

“EXCEEDINGLY [UN]PERSUASIVE” AND  
UNJUSTIFIED: THE INTERMEDIATE SCRUTINY  
STANDARD AND SINGLE-SEX EDUCATION  
AFTER *UNITED STATES V. VIRGINIA*

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2015 MICH. ST. L. REV. 2047

ABSTRACT

*Although single-sex public schools in the United States were virtually nonexistent in the 1980s, the popularity of public single-sex elementary and secondary schools has increased dramatically in the past fifteen years. This increase occurred as a result of a variety of factors, including the deficiencies of coeducational school settings, increasing research showing the benefits of single-sex education, and support by federal law under the No Child Left Behind Act and Department of Education regulations. However, schools attempting to use the educational benefits of single-sex education to provide individualized instruction to their students continue to face the threat of litigation for their well-intentioned efforts. School districts fearing the risks of this litigation are thus pressured to discontinue experimentation with these programs despite the federal government’s encouragement of this experimentation. This result is undesirable in the current educational environment, where educational reform is of paramount importance, federal standards increasingly demand more of schools, and school accountability is the education mantra.*

*The reason for this situation is simple—Supreme Court cases analyzing the constitutionality of sex-class isolations have applied conflicting standards of review. The Supreme Court’s application of*

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*the intermediate scrutiny standard has ranged from applying a more demanding intermediate scrutiny standard in some cases to adopting a more relaxed intermediate scrutiny standard in others. Conversely, lower federal courts have increasingly accepted state-sponsored single-sex educational options that exhibit the requisite safeguards. Without a clear standard for analyzing sex-class isolations, the constitutionality of single-sex education will remain on insecure footing. Schools attempting to implement single-sex educational programs will continue to be faced with the threat of lawsuits, despite the fact that the trend of current research, public opinion, and federal law supports their position.*

*In order to remedy this problem, the Supreme Court must reaffirm its commitment to the “traditional” intermediate scrutiny standard of review for analyzing single-sex educational programs. As such, in reviewing single-sex educational programs or schools, the Supreme Court should simply analyze (1) whether the state furthers an “important governmental objective” in establishing the school or program and (2) whether the state’s means are “substantially related to achievement” of this objective. In so doing, the Supreme Court would reconcile its conflicting standards of review with the increasing acceptance of single-sex education programs in popular opinion, federal law, and lower federal courts.*

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INTRODUCTION

In 1991, the Detroit School Board addressed its “high unemployment rates, school dropout levels and homicide among urban males” by attempting to open all-male elementary and middle schools for African-American males.<sup>1</sup> These schools focused on overcoming the educational hurdles that urban males faced by providing them with individualized counselors, mentors, and career advisors.<sup>2</sup> Additionally, the schools adopted a specialized Afrocentric curriculum and extended weekday classes.<sup>3</sup> Prior to establishing

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1. *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1006 (E.D. Mich. 1991).  
 2. *See id.*  
 3. *See id.*

these schools, the Board reviewed experimental programs focused on the special needs of urban males and found these programs successful.<sup>4</sup> In fact, the Board found that these schools were “critical . . . to keep[ing] urban males out of the City’s morgues and prisons.”<sup>5</sup>

However, a suit brought in the Eastern District of Michigan ultimately frustrated the Board’s hopes to remedy the hurdles faced by urban males.<sup>6</sup> After a female student sued the school board on equal protection grounds, the Eastern District of Michigan granted a preliminary injunction prohibiting the Board from opening these schools.<sup>7</sup> The court found that while the school’s purpose was “important,” and the status of urban males was “endangered,” this was insufficient to overcome the standard set by the Supreme Court in *Mississippi University for Woman v. Hogan* for analyzing state-authorized sex-class isolations.<sup>8</sup>

*Garrett v. Board of Education of the School District of the City of Detroit* is a classic example of how schools nationwide have attempted to use the educational benefits of single-sex education to provide individualized instruction to their students only to face the threat of litigation for the schools’ well-intentioned efforts.<sup>9</sup> The reason for this situation is simple: Supreme Court cases analyzing sex-class isolations have applied conflicting standards of review.<sup>10</sup> Without a clear standard for analyzing sex-class isolations, the

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4. See *id.* at 1008 n.6. The assistant principal at one of the schools, over a period of three years, provided male students with a “voluntary extra-curricular mentorship program, ‘Man to Man.’” *Id.* This program achieved “some improvement in the academic status of male participants.” *Id.*

5. *Id.* at 1008.

6. *Cf. id.* at 1014.

7. See *id.*

8. See *id.* Ostensibly, the *Garrett* court required Detroit to show that its sex-based classification served an important government interest and that its means were “substantially related to the achievement of those objectives.” *Id.* at 1006 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). However, like the Supreme Court in *Hogan*, the *Garrett* court applied a rigorous scrutiny of the state’s alleged objectives and required the school district to show that its single-sex admissions program was necessary to achieve this objective in every instance—that the exclusion of girls was necessary in every instance in order to improve minority boys’ academic achievement. See *id.* at 1007-08. Therefore, like *Hogan*, *Garrett* represents a federal court’s application of a heightened form of intermediate scrutiny. *Cf. infra* Section III.A.

9. See David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation’s Experiment with State-Sponsored Sex Segregation in Education*, 44 SETON HALL L. REV. 339, 344-46 (2014) (describing litigation surrounding schools that have implemented single-sex education programs).

10. See *infra* Section I.D.

constitutionality of single-sex education will remain in limbo.<sup>11</sup> Schools attempting to implement single-sex educational programs will continue to be faced with the threat of lawsuits, despite the fact that the trend of current research,<sup>12</sup> public opinion,<sup>13</sup> and federal law<sup>14</sup> supports the schools' position.

In order to remedy this problem, the Supreme Court must reaffirm its commitment to the "traditional" intermediate scrutiny standard of review for analyzing single-sex educational programs.<sup>15</sup> As such, in reviewing single-sex educational programs or schools, the Supreme Court should simply analyze (1) whether the state furthers an "important governmental objective[]" in establishing the school or program; and (2) whether the state's means are "substantially related to achievement" of this objective.<sup>16</sup>

Part I of this Note discusses the background and development of single-sex education, federal law regulating single-sex education, and lower federal courts' jurisprudence in the broader context of sex-class isolations.<sup>17</sup> Part II examines the constitutional theories undergirding the Supreme Court's "exceedingly persuasive justification" standard of review<sup>18</sup> that it adopted in two recent

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11. See Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 1998-2000 (2006) (arguing that the Supreme Court's differing interpretations of the standard of review applicable to single-sex education could lead to either a too strict or too permissive scrutiny of state-sponsored single-sex education programs and schools).

12. See *infra* Section I.B.

13. See *infra* notes 22-24 and accompanying text.

14. See *infra* Section I.C.

15. Throughout this Note, the "traditional" intermediate scrutiny standard refers to the standard that the Court applied to sex classifications prior to its introduction of the confusing "extremely persuasive justification" language in analyzing sex classifications. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). Under the traditional intermediate scrutiny test, the Court analyzes whether the state furthers an important government objective using means substantially related to achieving that objective. See *id.*

16. See *id.*

17. See *infra* Part I.

18. Throughout this Note, the "exceedingly persuasive justification" standard of review will be referred to as the "*Virginia* standard of review." This standard of review refers to the standard that the Supreme Court explicitly adopted in analyzing the constitutionality of the sex classifications in *United States v. Virginia*, 518 U.S. 515, 534 (1996). Under the *Virginia* standard of review, the Court requires a state to provide an "exceedingly persuasive justification" for its sex-class isolation. See *id.*

cases.<sup>19</sup> Finally, Part III proposes that the Supreme Court follow the trend of public opinion, federal law, and lower federal courts' jurisprudence by reaffirming its commitment to the traditional intermediate scrutiny standard in analyzing the constitutionality of single-sex educational options.<sup>20</sup>

## I. THE BACKGROUND AND DEVELOPMENT OF SINGLE-SEX EDUCATION LAW

Although single-sex public schools in the United States were virtually nonexistent in the 1980s,<sup>21</sup> the popularity of public single-sex elementary and secondary schools has increased dramatically in the past fifteen years.<sup>22</sup> In 2002, about fifteen public schools in the United States offered single-sex classroom options.<sup>23</sup> By 2012, the number of public schools that offered single-sex classroom options increased to over 506 nationwide.<sup>24</sup> This increase occurred as a result of a variety of factors, including the deficiencies of coeducational school settings, increasing research showing the benefits of single-sex education, and support by federal law.<sup>25</sup>

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19. See *infra* Part II.

20. See *infra* Part III.

21. See *Single-Sex Public Schools in the United States*, NAT'L ASS'N FOR SINGLE-SEX PUB. EDUC., <http://www.singlesexschools.org/schools.html> [<https://web.archive.org/web/20050404003134/http://www.singlesexschools.org/schools-schools.htm>] (last visited Nov. 24, 2015) (listing only two single-sex public schools in existence in the United States during the late 1980s).

22. See *id.*; Motoko Rich, *Old Tactic Gets New Use: Public Schools Separate Girls and Boys*, N.Y. TIMES (Nov. 30, 2014), <http://www.nytimes.com/2014/12/01/education/single-sex-education-public-schools-separate-boys-and-girls.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&r=2>.

23. See *Single-Sex Public Schools in the United States*, *supra* note 21.

24. See *Single-Sex Schools / Schools with Single-Sex Classrooms / What's the Difference?*, NAT'L ASS'N FOR SINGLE-SEX PUB. EDUC., <http://www.singlesexschools.org/schools.html> (last visited Nov. 24, 2015). Other organizations' data provide even higher numbers; according to the Feminist Majority Foundation, over 1,000 public schools offered single-sex classes between 2007 and 2010. See SUE KLEIN, FEMINIST MAJORITY FOUND., STATE OF PUBLIC SCHOOL SEX SEGREGATION IN THE UNITED STATES 2007-2010: PART I: PATTERNS OF K-12 SINGLE-SEX PUBLIC EDUCATION IN THE U.S. 14 (2012), [http://www.feminist.org/education/pdfs/sex\\_segregation\\_study\\_part1.pdf](http://www.feminist.org/education/pdfs/sex_segregation_study_part1.pdf).

25. See *infra* Sections I.A-C.

## A. The Deficiencies of Coeducational Settings

In the 1970s, researchers began discovering extensive patterns of gender bias within coeducational school settings.<sup>26</sup> This gender bias included teachers associating certain academic subjects with a particular gender<sup>27</sup> and girls being “less comfortable speaking out in class” and “receiv[ing] less teacher attention” and feedback from teachers than boys.<sup>28</sup> By the 1990s, studies revealed that girls in coeducational settings “often [were] not expected or encouraged to pursue higher-level mathematics and science courses.”<sup>29</sup> Researchers showed that this lack of equitable treatment resulted in lower self-esteem, achievement, and career opportunities for girls.<sup>30</sup> Other research focused on the disproportionate amount of harassment that girls suffered in coeducational settings, including sexual harassment.<sup>31</sup> As a result, both researchers and educators concluded that various factors inherent in coeducational settings have a negative influence on the educational attainment and career opportunities of many girls in coeducational settings.<sup>32</sup>

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26. See Amanda Datnow & Lea Hubbard, *Introduction to GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING 2-3* (Amanda Datnow & Lea Hubbard eds., 2002) (“[M]any studies over the past twenty-five years have documented gender bias against females in coeducational classrooms both at the K-12 and higher education levels.”); ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 70-71* (2003) (discussing studies revealing gender bias in coeducational settings during the late 1970s and 1980s).

27. See SALOMONE, *supra* note 26, at 71.

28. See Datnow & Hubbard, *supra* note 26, at 3 (“Females have historically received less teacher attention than boys [and] feel less comfortable speaking out in class . . .”).

29. See AM. ASS’N OF UNIV. WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS—THE AAUW REPORT 147* (1992); see also John Borkowski, *Single Gender Education and the Constitution*, Speech at ABA Convention (Aug. 6, 1994), in 40 LOY. L. REV. 253, 275 (1994) (noting the research indicating the gender equity concerns in the teaching of math and science classes); cf. Steven J. Spencer, Claude M. Steele & Diane M. Quinn, *Stereotype Threat and Women’s Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 7, 21-22 (1999) (arguing that differences in math ability between boys and girls result from “stereotype threat[s]” often caused by “[s]imply being in a situation where one can confirm a negative stereotype about one’s group”).

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

31. See AM. ASS’N OF UNIV. WOMEN, *GENDER GAPS: WHERE SCHOOLS STILL FAIL OUR CHILDREN 85* (1999) (finding that the rates of sexual harassment were 85% for girls and 76% for boys).

32. See SALOMONE, *supra* note 26, at 71.

Conversely, other researchers have argued that coeducational settings disadvantage boys in various ways.<sup>33</sup> Studies support this proposition, with boys lagging behind girls in educational aspirations, grades, and enrollment in rigorous academic programs.<sup>34</sup> Additionally, boys are more often referred to special-education programs and are more likely to be involved in violence, drugs, and alcohol while in school.<sup>35</sup> In fact, some researchers have concluded that greater gender bias exists against boys than against girls in coeducational settings.<sup>36</sup>

Coeducational settings have been shown to be even more disadvantageous to urban minority males.<sup>37</sup> For example, the drop-out rate of African-American males in coeducational settings is often two to three times higher than the rate of other racial groups.<sup>38</sup> Further, the academic performance of African-American, urban males is lower than that of other racial groups.<sup>39</sup>

With research showing that coeducational settings disadvantage both sexes, educators, researchers, and other policy-making entities focused on finding educational alternatives to remedy the gender equity problems occurring in coeducational settings.<sup>40</sup> Single-sex education emerged as one of the possible alternatives to address the disparate outcomes and problems faced by boys and girls in

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33. See MICHAEL GURIAN, PATRICIA HENLEY & TERRY TRUEMAN, BOYS AND GIRLS LEARN DIFFERENTLY! 63-66 (2001); Datnow & Hubbard, *supra* note 26, at 3; SALOMONE, *supra* note 26, at 235; Ann Hulbert, *Boy Problems: The Real Gender Crisis in Education Starts with the Y Chromosome*, N.Y. TIMES, Apr. 3, 2005 (Magazine), at 13, 13-14 (showing that boys lag behind girls in college enrollment, the number of college degrees earned, and test scores).

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

35. See Datnow & Hubbard, *supra* note 26, at 3; Hulbert, *supra* note 33, at 13-14 (discussing the educational problems disadvantaging boys).

36. GURIAN, HENLEY & TRUEMAN, *supra* note 33, at 54.

37. See Antoine M. Garibaldi, *The Educational Status of African American Males in the 21st Century*, 76 J. NEGRO EDUC. 324, 324 (2007).

38. See Audrey T. McCluskey, *The Historical Context of the Single-Sex Schooling Debate Among African Americans*, 17 W.J. BLACK STUD. 193, 195 (1993).

39. See CHRISTOPHER JENCKS & MEREDITH PHILLIPS, THE BLACK-WHITE TEST SCORE GAP 45-62 (1998).

40. See Datnow & Hubbard, *supra* note 26, at 3 (“Gender bias is now seen as affecting both girls and boys, because neither group is immune to societal pressures and expectations.”).

coeducational settings.<sup>41</sup> After closer examination, the benefits of single-sex education became apparent.<sup>42</sup>

## B. The Benefits of Single-Sex Education

The benefits of single-sex education proved to be numerous.<sup>43</sup> For instance, studies have shown that single-sex education decreases the chances that boys and girls will categorize subjects as being either masculine or feminine.<sup>44</sup> Single-sex education has also been shown to provide students with a more organized, controlled, and ordered educational environment.<sup>45</sup> Additionally, research shows that single-sex education tends to motivate students to be more academically minded, with boys focusing less on “athletic ability” and girls focusing less on “physical attractiveness.”<sup>46</sup>

Single-sex environments have been shown to be particularly beneficial to girls.<sup>47</sup> In contrast to their counterparts in coeducational schools, girls in single-sex schools are more likely to prefer and excel in science, technology, and math courses.<sup>48</sup> Further, research supports the fact that the benefits of single-sex schooling for girls

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41. See AM. ASS'N OF UNIV. WOMEN, *supra* note 29, at 3-5; Datnow & Hubbard, *supra* note 26, at 2-3; SALOMONE, *supra* note 26, at 4-5; Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 389-90.

42. See *infra* Section I.B.

43. See *infra* notes 44-52 and accompanying text.

44. See SALOMONE, *supra* note 26, at 235; Pamela Haag, *Single-Sex Education in Grades K-12: What Does the Research Tell Us?*, in THE JOSSEY-BASS READER ON GENDER IN EDUCATION 647, 653-54 (Elisa Rassen et al. eds., 2002); Fred A. Mael, *Single-Sex and Coeducational Schooling: Relationships to Socioemotional and Academic Development*, 68 REV. EDUC. RES. 101, 111 (1998).

45. See Haag, *supra* note 44, at 655.

46. See SALOMONE, *supra* note 26, at 198-200. Salomone notes that students in single-sex schools spent more time on homework and had a higher focus on academic and educational achievements. See *id.* at 199.

47. See *id.* at 207-08. One of the several examples of single-sex schools that achieved prominent success in improving educational outcomes for girls was the Thurgood Marshall Elementary School in Seattle, Washington. See Leonard Sax, *The Promise and Peril of Single-Sex Public Education*, EDUC. WK. (Bethesda, Md.), Mar. 2, 2005, at 48. As a coeducational institution, none of the girls enrolled in the school passed the state math exam the year before the school became single-sex. *Id.* The year after the change, 53% of the girls passed the state math exam. *Id.*

48. See SALOMONE, *supra* note 26, at 207-08; Haag, *supra* note 44, at 653; Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 471 (1999); Mael, *supra* note 44, at 108-09, 111.

extend beyond education into the career field.<sup>49</sup> Women graduates from single-sex schools are twice as likely to have doctorates as those graduating from coeducational schools and are more likely to have a successful career.<sup>50</sup>

Additionally, single-sex schooling has been shown to be particularly helpful in improving educational outcomes for minority and disadvantaged students.<sup>51</sup> Studies have shown that African-American and Hispanic students enrolled in single-sex schools perform better academically than their counterparts who attend coeducational schools.<sup>52</sup> In fact, single-sex education programs may be one of the very few school reforms that have proven successful in urban school districts.<sup>53</sup> However, despite the research showing the benefits of single-sex education, federal courts and federal law provided no support for experimentation in single-sex education, but rather discouraged such experimentation until 2001.<sup>54</sup>

### C. Single-Sex Education and Federal Law

Beginning in the twenty-first century, single-sex public education received valuable support from the federal government in the No Child Left Behind Act and new Department of Education regulations.<sup>55</sup> The No Child Left Behind Act,<sup>56</sup> enacted in 2001,

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49. See Laura Clark, *More Career Women Come from Single-Sex Schools*, DAILY MAIL (Sept. 22, 2006), <http://www.dailymail.co.uk/news/article-406374/More-career-women-come-single-sex-schools.html>. The study discussed in this article showed that single-sex schooling provided women with more confidence in negotiating salaries and helped women break into traditionally male-dominated career fields such as math and physics. *Id.*; see also M. Elizabeth Tidball, *Women's Colleges and Women Achievers Revisited*, 5 J. WOMEN IN CULTURE & SOC'Y 504, 509, 515 (1980) (discussing studies showing females enrolled in single-sex schools are more likely to have successful careers).

50. See Tidball, *supra* note 49, at 509, 515.

51. See Cornelius Riordan, *What Do We Know About the Effects of Single-Sex Schools in the Private Sector?: Implications for Public Schools*, in GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING, *supra* note 26, at 10, 14, 28; see also McCluskey, *supra* note 38, at 195.

52. See CORNELIUS RIORDAN, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? 112-13 (1990).

53. Cf. Riordan, *supra* note 51, at 14. Riordan argues that single-sex education benefits students because it "provide[s] an avenue for students to make a proacademic choice, thereby affirming their intrinsic agreement to work in the kind of environment we identify as effective and equitable." *Id.* at 28.

54. See *infra* note 61 and accompanying text; see also *infra* Section I.D.

55. See *infra* notes 56, 60 and accompanying text.

provided a limited amount of federal funding for local educational agencies to experiment with single-sex education.<sup>57</sup> The Act further required the Secretary of Education to promulgate regulations to implement this provision.<sup>58</sup>

The Department of Education followed this requirement by adopting a similar position in 2006 with the release of new regulations that increased the flexibility of the Title IX Education Amendments of 1972<sup>59</sup> with regard to public single-sex education options.<sup>60</sup> Prior to 2006, Title IX allowed single-sex education programs in only a very limited context.<sup>61</sup> However, the new regulations were more flexible, permitting schools to implement single-sex programs if the school demonstrated an “important objective” for doing so.<sup>62</sup> Two objectives qualified in this regard: (1) improving educational outcomes by providing for “diverse

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56. Pub. L. No. 107-110, § 1112(c)(1)(G), 115 Stat. 1425, 1465 (codified at 20 U.S.C. § 6312(c)(1)(G) (2012)). This Act’s purpose was “[t]o close the achievement gap with accountability, flexibility, and choice, so that no child is left behind.” *Id.*

57. 20 U.S.C. § 7215(a)(23) (2012). (providing that innovative program funds may be used for “[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)”).

58. *Id.* § 7215(c).

59. Title IX Education Amendments of 1972 prohibits discrimination based on sex in educational programs and activities that receive financial assistance from the federal government. *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, [http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (last modified Apr. 29, 2015).

60. See 34 C.F.R. § 106.34(b)(1)(i) (2008).

61. 34 C.F.R. § 106.34 (2005). Title IX regulations precluded a federal funding recipient from “provid[ing] any course or otherwise carry[ing] out any of its education program[s] or activit[ies] separately on the basis of sex, or requir[ing] or refus[ing] participation therein by any of its students on such basis.” *Id.* However, private elementary, secondary, and undergraduate admissions policies were exempted from these regulations. *Id.* § 106.15(d).

62. See 34 C.F.R. § 106.34(b)(1)(i) (2008); see also Rebecca A. Kiselewich, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 227-28 (2008). The new regulations allowed school districts to set up single-sex schools as long as “substantially equal” single-sex schools existed for both sexes or a coeducational option was available. 34 C.F.R. § 106.34(b)(1)(iv). Conversely, the previous regulations only allowed single-sex schools to exist if “substantially equal” single-sex schools existed for both sexes. 34 C.F.R. § 106.35 (2005). Additionally, the new regulations allowed elementary and secondary coeducational schools to provide a variety of single-sex classes and extracurricular activities. 34 C.F.R. § 106.34(b)(1)(i)-(iv) (2008).

educational opportunities” or (2) providing individualized instruction to meet the specific needs of individual students.<sup>63</sup>

The new regulations safeguarded against sex discrimination as well.<sup>64</sup> The Department required that single-sex programs adopted by schools be voluntary and implemented evenhandedly.<sup>65</sup> Further, schools experimenting with single-sex educational options were required to provide a “substantially equal coeducational class . . . in the same subject.”<sup>66</sup>

In response to increasing inquiries about the legality of single-sex education, the Obama Administration released new guidelines for school districts in December 2014.<sup>67</sup> These guidelines essentially mirrored the regulations implemented by the Department of Education under the Bush Administration.<sup>68</sup> As such, federal law and regulations eventually caught up with popular opinion and research related to single-sex education.<sup>69</sup> However, the Supreme Court’s jurisprudence developed in the opposite direction.<sup>70</sup>

#### D. Single-Sex Education and Federal Courts

State and federal statutory classifications on the basis of sex have customarily been reviewed by federal courts under the Equal Protection Clause.<sup>71</sup> Traditionally, the Supreme Court has applied an intermediate scrutiny standard in analyzing sex-class isolations, such

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63. 34 C.F.R. § 106.34(b)(1)(i)(A)-(B).

64. See *infra* notes 65-66 and accompanying text.

65. 34 C.F.R. § 106.34(b)(1)(ii)-(iii).

66. *Id.* § 106.34(b)(1)(iv). Factors to be considered in determining whether classes are “substantially equal”; include the “quality, range, and content of curriculum”; “the quality and availability of books, instructional materials, and technology”; “the qualifications of faculty and staff”; and “the quality, accessibility, and availability of facilities and resources provided to the class.” *Id.* § 106.34(b)(3). “Intangible features” can also be considered. *Id.*

67. Press Release, Dep’t of Educ., Education Department Clarifies Requirements for Offering Single-Sex Classes (Dec. 1, 2014), <http://www.ed.gov/news/press-releases/education-department-clarifies-requirements-offering-single-sex-classes>.

68. See *id.*

69. See *supra* notes 56, 60 and accompanying text (discussing the increased flexibility of federal law and regulations with regard to experimentation with single-sex education programs in public schools).

70. See *infra* Section I.D.

71. See *Reed v. Reed*, 404 U.S. 71, 75 (1971) (holding that statutory classifications on the basis of sex are “subject to scrutiny under the Equal Protection Clause”).

as those involved in single-sex education.<sup>72</sup> Intermediate scrutiny lies in the middle of the Court's other two levels of scrutiny: strict scrutiny and rational-basis scrutiny.<sup>73</sup> Rational-basis review only requires the law at issue to be rationally related to a legitimate governmental interest.<sup>74</sup> Conversely, strict scrutiny requires the law at issue to be "narrowly tailored" to "further compelling governmental interests."<sup>75</sup> Intermediate scrutiny review requires laws to bear a "substantial relationship to important governmental objectives."<sup>76</sup>

The Supreme Court has ruled on various facets of single-sex education on three different occasions,<sup>77</sup> most recently in 1996 in *United States v. Virginia*.<sup>78</sup> In two of the most recent cases evaluating the constitutionality of the sex classifications involved in single-sex

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72. See *infra* Subsection I.D.1 (providing examples of Supreme Court cases analyzing the constitutionality of sex-class isolations under the intermediate scrutiny standard of review).

73. See David K. Bowsher, *Cracking the Code of United States v. Virginia*, 48 DUKE L.J. 305, 306 (1998).

74. See *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("The general rule [in equal protection cases] is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) ("In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures.").

75. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

76. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 273 (1979).

77. See generally *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Vorchheimer v. Sch. Dist. of Phila.*, 430 U.S. 703 (1977). In *Vorchheimer v. School District of Philadelphia*, the Third Circuit Court of Appeals held single-sex public schools for each gender were constitutional because they were "similar and of equal quality." 532 F.2d 880, 882, 888 (3d Cir. 1976), *aff'd mem.*, 430 U.S. 703 (1977). The Third Circuit based its decision on the fact that "there are differences between the sexes which may, in limited circumstances, justify disparity in the law." *Id.* at 886. In so doing, the Third Circuit found single-sex education to be a "respected educational methodology." *Id.* at 888. An equally divided Supreme Court affirmed the Third Circuit's holding without issuing a formal opinion. *Vorchheimer*, 430 U.S. at 703. Because the *Vorchheimer* Court did not issue an opinion or apply a specific standard of review, this case does not carry particular weight in this Note's discussion. See Subsections I.D.1-3.

78. 518 U.S. 515 (1996).

education, the Court utilized a new analytical framework, requiring an “exceedingly persuasive justification” for the sex classification.<sup>79</sup> This analytical framework is contrasted by another line of cases in which the Court adhered to the traditional intermediate scrutiny standard of review in analyzing sex classifications.<sup>80</sup> Conversely, lower federal courts post-*Virginia* have increasingly accepted the sex classifications involved in single-sex educational programs that exhibited the requisite safeguards.<sup>81</sup> Thus, the constitutionality of single-sex education in public schools remains on insecure footing.<sup>82</sup>

### 1. *The Intermediate Scrutiny Standard of Review*

Beginning in 1976 with *Craig v. Boren*, the Supreme Court applied an intermediate scrutiny test to sex-class isolations.<sup>83</sup> Under this standard, the Court required sex-class isolations to further an important governmental interest and be substantially related to the achievement of that interest.<sup>84</sup> Typically, this requires that states resort to sex-class isolations only when the state cannot achieve its interest through sex-neutral classifications.<sup>85</sup> Thus, in *Craig v. Boren*, the Court held unconstitutional an Oklahoma statute that differentiated the cut-off age for buying alcohol based on sex.<sup>86</sup> The Court’s reasoning centered on the fact that the sex classification was unnecessary for the state to address its safety concerns; setting an equal cut-off age for both sexes was just as effective in addressing those concerns.<sup>87</sup>

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79. See *id.* at 534; *Hogan*, 458 U.S. at 731.

80. See *infra* Subsection I.D.3.

81. See *infra* Subsection I.D.4.

82. See, e.g., Nancy Chi Cantalupo, *Comparing Single-Sex and Reformed Coeducation: A Constitutional Analysis*, 49 SAN DIEGO L. REV. 725, 731 (2012) (finding that single-sex education programs are “clearly unconstitutional under the Supreme Court’s thirty-year-plus line of equal protection cases” analyzing sex-class isolations); Cohen & Levit, *supra* note 9, at 340 (arguing that single-sex education is “fundamentally discriminatory, and patently unconstitutional” because the heightened standard of review employed by the Court leads to the conclusion that single-sex education violates the Equal Protection Clause).

83. 429 U.S. 190 (1976).

84. See *id.* at 197.

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

86. *Craig*, 429 U.S. at 204.

87. See *id.* at 201-04 (“[T]he showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving.”).

In reviewing sex classifications under the intermediate scrutiny standard, the Supreme Court has consistently enforced certain guidelines.<sup>88</sup> States must show how the sex-class isolation furthers their interest, namely how the states' treating the sexes differently allows the states to achieve their objective.<sup>89</sup> Further, the Supreme Court has historically been very skeptical of sex classifications based on overbroad generalizations or stereotypes, despite the evidence on which they may rest.<sup>90</sup> Apart from enforcing these guidelines, however, the Supreme Court's application of the intermediate scrutiny standard has been inconsistent.<sup>91</sup>

## 2. The "Exceedingly Persuasive Justification" Standard of Review

The Supreme Court's application of the intermediate scrutiny standard has ranged from applying a more demanding intermediate scrutiny standard in some cases to adopting a more relaxed intermediate scrutiny standard in others.<sup>92</sup> The Supreme Court first used the "exceedingly persuasive justification" language in analyzing state sex classifications in *Personnel Administrator of Massachusetts v. Feeney*.<sup>93</sup> In that case, the Court upheld a Massachusetts statute that provided preferential hiring treatment to veterans who applied for civil service jobs.<sup>94</sup> The Court found that the statute was not discriminatory against women even though the vast majority of Massachusetts's veterans were male.<sup>95</sup> The Court relied on *Craig v. Boren* in applying the intermediate scrutiny standard, but also noted that any statute preferring one sex over the other "require[s] an exceedingly persuasive justification to withstand a constitutional challenge."<sup>96</sup>

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88. See *infra* notes 89-90 and accompanying text.

89. See *Craig*, 429 U.S. at 203-04.

90. See *Wengler*, 446 U.S. at 150-52; *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977).

91. See *infra* Subsections I.D.2-3.

92. Compare *United States v. Virginia*, 518 U.S. 515, 534 (1996) (applying a more demanding intermediate scrutiny standard), with *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (applying a more relaxed intermediate scrutiny standard).

93. 442 U.S. 256, 273 (1979).

94. See *id.* at 259, 281.

95. See *id.* at 281 ("The appellee . . . failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex."). Over 98% of Massachusetts veterans were male; 1.8% were female. See *id.* at 270.

96. *Id.* at 273.

In *Mississippi University for Women v. Hogan*, the Supreme Court for the first time comprehensively adopted the “exceedingly persuasive justification” language into its intermediate scrutiny standard of review.<sup>97</sup> In this case, the Court held Mississippi’s woman-only, state-run nursing school unconstitutional under the intermediate scrutiny standard.<sup>98</sup> Justice O’Connor, writing for the majority, enunciated the standard as requiring an “exceedingly persuasive justification” for a sex classification.<sup>99</sup> This burden could only be met if the state established that its classification served an important government interest and that the means it used were “substantially related” to the achievement of its interest.<sup>100</sup>

The Court’s adoption of a more demanding standard ultimately proved fatal for Mississippi University for Women’s (MUW) all-women admissions policy.<sup>101</sup> First, the Court found that Mississippi’s objective of using an all-female admissions policy to remedy past discrimination against women was not legitimate because it furthered the stereotype that nursing was a woman’s profession.<sup>102</sup> Further, the Court argued that the admissions policy had not actually been adopted for that purpose because no evidence of that purpose existed in the legislative history of the statute establishing the admissions policy.<sup>103</sup> Second, in analyzing whether Mississippi’s sex classification was substantially related to its alleged objective, the Court required Mississippi to show that its admission policy was necessary in every instance to achieve its objective of remedying past discrimination.<sup>104</sup> Because the Court found that men auditing the nursing classes<sup>105</sup> in the school did not “adversely” affect women’s academic performance or the school’s teaching style, MUW’s female-only admissions policy was not “necessary to reach any of MUW’s educational goals” and therefore had no “exceedingly persuasive justification.”<sup>106</sup>

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97. 458 U.S. 718, 724 (1982).

98. *See id.* at 731.

99. *Id.* at 724 (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980); *Feeney*, 442 U.S. at 273).

100. *See id.*

101. *See infra* notes 102-05 and accompanying text.

102. *See Hogan*, 458 U.S. at 727-30.

103. *See id.* at 730 n.16.

104. *See id.* at 730.

105. Men were allowed to attend and fully participate in classes at the college, but not enroll for credit. *See id.* at 721.

106. *Id.* at 730-31.

Four Justices dissented from the Court's holding.<sup>107</sup> In their dissents, these Justices expressed strong disapproval of what they perceived to be the Court's heightening of the standard of review applicable to sex classifications.<sup>108</sup> The dissenting Justices would have upheld MUW's single-sex admissions system as constitutional, describing the Court's holding as preventing states from providing men and women with choice and diversity in education.<sup>109</sup> While the *Hogan* Court incorporated the "exceedingly persuasive justification" language into its standard of review,<sup>110</sup> the Supreme Court in *United States v. Virginia* officially adopted this language as central to its application of the intermediate scrutiny standard.<sup>111</sup> Justice Ginsburg, writing for the majority, established the standard as requiring states to provide "an 'exceedingly persuasive justification'" for their sex classification.<sup>112</sup> However, instead of labeling this standard intermediate scrutiny, Justice Ginsburg labeled it "skeptical scrutiny"<sup>113</sup> and proceeded to use this phrase as the "core instruction" of the Court's analytical framework.<sup>114</sup> Thus, the Court required Virginia to provide an "exceedingly persuasive justification" for the Virginia Military Institute's (VMI) single-sex admission policy and show that it was necessary in order for the State to train its "citizen-soldiers."<sup>115</sup>

Virginia provided two justifications for its single-sex admissions policy.<sup>116</sup> First, Virginia claimed that its single-sex education program was justified because it provided a diverse educational approach.<sup>117</sup> Second, Virginia argued that admitting women would require a modification of the school's "adversative

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107. *Id.* at 733 (Burger, C.J., dissenting); *id.* (Blackmun, J., dissenting); *id.* at 735 (Powell, J., dissenting).

108. *See id.* at 736 (Powell, J., dissenting).

109. *See id.* at 741 (describing the majority's holding as "frustrat[ing] the liberating spirit of the Equal Protection Clause[ and] prohibit[ing] the States from providing women with an opportunity to choose the type of university they prefer").

110. *See id.* at 724 (majority opinion).

111. *See United States v. Virginia*, 518 U.S. 515, 534 (1996).

112. *Id.* at 530.

113. *Id.* at 531.

114. *See id.* Not only was this phrase central to the Court's analysis, but as Justice Scalia pointed out in his dissent, the *Virginia* majority used the "exceedingly persuasive justification" phrase nine times in its opinion. *See id.* at 571 (Scalia, J., dissenting).

115. *See id.* at 540-46 (majority opinion). VMI used the term "citizen-soldiers" to describe its graduates. *See id.* at 521-22.

116. *See id.* at 535.

117. *See id.*

method,”<sup>118</sup> which it used to train its students to become citizen-soldiers.<sup>119</sup>

However, the Court dismissed both of Virginia’s proposed justifications.<sup>120</sup> With regard to the State’s first alleged objective,<sup>121</sup> the Court found that Virginia had not established VMI to provide a diversity of educational opportunities because of its history of providing women with inferior educational opportunities and excluding them from higher education.<sup>122</sup> The Court likewise rejected Virginia’s second justification that admitting women would destroy its adversative program.<sup>123</sup> The Court found that because some women might desire to attend VMI and some women would be capable of excelling there, Virginia did not meet its burden of proving that excluding women was necessary to train citizen-soldiers.<sup>124</sup> Thus, because VMI’s exclusion of women was not necessary for Virginia to train its citizen-soldiers, it failed to provide an “exceedingly persuasive justification” for its sex classification.<sup>125</sup>

Although six Justices joined Justice Ginsburg in the *Virginia* holding, Justice Rehnquist concurred separately.<sup>126</sup> He argued that the Court should have confined its use of this language to restate the intermediate scrutiny standard, as the *Feeney* Court had done.<sup>127</sup> Further, he expressed strong disapproval of the Court’s use of the

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118. VMI’s adversative method consisted of “[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.” *See id.* at 522 (alteration in original) (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

119. *See id.* at 535.

120. *See id.* at 535-43.

121. *See id.* at 539-40.

122. *See id.* at 535-38 (“Neither recent nor distant history bears out Virginia’s alleged pursuit of diversity through single-sex educational options.”).

123. *See id.* at 541-43 (“The notion that admission of women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction . . . once routinely used to deny rights or opportunities.”).

124. *See id.* at 540-42 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)). In so doing, the majority dismissed out of hand the district court’s factual finding that Virginia’s expert testimony describing VMI as “pedagogically justifiable” was sound. *See id.* at 540.

125. *See id.* at 534.

126. *See id.* at 558 (Rehnquist, C.J., concurring).

127. *See id.* at 559 (arguing that the “exceedingly persuasive justification” language “is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself”).

phrase, arguing it introduced “uncertainty” and “confusion” to the test applicable to sex classifications.<sup>128</sup>

Justice Scalia, on the other hand, dissented from the Court’s holding, arguing that VMI’s single-sex admissions policy was constitutional.<sup>129</sup> He viewed the majority as using the “exceedingly persuasive justification” language to heighten the intermediate scrutiny standard to a test closer to strict scrutiny.<sup>130</sup> As a result, Justice Scalia believed single-sex education was left “functionally dead.”<sup>131</sup> Despite the large majority that the Court’s opinion commanded in *Virginia*, its holding stands in sharp contrast with other cases applying a less demanding standard of review.<sup>132</sup>

### 3. *The Traditional Intermediate Scrutiny Standard of Review*

The Supreme Court has analyzed other cases involving sex-class isolations under a less demanding standard; namely, the traditional intermediate scrutiny standard.<sup>133</sup> In *Nguyen v. INS*, the Supreme Court examined a law requiring only fathers, and not mothers, of out-of-wedlock children born outside the United States to take the first step toward acquiring United States citizenship for the child.<sup>134</sup> Here, the Court held that this law passed the traditional intermediate scrutiny test.<sup>135</sup> First, the Court found that the statute furthered the important governmental objectives of providing for a “biological parent-child relationship” and ensuring that relationship consisted of “real, everyday ties” among the child, parent, and the United States.<sup>136</sup> Second, the Court found that the means Congress used were substantially related to its objectives.<sup>137</sup> The Court reasoned that various other naturalization statutory provisions

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128. *See id.* at 559-60.

129. *See id.* at 566-603 (Scalia, J., dissenting).

130. *See id.* at 568 (“I have no problem with a system of abstract tests . . . though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it.” (internal parentheses omitted)).

131. *See id.* at 596-97 (“The enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.”).

132. *See infra* Subsection I.D.3.

133. *See infra* note 135 and accompanying text.

134. 533 U.S. 53, 62 (2001).

135. *See id.* at 73.

136. *See id.* at 62, 64-65.

137. *See id.* at 68-69.

already required parents to take action to link their nonmajority age children to the United States, and the statute provided for an “easily administered scheme” to advance the development of a parent–child relationship.<sup>138</sup>

Justice Kennedy, writing for the majority, relied on the traditional intermediate scrutiny standard and failed to incorporate the “exceedingly persuasive justification” language into the Court’s enunciation of that standard.<sup>139</sup> The Court acknowledged that sex-neutral alternatives existed<sup>140</sup> but dismissed these alternatives.<sup>141</sup> The Court’s reasoning emphasized that “[n]one of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.”<sup>142</sup>

Similarly, in *Rostker v. Goldberg*, the Court found that a male-only draft registration survived the traditional intermediate scrutiny test.<sup>143</sup> First, because the federal government only allowed men to serve in combat positions, the draft registration furthered the important governmental objective of providing the pool of men from which combat troops could be selected.<sup>144</sup> Second, the Court held that the sex classification was “closely related to Congress’ purpose in authorizing registration,”<sup>145</sup> despite the fact that combat-ineligible men were required to register<sup>146</sup> and noncombat positions were available for women as well.<sup>147</sup> The Court reasoned that the draft registration was not required to achieve its objective of providing combat-ready men in every instance because Congress may simply have found the added costs of requiring women to register for the draft to be excessive.<sup>148</sup>

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138. *See id.*

139. *See id.* at 60.

140. *See id.* at 69. The Court found that Congress could have mandated an actual relationship between the child and parent, or exempted parents and children who already had a relationship. *See id.*

141. *See id.* The Court reasoned that Congress may have found these alternatives to be too subjective, intrusive, and difficult to prove. *See id.*

142. *See id.* at 70.

143. 453 U.S. 57, 78-81 (1981). While the Court did not explicitly state the intermediate scrutiny standard in this case, its citations to cases such as *Craig v. Boren* in reaching its holding exemplify its application of that standard. *See id.* at 79.

144. *Id.* at 78-79.

145. *Id.* at 79.

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

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

148. *See id.* at 81 (majority opinion).

As a result of this line of cases, the Supreme Court's application of the intermediate scrutiny standard in assessing the constitutionality of single-sex-class isolations in general has been described as "vague, poorly defined and malleable, providing insufficient guidance in individual cases and giving broad discretion to individual judges."<sup>149</sup> Additionally, the constitutionality of single-sex education has come into question because the Supreme Court ruled against single-sex education on both occasions in which the Court addressed it.<sup>150</sup> Meanwhile, lower federal courts have declined to apply the "exceedingly persuasive justification" intermediate scrutiny standard with the same amount of rigor as the *Virginia* and *Hogan* Courts, and in some cases, even failed to rely on that standard in analyzing single-sex educational programs.<sup>151</sup>

#### 4. Recent Developments

Lower federal courts have consistently held that single-sex classes are not per se unconstitutional.<sup>152</sup> In *A.N.A. ex rel. S.F.A. v. Breckenridge County Board of Education*,<sup>153</sup> the Western District of Kentucky held that a public school offering optional single-sex classes did not constitute sex discrimination because a school's separation of students based on their sex was not a constitutional injury.<sup>154</sup> The court failed to even enunciate the "exceedingly persuasive justification" standard of review, summarizing the Supreme Court's jurisprudence in this area as never having held that public single-sex education programs or schools were per se unconstitutional.<sup>155</sup> Rather, the court argued that the applicable law

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149. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1213 (2005) (condensing lower courts, scholars, and Justice Souter's Supreme Court confirmation hearing critiques of the intermediate scrutiny standard).

150. See *United States v. Virginia*, 518 U.S. 515, 534 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982).

151. See *infra* Subsection I.D.4.

152. See *infra* notes 153, 166 and accompanying text.

153. 833 F. Supp. 2d 673, 678 (W.D. Ky. 2011).

154. See *id.* ("[T]he separation of students by sex does not give rise to a finding of constitutional injury as a matter of law.").

155. See *id.* ("The Supreme Court has never held that separating students by sex in a public school . . . or offering a single-sex public institution is *per se* unconstitutional.").

did not prevent a public school from having coed and single-sex classrooms.<sup>156</sup>

Additionally, lower federal courts since *Virginia* have not required absolute equality of opportunity for both sexes with regard to single-sex education.<sup>157</sup> For example, in *Myers v. Simpson*, the Eastern District of Virginia held that a county offering sexual assault and rape awareness classes exclusively to women did not constitute sex discrimination and met the “exceedingly persuasive justification” test established by the Supreme Court for sex-based classifications.<sup>158</sup> The court relied on the fact that the government could compensate women for past economic impediments and provide economic opportunities for them.<sup>159</sup> Similarly, in *Reach Academy for Boys and Girls, Inc. v. Delaware Department of Education*, the District of Delaware granted a preliminary injunction requiring that the Delaware Department of Education renew the charter for an all-girls charter school.<sup>160</sup> The court’s reasoning centered on the fact that the Department of Education had likely violated the Equal Protection Clause and Title IX by not renewing the charter for the all-girls school, but renewing the charter for the all-boys school.<sup>161</sup> However, the court acknowledged that its holding rested on the state’s failing to consider new applications for single-sex schools, not on the fact that the state only had an all-boys school and not an all-girls school.<sup>162</sup>

In line with Title IX requirements, lower federal courts have consistently held that single-sex education programs must be

156. *See id.* (arguing that the theory that “the coexistence of coed and single-sex classrooms in schools constitutes sex discrimination . . . finds no support . . . in law”).

157. *See, e.g., Reach Acad. for Boys & Girls, Inc. v. Del. Dep’t of Educ.*, 46 F. Supp. 3d 455, 476-77 (D. Del. 2014) (granting preliminary injunction); *Myers v. Simpson*, 831 F. Supp. 2d 945, 951 (E.D. Va. 2011).

158. 831 F. Supp. 2d at 951.

159. *See id.* at 950 (“[G]overnments can use sex-based classifications to . . . compensate women for economic disadvantages they have suffered, promote employment opportunity, and ‘advance full development of the talent and capacities of our Nation’s people.’” (quoting *United States v. Virginia*, 518 U.S. 515, 533-34 (1996))).

160. 46 F. Supp. 3d at 476-77 (granting preliminary injunction).

161. *Id.* at 472, 474.

162. *Id.* at 472 n.12 (“[T]he State could lawfully fund two all-boys schools and only one all-girls school; it may also . . . lawfully fund one all-boys school and no all-girls schools, so long as the State [is] willing to entertain new applications for single-sex charter schools.”).

voluntary.<sup>163</sup> In *Doe v. Wood County Board of Education*,<sup>164</sup> the Southern District of West Virginia granted a preliminary injunction on participation by West Virginia middle-school students in single-sex classes because the participation was not completely voluntary, which the court found violated the Title IX requirements of such classes.<sup>165</sup> However, in emphasizing that its ruling rested only on the fact that the single-sex classes were not completely voluntary, the court explicitly adopted the Western District of Kentucky's position in *A.N.A. ex rel. S.F.A.* that "the separation of students by sex does not give rise to a finding of constitutional injury as a matter of law."<sup>166</sup> Rather, the court emphasized that if the classes meet the "exceedingly persuasive justification" standard established by *Virginia*, then "single-sex classes can certainly be constitutional."<sup>167</sup> Thus, lower federal courts post-*Virginia* have consistently held that single-sex programs and schools may, indeed, be constitutional, especially if the school at issue can demonstrate that its program is distinguishable from the admissions policies under review in *Hogan* and *Virginia*.<sup>168</sup> In order to meet the *Virginia* standard of review, single-sex schools thus face the determination of whether the constitutional theories undergirding this standard justify their sex classifications.<sup>169</sup>

## II. THE CONSTITUTIONAL THEORIES UNDERGIRDING THE *VIRGINIA* STANDARD OF REVIEW

Supporters of the *Virginia* and *Hogan* decisions lauded the advent of the "exceedingly persuasive justification" standard as applied to single-sex education as indispensable in preventing the harmful effects of sex discrimination.<sup>170</sup> These scholars relied on the

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163. See *infra* note 165 and accompanying text.

164. 888 F. Supp. 2d 771 (S.D. W. Va. 2012).

165. See *id.* at 777-78.

166. *Id.* at 778-79 (quoting *A.N.A. ex rel. S.F.A. v. Breckenridge Cty. Bd. of Educ.*, 833 F. Supp. 2d 673, 678 (W.D. Ky. 2011)).

167. *Id.* at 779.

168. See *supra* notes 153-62, 164-67.

169. See *infra* note 171 and accompanying text.

170. See, e.g., Elizabeth Schneider, Professor of Law, Brooklyn Law Sch., Panel Discussion at the Washington College of Law of American University (Apr. 8, 1996), in *Centennial Panel: Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women*, 6 AM. U. J. GENDER & L. 1, 24 (1997); Deborah L. Brake, *Reflections on the VMI Decision*, 6 AM. U. J. GENDER & L. 35, 36 (1997);

sex-equity theories of formal equality and antisubordination, arguing that under the *Virginia* standard of review, single-sex education was only constitutional if it met those theories' criteria.<sup>171</sup> Conversely, opponents of single-sex education have also used these theories to argue that single-sex education is effectively unconstitutional under the *Virginia* standard.<sup>172</sup>

Some scholars supporting single-sex education under the *Virginia* standard of review have justified single-sex education under the theory of formal equality.<sup>173</sup> This theory posits that similarly situated individuals should be treated in similar ways.<sup>174</sup> Thus, with regard to single-sex education, supporters under the formal equality theory emphasize that single-sex schools are only constitutional if they provide equal choices to boys and girls.<sup>175</sup> These scholars point to the *Virginia* Court's emphasis on the fact that increasing the diversity of educational options open to students may be a legitimate objective of single-sex education only if that objective is carried out evenhandedly.<sup>176</sup>

Conversely, those opposing single-sex education under the formal equality theory argue that single-sex schools are unconstitutional because they are inherently unequal and

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Margo L. Ely, *Court's VMI Decision Reinforces Review Standard for Sex Bias*, CHI. DAILY L. BULL., July 8, 1996, at 6.

171. See Martha Minow, Remarks, *Fostering Capacity, Equality, and Responsibility (and Single-Sex Education): In Honor of Linda McClain*, 33 HOFSTRA L. REV. 815, 818 (2005) (arguing that the single-sex education debate "reflect[s] the debates over whether gender equality calls for treating males and females the same, or instead attending to differences between them").

172. See SALOMONE, *supra* note 26, at 2; Brian Johnson, *Admitting That Women's Only Public Education is Unconstitutional and Advancing the Equality of the Sexes*, 25 T. JEFFERSON L. REV. 53, 88 (2002); Lucille M. Ponte, *United States v. Virginia: Reinforcing Archaic Stereotypes About Women in the Military Under the Flawed Guise of Educational Diversity*, 7 HASTINGS WOMEN'S L.J. 1, 68 (1996).

173. See, e.g., Minow, *supra* note 171, at 818; Michael Heise, *Are Single-Sex Schools Inherently Unequal?*, 102 MICH. L. REV. 1219, 1244 (2004).

174. See KATHERINE T. BARTLETT ET AL., *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 117 (3d ed. 2002).

175. See Gary J. Simson, *Separate but Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 451 (2005); Heise, *supra* note 173, at 1244.

176. *United States v. Virginia*, 518 U.S. 515, 534 n.7 (1996) (stating that the Court "do[es] not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities"); cf. *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (holding that a Cleveland, Ohio voucher program allowing students to choose between private and public schools was constitutional).

discriminatory.<sup>177</sup> These scholars often emphasize the history of sex discrimination in the United States, arguing that single-sex male schools have always enjoyed more resources than single-sex female schools.<sup>178</sup> However, on both sides of the debate, scholars espousing the formal equality theory view equality of the sexes as occupying paramount importance.<sup>179</sup>

Other scholars have relied on the theory of antisubordination, under which the inquiry turns on “not whether women are like, or unlike, men, but whether a rule or practice serves to subordinate women to men.”<sup>180</sup> Those espousing the antisubordination argument maintain that single-sex schools are constitutional under the *Virginia* standard of review if they serve the purpose of remedying past discrimination against women.<sup>181</sup> The central question, according to this theory, is whether single-sex education benefits or harms women.<sup>182</sup> Scholars advocating this theory point to several examples in the Court’s case law where the Court has allowed sex classifications that remedy past discrimination against women.<sup>183</sup>

Finally, an alternative approach provides for a modification of the *Virginia* standard of review based on the factors of voluntariness and equal opportunity.<sup>184</sup> According to this approach, the “strictness” of the intermediate scrutiny test should be calibrated based on the

177. See *Levit*, *supra* note 48, at 521; see also *Johnson*, *supra* note 172, at 87.

178. See *Levit*, *supra* note 48, at 526 (“Sex segregation with connotations of inequality is of too recent vintage—indeed, it never left us.”).

179. See *BARTLETT ET AL.*, *supra* note 174, at 533.

180. *Jenkins*, *supra* note 11, at 2005 (quoting *BARTLETT ET AL.*, *supra* note 174, at 533).

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

182. *Morgan*, *supra* note 41, at 459 (“[S]hifting the emphasis of [the intermediate scrutiny] test from fit to anti-subordination focuses the judicial inquiry on the most important question in sex equality jurisprudence: whether government use of sex-based classifications works explicitly or implicitly to perpetuate the hierarchy of men over women.”).

183. See, e.g., *Califano v. Webster*, 430 U.S. 313, 317-20 (1977) (per curiam) (“Reduc[ing] . . . the disparity in economic condition between men and women caused by the long history of discrimination against women . . . [is] an important governmental objective.”); *Craig v. Boren*, 429 U.S. 190, 198 n.6 (1976) (finding that earlier sex classifications were upheld because they remedied “disadvantageous conditions suffered by women in economic and military life” (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974))); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (recognizing the “long and unfortunate history of sex discrimination” in the United States).

184. See *Jenkins*, *supra* note 11, at 1960-61.

measure to which the scrutinized programs or schools meet the voluntariness and equal opportunity factors.<sup>185</sup> In assessing “involuntary schools” or schools without “equal opportunities,” the intermediate scrutiny test should be more demanding, while in assessing voluntary schools or equal opportunity schools, the intermediate scrutiny test should be less demanding.<sup>186</sup> The prevalence of these constitutional theories<sup>187</sup> and the disparate standards of review that the Supreme Court has used in analyzing the constitutionality of single-sex education<sup>188</sup> belie the fact that the constitutionality of single-sex education remains undetermined.<sup>189</sup> These concerns can be addressed by the Supreme Court’s reaffirmation of its adherence to the traditional intermediate scrutiny standard for analyzing sex classifications.<sup>190</sup>

### III. THE IMPORTANCE OF REAFFIRMING THE SUPREME COURT’S ADHERENCE TO THE TRADITIONAL INTERMEDIATE SCRUTINY STANDARD

Although many scholars supported the *Virginia* and *Hogan* Courts’ decisions to heighten the standard of review applicable to state sex classifications, others decried the advent of the elevated standard, particularly for its perceived detrimental effect on single-sex education.<sup>191</sup> Several reasons exist for the Supreme Court to reaffirm its commitment to the traditional standard of review.<sup>192</sup> First, the *Virginia* and *Hogan* decisions heightened the standard of review applicable to state sex classifications.<sup>193</sup> Second, the *Virginia* and *Hogan* decisions diverged from prior precedent.<sup>194</sup> Finally, there are several policy reasons against the Supreme Court’s adoption of the *Virginia* standard of review.<sup>195</sup> As such, precedent and policy call for

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185. *See id.*

186. *See id.* at 2022, 2026.

187. *See supra* note 171 and accompanying text.

188. *See supra* Subsections I.D.2-3.

189. *See supra* Subsections I.D.2-3.

190. *See infra* Part III.

191. *See, e.g.,* Jeffrey A. Barnes, Note, *The Supreme Court’s “Exceedingly [Un]persuasive” Application of Intermediate Scrutiny in United States v. Virginia*, 31 U. RICH. L. REV. 523, 523 (1997).

192. *See infra* Section III.C.

193. *See infra* Section III.A.

194. *See infra* Section III.B.

195. *See infra* Section III.C.

the Supreme Court's reaffirmation of the applicability of the traditional intermediate scrutiny standard to single-sex education.<sup>196</sup>

#### A. The *Virginia* and *Hogan* Decisions Heightened the Standard of Review Applicable to Sex-Based Classifications

It is important for the Supreme Court to reaffirm its adherence to the traditional intermediate scrutiny standard in analyzing sex classifications because the *Virginia* and *Hogan* Courts heightened that standard.<sup>197</sup> This is particularly imperative because the *Virginia* and *Hogan* Courts ostensibly applied traditional intermediate scrutiny,<sup>198</sup> distorting the true nature of the standard applied in these cases.<sup>199</sup> The *Virginia* and *Hogan* Courts heightened the standard of review applicable to state sex-class isolations by: (1) requiring a perfect fit between the means the state used and the end it sought; (2) placing inordinate emphasis on the “exceedingly persuasive justification” language; and (3) rigorously scrutinizing the states’ alleged objectives.<sup>200</sup>

In both *Virginia* and *Hogan*, the Court required the respective states to show that their sex-class isolations were necessary to achieve the state’s important objective in *every* instance.<sup>201</sup> In other words, the *Virginia* and *Hogan* Courts held VMI and MUW to a standard requiring a perfect fit between the means used and ends sought (the states’ respective statutes could not inappropriately over-

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196. See *infra* Sections III.B-C (discussing the precedential and policy reasons for returning to the traditional intermediate scrutiny standard of review in the context of single-sex education).

197. Cf. *United States v. Virginia*, 518 U.S. 515, 572-73 (1996) (Scalia, J., dissenting) (showing how the majority heightened the standard of review for sex classifications).

198. See *id.* at 524, 532-33 (majority opinion) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)); *Hogan*, 458 U.S. at 724.

199. See *Virginia*, 518 U.S. at 573-74 (Scalia, J., dissenting) (arguing that the majority applied the strict scrutiny standard of review even though “[t]here is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance”); Candace Saari Kovacic-Fleischer, *United States v. Virginia’s New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 883 (1997) (noting that “by requiring VMI to make institutional adjustments to admit qualified women, the Court . . . elevated equal protection analysis to the level of . . . strict scrutiny”).

200. See *infra* notes 201-13 and accompanying text.

201. See *supra* Subsection I.D.2.

or under-include basically *anyone*).<sup>202</sup> For example, the *Virginia* Court relied on the fact “that some women may prefer [the adversative method] to the methodology a women’s college might pursue” in finding VMI’s all-male admissions policy unconstitutional.<sup>203</sup> Likewise, under strict scrutiny, a law that under-included some women would be unconstitutional based on its failure to be “narrowly tailored” to “further compelling governmental interests.”<sup>204</sup> Therefore, the *Virginia* Court’s reliance on the fact that some women could prefer VMI’s adversative method required Virginia’s statute to have a near perfect means-ends relationship in order to survive the Court’s review, which is exactly what strict scrutiny would have required.<sup>205</sup>

The *Virginia* and *Hogan* Courts also heightened the standard of review by placing inordinate emphasis on the “exceedingly persuasive justification” language in their formulations of the intermediate scrutiny test.<sup>206</sup> As such, the Court gave this language its own separate meaning.<sup>207</sup> Instead of using this phrase to describe the difficulty in meeting the test applicable to the respective cases, the *Virginia* and *Hogan* Courts used the phrase to define the test itself.<sup>208</sup>

Further, the *Virginia* and *Hogan* Courts elevated the standard of review by rigorously scrutinizing the respective states’ proffered governmental objectives with regard to the sex classifications at issue.<sup>209</sup> In both *Hogan* and *Virginia*, the Court second-guessed and ultimately dismissed the states’ proffered objectives, finding that the statutes at issue were not adopted for their alleged purposes.<sup>210</sup> Rather, the *Virginia* and *Hogan* Courts found the respective state objectives to be based on stereotypes and overbroad generalizations.<sup>211</sup> For example, in *Hogan*, the Court found that Mississippi’s alleged objective of using an all-female admissions

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202. *See id.*

203. *Virginia*, 518 U.S. at 540.

204. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

205. *See Barnes*, *supra* note 191, at 541.

206. *Virginia*, 518 U.S. at 571 (Scalia, J., dissenting). As Justice Scalia pointed out in his dissent, the *Virginia* majority used the “exceedingly persuasive justification” phrase nine times. *See id.*

207. *See Barnes*, *supra* note 191, at 541.

208. *See infra* note 253 and accompanying text.

209. *See infra* notes 210-12 and accompanying text.

210. *See Virginia*, 518 U.S. at 535-38; *Miss. Univ. for Woman v. Hogan*, 458 U.S. 718, 730 n.16 (1982).

211. *See Virginia*, 518 U.S. at 540-43 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1412 (W.D. Va. 1991)); *Hogan*, 458 U.S. at 727-30.

policy to remedy past discrimination against women was not its true objective because no evidence of that purpose existed in the legislative history of the statute establishing the admissions policy.<sup>212</sup> Further, the *Hogan* Court found that this objective was not legitimate because it furthered the stereotype that nursing was a woman's profession.<sup>213</sup> Because strict scrutiny also requires the law at issue to "further compelling governmental interests,"<sup>214</sup> the *Virginia* and *Hogan* Courts' rigorous scrutiny of states' proposed governmental objectives is reminiscent of strict scrutiny.<sup>215</sup>

Finally, even those supporting the *Virginia* holding have acknowledged that *Virginia*'s "exceedingly persuasive justification" standard of review "heighten[ed] the level of scrutiny and [brought] it closer to . . . 'strict scrutiny.'"<sup>216</sup> The *Virginia* decision has further been characterized as "rule-free" and a move "in the direction of open-ended balancing."<sup>217</sup> However, the *Virginia* and *Hogan* Courts' heightening of this standard lacks a basis in Supreme Court precedent.<sup>218</sup>

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212. See *Hogan*, 458 U.S. at 730 n.16. Likewise, in *Virginia*, the Court dismissed Virginia's alleged objective, finding that it had not established VMI in order to provide a diversity of educational opportunities because of the state's history of providing women with inferior educational opportunities and excluding them from higher education. See *Virginia*, 518 U.S. at 535-38.

213. See *Hogan*, 458 U.S. at 727-30. Likewise, in *Virginia*, the Court rejected Virginia's second justification for its sex classification, namely that admitting women to VMI would destroy its "adversative program," because the Court found it was based on an overbroad generalization; "some women" could excel in the program. See *Virginia*, 518 U.S. at 540-43 (quoting *Virginia*, 766 F. Supp. at 1412).

214. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

215. See *Barnes*, *supra* note 191, at 541.

216. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 73 (1996); Carrie Corcoran, Comment, *Single-Sex Education After VMI: Equal Protection and East Harlem's Young Women's Leadership School*, 145 U. PA. L. REV. 987, 1010 (1997) (arguing that the *Virginia* Court's use of the "exceedingly persuasive justification" language reveals "that the Court might have applied a heightened form of intermediate scrutiny or, perhaps, even strict scrutiny"); Collin O. Udell, Note, *Signaling a New Direction in Gender Classification Scrutiny: United States v. Virginia*, 29 CONN. L. REV. 521, 553 (1996) (arguing that the *Virginia* Court's use of the "exceedingly persuasive justification" language signals a "more rigorous formulation of the intermediate scrutiny test"). But see Larry Cata Backer, *Reading Entrail: Romer, VMI and the Art of Divining Equal Protection*, 32 TULSA L.J. 361, 369 (1997) (arguing that the *Virginia* Court's standard of review did not heighten the level of scrutiny applicable to sex classifications).

217. Sunstein, *supra* note 216, at 78, 81.

218. See *infra* Section III.A.

B. The *Virginia* Standard of Review, as Applied to Single-Sex Education, Lacks Support in the Supreme Court's Precedent

As Justice Scalia pointed out in his lone dissent from the Supreme Court's holding in *Virginia*, the *Virginia* standard of review, as applied to single-sex education, "contradicts the reasoning of . . . other precedents."<sup>219</sup> First, even outside the education field, prior to *Virginia*, the Supreme Court had never required that a sex-based classification meet its objective in every possible scenario, but only required that it further its objective "in the aggregate."<sup>220</sup> Second, the *Virginia* and *Hogan* Courts' intensive reliance on the "exceedingly persuasive justification" language to increase the demanding nature of the standard of review has no support in precedent.<sup>221</sup> Third, the Court's rigorous scrutiny of Virginia's and Mississippi's proposed governmental objectives is not justified on precedential grounds.<sup>222</sup>

1. *The Virginia Court's Requirement That VMI Meet Its Objective in Every Instance Is Not Supported by Precedent*

The *Virginia* Court's reasoning that VMI's admissions policy was unconstitutional because "a single woman" could very well be interested in attending VMI<sup>223</sup> encounters no support in the Supreme Court's precedent.<sup>224</sup> For instance, in *Craig v. Boren*, the Court found the state's statutory sex-based differentiation of the cut-off age for buying alcohol to be overwhelmingly over-inclusive and under-inclusive because it improperly affected many alcohol-buying men.<sup>225</sup> Thus, the Court in *Craig v. Boren* faulted the state's sex-based classification not for failing to meet its objective in every instance, but rather because it failed to do so in many instances.<sup>226</sup> Conversely, in *Virginia*, the Court failed to make any such finding.<sup>227</sup> Rather, the

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219. United States v. Virginia, 518 U.S. 515, 572 (1996) (Scalia, J., dissenting).

220. *Id.* at 573 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 579, 582-83 (1990), overruled on other grounds by Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).

221. See *infra* note 253 and accompanying text.

222. See *infra* notes 265-66 and accompanying text.

223. *Virginia*, 518 U.S. at 573.

224. See *infra* note 230 and accompanying text.

225. See *Craig v. Boren*, 429 U.S. 190, 204 (1976).

226. See *id.*

227. Cf. *Virginia*, 518 U.S. at 572 n.6.

Virginia Court merely relied on the fact that some undetermined small number of women could prefer the “adversative method” that VMI offered, and therefore, Virginia’s statute did not meet its objective in every instance.<sup>228</sup> As such, the Virginia Court’s holding VMI’s admissions policy unconstitutional for failing to meet its objective in every instance is not supported by precedent.<sup>229</sup>

Contrary to the Virginia Court’s holding, the Supreme Court’s precedent strongly supports the rule that the strict scrutiny standard is not applicable to sex-based classifications.<sup>230</sup> As the Virginia Court itself even acknowledged, Supreme Court precedent “thus far reserve[s] most stringent judicial scrutiny for classifications based on race or national origin.”<sup>231</sup> Five years after the Virginia decision, the Nguyen Court applied a much less demanding intermediate scrutiny than the Virginia and Hogan Courts.<sup>232</sup> While in Virginia the Court required the sex classification to achieve its objective in basically every instance,<sup>233</sup> the Court in Nguyen explicitly stated that “[n]one of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.”<sup>234</sup> Thus, the Nguyen Court officially authorized a state’s sex classification’s inability to meet its objective in every instance.<sup>235</sup> Further, the state statute at issue in Nguyen was facially discriminatory,<sup>236</sup> which made it all the more surprising that the Court upheld it under the traditional intermediate scrutiny standard.<sup>237</sup>

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228. See *id.*

229. See *supra* notes 225-28 and accompanying text.

230. See, e.g., *Heckler v. Mathews*, 465 U.S. 728 (1984) (holding that the state’s sex-based classification survives the intermediate scrutiny standard); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding the state’s sex-based classification after applying intermediate scrutiny standard).

231. *Virginia*, 518 U.S. at 532.

232. See *Nguyen v. INS*, 533 U.S. 53, 79-89 (2001) (O’Connor, J., dissenting) (arguing that the majority’s intermediate scrutiny test was not sufficiently rigorous).

233. See *Virginia*, 518 U.S. at 542.

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

235. See *id.*

236. A facially discriminatory law is one that explicitly, on its face, discriminates against a certain group. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 771 (4th ed. 2013).

237. See Heather L. Stobaugh, *The Aftermath of United States v. Virginia: Why Five Justices Are Pulling in the Reins on the “Exceedingly Persuasive Justification,”* 55 SMU L. REV. 1755, 1756-57 (2002). Surprised by the majority’s deferential treatment of what the dissent saw as the immigration statute’s explicit

In *Rostker*, the Court likewise only required the state statute's means to be substantially related to the achievement of an important government purpose, not to achieve this purpose in every possible instance.<sup>238</sup> In this case, the government's distinguishing between men and women in its draft requirement was not necessary in every instance in order to meet its objective in providing combat-ready troops.<sup>239</sup> Further, the *Rostker* Court held that even if some women could serve in noncombat roles in the army, women could still be constitutionally excluded from the federal government's selective-service registration plans.<sup>240</sup> The Court simply deferred to Congress's judgment that the burdens involved in adding women to draft and registration plans were too egregious.<sup>241</sup>

The nature of the *Rostker* decision, namely the Court's review of a congressional decision involving military affairs, fails to account for the Court's application of the traditional intermediate scrutiny standard to this case.<sup>242</sup> A prominent scholarly interpretation of *Rostker* is that it simply represents an instance where the Court deferred to Congress's wishes because the statute at issue involved military affairs.<sup>243</sup> However, while the *Rostker* Court did emphasize Congress's unique role under the Constitution to "raise and support armies," the Court explicitly stated that its precedent "d[oes] not purport to apply a different equal protection test [than the traditional intermediate scrutiny test] because of the military context."<sup>244</sup> As such, the *Rostker* Court did not apply a more deferential test because of its military context.<sup>245</sup>

It is also illogical to argue that the Court in *Virginia* confronted a "unique" situation requiring the application of a stricter form of scrutiny than the traditional intermediate scrutiny standard.<sup>246</sup> As Justice Scalia noted in his dissent, a single-sex educational program will always be unique in some sense; a single-sex educational

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discrimination against men, the dissent argued that the majority applied rational basis review, not the traditional intermediate scrutiny test. See *Nguyen*, 533 U.S. at 83 (O'Connor, J., dissenting).

238. See *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981).

239. See *id.* This is exemplified by the fact that combat-ineligible men were also required to register. See *TRIBE*, *supra* note 146, at 1573.

240. See *Rostker*, 453 U.S. at 81.

241. See *id.*

242. See *infra* notes 243-44 and accompanying text.

243. See *CHEMERINSKY*, *supra* note 236, at 775, 783.

244. See *Rostker*, 453 U.S. at 71.

245. See *id.*

246. See *Barnes*, *supra* note 191, at 536-37.

program that is not unique would itself be unique.<sup>247</sup> Further, regardless of how the Supreme Court may characterize a decision, every one of its dispositions establishes precedent and provides rationale that lower courts are bound to follow.<sup>248</sup> Therefore, the *Virginia* decision does not represent a “unique” disposition that has no bearing on the current law relating to single-sex education.<sup>249</sup>

2. *The Virginia and Hogan Courts’ Use of the “Exceedingly Persuasive Justification” Phrase Is Not Justified on Precedential Grounds.*

The *Virginia* and *Hogan* Courts’ use of the “exceedingly persuasive justification” phrase to define the intermediate scrutiny test, rather than to describe the test, also altered the Court’s long-standing precedent.<sup>250</sup> The first case in which the Supreme Court used the “exceedingly persuasive justification” language supports the fact that the introduction of this language was not intended to make the intermediate scrutiny test more demanding.<sup>251</sup> In *Personnel Administrator of Massachusetts v. Feeney*, the Court upheld, rather than invalidated, the state statute at issue.<sup>252</sup> This strongly suggests that the Court did not envision the “exceedingly persuasive justification” language to be as demanding as *Virginia* and *Hogan* held it to be.<sup>253</sup>

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247. *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting). Justice Scalia noted that the majority failed to provide any examples of single-sex programs that would survive review. *See id.* at 596 n.8.

248. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996).

249. *See Barnes, supra* note 191, at 536-37.

250. *See infra* note 253 and accompanying text.

251. *See Pers. Adm’r v. Feeney*, 442 U.S. 256, 273 (1979).

252. *See id.* at 281.

253. *See Stobaugh, supra* note 237, at 1759. This is further supported by the fact that Chief Justice Rehnquist was part of the *Feeney* majority that used the “exceedingly persuasive justification” language, *see Feeney*, 442 U.S. at 273, but in joining Justice Powell in his *Hogan* dissent, he expressed strong disapproval with the Court’s use of this language. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 735 (1982) (Powell, J., dissenting). Additionally, if the Court had intended to use the “exceedingly persuasive justification” language to signal a shift to a higher scrutiny standard for sex-based classifications, this would have been evident in its next case analyzing sex classifications, *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980). However, in *Wengler*, the Court notably applied the intermediate scrutiny standard, but failed to even use the “exceedingly persuasive justification” language. *See id.* at 150.

As Chief Justice Rehnquist noted in his *Virginia* concurrence, the phrase “exceedingly persuasive” was originally used simply as an “observation on the difficulty of meeting the applicable test.”<sup>254</sup> It was not supposed to be “a formulation of the test itself.”<sup>255</sup> In fact, the later *Nguyen* decision can be seen as an attempt by the Court to shift its sex classification analysis framework away from the *Virginia* standard of review to its earlier formulation of the test.<sup>256</sup> In contrast with the *Virginia* and *Hogan* Courts’ singular emphasis on the “exceedingly persuasive justification” language in its formulation of the standard of review applicable to those cases,<sup>257</sup> the *Nguyen* Court mentioned the phrase only twice and failed to identify this language as central to its analysis.<sup>258</sup>

### 3. *The Virginia and Hogan Courts’ Rigorous Scrutiny of the States’ Proffered Governmental Interests Conflicts with Prior Precedent*

The *Virginia* and *Hogan* Courts’ rigorous scrutiny of the states’ proffered governmental objectives for the sex classifications at issue also conflicts with the Supreme Court’s precedent.<sup>259</sup> In both *Hogan* and *Virginia*, the Court second-guessed and ultimately dismissed the states’ proffered objectives, finding that the statutes at issue were not adopted for their alleged purposes, but were rather based on stereotypes and overbroad generalizations.<sup>260</sup> Conversely, in *Nguyen*, the Court found that the statute at issue was not based on stereotypes, despite the petitioners’ and dissenters’ allegations to the contrary.<sup>261</sup> Rather, the Court accepted the respondent’s argument that the statute was based on biological realities<sup>262</sup> and did not engage in any second-

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254. *United States v. Virginia*, 518 U.S. 515, 559 (1996) (Rehnquist, C.J., concurring).

255. *Id.*

256. *See Stobaugh, supra* note 237, at 1756-57.

257. As Justice Scalia pointed out in his dissent, the *Virginia* majority used the “exceedingly persuasive justification” phrase nine times. *Virginia*, 518 U.S. at 571 (Scalia, J., dissenting).

258. *Nguyen v. INS*, 533 U.S. 53, 60-73 (2001). Justice Kennedy, writing for the majority, used the “exceedingly persuasive justification” phrase merely to state that the standard had been met and to recite its meaning. *See id.* at 70.

259. *See infra* notes 264-66 and accompanying text.

260. *See supra* notes 210-13 and accompanying text.

261. *See Nguyen*, 533 U.S. at 62, 64.

262. The respondents argued that the statute at issue furthered the important governmental objectives of providing for a “biological parent-child relationship”

guessing or rigorous scrutiny to determine if the government's alleged objective actually was its true objective.<sup>263</sup>

Instead of an intense scrutiny of states' proffered educational objectives, the Supreme Court's precedent provides for a longstanding history of deference to states and local school districts in making educational decisions and furthering educational objectives.<sup>264</sup> The Supreme Court has emphasized that the "local autonomy of school districts is a vital national tradition."<sup>265</sup> The Court's rationale in providing this autonomy to school districts is that educators are better informed about facts on the ground and have more expertise than federal judges in making educational decisions.<sup>266</sup> While this history of deference should not provide states and local school districts with a free hand to enact sex classifications at will, it does call for federal courts to at least provide local school districts with the opportunity to experiment with single-sex educational options.<sup>267</sup>

The Supreme Court chose to use the intermediate scrutiny standard to review government-sponsored sex classifications to prevent sexual stereotyping.<sup>268</sup> In the vast majority of cases, single-sex education programs do not perpetuate such stereotypes, but rather, in many instances, provide additional choices and

and ensuring that relationship consisted of "real, everyday ties" among the child, parent, and the United States. *See id.* at 62, 65.

263. *See id.* at 62-64.

264. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("[P]ublic education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

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

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

267. *See Tomiko Brown-Nagin, Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 832, 848-49 (2000); Morgan, *supra* note 41, at 423; Barnes, *supra* note 191, at 545; Pherabe Kolb, Comment, *Reaching for the Silver Lining: Constructing a Nonremedial yet "Exceedingly Persuasive" Rationale for Single-Sex Educational Programs in Public Schools*, 96 NW. U. L. REV. 367, 398-400 (2001). Barnes shows how the *Virginia* Court's second-guessing states' alleged objectives in reviewing state statutes forces states to legislate in a manner similar to the way in which regulations are enacted under the Administrative Procedure Act, where states must enumerate the purposes and objectives of every classification statute. *See Barnes, supra* note 191, at 545.

268. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

opportunities to disadvantaged men and women.<sup>269</sup> Thus, the Court should not heighten the intermediate scrutiny standard in an effort to invalidate state actions designed to expand men and women's choices where the parties at issue often have substantially equal opportunities.<sup>270</sup>

As Justice Powell noted in his *Hogan* dissent, the Court thwarts the liberating effect of the Equal Protection Clause when it uses the *Virginia* standard of review in contradiction of its precedent.<sup>271</sup> The Court prevents states from providing both men and women with the choice of educational options.<sup>272</sup> Across the board, the petitioners in lawsuits against single-sex schools do not argue that the state is depriving them of a substantive education or even the right to attend a single-sex or coeducational school.<sup>273</sup> The petitioners do not complain that they are discriminated against because they cannot attend a single-sex school open to their respective sex.<sup>274</sup> Rather, they seek to attend a specific school for their personal convenience.<sup>275</sup> Thus, if the Court seeks to remain true to its sex-based equal protection doctrine, it should reaffirm its commitment to traditional intermediate scrutiny and not heighten its standard of review.<sup>276</sup>

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269. See *supra* Section I.B.

270. Cf. *supra* Section I.B.

271. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 741 (1982) (Powell, J., dissenting).

272. *Id.*

273. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (deciding whether women's exclusion from VMI *in particular* denies them the equal protection of the laws); *Hogan*, 458 U.S. at 741-42 ("[Petitioner's] claim . . . is not that he is being denied a substantive educational opportunity, or even the right to attend an all-male or a coeducational college . . . [but] *only* that the colleges open to him are located at inconvenient distances."); *Vorchheimer v. Sch. Dist.*, 532 F.2d 880, 882-83 (3d Cir. 1977) ("[T]he deprivation asserted is that of the opportunity to attend a specific school, not that of an opportunity to obtain an education at a school with comparable educational facilities, faculty and prestige.").

274. See *supra* note 273 and accompanying text.

275. See *id.*

276. *Virginia*, 518 U.S. at 574-75 (Scalia, J., dissenting). As Justice Scalia argued in his *Virginia* dissent:

The Court's intimations [about adopting strict scrutiny for sex classifications] are particularly out of place because it is perfectly clear that, if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review.

*Id.*

In summary, the *Virginia* standard of review represents a departure from the Court's equal protection precedent as applied to sex classifications in general and single-sex education in particular.<sup>277</sup> For this reason, it is important to understand how the *Virginia* standard of review would impact single-sex education.<sup>278</sup> An examination of the policy implications of the *Virginia* standard of review is therefore warranted.<sup>279</sup>

### C. The *Virginia* Standard of Review, as Applied to Single-Sex Education, Lacks Support in Public Policy

The potential detrimental effects of the *Virginia* standard of review on education in general and single-sex education in particular are numerous, and therefore several public policy reasons exist for the Court to return to the traditional intermediate scrutiny standard.<sup>280</sup> The *Virginia* standard of review (1) hinders experimentation in education; (2) precludes states from following research showing that single-sex schools benefit students; and (3) prevents states from using single-sex schools to remedy past or present discrimination against particular groups.<sup>281</sup> Further, the constitutional theories that serve as the foundation of the *Virginia* standard of review lack support in educational policy.<sup>282</sup>

#### 1. *The Policy Arguments Against the Virginia Standard of Review*

As Justice Scalia noted in his *Virginia* dissent, a court's application of the *Virginia* standard of review to single-sex public education programs or schools would leave the concept of single-sex education "functionally dead."<sup>283</sup> Like in *Virginia* and *Hogan*, a state

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277. See *supra* notes 219, 251-55 and accompanying text.

278. See *Virginia*, 518 U.S. at 597 (Scalia, J., dissenting) ("[T]he enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.").

279. See *infra* Section III.C.

280. See *infra* Subsection III.C.1.

281. See *infra* Subsection III.C.1.

282. See *infra* Subsection III.C.2.

283. *Virginia*, 518 U.S. at 573-74. Justice Blackmun, in his dissent in *Hogan*, similarly noted that the majority's holding in that case "place[d] in constitutional jeopardy any state-supported educational institution that confines its student body in

attempting to experiment with single-sex education would be required to establish that the single-sex educational program at issue is necessary in every instance in order to further the state's important objective.<sup>284</sup> As shown in the *Virginia* and *Hogan* cases, this is a practically insurmountable burden for a state to meet.<sup>285</sup>

For example, like the single-sex school at issue in *Garrett*, a state may wish to improve the plight of its poor, minority, urban girls by experimenting with an all-girls school in a poor, urban area.<sup>286</sup> However, because of the stringent nature of the *Virginia* standard of review, the state will likely get sued for discriminating against urban boys as soon as it begins to implement this experiment.<sup>287</sup> The indeterminate, yet exacting nature of the standard (requiring an "exceedingly persuasive justification") invites litigation by those opposed to single-sex education.<sup>288</sup> School districts fearing the risks of litigation are thus pressured to discontinue experimentation with these programs<sup>289</sup> despite the federal government's encouragement of this experimentation.<sup>290</sup> This result is particularly undesirable in the current educational environment where educational reform is of paramount importance,<sup>291</sup> federal standards increasingly demand

any area to members of one sex." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 734 (1982) (Blackmun, J., dissenting).

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

285. See *supra* Subsection I.D.2.

286. Cf. *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1006-08 (E.D. Mich. 1991).

287. See *infra* note 288 and accompanying text.

288. See Rosemary Salomone, *Rights and Wrongs in the Debate over Single-Sex Schooling*, 93 B.U. L. REV. 971, 983-88 (2013) (providing examples of the ACLU suing school districts over single-sex programs and threatening school districts with litigation in an effort to pressure them to drop single-sex options); Tod Christopher Gurney, Comment, *The Aftermath of the Virginia Military Institute Decision: Will Single-Gender Education Survive?*, 38 SANTA CLARA L. REV. 1183, 1221-22 (1998) (arguing that the *Virginia* Court "failed to answer important questions which need to be answered in order to give school officials guidance when implementing single-gender schools"); Robert Knight, *KNIGHT: ACLU Declares New War on Single-Sex Education*, WASH. TIMES (May 23, 2012), <http://www.washingtontimes.com/news/2012/may/23/aclu-declares-new-war-on-single-sex-education/?page=all> (assailing the ACLU for "launch[ing] a nationwide jihad against single-sex education").

289. See Salomone, *supra* note 288, at 983-88.

290. See *supra* Section I.C.

291. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973) (stressing that "[t]he need is apparent for reform" and that "innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity"); see also CASEY GIVEN, A NATION STILL AT RISK: THE CONTINUING CRISIS OF AMERICAN EDUCATION AND ITS

more of schools, and school accountability is the education mantra.<sup>292</sup> Therefore, because of its stringency,<sup>293</sup> the *Virginia* standard of review hinders experimentation with single-sex schools.<sup>294</sup>

Conversely, if a school decided to go to court in order to preserve its experiment, the state would be required to justify the constitutionality of this school under the *Virginia* standard of review by showing: (1) that it has an “exceedingly persuasive justification” for setting up the school, and (2) that its school meets that objective in basically every instance.<sup>295</sup> In order to meet this burden, the state could use several arguments.<sup>296</sup> First, the state may argue that its school is justified by the research showing single-sex school programs can benefit many students.<sup>297</sup> The state could point to numerous studies that have provided an abundance of evidence showing the benefits of single-sex education.<sup>298</sup> Second, the state may argue that its single-sex school is justified because it remedies the past effects of discrimination against women.<sup>299</sup> The state could point to evidence that single-sex educational environments have been shown to be particularly beneficial to girls because girls in single-sex schools are more likely to prefer science, technology, and math courses than their counterparts in coeducational schools.<sup>300</sup> Further,

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STATE SOLUTION (2013), [http://www.kslegislature.org/li\\_2014/b2013\\_14/committees/misc/ctte\\_h\\_ed\\_1\\_20130321\\_36\\_other.pdf](http://www.kslegislature.org/li_2014/b2013_14/committees/misc/ctte_h_ed_1_20130321_36_other.pdf) (describing the dire need for education reform); Ken Robinson, *Why We Need to Reform Education Now*, HUFFINGTON POST (July 3, 2014), [http://www.huffingtonpost.com/sir-ken-robinson/reform-american-education-now\\_b\\_3203949.html](http://www.huffingtonpost.com/sir-ken-robinson/reform-american-education-now_b_3203949.html) (describing the need for a personalization of the education process).

292. See Rosemary Salomone, *The Common School Before and After Brown: Democracy, Equality, and the Productivity Agenda*, 120 YALE L.J. 1454, 1474-76 (2011) (reviewing MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* (2010)).

293. See Sunstein, *supra* note 216, at 73, 76, 78.

294. See *United States v. Virginia*, 518 U.S. 515, 597 (1996) (Scalia, J., dissenting) (“The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials.”).

295. See *supra* Section III.A.

296. See *infra* notes 297, 299, 302 and accompanying text.

297. See *supra* Section I.B.

298. See *supra* Section I.B.

299. See *infra* note 300 and accompanying text.

300. See SALOMONE, *supra* note 26, at 207-08; Haag, *supra* note 44, at 653; Levit, *supra* note 48, at 493; Mael, *supra* note 44, at 108-09, 111. *But see* Levit, *supra* note 48, at 494 (finding one study showing that single-sex education did not promote a preference for math among girls).

single-sex schooling “improves girls’ chances of landing well-paid careers.”<sup>301</sup>

Similarly, the state may argue that its school is justified because it assists minority and disadvantaged students.<sup>302</sup> The state may point to evidence that single-sex schooling has been shown to be particularly helpful to minority and disadvantaged students because the mere presence of this alternative empowers students and parents to choose schools that best fit their unique needs.<sup>303</sup> While affluent families have always had the option to enroll their students in single-sex private schools, it was not until the No Child Left Behind Act encouraged experimentation in single-sex education in public schools that students from low-income, minority, and disadvantaged households have enjoyed that opportunity.<sup>304</sup> Since then, many single-sex public schools have been established in urban neighborhoods, and the success stories of many of these schools are noteworthy.<sup>305</sup> Providing this choice also increases competition among schools, which can lead to improvement in outcomes for schools.<sup>306</sup>

However, by requiring an “exceedingly persuasive justification” for single-sex educational options, the *Virginia*

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301. Clark, *supra* note 49.

302. See *infra* note 303 and accompanying text.

303. See Riordan, *supra* note 51, at 14, 28 (arguing that single-sex education benefits minority and disadvantaged students because it “provide[s] an avenue for students to make a proacademic choice, thereby affirming their intrinsic agreement to work in the kind of environment we identify as effective and equitable”); Brown-Nagin, *supra* note 267, at 867-68; Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL’Y 227, 251-52 (1994); see also Howard Fuller, *The Continuing Struggle for School Choice*, in EDUCATIONAL FREEDOM IN URBAN AMERICA: *BROWN V. BOARD* AFTER HALF A CENTURY 1, 2-4 (David Salisbury & Casey Lartigue, Jr. eds., 2004).

304. See Christina Hoff Sommers, *The Bizarre, Misguided Campaign to Get Rid of Single-Sex Classrooms*, ATLANTIC (Oct. 4, 2013), <http://www.theatlantic.com/education/archive/2013/10/the-bizarre-misguided-campaign-to-get-rid-of-single-sex-classrooms/280262/2/>.

305. See *id.* One of the several examples that Sommers notes is the Irma Lerma Rangel Young Women’s Leadership School in Dallas, Texas, whose student body consists of 70% students from low-income homes and 90% minority students. See *id.* Since it opened in 2004, the school has been awarded several academic achievement honors and has been ranked among the top public schools in Texas by *U.S. News & World Report. Id.*

306. See Paul E. Peterson, *The Meaning of Zelman and the Future of School Choice*, in EDUCATIONAL FREEDOM IN URBAN AMERICA, *supra* note 303, at 53, 65 (showing how areas with more parental choice leads to more competition between private and public schools and improved student performance).

standard of review only allows schools to implement single-sex education if they can prove that it is better than coeducation in every instance.<sup>307</sup> Importantly, proving that single-sex education is *better* than coeducation on all levels, as opposed to proving that single-sex education provides benefits to many students, is nearly impossible.<sup>308</sup> First, the methodology is challenging because a randomized study would require the assignment of students to single-sex or coed schools, which is legally impossible and unethical.<sup>309</sup> Second, allowing for parental involvement in such a study, a prerequisite because of the age of the subjects, would raise the specter of confounding variables such as parental education and income.<sup>310</sup> As such, under the *Virginia* standard of review, schools wishing to follow research showing the benefits of single-sex education face a practically insurmountable burden in justifying their choice.<sup>311</sup> Therefore, the exacting nature<sup>312</sup> of the *Virginia* standard of review prevents states from following research showing that single-sex schools benefit students.<sup>313</sup>

Further, the rigid and conforming nature of the *Virginia* standard of review places an exceedingly high burden on schools to justify the implementation of single-sex education programs, even if the justification is remedying the effects of previous discrimination.<sup>314</sup> Instead of allowing schools to fashion admission policies around the rule that single-sex education benefits many of the most disadvantaged students,<sup>315</sup> the *Virginia* standard of review

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307. See *supra* Subsection I.D.2; see also *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting).

308. Christine Gross-Loh, *The Never-Ending Controversy over All-Girls Education*, ATLANTIC (Mar. 20, 2014), <http://www.theatlantic.com/education/archive/2014/03/the-never-ending-controversy-over-all-girls-education/284508/>.

309. See *id.*

310. See *id.*

311. See *supra* notes 308-10 and accompanying text. Not only is proving that single-sex education is better than coeducation impossible, it is also undesirable. See Sommers, *supra* note 304. Similar to the research on single-sex education, most of the research on the classroom effects of the length of school days, class size, and homework amounts is unsettled and does not all point to one direction. See *id.* Requiring the research to be unequivocal before implementing school reforms in these areas would lead to paralysis and hamper student achievement in education. See *id.*

312. See Sunstein, *supra* note 216, at 73, 76, 78.

313. See *supra* notes 308-10 and accompanying text.

314. See *supra* Subsection I.D.2; see also *United States v. Virginia*, 518 U.S. 515, 596-97 (1996) (Scalia, J., dissenting).

315. See *supra* Section I.C.

for single-sex education is fashioned around the exception that some students may not share in these benefits.<sup>316</sup> Thus, the *Virginia* standard of review prevents schools from using the unique benefits of single-sex education to remedy past effects of discrimination against women and minorities in the education field.<sup>317</sup>

The *Virginia* standard of review's detrimental effect on single-sex education is further evidenced by the fact that federal courts upholding single-sex public education programs after *Virginia* have only been able to do so by skirting the application of the *Virginia* standard of review to a large extent.<sup>318</sup> For example, the federal court in *A.N.A. ex rel. S.F.A.* interpreted the *Virginia* decision as holding that "barring students from educational opportunities based on their sex without an exceedingly persuasive justification constitutes [sex discrimination]."<sup>319</sup> The court then found that because the students in the school at issue could choose coeducation, the students were not barred from educational opportunities.<sup>320</sup> While the *Virginia* and *Hogan* Courts required the respective states to provide an exceedingly persuasive justification for *the very existence* of their single-sex admissions programs, the *A.N.A. ex rel. S.F.A.* court never required this.<sup>321</sup> Therefore, although the current resurgence of single-sex education proved Scalia's claim of the portending extinction of single-sex education to be false,<sup>322</sup> his implied claim that single-sex education is technically not able to survive the *Virginia* standard of review is supported by persuasive evidence.<sup>323</sup>

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316. See SALOMONE, *supra* note 26, at 220.

317. See Borkowski, *supra* note 29, at 273-75, 278 ("[A]ll-girls schools or all-girls classrooms are necessary as a response to gender discrimination in the classroom. There is widespread evidence of the prevalence of such discrimination, and increasingly this evidence forms the basis of arguments in favor of single-sex education for girls."); see also *supra* notes 308-10, 316 and accompanying text.

318. See Cohen & Levit, *supra* note 9, at 358-62 (arguing the federal courts in *A.N.A. ex rel. S.F.A.* and *Vermillion Parish* misapplied the constitutional standard in analyzing the constitutionality of single-sex educational programs); see also *supra* Subsection I.D.4.

319. See *A.N.A. ex rel. S.F.A. v. Breckinridge Cty. Bd. of Educ.*, 833 F. Supp. 2d 673, 678 (W.D. Ky. 2011).

320. See *id.* at 678-79.

321. See Cohen & Levit, *supra* note 9, at 359.

322. See *supra* notes 22-24 and accompanying text.

323. See generally Cohen & Levit, *supra* note 9, at 348-93 (arguing that single-sex education has no exceedingly persuasive justification and is thus unconstitutional under the Equal Protection Clause).

2. *The Policy Arguments Against the Constitutional Theories Undergirding the Virginia Standard of Review*

The main reason that the *Virginia* standard of review lacks support in policy stems from the fact that the constitutional theories undergirding this standard of review also lack support in policy.<sup>324</sup> The theory of formal equality, with its insistence on the inherent inequality of single-sex schools, has substantial weaknesses.<sup>325</sup> In the first place, coeducation, as the alternative to single-sex schools, does not necessarily ensure equality of opportunity for the sexes.<sup>326</sup> Rather, many of the same mechanisms that promote a lack of opportunities for a particular sex are present in both single-sex education and coeducation.<sup>327</sup> In fact, the history of coeducation provides many examples of sex stereotyping even in coeducational settings where females and males have equal access to resources and operate under the same curriculum.<sup>328</sup>

Research of the historical record shows that “differences of form,” such as the differences between single-sex and coeducational school settings, are “relatively unimportant” in terms of providing for sexual stereotyping and discrimination.<sup>329</sup> Thus, single-sex education and coeducation can be used for good or bad purposes with regard to students’ achievement and future opportunities.<sup>330</sup> It is not the form of education, but rather the day-to-day operations and pedagogical attitudes and practices that make the difference in the risk for sexual stereotyping and discrimination in educational settings.<sup>331</sup>

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324. See *infra* notes 326-31, 341-44 and accompanying text.

325. See *infra* notes 326-31.

326. Jill E. Hasday, *The Principle and Practice of Women’s “Full Citizenship”*: A Case Study of Sex-Segregated Public Education, 101 MICH. L. REV. 755, 758 (2002).

327. See *id.*

328. See *id.* at 794.

329. See *id.*

330. See Datnow & Hubbard, *supra* note 26, at 7. An example of this fact can also be gleaned from a 2001 California study of single-sex public schools. See AMANDA DATNOW, LEE HUBBARD & ELISABETH WOODY, IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR?: LESSONS FROM CALIFORNIA’S PILOT PROGRAM 74 (2001) (“Sex segregated education can be used for emancipation or oppression. As a method, it does not guarantee an outcome. The intentions, the understanding of people and their gender, the pedagogical attitudes and practices, are crucial, as in all pedagogical work.”).

331. See Datnow & Hubbard, *supra* note 26, at 7-8.

By only permitting strictly equal single-sex schools in line with the formal equality theory, the Court would adopt a rigid, categorical approach to the novel circumstances that often arise in the ever-changing educational field.<sup>332</sup> Additionally, requiring absolute equality of opportunity between single-sex educational options themselves, or as compared to coeducational options, is unsupported by the Supreme Court's precedent.<sup>333</sup> Lower federal courts have likewise held that absolute equality of opportunity for both sexes with regard to single-sex education is not required by the Equal Protection Clause.<sup>334</sup>

The Department of Education regulations and oversight, such as those currently in effect, are much more effective in promoting equality of opportunity for both sexes in single-sex schools than the constitutionalization of formal equality.<sup>335</sup> Federal law and regulations have been shown to be adaptable to novel circumstances and research findings, such as the research showing the benefits of single-sex education.<sup>336</sup> Further, as a government agency, the Department of Education has more resources, time, and expertise to combat occurrences of sexual stereotyping and discrimination in schools than federal courts.<sup>337</sup> This is particularly important in light of the fact that it is the day-to-day management and pedagogical attitudes and practices of schools that ultimately determine the pervasiveness of sexual stereotyping and discrimination in schools, and not the categorical form of education used.<sup>338</sup>

The antisubordination theory, with its insistence that single-sex schools are only constitutional if those schools remedy the effects of

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332. See Jenkins, *supra* note 11, at 2004-05.

333. See *United States v. Virginia*, 518 U.S. 515, 565 (1996) (Rehnquist, C.J., concurring) (arguing that in order to remedy its constitutional violation, Virginia "does not need to create two institutions with the same number of faculty Ph.D.'s similar SAT scores, or comparable athletics fields"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 720 n.1 (1982) ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.").

334. See *supra* notes 157-62 and accompanying text.

335. See 34 C.F.R. § 106.34(b)(1)(ii), (iii) (2008) (requiring single-sex schools to be voluntary and implemented in an "evenhanded" manner).

336. See *supra* Section I.C.

337. Cf. William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 421-22 (arguing that agencies are superior to courts in implementing statutory mandates).

338. Datnow & Hubbard, *supra* note 26, at 7.

historical discrimination against women,<sup>339</sup> also suffers from various weaknesses.<sup>340</sup> First, men seeking benefits given only to women have had most of the success in sex-discrimination cases before the Court.<sup>341</sup> Second, because of its sole focus on remedying historical discrimination against women, this theory, at its core, advocates for an asymmetrical approach.<sup>342</sup> The Court has consistently rejected such an approach, explicitly requiring states employing sex classifications not to “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>343</sup>

In the current educational environment, the anti-subordination approach may be especially unhelpful in promoting equal opportunities for students because in recent years boys have lagged behind girls across a spectrum of educational outcomes.<sup>344</sup> In fact, the most recent research shows females outperforming males “at each education level since 2000.”<sup>345</sup> Although women have historically been discriminated against and the United States has yet to overcome that history,<sup>346</sup> it is difficult to argue that women in educational settings are a “discrete and insular minorit[y]” requiring heightened scrutiny under the Equal Protection Clause.<sup>347</sup> Rather, research on

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339. See *supra* note 179 and accompanying text.

340. See *infra* notes 341-42 and accompanying text.

341. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982); *Caban v. Mohammed*, 441 U.S. 380, 392-94 (1979); *Orr v. Orr*, 440 U.S. 268, 283 (1979).

342. See *BARTLETT ET AL.*, *supra* note 174, at 117.

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

344. See *Datnow & Hubbard*, *supra* note 26, at 3; *SOMMERS*, *supra* note 34, at 24 (contending that “it is boys, not girls, who are languishing academically”).

345. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *THE CONDITION OF EDUCATION 2014*, at 2 (2014), <http://nces.ed.gov/pubs2014/2014083.pdf>.

346. See, e.g., *LORRAINE DUSKY, STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA* 407-13 (1996) (discussing research on instances of sex discrimination in the criminal justice system); Eileen Patten, *On Equal Pay Day, Key Facts About the Gender Pay Gap*, PEW RES. CTR. (Apr. 14, 2015), <http://www.pewresearch.org/fact-tank/2014/04/08/on-equal-pay-day-everything-you-need-to-know-about-the-gender-pay-gap/> (finding that, based on the hourly wages of both full- and part-time employees in 2014, “women earn 84 percent of what men earn”).

347. See *Virginia*, 518 U.S. at 575 (Scalia, J., dissenting). The “discrete and insular minorit[y]” phrase was coined in *United States v. Carolene Products*, 304 U.S. 144 n.4 (1938), the famous footnote four case. See Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982) (arguing that footnote four is “the most celebrated footnote in constitutional law”). In *Carolene Products*, Justice Stone argued that certain “discrete and insular minorities” are entitled to strict scrutiny because prejudice against them “may be a special

achievement outcomes for both girls and boys provides a more nuanced picture, with each sex facing different challenges in the educational field.<sup>348</sup> Thus, adopting a theory that views education as a zero-sum game between girls and boys will not provide equal opportunities for all children.<sup>349</sup>

Finally, a return to the traditional intermediate scrutiny standard is needed because modifying the *Virginia* standard of review by requiring the Court to take other factors into consideration would only serve to further confuse the already muddled case law surrounding single-sex education.<sup>350</sup> Scholars have already severely criticized the intermediate scrutiny standard of review for allowing too much judicial discretion;<sup>351</sup> providing for a sliding scale of intermediate scrutiny would only aggravate this fact. Further complicating the intermediate scrutiny standard provides no palpable benefits to states seeking to enact educational reforms, schools seeking to implement these reforms, or students seeking to benefit from these reforms.<sup>352</sup>

In his *Virginia* concurrence, Chief Justice Rehnquist faulted VMI for not noticing the Court's trend in single-sex education jurisprudence.<sup>353</sup> He argued that while VMI was "entitled to believe that 'one swallow doesn't make a summer' and await further developments" in the law,<sup>354</sup> after the Supreme Court's holding in

condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." 304 U.S. at 152 n.4.

348. See *supra* Section I.A.

349. See ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 150 (2003) ("[W]hen we fail to 'treat likes alike'—we not only limit individual liberty and destroy some social tradition, but we also, in effect, *excommunicate*: we declare some people to be not worthy, and thus not 'like us' and therefore not 'of us.'").

350. See *supra* Subsections I.D.1-3.

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

352. Cf. *supra* note 351 and accompanying text.

353. See *United States v. Virginia*, 518 U.S. 515, 561 (1996) (Rehnquist, C.J., concurring); see also Mary Ann Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1462 (2000).

354. *Virginia*, 518 U.S. at 561 (Rehnquist, C.J., concurring).

*Reed v. Reed*,<sup>355</sup> single-sex education jurisprudence developed for eleven years.<sup>356</sup> Thus, VMI was “on notice . . . that [its] men-only admissions policy was open to serious question.”<sup>357</sup>

Currently, more than eighteen years after the Supreme Court’s holding in *Virginia*, single-sex education jurisprudence has developed significantly, trending towards constitutionalizing single-sex education programs that exhibit appropriate safeguards.<sup>358</sup> Since *Virginia*, the federal government has encouraged experimentation with single-sex education programs,<sup>359</sup> and the number of single-sex education programs continues to grow.<sup>360</sup> Thus, according to Justice Rehnquist’s logic, the *Virginia* standard of review, requiring the strictest analysis of single-sex education programs, is open to serious question.<sup>361</sup> Despite his ultimate holding, Justice Rehnquist’s *Virginia* concurrence was correct in one regard: Instead of adopting the “exceedingly persuasive justification” standard of review in analyzing single-sex education programs, the *Virginia* Court should have adhered to the traditional intermediate scrutiny standard, requiring that a state sex-based classification be substantially related to important governmental ends.<sup>362</sup>

## CONCLUSION

Since *Virginia*, single-sex education has grown in popularity,<sup>363</sup> the federal government has decided to encourage experimentation in single-sex education programs,<sup>364</sup> and lower federal courts have increasingly accepted state-sponsored single-sex educational

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355. 404 U.S. 71 (1971).

356. *Virginia*, 518 U.S. at 561.

357. *Id.*

358. See *supra* Subsection I.D.4. Some of the safeguards that federal courts and federal regulations have consistently enforced are that single-sex educational programs and schools must be completely voluntary; that is, parents and children must have the choice of whether to enroll in single-sex educational classes or schools, and they must have a substantially equal coeducational alternative open to them as well. See *supra* notes 163-65 and accompanying text.

359. See No Child Left Behind Act of 2001, 20 U.S.C. § 6312(c)(1)(g) (2006).

360. See *supra* notes 21-24 and accompanying text.

361. Cf. *Virginia*, 518 U.S. at 561 (Rehnquist, C.J., concurring).

362. See *id.* at 559 (arguing that the majority should have “adhered more closely . . . to [its] traditional . . . intermediate scrutiny” test).

363. See *supra* notes 21-24 and accompanying text.

364. See *supra* Section I.C.

options.<sup>365</sup> Thus, the foundation has been laid for the Supreme Court's reaffirmation of the applicability of the traditional intermediate scrutiny standard to single-sex education.<sup>366</sup> In order to reconcile the *Hogan* and *Virginia* decisions with the increasing acceptance of single-sex education programs in popular opinion,<sup>367</sup> federal law,<sup>368</sup> and lower federal courts,<sup>369</sup> the Supreme Court should reaffirm its commitment to the traditional intermediate scrutiny standard, thus recognizing the constitutionality of public single-sex education programs that meet that standard.<sup>370</sup>

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365. See *supra* Subsection I.D.4.

366. See *supra* Part I (discussing the increasing acceptance in popular opinion, federal law, and lower federal courts of single-sex education options).

367. See *supra* notes 21-24 and accompanying text.

368. See *supra* Section I.C.

369. See *supra* Subsection I.D.4.

370. See *supra* Part III (discussing the importance of the Supreme Court's reaffirmation of the applicability of the traditional intermediate scrutiny standard to its review of the constitutionality of state sex-classifications).