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## WHAT REMAINS OF PUBLIC CHOICE AND PARENTAL RIGHTS: DOES THE *VMI* DECISION PRECLUDE EXCLUSIVE SCHOOLS OR CLASSES BASED ON GENDER?

### INTRODUCTION

On June 26, 1996, the U.S. Supreme Court ruled that the Virginia Military Academy (VMI) violated the equal protection clause of the Fourteenth Amendment because it was a state-supported institution with a male-only admissions policy.<sup>1</sup> In a 7-1 decision (Justice Thomas recused himself from the case),<sup>2</sup> the Court held that the state failed to demonstrate an "exceedingly persuasive" justification for barring women from VMI.<sup>3</sup> The decision further held that Virginia failed to remedy the constitutional violation when it established a separate, but unequal, women's program at a nearby all-women's college.<sup>4</sup> Justice Scalia, in his dissent, lamented that this decision threatens single-sex education in general.<sup>5</sup> Although the majority did not rule that all publicly supported, single-sex education programs were necessarily unconstitutional, Justice Scalia warned that would be the effect of the decision, because few officials would be willing to risk the high cost of a lawsuit and the high risk of losing.<sup>6</sup>

The *VMI* decision raises several important issues for public schools. For the past several years, some school districts around the nation have implemented experimental pilot programs for students based on their race or sex. Some programs are aimed at strengthening academics in response to concerns about deficiencies in our public education system. Other programs focus on building character because of a perception that today's youth lack self-respect and respect for others. If Justice Scalia is correct, these innovative programs may be in jeopardy if *VMI* is expanded and applied to public schools.

The most extensive experiment in single-gender classes is in Baltimore, where boys and girls attend separate classes in more than a dozen schools.<sup>7</sup> In California, Governor Wilson recently proposed single-gender public schools;<sup>8</sup> and in his 1997-98 budget, there is a five million dollar appropria-

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1. United States v. Virginia, 116 S. Ct. 2264 (1996).

2. Justice Thomas' son, Jamal, attends VMI.

3. *VMI*, 116 S. Ct. at 2276-80.

4. In discussing the parallel program for women at Mary Baldwin College, the Virginia Women's Institute for Leadership (VWIL), the majority held that "Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education . . . Virginia's remedy does not match the constitutional violation." *Id.* at 2286.

5. *Id.* at 2306.

6. *Id.* at 2305.

7. Janny Scott, *Boys Only: Separate But Equal? Does Placing Black Youths in Their Own Classes Help Them Do Better?*, L.A. TIMES, Jan. 15, 1994, at A1.

8. *Southern California Voices / A Forum for Community Issues: Platform / Youth Opinion; Same-Sex Public Schools: 'Boys and Girls Learn Differently,'* L.A. TIMES, Feb. 3, 1996, at B7.

tion for that purpose.<sup>9</sup> In Detroit, a plan for all male academies was shut down by threat of a lawsuit; instead, the school district implemented African-Centered Academies, which are open to boys and girls.<sup>10</sup> In Savannah-Chatham County, Georgia, the school district considered boys-only classes, but opted instead, for "heritage immersion" programs.<sup>11</sup> In Virginia, Governor Allen appointed a strike force to review government operations, including education, and recommended the state Department of Education study the potential advantages of single-sex schooling.<sup>12</sup>

The concern with these alternative programs is that they may promote segregation and undo the progress that has been made towards equality in education. Thus, tension exists between the Court's role in ensuring equal protection on the one hand, and citizens' desire that their elected officials remedy the deficiencies in public education on the other. Although education has traditionally been a state function, the Court's holding in *VMI* makes it more difficult for school districts to design and implement innovative educational programs based on gender.

This Note examines the current state of the law relative to elementary and secondary education in light of the *VMI* decision. Specifically, where does this leave public choice and parental rights regarding education?

Part One of this Note summarizes the *VMI* decision. It focuses on Justice Scalia's dissent—particularly, his animosity toward a heightened test for gender classifications and his prediction that single-sex education is dead. To help put the *VMI* decision in context, Part One presents a case history of the types of equal protection issues that the courts have addressed with respect to public education. By viewing the *VMI* decision along an evolutionary continuum, two issues emerge. First, there is the possibility that today's popular experimental programs could result in segregated classrooms, reverting to pre-*Brown* days. And second, there is uncertainty about the proper level of review for cases involving gender classification.

Part Two examines the current state of the law governing gender classifications in public education. A myriad of laws govern our public education system from the United States Constitution to federal statutes, and state laws.<sup>13</sup>

9. Richard Lee Colvin, *The Governor's 1997 Budget*, L.A. TIMES, Jan. 10, 1997, at A3.

10. Valarie Basheda, *Detroiters May Boycott the NAACP*, DETROIT NEWS, Sept. 9, 1991, at B3.

11. Scott, *supra* note 7. Heritage immersion programs are multicultural programs geared toward students in a particular community or school district. For example, schools in predominantly Black, inner city areas would teach Black history as part of the curriculum and would make extra efforts to attract black teachers to serve as role models. Other school districts might have "Latino-centric" studies. Ultimately, the idea is to expand these programs to teach about contributions made by all races and ethnic groups, and not cater to a single minority. *Id.*

12. Jon Glass, *Separated, Boys and Girls May Learn Better; Controversial Approach Limits Intimidation, Classroom Distractions*, VA-PILOT & LEDGER-STAR, Jan. 4, 1995, at A1.

13. U.S. CONST. amend. XIV, § 1; Title IX of the Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (1996); Equal Educational Opportunities Act of 1974 § 201, 20 U.S.C. §§ 1701-1703 (1996).

Part Three surveys different single-gender educational programs, whether the segregation is intended when the program is initiated, or merely the outcome of a pedagogical goal. This section demonstrates the variety of forms single-gender programs can take.

Part Four compares and contrasts the alternative single-gender programs. Here, the discussion focuses on why certain programs can pass constitutional muster, while others cannot.

Finally, Part Five concludes that single-gender programs can exist and be successful. Over the past several decades, sacrifices have been made to achieve equal opportunities in education. Today, some school districts are implementing innovative programs to improve public education and help move young people into the twenty-first century. But in the process of going forward, schools must be diligent and protect against equal protection violations and taking steps backwards. In sum, Justice Scalia's concern over the end of single-gender education is unfounded. For now, the *VMI* decision seems to be limited to a situation where males could participate in a very unique educational opportunity, while females had no opportunity for an equivalent educational experience, not even one that came close.<sup>14</sup>

## I. A LOOK AT THE PAST: EQUAL PROTECTION ISSUES IN PUBLIC EDUCATION

### *A. The Fourteenth Amendment and Equal Protection*

The Fourteenth Amendment's guarantee of equal protection sounds simple: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>15</sup> Yet more than one hundred years after its ratification, it can be difficult to apply and its meaning remains open to debate. The Supreme Court has identified three standards of review, or tests, in applying the equal protection clause, ranging from deferential to strict.

The standard equal protection analysis applicable to most government classifications asks whether laws that treat people differently serve a legitimate state purpose. In other words, equal protection requires reasonableness in legislative and administrative classifications.<sup>16</sup> To provide content, equal protection demands "some rationality in the nature of the class singled out."<sup>17</sup> "Rationality" is tested by the classification's ability to serve the purposes intended by the legislative or administrative rule: "The courts

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14. In fact, Justice Ginsburg appeared to agree with amici that it might be appropriate for the government to encourage diverse educational opportunities, including single-sex schools. She seemed to leave the door open for such programs when she wrote, "[w]e do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized . . . as 'unique . . .'" *VMI*, 116 S. Ct. at 2276 n.7.

15. U.S. CONST. amend. XIV, § 1.

16. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2, at 1439 (2d ed. 1988).

17. *Id.* at 1440 n.2 (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966)).

must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . . .”<sup>18</sup> Under the “rational basis test,” a law is upheld if the government shows a rational relationship between the classification and a legitimate purpose. This test gives great deference to legislative and administrative decisions. Most laws fall in this category.<sup>19</sup>

At the other extreme is the “strict scrutiny” test. Under this standard, a law is upheld only if it is necessary to achieve a compelling government interest. Under strict scrutiny, the means to achieve the end must be narrowly tailored and the Court will always consider whether less burdensome means can achieve the same purpose. Race-based classifications are reviewed under this standard.<sup>20</sup>

Between the rational basis and strict scrutiny tests is the “intermediate” standard of review where a law will be upheld if it is substantially related to an important government purpose. Historically, classifications based on gender have been reviewed under this standard.<sup>21</sup> In practice, the three categories are not strictly adhered to, because equal protection analysis is sometimes viewed along a continuum rather than three discrete categories. One author of a well-known treatise noted that Court decisions under the intermediate standard “appear to be ad hoc judgments based upon justices’ perceptions of the gender classification at issue in each case.”<sup>22</sup>

Whether one views equal protection standards of review as three discrete categories or as classifications along a continuum, one issue stands out. Since *VMI*, it remains to be seen whether gender classifications will continue to be subject to intermediate scrutiny as we have known it, or if the Court’s use of the term “exceedingly persuasive justification” signals a heightened form of

18. *Id.* at 1440 n.3 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964)).

19. When legislation addresses a social or economic policy, a court can reasonably conclude of a reasonable public purpose for the classification: *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (upholding a New York City personnel policy which precluded known methadone users from being employed by the transit authority); *Railway Express v. New York*, 336 U.S. 106 (1949) (upholding a New York traffic regulation which banned ads on commercial vehicles but not on owner-operated vehicles); *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (upholding an Oklahoma statute prohibiting opticians from fitting eyeglasses without a new prescription, but exempting ready-to-wear eyeglass distributors); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding a Minnesota law banning plastic milk containers while encouraging use of paper cartons).

20. Some examples of classifications that are subject to strict scrutiny are ethnic and national origin classifications, and classifications affecting fundamental rights.

21. The Court established the intermediate level of scrutiny for gender-based classifications in *Craig v. Boren*, 429 U.S. 190 (1976) (holding unconstitutional a state law that prohibited the sale of 3.2% “near beer” to males under the age of 21 and to females under the age of 18, even though statistics showed that males had a higher incidence of alcohol-related driving arrests). The Court held that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Craig*, 429 U.S. at 197.

22. ROTUNDA AND NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE* § 18.23, at 277 (2d ed. 1992 & Supp. 1996).

the test.<sup>23</sup>

*B. A Case History—Equal Protection and Education:  
The Debate is Still Going Strong*

It is virtually impossible to apply an originalist's interpretation<sup>24</sup> to the Fourteenth Amendment with respect to education. In 1868, who could predict the role of formal education in our society? By 1954, however, its importance was clear. In its landmark decision *Brown v. Board of Education of Topeka*,<sup>25</sup> the Court recognized that:

[E]ducation is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>26</sup>

Even before *Brown*, the Court decided in *Sweatt v. Painter*<sup>27</sup> that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities."<sup>28</sup> In *Sweatt*, the plaintiff was denied admission to the University of Texas Law School simply because of his race. When the state established a parallel law school for Blacks, the Court compared the offerings of the two facilities<sup>29</sup> and found that they were not substantially equal.<sup>30</sup> While the tangible features of the two schools were found to be unequal, the Court placed great emphasis on certain intangibles "incapable of objective measurement."<sup>31</sup> The Court held that the equal protection clause required

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23. The "exceedingly persuasive justification" language was used in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) without raising the same concerns as the *VMI* decision. See discussion *infra* note 45 and accompanying text.

24. An originalist is one who believes he knows the intent of the drafters of the Constitution and, thus, can interpret the Constitution according to their original intent. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 785-86 (3d ed. 1996).

25. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

26. *Id.*

27. *Sweatt v. Painter*, 339 U.S. 629 (1950).

28. *Id.* at 635 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

29. *Id.* at 632. Among the Court's considerations were the University of Texas Law School had a faculty of sixteen full-time and three part-time professors, a student body of 850, a library of more than 65,000 volumes, and was considered one of the nation's top-ranked law schools. The newly established law school for Negroes had five full-time faculty members, a student body of 23, and a library of 16,500 volumes; moreover, the school lacked accreditation. *Id.*

30. *Id.* at 633.

31. *Id.* at 634. Some advantages of the University of Texas Law School were reputation of the faculty, experience of the administration, the influential alumni network, and the school's standing and prestige in the community. *Id.*

that the plaintiff, Mr. Sweatt, be admitted to the University of Texas Law School.<sup>32</sup>

In a more modern case, the Court was given an opportunity to decide whether the Constitution and the laws of the U.S. require every public school, in every public school system in the nation, be coeducational. In *Vorchheimer v. School Dist. of Philadelphia*,<sup>33</sup> a female high school student was denied admission to an all-male academic high school. In Philadelphia, the school district offered four types of senior high schools: academic, comprehensive, technical, and magnet. There were two academic schools, one for males and one for females. These schools, which offered college prep curriculums, were not neighborhood based; they accepted students from throughout the city. The Third Circuit held that where attendance at either of the two gender-segregated public high schools was voluntary, and educational opportunities offered at the two schools were essentially equal, admission requirements based on gender classification did not violate the equal protection clause.<sup>34</sup> On appeal, without writing an opinion, an equally divided Supreme Court affirmed the judgment of the lower court (Justice Rehnquist did not participate).<sup>35</sup>

The Third Circuit ruled that the Philadelphia School District provided excellent educational facilities for both sexes, that there was a legitimate educational policy being served by having single-sex high schools, and that the primary aim of the school system is to provide a high quality education.<sup>36</sup> The court did not decide the "wisdom of segregating boys and girls in high school";<sup>37</sup> they were concerned with the constitutionality of such a plan and found "once that threshold has been passed, it is the school board's responsibility to determine the best methods of accomplishing its mission."<sup>38</sup>

In dissent, Circuit Judge Gibbons was incredulous. He compared the voluntariness and equality of this dual system to a "twentieth-century sexual

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32. *Id.* at 636.

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

34. *Id.*

35. *Id.*

36. *Vorchheimer*, 532 F.2d at 887-88.

37. *Id.* at 888.

38. *Id.* *But see* EDUCATION AND EMPLOYMENT ISSUES, U.S. GEN. ACCT. OFF., PUBLIC EDUCATION: ISSUES INVOLVING SINGLE-GENDER SCHOOLS AND PROGRAMS 13 (1996) [hereinafter GAO]. In 1983, female students again sought admission to Central High School and sued in the Common Pleas Court of Philadelphia County. The court ordered the admission of the girls to Central. The court found that *Vorchheimer* did not bar this claim because of inadequate representation by plaintiff's counsel in *Vorchheimer*. In *Vorchheimer*, plaintiff's counsel did not disclose evidence to the court, which was relevant here. For example, the boys' school was almost three times larger, its library had about twice as many books, the boys' school had a computer lab, and its graduates received almost twice the amount of money for college scholarships. Central High School is currently coeducational; the High School for Girls is open to students of both sexes, but no boys are enrolled. *Id.*

equivalent to the *Plessy* decision.”<sup>39</sup> Judge Gibbons wrote, “The majority opinion ironically emphasizes that Vorchheimer’s choice of an academic high school was ‘voluntary.’ It was ‘voluntary,’ but only in the same sense that Mr. Plessy voluntarily chose to ride the train in Louisiana.”<sup>40</sup>

Another case often relied on in discussing gender classifications and education is the Supreme Court’s 1982 decision in *Mississippi Univ. for Women v. Hogan*.<sup>41</sup> In that case, Mr. Hogan, a registered nurse, applied for admission to the Mississippi University for Women (MUW) School of Nursing with the intent of earning a Bachelor’s degree. Since its founding in 1884, MUW School of Nursing was a state-supported women’s school and the only state-supported nursing school in Columbus. While the school would not allow Mr. Hogan to enroll for credit, it did allow men to audit classes; thus, the school was not, strictly speaking, a single-gender nursing school.

The state defended its admissions policy on the grounds that its program compensated for discrimination against women and was an educational affirmative action program.<sup>42</sup> Unpersuaded, the Court used the predominance of women in the nursing profession as evidence that affirmative action was unnecessary.<sup>43</sup> Moreover, the Court found that MUW’s policy of excluding men perpetuated the stereotypical view of nursing as a woman’s job.<sup>44</sup> Finding that the state failed to establish an “exceedingly persuasive justification” to sustain the gender-based classification, the Court held that MUW’s policy of denying males admission to the School of Nursing for credit violated the equal protection clause.<sup>45</sup>

A review of these cases leading up to the present time demonstrates the issues that courts have been asked to address relative to public education. Thus, the *VMI* case was not so unique, as it encompassed many of the same concerns: the importance of education, the concept of separate but equal, and the true meaning of choice. In *VMI*, the Supreme Court concluded that single-sex education has pedagogical benefits and diversity in public education can serve the public good.<sup>46</sup> However, the Court said “without

39. *Vorchheimer*, 532 F.2d at 889.

40. *Id.* In *Plessy v. Ferguson*, 163 U.S. 537 (1896), Mr. Plessy (seven-eighths white, but “colored” nonetheless) was prosecuted under a Louisiana statute when he refused to vacate a railroad car reserved for Whites. The Supreme Court upheld the constitutionality of the statute which required railroad companies to provide separate but equal accommodations for White and colored races.

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

42. *Id.* at 727. Claiming to be an affirmative action program would place this program within a lawfully-accepted exception which allows remedial action for past discrimination.

43. *Id.* at 729.

44. *Id.*

45. *Id.* at 731. In its rationale, the Court hinted at a heightened form of intermediate scrutiny when it required the state to show “an exceedingly persuasive justification” for the challenged classification.

46. *VMI*, 116 S. Ct. at 2276. The Court cited *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995); and *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (Kennedy, J., concurring).



equating gender classifications, for all purposes, to classifications based on race or national origin,<sup>47</sup> the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men).<sup>48</sup>

In over twenty cases since 1971, government classifications based on sex have been subjected to heightened scrutiny evidencing a "strong presumption that gender classifications are invalid."<sup>49</sup> Thus, more than forty years after *Sweatt* and *Brown*, questions of equal protection in public education are still being decided. Yet, while racial classifications are clearly subject to strict scrutiny, the application of intermediate scrutiny to gender classifications is less clear and court holdings provide little guidance for future decisions.<sup>50</sup> The issues today demonstrate that this is a very unsettled area of law, open to broad interpretation and debate.

### C. *Old Traditions Die Hard*—U.S. v. Virginia

#### 1. VMI Procedural History

The Supreme Court's 1996 *VMI* decision culminated a six-year battle for gender equality in education in Virginia. In 1990, a female high school student filed a complaint with the Justice Department alleging an equal protection violation because of VMI's male-only admissions policy.<sup>51</sup> The District Court rejected the equal protection claim and ruled in favor of VMI.<sup>52</sup> Applying the intermediate scrutiny test,<sup>53</sup> the District Court found

47. *Id.* at 2275 (citing *Adarand*, 115 S. Ct. 2097 (1995)).

48. *Id.* (citing *J.E.B.*, 511 U.S. 127 (1994)).

49. *J.E.B.*, 511 U.S. at 152 (1994).

50. Amicus Brief for Petitioner at 6, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (No. 94-1941), available in 1995 WL 703392. Amici supported the U.S. government's arguments and urged that the Court apply strict scrutiny to classifications based on gender, in general, and to the VMI case, in particular. In their brief, amici cited numerous cases where lower courts were confused in trying to apply the intermediate scrutiny test: *Lamprecht v. FCC*, 958 F.2d 382, 398 n.9 (D.C. Cir. 1992) (referring to intermediate scrutiny as indeterminate); *Coral Constr. Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991) ("[W]e are cognizant of the problems with intermediate scrutiny"), *cert. denied*, 502 U.S. 1033 (1992); *Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco*, 813 F.2d 922, 939 (9th Cir. 1987) ("[intermediate scrutiny] provides 'relatively little guidance in individual cases'") (citation omitted); *Meloon v. Helgemoe*, 564 F.2d 602, 604 (1st Cir. 1977) (calling intermediate scrutiny "hardly a precise standard"), *cert. denied*, 436 U.S. 950 (1978); *Contractors Ass'n of E. Pa. v. City of Phila.*, 735 F. Supp. 1274, 1303 (E.D. Pa. 1990) (asserting that intermediate scrutiny provides little guidance to courts in decision making); *Joseph v. City of Birmingham*, 510 F. Supp. 1319, 1335 n.22 (E.D. Mich. 1981) ("[Intermediate scrutiny does] not provide definite guidance . . . decisions may appear inconsistent and unprincipled").

51. *VMI*, 116 S. Ct. at 2271.

52. *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991).

53. The court noted that,

The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification. The burden is met only by showing at least that the discrimination serves important governmental objectives and that the discriminatory means employed

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that “VMI’s single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission.”<sup>54</sup>

On appeal, the Fourth Circuit Court held that VMI’s policies violated the equal protection clause. The District Court’s judgment was vacated, and the case was remanded. The state was given the following options: admit women to VMI, establish parallel institutions or programs, or give up state financial support and become a private institution.<sup>55</sup> In response, Virginia agreed to initiate a parallel women’s program at Mary Baldwin College, Virginia Women’s Institute for Leadership (VWIL), which was approved.<sup>56</sup> Challenging the establishment of a separate women’s program, the U.S. sought certiorari and it was granted.

## 2. *Majority Opinion*

The Supreme Court held that while maintaining VMI for men only, Virginia failed to provide any “comparable single-gender women’s institution.”<sup>57</sup> Adopting the language from Judge Phillips’ dissenting opinion from the Court of Appeals, the Court said, “the Commonwealth has created a VWIL program fairly appraised as a ‘pale shadow’ of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.”<sup>58</sup>

Although the majority did not say that publicly supported, single-sex education programs were inevitably unconstitutional, that is how Justice Scalia viewed the holding: “Under the constitutional principles announced and applied today, single-sex public education is unconstitutional.”<sup>59</sup>

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are substantially related to the achievement of those objectives.

*Id.* (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982)).

54. *Id.* at 1413.

55. *United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992). Arguably, by electing to become a private institution, VMI could continue its male-only admissions policy without being scrutinized under the equal protection clause.

56. *United States v. Virginia*, 852 F. Supp. 471, 476 (W.D. Va. 1994).

57. *VMI*, 116 S. Ct. at 2285 (citing *United States v. Virginia*, 44 F.3d 1229, 1241 (4th Cir. 1995)). The Court considered tangible differences between VMI and VWIL (physical facilities, faculty, course offerings) and intangible differences (VMI’s 157-year old history, name recognition and prestige, and its influential alumni network).

58. *Id.* (citing *United States v. Virginia*, 44 F.3d at 1250).

59. *Id.* at 2305.

### 3. Justice Scalia's Dissent

This landmark decision put an end to the institution that was known as VMI and its 157-year-old tradition of producing "citizen-soldiers."<sup>60</sup> Justice Scalia, in his lone dissent, lamented:

[T]he rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny . . . regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials . . . . No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program.<sup>61</sup>

In his discussion of the three tests used in equal protection jurisprudence, Justice Scalia noted that they are abstract, but necessary. In applying the tests, he cautioned that the Court's role was to preserve society's values, not revise them.<sup>62</sup> In the context of VMI's admissions policy, Justice Scalia wrote that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."<sup>63</sup> Of course, this reasoning can be attacked by analogy. Many practices that were acceptable when our nation was first founded are not tolerated today.<sup>64</sup>

To make his point and demonstrate the majority's boldness in arriving at its decision in *VMI*, Justice Scalia pointed out that the U.S. service academies admitted women in 1976 "not by court decree, but because the people through their elected representatives, decreed a change."<sup>65</sup> Consequently, he blasted the Court's decision and said the *VMI* holding forced change upon Virginia "not by democratic processes but by order of this Court . . . the Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built 'tests.' This is not the interpretation of a Constitution, but the creation of one."<sup>66</sup>

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60. *Id.* at 2276. VMI was founded in 1839 with a mission to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues its mission through an adversative training program which includes physical and mental stress, lack of privacy, and absolute equality of treatment. While recognizing that there might be some pedagogical value in a single-sex education, the Court found that the state failed to show exceedingly persuasive justification for excluding women from this program.

61. *Id.* at 2306.

62. *Id.* at 2292.

63. *Id.* (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990)).

64. For example, anti-miscegenation laws were not ruled to be unconstitutional until 1967, *Loving v. Virginia*, 388 U.S. 1 (1967).

65. *VMI*, 116 S. Ct. at 2293.

66. *Id.*

What Justice Scalia was referring to was the Court's repeated reference to a requirement that the state show an "exceedingly persuasive justification" in support of its male-only admissions policy at VMI. While the United States urged the Court to apply the strict scrutiny test in *VMI*,<sup>67</sup> the Court treated the matter as a closed issue.<sup>68</sup> Although the Court reiterated the intermediate scrutiny standard as established in *Hogan*,<sup>69</sup> Justice Scalia interpreted the use of this particular language to indicate a heightened form of intermediate scrutiny, in effect, imposing an additional requirement into the test to show an "exceedingly persuasive justification." In Justice Scalia's view, this represented a divergence, for all practical purposes, in the level of scrutiny applied to classifications based on gender.<sup>70</sup>

#### 4. Chief Justice Rehnquist's Concurrence

Chief Justice Rehnquist also disagreed with the majority's analysis in his concurring opinion. He stated, "to withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>71</sup> Continuing, he wrote,

While the majority adheres to this test today, it also says that the State must demonstrate an "exceedingly persuasive justification" to support a gender-based classification. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test. While terms like "important government objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification."<sup>72</sup>

#### 5. Summary

While Justice Scalia's opinion should not surprise anyone familiar with his originalist view of Constitutional interpretation, it is a warning to public school administrators. Although the *VMI* decision does not render publicly supported, single-sex education programs unconstitutional, Justice Scalia believes that any alternative school program that classifies students according to sex will be subject to a standard that is "utterly impossible of achieve-

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67. United States Supreme Court Official Transcript of Oral Argument at 11-12, *U.S. v. Virginia*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107), available in 1996 WL 16020 [hereinafter Transcript].

68. *Id.* at 13-14.

69. *VMI*, 116 S. Ct. at 2271 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

70. See Anita K. Blair, *The Equal Protection Clause and Single-Sex Public Education: United States v. Virginia and Virginia Military Institute*, 6 SETON HALL CONST. L.J. 999 (1996) (raising concerns over subjecting gender classifications to strict scrutiny).

71. *VMI*, 116 S. Ct. at 2288 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

72. *Id.*

ment.<sup>73</sup>

## II. THE CURRENT STATE OF THE LAW GOVERNING GENDER CLASSIFICATIONS IN PUBLIC EDUCATION

### A. *Title IX of the Education Amendments of 1972*<sup>74</sup>

Title IX prohibits gender discrimination in public elementary and secondary education. Passed as part of an amendment package to the Civil Rights Act of 1964, Title IX states that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .”<sup>75</sup> Single-sex public education at the elementary and secondary levels may violate Title IX if school districts fail to provide comparable facilities, courses, and services to both boys and girls.<sup>76</sup>

During oral arguments in *VMI*, the question was raised whether Title IX was applicable to the case.<sup>77</sup> Title IX was not applicable because VMI fit within an exception for undergraduate institutions of higher education that have traditionally and continually had a policy of admitting only students of one sex.<sup>78</sup>

In conjunction with the Education Amendments of 1972, the Department of Education promulgated regulations effectuating Title IX.<sup>79</sup> While Title IX does not preclude a school district from having single-gender schools, the implementing regulations generally prohibit single-gender classrooms in coeducational schools.<sup>80</sup> Specifically, a recipient of federal financial aid “[s]hall not, on the basis of sex . . . [p]rovide different aid, benefits, or services or provide aid, benefits, or services in a different manner.”<sup>81</sup> While

73. *VMI*, 116 S. Ct. at 2306. Justice Scalia used these words to describe the burden of demonstrating an “exceedingly persuasive justification” for gender classifications.

74. Title IX of the Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (1996).

75. 20 U.S.C. § 1681(a). Federal funding is a primary factor in determining whether a program may create classifications based on gender. *But see* Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL’Y 227 (1994) (discussing the legitimate social goals and governmental interest in single-gender public education as part of diversified educational opportunities and why government funding should not be the deciding factor in judging the constitutionality of single-sex educational programs).

76. 34 C.F.R. § 106.35(b) (1996).

77. Transcript, *supra* note 67, at 38-40.

78. 20 U.S.C. § 1681(a)(5) states, “Public educational institutions with traditional and continuing admissions policy: in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.”

79. 34 C.F.R. § 106 (1996), Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

80. GAO, *supra* note 38, at 7.

81. 34 C.F.R. § 106.31(b)(2) (1996).

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dictating that courses may not be carried out separately on the basis of sex,<sup>82</sup> the regulations do permit certain exceptions allowing for certain types of single-sex classes. For example, students may be grouped in physical education classes by ability;<sup>83</sup> students may be separated by sex within physical education classes while participating in contact sports;<sup>84</sup> elementary and secondary school students may be separated by gender for sex-education classes;<sup>85</sup> and students may be separated based on vocal range which may result in single-gender choral groups.<sup>86</sup>

While single-gender classes are generally unacceptable, Title IX allows affirmative action to overcome "the effects of conditions which resulted in limited participation by persons of a particular sex."<sup>87</sup> Under the affirmative action provision, classifications that result in single-sex classes must be directly related to the reasons for having the single-gender programs. Thus, (1) beneficiaries of the single-gender programs must have had limited opportunities to participate in a school's activities because of their sex, (2) less restrictive means to achieve the goals of the single-gender programs must have been considered and rejected, and (3) there must be evidence that the intended results of single-gender programs could not be accomplished through comparable sex-neutral programs.<sup>88</sup>

Therefore, while Title IX bars discrimination on the basis of gender in any publicly-funded program, it does not directly forbid admissions policies based on gender. And, while gender-classifications may be an acceptable means of affirmative action, single-gender programs must be narrowly tailored to achieve specific goals.

### *B. Equal Educational Opportunities Act of 1974<sup>89</sup>*

The Equal Educational Opportunities Act (EEOA) applies to elementary and secondary schools and, for the most part, parallels Title IX. Apparently passed by Congress in response to racial discrimination, it is not clear that Congress even intended it to specifically address sex segregation in public schools.<sup>90</sup> It is a policy of the U.S. that "all children enrolled in public

82. 34 C.F.R. § 106.34 (1996).

83. 34 C.F.R. § 106.34(b) (1996).

84. 34 C.F.R. § 106.34(c) (1996).

85. 34 C.F.R. § 106.34(e) (1996).

86. 34 C.F.R. § 106.34(f) (1996).

87. 34 C.F.R. § 106.3(b) (1996), remedial and affirmative action and self-evaluation.

88. GAO, *supra* note 38, at 22.

89. Equal Educational Opportunities Act of 1974 § 201, 20 U.S.C. §§ 1701-1703 (1996).

90. The language that is relevant to the issue of single-gender public education is a bit confusing because it does not consistently use "sex" as a classification:

Legislative history indicates that Congress passed the EEOA with the specific intent to remedy the last vestiges of intentional racial discrimination in school systems, and that the issue of sex segregation did not arise in congressional debates. One

schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin. . . .<sup>91</sup> Furthermore, Congress found that students were denied equal protection under the Fourteenth Amendment when dual school systems were based "solely on the basis of race, color, sex, or national origin."<sup>92</sup> Likewise, individuals cannot be denied equal educational opportunity because of *race, color, sex, or national origin*, by educational agencies that deliberately segregate students among or within schools on the basis of *race, color, or national origin*.<sup>93</sup> currently Note that this part of the law prohibiting deliberate segregation does not include "sex" as a forbidden classification. Thus, it appears that Congress did not intend to prohibit single-sex education. Rather, it seems that students may voluntarily choose single-sex classes or schools. In construing this statute, however, it is unclear whether the inclusion of "sex" in some places, while omitting it in others, was intentional, or merely an oversight in legislative drafting.

### III. A SURVEY OF ALTERNATIVE EDUCATIONAL PROGRAMS

While many people today would agree that our public schools must be reinvented to elevate standards and raise student achievement levels, there is disagreement over how best to accomplish these goals. Some education experts believe the difficulties facing U.S. public education may be traced to the traditional design of our schools—from the way they are structured to the way they are operated.<sup>94</sup> Others view the problem as part of a larger one of ethnic and socio-economic changes in our culture, compounded by the

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explanation for the EEOA's partial inclusion of sex is that it was intended only to combat racial discrimination manifesting itself through the sex segregation of elementary and secondary schools. Sex segregation became common in the south after *Brown*, as a way to comply with racial integration orders but still keep black boys and teachers away from white girls.

Bennett L. Saferstein, Note, *Revisiting Plessy At the Virginia Military Institute: Reconciling Single-Sex Education With Equal Protection*, 54 U. PITT. L. REV. 637, 675 (1993) (citing Robert B. Barnett, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296 (1970)).

91. 20 U.S.C. § 1701(a)(1).

92. 20 U.S.C. § 1702(a)(1).

93. 20 U.S.C. § 1703(a) (emphasis added).

94. CHESTER E. FINN, JR., *DIFFERENT SCHOOLS FOR A BETTER FUTURE* 4 (Hudson Briefing Paper No. 193, 1996). Chester Finn believes that school systems that still prepare some students for college and others for blue-collar jobs is obsolete in an age where just about everyone needs to possess academic knowledge and practical skills, including computer literacy. Additionally, school programs are archaic because they do not take advantage of what research has taught us about effective organizational and instructional arrangements. He believes that schools need to pay more attention to modern technology and the changing nature of family and community life. He says the traditional school design does not meet individual's or society's needs. For example, the 180-day school calendar was implemented to facilitate crop harvests; schools were shut down during the summer months before air conditioning was invented; the five-to-six hour school day was more appropriate when children went home after school to find their mothers waiting for them.

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explosion of information and technology.<sup>95</sup> Still, others see American education as a “mess,”<sup>96</sup> and liken school yards to combat zones.<sup>97</sup> This latter view may not be an exaggeration. The California Department of Education compared teachers’ complaints in the 1940s with those in the 1990s. In the 1940s, major problems in California schools were chewing gum, wearing inappropriate clothes, and getting out of turn in line.<sup>98</sup> Today, the problems range from drug and alcohol abuse, to pregnancy and suicide, to gang warfare and murder.<sup>99</sup> Frankly, it is no wonder that some school districts are willing to try just about anything to take back their schools and focus on education and good citizenship.

Public education in the United States must also be viewed in the larger context of international competitiveness. An international assessment of math skills among thirteen-year-olds found that students in the United States scored below four countries and four Canadian provinces participating in the study.<sup>100</sup> Korean students scored the highest with an average score of 567.8 compared to American students with a 473.9 average.<sup>101</sup> In the same survey, American students placed ninth in scientific knowledge among the twelve nations and provinces that participated.<sup>102</sup>

In the United States, standardized test results show that girls begin school outperforming boys in almost all areas.<sup>103</sup> Girls finish elementary school surpassing boys on every standardized test in every academic subject except science, where boys have a slight lead.<sup>104</sup> In middle school, girls’ test scores, relative to boys’, begin to drop and the decline continues through high school.<sup>105</sup> The small lead that boys enjoyed in science widens, becoming a gap; and the longer girls stay in school, the further behind they fall,

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95. *Id.* at 2.

96. JOSEPH FERNANDEZ & JOHN UNDERWOOD, *TALES OUT OF SCHOOL 1* (1993).

97. *Id.* at 2.

98. *Id.* Ranked in order, problems in the 1940s were (1) talking, (2) chewing gum, (3) making noise, (4) running in the halls, (5) getting out of turn in line, (6) wearing improper clothes, and (7) not putting trash in trash cans. *Id.*

99. *Id.* In the 1990s, the problems are ranked as (1) drugs, (2) alcohol, (3) pregnancy, (4) suicide, (5) rape, (6) robbery, (7) assault, (8) burglary, (9) arson, (10) bombings, (11) murder, (12) absenteeism, (13) vandalism, (14) extortion, (15) gangs, (16) abortion, and (17) sexually transmitted diseases. *Id.*

100. AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS: A STUDY OF MAJOR FINDINGS ON GIRLS AND EDUCATION 25* (1992).

101. *Id.* (citing A. LAPOINTE ET AL., *WORLD OF DIFFERENCE: AN INTERNATIONAL ASSESSMENT OF MATHEMATICS AND SCIENCE* (1989)).

102. *Id.* at 26.

103. MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA’S SCHOOLS CHEAT GIRLS*, 13-14, 137-38 (1994).

104. *Id.* at 138.

105. *Id.*



especially in math and science.<sup>106</sup>

Recent studies are persuasive in showing that there may be pedagogical value in single-gender education. Some educators believe that boys achieve more in single-sex schools, concentrate more on their studies, and express themselves more freely in all-male classes.<sup>107</sup> Conversely, others believe a coeducational environment is more like the real world, therefore, more valuable for boys and girls.<sup>108</sup> While the benefits of an all-male education are less certain,<sup>109</sup> research indicates that schools without boys seem to be good for girls.<sup>110</sup> Compared to girls in coeducational schools, girls in single-sex schools have higher self-esteem, are more interested in nontraditional subjects, and achieve more in higher education and careers.<sup>111</sup>

Though not conclusive, studies and statistics provide some evidence that single-gender education may be substantially related to an important government purpose. If one believes that education is an important government function, and that the government has a vested interest in having highly educated and skilled citizens, then single-gender education is not unconstitutional if the gender classifications are substantially related to pedagogical goals.

### *A. Single-Gender High Schools*

One of the oldest single-gender educational concepts in the United States is the all-male or all-female school. Today, about nineteen percent of nonreligious independent schools are single sex compared with about sixty-two percent in the 1960s.<sup>112</sup> Similarly, during the 1960s, one hundred percent of Catholic schools were single sex, but now more than half are

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106. *Id.* An underlying premise of the Sadkers' work is that differences in achievement levels between male and female students is the result of unequal treatment they receive in the classroom from their teachers. For example, boys get more of their teachers' attention either because they raise their hands more often or blurt things out; or they require more attention because they tend to be less disciplined than the girls. Thus, the Sadkers' view would emphasize teacher training and awareness to overcome classroom discrimination, rather than single-gender educational programs to combat academic deficiencies.

107. *Id.* at 239-40. Boys in single-sex schools also seem to have a better appreciation for nontraditional subjects like literature and art. However, these positive generalizations are tempered by an observation that all-boys' schools may also encourage sexist views. *Id.* at 240-41.

108. *Id.* at 248.

109. *Id.* at 239-40, 248.

110. *Id.* at 233, 248.

111. *Id.* at 233. Often, the success of single-sex schools and women's colleges is attributed to role models and mentors. Some education experts believe that single-sex high schools help girls get through periods of low self-esteem during adolescence. A nationwide survey of alumnae from all-girls' schools across the nation reported that single sex schools helped them develop self-confidence, assertiveness, and a strong sense of identity. Graduates from women's colleges earn more degrees in economics, life science, physical science, and math; they are two to three times more likely than their coeducational peers to enter medical school; they are well represented in Fortune 500 companies and in high government positions. *Id.*

112. *Id.* at 232.

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coeducational.<sup>113</sup> Today, single-sex private schools are less of a factor in the educational system, and they are illegal altogether in the public school system, with some narrow exceptions.<sup>114</sup>

In 1992, the Department of Education, Office of Civil Rights, investigated a complaint that Baltimore's Western High School was excluding boys from admission.<sup>115</sup> The high school was initially established in 1844 to provide girls an education beyond elementary school. During the 1960s, the school focused on college preparation; today about ninety-six percent of its graduates go on to college.<sup>116</sup> Western is one of ten citywide high schools in Baltimore which attracts students from the entire city.<sup>117</sup> Students must have a B average to be admitted and a C average to remain enrolled. The student population at Western is racially and ethnically diverse.<sup>118</sup> School brochures do not advertise a girls only school, and applications are evaluated on merit, without regard to sex.<sup>119</sup>

The Office of Civil Rights found no Title IX violation at Western. The investigators found that Western's program was not unique because similar programs were available to students of both sexes at other citywide high schools.<sup>120</sup> Moreover, there was no evidence that boys were prohibited from applying or attending Western High School.<sup>121</sup>

The Department of Education's Office of Civil Rights also investigated a complaint that boys were being denied admission to Philadelphia High School for Girls.<sup>122</sup> The Philadelphia High School for Girls opened in 1818 as a coeducational teacher's training school and in 1848 it became the Girl's Normal School. By 1992, the school was one of nine magnet high schools in Philadelphia, which encourages all students to apply, regardless of gender.<sup>123</sup> The school admits students from all over the city and reflects school district demographics: about forty-four percent of the students are from families below the poverty line.<sup>124</sup> The school offers an "academic enrichment curriculum" and extracurricular activities and attracts students with high academic performance and good attendance records.<sup>125</sup> Currently,

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113. *Id.* at 232-33.

114. *Id.* at 232. Under Title IX, public schools may not classify students according to gender except under very limited circumstances. See discussion *supra* notes 82-88 and accompanying text.

115. GAO, *supra* note 38, at 8.

116. *Id.*

117. *Id.*

118. Students represent about thirty national and ethnic groups and about eighty percent of the students are African-American. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 9.

122. *Id.* at 8.

123. *Id.*

124. *Id.*

125. *Id.*

about ninety-eight percent of the school's graduates go on to college.<sup>126</sup>

At the completion of its investigation, the Office of Civil Rights concluded that no Title IX violation existed. The school district had no policy of excluding males from Philadelphia High School and eight other magnet schools in the city offered equivalent programs.<sup>127</sup>

### B. All-Male Academies

An educational concept making a comeback in the 1990s is the "male academy,"<sup>128</sup> intended to focus on special needs of young males, particularly those growing up in inner cities.<sup>129</sup> In 1991, the Detroit School District tried to establish three male academies to serve about 250 boys from preschool through fifth grade.<sup>130</sup> The school district planned to phase in similar programs for grades six to eight over the next several years.<sup>131</sup> The academies were going to offer special programs, including a class entitled "Rites of Passage," an Afrocentric curriculum,<sup>132</sup> career planning, an emphasis on male responsibility, Saturday classes, individualized counseling, and extended classroom hours.<sup>133</sup>

The school district was sued by girls and their parents who sought a temporary restraining order to enjoin the Board from implementing the male academies.<sup>134</sup> The plaintiffs, supported by the American Civil Liberties Union and the National Organization for Women, objected to the plan arguing that these programs addressed issues facing all children, including females, and did not require a uniquely male environment.<sup>135</sup> Furthermore, the plaintiffs charged that despite the Academies' stated goal of addressing special problems of urban males, like high homicide, unemployment, and

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126. *Id.*

127. *Id.*

128. Historically, America's educational system followed the lead of Europe in formally educating males, but not females. For a historical perspective on education in America, see SADKER, *supra* note 103, at 15-28, 230.

129. FERNANDEZ, *supra* note 96, at 80-81 (noting that the leading cause of death for Black males aged fifteen to twenty-four is homicide and that more young Black men go to jail than to college).

130. GAO, *supra* note 38, at 14.

131. *Id.*

132. Afrocentric programs emphasize African-American history and culture. Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1100 n.11 (1993).

133. *Garrett v. Board of Educ. of Sch. Dist. of Detroit*, 775 F. Supp. 1004, 1006 (E.D. Mich. 1991).

134. *Id.* at 1005. Shawn Garrett was a Detroit mother whose four year old daughter was to attend preschool in the Fall of 1991. Shawn Garrett voluntarily dismissed her action before oral argument because she had been harassed by phone calls and comments from community members. Nancy Doe and her daughters continued the suit pseudonymously. *Id.*

135. *Id.* at 1006.

drop-out rates, the selection criteria did not specifically target “at risk” males.<sup>136</sup> Rather, the admissions policy included seven variables from which an at-risk point value was calculated. Applicants were then separated into three categories: high need, mid-level, and low need. One-third of the students admitted were randomly selected from each need category.<sup>137</sup>

Proponents of the coeducational program argued that girls had historically been denied equal access to quality programs, and that the drop-out rate for black girls in Detroit was only slightly behind that for black boys.<sup>138</sup> But supporters of the all-male academy concept said that black girls in Detroit still graduated at a rate twice that for boys.<sup>139</sup> Moreover, it was suggested that boys had more urgent needs than girls because “the boys are the ones who end up killing each other.”<sup>140</sup>

The court applied the intermediate scrutiny test of *Hogan*, and found that excluding females from the Academies was not substantially related to achieving important governmental objectives.<sup>141</sup> The court was skeptical of the school board’s argument that the present system of coeducation had failed male students.<sup>142</sup> Furthermore, the school board failed to show a connection between excluding females from the Academies and improving dropout and homicide rates among urban males.<sup>143</sup> Without evidence to show that the educational system was failing males *because* of the presence of females, the court granted the preliminary injunction; the case was ultimately settled without a trial.<sup>144</sup> The court found that the plaintiffs met their burden of showing the likelihood of success on a Title IX cause of action.<sup>145</sup> Conversely, the plaintiffs did not carry that burden in alleging a violation of the Equal Educational Opportunities Act.<sup>146</sup> The court recognized the important purpose of the Academies and even went so far as to acknowledge the status of urban males as an “endangered species.”<sup>147</sup> Yet, the court found that the important purpose was “insufficient to override the rights of females to equal opportunities.”<sup>148</sup>

Ultimately, the Detroit School Board reached a compromise agreement with the American Civil Liberties Union and the National Organization for

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136. *Id.*

137. *Id.*

138. Rogers Worthington, *Milwaukee Idea Shapes a New School*, CHI. TRIB., Dec. 1, 1991, at 25.

139. *Id.*

140. *Id.* (quoting Spencer Holland, director of the Center for the Education of the African American Male at Morgan State University in Baltimore).

141. *Garrett*, 775 F. Supp. at 1007.

142. *Id.*

143. *Id.* at 1008.

144. *Id.* at 1014.

145. *Id.* at 1010.

146. *Id.*

147. *Id.* at 1014.

148. *Id.*

Women.<sup>149</sup> The academies are now called African-Centered Academies,<sup>150</sup> and offer comparable programs for males and females.<sup>151</sup>

While Detroit was unsuccessful in establishing all-male academies within the public school system, an urban middle school in the northeastern part of the country<sup>152</sup> established an all-male academy within the school.<sup>153</sup> While the academy does not single out black males for the program, about ninety-nine percent of the school's 1,000 students are minority. The all-male academy is one of three voluntary "magnet programs" at the school, and has fifty-seven seventh graders enrolled.<sup>154</sup> Students in the academy rotate among four classrooms where they are taught traditional middle school subjects with an emphasis on academic success, social responsibility, and good citizenship.<sup>155</sup> Students learn about culture, history, and technology, and participate in a mentoring program where they are counseled on careers and family issues.<sup>156</sup> While the school hopes to continue the all-male academy, there are plans to begin an all-girls' program in the 1996 or 1997 school year.<sup>157</sup>

### C. Single-Gender Classes

Along with single-gender schools, single-gender classes are appearing in public schools around the nation. In Ventura, California, two schools have single-gender math classes especially for girls. At Ventura High School, most girls stopped taking math after Algebra II, the highest-level math course required for admission to a California state university.<sup>158</sup> Typically, less than thirty girls would advance onto the next level of math, trigonometry.<sup>159</sup>

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149. Basheda, *supra* note 10.

150. *Id.*

151. GAO, *supra* note 38, at 15.

152. Telephone Interview with Carlotta C. Joyner, Director, Education and Employment Issues; Health, Education, and Human Services Division, United States General Accounting Office, Washington, D.C. (Oct. 29, 1996). Congressman John R. Kasich, Chairman of the House Committee on the Budget, asked the GAO to investigate and report on the major educational and legal issues involved with public single-gender education. Mr. Kasich specifically requested that the report include some examples of recent public single-gender education programs. The GAO conducted its study between February and April 1996, and reported to Mr. Kasich on May 28, 1996. It is intentional that the GAO report does not identify the individual schools that are cited. The GAO's task was simply to survey and report on various single-sex programs, and not determine whether or not those programs complied with the law. Not wanting to draw attention to any programs that may have violated Title IX, the GAO decided to keep even the school districts confidential. Thus, Ms. Joyner did not feel she was at liberty to provide me with further details.

153. GAO, *supra* note 38, at 15.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Glass, *supra* note 12.

159. *Id.*

During the 1993-94 school year, Ventura High School offered two all-girls Algebra II classes. One year later, the number of girls choosing to enroll in trigonometry almost doubled.<sup>160</sup> During the 1994-95 school year, the school expanded all-girls classes to geometry and trigonometry.<sup>161</sup> Another school in Ventura, a middle school, changed the name of its all-girl math class to Math PLUS (Power Learning for Underrepresented Students). To avoid legal challenges, the class is open to males, although none have enrolled.<sup>162</sup>

At Marsteller Middle School, in Prince William County, Virginia, eighth-grade students may choose to attend single-sex classes in physics and English.<sup>163</sup> After one semester in the program, Marsteller boys raised their average language arts grades by one grade. During the same time, girls' average science grades did not even increase by one point.<sup>164</sup> The program was viewed as a success and in 1995, the school board approved expanding the program from about 100 students to as many as 300.<sup>165</sup>

#### D. Culturally-Based Immersion Programs

A few programs around the country have the more traditional "special education" classes where students are segregated because of special needs. However, these "special ed" classes of the 1990s have a new twist: cultural awareness. Savannah-Chatham County, Georgia instituted a Heritage Immersion pilot program in 1994 aimed at boys with special problems that were linked to academic failure. Savannah-Chatham's program operates at two elementary schools, for fourth and fifth graders.<sup>166</sup> The program is designed for fifteen students in each school; currently, each school has twelve students enrolled.<sup>167</sup> Students are eligible to participate in the heritage classes if they meet some of the following criteria: (1) being retained at least once between kindergarten and fourth grade; (2) being referred frequently for disciplinary problems; (3) having high absenteeism; (4) scoring below the 25th percentile in reading or math; and (5) lacking motivation and inter-

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160. *Id.*

161. *Id.*

162. Lynnell Hancock & Claudia Kalb, *A Room of Their Own*, NEWSWEEK, June 24, 1996, at 76.

163. Eric L. Wee, *School Board Approves Experiments*, WASH. POST, May 4, 1995, available in 1995 WL 2091846.

164. Girls' average scores increased four-tenths of a point. Hancock, *supra* note 162.

165. Wee, *supra* note 163.

166. The program operates at Hodge Elementary and Garrison Elementary schools. Letter from Patrick J. Russo, Superintendent of Public Education, Savannah-Chatham County Public Schools (Oct. 3, 1996) (on file with author).

167. THE BOARD OF PUBLIC EDUCATION, SAVANNAH-CHATHAM COUNTY PUBLIC SCHOOLS, THE HERITAGE IMMERSION PROGRAM, A REPORT ON 1993-94 AND 1994-95 ACHIEVEMENTS, at 4.

est.<sup>168</sup>

Heritage immersion participants are taught to appreciate their own heritage and they learn about different cultures of the world.<sup>169</sup> Program participants are assigned to regular fourth and fifth grade classes, where they have the support of team-teaching.<sup>170</sup> Heritage students are taught through an interdisciplinary approach of social studies and art, and they learn conflict resolution skills.<sup>171</sup>

Using the regular fourth and fifth grade classes at each site as control groups, the county compiled quantitative data. Based on limited initial findings, the school board believes the program is a success.<sup>172</sup> Heritage participants improved attendance and improved standardized test scores in math and reading.<sup>173</sup> The Heritage immersion pilot program continued through the 1995-96 school year and is subject to approval on an annual basis.<sup>174</sup>

While Savannah-Chatham County is still in the preliminary phase of its pilot program, an urban middle school<sup>175</sup> already had a school-wide Afrocentric curriculum in place when, in 1993, it began allowing students to choose from single-gender and coeducational classes.<sup>176</sup> The single-gender program focused on students' academic and social needs, and especially targeted African American males with serious learning disabilities.<sup>177</sup> After only three years, however, the single-gender classes were discontinued to comply with the state administrative code.<sup>178</sup>

#### IV. COMPARING AND CONTRASTING THE PROGRAMS

Although only a small sampling of programs has been reviewed, it is clear that single-gender educational programs can take many different forms. While the various programs are structured differently, they share an implicit recognition that a one-size-fits-all educational program does not serve the needs of all students. Thus, some single-gender programs, like those in Ventura and Marsteller, focus on improving academic performance in one school subject. Other programs, like the single-gender high schools in Philadelphia and Baltimore, are more broadly tailored towards either the

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168. *Id.*

169. *Id.*

170. *Id.* The regular fourth or fifth grade teacher is assisted by the heritage teacher.

171. *Id.* at 28.

172. *Id.* at 3.

173. *Id.*

174. *Id.* at 7.

175. The GAO would not identify the school. See Telephone Interview, *supra* note 152.

176. GAO, *supra* note 38, at 16.

177. *Id.*

178. *Id.*; see also Telephone Interview, *supra* note 152. The GAO would not identify the administrative code or the state in this case.

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academic or social needs of students. Still, some programs, like the Savannah-Chatham heritage immersion program, are integrated plans that aim to satisfy learning needs, personal development needs, and socialization needs.

While studies and surveys are inconclusive, many people still believe that single-sex classes and schools have some legitimate pedagogical benefits. Proponents of single-sex education say it (1) provides choice for parents and students; (2) reduces distractions in the classroom;<sup>179</sup> (3) gives teachers flexibility in the way they teach;<sup>180</sup> and (4) enables girls to take leadership roles and develop self-confidence.<sup>181</sup> Opponents of single-gender education say it (1) creates a sheltered environment that does not prepare students for the real world;<sup>182</sup> (2) reinforces gender stereotypes or promotes sexism;<sup>183</sup> and (3) may be unconstitutional.

While the Fourteenth Amendment provides the bare minimum level of

179. See Carol Kreck, *A School of Their Own: Girls' Academies Proving Value of Same-Sex Education*, DENVER POST, Feb. 23, 1993, at 1E. One ninth-grade girl said that a single-sex education allowed girls to be themselves. She said, "We don't have to worry about what the guys would say about the way we act or dress." Such sentiments confirm research done by Harvard education Professor Carol Gilligan. Gilligan's studies in the psychology of adolescent girls shows that beginning at about age 11, girls' feelings of confidence and competence begin to disintegrate. Young women become sensitive to their physical appearance which may distract them from learning. *Id.*; see also Mary Challenger, *Separating the Girls from the Boys*, DES MOINES REG., July 15, 1995, at 1. Recalling her all-girls' high school in the 1970s, one woman said, "No one wore makeup, there was no pretentiousness, and people wore curlers in their hair to school. I think people felt more free to be themselves." Likewise, a young man recalling his all-male high school said, "You didn't have to put up a pretense of maybe being something you weren't. You could goof around and do stupid stuff." He also said, "At the all-male school, you'd joke around with the teacher and have more interaction with the teacher. There was more of an exchange of ideas." *Id.*

180. See Kreck, *supra* note 179. Studies show that boys and girls learn differently. Key findings of Carol Gilligan showed that females need to feel connected to each other and to their teachers. *Id.*; see also Dana Pride, *Math Gap Gives Boys Advantage*, NASHVILLE BANNER, Feb. 26, 1996, at A1. Many educators call for a teaching approach that accommodates girls' learning styles. Girls are more social and verbal, so collaboration on projects is suggested. *Id.*; see also Glass, *supra* note 12. In one all-girls' math class, students sat at tables in groups of three or four and were able to talk and ask questions of anyone in the class. One student in an all-girls' algebra class went from Cs to an A. In another male-only fifth grade class, the teacher got her students interested in reading by including sports magazines in the curriculum. By years' end, the class was reading at grade level. *Id.*

181. One seventeen-year old high school student commented on her all-girls high school. She said the school offered more leadership opportunities because the girls were forced to "step up and take the initiative . . . In student government [boys] would take the initiative and the girls would sometimes sit back and just let the boys take control." Comment by Keila Trimble to Jim Blair (Feb. 3, 1996), in *Southern California Voices*, *supra* note 8; see also Kreck, *supra* note 179. In an all-girls school, girls run for student council president or edit the school paper, tasks they might not undertake in a coeducational school. *Id.*

182. SADKER, *supra* note 103, at 247-50.

183. *Id.* at 240-41. In one all-girls' school, the teacher announced a difficult assignment but reassured the students that "major hand-holding" would be available. In all-male classrooms, the stereotyping and sexism takes a much different form. Classroom discussions may sound like "locker room" talk and discussions in English literature can take on sexual overtones. *Id.*; but see Glass, *supra* note 12. Reinforcing stereotypes is furthest from the truth in an all-boys' class where a boy plays the part of Pocahontas; where boys take interest in reading "Sarah, Plain and Tall"; or where boys learn that baking cookies requires math skills. *Id.*



equal protection, single-gender programs must also comply with federal statutes. Requirements for single-gender programs under Title IX and the EEOA are at least as stringent as those under the intermediate scrutiny test of the Fourteenth Amendment.<sup>184</sup> Assuming that single-gender programs were valid pre-*VMI*, the *VMI* decision could only jeopardize them if the intermediate standard has, in fact, been heightened. In other words, this appears to be Justice Scalia's fear: that *VMI* changed the current law under Title IX and the EEOA, invalidating those statutes. This could only be the result if *VMI* did, in fact, impose a higher form of intermediate scrutiny on gender classifications. Given the majority opinion of *VMI*, Justice Ginsburg's reassurance that the standard remains the same, and Justice Rehnquist's concurrence, this paper presumes that single-gender programs that were valid under Title IX and the EEOA before *VMI* remain valid after *VMI*.<sup>185</sup>

Evaluating these single-gender educational programs in the context of the Fourteenth Amendment and its protections, one must remember that equal protection does not always require that a state treat everyone equally. The equal protection clause, in an educational context, does not mean that all students must receive uniform treatment. In fact, equal protection may require treating students differently in order to achieve as nearly as possible equal educational results. Single-gender programs are aimed at achieving this result. Students come to school with different backgrounds—social, economic, and ethnic. Because students are not similarly situated, allowances must be made to help them reach their maximum potential. One educator aptly stated the dilemma:

Our schools . . . are centers of both the most self-centered forms of individualism and the most banal kinds of standardization. They celebrate mindless objectivity and simultaneously offer the grossest inequities . . . We have managed to define equity as the enemy of creativity, and thus, given equity a bad name . . . It may be hard to produce both equity and good schooling, but we will not achieve either goal any quicker if we opt for centralization, standardization, and uniformity . . . Equity is an idea we are in danger of losing these days. It has few powerful proponents. However, the best response is to note that fairness requires such diversity. . . .<sup>186</sup>

With preliminary indications showing pedagogical benefits of single-sex education, it is prudent to allow experimentation and innovation in this

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184. While intermediate scrutiny requires that gender classifications be substantially related to important government objectives, Title IX allows gender classifications only when less restrictive means cannot be utilized and when the same results could not be accomplished through gender-neutral means. See discussion *supra* note 88 and accompanying text.

185. For an equal protection analysis of single gender schools and an analysis of Title IX and the EEOA, including a legislative history, see Daniel Gardenswartz, Comment, *Public Education: An Inner-City Crisis! Single-Sex Schools: An Inner-City Answer?* 42 EMORY L.J. 591 (1993).

186. Deborah W. Meier, Keynote Address, *A Colloquium on Public Education Reform*, 21 N.Y.U. REV. L. & SOC. CHANGE 649, 650-51 (1995). Ms. Meier is Co-Director, Central Park East Secondary School, Coalition Campus School Project.

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### *A. Single-Gender High Schools*

The single-gender high schools in Baltimore and Philadelphia are examples of how single-gender schools can exist without violating the Constitution. Like *VMI*, these schools have long histories as single-sex institutions. Having been established in the 1800s, their reputations as all-girl schools carry forward to this day. Unlike *VMI*, however, neither school expressly prohibits males from applying. Both schools have high academic standards, but neither classifies students based on gender for admission purposes. Thus, unlike women who were flatly denied a unique educational opportunity at *VMI*, students who are not admitted to either of these high schools have other equivalent educational programs available to them.

A high percentage of the girls in the single-gender high schools of Baltimore and Philadelphia go on to college: ninety-six percent and ninety-eight percent, respectively. Granted, both schools begin with students who are motivated to do well academically. In Baltimore, students must have a B average to be accepted and a C average to remain enrolled; in Philadelphia, students with high academic standing and good attendance records are accepted. Without knowing whether these students would do equally as well in a coeducational environment, they have, nonetheless, chosen to attend female-only schools. Considering that these students do not come from privileged backgrounds, they should be given that choice and the opportunity to excel.

### *B. All-Male Academies*

The idea behind the all male academies is to focus on special needs of adolescent boys and direct their energy and attention toward academic achievement and social responsibility. As discussed earlier, however, Detroit was stalled in its efforts to establish these institutions and modified its program to include girls. The Detroit program could not meet the intermediate scrutiny test because it was intended to benefit males but failed to have specific pedagogical goals when the program was conceived. On the contrary, its stated goals were to combat high rates of homicide and unemployment—problems that also faced young women in Detroit. Additionally, the entrance criteria for the male academies were not what they appeared to be. While the admissions policy fashioned an “at risk factor” and claimed to target “at risk males,” in reality, some of the males were not any more at risk than their female counterparts in the community.

The Detroit example is very similar to the *VMI* case. The most obvious similarity is the exclusion of females. And like *VMI*, the Detroit School Board justified its position on a conclusion, rather than supporting evidence. Like Virginia, which concluded that women were ill-suited for the adversative method of learning at *VMI*, the Detroit School Board concluded that males

more than females were harmed by their inner city environment. The male academies in Detroit could not pass an equal protection analysis because the school board based its conclusions primarily on subjective sociological factors rather than objective pedagogical factors. And the "real" differences between young males and females in the inner city were not so different, after all.

Another problem with the Detroit proposal may have been the timing of the phase-in of the program. While an incremental approach is generally acceptable when implementing new programs, the school district wanted to establish an exclusive program for males, without offering an equivalent program for females. Furthermore, there were already plans to expand the boys' program before even initiating a similar program for girls.

Unlike the situation in Detroit, the other (unidentified) male academy<sup>187</sup> was able to operate and succeed. Because the program is geared only toward seventh graders, it is very limited. However, given these limited facts, it is not certain whether this in-school male academy actually complies with equal protection requirements. Although participation in the program is voluntary, there is no information on admissions criteria. In order to fit within a Title IX exception permitting single-gender classrooms, the school would have to show that the boys had special educational needs that could not be met in a coeducational classroom. Without details on the admissions criteria and stated goals, one can only speculate about the justifications for this program. Nonetheless, if one believes that a single-gender environment promotes a more conducive learning environment for boys at this age, then academic success should follow.

### C. Single-Gender Classes

Of the innovative single-gender educational programs, probably the easiest application of the intermediate scrutiny test is with the single-gender classes. In California and Virginia, single-gender math classes, English classes, and science classes are offered specifically to students who need extra instruction and encouragement in these subjects.

Marsteller's program is designed to increase females' performance in science and males' performance in English. Studies show that in middle school, boys see science as a "male" subject, while girls view it neutrally.<sup>188</sup> However, by high school, both boys and girls agree that science is no longer a neutral subject, and males clearly dominate.<sup>189</sup> Conversely, English is one area where boys score lower than girls on the American College Testing

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187. See Telephone Interview, *supra* note 152.

188. SADKER, *supra* note 103, at 123.

189. *Id.* Of all the subjects in high school, physical science is the most male dominated. By the time students take advanced courses in high school, females take advanced biology while males choose physics and advanced chemistry. A 1991 survey by the Council of Chief State School Officers reported that males comprise 60% of first-year physics and 70% of second-year physics students. *Id.*

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Program standardized test.<sup>190</sup> Clearly, pedagogical goals have been achieved at Marsteller where test scores have improved in English and science, for boys and girls, respectively.

Unlike VMI, where females were denied an opportunity to participate in the adversative training method with no equivalent alternative, these single-gender classes are voluntary and are narrowly tailored to pedagogical goals. Students at Marsteller are not prohibited from attending certain English or science classes; rather, they may choose to study in coeducational classes or single-gender classes.

Likewise, Ventura has successfully met pedagogical goals by enrolling more girls in upper-level math classes, where prior to the girls-only classes, they were sorely underrepresented. This is unlike *Hogan*, where males were denied regular admission to nursing school. In *Hogan*, females were already well represented at the nursing school; in fact, they dominated the field of nursing, nullifying the argument for affirmative action.

The Fourteenth Amendment is not violated where affirmative action is justified. Similarly, these programs fall within the narrow affirmative action exception to Title IX.

#### *D. Culturally-Based Immersion Programs*

In Savannah-Chatham County, strict selection criteria are used and specific goals are formulated for students in the heritage immersion program. The law does not prohibit classifications based on academic ability, and programs such as Savannah-Chatham's serve special pedagogical purposes. The culturally-based immersion program in Savannah-Chatham County is an intensive remedial program aimed at young boys with a history of academic failings and disciplinary problems. Again, this program is narrowly tailored to achieve pedagogical goals and is very limited: it only has twenty-four students enrolled.

On the other hand, in the unidentified school, all students participate in the Afrocentric curriculum, thus, there are no classifications at all. It is unclear why the unidentified school discontinued its single-gender classes, especially when participation was optional. But, based on these limited facts there was nothing to justify gender classifications.

#### *E. Summary*

Although single-sex programs may be challenged on grounds of equal protection violations, there is enough interest across the country warranting at least some study and experimentation. In California, Governor Pete Wilson

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190. *Id.* at 141. The American College Testing Program, or ACT, is one college admission test administered during high school. The test assesses academic achievement in English, math, natural science, and reading. Girls score almost a full point higher than boys on the English section of the test, but boys lead in the other sections. *Id.*

appropriated five million dollars in the 1996-97 budget to establish twenty single-sex schools.<sup>191</sup> Although there is just one such school operating in the state, Governor Wilson's 1997-98 budget includes another five million dollars to continue the effort.<sup>192</sup>

Meanwhile, in New York, a publicly-funded all-girls' school opened in September with fifty seventh graders and four teachers.<sup>193</sup> The Young Women's Leadership School received more than one hundred applications and selected students based on a formula favoring students with high scores on achievement tests and low family incomes.<sup>194</sup>

Interest in single-gender education is also apparent on a national level. Legislation was introduced in the 104th Congress that would have eased the restrictive language in Title IX and allowed school districts to establish and fund some single-sex pilot programs.<sup>195</sup> Senator Hutchison's proposal acknowledged the importance of equal rights, recognized a compelling government interest in assuring that all children receive a high-quality education, and emphasized the need for parental and student choice.<sup>196</sup> The legislative language pointed out that actual and threatened lawsuits, by private organizations and government agencies, interfered with parents' rights and limited schools' ability to undertake innovative educational programs.<sup>197</sup> Although Senator Hutchison's bill died, it is possible that similar legislation could be introduced in the 105th Congress.<sup>198</sup>

191. 1996-97 CAL. STATE BUDGET HIGHLIGHTS; see also Susan Estrich, *Political Winds Shifting: Wilson's New, Moderate Views A Model For Future Debate*, USA TODAY, Jan. 11, 1996, at 11A. Governor Wilson's statewide experiment would allow the establishment of twenty single-sex schools: ten for boys, geared toward providing positive role models to counter the appeal of gang leaders, and ten for girls emphasizing math and science. *Id.*

192. Colvin, *supra* note 9. The single-sex academies aim to improve boys' discipline and allow girls to learn in an environment free from competition with boys.

193. Rose Kim, *Not Making the Grade? All-Girl School's Foes Fault U.S. Probe*, NEWSDAY, Feb. 3, 1997, at A20.

194. Tamara Henry, *A New Push for Girls-Only Public Schools*, USA TODAY, Sept. 18, 1996, at 1D.

195. *Id.*; see also Educational Opportunity Demonstration Act, S. 829, 104th Cong. (1996).

196. 141 CONG. REC. S6926 (daily ed. May 18, 1995) (statement of Sen. Hutchison). Senator Kay Bailey Hutchison (R-TX) proposed legislation to facilitate educational innovation by allowing experiments in same-sex classes and schools. The Act established an educational opportunity demonstration program to grant waivers to (1) allow experimentation with same gender classes for low-income, educationally disadvantaged students; (2) determine whether such classes make a difference in the educational achievement and opportunities of individuals; and (3) involve parents in the educational options and choices of their children. The Act directed the Secretary of Education to waive for up to five years any statutory or regulatory requirement of Title IX and any other law prohibiting discrimination on the basis of sex. Nothing in the legislation would have affected efforts to overcome the effects of past gender discrimination. *Id.*

197. *Id.* The Act would have countered threats of lawsuits from private groups and Government.

198. Speech by John Borkowski to the Annual ABA Convention (Aug. 6, 1994), in *Speeches, Single Gender Education and the Constitution*, 40 LOY. L. REV. 253, 276 (1994). A bill similar to Senator Hutchison's had been introduced by Senator Danforth (R-Mo.) in 1994, indicating an on-going interest in this issue.

## CONCLUSION

While Justice Scalia and other like-minded people may view the *VMI* decision as a threat to *any* single-sex school, there is no evidence of that yet. However, the precedential value of that holding and its application to publicly-funded single-sex primary and secondary education may not be too far away.

The Young Women's Leadership School in East Harlem is being challenged by the New York Civil Liberties Union, the New York Civil Rights Coalition, and the National Organization for Women.<sup>199</sup> Relying on the federal court's decision striking down the constitutionality of Detroit's all-male academies, the New York civil rights groups filed a complaint against the United States Department of Education and the all-girls' school.<sup>200</sup> The groups opposing the school are asking for significant changes, including renaming the school, restructuring the program, and actively recruiting boys.<sup>201</sup> While this opposition seems relatively mild, a formal court challenge cannot be brought until a male who has been denied admission comes forward and is willing to serve as a plaintiff. Thus far, the school claims not to have received a single inquiry from a male.<sup>202</sup>

Although the Department of Education's investigation which began in September should have been completed in four to six months, the school district has been slow in responding to a request for documents.<sup>203</sup> Opponents of the school allege that the school district is deliberately delaying the investigation until a comparable all-boys school can be established.<sup>204</sup> In the meantime, school officials stand by their decision to open the school and rely on research that shows girls have unique social and educational needs.<sup>205</sup> Nonetheless, without specifying what pedagogical benefits it hopes to achieve and how the single-sex classification is substantially related to that goal, reliance on developmental differences between male and female adolescents may not be enough. Like *VMI*, where the Court was not persuaded by Virginia's reliance on similar studies, the future of the East Harlem school is at risk. If the intermediate scrutiny standard is applied as it was in *VMI*, East Harlem's reliance on differences between learning and development needs of boys and girls may be viewed as an over broad

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199. Liz Willen, *No Schoolin / Rights Group Seeks to Block All-Girls Program From Opening*, NEWSDAY, Aug. 23, 1996, at A4.

200. Michael Meyers, *Schools Dodge the Law*, USA TODAY, Oct. 15, 1996, at 14A.

201. Henry, *supra* note 194.

202. Willen, *supra* note 199.

203. Kim, *supra* note 193.

204. *Id.*

205. Henry, *supra* note 194.

generalization, and not persuasive.<sup>206</sup>

Nonetheless, contrary to Justice Scalia's belief, the future of single-sex education is not "utterly impossible of achievement." The equal protection clause simply requires school districts to walk a fine line. Various public education programs around the country are proof that single-sex education can exist within the bounds of the Fourteenth Amendment, Title IX, and the Equal Educational Opportunities Act. In fact, many of these programs do not begin with an intent to segregate; rather, they set out to achieve a pedagogical goal, and the effect is a program that happens to be sexually segregated. In these cases, where the resulting byproduct is a single-gender program, equal protection is not even an issue.<sup>207</sup>

Conversely, where programs begin with the premise of a single-gender classification, the difficult part of an equal protection analysis is showing how that classification may be substantially related to achieving a pedagogical goal. Admittedly, research in this area is sparse, study results are inconclusive, and there is nothing to prove a direct correlation between single-gender classes or schools and academic achievement.<sup>208</sup> However, preliminary results from scattered programs across the nation appear to show a positive trend. The only way to measure the success or failure of these programs, though, is to allow them to operate so that data can be collected. Only after these programs have been operating for a sufficient time can statistics be compiled from which to form valid conclusions.

Viewing American education in the context of a rapidly-changing society far removed from the 1950s, it is difficult to know where to go from here. But as schools are increasingly looked upon to prepare young people for life, in addition to preparing them for college and careers, it is clear that something must be done to better serve students, and society as a whole, through the educational process. More and more, people expect schools to provide children with more than "book smarts."

A critical question to be answered is: Who should have the power to decide whether single-gender schools have a place in primary and secondary public education? It is hard not to side with tax-paying parents who want the best quality education for their children. Similarly, if students are more motivated to learn in a single-sex environment, they should have that option. Likewise, educators and administrators who experience first-hand the deficiencies with the current system should be empowered to innovate and experiment. And even if these programs become more widely accepted, there would still be a role for national organizations like the American Civil

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206. "The justification must be genuine . . . [a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 116 S. Ct. at 2275.

207. In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court decided that a law, neutral on its face, may disproportionately impact one class of people. Such an outcome, without evidence of intentional discrimination, does not violate the Equal Protection Clause.

208. Borkowski, *supra* note 198, at 269.

Liberties Union and the National Organization for Women. Parents, teachers, and administrators who understand the detrimental effect of segregation when its sole purpose is to reinforce stereotypes and feelings of inferiority would welcome the challenge of establishing single-gender programs that serve pedagogical goals.

Considering the many changes in our society, including advancements in science and technology, and what we know about interpersonal relationships and learning methods, perhaps the public school system of the not too distant future will include single-gender schools and programs as the norm, and not the exception. Perhaps the typical school system will offer a wide range of programs—a mixture of single-gender schools and classes along with coeducational institutions—from which students may choose. This is my hope. Across the nation, from California to New York, from Michigan to Georgia, parents, teachers, administrators and elected officials share my hope. Contrary to Justice Scalia's warning, that single-gender education is dead, the time is ripe for change in our schools and the manner in which we educate our children.

Educating students and preparing them to be respectable, responsible, and productive citizens is unquestionably an important governmental objective. If there are pedagogical reasons for classifying students based on gender, and the classification is substantially related to those pedagogical goals, then under the intermediate scrutiny test, which is still the standard, single-sex educational programs should pass constitutional muster.

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