

**THE CONSTITUTIONALITY OF SINGLE-SEX PUBLIC
EDUCATION IN PENNSYLVANIA ELEMENTARY AND SECONDARY
SCHOOLS**

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INTRODUCTION

This country's education system is at a crucial moment. With concern about the state of public schools growing, educators' increasing willingness to experiment with non-traditional forms of education, and a President elected on a campaign promise of change, the time is ripe to implement innovative measures to boost student performance. The question is which reforms will have a lasting and desirable impact, and which will not create vital improvements though they may appear promising. This Comment will examine the constitutionality of a prevalent and highly debated form of experimentation designed to increase student achievement: single-sex education in public secondary and elementary schools.

Concern about the state of public education has intensified in recent years, particularly about the growing gap between the performance of students from wealthier backgrounds and that of students from less affluent backgrounds. This concern resulted in the 2002 No Child Left Behind Act, a law that imposes higher accountability on all elementary and secondary schools receiving federal funding, and puts pressure on failing schools to improve the performance of their students.¹ Educators and school districts across the country have experimented with a variety of techniques to improve student achievement, from focusing their schools' curricula on certain academic subjects such as science and technology,² to founding schools where students do not attend traditional classes but instead primarily

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1 No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

2 *See, e.g.*, Denver School of Science and Technology, <http://www.scienceandtech.org> (last visited Mar. 5, 2010) (describing a successful Denver public high school's focus on science and technology).

learn through real-world internships.³ One of the most prevalent experiments in non-traditional public school education is single-sex education. In 1995 there were just two public single-sex schools in the United States, but by March 2008, there were at least forty-nine.⁴ In 2002 only about a dozen public schools offered any sort of single-sex instruction, besides physical education or health, but as of February 2010, at least 540 public schools are either entirely single-sex or divide classes by sex for instruction.⁵ Given recent changes to Department of Education regulations concerning the permissibility of single-sex classes and schools,⁶ the number of single-sex public schools is likely to continue to grow.

The increase in the number of public single-sex schools is taking place despite the most recent Supreme Court ruling on the constitutionality of single-sex education. In *United States v. Virginia*, the Court held that Virginia Military Institute's male-only admission policy violated the Equal Protection Clause of the Fourteenth Amendment, thereby calling into question the validity of single-sex public education opportunities.⁷ Since this decision, the Court has not ruled on the constitutionality of single-sex public education in the elementary and secondary context. Many school districts, even while acknowledging that they are not entirely certain that single-sex schools and classes are legal,⁸ and while facing intense opposition from groups such as the Education Law Center, the American Civil Liberties Union, the Public Interest Law Center of Philadelphia, and the Wom-

³ See e.g., The Met School: The Education, http://www.themetschool.org/Metcenter/The_Education.html (last visited Mar. 5 2010) (describing a Providence public school that places its students in internships where the students learn the same skills that are covered in traditional classrooms).

⁴ Elizabeth Weil, *Teaching to the Testosterone*, N.Y. TIMES, Mar. 2, 2008, § MM (Magazine), at 38.

⁵ *Id.*; National Association for Single Sex Public Education: Schools, <http://www.singlesexschools.org/schools-schools.htm> [hereinafter NASSPE: Schools] (last visited Mar. 5, 2010) (stating further that in at least ninety-one of these 540 schools, all of the students' activities are entirely segregated by sex).

⁶ See Access to Classes and Schools, 34 C.F.R. § 106.34 (2007) (allowing the creation of public single-sex schools and classes as long as certain requirements are met).

⁷ 518 U.S. 515, 534 (1996). Justice Scalia decried the Court's holding, stating in his dissent that "[u]nder the constitutional principles announced and applied today, single-sex public education is unconstitutional." *Id.* at 595.

⁸ See Martha Woodall, *Reworked Charter for Boys Approved*, PHILA. INQUIRER, June 29, 2006, at B1 (quoting the Commissioner of the Philadelphia School Reform Commission Daniel Whelan as stating that, by opening a boys-only charter school, the Commission is "perhaps, pushing the edge of the legal envelope").

en's Law Project,⁹ have continued to open even more single-sex schools and establish single-sex classes in coeducational schools.¹⁰

School districts in Pennsylvania are among the districts that have recently added single-sex schools and classes to the public education opportunities available to their students. It is unclear exactly how many Pennsylvania public schools have implemented or are experimenting with single-sex classes because there is no reliable data source compiling a list of all schools with single-sex educational opportunities; however, at least a dozen schools have offered single-sex educational opportunities in recent years.¹¹ This Comment will analyze how well these schools would withstand Equal Protection scrutiny if their legality were ever challenged. Part I will give background to the debate over single-sex education. It will describe student achievement in the United States, research on how children learn, and the current federal regulations governing single-sex education. Part II will describe and analyze the constitutional status of public single-sex education through a summary of the most significant federal cases concerning public single-sex education. Part III will describe single-sex schools in Pennsylvania and analyze their constitu-

9 See Mensah M. Dean, *School Panel Draws Fire*, PHILA. DAILY NEWS, Jan. 12, 2006, at 10 (noting groups opposed to opening of single-sex schools such as Boys' Latin Charter School of Philadelphia); see also *infra* note 129.

10 See NASSPE: Schools, *supra* note 5 (stating that the number of single-sex schools and classes has grown enormously in the last eight years).

11 School districts in Pennsylvania are not required to maintain a list of the schools within their districts offering single-sex classes or that are entirely single-sex. Schools are free to implement single-sex classes without authorization from administrators in the school district. See *infra* note 108 and accompanying text. This remains true in the School District of Philadelphia, the largest school district in Pennsylvania. Alliance for Excellent Education, Pennsylvania's Ten Largest School Districts, http://www.all4ed.org/about_the_crisis/schools/state_and_local_info/pennsylvania/10_largest_districts (last visited Mar. 5, 2010). The National Association for Single Sex Public Education, NASSPE: Schools, *supra* note 5, has compiled the most comprehensive list of schools within Pennsylvania offering single-sex classes, but this list is not up to date. For example, the website states that the McKinley Elementary School in Erie has offered single-sex classes since the 2005–06 school year, but in fact, the school's experiment with single-sex classes ended in 2006 with the departure of the school's principal. Erica Erwin, *Class of their Own?*, ERIE TIMES-NEWS, Nov. 6, 2006. Similarly, the website states that the Richard Wright School, an elementary school in Philadelphia, offers single-sex dual academies, but the school has not offered single-sex classes for a few years. Interview with Anonymous Official, Richard Wright School, School District of Philadelphia (Jan. 20, 2010). In contrast, the website does not include some schools that do offer single-sex classes, such as the Shamokin Area Elementary school, which began offering single-sex classes in the 2009–10 school year. See *infra* notes 107–108 and accompanying text. Based on conversations with administrators in the schools listed at the NASSPE website and other schools, there are at least eleven, and likely many more, schools that have offered single-sex educational opportunities in recent years.

tionality under the Supreme Court's Equal Protection jurisprudence. This Comment concludes that at least some of the Pennsylvania schools are vulnerable to attack under current law, but that there are several ways school officials could improve their chances of survival if challenged.

I. STATE OF EDUCATION TODAY: STUDENT ACHIEVEMENT, RESEARCH ON STUDENT LEARNING, AND GOVERNMENT REGULATIONS

A. *Student Achievement*

There are several disturbing trends concerning student achievement in the United States. First, U.S. students lag behind their international counterparts. In 2006, U.S. students taking the Program for International Student Assessment (PISA), a test given to fifteen-year-olds in thirty industrialized countries, ranked twenty-fifth in math and twenty-fourth in science.¹² Also, there is a large gap between the performance of top students in the United States compared with top students in other countries. The United States had one of the smallest proportions of fifteen-year-olds achieving at the highest levels in math.¹³

Perhaps more troubling than the gap in achievement between U.S. students and students of other countries is the achievement gap within the United States. Students from low-income backgrounds perform far below their counterparts from wealthier communities. As of 2005, fourth graders in low-income communities were three grade levels behind their peers in high-income communities, and low-income students who graduate from high school—and only half of low-income students graduate—perform at an average of an eighth grade level.¹⁴ Only one in ten low-income students will graduate from college.¹⁵ There are comparable gaps in achievement between African-American and Latino students and white students. African-American and Latino students are about two to three years behind white students, and this gap exists whether it is measured by test scores or graduation rates. For example, 48% of African-Americans and 43% of Latinos in fourth through eighth grades scored “below

12 MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS 7 (2009), available at http://www.mckinsey.com/client/service/Social_Sector/our_practices/Education/Knowledge_Highlights/Economic_impact.aspx.

13 *Id.* at 8.

14 Teach for America, http://www.teachforamerica.org/mission/greatest_injustice.htm (last visited Mar. 5, 2010).

15 *Id.*

basic” on the National Assessment for Educational Programs assessment, while only 17% of whites did.¹⁶

There are also gaps in achievement between boys and girls. Until recently, educators focused their energy on improving the performance of girls. The 1992 report *How Schools Shortchange Girls* drew attention to the fact that girls received less attention in school than boys and that girls were not encouraged to participate in math and science.¹⁷

In recent years, however, the attention has shifted. Reports in widely-read national media such as *Newsweek* and *The New York Times* have reported on the fact that boys’ achievement has begun to drop, with girls outperforming boys on standardized tests and the college matriculation rate of girls surpassing that of boys.¹⁸

B. Research on Student Learning

Faced with these disturbing figures, educators and policymakers are constantly crafting new practices and policies that incorporate current research on how children learn. One of the most publicized and discussed lines of research concerns the differences between the learning styles of boys and girls and the differences in level of achievement seen in single-sex schools compared to that in coeducational schools.

Some proponents of single-sex education base their support on research on the differences between boys’ and girls’ brains and on the differences in the way they learn. They point to brain research and other studies for support of their beliefs that boys and girls learn differently and that the most effective way to teach them is to place them in separate classrooms. Leonard Sax, the founder of the National Association for Single Sex Public Education (NASSPE), has taken the lead on publicizing this research through his books, such as *Why Gender Matters: What Parents and Teachers Need to Know about the*

¹⁶ MCKINSEY & CO., *supra* note 12, at 9–10.

¹⁷ See AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS* 84 (1992).

¹⁸ See Peg Tyre, *The Trouble With Boys*, NEWSWEEK, Jan. 30, 2006, at 44 (noting that boys’ standardized test scores are falling behind girls’ in writing, that boys are twice as likely as girls to be placed in special-education classes in elementary school, and that, in 2006, boys made up only forty-four percent of college students as opposed to fifty-eight percent thirty years ago); Weil, *supra* note 4 (stating that boys are behind girls in high school and college graduation rates).

Emerging Science of Sex Differences, and through frequent media appearances.¹⁹

Stating that “female brain tissue is ‘intrinsically different’ from male brain tissue,”²⁰ Sax goes on to explain that girls hear better than boys, and this has important implications for the way teachers should talk to boys and girls in the classroom.²¹ Sax also states that baby boys prefer to stare at mobiles and baby girls at faces,²² young women use the cerebral cortex portion of their brains when performing navigational tasks while young men use the hippocampus,²³ and young boys prefer to play with balls, trains, and cars while young girls prefer to play with dolls and baby carriages.²⁴ Sax argues that these and other differences illustrate the need for different teaching strategies for boys and for girls.²⁵ Other studies show that boys’ and girls’ brains develop differently, with girls’ cerebral volume peaking at 10.5 years, and boys’ peaking at 14.5 years.²⁶

As other research and articles have pointed out, the studies that supporters of single-sex education, such as Sax, use are not conclusive. Jay Giedd, the chief of brain imaging at the National Institute of Mental Health, explained that “when it comes to education, gender is a pretty crude tool for sorting minds” because “[t]here are just too many exceptions to the rule.”²⁷ Opponents question the research upon which Sax and others rely, saying that “[m]uch of what people are calling ‘research’ is popular literature, not evidence-based and not peer-reviewed, replete with recycled stereotypes” and that “[t]he peer-reviewed, evidence-based research doesn’t support Sax or other advocates of single-sex public schooling. Biological research shows that boys and girls are more alike than different, that there is much

19 See Weil, *supra* note 4 (describing Sax’s vocal support of public single-sex education).

20 LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES 14 (2005); see also NASSPE: About Leonard Sax M.D. Ph.D., <http://www.singlesexschools.org/home-leonardsax.htm> [hereinafter NASSPE: About Leonard Sax] (last visited Apr. 4, 2010).

21 *Id.* at 17–18.

22 *Id.* at 19.

23 *Id.* at 26.

24 *Id.* at 27.

25 See *id.* at 113.

26 See Weil, *supra* note 4 (describing a National Institute of Mental Health Study about boys’ and girls’ brains that ultimately concluded that “[d]ifferences in brain size between males and females should not be interpreted as implying any sort of functional advantage or disadvantage”).

27 *Id.*

greater variation among girls and among boys than there is between the sexes.²⁸

Other proponents of single-sex education base their support not on scientific research on the differences between boys and girls, but rather on the social benefits of single-sex education. They contend that girls feel self-conscious in coeducational classes, but in single-sex environments they have more leadership opportunities, receive more attention from teachers, and participate more fully in class.²⁹ They also argue that single-sex education has benefits for boys because boys in single-sex classes do not feel pressure to act tough but instead can focus on their studies and collaborate with their peers.³⁰ Advocates such as these cite studies that show that students in single-sex educational environments are more successful than their peers in coeducational environments.³¹ However, some researchers point out that even studies comparing the achievement of students in single-sex versus coeducational classes are not conclusive about the benefits of single-sex education.³² A 2005 survey of studies on the effects of single-sex versus coeducational schooling by the Department of Education found “minimal to medium support” for single-sex schooling.³³

28 Carol E. Tracy & Terry Fromson, Editorial, *Single-Sex Schools Don't Work*, PHILA. DAILY NEWS, Feb. 3, 2006, at 21.

29 See Kristen J. Cerven, *Single-Sex Education: Promoting Equality or an Unconstitutional Divide?*, 2002 U. ILL. L. REV. 699, 701–02 (summarizing some of the arguments upon which supporters of single-sex education for girls rely).

30 See Boys' Latin of Philadelphia Charter School: Our Mission, <http://www.boyslatin.org/our-mission> (last visited Mar. 21, 2010) (explaining the rationale behind the single-sex status of Boys' Latin School of Philadelphia, an all-boys charter school).

31 See Kay Bailey Hutchinson, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 AM. U. L. REV. 1075, 1076 & n.5 (2001) (“Study after study has demonstrated that girls and boys in single-sex schools are academically more successful and ambitious than their co-educational counterparts.” The article goes on to list numerous studies that support this proposition.).

32 See Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 500–01 (1999) (“Later studies, from the mid 1980s to the present, and those with more sophisticated methodology (controlling for conflating variables), are more likely to find that the effects of institutional gender type are insignificant and to show that other variables, such as prior individual student factors or institutional selectivity factors, matter much more to student satisfaction and performance. These later studies are more likely to favor mixed-sex over single-sex education.” (citation omitted)).

33 U.S. DEPARTMENT OF EDUCATION, SINGLE-SEX VERSUS COEDUCATION SCHOOLING: A SYSTEMATIC REVIEW at xv, 17 (2005).

C. Federal Law and Regulations Governing Single-Sex Public Schools

Despite a lack of consensus on the scientific and social soundness of single-sex education in elementary and secondary schools, federal laws and regulations have recently made it easier for school districts to experiment with single-sex educational opportunities. In 2002, President George W. Bush signed into law the No Child Left Behind Act (NCLB), a law that imposes higher accountability on schools with the goal of achieving universal proficiency among students.³⁴ In furtherance of that goal, the law provides school districts greater flexibility to experiment with different forms of schools, including single-sex schools and classes.³⁵

In response to NCLB and to the support given to single-sex education by prominent female senators including Senators Hillary Clinton and Kay Bailey Hutchinson,³⁶ the Department of Education issued new regulations for the implementation of Title IX of the Education Amendments of 1972 in November 2006.³⁷ Title IX was intended to create gender equality in educational institutions that receive federal funds and states, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³⁸ Until 2006, single-sex classes were prohibited except in limited circumstances including physical education, contact sports, classes dealing exclusively with human sexuality, and chorus based on vocal range.³⁹ As of November 24, 2006, however, public schools receiving federal funding have had

³⁴ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

³⁵ 20 U.S.C. § 7215(a)(23) (2006) (allowing federal funding for “[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)”; see also Jane Gross, *Dividing the Sexes, for the Tough Years 6–8*, N.Y. TIMES, May 31, 2004, at B1 (describing the No Child Left Behind Act as the Bush administration’s way of “encouraging single-sex classes and schools in the public sector where civil rights laws have sometimes halted such experiments”).

³⁶ See Diana Jean Schemo, *Federal Rules Back Single-Sex Public Education*, N.Y. TIMES, Oct. 25, 2006, at A1 (“[A] new attitude began to take hold with the passage of the No Child Left Behind law in 2002 when women senators from both parties came out in support of same-sex education”); Susan G. Clark, Commentary, *Public Single-Sex Schools: Are They Lawful?*, 213 EDUC. L. REP. (West) 319, 320 (2006) (“Congressional advocates of same-gender schools include Senators Hillary Rodham Clinton, Ted Kennedy, and Kay Bailey Hutchinson.”).

³⁷ Access to Classes and Schools, 34 C.F.R. § 106.34(b) (2007) (describing the conditions under which schools may provide single-sex classes or extracurricular activities).

³⁸ 20 U.S.C. § 1681(a) (2006).

³⁹ 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, 226 (2008).

much greater flexibility in providing single-sex classes and schools. Coeducational schools may provide single-sex classes as long as (1) they are based on the “important objective” of either improving “educational achievement of its students, through [the] overall established policy to provide diverse educational opportunities” or of meeting “the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;” (2) the school district implements the objective evenhandedly; (3) student enrollment in the class is voluntary; and (4) the school district provides a “substantially equal coeducational class” to all other students, including students of the excluded sex.⁴⁰ A school may be entirely single-sex as long as there is a “substantially equal” coeducational school or single-sex school for students of the opposite sex.⁴¹ Single-sex public charter schools are not subject to these requirements.⁴²

III. CONSTITUTIONAL STATUS OF SINGLE-SEX PUBLIC EDUCATION

The implementation of these regulations facilitating single-sex public education and the ensuing increase in the number of single-sex public schools have occurred despite the shaky standing of single-sex public education under the Supreme Court’s Equal Protection Clause jurisprudence.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”⁴³ Historically, the Equal Protection Clause was meant to combat racial discrimination against African-Americans, and therefore the Court applied a heightened level of equal protection scrutiny only to classifications based on race. For other discriminatory treatment, the Court required only that there be a minimally rational basis for that difference. However, the Court has come to apply heightened equal protection scrutiny to classifications beyond race, including gender.⁴⁴

For the last few decades, the Court has used three general levels of review when analyzing whether a government action makes an impermissible distinction between groups of people. Strict scrutiny, ap-

⁴⁰ 34 C.F.R. § 106.34(b).

⁴¹ 34 C.F.R. § 106.34(c)(1).

⁴² 34 C.F.R. § 106.34(c)(2).

⁴³ U.S. CONST. amend. XIV, § 1.

⁴⁴ KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 486–87 (16th ed. 2007).

plied to distinctions based on race, requires that the regulation serve a compelling government interest and that the regulation be essential to those interests. Intermediate scrutiny requires that the regulation serve an important government interest and that it be substantially related to the achievement of that interest. Rationality review requires that there be a rational relationship between the regulation and a legitimate government goal.⁴⁵

The application of an intermediate level of scrutiny to distinctions based on gender occurred incrementally over a number of cases. In 1971 in *Reed v. Reed*, the Court purported to apply rational basis review when it struck down a state law that expressed a preference for men over women as administrators of estates.⁴⁶ The Court discredited the basis for the law offered by the legislature—to eliminate the necessity for a hearing deciding on an administrator. Giving “a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by [equal protection].”⁴⁷

Two years later in *Frontiero v. Richardson*, the Court sustained an equal protection challenge to a federal law that gave male members of the armed forces an automatic dependency allowance for their wives, but made female members prove that their husbands were dependent.⁴⁸ Justice Brennan’s plurality opinion advocated treating sex as a suspect class and applying a heightened level of scrutiny to distinctions based on gender, but he failed to garner a majority in favor of that opinion.⁴⁹

The Court first applied a heightened level of scrutiny to distinctions based on sex in 1976 in *Craig v. Boren*, a case in which a male plaintiff challenged the Oklahoma state law that made it illegal to sell “non-intoxicating” beer to males under twenty-one but to females under eighteen.⁵⁰ The majority set forth a new standard of review for gender-based equal protection claims—intermediate scrutiny. Under this level of review, state actions making distinctions based on sex “must be substantially related to achievement of [important governmental objectives].”⁵¹

45 *Id.*

46 404 U.S. 71 (1971).

47 *Id.* at 76.

48 411 U.S. 677 (1973).

49 *Id.* at 687–88.

50 429 U.S. 190, 192 (1976).

51 *Id.* at 197.

Several cases explicitly involving gender distinctions in public education have been litigated in the federal courts. In 1976, in *Vorchheimer v. School District*, the Third Circuit upheld the School District of Philadelphia's maintenance of separate boys' and girls' honors high schools in an otherwise coeducational school district.⁵² The Third Circuit found that Central High School, limited to boys, and Philadelphia High School for Girls (Girls' High), limited to girls, offered substantially similar educational opportunities to its students,⁵³ and as a result, the school district's policy did not violate the Equal Protection Clause. Citing the importance of the "ability of the local school board to continue with a respected educational methodology" and the importance of "freedom of choice" to parents and students, the court upheld the existence of separate boys' and girls' schools.⁵⁴

In 1982, the Supreme Court ruled differently on a similar issue. In *Mississippi University for Women v. Hogan*, the Court disallowed the female-only policy of a state nursing school.⁵⁵ Applying the intermediate scrutiny standard set forth in *Craig*, the Court rejected the State's primary justification that the single-sex admissions policy "compensates for discrimination against women and, therefore, constitutes educational affirmative action."⁵⁶ Moreover, the all-female policy failed the "substantial relationship" part of the test, as the State did not show that the sex-based classification was substantially related to its proposed compensatory objective. Instead, its policy of allowing men to audit classes undermined the claim that men's presence in the school negatively affected female students.⁵⁷

In 1991 in *Garrett v. Board of Education*, a Michigan federal district court held that the Detroit School District's maintenance of three male-only academies violated the female plaintiffs' equal protection

52 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977).

53 *Id.* at 881-82.

54 *Id.* at 888. In 1983, two female plaintiffs sued the School District of Philadelphia in a Pennsylvania state court on a substantially similar set of facts to those presented in *Vorchheimer*. *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682 (1983), *aff'd* 478 A.2d 1352 (Pa. Super. Ct. 1984). In the state case, the court found that Central High and Girls' High did not provide substantially similar educational opportunities for its students, but rather that Central High provided a superior education. *Id.* at 706. The court enjoined the school district from barring admission to Central High based solely on gender, *id.* at 712, and Central High has been coeducational since then. See Central High School: History, <http://www.centralhigh.net/?q=node/5> (last visited Jan. 16, 2010) (stating that Central was opened to girls in 1983 and that currently the student population is slightly more than half female).

55 458 U.S. 718 (1982).

56 *Id.* at 727.

57 *Id.* at 731.

rights.⁵⁸ While the court believed that improving the education available to urban boys was an important government objective, it was not persuaded by the district's explanation that all-boys' schools were necessary to counter the "crisis facing African-American males manifested by high homicide, unemployment, and drop-out rates," and that a single-sex approach was necessary because "co-educational programs aimed at improving male performance have failed."⁵⁹ Instead, the court stated, the school district was using sex as a proxy for at-risk students, and that urban girls faced similar issues to those that boys faced, namely high risk for dropping out and subsequently becoming involved in criminal activity.⁶⁰ This case did not resolve the legal questions concerning the legality of public single-sex secondary and elementary schools, however, because after the injunction was granted, but before the case was fully litigated, the case was settled and the district agreed to accept male and female students.⁶¹

In 1996, the Supreme Court handed down its most recent and significant decision on public single-sex education: *United States v. Virginia*,⁶² a high-profile decision that received wide media coverage⁶³ and has been a popular subject of legal and academic debate.⁶⁴ In *Virginia*, the U.S. government challenged Virginia's maintenance of an all-male military college, Virginia Military Institute (VMI).⁶⁵ Out of

58 775 F. Supp. 1004 (E.D. Mich. 1991).

59 *Id.* at 1007.

60 *Id.* at 1008.

61 Pherabe Kolb, *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, 371-72 (2001) (citing Daniel Gardenswartz, Comment, *Public Education: An Inner-City Crisis! Single-Sex Schools: An Inner-City Answer?*, 42 EMORY L.J. 591, 611 (1993)).

62 518 U.S. 515 (1996).

63 In the days following the release of the Supreme Court's opinion, newspapers such as the *New York Times* and *The Washington Post* published front-page articles about the decision. See e.g., Joan Biskupic, *Supreme Court Invalidates Exclusion of Women by VMI*, WASH. POST, June 27, 1996, at A1; Linda Greenhouse, *The Supreme Court: Discrimination; Military College Can't Bar Women*, *High Court Rules*, N.Y. TIMES, June 27, 1996, at A1; Tony Mauro, *VMI Told to Admit Women*, USA TODAY, June 27, 1996, at 1A.

64 There are dozens of law journal articles and student notes whose sole purpose is to analyze the meaning of the *Virginia* decision, and hundred of articles that feature the case in an analysis of a related topic. See, e.g., Catherine A. O'Neill, *Single-Sex Education after United States v. Virginia*, 23 J.C. & U.L. 489 (1997); 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 (1996); Christopher H. Pyle, *Women's Colleges: Is Segregation by Sex Still Justifiable after United States v. Virginia?*, 77 B.U. L. REV. 209 (1997); 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 (1997).

65 518 U.S. at 515.

fifteen publicly-funded colleges and universities in Virginia, VMI was the only single-sex school. Its mission was to produce “citizen-soldiers,” a mission it pursued through an “adversative method” unique to VMI.⁶⁶ VMI had a devoted alumni base, consisting of distinguished individuals such as members of Congress, military generals, and business executives.⁶⁷ In response to litigation and a series of lower court rulings, Virginia established a parallel program for women, Virginia Women’s Institute for Leadership (VWIL).⁶⁸ VWIL, a state-sponsored four-year undergraduate program located at a private liberal arts school for women, shared the VMI mission “to produce ‘citizen-soldiers,’” but it differed in “academic offerings, methods of education, and financial resources.”⁶⁹ The average combined SAT score of students at VWIL was approximately 100 points lower than that of VMI freshman, and students at VWIL could receive only Bachelor of Arts degrees while students at VMI could receive degrees in liberal arts, the sciences, and engineering.⁷⁰ VWIL did not promote an adversative training method, but instead favored “a cooperative method which reinforces self-esteem.”⁷¹

In ruling that VMI’s male-only policy violated equal protection, Justice Ginsburg, writing for the majority, applied a heightened level of scrutiny explaining that the Court had to determine “whether the proffered justification is exceedingly persuasive.”⁷² She continued, “The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”⁷³ The Court cited several reasons for its holding that VMI’s single-sex policy did not meet this standard. First, it was not convinced that maintaining VMI as an all-male institution served an important government objective. Virginia argued that maintaining VMI as an all-male institution served the important governmental objective of providing a diversity of education options. The state argued that single-sex education provides educational benefits for some students and that therefore “the option of single-sex education contribute[d] to diversity in educational approaches.”⁷⁴ The Court, while

66 *Id.* at 520.

67 *Id.*

68 *Id.* at 526.

69 *Id.*

70 *Id.*

71 *Id.* at 527 (quoting *United States v. Virginia*, 852 F. Supp. 471, 476 (W.D. Va. 1994)).

72 *Id.* at 533 (internal quotation marks omitted).

73 *Id.* (alteration in the original) (internal quotation marks omitted).

74 *Id.* at 535 (internal quotation marks omitted).

stating that “it is not disputed that diversity among educational institutions can serve the public good” and perhaps be an important governmental objective,⁷⁵ was not persuaded by this argument. Instead, the Court considered this explanation to be a post hoc rationalization that the state “invented . . . in response to litigation.”⁷⁶

The Court also stated that Virginia’s male-only admissions policy did not serve an important government objective because it relied on overbroad generalizations about men and women. The Court stated, “[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females’”⁷⁷ in such a way that the judgments would be “likely to . . . perpetuate historical patterns of discrimination.”⁷⁸ The Court noted Virginia’s arguments about the differences between men and women and explained that similar arguments had been used in the past to support the exclusion of women from the legal and medical professions.⁷⁹ These justifications, even if true,⁸⁰ did not justify excluding women from VMI. The Court also explained that Virginia’s generalizations about women did not apply to all women, that some women desired to attend VMI, and that some women would thrive under VMI’s adversative method.⁸¹

Finally, the Supreme Court took issue with the fact that Virginia did not offer a similar educational opportunity for women. Besides the differences in level of student and faculty achievement, course offerings, type of training, and facilities available, there were also differences in the value of a VMI and VWIL degree. Graduates of VWIL would not be able to take advantage of the VMI alumni network or the intangible and unmeasurable prestige of a VMI degree.⁸² The Court explained that Virginia had “failed to provide any ‘comparable single-gender women’s institution’ . . . the Commonwealth has created a VWIL program fairly appraised as a ‘pale shadow’ of VMI.”⁸³

75 *Id.*

76 *Id.* at 533; *see also id.* at 539 (“In sum, we find no persuasive evidence in this record that VMI’s male-only admission policy ‘is in furtherance of a state policy of diversity.’”).

77 *Id.* at 541 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

78 *Id.* at 541–42 (quoting *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994)).

79 *Id.* at 541–45.

80 The U.S. government chose not to contest Virginia’s arguments, supported by its expert witnesses, that there were “gender-based developmental differences” between men and women. *Id.* at 541 (internal quotation marks omitted).

81 *Id.* at 550.

82 *Id.* at 552.

83 *Id.* at 552–53 (quoting *United States v. Virginia*, 852 F. Supp. 471, 476 (W.D. Va. 1994) (Phillips, J., dissenting)).

Justice Scalia dissented vigorously from the majority opinion, arguing that the decision had not applied an intermediate scrutiny analysis, the proper level of scrutiny for distinctions based on sex, but rather had applied “the amorphous ‘exceedingly persuasive justification’ phrase.”⁸⁴ Further, he wrote that the majority’s opinion spelled the end of single-sex education: “Under the constitutional principles announced and applied today, single-sex public education is unconstitutional.”⁸⁵ Justice Ginsburg, however, maintained that the *Virginia* decision regarding the unconstitutionality of VMI’s male-only policy applied only to “an educational opportunity recognized . . . as ‘unique’” and that the Court did “not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities.”⁸⁶

Some legal scholars initially concluded that *Virginia* effectively heightened the standard of review for sex classifications from intermediate to strict scrutiny.⁸⁷ The Supreme Court’s decision in *Nguyen v. Immigration and Naturalization Service*, however, indicated that the Court is not applying a strict scrutiny standard to sex-based distinctions.⁸⁸ In *Nguyen*, the Court upheld a law that treated children born out-of-wedlock to one citizen-parent and one non-citizen-parent differently based on whether the citizen-parent was the mother or the father.⁸⁹ Under the federal law at issue, children with citizen-mothers were automatically considered citizens at birth, but children with citizen-fathers had to take several steps in order to become citizens.⁹⁰ As one of the few facially discriminatory federal laws remaining, it “seemed destined for invalidation.”⁹¹ The Court, however, upheld the law, purporting to apply the traditional language of intermediate scrutiny set forth in *Craig*, not the “exceedingly persuasive justification” language of *Virginia*. The majority wrote that “[f]or a gender-

84 *Id.* at 573.

85 *Id.* at 595.

86 *Id.* at 534 n.7 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1413, 1432 (W.D. Va. 1991); *United States v. Virginia*, 976 F.2d 890, 892 (4th Cir. 1992)).

87 See Kolb, *supra* note 61, 374–75 & n.61 (stating that some members of the legal community “initially concluded that Virginia’s ‘exceedingly persuasive justification’ requirement effectively heightened the standard of review for gender classifications from ‘intermediate’ to ‘strict’ scrutiny” and listing several federal court opinions that expressed confusion over which level of scrutiny should be applied to distinctions based on gender following *Virginia*).

88 533 U.S. 53 (2001).

89 *Id.* at 53.

90 *Id.*

91 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, 1757 (2002).

based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”⁹²

As it stands today, it is not entirely clear what level of scrutiny the Court will apply to distinctions based on sex. At the very least, when defending a distinction based on sex, a state actor must prove that the distinction at issue serves an important government interest and that the means chosen to reach that goal are substantially related to the distinction. Moreover, the distinction cannot be based on overbroad generalizations about the differences between males and females, nor can they be post hoc rationalizations in response to litigation. It is not clear what exactly will qualify as an important government objective, although the *Virginia* court left open the possibility that diversity of educational choice may qualify.⁹³ Distinctions based on sex may be permissible if options are evenhanded, although it is unclear what evenhanded treatment looks like. The courts in *Vorchheimer* and *Virginia* explained why the all-female and all-male schools at issue in those two cases were or were not substantially equal, but the opinions did not specifically enumerate factors to consider in making this determination.⁹⁴ Based on this precedent, when deciding whether a pair of schools for students of different sexes receives evenhanded treatment, courts will most likely look to the courses offered, the facilities, the quality of teachers, the quality of

⁹² 533 U.S. at 60 (alteration in the original) (internal quotation marks omitted). See Stobaugh *supra* note 91, at 1770–71 (arguing that the *Nguyen* analysis made it unclear whether an intermediate scrutiny standard or an “exceedingly persuasive justification” standard applies to sex-based distinctions, and noting that the dissent in *Nguyen* argued that the majority was in fact applying a rational basis review).

⁹³ See *United States v. Virginia*, 518 U.S. 515, 535 (1996) (noting that diversity of education choice may qualify as an important governmental objective, but in this case “Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth”).

⁹⁴ In declaring that Central and Girls’ High were substantially equal, the court in *Vorchheimer* noted the quality of the facilities, the number and type of classes offered, the achievement of alumni, and the reputation of the schools. *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880, 881–82 (3d Cir. 1976). In finding that VMI and VWIL were *not* substantially equal, the Court in *Virginia* focused on the teaching methods used at the schools, *Virginia* 518 U.S. at 523, the qualifications and achievements of students (based on SAT scores) and faculty (based on number of Ph. D.’s), *id.* at 526, the reputation of the schools, *id.* at 523, and the alumni networks, *id.* at 527.

the alumni base if the school is a high school, and the teaching methods employed.⁹⁵

IV. SINGLE-SEX PUBLIC EDUCATION IN PENNSYLVANIA

A. *Background on Single-Sex Public Education*

Despite the questionable constitutional status of single-sex public schools, there has been a proliferation of single-sex public schools and schools offering single-sex classes since the Supreme Court's ruling in *Virginia*.⁹⁶ Thanks to NCLB and the 2006 Title IX regulations' endorsement of single-sex education as a means of boosting student achievement and providing diversity in school choice, the number of public single-sex educational opportunities is likely to continue to rise.

Single-sex classes were common in secondary schools throughout the nineteenth century, but during the Progressive Era, John Dewey and his followers advocated for the creation of coeducational high schools that could provide a comprehensive range of courses to suit each student's needs.⁹⁷ By the beginning of the twentieth century it was widely accepted that primary and secondary schools should be coeducational.⁹⁸ In the 1970s, most major universities that were still single-sex, such as Yale, Princeton, and the University of Virginia, converted to coeducational institutions, and today there are far fewer private single-sex universities and K–12 schools than there were fifty years ago.⁹⁹ By 1995, there were only two single-sex K–12 public schools in the country, one of them Philadelphia High School for Girls, and both of them were all-female. The last remaining public school for boys, Central High School in Philadelphia, had admitted

⁹⁵ It is worth noting that a plausible argument could almost always be made that two different schools do not receive evenhanded treatment. First, at least a few of the factors constituting evenhandedness, such as reputation of the school and quality of alumni base, are difficult to capture with objective measurements. Moreover, it would be difficult to perfectly equalize even factors that seem capable of objective measurement, such as quality of teachers; while teacher quality can theoretically be determined by measures such as number of years of experience and number of educational degrees, there is great variety of teaching quality among teachers with identical objective qualifications.

⁹⁶ See *supra* notes 4–5 and accompanying text.

⁹⁷ Frances R. Spielhagen, *Single-Sex Classes: Everything That's Old Is New Again*, in *DEBATING SINGLE-SEX EDUCATION: SEPARATE AND EQUAL?* 1, 1 (Frances R. Spielhagen ed., 2008).

⁹⁸ 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, 385–86.

⁹⁹ *Id.* at 387–88.

girls in 1983, and Milwaukee, Detroit, and New York all rejected plans for new all-boys public schools in the early 1990s.¹⁰⁰

There was an increased interest in single-sex education following the 1992 American Association of University Women report *How Schools Shortchange Girls*.¹⁰¹ Just four years after the release of the report, the Young Women's Leadership School, the first single-sex public K–12 school to open in decades, opened in Harlem.¹⁰² One year later, California launched seven matched pairs of single-sex public schools.¹⁰³ The number of single-sex educational opportunities in public schools has increased dramatically since then. As of February 2010, there were 547 schools offering single-sex classes, and at least 91 of them were entirely single-sex.¹⁰⁴

Single-sex public education in K–12 schools currently takes several different forms. Some public schools are entirely single-sex, often paired with another school of the opposite sex; some coeducational schools segregate their students by sex for all activities except, for example, lunch and recess; some coeducational public schools have certain grade levels that are single-sex; and some public schools offer single-sex classes for certain subjects. There are also several public charter schools that are entirely single-sex or have single-sex classes. Enrollment is voluntary at all of the public charter schools and at most of the public schools.¹⁰⁵

B. Description of Single-Sex Public Education in Pennsylvania

Several Pennsylvania school districts have experimented with single-sex educational opportunities in recent years. The rest of this section will first describe some of the different single-sex schemes in Pennsylvania and then analyze their legality.

The Shamokin Area School District in central Pennsylvania is one of the Pennsylvania school districts experimenting with single-sex classes. Administrators began a pilot program of voluntary single-sex classes in the 2009–10 school year with the hopes of increasing the

100 *Id.* at 388.

101 *Id.* at 391.

102 *Id.*

103 *Id.* at 390–91. The California single-sex programs ended in 1998, National Association for Single-Sex Public Education: Policy; The California Experiment, <http://www.singlesexschools.org/policy-california.htm> (last visited Jan. 21, 2009), but the Young Women's Leadership School still exists and has opened four new campuses, including one in Philadelphia, Young Women's Leadership Network, http://www.ywlnetwork.org/network_network.htm (last visited Jan. 21, 2009).

104 NASSPE: Schools, *supra* note 5.

105 *See id.* (listing the different public single-sex schools in the U.S.).

achievement of at-risk students. The program is currently open to sixth graders, and, if successful, will expand into more grades in the future.¹⁰⁶ The District brought in Abigail James, a researcher on the differences between boys' and girls' brains, to train teachers on how to lead single-sex classes. James instructed teachers that, among other differences, most girls learn better when sitting quietly and observing, while most boys need to be more active. Teachers and parents are both satisfied with the success of the pilot program, with teachers noting that there are fewer distractions in the class and that they are better able to target their teaching.¹⁰⁷

Philadelphia has several schools with single-sex classes and several schools that are entirely single-sex. Schools in the School District of Philadelphia are free to implement single-sex classes as they see fit without authorization from the District and without notifying anyone in the District.¹⁰⁸ As a result, there are quite a few Philadelphia schools with single-sex classes.

The most common form of single-sex schooling in Philadelphia public schools are schools that serve both girls and boys but divide them into single-sex classes. Many of these schools are operated by Victory Schools, one of the for-profit educational management organizations (EMO) that operates schools in the School District of Philadelphia.¹⁰⁹ The Victory schools in Philadelphia are either completely single-sex or have single-sex classes.¹¹⁰ Victory cites "studies that purport to show differences in the brains and learning styles of boys and girls" in support of its single-sex policies.¹¹¹ Before the 2005–06 school year, Victory brought in Leonard Sax¹¹² to talk to its

¹⁰⁶ Interview with Anonymous Official, Shamokin Area School District (Jan. 20, 2010).

¹⁰⁷ Rachel Carta, *Boys Rock! Girls Rule! Thus Far in Shamokin Area's Single-Gender Classes, Both are True*, <http://newsitem.com/news/boys-rock-girls-rule-thus-far-in-shamokin-area-s-single-gender-classes-both-are-true-1.269211> (Sept. 20, 2009).

¹⁰⁸ Interview with Anonymous Official, School District of Philadelphia, (Jan. 20, 2010).

¹⁰⁹ In 2001, in response to the failing performance of many of the city's schools, the Pennsylvania state government took over control of the school district, taking power from the local school board and handing it to the state School Reform Commission (SRC). The SRC gave control of the worst-performing schools in the city to outside companies, community groups, and universities. For-profit EMOs, including Victory, took over control of thirty-eight of these schools. See Keith B. Richburg, *Setback for Philadelphia Schools Plan*, WASH. POST, June 29, 2008, at A3 (describing the history of the state takeover of the Philadelphia school district; the article also notes that the SRC has removed control of six of these schools from the EMOs).

¹¹⁰ See NASSPE: Schools, *supra* note 5.

¹¹¹ Mensah M. Dean, *Same-Sex Education*, PHILA. DAILY NEWS, June 12, 2007, at 3.

¹¹² Sax is a vocal proponent of single-sex education based on the theory that boys and girls have essential biological differences. See *supra* notes 19–26 and accompanying text.

Philadelphia teachers about the research on the differences in the learning styles and development of boys and girls.¹¹³

The Anna B. Pratt School, serving kindergarten through sixth grade, is typical of these schools.¹¹⁴ Pratt has been implementing its single-sex program for several years and automatically separates students in the fourth through sixth grades by sex. Teachers in the single-sex grades receive professional development on how to teach single-sex classes and on the differences between boys and girls at the beginning of every school year. They receive ongoing support throughout the year from school administration and mentor teachers. While the boys and girls are taught the same curriculum, teachers tailor their activities and teaching techniques to the sex of their students; for example, teachers choose Language Arts books based on the sex of the children in their class. Overall, teachers, administration, and parents are pleased with the single-sex classes, commenting that they decrease the amount of class distractions and make some students feel less self-conscious in class.¹¹⁵

Until recently, Victory also operated two high schools that were completely single-sex: the all-boys Thomas FitzSimons School and the all-girls Young Women's Leadership School at Rhodes. In September 2002, Victory took over the then-coeducational Thomas FitzSimons School, located in North Philadelphia.¹¹⁶ As part of its plan to boost student achievement and improve school climate, the new administration instituted single-sex classes for all of the students, even though the school remained coeducational.¹¹⁷ Administrators overseeing the overhaul explained that "[f]or the girls, it's a tremendous builder of self-confidence, and with the boys, the pressure is off in this culture, where sometimes it isn't cool to be smart."¹¹⁸ Officials also explained that the separate-sex design will "reduce distractions."¹¹⁹ At the beginning of the 2005–06 school year, school district officials converted FitzSimons into a 750-student all-boys school for grades six through eleven, and added a twelfth grade the next school year.

113 Susan Snyder, *High School Reworked as Boys-Only*, PHILA. INQUIRER, Aug. 14, 2005, at B1.

114 Interview with Anonymous Official, Anna B. Pratt School, School District of Philadelphia (Feb. 4, 2010).

115 *Id.*

116 Susan Snyder, *A School Trial Will Separate the Sexes*, PHILA. INQUIRER, June 17, 2002, at A1 (discussing Victory taking over FitzSimons Middle School.).

117 *Id.*

118 *Id.* (quoting Lynn Spampinato, one of the officials heading Victory's efforts at FitzSimons).

119 Snyder, *supra* note 113.

They converted the nearby Rhodes High School to an all-girls high school, the Young Women's Leadership School (YWLS) at Rhodes.¹²⁰

Since the split, there has been a significant difference in the directions of the all-boys FitzSimons and all-girls YWLS at Rhodes. By February 2006, discipline at FitzSimons had deteriorated enough to attract the attention of the media: assaults on teachers and students had risen and teachers had quit in the middle of the year.¹²¹ In June 2008, SRC officials, unsatisfied with the progress that Victory had made at FitzSimons, removed control from the EMO and returned it to the school district.¹²² In September 2008, FitzSimons was added to the list of "persistently dangerous" schools, a designation given to schools with a certain number of assaults that result in arrest per student.¹²³ Despite school violence, FitzSimons's students' test scores in math have risen in the past four years, although reading scores have remained level.¹²⁴

Since the move to its own all-girls campus in September 2004, YWLS at Rhodes has experienced quite different results. Rhodes is still under Victory management, and now partners with the Young Women's Leadership Foundation, an organization that has founded several all-girls public schools in urban communities in recent years.¹²⁵

¹²⁰ *Id.*

¹²¹ See Martha Woodall, *All-Boys' High School off to a Rocky Start*, PHILA. INQUIRER, Feb. 26, 2006, at B1 (noting that thirty-one assaults were reported in the first four months of school, compared with fourteen in the same period the previous year).

¹²² See Kristen A. Graham, *City Takes 6 Schools Back from Managers*, PHILA. INQUIRER, June 19, 2008, at A1 (naming FitzSimons as one of the schools that the SRC was returning to district control for failure to improve).

¹²³ Kristen A. Graham, *Phila. Sees Surge in "Persistently Dangerous" Schools*, PHILA. INQUIRER, Aug. 28, 2008, at A1; see also School District of Philadelphia: School Profile, <https://sdp-webprod.phila.k12.pa.us/OnlineDirectory/schools.jsp> (noting that there were sixty-seven assaults on teachers and students in the 2007–08 school year, in contrast to fourteen in the 2004–05 school year).

¹²⁴ The percentage of eighth graders scoring "Advanced" or "Proficient" on the Pennsylvania System of School Assessment (PSSA) in math increased from 10.8% in 2004 to 24.7% in 2008. The percentage of eighth graders scoring "Advanced" or "Proficient" on the PSSA in reading was 21.9% in 2004 and 23.5% in 2008. The School District of Philadelphia: Regional Offices and School Information, <https://sdp-webprod.phila.k12.pa.us/OnlineDirectory/schools.jsp> (follow the "Schools" tab and use the drop-down menu to find information about each Philadelphia school) (last visited Jan. 21, 2009).

¹²⁵ The Young Women's Leadership Foundation attracted national attention when it founded the Young Women's Leadership School (YWLS), an all-girls public school serving students in grades 7–12, in East Harlem in 1996. Morgan, *supra* note 98, at 391. Students at the YWLS are predominantly minority and low-income students, and most have gone on to attend college, including schools such as Cornell University and Williams College. Young Women's Leadership Foundation, <http://www.tywls.org/> (last visited Mar. 22, 2010). The YWLS is considered one of the best public schools in the country. See

Test scores at Rhodes have risen markedly in the last four years, and school violence has decreased.¹²⁶

There are also public charter schools¹²⁷ in Philadelphia that offer single-sex educational opportunities. One of these schools is Boys' Latin of Philadelphia Charter School (Boys' Latin) which opened in the fall of 2007 after much public debate concerning the legality and desirability of a public charter school solely for boys.¹²⁸ Prominent legal organizations, such as the Women's Law Project, the Education Law Center, the Public Interest Law Center of Philadelphia, and the Pennsylvania chapter of the American Civil Liberties Union, opposed the opening of such a school, arguing that its opening would violate federal and state laws.¹²⁹ Although the Philadelphia School Reform Commission (SRC) initially declined Boys' Latin's application for a charter in January 2006, primarily because of concerns about the legality of a boys-only school,¹³⁰ by June of that year the SRC had approved the school's application, even while acknowledging that it was "perhaps pushing the edge of the legal envelope."¹³¹ Located in southwest Philadelphia, the school offers a rigorous college prepara-

Barbara Kantrowitz & Pat Wingert, *What Makes a High School Great?*, NEWSWEEK, May 8, 2006, at 50 (mentioning YWLS in its descriptions of the best high schools in the country).

¹²⁶ The percentage of eighth graders scoring "Advanced" or "Proficient" on the PSSA in math increased from 12.2% in 2004 to 29% in 2008. The percentage of eighth graders scoring "Advanced" or "Proficient" on the PSSA was 23.7% in 2004 and 41.1% in 2008. The number of assaults on teachers and students decreased from 43 in the 2004–05 school year to seven in the 2007–2008 school year. School District of Philadelphia: Regional Offices and School Information, *supra* note 124.

¹²⁷ A charter school is a public school open to all students in the school district. Charter schools are funded largely by tax dollars, but they have more autonomy than traditional district schools and often have unique programs, such as a focus on arts or leadership. An individual or group seeking to found a charter school must obtain initial approval from the school district, and then continue to renew its charter. Although charter schools do not have to follow the particular curriculum or program of their district, they are held to the same academic standards. See Sarah Kinsman, *The Crack in Justice Scalia's Crystal Ball: Single-Sex Charter Schools May Prove His Prediction in VMI Was Wrong*, 8 WM. & MARY J. WOMEN & L. 133, 136–38 (2001).

¹²⁸ Woodall, *supra* note 8. The school's original name was Southwest Philadelphia Academy for Boys Charter School. Martha Woodall, *Pupils Eager to Excel at Single-Sex Charter*, PHILA. INQUIRER, Aug. 6, 2007, at B1. This article will refer to the school by its current name.

¹²⁹ See Dean, *supra* note 9; see also Letter from Women's Law Project to School Reform Commission, Re: Southwest Philadelphia Academy for Boys—Charter Application, Jan. 11, 2006), available at www.womenslawproject.org/testimony/Letter_School_Reform_011106.pdf (arguing that the approval of the Boys' Latin charter would violate federal and state law).

¹³⁰ See Martha Woodall, *All-Boys Charter School Is Denied*, PHILA. INQUIRER, Jan. 19, 2006, at B1 (noting that the school's low scores in the legal and equity areas were responsible for the application's low score by the SRC).

¹³¹ Woodall, *supra* note 8 (quoting SRC Commissioner Daniel Whelan).

tory course to an urban, mostly African-American student population, and requires that students learn Latin.¹³² Boys' Latin will eventually serve five hundred students in grades nine through twelve.¹³³

Officials at Boys' Latin offer several reasons for why the school is all-boys:

Statistically speaking, boys are far more likely to have problematic academic experiences and are 30% more likely to drop out of school. Teachers in an all boys' school can teach effectively in ways which reach boys and appeal to their learning style. This allows a young man more ease in developing his full potential.

Extensive research has shown that boys tend to soften their competitive edge and become more collaborative in a single sex setting. They can just be themselves and not worry about the social stresses inherent in a co-educational environment. Boys are far more likely to participate in musical and artistic programming or learn a foreign language in single sex settings.¹³⁴

The longest operating single-sex public school in Philadelphia is the Philadelphia High School for Girls (Girls' High), a Philadelphia public magnet school¹³⁵ that was founded in 1848. Until 1983, when the distinguished Central High School was ordered to admit girls, Girls' High was the most elite public high school girls in Philadelphia could attend.¹³⁶ Since the forced admission of girls to Central High, the stature of Girls' High has dropped somewhat.¹³⁷ Admission to Girls' High is not limited to girls only, but as of 1996, no boys had matriculated.¹³⁸ School district administrators explained that they maintained a female-only status "simply by virtue of a fragile blend of tradition, informal district policy and success in warding off the hand-

132 See Woodall, *supra* note 128.

133 See Boys' Latin Charter School of Philadelphia: School Profile, <http://www.boyslatin.org/school-profile> (last visited Mar. 23, 2010).

134 Boys' Latin Charter School of Philadelphia: Our Mission, <http://www.boyslatin.org/our-mission> (last visited Mar. 13, 2010); see also Letter from Women's Law Project to SRC, *supra* note 129 (noting the reasons that the school's proponents gave for the need for an all-boys schools were the reasons described above as well as "the failure of the existing public schools to serve children").

135 See The School District of Philadelphia: Information & Resources, <http://webgui.phila.k12.pa.us/schools/g/girlshigh/for-students> (last visited Jan. 21, 2009) (describing admissions requirements for Girls' High, including scoring above a certain level on national standardized tests and receiving a certain grade point average).

136 See Mary B. W. Tabor, *Planners of a New Public School for Girls Look to Two Other Cities*, N.Y. TIMES, July 22, 1996, at B1 (discussing how Central High School was forced to admit girls in 1983).

137 *Id.* (noting that, as of 1996, the enrollment at Girls' High has dropped from 2000 students in the 1980s to 1500 students and that the average SAT score was below the national and state average).

138 *Id.*

ful of boys who express interest.”¹³⁹ A 1992 review by the Department of Education’s Office of Civil Rights found that, as there was no policy to not admit male students, the school did not discriminate.¹⁴⁰ Besides the 1992 investigation, the school has not confronted legal troubles arising from its single-sex status.¹⁴¹

C. *Analysis of the Constitutionality of the Pennsylvania Schools*

The first question in analyzing the constitutionality of the Pennsylvania schools is whether the state has “important” or “exceedingly persuasive” goals. Administrators of all of the schools, except for those of Girls’ High who do not publicly comment on the all-girls status of the school, cite the academic benefits of single-sex education.¹⁴² Thus, if the schools’ single-sex policies were challenged in litigation, the administrators would likely cite the depressed achievement of their students and the government’s interest in improving the education of their students as the important interest at stake. Administrators of the all-boys schools, such as Boys’ Latin and FitzSimons, would also likely raise the fact that boys’—particularly urban boys’—achievement lags behind that of girls. Additionally, they would note the high rates of crime among male urban teenagers, as did the School District of Detroit in *Garrett*.¹⁴³ Administrators of all-girls schools, such as YWLS at Rhodes and Girls’ High, would likely point to problems that are particular to girls, especially urban girls, such as teenage pregnancy. Given the political and popular focus on improving public education and student achievement, it is likely that a court would find that this would satisfy the “important” standard, as did the court in *Garrett*,¹⁴⁴ and perhaps even the “exceedingly persuasive standard.”

The next question that must be answered is whether the means chosen—here, the single-sex policies—are “substantially related” to the important government objective sought to be achieved. Administrators of all schools described—again, except for those of Girls’ High—explain that benefits result from single-sex education either because of learning differences between girls and boys, social benefits

139 *Id.*

140 *Id.*

141 BRIGHTER CHOICE CHARTER SCHOOLS, SINGLE-SEX PUBLIC SCHOOLS IN THE U.S. 10, (2002 ed.) available at http://www.brighterchoice.org/fileadmin/user_upload/report.pdf.

142 *See supra* Part III.B.

143 *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991); *see supra* note 59 and accompanying text.

144 *Garrett*, 775 F. Supp. at 1004.

that come from isolating the sexes, or both.¹⁴⁵ As research on both of these areas is inconclusive,¹⁴⁶ and as the superiority of single-sex over coeducational education has not been proven,¹⁴⁷ it may be difficult for a court to find that the single-sex status of the Pennsylvania schools is substantially related to the government interest at stake. Just as the court in *Garrett* found that the school district did not show that the presence of girls in coeducational classes was responsible for the decline of boys' academic performance,¹⁴⁸ it may be hard for the school administrators to show that their single-sex policies will raise student achievement more than other changes, such as smaller class sizes or different curricula, can. As school districts could improve student performance through other coeducational means, it is probable that a court would find that there is not a substantial relationship between the single-sex policies and the government interest.

Additionally, a justification for a distinction based on sex will not be found valid if it is based on overbroad generalizations about members of each sex.¹⁴⁹ Again, research about the differences between girls' and boys' learning styles, as well as about girls' and boys' brains, has not conclusively proven that *all* girls learn best in one way and *all* boys learn best in another. If school districts make decisions about curriculum, teaching styles, and classroom activities based on the supposed differences between males and females, they are reinforcing stereotypes about the differences between boys and girls that arguably perpetuate "historical patterns of discrimination," which they are constitutionally forbidden from doing.¹⁵⁰

School officials will have the most success if they argue that the single-sex policies do not perpetuate discrimination, but instead combat it. While they are resting their single-sex policies on generalizations about the sexes that are not scientifically proven, they can argue that these generalizations allow teachers to tailor their teaching to their particular students, resulting in higher student achievement for both male and female students. Thus, instead of perpetuating patterns of discrimination, the single-sex policies combat this pattern

145 See *supra* Part III.B.

146 See *supra* notes 27–28 and accompanying text.

147 See *supra* notes 32–33 and accompanying text.

148 See *Garrett*, 775 F. Supp. at 1004 (citing the school district's failure to show that the presence of girls was responsible for boys' underachievement, in finding that the all-boys policy was not substantially related to the goal of the school).

149 See *supra* Part II.

150 See *United States v. Virginia*, 518 U.S. 515, 542 (1996) (quoting *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994)).

by allowing all students, particularly girls who have historically faced discrimination, to achieve more.

The administrators of Boys' Latin and Girls' High would face the most difficulties in overcoming equal protection scrutiny. Boys' Latin offers a unique curriculum to its students, one that is not available at an all-girls or coeducational school in Philadelphia. Just as it was a violation of equal protection for Virginia to exclude women from the unique education available at VMI and for Detroit to exclude girls from the superior education available at the all-boys charter school,¹⁵¹ so too is it likely that the exclusion of girls from Boys' Latin would be a violation. While Girls' High is not technically limited to girls, it has never admitted a boy, even when boys apply. If its admissions policy were challenged, administrators would likely point to the fact that boys can attend coeducational schools, such as Central, offering equal or even superior educational opportunities, and thus boys' equal protection rights are not violated. While Girls' High has not publicly offered an explanation for its single-sex status, it would likely be able to articulate one if faced with litigation. However, because discrimination against girls and women in education has largely ended, with women now surpassing men in college enrollment rates,¹⁵² an equal protection challenge to Girls' High's informal all-girls admission policy may succeed.

The School District of Philadelphia may face unique difficulties in defending some of its single-sex policies because parents do not always have complete freedom in the placement of their children in single-sex classes. So far, parties challenging single-sex educational opportunities in court have complained about schools and programs that they were excluded from, not schools and programs that they were required to attend.¹⁵³ In contrast, students in Philadelphia public schools, with the exception of students attending Girls' High, are automatically placed into schools and therefore do not choose to attend schools where they are separated by sex. While children can technically transfer out of the school where the District places them based on the neighborhood where they live, transfer to another school is based on a number of factors, is a cumbersome process, and

151 See *supra* Part II.

152 See *supra* note 18 and accompanying text.

153 See *supra* Part II. The plaintiffs in *Mississippi University for Women, Garrett, and Virginia* all challenged the legality of unique single-sex programs that they were excluded from.

is not guaranteed.¹⁵⁴ The District can make the arguments described above to defend its single-sex policies, but it may have to clear higher standards because students' and parents' decisions to enroll in single-sex classes are not always entirely voluntary.

Administrators of Pennsylvania schools offering single-sex educational opportunities may have most success arguing that their single-sex policies serve the important government interest of providing a diversity of educational choice to all students, not just to the students who can afford to attend private schools. The *Virginia* decision left open the possibility that diversity of educational choice could be an important government interest.¹⁵⁵ Administrators of single-sex schools could argue that they are providing all parents with a choice of what kind of school their children should attend. If administrators choose to defend their single-sex systems on this basis, they must also be able to prove that they do so evenhandedly, which may be a difficult task.¹⁵⁶ If school administrators are seeking to defend a unique educational opportunity, such as the one offered at VMI, this will be an even harder task. The School District of Philadelphia would face the most challenges in defending the single-sex policy of Boys' Latin on this ground because girls are denied the unique educational opportunities available at Boys' Latin, much as the plaintiffs in *Virginia* were denied the benefits of a VMI education.

It should be noted that most of the Pennsylvania schools described seem to be in compliance with the 2006 Department of Education regulations on Title IX. All of the schools seem to meet the first criterion that the single-sex opportunities have the important objective of increasing diversity of educational choice or meeting the particularized needs of their students.¹⁵⁷ The administrators of all of the schools, except for those of Girls' High, have articulated reasons for the importance of single-sex classes or schools. They explain that the single-sex environments will allow either the teacher to tailor his or her teaching to the particular learning styles of the sex of the students, or will allow the students to focus and develop in ways that they would not be able to if children of the opposite sex were present. Ei-

154 See School District of Philadelphia: Voluntary Transfers, <http://www.phila.k12.pa.us/students/voluntarytransfers.html> (last visited Jan. 21, 2009) (describing the transfer process and noting that "[a]dmission is not guaranteed").

155 See *supra* notes 74–76, 93.

156 It would be difficult to conclusively prove that two schools receive evenhanded treatment. See *supra* note 95 and accompanying text.

157 See Access to Classes and Schools, 34 C.F.R. § 106.34(b)(1)(i) (2007).

ther one of these justifications allows the single-sex classes to meet the particular needs of its students.

As for the second requirement of evenhanded treatment of the program,¹⁵⁸ the school administrators will probably be able to make a persuasive argument that they are in compliance. This Comment has not presented data about the funding, staffing, or student achievement of the boys and girls at the particular schools, but given the vagueness of the regulation's requirement, it is likely that the administrators could make a plausible argument that there is evenhanded treatment of single-sex educational opportunities for both sexes.

The third requirement of the regulations is that enrollment in the single-sex classes be voluntary.¹⁵⁹ Enrollment in the Shamokin Area single-sex classes, the Philadelphia charter schools (which are not even subject to these regulations),¹⁶⁰ and Girls' High is voluntary, but enrollment at many of the other Philadelphia public schools is not entirely by choice.¹⁶¹ Administrators of the School District, if faced with a challenge, would likely point to their transfer processes and argue that students assigned to single-sex classes or schools had the choice to transfer to another school.

The final requirement is that the district provide a "substantially equal opportunity," either single-sex or coeducational, for students of the opposite sex.¹⁶² The regulation states that factors that determine whether the opportunities are substantially equal include the educational benefits of each, the quality and content of the curriculum, the quality of books and other materials, and the quality of the faculty.¹⁶³ While this Comment does not delve into these specifics of each single-sex class and school in Pennsylvania, it is likely that school administrators will be able to argue that there are substantially equal opportunities for students of the opposite sex, either at another single-sex or coeducational class in the same school, at the single-sex school's partner school, or in an entirely coeducational school in the same district. None of the Pennsylvania public schools offering single-sex educational opportunities, except for Boys' Latin which, as a charter school is not subject to the regulations, is offering a unique opportunity such as the one at VMI.

158 See 34 C.F.R. § 106.34(b)(1)(ii).

159 See 34 C.F.R. § 106.34(b)(1)(iii).

160 See 34 C.F.R. § 106.34(c)(2) (stating that charter schools are exempt from compliance with these regulations).

161 See *supra* note 154 and accompanying text.

162 34 C.F.R. § 106.34(b)(1)(iv).

163 34 C.F.R. § 106.34(b)(3).

The fact that most of the Pennsylvania schools described are likely in compliance with the Department of Education regulations, but that many of them may not withstand equal protection scrutiny because of their reliance on overbroad generalizations about the sexes, illustrates that the regulations may violate the Constitution. This potentially calls into question the legality of hundreds of schools across the country.

V. CONCLUSION

The constitutional status of K–12, single-sex public education is not clear. However, given the current Supreme Court Equal Protection jurisprudence and the state of research on the differences between how boys and girls learn and develop, it is likely that an equal protection challenge to most of the single-sex educational opportunities in Pennsylvania public schools would succeed. Because the administrators base their decisions to have single-sex classes and schools on inconclusive research and studies, they are actually relying on overbroad generalizations about the sexes that may perpetuate historical patterns of discrimination.

There are many public and charter schools throughout the country that are successfully raising the achievement of their students without separating them by sex. For example, the Knowledge Is Power Program (KIPP) operates charter schools throughout the country that uniformly have raised the test scores of their students, the majority of whom are below the poverty level, far beyond the scores of students in their respective school districts.¹⁶⁴ KIPP does this through extended school days, longer school years, Saturday classes, extracurricular activities, and field trips.¹⁶⁵ Until there is broader consensus in the scientific and education communities about biological differences accounting for true differences in learning styles between boys and girls, or the proven superiority of single-sex over coeducational education, the public single-sex K–12 educational opportunities in Pennsylvania will not pass intermediate scrutiny under the Equal Protection Clause. Instead of using sex classifications to cure the problems facing this country's schools, educators should turn to other solutions that do not risk stigmatizing students and perpetuating stereotypes.

¹⁶⁴ See Richard E. Nisbett, *Education is All in Your Mind*, N.Y. TIMES, Feb. 8, 2009, at 12; see also KIPP: About KIPP, <http://www.kipp.org/about-kipp> (last visited Mar. 22, 2009).

¹⁶⁵ KIPP: Commitment to Excellence, http://www.kipp.org/files/dmfile/KIPP_Commitment_to_Excellence_Sample.pdf