"Fire Where There Is No Flame:" The Constitutionality of Single-Sex Classrooms in the Commonwealth

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"FIRE WHERE THERE IS NO FLAME:"
THE CONSTITUTIONALITY OF SINGLE-SEX CLASSROOMS IN
THE COMMONWEALTH

If there is any misleading concept,
it is that of "coeducation"...

—Adrienne Rich

INTRODUCTION

The Commonwealth of Virginia, once chastised for excluding
students based on gender from institutions of higher education, now
offers single-sex opportunities in public secondary schools. These
initiatives, encouraged by the No Child Left Behind Act, bring the
Commonwealth back into the debate on the constitutionality of state-
supported single-sex education. This note argues the Commonwealth’s
justifications for separating students based on gender in public sec-
ondary schools can withstand constitutional scrutiny.

1. ADRIENNE RICH, Taking Women Students Seriously, in ON LIES, SECRETS, AND
.org/schools-classrooms.htm#22 (last visited Mar. 18, 2007) (summarizing the Common-
wealth’s single-sex schools and classrooms).
The Supreme Court's current articulation of the constitutional standard for single-sex education emerged out of a challenge to the Commonwealth's flagship military institution, the Virginia Military Institute (VMI). While United States v. Virginia mandated the admission of women to an all-male military college, it should not be read as a prohibition against single-sex classrooms in public secondary schools. The Court, speaking through Justice Ginsburg, recognized the potential "pedagogical benefits" of single gender education. While articulating the standard for single-sex education, Virginia left unresolved the question of whether public secondary schools as opposed to colleges would violate the Equal Protection Clause of the Fourteenth Amendment. As the sole dissenter to Virginia, Justice Scalia predicted the majority's decision would kill single-sex public education initiatives across the country. Despite his predictions, recent trends in public education indicate a resurgence of interest in single-sex schools.

Renewed interest in single-sex education emerges out of the continuing debate concerning the best way to educate the nation's

5. See Virginia, 518 U.S. at 532-33 (indicating "a heightened review standard" that "focus[es] on the differential treatment or denial of opportunity ... [in] determining whether the proffered justification is 'exceedingly persuasive.'"); see also 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, 384 (noting the Court's "language suggests that the goal of intermediate scrutiny is to identify and strike down rules that maintain the traditional hierarchy of men over women, rather than to determine which differences between the sexes can justify their disparate treatment").


7. Id. at 557.


9. Notably, the Court spoke through Justice Ginsburg, a fierce advocate of women's rights. See id. ("The Court's spokesperson was Justice Ruth Bader Ginsburg, a seasoned veteran of the gender wars.").


12. Virginia, 518 U.S. at 596 (Scalia, J., dissenting) (arguing that "single sex public education [would be] functionally dead").


14. See Morgan, supra note 5, at 389 (noting a "resurgence of interest in single sex schooling — particularly on the K-12 level").
youth.\textsuperscript{15} In reaction to a perceived lack of educational opportunities, President George W. Bush pushed for pedagogical experimentation, including funding for single—gender classrooms.\textsuperscript{16} During debates on the Senate floor, Senator Hillary Rodham Clinton rose to defend the proposal, advocating against “any obstacle to providing single-sex choice within the public school system.”\textsuperscript{17} The No Child Left Behind Act, with unlikely advocates on both sides of the political spectrum,\textsuperscript{18} opened the door to educational experimentation and encouraged school districts across the nation to begin offering single-sex opportunities for students.\textsuperscript{19} During the 2005-2006 school year, over 193 school districts across the country offered single-sex classrooms within the context of coeducational schools.\textsuperscript{20} In 2006 the Department of Education promulgated rules opening the door for school districts to create voluntary single-sex classrooms.\textsuperscript{21} Effective November 2006, these regulations potentially create an influx of single-sex classrooms across the country.\textsuperscript{22}

Six years after the Supreme Court admonished Virginia for discriminatory practices,\textsuperscript{23} elementary school districts within the Commonwealth,\textsuperscript{24} encouraged by the No Child Left Behind Act,  

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16. See, e.g., Jane Gross, \textit{Dividing the Sexes, for the Tough Years: A Coed School Offers Boys and Girls Separate Classes in Grades 6-8}, N.Y. Times, May 31, 2004, at B1 (noting the greater “flexibility to experiment with single-sex education in the No Child Left Behind Act, the initiative pushed by President Bush”); see also Diana Jean Schemo, \textit{Administration Proposes Same-Sex-School Option: Underlying Criterion is Equal Opportunities}, N.Y. Times, Mar. 4, 2004, at A16 (reporting the “Bush administration has proposed regulations giving public school districts new freedom to create same sex classes and schools as long as ‘substantially equal’ opportunities are also provided for the excluded sex”); Sherwin, supra note 13, at 35-36 (noting that “politicians at the national level have embraced the trend toward single-sex education as well”).  
19. Fortney, supra note 11, at 859 (“It seems that single-sex elementary schools are slowly infiltrating the country.”).  
20. Id.  
22. Id.  
24. National Association for Single Sex Public Education, supra note 3 (indicating that in 2006-2007 eight schools in Virginia experimented with single—sex classrooms: Mechanicsville Elementary School, Cedar Lee Middle School, Bailey Bridge Middle School, Henderson Middle School, Williamsburg Middle School, Achievable Dream Academy in
again started experimenting with single-sex initiatives. This note examines the school districts in the Commonwealth offering single-sex classrooms within the context of coeducational secondary schools. Despite separating students because of their gender, this note argues these single-sex programs withstand constitutional scrutiny.

I. CONSTITUTIONAL CONTEXT

The Supreme Court’s current constitutional review evolved out of years of encountering single-sex education across the nation. In confronting gender classifications, the Court considers the Fourteenth Amendment’s equal protection clause and the Fifth Amendment’s due process clause. The Constitution’s mandate of equal protection eliminates rules maintaining a bias for one sex over another. The Commonwealth’s current educational initiatives must be examined within this constitutional context in order to determine whether they will survive judicial scrutiny.

Gender—based state action requires heightened scrutiny under the Fourteenth Amendment. A government action remains unconstitutional unless it “serve[s] important governmental objectives.” Further, the government’s action must be “substantially related to achievement of those objectives.” This intermediate standard seems purposefully positioned between the Court’s lenient rational basis

Newport News, Spratley Middle School, and Patrick Henry Elementary School).

25. See SALOMONE, supra note 8, at 176 (“The VMI decision did not sound the death knell for single-sex education. In fact, it left considerable room for well-designed programs with clearly stated and non-biased objectives.”).


28. The Fourteenth Amendment mandates “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

29. The Fifth Amendment provides “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend V.

30. Morgan, supra note 5, at 459–60 (“The goal of identifying and eliminating rules that function to maintain the traditional hierarchy of men over women, is what the Equal Protection Clause requires.”).

31. Craig v. Boren, 429 U.S. 190, 192 (1976) (striking down a statute that discriminated against the right of young men to buy 3.2% non-intoxicating beer at the same age that young women were allowed to purchase it).

32. Id. at 197.

33. Id.
review and fatal strict scrutiny.\textsuperscript{34} Sex discrimination jurisprudence focuses on state actions that distinguish between the sexes, with the Court condemning actions that "generally reinforce stereotypical and over-generalized notions about the abilities of men and women."\textsuperscript{35}

Over fifty years ago in \textit{Brown v. Board of Education},\textsuperscript{36} the Supreme Court recognized states’ significant interest in educating children without discrimination.\textsuperscript{37} Education had become a battle ground for racial segregation, with the Court intervening to mandate separating students into so-called "equal" facilities would not pass constitutional scrutiny under the Fourteenth Amendment.\textsuperscript{38} While initially applied in the context of racial segregation,\textsuperscript{39} it is unclear whether the principle of "separate as inherently unequal" would also implicate gender–segregated classrooms.\textsuperscript{40} On its face the analogy seems sound. In \textit{Brown}, however, the "state could offer no pedagogical justification for the segregation."\textsuperscript{41} Instead, the segregation in \textit{Brown} was based solely on an attempt to maintain racial hierarchies.\textsuperscript{42} Current single-sex educational opportunities operate in a far different context, with attendance voluntary instead of mandated by the state.\textsuperscript{43} Rather than attempting to instill "inferiority" between the segregated classes, the current proposals hope to "help students realize

\textsuperscript{34} Jill Elaine Hasday, \textit{The Principle and Practice of Women’s “Full Citizenship”: A Case Study of Sex-Segregated Public Education}, 101 MICH. L. REV. 755, 759-60 (2002) (noting that intermediate review is "situated between rational basis analysis, which almost always upholds the constitutionality of challenged actions, and strict scrutiny, which almost always strikes practices down").

\textsuperscript{35} J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 131 (1994) (refusing to recognize "invidious, archaic, and overbroad stereotypes about the relative abilities of men and women"); see also Amanda Koman, Note, \textit{Urban, Single-Sex Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America’s Young Women}, 39 WM. & MARY L. REV. 507, 537 (1998) ("In the context of public education, the Supreme Court has examined only cases that involved gender classifications that perpetuated the stereotypes of women’s dependency.").

\textsuperscript{36} Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954) ("In the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.").

\textsuperscript{37} Id. at 493 (noting it is the "very foundation of good citizenship").

\textsuperscript{38} Id. at 483.

\textsuperscript{39} See Salomone, supra note 8, at 116 (noting that "the Supreme Court’s unanimous and far reaching decision on racial segregation in \textit{Brown v. Board of Education} became a guiding force in breaking down social and political barriers that historically excluded certain groups, including women, from equal opportunity").

\textsuperscript{40} See Gary J. Simson, \textit{Separate But Equal and Single Sex Schools}, 90 CORNELL L. REV. 443, 443 (2005) (arguing that the United States Supreme Court has yet to resolve the issue in regard to public secondary and elementary schools).

\textsuperscript{41} Salomone, supra note 8, at 119.

\textsuperscript{42} Id.

\textsuperscript{43} Id.
their full potential." Education remains a significant governmental function, however the Court has only articulated a clear standard for single-sex public higher education facilities.\(^4\)

II. EARLY CONSTITUTIONAL CHALLENGES TO SINGLE-SEX EDUCATION

While the Court established its clearest articulation of sex-based classifications in public education with the \textit{Virginia} decision, several other cases also were instrumental in creating this level of review. Over time, in the cases leading up to \textit{Virginia}, the Court clarified the standard of review required for single-sex education.

The first case to reach the Court on sex-segregated public education was \textit{Vorchheimer v. School District of Philadelphia}.\(^4\) In \textit{Vorchheimer}, the Court faced a challenge to a Philadelphia school district's practice of "maintaining single-sex male and female academies" for gifted students.\(^4\) The Third Circuit approved the practice, noting in particular the "voluntary and not mandatory" nature of the programs.\(^4\) The Supreme Court could not decide the case; splitting four-to-four in \textit{Vorchheimer}, without issuing an opinion.\(^4\) The decision allowed Philadelphia to continue the single-sex schools;\(^5\) it would take five years before another challenge would reach the Court.

Ironically, the first time the Supreme Court issued an opinion involving single-sex education revolved around the exclusion of men.\(^5\) While sex exclusion historically disadvantaged women, the Court considered the issue as it related to a male student excluded from an all female program.\(^5\) In \textit{Mississippi University for Women v. Hogan} a male applicant challenged the admissions policy of a state nursing school for women.\(^5\) Applying heightened scrutiny, the Court struck down the policy noting Mississippi's purported purposes did not seem

\(\text{\textsuperscript{44}}\) Id.
\(\text{\textsuperscript{45}}\) See Nancy Levit, \textit{Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation}, 67 GEO. WASH. L. REV. 451, 455 (1999) ("Decisions \ldots over the past quarter of a century offer no clear guidance on the constitutionality of single-sex education in its current forms: voluntary single-sex classes or schools. \ldots ").
\(\text{\textsuperscript{46}}\) 430 U.S. 703 (1977).
\(\text{\textsuperscript{47}}\) \textit{Vorchheimer}, supra note 45, at 456.
\(\text{\textsuperscript{49}}\) \textit{Vorchheimer}, 430 U.S. at 703.
\(\text{\textsuperscript{50}}\) \textit{Id}.
\(\text{\textsuperscript{51}}\) Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).
\(\text{\textsuperscript{52}}\) \textit{Id}.
\(\text{\textsuperscript{53}}\) \textit{Id}. 

sincere\(^\text{54}\) and therefore were not persuasive.\(^\text{55}\) Mississippi failed to show that women were disadvantaged or lacked leadership positions in nursing.\(^\text{56}\) Rather than compensatory, the state's policy of "excluding males from admission to the school of nursing trend[ed] to perpetuate the stereotyped view of nursing as exclusively a woman's job."\(^\text{57}\) For these reasons, the Court mandated Mississippi open the college to men.\(^\text{58}\) The Court's articulation of stereotyped views of gender would resurface again in \textit{Virginia}.\(^\text{59}\)

III. \textit{Kirstein v. University of Virginia: A Precursor to \textit{Virginia}}

Before \textit{Virginia}, the Commonwealth had to consider the impact of single-sex admissions policies for its colleges and universities.\(^\text{60}\) In 1970, the United States District Court for the Eastern District of Virginia heard a suit by four women demanding admission to the University of Virginia.\(^\text{61}\) In \textit{Kirsten v. University of Virginia} a district court determined the Commonwealth could not discriminate against women on the basis of sex.\(^\text{62}\) In particular, the district court noted the University of Virginia's educational amenities could not be matched by any other institution within the Commonwealth.\(^\text{63}\) Therefore, the Commonwealth had to open the institution to women as well as men.\(^\text{64}\) The district court made this decision without using the later articulated standard of heightened scrutiny.\(^\text{65}\) Reasoning that no other institution within the Commonwealth offered the same educational opportunities as the University of Virginia, the district court

\(^{54}\) Id. 723-24, 730. Mississippi proposed the nursing program "compensate[d] for discrimination against women . . . ." Id. at 727.

\(^{55}\) Id. at 727.

\(^{56}\) Id. at 729.

\(^{57}\) Id.

\(^{58}\) Id. at 731.

\(^{59}\) See \textit{Levit, supra} note 45, at 459 ("The Hogan Court expressly declined to determine whether single-sex education itself was unconstitutional; the Court limited its holding to the narrow issue of whether an all-female admissions policy could operate as an affirmative action program at a nursing school.").

\(^{60}\) \textit{Salomone, supra} note 8, at 152 (noting that courts two decades earlier forced the Commonwealth to admit women into the University of Virginia, one of the premier institutions in the Commonwealth).


\(^{62}\) Id.

\(^{63}\) Id. at 187.

\(^{64}\) Id.

\(^{65}\) See \textit{Levit, supra} note 45, at 456 (stating that after finding a violation of the Fourteenth Amendment's guarantees of equal protection, the "Court decided the case without the benefit of heightened scrutiny").
recognized women could not be given an equal experience in any other location in the Commonwealth.\textsuperscript{66} Within the opinion, the judges explicitly noted they were “urged to go further” than just opening the admissions policies of the University of Virginia.\textsuperscript{67} The district court knew the Commonwealth operated VMI under similar practices, but refused to clarify whether it too would be coeducational under the constitution’s grant of equal protection.\textsuperscript{68} The district court, pondering VMI, wondered if “women [were] to be admitted on an equal basis, . . . [were] they to wear uniforms and [be] taught to bear arms?”\textsuperscript{69} The Supreme Court would tackle this lingering question\textsuperscript{70} in \textit{United States v. Virginia}, when the Commonwealth’s continued experiment with single-sex education would again become the focus of litigation.

\section*{IV. Articulating the Current Standard: \textit{United States v. Virginia}}

Almost fifteen years after \textit{Hogan} and more than twenty years after \textit{Kirsten}, litigation forced the Commonwealth to consider single-sex education at VMI.\textsuperscript{71} \textit{United States v. Virginia} originated from a suit “filed on behalf of an unnamed woman, who, upon graduation from a Northern Virginia high school was denied admission” to VMI.\textsuperscript{72} The suit argued that the male-only admission policy violated the Civil Rights Act and the Fourteenth Amendment.\textsuperscript{73} The Department of Justice sought to force the state–supported college\textsuperscript{74} to open its doors to women by “enjoining VMI to consider females as applicants to its undergraduate program.”\textsuperscript{75} The resulting litigation sought to eviscerate a long history of female exclusion from Virginia’s military

\begin{footnotes}
\footnotetext[66]{See William Henry Hurd, \textit{Gone With the Wind? VMI’s Loss and the Future of Single-Sex Public Education}, 4 DUKE J. GENDER L. \& POL’Y 27, 54 (1997) (“The Court went on to describe those opportunities uniquely available in Charlottesville in terms of two factors — curriculum and prestige . . . .”)(internal citation omitted).}
\footnotetext[67]{Kirstein v. University of Virginia, 309 F. Supp. 184, 187 (1970).}
\footnotetext[68]{Id.}
\footnotetext[69]{Id.}
\footnotetext[70]{See Levit, supra note 45, at 456 (“One of the court’s primary concerns was the effect such a broad ruling would have on Virginia’s military institution. This question had to wait twenty-six years for an answer in the VMI litigation.”).}
\footnotetext[71]{Salomone, supra note 8, at 150 (noting that “similar to \textit{Hogan}, [Virginia] arrived cloaked in a set of facts that bore but a bare resemblance to current single-sex initiatives”).}
\footnotetext[72]{Frank Wolfe, \textit{U.S. Fights Wilder on VMI Motion}, WASH. TIMES, May 1, 1990, at B3.}
\footnotetext[73]{Id.}
\footnotetext[74]{Peter Baker, \textit{U.S. Files Its VMI Lawsuit: Action Seeks to Force Admission of Women}, WASH. POST, Mar. 2, 1990, at C1.}
\end{footnotes}
institutions; it also had major implications for single-sex education across the nation. The trial lasted six days with expert witnesses testifying on behalf of both parties. Ultimately the district court ruled in favor of VMI, finding classifications based on sex must be coupled with an exceedingly persuasive justification. The district court noted single-sex education "yields substantial benefits." By maintaining the the status quo at VMI, the Commonwealth added diversity to "an otherwise coeducational system." Finally, the district court noted this "diversity was enhanced" by the adversarial instructional methods employed at VMI. This "distinctive method" would be destroyed by the admittance of women. In the eyes of the district court, the Commonwealth had provided sufficient justification to pass constitutional muster; the district court allowed it to continue denying women admission to the Institute.

The Court of Appeals for the Fourth Circuit reversed, noting the Commonwealth did not put forth sufficient justification to maintain the program. On remand, the Commonwealth had to design an appropriate remedy. The Commonwealth was given three options: "admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution." The Commonwealth took the remedial approach rather than abandoning state support and started a second program designed exclusively for women. Despite purporting to produce citizen soldiers, the program differed drastically from VMI in "academic offerings, methods of education, and financial resources." Further, the program was located on the campus of a private women's college, Mary Baldwin College, located in a different town. The Commonwealth brought this remedial approach to the district court,

77. Id. at 523.
78. Id. at 524.
79. Id.
80. Id.
81. Id.
82. Id.
84. Id.
85. Id. at 525–26.
86. Id. at 526
87. Id.; see also Simson, supra note 40, at 445 ("The program was almost laughably unequal to VMI, more resembling a finishing school than the grueling, physically and mentally exhausting program of VMI. In a concurring opinion, Chief Justice Rehnquist characterized the program as 'distinctly inferior.'") (internal citation omitted).
89. Id.
which approved the plan. A divided panel of the Fourth Circuit affirmed, setting the stage for the Supreme Court’s intervention.91

The United States Supreme Court faced two issues: did the Commonwealth’s practice of excluding women from VMI violate equal protection92 and if so, what remedy it grant?93 Justice Ginsburg, writing for the Court, indicated a reviewing court must determine “whether the proffered justification is exceedingly persuasive.”94 Meeting this heavy burden, Justice Ginsburg noted, “rest[ed] entirely on the state.”95 The Commonwealth’s justification had to be “genuine, not hypothesized or invented” when the threat of litigation arose.96 Instead the justification had to be specific, rather than relying on “overbroad generalizations about the different talents, capacities, or preferences” of the genders.97 Inherent differences between the sexes were for celebrating, Justice Ginsburg noted, not for “denigration of the members of either sex.”98 These classifications could be used to “compensate women”99 for past wrongs but not to “create or perpetuate the legal, social, and economic inferiority of women.”100

In applying the new standard, the Court held the Commonwealth did not establish an exceedingly persuasive justification for denying women the opportunity to study at VMI.101 The remedy constructed by the Commonwealth did “not cure the constitutional violation.”102 The Court held that “women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth’s obligation to afford them genuinely equal protection.”103 As a result the Court commanded VMI to open its doors to female cadets.104 The

90. Id. at 528.
91. Id.
92. Id. at 530–31.
93. Id.
95. Id. (requiring the State to 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”) (internal citations omitted).
96. Id.
97. Id. (“Supposed ‘inherent differences’ are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring . . .”) (internal citations omitted).
98. Id.
99. Id.
101. Id.
102. Id.
103. Id. at 557.
104. Id. at 558; see also SALOMONE, supra note 8, at 162–63 (“The Court . . . stopped short of renouncing all gender-based classifications, leaving open the door to single-sex schools under certain conditions.”); Morgan, supra note 5, at 458–59 (stating the Court
Commonwealth's 150 year experiment with a single-sex military academy for men ended the next school year as VMI prepared to admit women into its classes.105

V. JUSTICE SCALIA'S DISSERT: PREDICTING THE DEATH OF SINGLE-SEX EDUCATION

As the sole dissenter in Virginia, Justice Scalia argued that the Court's decision "ensure[d] that single-sex education is functionally dead."106 The majority, Justice Scalia reasoned, ensured all forms of "single sex public education [would be] unconstitutional."107 The Court, he argued, "created the illusion that government officials in some future case [would] have a clear shot at justifying some sort of single–sex public education."108 In Justice Scalia's opinion, the majority's reasoning in Virginia left the door open for further challenges to single sex education. The opinion, he thought, left single-sex schools vulnerable to attack and potential extinction.109

Virginia clarified the Court's constitutional standard as it related to single–sex education in higher education;110 it did not fatally impact America's experiment with single–sex education.111

VI. A NEW GENERATION OF SINGLE-SEX EDUCATIONAL INITIATIVES

The No Child Left Behind Act of 2001112 authorizes creativity in solving the nation's educational troubles, including the allowance for "single-gender schools and classrooms."113 These regulations encompass the Supreme Court's recent precedents, providing that once a recipient of federal funds decides to establish a single-sex classroom or institution, it must offer a "substantially equal" opportunity for the
other sex. In determining whether the opportunity is "substantially equal" the Department of Education will consider the "aggregate benefits provided by each school as a whole."

School districts, under No Child Left Behind, are creating a new generation of single-sex schools and classrooms. These classrooms attempt to target students who will benefit the most from separating the sexes. The same justifications traditionally proffered for single-sex education do not apply to the Act's new single-sex initiatives. Old justifications tend to "steer students to traditional gender roles."

The new programs established under the Act cannot implicate any historic inferiorities between the sexes to withstand constitutional scrutiny. Instead, the new programs cater to the educational requirements of each sex. The single-sex initiatives should seek to establish equality between the sexes, rather than play into negative stereotypes. In particular, separate classrooms for women cannot be "based on stereotypes about girls' underachievement."

The No Child Left Behind Act allows school districts to experiment with new learning techniques, backed by federal funding, in the hopes that America's educational system will improve. The

114. Id.
115. 34 C.F.R. § 134 (c)(3)(ii). The factors include:
   [t]he policies and criteria of admission; the educational benefits provided, including the quality, range, and content of curriculum and other services and quality and availability of books, instructional materials, and technology; the quality and range of extra-curricular offerings; the qualifications of faculty and staff; geographic accessibility; and the quality, accessibility and availability of facilities and resources.

Id.

116. See Morgan, supra note 5, at 383 (stating this "new generation of single-sex schools and programs is more likely to satisfy" constitutional scrutiny. Advocates "of those schools are more likely to try to match their use of a single-sex pedagogy to a specific educational goal and to be able to demonstrate that the pedagogy actually helps achieve that goal").
117. See Karen Stabiner, Single Sex Schools Deserve Support, in EDUCATION: OPPOSING VIEWPOINTS 98 (Mary E. Williams et al. eds., 2005) (noting that without public single-sex educational opportunities, indigent students, standing to gain the most from single-sex environments, could not afford the benefits offered by single-sex private schools).
119. See Morgan, supra note 5, at 396.
120. See SALOMONE, supra note 8, at 177.
121. Id.
122. Id.
123. Id.
124. Erin L. Logsden, "No Child Left Behind" and the Promotion of Single-Sex Education in Primary and Secondary Schools: Shattering the Glass Ceilings Perpetuated by Coeducation, 32 J.L. & EDUC. 291, 293 (2003) (stating that the No Child Left Behind Act "enables America's public schools to receive record levels of funding from the federal government, and creates unprecedented levels of accountability to ensure that those funds
provisions included in the Act help ensure all students, regardless of their economic background, may be afforded the ability to partake in single-sex learning environments.\textsuperscript{125} Parents can enroll their children in single-sex classrooms in public schools, without having to pay private tuition.\textsuperscript{126} In order to improve public education in America, the No Child Left Behind Act created a dramatic new choice.\textsuperscript{127}

VII. EXCEEDINGLY PERSUASIVE JUSTIFICATION

The Court in \textit{Virginia} articulated a standard that called for an exceedingly persuasive justification for separation of the sexes in a public education setting.\textsuperscript{128} Any school system attempting to promulgate single-sex education would have to provide an exceedingly persuasive justification for the program.\textsuperscript{129}

Inherent differences between the sexes are often offered as a justification for separating the sexes.\textsuperscript{130} Generally, the “most prevalent
justification for single-sex education is the supposed difference between boys' and girls' learning styles."\textsuperscript{131} The learning distinction between genders was a justification considered by the Court in Virginia. The Commonwealth "relied on theories put forward by such scholars as Carol Gilligan on the difference in rational styles and psychological development between men and women."\textsuperscript{132} The Court was ultimately not "persuaded that the need to address these differences represented an interest important enough in itself to justify sex segregation."\textsuperscript{133} In order to meet this standard, it might be necessary for a school district to provide empirical evidence. Numerous research studies create a distinction between the learning styles of the sexes, but many experts have questioned these conclusions.\textsuperscript{134} An exceedingly persuasive justification could be found in "improving academic achievement generally."\textsuperscript{135} The fit between the means and the ends would have to be tight though, as "the most difficult hurdle facing supporters of single-sex education is to establish a causal relationship between single-sex schools and educational improvement."\textsuperscript{136}

Another potential justification revolves around remedial measures. The Court in Virginia stated that if the State sought "to compensate women for particular economic disabilities they have suffered," remedial measures might be justified under the Constitution.\textsuperscript{137} In secondary schools, empirical evidence suggests a "gap in academic achievement and self-esteem between girls and boys in science and math" based on years of women not being pushed to succeed in those subjects.\textsuperscript{138} It seems likely that separate classrooms for girls in math and sciences would be held to be constitutional, so long as they were substantially equal to those offered to boys.\textsuperscript{139}

\textsuperscript{131} See Sherwin, supra note 13, at 57; see also Patricia B. Campbell & Ellen Wahl, Of Two Minds: Single-Sex Education and The Search for Gender Equality in K-12 Public Schooling, 14 N.Y. L. SCH. J. HUM. RTS. 289, 293 (noting a rekindled interest in single sex schools, especially for girls, "fueled by research and reports that schools 'shortchange' girls").
\textsuperscript{132} See Sherwin, supra note 13, at 57.
\textsuperscript{133} Id.
\textsuperscript{134} Campbell & Wahl, supra note 131, at 308 ([I]t [is] clear that significant variables [have] not been addressed or examined in depth, and that well constructed research studies could modify this conclusion.).
\textsuperscript{135} Sherwin, supra note 13, at 59.
\textsuperscript{136} Id. at 61.
\textsuperscript{138} Sherwin, supra note 13, at 59.
\textsuperscript{139} See Carolyn B. Ramsey, Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools, 8 TEX. J. WOMEN & L. 1, 7 (1998) (stating "girls-only math classes should not run afoul of the law as long as they are optional and substantially equal to those offered to boys"); see also Amy Nemko, Single-Sex Public Education After VMI: The Case for Women's Schools, 21 HARV.
The non-remedial justification of "increasing educational options" for American students could also be raised.\textsuperscript{140} The Commonwealth raised this justification in \textit{United States v. Virginia}, but the Court rejected this argument.\textsuperscript{141} The Court did not rule out the possibility that it could never be "regarded as an important government interest; this leaves open the possibility that such a justification might be more successful in a less extreme context than that presented in VMI."\textsuperscript{142} No matter what reasoning is raised, the burden of establishing an exceedingly persuasive justification will be a difficult one to bear.\textsuperscript{143} The Commonwealth of Virginia would have to be explicit about its exceedingly persuasive justification for single-sex education.\textsuperscript{144} Likely, the Commonwealth will have to present empirical evidence of the benefits of separating the sexes during certain classes.\textsuperscript{145}

\textbf{VIII. PERPETUATING INFERIORITY}

The burden still rests on the State to prove a genuine justification that is not based on overbroad generalizations about the capacities of the genders.\textsuperscript{146} Further, they cannot create or perpetuate the inferiority of women.\textsuperscript{147} The justifications proffered will pass a court's inquiry "as long as they are voluntary, educationally beneficial, allow alternatives to traditional gender identities and roles and do not harm women's economic or political status."\textsuperscript{148} Interestingly enough, scholars have suggested separate classes for women in math may also be "based on stereotypes about girls' underachievement" in those subjects.\textsuperscript{149} It is possible that single-sex classes could impact the second prong set forth in \textit{United States v. Virginia}.\textsuperscript{150}

\textsuperscript{140.} Sherwin, \textit{supra} note 13, at 62.
\textsuperscript{141.} Land, \textit{supra} note 11, at 318 (noting that educational diversity in state-supported educational opportunities failed in the VMI case because the Commonwealth only offered single-sex schools for men and VMI was not chartered for educational diversity).
\textsuperscript{142.} \textit{Id.}
\textsuperscript{143.} \textit{Id.} ("[E]ach of the justifications presents its own set of challenges. . . . the constitutional foundation supporting single-sex schools is hardly firm."); \textit{see also} Otto, \textit{supra} note 118, at 357 ("In order to survive, a single sex school must first of all be founded for a compelling reason that is related to the exclusion of one sex.").
\textsuperscript{144.} \textit{See} Morgan, \textit{supra} note 5, at 418 (noting that schools established under the current evolution of justifications for single-sex education will likely survive intermediate scrutiny).
\textsuperscript{145.} \textit{Id.} at 420.
\textsuperscript{146.} \textit{See} SALOMONE, \textit{supra} note 8, at 177.
\textsuperscript{147.} \textit{Id.}
\textsuperscript{148.} \textit{See} Morgan, \textit{supra} note 5, at 427.
\textsuperscript{149.} \textit{Id.}
\textsuperscript{150.} SALOMONE, \textit{supra} note 8, at 177.
IX. THE STATUTORY STANDARD: TITLE IX

In addition to the constitutional context, public schools must adhere to Title IX.\textsuperscript{151} Title IX of the 1964 Civil Rights Act passed in 1972 states “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”\textsuperscript{152} This provision may be “viewed as the culmination of the long struggle for educational equality for girls in this country.”\textsuperscript{153} This statutory standard must be met in order for a public school system to maintain its federal funding.\textsuperscript{154}

All state educational systems receive some form of federal funding,\textsuperscript{155} and Title IX “paints a more complete version of equality than the Equal Protection Clause.”\textsuperscript{156} Notably, it does not apply to admissions in non-vocational elementary and secondary schools.\textsuperscript{157} Nor does it apply to gender-segregated activities such as “any Boys State conference or Girls State conference,” nor to “father-son or mother-daughter activities at an educational institution.”\textsuperscript{158} These gender-segregated activities can be maintained so long as “reasonably comparable activities” are provided for the excluded sex.\textsuperscript{159} Title IX’s vague framework makes it possible for a school district to offer single sex classes, so long as they are “reasonably comparable” to those offered for the opposite sex.\textsuperscript{160} The Department of Education determines, using a variety of factors, whether the educational opportunity

\begin{footnotesize}
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\item 151. 20 U.S. C. §1681(a) (Supp. IV 2005).
\item 152. Id.
\item 153. See Sherwin, supra note 13, at 53 (“[Title IX is] [b]est known for its application to the arena of women’s athletic programs. . . . By conditioning federal funding on a discrimination-free educational environment, the statute promised to be a powerful tool for proponents of educational equity.”).
\item 154. See Salomone, supra note 8, at 171 (stating that “from the legislative language and subsequent history of Title IX, we can reasonably conclude that neither the statute nor the regulations cover the admissions policies of public elementary and secondary schools”).
\item 158. Id. § 1681 (a)(8); see also Salomone, supra note 8, at 171 (stating these “narrow exceptions [to Title IX] do not cover any of the core academic subjects, such as math and science, or computers, all of which have been the focal point of recent single-sex class initiatives for girls”).
\item 159. Id. at § 1681 (a)(8).
\end{itemize}
\end{footnotesize}
afforded to one sex is equal to that offered to the opposite sex. Any school district in the Commonwealth will have to abide not only by the framework of the Constitution but also to the statutory standards set out in Title IX.

X. APPLYING THE STANDARD: THE COMMONWEALTH'S SINGLE-SEX CLASSROOMS

The Code of Virginia mandates that "consistent with constitutional principles, a school board may establish single-sex classes in public schools of the school division." Many school districts in the Commonwealth currently separate out the sexes for physical education and sexual education classes. In addition, six school districts in the Commonwealth are now offering single-sex classes for elementary school students in math and science.

Ironically, the first secondary school in the Commonwealth to offer single-sex classes, Bailey Bridge Middle School, did not intend to create single-sex classes for its six graders. A random assignment of students to sixth grade classes resulted in several single-sex classes in subjects other than physical education. Ultimately, the school decided to keep the classes and continued to offer single-sex classes. Academic improvement increased among the students and discipline issues declined.

Bailey Bridge's mission statement

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161. Id. at 2042.
162. VA. CODE ANN. § 22.1-212.1:1 (2005). Note that the Virginia Constitution affords no greater equal protection rights than the United States Constitution. See Archer v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (Va. 1973) (indicating the Virginia constitution "is no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States").
164. National Association for Single Sex Public Education, supra note 3 (noting that the schools currently offering single-sex classes in the core academic subjects are: Bailey Bridge Middle School, Henderson Middle School, Williamsburg Middle School, Achievable Dream Academy in Newport News, Spratley Middle School, and Patrick Henry Elementary School).
165. ONLINE NEWS HOUR: Separate Classrooms (PBS television broadcast May 19, 2003), available at http://www.pbs.org/newshour/bb/education/jan-june03/classrooms_05-19.html ("A glitch in the school's computer system resulted in a random assignment of 98 percent girls to one section of the sixth grade and 98 percent to another, leaving three sections, or teams, as they're known — coed.").
166. Id.
167. Id. (stating that at times schools must be "unorthodox in the way that you go about doing things for children," and noting that "if single-gender grouping for some children will make them the leaders of tomorrow, I'm all for it . . .").
indicates it hopes to "work in partnership with students, families, and the community to ensure the success of each student."  

In 2003, the Achievable Dream Academy in Newport News and Henderson Middle School in Richmond began offering single-sex classes. The Achievable Dream Academy at Dunbar-Erwin initially offered a single-sex class for girls in math and science. Later, the principal created a girl's only class for all subjects. These classes supplemented the school's mission of "provid[ing] a unique [and] challenging disciplined academic environment" for its students. Henderson Middle School in Richmond offers single-sex sixth and seventh grade classes in the core subjects. The students are separated for the core subjects, "while lunch, electives, and physical education remain coeducational." Spratley Middle School in Hampton Roads and Cedar Lee Middle School in Bealeton both offer single-sex classes for eighth graders. Cedar Lee separates the sexes for English classes, rather than science and math classes. Williamsburg Middle School in Arlington offers a "girl's only science" class. Patrick Henry Middle School in Richmond offers third through fifth grade "boys only" classes.

Several of the Commonwealth's programs have flaws that could open them up to constitutional challenges. Bailey Bridge Middle School did not intend to offer single-sex classes, and any challenge to the school's plan might be able to establish a disingenuous purpose. Offering single-sex classes in English instead of subjects that traditionally disadvantage women may not be able to establish that the program meets an exceedingly persuasive justification. None of the programs rely on remedial justifications. Instead, they all rely heavily on the different learning styles between the sexes. The question remains whether a court will find this a compelling state interest—one that can pass constitutional muster.

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171. Id.
172. Id.
175. Id.
176. Id.
177. Id.
178. Id.
179. Id.
Conclusion

School districts in the Commonwealth, offering single-sex education opportunities, must do so under the genuine auspices of providing the best academic environment possible for their students. The objective of these single-sex initiatives must be clearly defined against the backdrop of United States v. Virginia.180

The standard articulated in Virginia sought to remedy years of discrimination against women.181 Equal protection analysis under Virginia clarified that the Commonwealth must put forth a justification that is both genuine and exceedingly persuasive in order to withstand constitutional scrutiny.182 This justification must not be based on stereotypical assumptions about the sexes.

As the Court stated in Virginia, single-sex education offers pedagogical benefits to some students.183 The No Child Left Behind Act recognizes single-sex education as a useful pedagogical tool and seeks to encourage its implementation in classrooms across the country. Parents should be afforded the choice for the learning environment that best suits their children.

School districts in the Commonwealth seeking to offer single-sex educational environments must fulfill their constitutional obligations under the Equal Protection Clause. The new generation of single-sex initiatives in the Commonwealth seeks to enhance the academic performance of students by catering to each individual student's learning style. This seems to be a compelling and genuine state interest. These programs do not seek to play into the stereotypical assumptions about the capabilities of the genders. Therefore, the Commonwealth's pursuit of single-sex education should be able to withstand a court's constitutional scrutiny.

Justice Ginsberg, writing for the majority, noted that Justice Scalia's dissent saw "fire where there was no flame." Nearly ten years after the Court's opinion in Virginia, the Commonwealth continues to put forth single-sex opportunities. Despite all predictions, single-sex education is not dead but continues to thrive and maintains its constitutionality under the standards articulated in Virginia.

Frances Elizabeth Burgin*

181. Id. at 523 ("Through a century plus three decades and more of that history, women did not count among voters composing 'We the people.'").
182. Id.
183. Id. at 564 (emphasis added).
184. Id. at 535 n.8.

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