SINGLE-SEX PUBLIC EDUCATION: EQUALITY VERSUS CHOICE

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I. INTRODUCTION

In July of 1996, the Supreme Court rendered a decision in United States v. Virginia that established a new standard for determining the constitutionality of an educational "experiment" that has been gaining in popularity in recent years: single-sex public education.¹ The facts of Virginia are similar to the two other recent decisions on this topic, Vorchheimer v. School District of Philadelphia and Mississippi University for Women v. Hogan, in that the plaintiffs claimed that their exclusion from traditionally single-sex public schools violated their Equal Protection rights under the Fourteenth Amendment.²

However, the evolving standards for determining violations of these rights produced by these cases are now more likely to be applied to newly created systems of voluntary separation of the sexes. These programs have appeared in inner cities and have primarily involved minority children at the elementary and high school level. Public educators have tried to use single-sex education either to provide inner-city students with the skills and self-esteem necessary to succeed academically or to aid girls in math and science. Experiments such as the all-male academies for "at-risk" boys in Detroit and the Young Women's Leadership School in East Harlem that serves mostly black and Hispanic girls, despite their controversial nature and limited success in the judicial system, have attracted the attention of school boards from California to Virginia.³ The all-girl sci-

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* J.D. Candidate, 1998, University of Pennsylvania Law School; B.A., 1995, Cornell University. This Comment is dedicated to my parents, Jeff and Diane Boland, and to Greg Mucha, for their love and support. I would like to thank Professor Seth Kreimer for his guidance in the writing of this Comment and the founding members of the Journal of Constitutional Law, in particular Mike Gold, for giving me the opportunity to be a part of such an exciting and challenging endeavor.

¹ See 116 S.Ct. 2264 (1996).

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ence and math classes have also garnered much support, dem-
strating a changing climate toward "separate but equal" single-sex 
education at the same time that the Court has ordered one of the 
nation's oldest male military academies to admit women.

The Supreme Court's attitudes towards single-sex public edu-
cation and the standard used to determine its constitutionality have 
undergone both radical and subtle changes in the last two decades. 
In 1973 in Vorchheimer, the Supreme Court affirmed the Third Cir-
cuit's constitutional standard that required the showing of any "sub-
stantial relationship" between a "legitimate educational policy" and 
single-sex schools. The Court articulated in Hogan and affirmed in 
Virginia a standard for single-sex public education of "an exceedingly 
persuasive justification" substantially related to an important gov-
ernment interest. Although the wording of the standard was identi-
cal in both Hogan and Virginia, the Court changed its view on the use 
of traditional gender stereotypes as a basis for single-sex public edu-
cation.

This Comment will explore the evolution of the Court's standard 
for determining if single-sex schooling violates the Equal Protection 
Clause, and it will attempt to predict, based on the Court's reasoning 
and apparent attitudes towards single-gender education in the three 
landmark cases, which current single-sex programs would meet with 
the Court's approval. Part II examines the Third Circuit's reasoning 
in Vorchheimer (the equally divided Supreme Court did not publish 
an opinion) for deciding that Vorchheimer's rights were not violated 
because Girls High provided girls with an experience equal to the 
opportunities at Central despite empirical evidence to the contrary. This conclusion stemmed from the Third Circuit's initial fear that 
any limitation on single-sex education would lead to its destruction. 
Part III provides an analysis of the Court's reasoning in Hogan and its 
creation of the "exceedingly persuasive justification" standard for 
single-sex public education. Here the Court's concern shifts to the 
danger of single-sex schools "perpetuat[ing] stereotypes of women." The Court accepted the Respondent's stated goal of affirmative ac-
tion, but it was only willing to find that a program met that goal if 
"the gender benefited by the classification actually suffer[s] a disad-
vantage related to the classification" regardless of this rule's effect on 
single-sex education as a whole. This section also discusses the 1983 
Pennsylvania state case Newberg v. Board of Public Education, which

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1 See 532 F.2d at 887-88. 
2 See 532 F.2d at 885. 
3 See 532 F.2d at 887. 
4 See 458 U.S. at 724; 116 S.Ct at 2271. 
5 See 532 F.2d at 885. 
6 See 458 U.S. at 723-27. 
7 Id. at 729. 
8 Id. at 728.
reached the opposite conclusion from Vorchheimer. Although Newberg was based upon the same arguments and empirical evidence as Vorchheimer, the divergence in result was in part due to the Newberg court’s application of the new Hogan standard. Although the court in Newberg rejected the argument that this case was barred by res judicata because of the materially inadequate presentation of evidence by plaintiff’s counsel, the court’s scrutiny of the inadequacies between Central and Girls probably would not have occurred without the precedent of Hogan. Part IV of this Comment deals with the Court’s affirmance of the Hogan standard in Virginia. The Court here did not completely reject the notion that some single-gender schools, in order to achieve “diversity” in education, may rely upon the very stereotypes that the Court found intolerable in Hogan.

Finally, Part V explores the single-sex public education programs that exist today or have been instituted in recent years. Specifically, this analysis focuses on the failed male academies in Detroit, the newly created Young Women’s Leadership School in East Harlem, and various science and math classes for girls in several cities. This Comment concludes with some predictions as to which programs would meet the Supreme Court’s current standard and some suggestions for an ideal program.

II. THE BEGINNING OF THE DEBATE: VORCHHEIMER V. SCHOOL DISTRICT OF PHILADELPHIA, THE SUBSTANTIAL RELATIONSHIP TEST AND THE DEFERENCE TO EDUCATORS.

In the early 1970s, Susan Lynn Vorchheimer, a junior high school honors student, decided that she would like to attend Philadelphia’s prestigious academic public high school, Central High. Vorchheimer claimed that the school’s basis for the denial of her admission, her gender, was a violation of her rights under the Fourteenth Amendment. She argued in a class action suit that the single-sex institutions of Central High and Girls High (the only academic high schools in Philadelphia) were unequal in reputation,

11 See id. at 700.
12 See id. at 705.
14 See id. at 2276.
17 See U.S. CONST. amend. XIV, § 1 “[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws . . .”
Petitioner Vorchheimer asserted in the brief to the Supreme Court that Girls High had not achieved the “first rank prestige in the community” of Central not only because Girls was initially founded as a school for training teachers, but also because girls’ schools traditionally “have not served as the training grounds for future ‘leaders in all fields of endeavor.’” The Petitioner also raised the argument that single-sex institutions did not allow the boys to view the girls as their peers, but rather as members of a “second sex” in “[a]cademia, [b]usiness, the [p]rofessions, and [p]olitics.” According to Petitioner, this conclusion would be reached inevitably by both girls and boys in “a world and nation with ‘a long and unfortunate history of sex discrimination.’”

Adopting the general arguments that single-sex schools were unconstitutional, rather than focusing on Susan Vorchheimer's inability to attend a “coeducational facility for [s]cholastically-[s]uperior students,” ultimately doomed the Petitioners’ position. Petitioners attempted to extrapolate the assertion in *Brown v. Board of Education* that “separate but equal” schools for blacks and whites are per se unconstitutional to separate but equal schools for boys and girls. The brief cited an academic study from the late 1960s which concluded that “the pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges” as all-male colleges are “likely to be a witting or unwitting device for preserving tacit assumptions of male superiority.” Any type of segregation in public schools, according to Petitioners, did not allow students to “adjust normally to [their] environment” or “prepar[e]... for later professional training.” These analogies gave Respondents the opportunity to claim that if Petitioners were to prevail, the decision would signal the end of all single-sex education in the nation. Ironically, Respondents argued that if such an event occurred, students like Vorchheimer would have less choice in the type of school they could attend. Thus, although the Respondents had no empirical evidence that single-sex education would be the best method for either boys or girls, they asserted that for single-sex education to be a legitimate state goal, they needed only to show that

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18 See Brief for Petitioner at 5, 9, Vorchheimer v. School District of Philadelphia, 430 U.S. 703 (1977) (No. 76-37) (“It is undisputed that ‘in the scientific field . . . Central’s [facilities] are superior”

19 Id. at 9, 16.

20 See id. at 21, 23.

21 Id. at 23 (citing *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

22 See id. at 14.

23 See id. at 21.

24 Id. at 22 (quoting THE ACADEMIC REVOLUTION, 297-98 (1968)).

25 Id. at 34 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).


27 See id.
it was a "reasonable" "educational alternative." As the Supreme Court had not yet resolved the question raised in *Frontiero v. Richardson* of whether sex even constituted an "inherently suspect" class at the time of its review of the Third Circuit's decision, it was likely that the Court would view single-sex schools as such a reasonable alternative.

Faced with the apparent choice between allowing Susan Vorchheimer to attend the high school of her choice and abolishing the tradition of single-sex education in the nation, the Supreme Court probably affirmed the Third Circuit's decision out of fear of the latter. In its opinion, the Third Circuit court ignored the Petitioners' findings of unequal facilities and academic opportunities at Central and Girls. Even though the court conceded in the beginning of the opinion that Central's "academic facilities" in the "scientific field" are "superior," the court failed to mention this fact in its determination that "Girls and Central are academically and functionally equivalent." The court's finding that "enrollment at the single-sex schools" was "voluntary, not mandatory" did not take into account the inability of students to attend a coeducational academic high school in Philadelphia. Ignoring the Petitioners' arguments concerning the "unique reputation" of Central in the community and its greater prestige due to the number of "active, loyal alumni... who hold positions of power in city, state and nation," the court decided that Susan Vorchheimer's desire to go to Central was based upon "personal preference rather than... an objective evaluation."

Not only did the court manipulate and overlook factual findings concerning the relative qualities of the two high schools, but it also adopted the Supreme Court's developing standard for upholding the constitutionality of sex classifications. Citing the district court's analysis of recent Supreme Court cases regarding sex discrimination, the circuit court established the standard as being a "fair and substantial relationship" between the classification and the state's goal.25

28 See id. at 12, 14.
29 See id. at 14.
30 See *Frontiero v. Richardson*, 411 U.S. 677 (1973). As the Supreme Court did not publish an opinion for this case, for the purposes of this Comment, the Third Circuit's reasoning will be analyzed and assumed to have been the basis for the Supreme Court's ruling.
32 Id. at 882.
33 Id. at 886.
35 See 532 F.2d at 885-86.
Although the circuit court recognized that this standard was “strict” than the former “rational relationship” standard, which allowed virtually any classification that could be linked to a specific government goal, the circuit court did not attempt to define the standard. Rather, the court provided a general summary of recent Supreme Court decisions: “In each of the cases cited . . . there was an actual deprivation or loss of a benefit to a female which could not be obtained elsewhere.” The court reasoned that, in this situation, “[i]f there are benefits or detriments inherent in the system, they fall on both sexes in equal measure.” In distinguishing schools segregated by sex from schools impermissibly segregated by race in *Brown*, the court relied on the idea that single-sex education has “its basis in a theory of equal benefit.” Race is a suspect classification, according to this court, not because of the nation’s history of discrimination against minority races, but due to the judiciary’s “commit[ment] to the concept that there is no fundamental difference between races.” As there are undeniable “differences between the sexes,” the court found that “the special emotional problems of the adolescent years” justified the recommendations of “some educational experts” for single-sex high schools. By refusing to view single-sex education in light of either the past discrimination against women or the inadequacy of Girls High compared to Central, the Third Circuit, and most likely the Supreme Court, decided that holding single-sex schools unconstitutional would be merely an attempt to “keep abreast of the latest” in educational opinion. Out of fear that “all public single-sex schools would have to be abolished,” the court upheld single-sex education primarily on the strength of a “controverted, but respected theory” of education which served the ambiguous but “legitimate” state goal of “innovation in methods and techniques to achieve” the highest quality education while not causing any discernible “psychological or other injury” to either sex. The standard of constitutionality developed by the Supreme Court in the recent sex discrimination cases was used only to establish that sex is not a suspect classification. As the court stated, “[w]e need not decide whether this case requires application of the rational or sub-

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37 See id. at 886.

38 See id.

39 See id.

40 See id. at 887.

41 See id. at 886.

42 See id. at 886-87. Apparently, for the court, these justifying “differences” are only between the social and sexual characteristics of adolescent males and females, as there is no mention of disparate and inferior treatment of girls in the classroom.

43 See id. at 887. (citing Williams v. McNair, 316 F. Supp. 134, 137 (D.S.C. 1970) (rejecting a claim by males seeking admission to an all women’s college)).

44 See id. at 882, 888.
III. CHANGING ATTITUDES: AFFIRMATIVE ACTION AND THE PERPETUATION OF STEREOTYPES IN MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN.

A male nurse, Joe Hogan, decided in September of 1979 that he wanted to enroll at the School of Nursing of the Mississippi University for Women (MUW) because it was located in the town where he lived and worked. He filed an Equal Protection claim when MUW denied him admission based on his sex, even though he was allowed to audit courses. Unlike the Philadelphia school district in Vorchheimer, the state of Mississippi offered affirmative action as its important governmental objective and argued that single-sex education was inherently better for women. Petitioner Hogan also did not follow the line of argument presented by the plaintiff in Vorchheimer that all single-sex schools were per se unconstitutional. The Respondent's brief stated, "[t]his action was not brought to challenge the constitutionality of single-sex education in all its manifestations." The Supreme Court in this case was willing to accept affirmative action as an "important governmental objective." However, the Court created a higher standard of constitutionality by requiring the state to show that an "exceedingly persuasive justification" existed for the classification. Applying that standard to this fact situation, the Court determined that Mississippi could evoke affirmative action as the purpose for this discrimination "only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification." Despite Hogan's assurance that the abolition of single-sex education was not the desired outcome of this case, the Court displayed little apprehension in its creation of a standard that would make implementation of any single-sex program extremely difficult.

In evaluating the state's claim of an affirmative action justification, the Court employed a "searching analysis" of the relationship between objective and means to "determine whether the requisite direct, substantial relationship between objective and means [was] "

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45 See id. at 888.
47 See id. at 721 n.4.
49 See Respondent's Brief, supra note 46, at 5.
51 See id. at 724 (citing Kirchberg v. Feenstra, 450 U.S. 455, 461 (1985); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979)).
52 See id. at 728.
present. The Court was primarily concerned with affirmative action for the sexes being in actuality "the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." MUW's admissions policy, according to the Court, was based on such stereotypes. As the Court pointed out, "in 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees conferred nationwide." There was no evidence that "women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field." The Court found that "excluding males from admission to the School of Nursing tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job." Thus, the Court was completely committed to ending all sex-based stereotypes, even if they were relatively benign. Hogan claimed that it would be "a real extreme hardship" for him to attend another nursing school, not that MUW's denial of admission deprived him of his only opportunity to receive a degree. Also, the "self-fulfilling prophecy" of MUW's policy of only admitting women for a traditionally female field did not harm women as a class. The Court did not refer to the Respondent's argument that MUW's policy cannot qualify as affirmative action because it does not "encourage women to enter fields heretofore regarded as male domains." Apparently, the policy's failure to compensate for past wrongs against women alone made it an invalid affirmative action program. This Court wanted to ensure true equality in education for the sexes, regardless of the consequences to the institution of single-sex education.

Not only did the Court reject the state's main argument of affirmative action, but it also refused to consider the state's evidence documenting the success of graduates of women's colleges. Petitioners argued in their brief that such characteristics of women's colleges as a "supportive atmosphere geared to women's needs" and "encourage[ment] . . . to take leadership roles" would "be lost by absorption of male students into the student body." The Supreme Court disposed of this argument by pointing out that women in the

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53 See id. at 725, 728-30.
54 See id. at 726.
55 See id. at 729.
56 See id.
57 See id.
59 See 458 U.S. at 730.
60 See Brief for Respondent supra note 46, at 19.
62 See id. at 12, 16 (quoting MARCIA K. SHARP, ET AL., A STUDY OF THE LEARNING ENVIRONMENT AT WOMEN'S COLLEGES 27 (The Women's College Coalition 1981).
School of Nursing were not “adversely affected by the presence of men” as auditors in their classes, making it highly unlikely that they would be so affected by having men as classmates. The Court referred to the “uncontroverted record [which] reveal[ed] that admitting men to nursing classes did not affect teaching style, . . . that the presence of men in the classroom would not affect the performance of the female nursing students, . . . and that men in coeducational nursing schools did not dominate the classroom.” Therefore, the gender classification “fail[ed] the second part of the equal protection test” because it was not “substantially and directly related to its proposed . . . objective” of compensating women for past wrongs in the profession and the classroom. In contrast to the Third Circuit court in Vorchheimer, this Court was willing to overlook any controversial or ambiguous benefits of single-sex education to ensure complete equality of opportunity to attend one’s school of choice.

The standard developed in Hogan reappeared in a Pennsylvania state case with almost identical facts to Vorchheimer. In Newberg v. Board of Public Education, plaintiff brought another class action against the Philadelphia school board challenging the constitutionality of the maintenance of Girls and Central High. In response to the defendant’s argument that res judicata barred plaintiff’s action, the state court determined that only “inadequate presentation of evidence” by counsel that “failed to meet the basic standards for adequate representation” could have allowed the Third Circuit court to overlook the glaring inadequacies of Girl’s High. Included in this court’s findings of inadequacies were that:

there [were] 2.7 times more Ph.D.’s and 1.5 times more teachers with 21 years (or more) of teaching experience at Central High; Central’s High’s campus [was] almost three times larger; . . . Central High has more instructional equipment, including a separate computer room; . . . [and] Girls High students almost invariably scored lower than Central High students in testing on the Preliminary Scholastic Aptitude Test/National Merit Scholarship Qualifying Test, as well as on the Scholastic Aptitude Test.

The state court also questioned the basis of the “vague, unsubstantiated theory of single-gender schooling” that the Third Circuit and the Supreme Court so readily accepted. This court wanted to know the identity of the “educators” referred to so frequently in the

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63 See 458 U.S. at 730.
64 Id. at 731.
65 See id.
67 See id. at 702-706, 702 n. 100.
68 See id. at 703.
69 See id. at 706-707.
Although these facts were true at the time of the Vorchheimer decision, the Third Circuit did not consider these "differences" to be sufficiently injurious to women to find these schools unconstitutional. With the precedent of the Hogan decision, the Newberg court viewed these facts as inadequacies for which the "vague" and "unsubstantiated" benefits of single-sex education could never serve as an "exceedingly persuasive justification" for their existence.

Although the school district did not offer affirmative action as an objective of single-sex education, the court here was as concerned as the Hogan Court with complete equality of opportunity for the sexes. For example, this court focused on Central's superior course offerings in science and math, a factor that the Vorchheimer court probably overlooked because of the stereotype that girls do not usually excel in these subjects. In light of Central's superior faculty, courses, facilities, and standardized test scores, this court held that diversity in education was not a "compelling governmental interest" substantially related to such disparate schooling. Also, as the plaintiff in Newberg brought the action under Pennsylvania's ERA, which had recently been the basis for a decision in a motion for summary judgment that struck down a statutory provision prohibiting girls from competing in athletics against boys, the court recognized that the "separate-but-equal concept" of Vorchheimer did not "have currency" in the Pennsylvania judiciary. In the judicial climate created by Hogan and such progeny as the Pennsylvania ERA case, the Newberg court simply placed more emphasis on the inability of any girl who wanted to take an advanced math class to do so at Central (Girls did not offer any) than on any threat to the nation's single-sex schools.

IV. A RETURN TO "CHOICE": THE MODIFICATION OF THE STANDARD IN UNITED STATES v. VIRGINIA.

The question of the constitutionality of single-sex education reappeared in the Supreme Court in 1995 when an anonymous plaintiff claimed that the all-male admissions policy of the Virginia Military Institute violated her Equal Protection rights. The Supreme Court's ruling in United States v. Virginia has established the relevant standard to be applied to public single-sex education today. Although Justice Ginsburg used the Hogan court's term of an "exceed-
ingly persuasive justification," this Court interpreted the standard in a manner far more sympathetic to single-sex education. The Court did emphasize the importance of truly equal educational opportunities for each sex, but it was less concerned with single-sex schools' potential for maintaining gender stereotypes.

In its analysis of the specific facts of this case, the Court found that Virginia did not fulfill its stated objective of diversity in education. Ginsburg reached this conclusion first by recounting the history of single-sex education in Virginia. She determined that "no such policy" of diversity could be "discerned from the movement of all other public colleges and universities in Virginia away from single-sex education" and questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity." Therefore, the Court held that "this plan [for maintaining VMI as an all-male institution] serves the State's sons, but makes no provision whatever for its daughters."

The Court then focused its analysis on VMI's "remedial plan": the creation of the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College. Virginia argued that such a program would not only create a single-gender college option for women, but that it would also allow women to achieve "the results of an adversative method in a military environment." An institution that provided only these "results" and not the method itself was necessary, according to Virginia, because women ultimately "thrive in a cooperative atmosphere" and the "alterations" to this method that would have to take place at VMI if women were admitted would "destroy" the program. However, the Court was unwilling to extrapolate its undisputed "assumption that most women would not choose VMI's adversative method" to the conclusion that the state therefore has the right to "constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords." The Court subsequently found that VWIL did not supply women with any military experience remotely similar to the unique training methods of VMI. Ginsburg noted that VWIL students "participate in ROTC and a 'largely ceremonial' Virginia Corps of Cadets" and do not experience the "'barracks' life" of VMI where stu-

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77 See id. at 2276.
78 See id. at 2279.
79 See id. at 2277-78.
80 Id. at 2279 (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992)).
81 Id. at 2279.
82 See id. at 2282.
83 Id.
85 See United States v. Virginia, 116 S.Ct. at 2280.
students sacrifice privacy to live together, eat together, and wear uniforms. VWIL also had an inferior "student body, faculty, course offerings, and facilities." Like the state court in Newberg, the Supreme Court was not satisfied with the "parallel program" offered to women at VWIL that not only provided an inferior educational experience, but also denied to women the "benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network."

Although the Court did not discount the possibility that single-sex education in general could lead to the perpetuation of stereotypes, as it recognized the need to take a "hard look" at "generalizations or tendencies" of the sexes "pressed by Virginia," it did accept the stated objective of diversity as legitimate in the abstract. As the Court stated, "it is the mission of some single-sex schools to 'dissipate, rather than perpetuate, traditional gender classifications'” and "[w]e [the Court] do not question the State's prerogative evenhandedly to support diverse educational opportunities." Such statements reveal that the Court in theory would accept a single-sex counterpart to VMI if such a school would provide an equal experience for women, including the adversative training method. However, the Court did not address the inherent question that arises from its analysis of the failure of VWIL to provide an adequate single-sex solution. If the Court believed that some women would respond well to the aggressive and combative training at VMI, which the Court characterized as stereotypically male, then what would be the purpose of having a separate but equal women's institution? Ginsburg acknowledged that the "United States does not challenge any expert witness estimation on average capacities of men and women." In this case, the capacities testified to involved men's preference for "adversativeness" and women's preference for a "cooperative atmosphere." This feminine fear of competition was one of the factors advanced by the state in Hogan to justify single-sex women's colleges. In that case, the Court found that such a tendency was merely part of a stereotype that should be avoided even at the cost of single-sex education. Therefore, the Virginia Court created a new

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86 Id. at 2283.
87 Id. at 2284.
88 Id. at 2283-84.
89 See id. at 2280, 2276 n.7 (quoting O'Connor, Portia's Progress, 66 N.Y.U. L. Rev. 1546, 1551 (1991)).
90 Id. at 2276 n.7 (quoting Brief for Twenty-Six Private Women's Colleges as Amici Curiae at 5, United States v. Virginia, 116 S.Ct. 2264 (1996)).
91 See id. at 2279.
92 Id. at 2280.
93 Id. at 2279.
94 See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731.
95 See id. at 730.
standard that does not allow for single-sex education such as was allowed in *Vorchheimer*, where there were definite inequalities in the peer institutions. The Court did not destroy the opportunity for other single-sex schools, comparable in all other respects, at least at the college level, to exist for the sake of diversity. However, with this opportunity comes the danger that such schools may be based on the very stereotypes that the Court claims to reject.

V. THE CONSTITUTIONALITY OF PUBLIC SINGLE-SEX SCHOOLS AND SOME PREDICTIONS FOR THE FUTURE.

In recent years, public school districts have begun to return to single-sex education either through experimental single-sex “academies” primarily for minority students or through single-sex classes to aid girls in science and math. This return to single-sex education has grown out of educational research showing both the traditional findings of girls’ improved self-esteem and leadership abilities in a single-gender environment and some new conclusions, such as the benefit fatherless boys can receive from being exposed to positive male role models in single-sex classrooms. This section will explore both those experiments that the courts have already deemed unconstitutional and those that still must face judicial constitutional scrutiny.

A. The Detroit Male Academies: The First Failure

In 1991, Detroit attempted to “breathe some life back” into the academic careers of young African-American males in the inner-city by creating three all-male “academies” for kindergarten through the fifth grade. Educators believed that these academies could bolster the “poor academic achievement of male students” by providing them with an atmosphere in which they would be less likely to misbehave to impress girls, allowing them to receive the greater discipline that they require, and “alleviat[ing] social pressures that distract both boys and girls from their studies.” The students admitted

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Fifty-four percent of Detroit boys eventually drop out of school and over 66% receive suspensions. Boys fall further behind the national average academically in almost every successive year of elementary and secondary school. In the first grade, boys perform at or above grade level on academic achievement tests. By the twelfth grade, boys’ achievement is over two grades behind in reading and over three grades behind in mathematics. *Id.* at 1743.
to these academies were also supposed to be classified as “at-risk,” meaning that they were primarily African-American males who were likely, because of their urban environments and fatherless families, to “manifest[]” their problems with “high homicide, unemployment and drop-out rates.” The curriculum at these academies was to include such special programs as “a class entitled ‘Rites of Passage,’ an Afrocentric (Pluralistic) curriculum, . . . Saturday classes, individualized counseling, [and] extended classroom hours.” As for the exclusion of African-American females from these academies, the School Board claimed “simply that co-educational programs aimed at improving male performance have failed.”

The School Board only addressed the exclusion of females when, one month before the scheduled opening of the academies, the National Organization for Women (NOW) and the American Civil Liberties Union (ACLU) filed an Equal Protection suit, claiming that the academies violated the Equal Protection Clause, Title IX, and other federal and state statutes. The district court preliminarily enjoined the academies from opening only eleven days before the beginning of school. Issued before the Court’s *Virginia* decision, the district court’s reasoning did not need to extend beyond the lack of equal educational opportunities for both sexes that clearly violated the *Hogan* intermediate scrutiny test. In response to the school board’s proffered justification, the court stated, “there is no showing that it is the co-educational factor [in previously failed programs] that results in failure.” Despite the court’s recognition of the importance of the Board’s motive of “keep[ing] urban males out of the City’s morgues and prisons,” the defendant could not meet the burden of showing a “substantial relationship” between this goal and the exclusion of females. The court implicitly accepted the plaintiff’s argument that a class such as “Rites of Passage” which “teaches that ‘men need a vision and plan for living,’ ‘men master their emotions,’ and ‘men acquire skills and knowledge to overcome life’s obstacles,’” could be effectively applied to girls. After all, as the court noted, “the educational system is also failing females” who must deal with many of the same urban environmental problems as the males, and some of their own, such as “pregnancy-related” issues.

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99 *See* Garrett, 775 F.Supp. at 1007; *see also* Note, *supra* note 98, at 1744.
90 *Garrett*, 775 F. Supp. at 1006.
91 Id. at 1007.
92 *See* id. at 1005-06; *see also* Note, *supra* note 98, at 1746.
93 *See* Garrett, 775 F.Supp. at 1005; *see also* United States v. Virginia, 116 S.Ct. at 2306 (Scalia, J. dissenting) (explaining that the Detroit Board of Education abandoned the plan after the injunction was given).
94 *Garrett*, 775 F.Supp. at 1007.
95 Id. at 1008.
96 *See* id. at 1007.
97 Id.
such a program would also not pass muster under the current constitutional standard.

B. A Single-Sex School For Underprivileged Females? A Doomed Experiment in Harlem.

Since the ruling in Virginia, another urban single-sex experiment has appeared in East Harlem: the Young Women’s Leadership School (YWLS). The school opened in September 1996, but it has yet to face judicial scrutiny, despite the filing of a complaint with the U.S. Department of Education by the New York Civil Liberties Union (NYCLU) and the New York chapter of the National Organization for Women (NYNOW). These organizations claim that the school is in violation of both federal statutory law and the judicial standard of Virginia. The applicable statute dealing with sex discrimination in public education, 20 U.S.C.A. § 1681 (commonly known as Title IX), prohibits federally funded single-sex “institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.” Although the text of the statute is ambiguous as to the legality of single-sex schools at the primary and secondary levels, as the court pointed out in Garrett, numerous interpretations, including those of the CFR and the Office of Civil Rights for the Board of Education, have found single-gender institutions at this level also to be prohibited. Also, despite the claims of Theodore Olson, the attorney who represented VMI before the Supreme Court, and of Justice Scalia in his Virginia dissent, that the Virginia case led to the questioning of the constitutionality of such a school for “unpowerful and underprivileged girls,” YWLS would not have met the previous standard under Hogan. Like the Detroit academies, there is little evidence that the presence of boys in the classroom is holding these girls back academically. The school’s founders relied upon research based on

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110 See Today: Education Today; Professor Diane Ravitch of New York University and Norman Siegel of the New York Civil Liberties Union Debate the Issue of Single-Sex Public Schools (NBC television broadcast, Aug. 27, 1997) (discussing the issues raised by YWLS and the program’s legal standing under Title IX and the Virginia standard); see also 20 U.S.C.A. § 1681 (1990); United States v. Virginia, 116 S.Ct. 2264 (1996).
112 See 20 U.S.C. § 1681(a) (1994) (“No person in the United States shall, on the basis of sex, be excluded from participation in . . . any education program or activity receiving federal financial assistance.”); see also Garrett, 775 F.Supp. at 1008-09.
113 See First VMI, Then . . . , supra note 109 (reporting that Mr. Olson felt that the threatened suit was exactly like the suits he predicted would arise in the aftermath of the Virginia decision); see also United States v. Virginia, 116 S.Ct. 2264, 2305-2308 (1996) (Scalia, J. dissenting) (predicting that the Court’s decision would prohibit all public and private single-sex education programs).
anecdotal information and subjective findings to justify the exclusion of boys.\textsuperscript{114} For example, the school relied upon a study by the American Association of University Women which suggests that sexual bias in public school classrooms and sexual harassment by male students may be holding girls back academically, especially in science and math.\textsuperscript{115}

Even if these problems could be proven with certainty to be at the root of girls' failures in public schools, which is not likely, the Board would still have the problem of not supplying an equal opportunity to males, as required by Virginia.\textsuperscript{116} There was a proposal in December 1996 to establish an all boy's school in Harlem as a counterpart to the YWLS.\textsuperscript{117} However, this proposal has not yet been accepted, as of October 1997, by the New York School Board.\textsuperscript{118} The lack of enthusiasm for such a parallel program most likely stems from the fact that this proposal was created in anticipation of the impending litigation.\textsuperscript{119} A school created out of fear of a lawsuit rather than out of a desire to improve educational opportunities for boys is likely to have inferior facilities, faculty, and course offerings in comparison to YWLS. The School District is also taking into consideration a 1993 Department of Education study, which found that "there is a clear suggestion ... that for adolescent and college-age males, single-sex schools... may not offer the learning advantages that they may offer young women."\textsuperscript{120} As the court in Garrett pointed out, the current co-

\textsuperscript{114} See generally Rene Sanchez, In East Harlem, a School Without Boys: Experiment with All-Girls Classes Tops New Mood in Public Education, WASH. POST, Sept. 22, 1996; see Judy Mann, BOYS AND GIRLS APART: SINGLE-SEX EDUCATION IS ONE SCHOOL CHOICE WE NEED, WASH. POST, Oct. 20, 1996, at C1. The lack of solid statistics to justify the creation of the YWLS is not the fault of the school's founders. Most empirical evidence concerning the benefits of single-sex schools is limited and anecdotal. For example, Judith Mann, the author of THE DIFFERENCE: DISCOVERING THE HIDDEN WAYS WE SILENCE GIRLS: FINDING ALTERNATIVES THAT CAN GIVE THEM A VOICE, a recent analysis of education's effects on girls, relied on a 1986 study of 75 Catholic high schools in Chicago, 45 of which were single-sex, to reach the conclusion that "girls at all-girls schools showed a consistent and positive attitude toward school, tended to associate with academically minded friends, and expressed a greater interest in math and science."

\textsuperscript{115} See Sanchez, supra note 3 (quoting one of the school's founders as pointing to the AAUW's findings as one of the justifications for YWLS's creation).

\textsuperscript{116} See United States v. Virginia, 116 S.Ct. 2264, 2282-2286 (1996) (discussing whether VWIL was sufficiently equivalent in substance to VMI to remediate the constitutional violation caused by the state of Virginia's support of VMI and its single-sex admissions policy).

\textsuperscript{117} See Liz Willen, Boys Only School- Proposal Triggers Civil Rights Concerns, NEWSDAY, Dec. 11, 1996, at A4.

\textsuperscript{118} See Tamar Lewin, In California, Wider Test of Same-Sex Schools, N.Y. TIMES, Oct. 9, 1997, at A1 (explaining that New York Schools Chancellor has decided not to open a boys' school as a counterpart to YWLS).

\textsuperscript{119} See Somini Sengupta, East Harlem District is Considering an All-Boys Public School, N.Y. TIMES, Dec. 12, 1996 at B9 (stating that proponents of the all-male school consider it to be a prophylactic response to potential litigation); see also Lewin, supra note 118 (reporting that Schools Chancellor Rudy Crew decided against opening a comparable boys' school because he believed that YWLS was remedial, and therefore legal).

\textsuperscript{120} See Sengupta, supra note 119.
educational system has failed both sexes in some manner. The School Board would not be able to identify an "exceedingly persuasive justification" for giving girls in East Harlem "small classes," a decorative environment, school uniforms and same-sex role models, while denying these benefits to boys or providing them with an inferior institution. If the YWLS comes before the courts, it will probably be found to be in violation of the Equal Protection clause and Title IX.


Although the Virginia ruling has already been blamed for the probable demise of the Young Women's Leadership School, the Virginia standard actually allows more of an argument to be made for the constitutionality of the girls' school. YWLS is based on such stereotypical views of women as their need for a cooperative environment and increased attention in the areas of science and math. The Virginia Court was willing to consider the legitimacy of such general tendencies in creating truly equal single-sex institutions and perhaps would be more sympathetic to the YWLS than the Hogan Court.

The Virginia Court's partial acceptance of the stereotypes it claimed to reject may be the loophole for the constitutional legitimacy of the experimental math and science classes for girls that have appeared in co-educational public schools in California, Illinois, and Michigan. The argument could be made under the affirmative action standard of Hogan that girls have been denied an equal opportunity in the past to excel in math and science. Proving such an assertion would be difficult, as most evidence for it consists of statements such as, "girls are steered away often in subtle ways from taking advanced classes [in math and science], and they don't do as well as boys on standardized math and science tests." The key to achieving constitutional legitimacy in these circumstances is estab-

122 See Rene Sanchez, In East Harlem, a School Without Boys; Experiment with All-Girls Classes Taps New Mood in Public Education, WASH. POST, Sept. 22, 1996 (discussing the visible differences in amenities and appearance between YWLS and other schools in the same district).
123 See id.
124 See United States v. Virginia, 116 S.Ct. 2264, 2276-77 (1996) (suggesting that programs designed to support pedagogically advantageous schools may be constitutional); see also Jacques Steinberg, Just Girls, and That's Fine With Them; At a New School, No Boys, Less Fussing, and a Freer Spirit, N.Y. TIMES, Feb. 1, 1997 § 1 at 21.
126 See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729, n.6 (1982) (suggesting that an otherwise invalid program may be constitutional if explicitly responding to a history of prior discrimination).
127 See Russell & Wilson, supra note 3.
lishing the "substantial relationship" prong of the exceedingly persuasive justification standard.\footnote{See, e.g., Garrett v. Board of Educ., 775 F.Supp. 1004, 1008 (E.D. Mich. 1991) (holding that Detroit's plan to create three all-male academies probably would fail to fulfill the "substantially related" prong of intermediate scrutiny).} If it could be shown that boys' "dominance" and their greater knowledge and skill in science and math classes prevents girls from learning, the Court may uphold separate classes for girls. The rationale, under the Virginia standard, would be that the girls' classes are necessary to provide them with an opportunity equal to that enjoyed by boys in co-educational classes. As long as the girls do not receive any special advantages beyond learning the subjects at their own pace, such programs may pass constitutional muster under Virginia.

**D. Some Predictions For Acceptable Future Single-Sex Programs.**

Under the Virginia standard, the Court will approve public single-sex institutions that are equal in every relevant manner, regardless of any sexual stereotypes that they may be based upon. An ideal program would most likely consist of peer schools started at the exact same time, to avoid the prestige and alumni problems inherent in Vorchheimer and Virginia. Physical facilities should be identical. They would have to have faculty of an equal caliber, although the male school could have all male teachers and the female school all women instructors. Curriculum could include classes focusing on issues relevant to each sex, including past accomplishments of individuals sharing the students' gender and race. Finally, as the Virginia Court revealed its willingness to consider the legitimacy of each sex's "general tendencies" in designing pedagogically advantageous single-sex programs, the methods of teaching could be adjusted according to the dictates of research on the preferable methods for each sex, even if one is "adversative" and one is "co-operative."

The Supreme Court has demonstrated with its modification of the "exceedingly persuasive justification" standard in Virginia that it is not willing to outlaw single-sex education, and in some circumstances may even favor it. However, the above description may be impossible to attain, even if the difficulty merely arises from the fear of a lawsuit.

**VI. CONCLUSION**

The standard for determining the constitutionality of public single-sex education has evolved from one constructed entirely out of a blind-adherence to a time-honored tradition to one created to ensure equal and non-prejudicial treatment of the sexes while preserving the "choice" to attend a single-gender school. Unfortunately, the
Virginia standard will probably not succeed in efficiently achieving either goal. Voluntary programs such as the single-sex academies for inner-city youths will not survive under this standard unless the funding can be found to create fully equal institutions for both sexes. Math and science classes designed for girls may meet the standard, but may serve to enforce debilitating stereotypes through such preferential treatment for one sex. The ultimate fate of single-sex public education has yet to be determined. Until the next standard arrives, the nation must wait and see which programs will meet the inconsistent criteria required by the Court.