who are similarly situated and to acknowledge relevant distinctions when persons are differently situated. The proposal presented in this Article would provide the optimal protection for students' equal protection rights by focusing scrutiny on solitary or involuntary single-sex schools and limiting scrutiny of dual, voluntary single-sex schools. If educators develop public single-sex elementary and secondary schools, they should act with a clear understanding of their

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448. See *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) ("Sex classifications may be used ... to advance full development of the talent and capacities of our Nation's people.").

449. See *supra* notes 134-46 and accompanying text.

450. Cf. Minow, *supra* note 446, at 288 ("What if school choice reforms afforded the occasion for building on the past while undertaking bold experiments. What if we recognized, as Audre Lorde put it, that '[w]e have the power those who came before us have given us, to move beyond the place where they were standing.'" (alteration in original)).

451. See *id.* at 280 (noting that some new reforms "could undermine equality goals unless there are direct efforts to maintain and enforce them").

452. TRIBE, *supra* note 234, at 1437-38.

constitutional obligations. This understanding should encourage educators to develop beneficial educational programs and prevent the country from straying from its commitment to equal educational opportunity as public single-sex elementary and secondary schools continue to open.<sup>453</sup>

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453. See NASSPE, Schools, *supra* note 5 (identifying four single-sex schools that may open in 2006).