1-1-1998

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COMMENTS

THE AFTERMATH OF THE VIRGINIA MILITARY INSTITUTE DECISION: WILL SINGLE-GENDER EDUCATION SURVIVE?

I. INTRODUCTION

On June 26, 1996, the United States Supreme Court handed down its decision in United States v. Virginia. In this case, the Court ruled that the Virginia Military Institute's ("VMI") male-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Justice Ginsburg, for the majority, wrote that Virginia had failed to provide an "exceedingly persuasive justification" for VMI's gender discrimination. According to the Court, in order for a gender-based classification to be constitutional, the state must show that it is substantially related to the achievement of an important governmental interest. However, both Virginia and VMI failed to pass this so-called "skeptical scrutiny" test.

At approximately the same time that the Court made its ruling in the VMI case, parents, community members and school officials in Harlem, New York City were busy planning the opening of an all-girls middle school to be known as the Young Women's Leadership School ("YWLS"). This all-girls school targets underprivileged female students who might

1. 518 U.S. 515 (1996). Throughout this comment, this case is referred to as either the "VMI decision," the "VMI case," or by its official case name.
2. Id. at 518.
3. Id. at 529.
4. Id. at 533.
5. Id. at 534.
benefit from attending a single-gender school designed to address problems that girls often face in coeducational schools. For example, the YWLS emphasizes mathematics and science, two subjects in which girls often lag behind boys. In addition, classrooms are designed in ways that allow the teachers to give each girl more personal attention.

California has now entered the controversy over single-gender education. Five million dollars has been set aside in the state budget to fund the Single-Gender Academy Pilot Program. The program allows up to ten school districts or county education offices to receive $500,000 grants if they are selected to participate by the California Department of Education. However, unlike the YWLS and most other single-gender schools around the country, California’s single-gender schools must abide by the three following rules: (1) if a school for one sex is established, then another school for the other sex must be opened; (2) both schools must provide equivalent funding ($250,000 each), facilities, staff, books, equipment, curriculum and extracurricular activities (e.g. sports); and (3) although a single-gender school may be located on the campus of a larger co-educational school, it must be a complete school, not solely a single-gender class or program.

Many educators, government officials, and parent groups claim that single-gender schools are the answer to such problems as high drop-out rates and poor academic performance. Studies on single-gender education appear to confirm these claims. However, attempts to implement such programs have been met by strong opposition from civil rights groups that believe single-gender education violates federal statutory law and the equal protection doctrine. For example, the YWLS is currently under investigation by the United

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7. Steinberg, supra note 6, at A1.
8. Id. at B15.
9. Id.
11. Id. Nine counties and school districts applied to the California State Department of Education for these grants. Id. Two were rejected, four are being reviewed for the Fall of 1998, and three have been accepted (one in Stockton, another in Siskiyou County, and a third in San Francisco). Separating the Sexes, SACRAMENTO BEE, Sept. 7, 1997, at F4.
States Department of Education’s Office of Civil Rights ("OCR"), based on a complaint from the New York Civil Rights Coalition alleging gender discrimination. After the Supreme Court’s ruling in the VMI decision, it is unclear whether single-gender education is permissible under equal protection doctrine, even when comparable facilities for both sexes exist.

This comment begins with an objective summary of the existing research and evidence on the effectiveness of single-gender education in improving the academic performance of women and urban minority males. This section reveals that while most studies show that single-gender education is effective in improving academic performance, the evidence is not entirely conclusive. The background section also provides an explanation of federal statutory, regulatory and case law and their effects on the implementation of single-gender programs in public schools. Unfortunately, the Supreme Court’s rulings on single-gender education do not provide enough guidance on exactly how single-gender schools may be established and still pass constitutional muster. For example, the Court has yet to rule on whether the establishment of separate but equal single-gender schools for both genders would validate an otherwise invalid single-gender program which includes only one sex. Furthermore, it is unclear whether the Court would favor single-gender schools that benefit women over those that benefit men. Additionally, in the VMI case, the Court used ambiguous language which may cause uncertainty as to what level of scrutiny will be utilized in future gender discrimination cases.

In applying the current legal standard to the Young Women’s Leadership School, this comment concludes that

17. See infra Part II.A.1-2.
18. See infra Part II.B-E. This comment only deals with federal law. However, remedies are also available under state constitutions and statutes. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-96-122, PUBLIC EDUCATION: ISSUES INVOLVING SINGLE-GENDER SCHOOLS AND PROGRAMS 2 (1996) [hereinafter GAO, PUBLIC EDUCATION].
20. See infra Part IV.C.1.
unless boys are provided a substantially equal single-gender school, the YWLS violates both federal statutory law and equal protection doctrine. This comment proposes that the Supreme Court adopt the three following principles in order to resolve the uncertainty discussed above: (1) require separate but substantially equal facilities for both genders; (2) permit both all-boys and all-girls schools; and (3) eliminate the ambiguous phrase "exceedingly persuasive justification" when ruling on future single-gender education cases (as well as any other gender classification cases) because it only engenders confusion as to what level of scrutiny applies to single-gender schools. This comment concludes that these measures are necessary in order to encourage more research on and experimentation with single-gender education.

II. BACKGROUND

A. Impetus for Single-Gender Programs

Single-gender educational programs are most often established to improve the academic performance of females or urban minority males. Parts 1 and 2 of this section detail the obstacles encountered by both of these groups in receiving their education in coeducational schools. These parts also describe why single-gender education is seen as a solution to these problems. Finally, each part concludes that the available evidence regarding single-gender educational programs seems to indicate that such programs are effective. However, despite this indication, it is also clear that additional research must be performed before this evidence will be conclusive.

22. See infra Part IV.B.
23. See infra Part V.
24. See infra Part V.
25. GAO, PUBLIC EDUCATION, supra note 18, at 3-4.
1. **Improving Academic Performance of Urban Minority Males**

Studies show that, in general, boys outperform girls academically in coeducational settings. However, proponents of single-gender education claim that urban males, particularly minorities, face special problems that might be cured by all-male schools. For example, at many urban coeducational schools the drop-out rate for African American males is often two or three times that of other racial groups and those who stay in school tend not to perform as well academically as members of other racial groups. Moreover, studies have shown that African American males are subject to more disciplinary action in urban, coed schools than are other groups. Other studies show that minority males tend to suf-

26. Throughout this comment, the term “urban minority males” generally refers to African American males (as opposed to other urban racial groups), given that most of the attempts at establishing single-gender schools for urban males have been geared toward improving the status of inner-city black males. See, e.g., Garrett v. Board of Educ., 775 F. Supp. 1004, 1007 (E.D. Mich. 1991) (finding that the all-boys schools at issue were developed in response to the crisis facing African American males in inner-city Detroit). These past attempts to establish single-gender schools have addressed the particular problems that their students face, in part, through measures relating to their race (e.g. an Afrocentric curriculum), in addition to those relating to their gender. See infra notes 35-43 and accompanying text. This comment does not address the legality or the efficacy of utilizing measures relating to race in such schools.

27. Roberta Tovey, *Gender Equity: A Narrowly Gender-Based Model of Learning May End Up Cheating All Students*, HARV. EDUC. LETTER, July-Aug. 1995, at 4 (noting 1,000 studies on single-sex education done for the YMCA); see also CORNELIUS RIORDAN, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? 110-11 (1990).

28. Audrey T. McCluskey, *The Historical Context of the Single-Sex Debate Among African Americans*, 17 W.J. OF AFRICAN AM. STUD. 193, 195 (1993). Besides all-male schools, other types of single-gender programs include set-aside classrooms for male students, programs for different age groups, programs that emphasize academic development, and others that focus on personal development and cultural heritage. Id. at 196.

29. Id. at 195. In Milwaukee, which has a 26% African American male population in its schools, the drop-out rate for African American males is 60%. *Id.* The drop-out problem has implications beyond the fact that many children are failing to receive a education. In Detroit, 60% of the drug offenses are committed by high school dropouts, and 97% of the offenders are African American males. Id.

30. Id. at 195. Studies of urban schools show that African American males are the largest group assigned to special education classes. McCluskey, *supra* note 28, at 195. At Milwaukee’s schools, less than 20% of African American males had a grade average of C or above. Id.

31. Id. African American males (26% of Milwaukee’s public school population) account for 50% of the suspensions in that city. Id.
fer from low self-esteem.\textsuperscript{32} Many experts believe that a student's self-esteem is positively related to his or her academic progress, such that poor self-esteem results in poor academic performance.\textsuperscript{33} Proponents of all-male educational programs point to these problems to emphasize the necessity for extraordinary measures that will address the special needs of young minority students.\textsuperscript{34}

Most of the public single-gender schools that have been established for urban minority males employ an Afrocentric curriculum which centers around African history and culture.\textsuperscript{35} Notions of male responsibility and behavior inspired by heroic African American figures such as Marcus Garvey and Malcolm X (as well as male teachers and counselors) are also incorporated.\textsuperscript{36} The assumption is that boys need the presence of strong male authority figures in order to counteract the negative male influences that the young men may encounter on the streets.\textsuperscript{37} The male role models teach the boys self-esteem and responsibility for self and others.\textsuperscript{38} These all-male schools also stress traditional mainstream values such as honesty, punctuality, grooming, manners and, especially,
Strict standards of behavior, dress codes, and rules prescribing the type of haircut that is permissible are uniformly enforced.\textsuperscript{40} These all-male academies also attempt to provide a stimulating learning environment.\textsuperscript{41} They usually gear their curriculums toward teaching math, science, technology and English.\textsuperscript{42} These schools have more frequent student-teacher contact, class sizes are usually smaller, teachers are selected for their ability to teach African American boys, drills are frequent and intensive, and students are encouraged to read aloud and ask questions.\textsuperscript{43}

Many educators are convinced that all-male academies and other single-gender programs positively affect urban minority males.\textsuperscript{44} Unfortunately, the quantitative evidence showing these effects is not conclusive. The most famous studies are those done by Cornelius Riordan of Providence College.\textsuperscript{45} His studies show that African American and Hispanic males (and females in general) who attend single-gender schools have higher test scores and greater senses of environmental control (i.e., tend to be more internally oriented)\textsuperscript{46} than their counterparts in coeducational facilities.\textsuperscript{47}

However, Riordan admits that because these schools tend to have more discipline and more interested students and parents, the evidence is inconclusive as to whether the single-gender setting alone is what positively affects students at single-gender schools.\textsuperscript{48} It appears that single-gender school effects are conditional and the key condition may pivot

\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 197.
\textsuperscript{42} Id.
\textsuperscript{43} McCluskey, supra note 28, at 196.
\textsuperscript{44} See generally RIORDAN, supra note 27.
\textsuperscript{45} See generally id.; Cornelius Riordan, Single-Gender Schools: Outcomes for African and Hispanic Americans, 10 RES. SOC. EDUC. AND SOCIALIZATION 177 (1994).
\textsuperscript{46} See supra note 33.
\textsuperscript{47} RIORDAN, supra note 27, at 112-13.
\textsuperscript{48} Riordan, supra note 45, at 198. Riordan attributes about 70% of these differences to informal school variables such as parental interest, school discipline, and youth values. Id. Moreover, Riordan also found that students in single-gender schools do experience a decline in self-esteem, most likely due to the higher academic demands and discipline levels. Id. at 197. Yet, he does not believe that this loss of self-esteem is significant compared to the gains in feelings of environmental control the students experience. Id.
on the notion of making a parent/student pro-academic choice.\textsuperscript{49} Moreover, many experts believe that successful strategies used in single-gender settings, such as smaller classes and more individual attention, can be just as effective in coeducational settings.\textsuperscript{50}

While the quantitative evidence of the effectiveness of all-male schools is inconclusive, the qualitative, or anecdotal, evidence is much stronger.\textsuperscript{51} Educators, parents, and students have all reported positive effects of the all-male academies.\textsuperscript{52} Many believe that, at the very least, these schools inspire trust and cooperation between parents, teachers, and students.\textsuperscript{53} Single-gender schools for minority males are also hailed for providing minority groups a voice in the education of their children.\textsuperscript{54}

Furthermore, many educators believe that simply separating boys from girls in the classroom (especially during the middle school years) is an effective way in which to minimize distractions that boys (not just urban minority boys), as well as girls, cause and face every school day.\textsuperscript{55} For example, at the Forty-Niners Academy in East Palo Alto, California, classes were segregated by gender in Fall 1997 and since that time, students, teachers, and school administrators have noticed a significant decrease in distractions in the single-gender classes.\textsuperscript{56} The Academy’s executive director, Michele Murnane, reports that the boys “didn’t have to talk back to the teacher to show off in front of the girls.”\textsuperscript{57} Seventh-grader Fabricio Albarez attested to the distraction that girls can create for boys when he admitted that if “[a] girl is cute, you’re going to pay more attention to her” than a teacher.\textsuperscript{58} Another boy felt that an all-boys class facilitates open discussion in certain sensitive situations.\textsuperscript{59} He stated, “When we talk about body changes, we feel more open to asking ques-

\begin{thebibliography}{99}
\bibitem{note_49} Id. at 198.
\bibitem{note_50} GAO, \textit{PUBLIC EDUCATION}, \textit{supra} note 18, at 6.
\bibitem{note_51} Id. at 4.
\bibitem{note_52} McCluskey, \textit{supra} note 28, at 196-97. “He can hardly wait to go to school,” reports one mother of a student at an all-male academy. Id. at 196.
\bibitem{note_53} Id. at 198.
\bibitem{note_54} Id.
\bibitem{note_55} GAO, \textit{PUBLIC EDUCATION}, \textit{supra} note 18, at 4.
\bibitem{note_57} Id.
\bibitem{note_58} Id.
\bibitem{note_59} Id.
\end{thebibliography}
Regardless of whether or not all-male academies actually benefit males, especially urban minority males, these schools have been met by strong opposition, mostly from civil rights organizations such as the NAACP. Opponents argue that such programs ignore the plight of minority females who face gender discrimination in addition to race and class oppression. Moreover, the drop-out rate for African American females of lower socio-economic status is nearly as high as that of African American males. Additionally, the academic achievement of African American females is below their grade level.

Opponents have also argued that all-male programs for urban minority students have the effect of stereotyping minority males as being low achievers and needing special treatment. Opponents also express concern about the risk of a separate and unequal allocation of education resources, the fear being that all-female schools will get a smaller percentage than all-male schools.

2. Improving Academic Performance of Females

As stated above, statistics show that, in general, females do not perform as well academically as males in coeducational settings. Many coeducational schools are based on a male developmental model, emphasizing individualism and competition. This model poorly serves girls who tend to perform better academically under a model which emphasizes cooperative learning.

60. Id.
61. McCluskey, supra note 28, at 196. Opposition has also come from the federal government. Id. at 197. Lamar Alexander, former Secretary of Education for the Bush administration, criticized all-male academies, noting that parents who claim a right to send their children to such schools have arguments quite similar to those used by White supremacists in justifying segregated schools in the South during the middle of the century. Id.
62. Id. at 196.
63. Id.; see also GAO, PUBLIC EDUCATION, supra note 18, at 6.
64. McCluskey, supra note 28, at 196; see also GAO, PUBLIC EDUCATION, supra note 18, at 6.
65. GAO, PUBLIC EDUCATION, supra note 18, at 6.
66. Id. at 4.
67. RIORDAN, supra note 27, at 110-11; Tovey, supra note 27, at 4 (noting 1000 studies on single-sex education done for the YMCA).
68. Tovey, supra note 27, at 4-5.
69. Id. at 5 (citing a 1991 study by Renee Peterson). In fact, research shows
Recent research suggests that female students defer to males in coeducational classrooms, are called on less than males, and are less likely to study advanced mathematics and science. When girls do call out answers, they are often admonished by their teachers (whether male or female) for speaking out in class. The more recently published history textbooks devote only two percent of their pages to women. Furthermore, research has shown that girls' lower scores on standardized tests may be due, in large part, to gender bias in the tests.

Proponents of all-female schools and other single-gender programs believe that single-gender settings will improve girls' academic performance and attitude toward math and science. Single-gender schools and programs typically emphasize enhancing confidence, competence, and leadership skills, as well as encouraging female students to pursue careers not traditionally female.

Research on the subject shows that the proponents may be right, at least regarding all-female colleges. Graduates of these colleges are nearly twice as likely as women graduates of coeducational institutions to be listed in professional registries, such as Who's Who in America, or Who's Who of America's Schools Shortchange Girls (1992) [hereinafter WELLESLEY COLLEGE] (analyzing more than 1200 research studies on girls and boys in public schools); Myra & David Sadker, Failing at Fairness: How America's Schools Cheat Girls (Charles Scribner's Sons, MacMillan Publishing Co. 1994) (documenting the gender bias girls face in coeducational classrooms and its adverse effects).

70. GAO, PUBLIC EDUCATION, supra note 18, at 4; see also WELLESLEY COLLEGE CTR. FOR RES. ON WOMEN, AM. ASS'N OF UNIV. WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS (1992) [hereinafter WELLESLEY COLLEGE] (analyzing more than 1200 research studies on girls and boys in public schools); Myra & David Sadker, Failing at Fairness: How America's Schools Cheat Girls (Charles Scribner's Sons, MacMillan Publishing Co. 1994) (documenting the gender bias girls face in coeducational classrooms and its adverse effects).


72. Id.

73. See WELLESLEY COLLEGE, supra note 70, at 89-99. Standardized test scores may be a reflection of both gender bias and conditions for girls in coeducational schools. Estrich, supra note 70, at 38. Usually about 18,000 boys reach the top categories on the Preliminary Scholastic Assessment Test (P.S.A.T.), while only about 8000 girls reach top levels. Id. In 1994, 60% of the National Merit Scholarship finalists were boys (the P.S.A.T. determines eligibility for the scholarships). Id. Boys also outscore girls on eleven of the fourteen College Board Achievement tests. Id.

74. GAO, PUBLIC EDUCATION, supra note 18, at 4.

75. Id.

76. See M. Elizabeth Tidball, Women's Colleges and Women Achievers Revisited, 5 SIGNS: J. OF WOMEN IN CULTURE AND SOC'y 505 (1980).
can Women. Graduates of women's colleges are more than twice as likely as female graduates of coeducational institutions to have received research doctorates in all fields combined. Women's colleges produce far greater numbers of female graduates included in the Doctorate Record File than that of coeducational institutions. Finally, research has shown that the larger the proportion of male students on a campus, the less likely the female students will be recognized for career achievement.

Although little quantitative evidence exists regarding the benefits of single-gender settings to girls at levels before college, the anecdotal evidence strongly supports the proponents of all-girls elementary and secondary schools. For example, girls who have participated in the Illinois Math and Science Academy's all-girls calculus-based physics class have been extremely eager to ask and answer questions instead of sitting back, hoping that the teacher does not call on them. Generally, officials at all-girls programs are enthusiastic about the girls' performance and have noticed increased competence and confidence, development of leadership qualities, and better focus on academics than from girls in coeducational classes.

However, opponents of single-sex education question the research done on the subject. They charge that much of the research is merely qualitative or anecdotal and that many of the results are overstated and presented in a one-sided manner in the course of pursuing a political agenda. Many studies show that boys do in fact perform better than girls in math, science, and social science, but that girls perform better than boys in reading and far better in writing.

Many of the other arguments against all-female pro-

77. Id. at 506.
78. Id. at 515.
79. Id.
80. Id. at 509.
81. One interesting fact is that in girls' high schools, 80% of the girls take four years of science and math, compared with the national average of two years in a coed environment. Estrich, supra note 71, at 38.
82. Id.
83. Id.
84. GAO, PUBLIC EDUCATION, supra note 18, at 5.
85. Tovey, supra note 27, at 4.
86. Id.
87. Id.
grams are very similar to those arguments against all-male schools for minority males. Some educators worry that all-female programs merely reinforce gender stereotypes of females having special needs, limitations, or deficiencies in learning. Finally, opponents also believe that teacher training in diversity and equity can also contribute to a bias-free coeducational classroom.

B. Equal Education Opportunity Act

The Equal Education Opportunity Act of 1974 prohibits, among other things, student assignment to a school other than a neighborhood school if assignment results in more segregation of students on the basis of race, color, sex, or national origin among the schools than would result if such students were assigned to the school closest to their homes. The purpose of the Act was to specify appropriate remedies for the orderly elimination of vestiges of dual school systems, such as those racially segregated.

Thus, while the Equal Education Opportunity Act essentially forbids a school district from making mandatory assignments of students to single-gender public elementary and secondary schools, where the choice of schools is voluntary on the part of the students, a school district does not violate the Act. Therefore, the Young Women’s Leadership School in Harlem would not violate the Equal Education Opportunity Act because girls are not assigned to the school, but, rather, their attendance at the school is voluntary.

C. Title IX

Title IX of the Education Amendments of 1972 prohibits any person, on the basis of sex, from being excluded from participation in, denied the benefits of, or subjected to dis-

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88. See supra Part II.A.1; GAO, PUBLIC EDUCATION, supra note 18, at 6.
89. Tovey, supra note 27, at 4. As an example of this concern, federal officials suggested that all-girl math classes in a Ventura, California school be labeled “classes for the mathematically challenged” in order to comply with Title IX regulations. Id.
90. GAO, PUBLIC EDUCATION, supra note 18, at 6.
92. Id. § 1703(c).
93. Id. § 1701(b).
94. See GAO, PUBLIC EDUCATION, supra note 18, at 7 n.8.
95. Steinberg, supra note 6, at B15.
SINGLE-GENDER EDUCATION

While Title IX governs admissions policies of vocational, professional, graduate, and public undergraduate schools, it does not govern admissions practices at the elementary and secondary school levels. Thus, the Title IX statute does not explicitly preclude a school district from establishing single-gender elementary and secondary schools, even if it receives federal funds.

However, Title IX's implementing regulation only permits single-gender elementary and secondary schools if comparable facilities, courses, and services are made available to students of both genders. In 1992, the Department of Education's Office of Civil Rights ("OCR"), which enforces Title IX, investigated complaints against two single-gender public schools, but concluded that neither violated Title IX. The OCR found that despite the school's name, the Philadelphia High School for Girls had no official policy of excluding males and, therefore, it had not violated Title IX. The OCR made similar findings regarding the policies of the all-girls Western High School in Baltimore. Boys rarely apply to these schools because the schools have decidedly female atmospheres in which boys do not seem interested. Thus, even if a school consists of members of only one sex, as long as an elementary or secondary school does not have an official policy excluding a particular sex from attending a school, the OCR will not find a violation of Title IX.

D. Equal Protection History of Gender-Based Classifications

In addition to Title IX, single-gender education has also been challenged under the Equal Protection Clause of the Fourteenth Amendment which declares that a state may not deny anyone in its jurisdiction the equal protection of the

97. Id. § 1681(a).
98. Id. § 1681(a)(1).
99. Id.
100. 34 C.F.R. § 106 (1996).
101. Id. § 106.35(b).
102. GAO, PUBLIC EDUCATION, supra note 18, at 7-8.
103. Id. at 8.
104. Id.
106. GAO, PUBLIC EDUCATION, supra note 18, at 7-8.
1. Initial Standard: Rational Basis

Prior to 1971, the courts examined classifications based on gender under the highly deferential "rational basis" test, where a statute was upheld if it was rationally related to some legitimate state objective.\(^{109}\)

2. Reed: Rational Basis with Bite

However, in Reed v. Reed,\(^{110}\) decided in 1971, the United States Supreme Court unanimously held that in order for gender classifications to comport with the Fourteenth Amendment, they "must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."\(^{111}\) In Reed, the Court struck down an Idaho statute preferring men over women as administrators of estates because the classification was arbitrary.\(^{112}\) The Court rejected the state's contention that the preference was necessary to reduce the work-load of probate courts by eliminating hearings on the merits.\(^{113}\) While the Reed Court did not explicitly establish a new standard or find gender to be a suspect class, the Court required much more justification for gender-based classifications than had been previously required and implicitly rejected the traditional and highly deferential rational basis test for gender classifications.\(^{114}\)

3. Brief Support for Strict Scrutiny

The rational basis test for gender classifications was explicitly rejected by the Court in Frontiero v. Richardson.\(^{115}\) In fact, in Frontiero, a plurality of the Court held that classifications based on gender, like those based on race, were subject

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108. Id.
111. Id. at 76 (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
112. Id.
113. Id.
to strict scrutiny. However, this position was never formally adopted by a majority of the Court.


Finally, in *Craig v. Boren*, decided in 1976, a majority of the Justices agreed upon a specific definition of an intermediate standard of review for gender-based classifications. In this case, the Court invalidated an Oklahoma law which permitted the sale of 3.2% beer to women at age eighteen, but required males to be twenty-one. In applying this new intermediate standard, the Court held that to withstand a Fourteenth Amendment challenge, gender-based classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives." The state attempted to justify the statute on the grounds that it promoted traffic safety, citing evidence showing that males ages eighteen to twenty were arrested more often for drunk driving and were involved in more car accidents than females in the same age group. However, the Court rejected this argument, holding that the relationship between traffic safety and the gender classification was too tenuous and that the state was merely using "maleness" as a proxy for drinking and driving.

Currently, courts still apply the intermediate level of scrutiny to governmental classifications based on gender. The next section of this comment summarizes the major cases involving single-gender education.

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116. *Id.*
117. See NOWAK & ROTUNDA, supra note 109, § 14.3, at 779.
118. 429 U.S. 190 (1976).
119. *Id.* at 197.
120. *Id.* at 192.
121. *Id.* at 197.
122. *Id.* at 199-200.
123. Craig v. Boren, 429 U.S. 190, 201-02 (1976). In other words, because only two percent of males in that age group were actually arrested for drunk driving, the classification was based upon a stereotype of all males in that age group being drunk drivers. *Id.*
E. Equal Protection History of Single-Gender Education

1. Pre-Craig v. Boren Decisions

In Williams v. McNair, decided before the Reed and Craig decisions, the United States District Court for the District of South Carolina held that Winthrop College, a state supported institution, did not violate equal protection doctrine by limiting admission to female students. Examining the gender-based classification under the rational basis test, the court held that the classification— premised on evidence showing the positive effects of single-gender education—was rational. Moreover, the court held that "the Constitution does not require that a classification 'keep abreast of the latest' in educational opinion, especially when there remains a respectable opinion to the contrary." The district court also found that males could attend other institutions in the state and that there were no special features connected to Winthrop that made it more advantageous educationally than other institutions.

In Vorchheimer v. School District of Philadelphia, a female high school student was denied admission to an all-male academic high school in Philadelphia solely because of her sex. The district had established two single-gender academic high schools: all-boys Central High School and Philadelphia High School for Girls. The federal district

126. Id. at 138.
127. Id. at 137-38.
128. Id. at 137.
130. 532 F.2d 880 (3d Cir. 1976), aff'd by an equally divided Court, 430 U.S. 703 (1977). Because this decision was affirmed by an equally divided Supreme Court, it is precedential only in the Third Circuit. GAO, PUBLIC EDUCATION, supra note 18, at 13 n.17. Female students subsequently brought another suit under the Equal Protection Clause and were not barred because of materially inadequate representation by plaintiff's counsel in Vorchheimer. Id. The Common Pleas Court of Philadelphia County ordered the admission of girls to Central High School because the boys' campus was almost three times larger, its library had almost twice as many books, its school had a computer room, and its graduates received almost twice the amount of money for college scholarships as the graduates of Philadelphia High School for Girls. Id. Central High School is currently coeducational and the girls school does not deny admission to boys; however, no boys are enrolled. Id.; see also discussion supra Part II.C.
131. Vorchheimer, 532 F.2d at 881.
court found that both schools had excellent reputations for academic excellence and enrollment in either school was voluntary. The school district also provided coeducational high schools which offered courses required for college admission and advanced placement courses. The United States Court of Appeals for the Third Circuit agreed with the district court’s findings that the admissions requirements, although not gender neutral, did not offend the Equal Protection Clause. The court declined to treat gender the same as race and apply strict scrutiny, reasoning that although no fundamental difference exists between races, differences between the sexes do exist that may, in limited circumstances, justify disparity under the law. However, the court also failed to establish exactly which level of scrutiny it was applying—rational basis or intermediate scrutiny—because it stated that the school district would prevail under either test. Finally, the court noted that the primary “aim of any school system must be to furnish an education of as high a quality as feasible.”

2. Post-Craig v. Boren Decisions

Williams and Vorheiser were decided before the Supreme Court ruled in Craig that gender classifications were to be examined under an intermediate level of scrutiny. Although the Supreme Court affirmed both Vorheiser and Williams, in neither case did the Court issue a full opinion.

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133. Id. at 882.
134. Id. at 881.
135. Id. at 888.
136. Id. at 886.
138. Id.
139. Id.
140. Craig v. Boren, 429 U.S. 190, 197 (1976). However, the court in Vorheiser did make reference to a “substantial relationship.” Vorheiser, 532 F.2d at 888.
The Court did not issue a full opinion on the constitutionality of single-gender education until 1982 when it decided *Mississippi University for Women v. Hogan.*

In *Mississippi University for Women,* the Court held, by a vote of five to four, that it was a violation of equal protection for a state-supported professional nursing program to deny admission to males solely on the basis of their gender. The Court stated that because Mississippi maintained no other single-sex public university or college, "we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females," as was the case in *Vorchheimer.* In *Mississippi University for Women,* the Court held that a state needs to show an "exceedingly persuasive justification" for classifying individuals on the basis of gender. The state can only meet that burden by showing that the classification serves "important governmental objectives" and that the discriminatory means employed are "substantially related" to achieving those objectives. In applying this intermediate level of scrutiny, the Court held that fixed notions about roles and abilities of males and females should not be considered. The majority also stated the fact "[t]hat this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review."

The Court was not persuaded by Mississippi's argument that its single-sex admissions policy compensated for discrimination against women. Mississippi had failed to show that women lacked opportunities to obtain nursing training when the school was originally established or that women were deprived of such opportunities when Hogan sought admission. The state's policy, rather than compensating for discriminatory barriers faced by women, tended to perpetuate the stereotyped view of nursing as an exclusively female

143. *Id.* at 731.
144. *Id.* at 720 n.1.
145. *Id.* at 724.
146. *Id.*
148. *Id.* at 724.
149. *Id.* at 727.
150. *Id.* at 729.
profession. The policy also failed because the state had not shown “that the gender-based classification was substantially and directly related to its proposed compensatory objective.”

The United States District Court for the Eastern District of Michigan applied *Mississippi University for Women*’s intermediate standard in *Garrett v. Board of Education of School District of Detroit*. In this case, a Detroit school district sought to establish three male academies which would offer special programs in order to address the high unemployment rates, school dropout levels, and homicide among urban males. The plaintiffs contended that these special programs did not require a uniquely male atmosphere to succeed and that they also addressed issues females face. Furthermore, the academies did not target only at-risk boys, but boys from all achievement levels.

The district court issued a preliminary injunction, ruling that under the standard set forth in *Mississippi University for Women*, the U.S. Constitution prohibits the exclusion of an individual from a publicly funded school because of his or her gender, unless the school district can show that the gender-based classification serves an important governmental objective and that the discriminatory means employed are substantially related to achieving that objective. The school district failed to carry its burden because the court found no evidence that the education system was failing urban males due to the attendance of females. After the injunction was granted, the school district agreed to expand the academies to include girls and to have comparable male-focused and female-focused classes and activities; thus, the case never went to trial.

3. *The VMI Decision*

Finally, on June 26, 1996, in *United States v. Virginia*,

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151. *Id.* at 729-30.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 1007-08.
158. GAO, PUBLIC EDUCATION, supra note 25, at 14-15.
the Supreme Court held that the Virginia Military Institute's ("VMI") male-only admissions policy violated the Equal Protection Clause. As the only publicly funded single-gender institution of higher learning in Virginia, VMI pursued its goal of producing "citizen-soldiers" through an "adversative" method which featured physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in "desirable values." Its cadets live in spartan barracks under constant surveillance, wear uniforms, eat together, and participate in regular drills.

In 1990, a female high school student seeking admission to VMI filed a complaint with the United States Attorney General. The United States sued the Commonwealth of Virginia and VMI alleging that the institute's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. The district court ruled in favor of VMI, but the Fourth Circuit Court of Appeal vacated the judgment and remanded the case. As a result, Virginia established an alternative program for women known as the Virginia Women's Institute for Leadership ("VWIL"), a state-sponsored undergraduate program located at the all-female Mary Baldwin College. VWIL shared VMI's mission to produce "citizen soldiers," however, VWIL did not have a military format, did not require its students to eat together or to wear uniforms, and offered only off-campus leadership programs. Mary Baldwin's faculty was less credentialed and was paid less than VMI's, and the school offered only bachelor of arts degrees, in contrast to VMI's science and engineering alternatives. VWIL had an endowment of about $19 million compared to VMI's $131 million. Nonetheless, the district court found that Virginia's proposed remedial plan satisfied equal protection requirements and the Fourth

160. Id. at 518.
161. Id. at 520.
162. Id. at 522.
163. Id. at 523.
164. Id.
166. Id. at 526.
167. Id. at 526-27.
168. Id. at 526.
169. Id. at 527.
Circuit affirmed. 170

The Supreme Court reversed and remanded, in part because the VWIL remedy proposed by the state was not a comparable single-gender women's institution, but merely a "pale shadow" of VMI. 171 Justice Ginsburg, writing for the majority, followed Mississippi University for Women and held that Virginia must show at least that the gender discrimination is substantially related to achievement of an important governmental interest. 172 Under what the majority referred to as "skeptical scrutiny," the state bears the "demanding" burden of demonstrating an "exceedingly persuasive" justification for gender-based discrimination. 173 The Court concluded that Virginia had not shown an exceedingly persuasive justification for excluding all women from VMI. 174

Although the Court agreed with Virginia's argument that single-gender education may benefit some students and that "diversity among public educational institutions can serve the public good, 175 Virginia failed to show that VMI was actually established and maintained to further these purposes. 176 Moreover, Virginia failed to show that the admission of women would destroy the adversative method at VMI. 177

The Court refrained from ruling explicitly on the constitutionality of single-gender educational programs other than the one maintained at VMI. 178 The Court stated, "[w]e do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique'..." 179

In his concurring opinion, Chief Justice Rehnquist stated that the majority opinion would result in uncertainty as to what the appropriate test is for gender classifications. 180 He believed that the term "exceedingly persuasive justification"

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170. Id. at 527-28.
172. Id. at 533.
173. Id. at 531.
174. Id. at 534.
175. Id. at 535.
176. Id.
178. Id. at 534 n.7.
179. Id.
180. Id. at 559 (Rehnquist, C.J., concurring).
was merely an observation on the difficulty of meeting the applicable intermediate test, not a formulation of the test itself, as he believed the majority was using the term.181

Justice Scalia's dissent criticizes the majority for essentially imposing strict scrutiny on gender classifications without officially adopting that standard.182 Justice Scalia recognized that the majority opinion did not absolutely preclude the establishment of public single-gender schools.183 However, because of the heightened level of scrutiny the Court applied to VMI's gender classification, school districts and universities would be too fearful of losing court battles to attempt to create such programs.184

III. STATEMENT OF THE PROBLEM

The Court's decisions in the area of single-gender education do not give states and school districts enough guidance in how to implement single-gender schools. Several issues remain unresolved by the Supreme Court's recent ruling in United States v. Virginia.185 The Court did not decide whether separate but equal facilities for both sexes would fulfill equal protection requirements.186 The Court also has yet to decide exactly under what circumstances single-gender schools are permissible. For example, in the future, the Court might be more accepting of single-gender programs which benefit females than of those which benefit males.187 Finally, it is also unclear how the VMI decision will affect secondary and elementary schools like the Young Women's Leadership School in New York City.188

Furthermore, the Court in the VMI case uses ambiguous language in applying the intermediate level of scrutiny.189 This may lead states and school districts to believe that the Court will now apply a higher level of scrutiny to gender classifications than the traditional intermediate level of scru-

181. Id.
182. Id. at 596 (Scalia, J., dissenting).
184. Id.
185. See infra Part IV.C.1-2.
186. See infra Part IV.C.2.
187. See infra Part IV.C.1.
188. See infra Part IV.B.1-2.
189. See infra Part IV.A.
tiny. As a result of the Court's ambiguous language and failure to resolve important issues, state and school officials will be discouraged from establishing single-gender schools. However, these schools should not be discouraged because the available research seems to indicate that such schools can have positive effects on the academic performance of both boys and girls. Moreover, more research is needed on single-gender education and, therefore, single-gender schools need to be established in order to perform this research.

IV. ANALYSIS

A. Under Equal Protection Doctrine, There Is Not a Higher Level of Scrutiny for Gender-Based Classifications After the VMI Decision

In his dissenting opinion, Justice Scalia argued that the majority in the VMI case effectively adopted a strict scrutiny level of review for gender-based classifications, as the United States had urged the Court to do.\footnote{190} However, this simply is not the case. The majority did not raise the level of review of gender classifications above the traditional intermediate level.

1. "Exceedingly Persuasive Justification"

Justice Scalia believed that the majority relied too heavily on the term "exceedingly persuasive justification" in making its ruling.\footnote{191} In other words, Justice Scalia believed that in determining whether the state had given an "exceedingly persuasive justification" for maintaining VMI's all-male status, the majority had imposed a level of scrutiny much higher than the traditional intermediate level of scrutiny.\footnote{192} This new level of scrutiny, according to Justice Scalia, was tantamount to strict scrutiny.\footnote{193}

However, Justice Scalia's assertion is incorrect. Nowhere in its opinion did the majority state that VMI's gender classification must be narrowly tailored to promote a compel-
ling state interest, as the strict scrutiny standard requires.\textsuperscript{194} In fact, the Court explicitly stated that it was not employing strict scrutiny when it held that the "heightened review standard our precedent establishes does not make sex a proscribed classification," under which gender discrimination would be examined under a strict level of scrutiny.\textsuperscript{195} The Court refused to treat gender the same as race and national origin (both suspect classes) because, "[s]upposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications."\textsuperscript{196} Rather, the Court found that there are inherent physical differences between men and women that are enduring, and, therefore, strict scrutiny should not apply to state programs which account for those differences in a constitutional manner.\textsuperscript{197}

Furthermore, \textit{United States v. Virginia} was not the first case in which the Court had used the phrase "exceedingly persuasive justification" in describing the intermediate level of scrutiny for gender classifications. In \textit{Mississippi University for Women}, the Court held that "the State has fallen far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification."\textsuperscript{198} In \textit{J.E.B. v. Alabama ex rel. T.B.},\textsuperscript{199} a 1994 case concerning gender-based peremptory challenges, the Court again held that "gender-based classifications require an 'exceedingly persuasive justification' in order to survive constitutional scrutiny."\textsuperscript{200} Justice Scalia also wrote a dissenting opinion in \textit{J.E.B.}, but unlike in \textit{VMI}, he did not object to the use of the phrase "exceedingly persuasive justification."\textsuperscript{201} Thus, the Court has used the term "exceedingly persuasive justification" in several gender discrimination cases prior to the \textit{VMI} case.\textsuperscript{202} Its continued use does not make gender a suspect class.

However, as Chief Justice Rehnquist stated in his con-
curring opinion, by using the phrase “exceedingly persuasive justification,” the majority “introduces an element of uncertainty respecting the appropriate test.”\textsuperscript{203} In the past, this term has been used as an “observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.”\textsuperscript{204} However, the majority seems to be using the term as a formulation of the test. As Justice Scalia points out, the majority uses the phrase nine times, but only uses the traditional intermediate test twice in making its ruling.\textsuperscript{205}

The use of the term “exceedingly persuasive justification” as a formulation of the intermediate test does not raise the level of scrutiny applied to gender discrimination cases. However, school officials could view this term’s use in that manner because of its excessive use in \textit{United States v. Virginia}. As a result, they may be discouraged from establishing single-gender schools for fear of losing legal challenges due to this apparently heavy burden.

Moreover, the phrase has little utility as an observation on the difficulty of meeting the appropriate test. It is readily apparent that a substantial relationship to an important state interest is difficult to prove. Saying that the state must be exceedingly persuasive adds nothing to the analysis. Because the term’s descriptive value is greatly outweighed by the confusion its use creates, the term “exceedingly persuasive justification” should be not be used in future cases.

2. \textit{Stereotypes and Generalizations}

Justice Scalia also objected to the majority’s finding that Virginia’s justification for excluding women was based on generalizations and stereotypes regarding women.\textsuperscript{206} The majority found that some women would thrive under the adversative model, would be able to meet the physical demands VMI imposed on its cadets, and would want to attend VMI given the opportunity.\textsuperscript{207} Women had traditionally been excluded from VMI because it was assumed that the adversative method was an inappropriate method for educating most

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\begin{thebibliography}{99}
\bibitem{204} \textit{Id.}
\bibitem{205} \textit{Id.} at 571 (Scalia, J., dissenting).
\bibitem{206} \textit{Id.}
\bibitem{207} \textit{Id.} at 550.
\end{thebibliography}
women. However, the Court found that this assumption was based on stereotypes about the capabilities of women.

As with the "exceedingly persuasive" requirement, the Court's suspicion of classifications based on gender stereotypes is neither new nor does it raise the level of scrutiny applied to gender classifications. In Craig v. Boren, the Court refused to allow the state to use status as an eighteen to twenty year old male to serve as a proxy for drinking and driving where statistics showed that relatively few males in that age group were actually arrested for drinking and driving. In J.E.B., the Court prohibited peremptory challenges based solely on gender. The State reasoned that such challenges were reasonable based on the historical perception that men might be more sympathetic and receptive than women to the arguments of a man charged in a paternity action. The Court held that the state's rationale was not exceedingly persuasive because it was based on "invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." Thus, the Court refused to allow gender to serve as a proxy for juror competence and impartiality.

Similarly, classifications which perpetuate such gender stereotypes have consistently been viewed with suspicion in determining whether a substantial relationship to an important governmental interest exists. For example, the Court found that the Mississippi University for Women's ("MUW") exclusion of men from its nursing school perpetuated the stereotype that nursing was a female occupation. Thus, MUW's gender classification was not substantially related to the school's alleged purpose in excluding men: namely, compensating women for past discrimination in the nursing field.

In the VMI case, the Court followed this precedent and viewed the exclusion of women with "skeptical scrutiny" be-

208. Id.
212. Id. at 137-38.
213. Id. at 131.
214. Id. at 127.
216. Id.
cause it was based on broad generalizations about the capabilities of women in relation to the adversative method. The Court stated that "[g]eneralizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." In other words, if some women (not necessarily most women) are willing and able to learn at VMI under the adversative method, then the State cannot use one's status as a female as a proxy for inability or incompetence. Continuing VMI's policy of excluding women would only serve to perpetuate those stereotypes.

3. State's Actual Motive

Finally, Justice Scalia further objected to the majority's insistence that the objective advanced by the State be the objective that actually motivated the government to establish the gender classification in the first place. Once again, this requirement is not new to gender discrimination cases. In Mississippi University for Women, the State justified the exclusion of men from MUW's nursing school as being in furtherance of "educational affirmative action" by "compensating for discrimination against women." However, the Court found that this was not the actual purpose behind the gender classification because MUW's all-female admissions policy was formulated in 1884, when remedies for past gender discrimination were not given consideration.

In the VMI case, Virginia tried to justify the all-male status of VMI as being in furtherance of a state policy of

218. Id.
219. The Court in J.E.B. stated, "[g]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 139 n.11 (1994); see also Craig v. Boren, 429 U.S. 190, 201 (1976) (invalidating an Oklahoma law that established different drinking ages for men and women, although the evidence supporting the age differential was "not trivial in a statistical sense").
221. Id. at 579 (Scalia, J., dissenting).
224. Id. at 730 n.16.
“diversity in educational approaches.” However, the majority found that this was not the actual state purpose. Virginia had established no all-female public universities in the name of diversity and VMI’s policy of excluding women dated from a time when Virginia neither offered, nor sought to offer any higher public education to women. Thus, following the rationale of Mississippi University for Women, the Court held that the State’s “justification must be genuine, not hypothesized or invented post hoc in response to litigation.”

In summary, the level of scrutiny applied to gender classifications has not changed. Courts in gender discrimination cases must still apply an intermediate level of scrutiny. The State has the burden proving that the purpose for the gender classification is to serve an important governmental interest and that the purpose is the actual purpose, not one fabricated at trial. Moreover, the classification must be substantially related to the achievement of the important governmental interest. If the classification is based upon gender stereotypes or overbroad generalizations, then the State will fail to establish a substantial relationship. Finally, the term “exceedingly persuasive” is merely a description of the difficulty of fulfilling the above requirements and not the formulation of the test to be applied. However, due to the confusion that the term “exceedingly persuasive justification” engenders, it should not be used in future gender discrimination cases.

B. Legality of Current Attempts at Establishing Single-Gender Schools

1. Applying Title IX

Lawyers representing the Young Women’s Leadership School have claimed that the United States Department of
Education lacks jurisdiction over it because the gender discrimination provisions of Title IX do not cover admissions to secondary schools. However, as mentioned earlier in this comment, even though the Title IX statute does not explicitly govern admissions to secondary or elementary schools, Title IX's implementing regulation prohibits gender segregation in such schools, unless comparable facilities, courses, and services are made available to students of both genders. Thus, the YWLS cannot expressly deny admission to boys unless a comparable school is established for any boys excluded.

Yet, so long as a single-gender school does not have an official policy of excluding a particular sex, the OCR will not find a violation of Title IX and the school district can avoid setting up comparable single-gender schools for both sexes. As currently operated, the YWLS would violate Title IX because it has an official policy of excluding boys and the school district has failed to establish a comparable all-boys school. Yet, if the YWLS follows the all-girls high schools in Philadelphia and Baltimore and does not officially exclude boys, then it too would withstand Title IX challenges, even if it keeps its name and all of its students are girls.

However, this course may eventually force the YWLS to admit boys, compromising the purpose of the school. Another alternative would be for the school district to establish a comparable all-boys school. Provided both schools were equally funded and had comparable facilities and instructors, they would both likely withstand challenges under Title IX. But, this latter course may prove to be economically unfeasible.

Despite the economic disadvantages of establishing equal facilities for both genders, California chose this course in or-

231. *See supra* Part II.C.
234. Id. § 106.35(b).
235. *See supra* Part II.C.
236. As of September 27, 1997, Schools Chancellor Rudy Crew has refused to admit boys to the school or create an all-boys school nearby, the two compromises offered by the Federal Department of Education to address what it has tentatively concluded are legitimate civil rights concerns. *Fairness and Single-Sex Schools*, N.Y. TIMES, Sept. 27, 1997, at A22.
der to avoid challenges to its single-gender schools. Because California's program provides for dual single-gender schools, each with equal funding, facilities, staffing, books, equipment, curriculums, and extracurricular activities, it will likely withstand any future Title IX challenges.

Nonetheless, even if comparable single-gender schools existed for both boys and girls, if suit were brought against the YWLS under an equal protection theory, the school district would be required to show that the gender classifications it established were constitutional.

2. Applying Current Equal Protection Doctrine

Although the YWLS has only been challenged under Title IX, it and California's new single-gender schools may, in the future, also have to fulfill equal protection requirements. Applying the intermediate standard used in gender discrimination cases, the YWLS would not likely withstand constitutional scrutiny, unless, like the California program, substantially equal facilities were provided for both sexes.

a. First Prong—Important State Interest

Establishing single-gender schools is an important state interest for several reasons. For example, the goal of the YWLS is to provide underprivileged girls a better education than they would receive in coeducational schools. Research shows that females in coed schools do not perform as well academically as males. This is most likely due to the fact that in coed schools female students are called on less than boys and are often admonished when they do speak up. Many coeducational schools emphasize individualism and competition. While boys tend to perform better in these situations, girls tend to perform better in schools which em-

240. Steinberg, supra note 6, at A1.
241. RIORDAN, supra note 27, at 110-11; Tovey, supra note 27, at 4.
243. RIORDAN, supra note 27, at 106-07.
Single-gender education emphasizes cooperation. All-girls schools emphasize cooperation, give the girls more individual attention, and focus on courses in which girls traditionally do not perform well (e.g. math and science). Thus, there is a great need for single-gender schools which address the problems females face in coed schools. Therefore, establishing all-girls schools like the YWLS is an important state interest.

Single-gender schools also serve an important state interest when they address the problems urban minority males encounter in coed schools. Minority males tend to have low self-esteem and extraordinarily high drop-out rates. Those who do not drop out tend to be disciplined often and perform poorly in school. Many experts point to all-male schools as a solution to these problems. For example, these schools often employ Afrocentric curriculums and use minority men as role models for the boys. Through these measures, all-male schools aim to improve self-esteem and teach responsibility for self and others. Single-gender schools for urban minority boys also emphasize courses, such as math, science, and English, in which minority boys do not perform as well when they are in coeducational settings. Thus, given the obstacles urban minority males face in coeducational schools, establishing all-male schools is an important state interest.

Furthermore, in regards to males in general, regardless of socio-economic and racial status, many educators believe that separating boys and girls in the classroom is an effective way to minimize distractions that boys (not just urban minority boys), as well as girls, cause and face every school day. As mentioned above, many boys talk back to teachers and act out in order to show off to the girls in the class. Eliminating distractions in the classroom and, in turn, improving the education system for all children, both boys and

244. Tovey, supra note 27, at 4-5.
245. See supra Part II.A.2.
246. RIORDAN, supra note 27, at 106-07.
248. Id.
249. See supra Part II.A.1.
250. McCluskey, supra note 28, at 196.
251. Id.
252. Id. at 197.
253. See supra notes 55-59 and accompanying text.
254. See supra notes 55-59 and accompanying text.
girls, is yet another important state interest.

Finally, much of the research on the subject indicates that both genders could perform better academically in single-gender settings. However, it is unclear that the single-gender setting itself is the decisive factor accounting for these students' improved performance. Much more research is needed on the effects of single-gender education. Due to this fact, establishing single-gender schools in order to study their effects is another important state interest.

b. Second Prong—Substantial Relationship To An Important State Interest

The second prong of the intermediate scrutiny test requires the reviewing court to determine whether the important state interest in providing a quality education is served by the gender classification. To meet this prong, the school district which established the YWLS must prove that excluding boys is substantially related to the important state interest in improving girls' academic performance.

However, because the research on single-gender education is not entirely conclusive, the school district could very well fail to prove that its gender-based classification is substantially related to an important state interest. In other words, because of the lack of conclusive evidence in the area of single-gender education, excluding boys from the YWLS may not be substantially related to the important state interest. On the other hand, the only way to achieve more positive results is to allow more single-gender schools to be established and to study their effects on academic performance.

The school district will be able to overcome this problem by pointing out that the evidence is conclusive that boys receive much more attention in coeducational schools. Furthermore, statistics conclusively show that girls do not do as well as most boys in math and science classes. Thus, a single-gender school which excludes boys and emphasizes math and science is substantially related to the important state in-

255. See discussion supra Part II.A.1-2.
256. See discussion supra Part II.A.1-2.
258. See discussion supra Part II.A.2.
260. GAO, PUBLIC EDUCATION, supra note 18, at 4.
interest in improving the academic performance of females. Moreover, if the need for more research on single-gender education is asserted as the important state interest, then the establishment of a single-gender school for such a purpose also bears a substantial relationship.

Finally, the school district will also have to prove that the gender classification is not based on faulty stereotypes or broad generalizations about the capabilities or limitations of the two genders. The school district runs the risk that the reviewing court may view the YWLS as being based on the faulty stereotype that women need special treatment or have inherent intellectual limitations. However, this is an incorrect view of single-gender schools like the YWLS. Single-gender schools do not provide special treatment to their students, nor do they view their students as being limited. Rather, they are established based on the rationale that coed schools were not providing their students with the education they needed in order to function in society. In other words, single-gender schools are not established based on the faulty stereotype that their students are limited. Instead, single-gender schools are appropriately established based on the fact that the quality of education at coed schools is limited in specific instances. Thus, as long as the school district proves that girls were not performing well academically at the district's coed schools, it will be able to prove that the YWLS was not established based on faulty stereotypes of girls, but was established in response to the severely limited education girls receive in coed schools.

In summary, the YWLS, as currently set up, violates Title IX unless the school district also provides a comparable single-gender facility for boys. However, the all-boys school must be almost exactly equal to the YWLS to satisfy equal protection requirements. School and class size, faculty pay and credentials, funding, and quality of facilities must all be substantially equal. Otherwise, the reviewing court will force the YWLS to admit boys.

262. See supra Part II.A.2.
263. See supra Part II.A.1-2.
264. See supra Part IV.B.1.
265. See infra Part IV.B.2.
266. See infra Part IV.B.2.
If separate but substantially equal facilities are provided for both sexes, the school district must still justify its gender classification to survive an equal protection challenge. Establishing a single-gender school is substantially related to the important state interest in improving academic performance. Much of the evidence on single-gender education shows the positive results such schools can have on their students. To the extent that the evidence is not entirely conclusive, establishing single-gender schools is substantially related to the important state interest in discovering more effective ways of providing education. Finally, single-gender schools will be upheld as long as the basis for their establishment is the failure of coeducational environments and not stereotypes relating to the limitations of females and minorities.

C. Currently Unresolved Issues That May Turn the Tide

Several questions in the area of single-gender education remain unanswered by the Court’s opinion in *United States v. Virginia*. The legality of single-gender programs, such as the Young Women’s Leadership School, depends heavily upon what the answers are to the remaining questions in this area.

1. Are Single-Gender Schools Only Permissible When They Benefit Females?

The Supreme Court has only ruled on single-gender programs that in some way involve stereotypes of females. In *Mississippi University for Women*, the Court ruled that the continued exclusion of men from an all-female nursing school would only perpetuate the stereotype of nursing being a female’s job. In the *VMI* case, the Court held that the exclusion of women from VMI was based on a stereotype that women were not fit for the adversative method. The Court reasoned that allowing VMI’s exclusionary policy to continue would only perpetuate that stereotype.

In the future, the Court could hold that all classifications are essentially based on and perpetuate stereotypes of women. For example, if an institution only admitted females,

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267. See supra Part II.A.1-2.
268. See supra Part II.A.1-2.
271. Id.
the Court might rule that the school was based on and per-
petuated a stereotype of females having certain limitations
and needing extra help. However, it is unlikely that the
Court would invalidate all-female schools in every case. In
United States v. Virginia, the Court stated that “[s]ex classi-
fications may be used to compensate women ‘for particular
economic disabilities [they have] suffered.’” Thus, in the
future, the Court will allow gender classifications where the
State’s actual motivation is to help women.

However, the future for all-male schools is uncertain. If
all-male schools are invalidated, a double standard would re-
sult under which all-female schools which do not perpetuate
sterotypes of women are upheld, but, all-male schools would
automatically be held to violate equal protection principles.
There is some precedent to support this position. The Court’s
basis for its opinion in Mississippi University for Women was
that the all-female nursing school did not compensate women
for past discrimination, as the State had argued. In fact,
the all-female nursing school was actually committing a dis-
service to women. By excluding men, the nursing school was
perpetuating a stereotype about proper roles for women.
Thus, in Mississippi University for Women, the Court was es-
sentially protecting women’s interests, not those of men.

In Garrett v. Board of Education of School District of De-
troit, a Detroit school district was enjoined from establish-
ing three all-male academies. The district court found no
evidence that the coeducational environment (i.e., the pres-
ence of girls) resulted in the failure of urban males. Fur-
thermore, because girls faced the same types of problems
boys faced in Detroit’s coed schools, the school district could
not set up all-male schools without addressing the girls’
needs. Garrett illustrates that there seems to be more of an
acceptance of evidence showing the beneficial effects of sin-
gle-gender settings for females, whereas, evidence showing
the beneficial effects of all-male schools, especially for urban

272. Id. at 533 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per
curiam)).
274. Id.
276. Id. at 1006.
277. Id.
278. Id.
minority males, is not as readily accepted.\textsuperscript{279}

What this means for all-girls schools like the YWLS is that it will be much easier for them to prove a substantial relationship to an important state interest than it would be for an all-boys school. All-female schools will be much more widely accepted because they seek to improve the position of females. Yet, they will still have to satisfy Title IX by providing comparable facilities for males.\textsuperscript{280} On the other hand, many all-male schools could be held to be unconstitutional because they might be viewed as perpetuating gender stereotypes. Thus, all-male schools will likely be more difficult to justify under equal protection doctrine, even if substantially equal facilities are provided for females.

2. \textit{Are Separate But Equal Single-Gender Institutions Constitutional?}

Another issue yet to be resolved by the Court is whether a State or school district may establish a separate but equal facility in order to avoid equal protection violations. Although the Court has consistently avoided addressing this issue in cases involving gender classifications, it appears that, theoretically, the "separate but equal" doctrine may be viable in gender discrimination cases.\textsuperscript{281}

For example, in the \textit{VMI} case, the Court stated that the Virginia Women's Institute of Leadership ("VWIL") was in no way equal to VMI and, therefore, did not serve as an adequate remedial measure.\textsuperscript{282} The Court seemed to imply that if VWIL were equal to VMI, the exclusion of women from VMI would not violate equal protection principles. The district court in \textit{Garrett} also implied that if the all-male academies under attack in Detroit had been accompanied by comparable all-female academies, the all-male programs would not have been discontinued.\textsuperscript{283} Finally, although not decided under the

\begin{footnotes}
\item[279] The District Court in \textit{United States v. Virginia} noted that both men and women can benefit from a single-gender education, although apparently "the beneficial effects are stronger among women than among men." \textit{United States v. Virginia}, 766 F. Supp. 1407, 1414 (W.D. Va. 1991).
\item[280] See discussion \textit{supra} Part IV.B.1.
\item[281] The Court's prohibition of the "separate but equal" doctrine in racial discrimination cases has not yet been extended to gender discrimination cases. See \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954).
\end{footnotes}
same level of intermediate scrutiny applied to gender discrimination cases today, in Vorchheimer, the Supreme Court affirmed the ruling of the U.S. Court of Appeals for the Third Circuit that an all-boys high school was equal to an all-girls high school and, therefore, the all-boys high school did not offend the Equal Protection Clause.\(^{284}\)

While, in theory, it may be possible to establish separate but equal single-gender educational facilities, in practice, it may be almost impossible to achieve sufficient equality to pass constitutional scrutiny. For example, in United States v. Virginia, the Court ruled that VWIL was "a pale shadow" of VMI because VWIL was lacking in obvious, tangible ways such as faculty, course offerings, funding, facilities, and, most importantly, a lack of military training.\(^{285}\) However, the Court also placed a great deal of importance on intangible factors. For example, the VWIL graduate could not "anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network."\(^{286}\) The VWIL student could not have taken advantage of the numerous benefits of VMI, such as, an influential VMI alumni network—a network unavailable at Mary Baldwin College and VWIL. Therefore, given equality in all other areas, an institution established as a remedial measure could only achieve substantial equality\(^ {287}\) if it was being compared to a relatively new institution that had not yet built up a reputation.

Another obstacle to achievement of substantial equality is what many educators see as a need to implement different curriculums and teaching methods for boys and girls.\(^ {288}\) For example, if girls learn better under a model which emphasizes cooperative learning, all-girls school officials will likely want to adopt such measures. However, if the all-male school in that district has adopted a model emphasizing individualism and competition, will these schools be considered equal? In other words, will the courts allow school districts the flexibility to account for differences in the ways boys and

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286. Id. at 550.
287. Id. at 553 (citing the standard established for racial discrimination cases in Sweatt v. Painter, 339 U.S. 629, 633 (1950)).
288. See discussion supra Part II.A.1-2.
girls learn their best or must the two schools be exactly equal? This issue is still undecided, but this comment proposes that school districts be given considerable flexibility in accounting for differences between the two genders' learning styles and needs.

V. PROPOSAL

This comment proposes that the United States Supreme Court, given the opportunity, revisit the single-gender education issue and clarify several ambiguities remaining from past decisions.

A. Eliminate Ambiguous Language

The Court needs to eliminate the use of the phrase "exceedingly persuasive justification" when applying the intermediate level of scrutiny. Because of the ambiguity caused by the use of the phrase, school districts will be discouraged from establishing single-gender educational programs. They may conclude that the Court is examining gender-based classifications under a heightened scrutiny which approaches strict scrutiny. Although this interpretation would be incorrect, the term "exceedingly persuasive justification" should be eliminated because it has little utility as a descriptive device, it creates ambiguity in the law, and its use will result in less experimentation with single-gender education at a time when more research is sorely needed.

B. Create Separate But Equal Educational Facilities

The Court should also rule on the constitutionality of separate but equal single-gender facilities. In both the VMI and the Mississippi University for Women cases, the Court has intimated that it is possible to have separate but equal facilities, but the lower courts are left with no guidance on how to make this determination.

Given that true equality is nearly impossible to measure and achieve, the Court and the OCR, in overseeing Title IX, should require substantially equal funding, instructors, and facilities when comparing boys and girls schools. However,

289. See supra Part IV.A.2.
290. See supra Part IV.C.2.
the Court and the OCR should also give the schools considerable flexibility in deciding the method of teaching their curriculums because boys and girls, oftentimes, learn in different ways. While girls and boys schools should share basic curriculums, the Court needs to give single-gender schools a great deal of latitude in addressing the specific needs of their students. Thus, if girls need extra help with math and science and boys need extra help with reading and writing, then single-gender schools should be allowed to provide that help without having to have exactly the same curriculums.

C. Allow All-Male Schools

In the future, the Court should not invalidate all-male schools if the school district provides a substantially comparable facility for females. Urban minority males face numerous problems in our society. Many studies show the positive effects that single-gender education can have on these men and boys. Moreover, boys tend to create distractions in coed classrooms which, if eliminated, could be beneficial to all boys, regardless of race. Thus, all-male schools serve the important state interest of improving education for all males, not just urban minority males. For this reason, in the future, the Court should not create a double standard under which all-female schools are allowed and all-male schools are invalidated.

V. CONCLUSION

The end result in the VMI case was not incorrect. The Virginia Military Institute was the only public institution of higher learning in the state with the adversative method. VMI unconstitutionally discriminated against women and perpetuated archaic stereotypes of the two genders. This comment has not taken issue with the ends reached in that decision. What is wrong with the case is the means by with the Court made its ruling. The Court unnecessarily created confusion in the area of single-gender education by using useless and ambiguous terminology. It also failed to answer important questions which need to be answered in order to

292. See discussion supra Part II.A.2.
293. See discussion supra Part II.A.2.
294. See discussion supra Part II.A.2.
295. See supra notes 55-59 and accompanying text.
give school officials guidance when implementing single-gender schools. Schools like the Young Women's Leadership School need these answers so that they may attempt to address important educational problems faced by many students in our country.

Tod Christopher Gurney