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Recommended Citation

Gary J. Simson, *Separate but Equal and Single-Sex Schools*, 90 Cornell L. Rev. 443 (2005)
Available at: <http://scholarship.law.cornell.edu/clr/vol90/iss2/7>

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SEPARATE BUT EQUAL AND SINGLE-SEX SCHOOLS

Gary J. Simson†

INTRODUCTION

At the close of his opinion for a unanimous Court, Chief Justice Warren wrote in *Brown v. Board of Education*¹: “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”² Though laid down in the context of public educational facilities separated on the basis of race, does the principle that separate is inherently unequal also apply to public educational facilities separated by sex?

The Supreme Court has yet to resolve the issue, but about twenty years after *Brown*, the U.S. Court of Appeals for the Third Circuit did.³ The Philadelphia School District had numerous high schools. However, its two most competitive and prestigious were Central High School, which admitted only boys, and Philadelphia High School for Girls, which was limited to girls. Susan Vorchheimer, an honors graduate of a Philadelphia junior high school, applied for admission to Central but was denied on the basis of her sex. Claiming a violation of the Equal Protection Clause, Vorchheimer succeeded in persuading the lower court to order her admission to Central, but a divided three-judge panel of the Third Circuit reversed.

Like the Supreme Court in the pre-*Brown* era,⁴ the panel majority in *Vorchheimer v. Philadelphia School District*⁵ focused on courses, facilities, faculty, and other measures of educational quality to determine whether the two single-sex high schools were essentially equal.⁶ One might suppose that the names of the schools alone were enough to

† Professor of Law, Cornell Law School. This Article is based on my remarks at the Cornell Law Review’s February 2004 conference, “Revisiting *Brown v. Board of Education*.” I am grateful to Susan Hensler and Seojung Park for research assistance. I also thank Risa Lieberwitz, Trevor Morrison, Steve Shiffrin, Erika Sussman, and especially Rosalind Simson for comments and encouragement.

¹ 347 U.S. 483 (1954).

² *Id.* at 495.

³ *Vorchheimer v. Phila. Sch. Dist.*, 532 F.2d 880 (3d Cir. 1976), *aff’d by an equally divided Court*, 430 U.S. 703 (1977) (per curiam).

⁴ See *Sweatt v. Painter*, 339 U.S. 629 (1950) (comparing racially separate state law schools and finding them unequal).

⁵ 532 F.2d 880 (3d Cir. 1976).

⁶ *Id.* at 881–83.

arouse some suspicion of inequality: the "central" school was for boys, while the presumably less central school was simply labeled as for girls. In examining the schools, the majority did acknowledge one aspect of inequality by noting that Central's science facilities were "superior."⁷ The court's conclusion, however, was that in this instance separate was essentially equal, and it rejected the plaintiff's constitutional claim.⁸

Judge Gibbons wrote an impassioned dissent. He maintained that the majority had failed to respect the lessons of *Brown*. "I was under the impression," he wrote, "that 'separate but equal' analysis, especially in the field of public education, passed from the fourteenth amendment jurisprudential scene over 20 years ago."⁹ Gibbons even went so far as to tacitly accuse the majority of the sort of insensitivity shown by the Supreme Court in 1896 in *Plessy v. Ferguson*,¹⁰ when it laid down the separate but equal doctrine and found it satisfied in the context of separate railroad cars for white and black passengers. Quoting from the Court's opinion in *Plessy* but substituting in brackets "sex" for "race," "male" for "white," and "female" for "colored," Gibbons summarized as follows the majority's approach in upholding Philadelphia's two single-sex high schools:

The object of the [14th] Amendment was undoubtedly to enforce the . . . equality of the two [sexes] before the law, but in the nature of things it could not have been intended to abolish distinctions based upon [sex], or to enforce social, as distinguished from political equality, or a commingling of the two [sexes] upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact with each other do not necessarily imply the inferiority of either [sex] to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for [male] and [female] children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of [women] have been longest and most earnestly enforced.¹¹

The Supreme Court accepted the *Vorchheimer* case for review. However, with then-Justice Rehnquist not participating, the Court divided 4-4, with the result that it affirmed the decision below without written opinion.¹²

⁷ *Id.* at 882.

⁸ *Id.* at 887-88.

⁹ *Id.* at 888 (Gibbons, J., dissenting).

¹⁰ 163 U.S. 537 (1896).

¹¹ *Vorchheimer*, 532 F.2d at 888 (Gibbons, J., dissenting).

¹² *Vorchheimer v. Phila. Sch. Dist.*, 430 U.S. 703 (1977) (per curiam).

Several years later in *Mississippi University for Women v. Hogan*,¹³ the Supreme Court addressed the constitutionality of public single-sex schools but in a context presenting a much simpler legal issue. Mississippi had a state nursing school that limited admissions to women. Joe Hogan, who lived in the city where the school was located, applied for admission but was denied on the basis of his sex. Although Mississippi did offer coed nursing programs at other locations in the state, none was within reasonable commuting distance for Hogan,¹⁴ and he brought suit seeking admission to the all-female school as a matter of equal protection.

Unlike *Vorchheimer*, unequal treatment on the basis of sex was apparent in *Hogan* on the face of the system, and the Supreme Court struck down the school's women-only admissions policy. Writing for the Court, Justice O'Connor acknowledged that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."¹⁵ She concluded, however, that in this instance, "[r]ather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."¹⁶

More recently, in *United States v. Virginia*¹⁷—the Virginia Military Institute (VMI) case—the Supreme Court returned to the problem of public single-sex schools in a factual context presenting a legal question somewhat more complex than the one in the Mississippi case but again substantially less complex than the one in *Vorchheimer*. In and of itself, VMI's male-only admissions policy presented an issue mirroring the one in *Hogan*. As in *Hogan*, unequal treatment on the basis of sex was apparent on the face of the system. In response to federal district and appellate court rulings in the case at hand, however, Virginia had proposed a coordinate program for women—the Virginia Women's Institute for Leadership.

In analyzing the adequacy of this proposed program to remedy the constitutional violation presented by VMI standing alone, Justice Ginsburg's opinion for the Court brought separate but equal doctrine into play.¹⁸ The proposed program, though, hardly posed a sufficiently close question in this regard to require the Court to address the ultimate question of whether sexually separate schools, like ra-

¹³ 458 U.S. 718 (1982).

¹⁴ *Id.* at 723 n.8.

¹⁵ *Id.* at 728.

¹⁶ *Id.* at 729.

¹⁷ 518 U.S. 515 (1996).

¹⁸ *Id.* at 546–54.

cially separate schools, are inherently unequal.¹⁹ 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.”²⁰ In light of his distinct lack of receptivity over the years to claims of unconstitutional sex discrimination,²¹ if he was persuaded of inequality, there should be no question that it existed.

In this Article I will consider whether coordinate public single-sex schools, such as those reviewed in *Vorchheimer*, should meet the same fate under the Equal Protection Clause as the racially segregated schools in *Brown*. After suggesting that the fate of coordinate single-sex schools should be seen as intimately tied to whether they disadvantage girls, I consider the constitutionality of public single-sex education when it takes a form that on its face quite overtly advantages girls: girls are allowed to choose between a coed public school and a single-sex one, while boys can only attend a coed public school. Whether or not coordinate single-sex schools and all-girls schools with no male counterpart can survive equal protection review is a difficult and complex question, and I will not try to provide a definite answer here. Instead, my principal objective will be to provide a framework for answering that question by separating out various issues central to resolving it. The validity of public single-sex schools under federal statutory law—in particular, Title IX of the 1972 Education Amendments and its accompanying regulations²²—is an important and interesting question as well. In keeping, however, with the focus of this symposium on

¹⁹ In a footnote Justice Ginsburg pointed out that “[s]everal amici have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity.” *Id.* at 534 n.7. Underlining the Court’s focus in the case at hand on the peculiar fact situation presented by VMI, Justice Ginsburg stated that “[w]e do not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities.” *Id.*

²⁰ *Id.* at 566 (Rehnquist, C.J., concurring).

²¹ See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 154–56 (1994) (Rehnquist, C.J., dissenting); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 735–46 (1982) (Powell, J., joined by Rehnquist, J., dissenting); *Stanton v. Stanton*, 421 U.S. 7, 18–20 (1975) (Rehnquist, J., dissenting); *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting).

²² Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. 1681(a) (2001). Implementing regulations were issued in 1975, see 34 C.F.R. § 106.34 (2003), and major revisions were proposed in 2004, see 69 Fed. Reg. 11276 (proposed Mar. 9, 2004). For discussion of the statute and regulations, see the Department of Education’s commentary in support of the proposed revisions, *id.* at 11276–85, and the National Women’s Law Center’s memorandum letter of April 22, 2004, opposing the proposed revisions, <http://www.nwlc.org/pdf/FinalSingleSexComments>.

Brown, a constitutional decision, I will limit my discussion to the question of constitutionality.

Before turning to the constitutional analysis, I should underline its contemporary significance. For a variety of reasons, including cost-savings and a belief by many that coeducation best serves children's intellectual and social development, coed public schools have vastly outnumbered single-sex ones in the United States for more than a century.²³ Moreover, although there were still a significant, though relatively small, number of single-sex public schools fifty years ago—virtually all concentrated in major cities—those schools almost all became coed or closed in the 1970s and 1980s, with actual or potential challenges under the Equal Protection Clause and Title IX playing an important role.²⁴ Spurred on, however, by reports such as the American Association of University Women's *How Schools Shortchange Girls*²⁵ as well as articles in the popular press about gender bias in the schools,²⁶ public single-sex schools began to make a comeback in the early 1990s.²⁷ In addition, in the past few years, the Bush Administra-

²³ See CAROLE B. SHMURAK, VOICES OF HOPE: ADOLESCENT GIRLS AT SINGLE SEX AND COEDUCATIONAL SCHOOLS 5–7 (1998).

²⁴ See ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 7–8, 67–70; SHMURAK, *supra* note 23, at 6–7.

²⁵ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS: A STUDY OF MAJOR FINDINGS ON GIRLS AND EDUCATION (1992). This report is discussed further *infra* at text accompanying notes 71–77, 82–83.

²⁶ See, e.g., Barbara Kantrowitz, *Sexism in the Schoolhouse*, NEWSWEEK, Feb. 24, 1992, at 62.

²⁷ See SHMURAK, *supra* note 23, at 8; Kristen J. Cerven, Note, *Single-Sex Education: Promoting Equality or an Unconstitutional Divide?*, 2002 U. ILL. L. REV. 699, 700–01. The National Association for Single-Sex Public Education stated in 2004:

Ten years ago, only three public schools in the United States offered single-sex educational opportunities. Right now (spring 2004), there are at least 97 public schools in the United States offering some form of single-sex education. . . . [There are] 25 single-sex public schools currently in operation . . . [and] 72 other public schools offering single-gender classrooms in otherwise coed schools.

<http://www.singlesexschools.org/schools.html>. (The organization defines a “single-sex school” as “a public school in which at least one grade has *only* single-sex classes.” See *id.*) The constitutional issue presented by the phenomenon, noted above, of single-sex classes in coed schools may vary considerably depending on whether the sex-segregated classes are ones in, for example, math or health. Although it is beyond the scope of this Article to address the constitutionality of such classes, the framework that the Article provides for analyzing the constitutionality of single-sex schools has substantial applicability.

Almost all of the twenty-five single-sex schools listed and described at the above website are either coordinate single-sex schools or all-girls schools with no male counterpart. A few, however, are all-boys schools with no female counterpart, and the website indicates that a few more of that variety will be opening soon. Although such schools might appear to be obviously unconstitutional under *United States v. Virginia*, discussed *supra*, the issue of constitutionality is complicated by the fact that virtually all such schools are not simply designed to advantage boys as a general group. Instead, they target African-American boys based on a perceived crisis among such youths, particularly in urban areas, with regard to involvement in criminal activity, incarceration, dropping out of school, and other serious

tion has added momentum to this development by supporting legislation that authorizes special federal funding for public single-sex schools²⁸ and by proposing amendments to Title IX regulations to remove possible legal impediments to establishing such schools.²⁹

I

VORCHHEIMER REVISITED: THE CASE OF COORDINATE SINGLE-SEX SCHOOLS

As in *Sweatt v. Painter*,³⁰ the pre-*Brown* decision finding inequality between the University of Texas School of Law and a law school created by Texas for black students, inequality of coordinate single-sex schools may be clear from measures such as variety of courses, types of facilities, faculty quality, and alumni network. As discussed above,³¹ the Third Circuit in *Vorchheimer* found that the coordinate high schools under review there were essentially comparable. In a case involving the same two schools several years later, however, a Pennsylvania state court found significant differences that made the all-male school superior to the all-female one and ordered the admission of women to the all-male school.³² The court did not suggest that the schools had changed significantly since *Vorchheimer*, but rather basically took the view that the plaintiff's lawyers in *Vorchheimer* had been incompetent in not proving that significant differences existed at the time.³³

problems. For discussion of the constitutional issues raised, see *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991) (enjoining, on equal protection and other grounds, the opening in Detroit of three all-boys schools with a specialized Afrocentric curriculum); Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and Brown v. Board of Education*, 20 HASTINGS CONST. L.Q. 725 (1993); Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003 (1992); Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 5.

²⁸ See 20 U.S.C. 7215(a) (23) (Supp. 1 2003) (a provision of the No Child Left Behind Act of 2001 making federal funds available to local educational agencies for "innovative assistance programs," including "[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)").

²⁹ See 69 Fed. Reg. 11276 (proposed Mar. 9, 2004); *supra* note 22. It may be that the Administration's sponsorship of single-sex education is driven by a strong conviction of the special advantages presented by such schools. It does not seem unduly cynical, however, to suppose that it instead is based largely on a desire to provide political cover for other aspects of the Administration's campaign to expand the range of educational choices available to parents—in particular, the Administration's support of public funding of parental choice of religious schools. Nevertheless, whatever its motivations may be, the Administration's efforts in this regard have helped cement the practical significance today of the question of the constitutionality of single-sex schools.

³⁰ 339 U.S. 629 (1950).

³¹ See *supra* text accompanying notes 5–8.

³² *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682 (Ct. C.P. Phila. County 1983), *appeal quashed*, 478 A.2d 1352 (Pa. Super. Ct. 1984).

³³ *Id.* at 701–05.

In light of the history of public single-sex education in the United States, the ultimate finding of inequality between the two Philadelphia high schools should not have come as much of a surprise. As Professor Hasday has documented, at least until the middle of the last century, this history is hardly one generally characterized by equal respect for the abilities and ambitions of both sexes. Rather, it is one dominated by gender role stereotyping, with all-boys schools typically oriented to training for professional and economic success and all-girls schools commonly oriented to training to be wives and mothers and to fill certain low-paying, low-status jobs.³⁴

In finding substantial equality between the two Philadelphia schools, the panel majority in *Vorchheimer* dismissed any notion of stigma.³⁵ Quoting from *Plessy* and drawing on *Brown*,³⁶ Judge Gibbons in dissent seemed to regard injury of this sort as intrinsic in sex-segregated schools, much as the Court in *Brown* had found it intrinsic in schools segregated by race.³⁷ Does the state's past use of public single-sex schools to enforce and perpetuate gender role stereotypes make such injury likely today even if coordinate schools appear to be substantially equal in more tangible measures of equality?

Coordinate schools can be defended as enhancing the education of both girls and boys by freeing both from the distractions of the opposite sex during adolescence.³⁸ More broadly, they may be seen as providing an optimal environment for addressing the problems of gender bias that disadvantage girls in coed schools.³⁹ Nevertheless, against the backdrop of a long national history of separate but unequal single-sex schools and in a society in which gender stereotyping is

³⁴ See Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 795-801 (2002).

³⁵ See *Vorchheimer v. Phila. Sch. Dist.*, 532 F.2d 880, 882 (3d Cir. 1976) ("[Plaintiff] submitted no factual evidence that attendance at Girls High would constitute psychological or other injury."); see also *id.* at 886 ("The plaintiff has difficulty in establishing discrimination in the school board's policy. If there are benefits or detriments inherent in the system, they fall on both sexes in equal measure.").

³⁶ See *supra* text accompanying notes 9-11.

³⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

³⁸ See AMANDA DATNOW, LEA HUBBARD & ELISABETH WOODY, IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR? LESSONS FROM CALIFORNIA'S PILOT PROGRAM 54 (2001). As Datnow, Hubbard, and Woody observed:

[T]he belief that single gender arrangements would reduce distractions was a commonly held assumption throughout all the [coordinate] schools [in the California pilot program] and was echoed by administrators, teachers, and parents. Indeed, limiting interactions with the opposite sex served as the method by which each district hoped to address the problems unique to its student population. . . .

Id.

³⁹ See *id.* at 12-13 (discussing "contemporary rationales for single sex education").

hardly a thing of the past, do coordinate single-sex schools send a message that girls and boys are best kept separate because girls cannot compete effectively with boys? Or perhaps a message that sex-segregated schools are desirable to ensure that girls do not interfere with the more important education of boys? Are the girls at the all-girls school apt to internalize such messages and experience the type of "feeling of inferiority" that the Court in *Brown* found affected the "hearts and minds" of black schoolchildren in all-black schools?⁴⁰ Even if not, are boys apt to perceive such messages and to act upon them in the short- and long-run in ways that disadvantage girls and women? Even if the all-girls school is no less rigorous and competitive than the all-boys school, will the girls' accomplishments at their school be undervalued by college admissions officers, employers, and others because of preconceived notions about all-girls, as compared to all-boys, schools?⁴¹

In sorting through these and other possibilities, a crucial issue is whether the challenger or the state has the burden of proof on the issue of the existence of disadvantage on the basis of sex. The Supreme Court's discussion in *Brown* of the disadvantage to black schoolchildren may fairly be read to suggest that the Court's general suspicion of racial classifications carried over to the separate question of whether laws taking race into account, though not expressly disadvantaging one race or the other, in fact disadvantage the minority race.⁴² The Supreme Court regards sex classifications with less, but still substantial, suspicion.⁴³ Should such suspicion carry over to the

⁴⁰ *Brown*, 347 U.S. at 494.

⁴¹ With regard to the above possibilities, see DATNOW, HUBBARD & WOODY, *supra* note 38, at 7 (finding in a study of six sets of coordinate public single-sex schools established in California in the late 1990s that "[t]raditional gender stereotypes were often reinforced"); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 518 (1999). According to Levit:

[G]iven the history of sex segregation in American education, and the social and psychological messages that such sex exclusivity carries, it is difficult to believe that state sponsorship of sex segregation can avoid imposing feelings of inferiority and superiority. The ideology of separatism—even "voluntarily" chosen separatism—carries with it a stigma: the message of something problematic about the presence of the other sex.

Id. For a more sanguine view of coordinate schools, see Cerven, *supra* note 27, at 723–27.

⁴² See *Brown*, 347 U.S. at 493–95. The Court's various summary dispositions after *Brown* striking down without written opinion other types of racially separate public facilities lend support to this view. See, e.g., *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses).

⁴³ Although a four-Justice plurality opinion maintained in 1973 that sex classifications, like race classifications, are suspect, see *Frontiero v. Richardson*, 411 U.S. 677, 682–88 (1973) (plurality opinion), a majority several years later in *Craig v. Boren*, 429 U.S. 190 (1976), settled on treating sex classifications as essentially semi-suspect. Middle-tier scrutiny, rather than the strict scrutiny reserved for suspect classifications, would apply. Al-

question of whether laws taking sex into account, though not expressly disadvantaging one sex or the other, in fact disadvantage one sex—in particular, females, the group that historically has experienced disadvantage when government has classified on the basis of sex? More specifically, with regard to coordinate single-sex schools, should this suspicion shift the burden to the state to disprove stigma and other types of disadvantage to girls?

If no such disadvantage is found to exist, coordinate public single-sex schools easily pass constitutional muster. Although the state is obviously taking sex into account in establishing such schools, it is not treating anyone any better or worse on the basis of sex. No sex *classification* exists, and therefore the higher level of scrutiny triggered by sex classifications does not come into play.⁴⁴ Indeed, if no one is being disadvantaged relative to anyone else, the equal protection issue disappears. Although the state action in establishing single-sex schools could still be challenged under the Due Process Clause, such a challenge would clearly be fruitless. Nothing more than rational basis review would arguably apply, and a justification in terms of minimizing distractions would easily suffice to meet that very relaxed test.

If, however, disadvantage to girls is found to exist, the state is clearly classifying on the basis of sex, and middle-tier scrutiny applies. As described in *Craig v. Boren* in 1976, this calls for a substantial relation to an important interest.⁴⁵ As described in the VMI case, this means an “exceedingly persuasive” justification,⁴⁶ which seems to elevate the middle-tier closer to the upper, strict scrutiny tier used for race. In any event, whatever the precise ingredients of middle-tier scrutiny, it is dubious that the system of coordinate single-sex schools in question could survive such review.

First of all, coordinate single-sex schools almost certainly do not serve the goal of minimizing distractions with sufficient precision to meet middle-tier review. Most obviously, any notion that separating students by sex eliminates distractions fueled by students’ sexual attractions to one another overlooks those students who are gay, lesbian, or bisexual. In addition, single-sex schools offer special

though I believe a strong case can be made for treating sex classifications as suspect, I take as a given, for present purposes, the Court’s disposition of the matter in *Craig*.

⁴⁴ The majority in *Vorchheimer* did not seem to appreciate this implication of its finding that “[i]f there are benefits or detriments inherent in the system, they fall on both sexes in equal measure.” *Vorchheimer v. Phila. Sch. Dist.*, 532 F.2d 880, 886 (3d Cir. 1976). Having found no disadvantage on the basis of sex, the court nonetheless proceeded to address whether the system of separate schools satisfied the standard of review triggered by sex classifications. *See id.* at 887–88.

⁴⁵ 429 U.S. 190, 197 (1976).

⁴⁶ *United States v. Virginia*, 518 U.S. 515, 531 (1996).

distractions of their own. A recent study of six sets of coordinate schools in California pointed out various such distractions:

Many girls complained about noisy female peers, noting an increase in girls' talking in the single gender academies. In a sense, some girls took over the role of noisemaker, causing as much trouble as the boys typically did. Girls also experienced a new type of harassment with heightened competition around issues of popularity. Incidents of fighting among girls did not necessarily improve in single gender settings; where girls said they used to fight over boys in coed settings, they now fought over issues of friendship, gossiping about each other. Many boys noted a similar increase in teasing and disruptive behavior without the girls to act as a "buffer."⁴⁷

In short, although sex segregation may help minimize distractions somewhat, any claim of a substantial relation to that end or anything approaching an "exceedingly persuasive" justification seems quite strained.

Second, an attempt to defend coordinate single-sex schools in broader terms—as a means of achieving academic and developmental benefits for girls and boys that could not be achieved in coed schools—also seems destined to failure under middle-tier review. The evidence that public single-sex education in this country produces, and can be expected to produce, substantial benefits for girls and boys not available in a coed environment appears to be inconclusive at best. Because there have been so few single-sex public schools in the United States in recent years, studies have largely focused on single-sex Catholic schools, other private schools, and colleges in this country or single-sex public schools in other countries where they are more prevalent.⁴⁸ Drawing inferences for the U.S. public school context from data collected about non-public or non-U.S. schools or about colleges rather obviously lends itself to disagreement because of the need to control for significant variables and the difficulty of doing so.⁴⁹ In general, however, while older studies tend to suggest substantial benefits to public single-sex education, recent studies have cast serious doubt on both the methodology of the older ones and the existence of any such benefits.⁵⁰ Perhaps most fundamentally, to the

⁴⁷ DATNOW, HUBBARD & WOODY, *supra* note 38, at 56.

⁴⁸ See SHMURAK, *supra* note 23, at 8–17; Pamela Haag, *Single-Sex Education in Grades K-12: What Does the Research Tell Us?*, in AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, *SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS* 13 (1998) [hereinafter *SEPARATED BY SEX*].

⁴⁹ See SHMURAK, *supra* note 23, at 9, 18–19; Patricia B. Campbell & Ellen Wahl, *What's Sex Got to Do with It? Simplistic Questions, Complex Answers*, in *SEPARATED BY SEX*, *supra* note 48, at 63, 64–65; Haag, *supra* note 48, at 14–16.

⁵⁰ See SHMURAK, *supra* note 23, at 8–12, 17–18; Campbell & Wahl, *supra* note 49, at 64–65; Valerie E. Lee, *Is Single-Sex Schooling a Solution to the Problem of Gender Inequity?*, in *SEPARATED BY SEX*, *supra* note 48, at 41; Levit, *supra* note 41, at 485–86, 500–01. *But see*

extent that single-sex schools do seem to yield advantageous results, there typically appears to be good reason to believe that the advantages derive not from the single-sex nature of the school but rather from other distinctive features of the school such as small class size, favorable faculty-student ratio, or special mentoring programs—features that could be replicated in coed schools.⁵¹ Coed schools therefore appear to offer a means of producing these results that avoids the disadvantaging effects of a sex classification, and the justification for using single-sex schools is substantially diminished as a result.

Third and lastly, although it may be argued that the creation of coordinate single-sex schools can be justified simply in terms of enhancing the diversity of options available to parents and children, that justification is no more likely than the two already discussed to survive the middle-tier scrutiny triggered by a finding that the schools in some significant respect disadvantage girls. Most obviously, unless a school district allows parents and children to choose between a coed school and a single-sex one, it has not increased their options by creating coordinate single-sex schools. Even assuming, however, that a district provides such a choice when creating coordinate single-sex schools, the district's creation of such schools still does not seem to serve a diversity interest of importance. I suggest that it would do so only if the option represented by coordinate single-sex schools offers a combination of features not only different than offered by coed schools but also, on balance, no less favorable. The combination of features offered by the single-sex option, however, appears on balance to be not as good. On the one hand, as discussed above, coordinate single-sex schools do not seem to promise substantial academic and developmental benefits that could not be achieved in a coed environment. On the other hand, as hypothesized at the outset of this discussion of middle-tier review, the coordinate schools carry with them by virtue of their single-sex character a significant disadvantage to girls not generated by coed schools.

Though it perhaps goes without saying, I underline that the diversity interest under discussion has virtually nothing to do with the diversity interest that the Supreme Court recently characterized as compelling in *Grutter v. Bollinger*,⁵² the University of Michigan Law School affirmative action case. That interest was one in "attaining a diverse student body,"⁵³ and it was rooted in a recognition of the value to the educational process of ensuring a broad range of perspectives

SALOMONE, *supra* note 24, at 189 ("Up to this point [2003], the findings [on single-sex education] have been mildly and qualifiedly supportive, though by no means conclusive.").

⁵¹ See Lee, *supra* note 50, at 48–51; Levit, *supra* note 41, at 504–05, 522–23.

⁵² 539 U.S. 306 (2003).

⁵³ *Id.* at 328.

among the student body. If anything, creating a single-sex school option is counterproductive in terms of that interest. By excluding one sex from the school, it makes for a less diverse student body and narrows the range of available student perspectives.

II

BEYOND SEPARATE BUT EQUAL: SINGLE-SEX SCHOOLS ONLY FOR GIRLS

Some school districts have created a single-sex middle or high school for girls with no male counterpart. In doing so, they typically have responded both to problems perceived first-hand in the district's schools and to studies highlighting the difficulties that adolescent girls experience generally and in coed learning environments in particular.⁵⁴ It is difficult to deny that the state is classifying on the basis of sex when it creates such schools. Girls have an opportunity to attend a single-sex school that boys do not. On the face of the system, boys are being disadvantaged. Moreover, since studies of boys' academic and personal development reveal problems that, at least for some boys, might be alleviated by enrollment in a single-sex school, it cannot be seriously argued that boys are not *really* disadvantaged by the unavailability of a single-sex option.⁵⁵

Under Supreme Court precedent, this disadvantage to boys triggers the same middle-tier scrutiny as would disadvantage to girls. Since *Craig v. Boren* in 1976,⁵⁶ it is clear that the Supreme Court treats classifications on the basis of sex as equally problematic whether it is females or males who are the disadvantaged group.⁵⁷ In more recent years the Court in race cases has adopted a similar principle of what Justice O'Connor in her opinion for the Court in *Adarand Constructors, Inc. v. Peña*⁵⁸ called "consistency," treating as equally problematic laws disadvantaging whites and ones disadvantaging racial minorities.⁵⁹

This is not the place for me to try to spell out in detail my difficulties with this consistency principle for classifications on the basis of race or sex. In brief, my argument against the principle is as follows: First, absent disadvantage to racial minorities or females, the concerns, such as relative political powerlessness of the disadvantaged

⁵⁴ See Cerven, *supra* note 27, at 701-02.

⁵⁵ For discussion of the research on boys, see SALOMONE, *supra* note 24, at 80-84; Levit, *supra* note 41, at 469-72.

⁵⁶ 429 U.S. 190 (1976).

⁵⁷ As the Court stated with regard to the all-female state nursing school in *Mississippi University for Women v. Hogan*, "That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." 458 U.S. 718, 723 (1982).

⁵⁸ 515 U.S. 200 (1995).

⁵⁹ See *id.* at 224.

group, that justify giving special scrutiny to classifications by race or sex largely do not come into play.⁶⁰ Second, a law disadvantaging whites and one disadvantaging racial minorities are therefore not equally problematic for equal protection purposes unless the law disadvantaging whites simultaneously disadvantages racial minorities in some significant respect. Similarly, a law disadvantaging males and one disadvantaging females are not equally problematic unless the law disadvantaging males simultaneously disadvantages females in some significant respect. Third and lastly, although any law disadvantaging whites or males deserves careful consideration for *possible* disadvantage to racial minorities or females, such laws may *in fact* not entail such additional disadvantage, and they should not be assumed to do so.

It may be that my disagreement with the Court's consistency principle stems entirely or almost entirely from the final point of my argument. Justice O'Connor's opinion for the Court in *Adarand* may be read to be compatible with my first two points.⁶¹ Rather clearly, however, that opinion insists on treating the *possibility* of disadvantage to racial minorities as the equivalent, for equal protection purposes, of *actual* disadvantage to racial minorities; and on that point, the Court and I definitely part ways.

⁶⁰ Over the years the Supreme Court has recognized various criteria as relevant to the "suspectness" of classifications—most notably, the relative political powerlessness of the disadvantaged group, *see, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the extent to which the disadvantaged group has had a history of disadvantage at the hands of lawmakers, *see, e.g.*, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*); *Rodriguez*, 411 U.S. at 28, the degree to which the disadvantaged group has been the object of societal prejudice, *see, e.g.*, *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 443 (1985); *Plyler v. Doe*, 457 U.S. 202, 216–17 n.14 (1982), and whether the classification is based on an immutable characteristic from birth, *see, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). (The final, immutable characteristic, criterion is sometimes articulated somewhat more broadly in terms of a characteristic beyond the disadvantaged group's control. *See, e.g.*, *Plyler*, 457 U.S. at 217 n.14.) If racial classifications only disadvantage whites and sex classifications only disadvantage males, they implicate only the last of the above criteria.

For the view that the relative political powerlessness of the disadvantaged groups should be the focus of the inquiry into suspectness, see Gary J. Simson, Note, *Mental Illness: A Suspect Classification?*, 83 *YALE L.J.* 1237, 1254–58 (1974). Under that view, the second and third factors named above—history of disadvantage and societal prejudice—would merit close consideration for the insight that they offer into political powerlessness. The final factor of immutable characteristic, however, would probably cease to be of concern.

⁶¹ At a number of places in her opinion, Justice O'Connor seems to predicate the need for strict scrutiny of laws disadvantaging whites on the dangers presented by such laws of simultaneous disadvantage to racial minorities. *See, e.g.*, *Adarand*, 515 U.S. at 226 (maintaining that "strict scrutiny of all governmental racial classifications is essential [to ensure that] 'there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype'"); *id.* at 228–29 (underlining that a "supposedly 'benign' racial classification . . . 'inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race'").

Returning, then, to the issue at hand of the constitutionality of single-sex schools for girls with no male counterpart, I would argue that the issue ought to turn on whether girls are in some significant respect disadvantaged. Cases like *Hogan* underline that this is hardly just a theoretical possibility.⁶² The single-sex nursing school there reinforced gender stereotypes about the proper roles of men and women that disadvantaged women throughout the state, whatever career choices they might be contemplating or have made. By the same token, although the Supreme Court treats discrimination against men in and of itself as a basis for middle-tier review, the Court's other sex classification cases involving facial discrimination against men in fact virtually always involved laws with a double edge—facially discriminatory against men, but simultaneously implicitly reinforcing gender stereotypes that disadvantage women.⁶³

Single-sex middle or high schools for girls with no male counterpart are considerably more defensible than the nursing school in *Hogan*. Such a middle or high school can be explained in terms that do not so obviously incorporate harmful gender stereotypes—that is, as an attempt to respond to special problems widely experienced by adolescent girls⁶⁴ and as providing an environment in which teaching methods can most easily be tailored to ways of learning that girls generally seem to find most congenial.⁶⁵ These explanations, however, are not unambiguously affirming of girls' abilities and potential, and altogether it is difficult to deny that there is some risk that the creation of the girls school sends a message to both girls and boys that girls are in some sense inferior to boys—whether that means more needy, less adaptable, more fragile, or some other disempowering comparative generalization.⁶⁶ Similarly, it is at least arguable that by

⁶² See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982), discussed *supra* text accompanying notes 13–16.

⁶³ See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding a federal law requiring only males to register for a possible military draft); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding a California statutory rape law that prohibits sexual intercourse if it involves a female under 18, limits criminal penalties to males, and applies such penalties to males even if they were under 18 when they violated the prohibition); *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 and females under 18).

⁶⁴ See Cerven, *supra* note 27, at 702 (“[S]upporters [of single-sex schools for girls] contend that girls need particular attention and direction during their adolescent years, a time when many may have questions or concerns about their own development.”).

⁶⁵ See *id.* at 717 (noting that a well-known East Harlem girls school, discussed *infra* note 69 and accompanying text, “stresses a collaborative, noncompetitive educational approach”).

⁶⁶ See Wendy Kaminer, *The Trouble with Single-Sex Schools*, ATLANTIC MONTHLY, Apr. 1998, at 22, 34 (“The sexism in girls’ and women’s schools is insidious. Whether manifested in feminine decor or in an approach to teaching that assumes a female penchant for cooperative, or ‘connected,’ learning, stereotypical notions of femininity often infect institutions for women and girls.”); Levit, *supra* note 41, at 517 (“[S]ocial separation on the

holding out this opportunity to girls, the state unwittingly disadvantages them in the long-run, if at this stage of their development it would be more beneficial for them to learn to cope with a coed environment.⁶⁷

In my view, then, the likelihood of some significant disadvantage to girls is central to the constitutional issue, and the state, having classified on the basis of sex, should bear the burden of disproving the likelihood of such disadvantage. If the state can carry that burden, I see no reason why the state's actions should be judged by a standard of review more stringent than the rational basis test traditionally applied to the vast majority of classifications; and the rationales noted above for giving adolescent girls special treatment in the form of an all-girls school suffice to meet that indulgent standard.

basis of identity characteristics engenders feelings, habits, attitudes, and expectations of superiority and inferiority. State-sponsored separation promotes the idea of inherent differences between the sexes. . . ."); Sharon K. Mollman, Note, *The Gender Gap: Separating the Sexes in Public Education*, 68 IND. L.J. 149, 169 (1992). In Mollman's view:

The social cost of excluding boys is not their subsequent feelings of inferiority, for their sense of power is too well entrenched. Instead, they perceive that girls are inferior because they will not compete with boys. There is a danger too that girls might choose the single-gender school over the coed one because they believe it must be less competitive, thus reinforcing their own sense of personal and gender inferiority.

Id. But see SALOMONE, *supra* note 24, at 20–25 (describing the “conscious effort” of one girls school “to present students and parents with a positive sense of womanhood” and maintaining that “the all-girl setting incorporates certain intangible elements—a feeling of school pride, self-confidence, and security—that are conducive to academic achievement”).

⁶⁷ See SHMURAK, *supra* note 23, at 173 (discussing results of her study of single-sex and coed schools, including comments by many girls in coed schools that being with boys “helped me to be aggressive,” taught them that “boys were people who could be my friends,” and was “good practice for college and the real world”); Kaminer, *supra* note 66, at 34 (“Many [girls’ and women’s schools] encourage female academic achievement, but they discourage academic competition with males. They encourage heterosexual women and girls to separate their social and intellectual lives, reinforcing the dissonance bred into many achievement-oriented females.”); Levit, *supra* note 41, at 495 (“The majority of researchers . . . have found results suggesting that coeducation may better prepare students for adult occupational and interpersonal roles, including the understanding of how to maintain long-term relationships with members of the opposite sex and how to avoid falling unthinkingly into traditional or stereotypic roles.”). But see SALOMONE, *supra* note 24, at 35–37 (characterizing three girls’ schools as “safe harbors where girls can securely weather the storms of adolescence while nurturing their spirit and intellect” and maintaining that the students there “have neatly compartmentalized their intellectual and social lives for the time being and feel confident that the skills and attitudes they develop in an all-girls setting will serve them well when they move on to a coed college”); Carrie Corcoran, Comment, *Single-Sex Education After VMI: Equal Protection and East Harlem’s Young Women’s Leadership School*, 145 U. PA. L. REV. 987, 1031 (1997) (acknowledging the possibility that “some on-lookers” may view the much-discussed girls school in East Harlem “as a manifestation of girls’ inferiority in subjects like science and math,” but suggesting that “it seems more likely that the school will produce capable young women who are confident in their abilities and whose lives will be a testament to the invalidity of negative gender role stereotypes”).

However, if the state cannot carry the burden of disproving disadvantage to girls, the school is on constitutionally shaky ground. Middle-tier review would apply, and the state's justification does not seem sufficiently forceful to satisfy that test. The state could argue that the school is defensible as a means of achieving significant academic and developmental benefits for girls that could not be achieved in coed schools. As discussed earlier, however, the evidence that single-sex schools achieve benefits of this sort seems too weak to establish the substantial means-end connection required by middle-tier review.⁶⁸

With single-sex girls schools that principally admit poor minority girls, such as the much-publicized Young Women's Leadership School in East Harlem,⁶⁹ the state might offer a second argument: Absent some special intervention by the state on behalf of such girls, the girls would be unlikely ever to overcome the constraints placed on their advancement by poverty and by societal discrimination against minorities. Though certainly not without its attractions, this alternative argument does not avoid the difficulty that undermines the first. Given the scarcity of evidence showing that single-sex schools deliver significant academic and developmental benefits that could not be achieved in coed schools, the state does not appear to have a weighty justification for using a single-sex, rather than coed, school as the means of helping poor minority girls avoid an unfortunate fate. The cogency of this alternative argument is also undercut by the difficulty of explaining why the state's interest in helping poor minorities avoid an unfortunate fate is limited to girls. Assuming for purposes of argument that single-sex schools really have the advantages for poor minority girls that their proponents claim, why is the state not also furnishing single-sex schools for poor minority boys? Poor minority boys face daunting obstacles to a reasonably successful future—even more daunting, some have argued, than poor minority girls.⁷⁰ It is not apparent that they are any less in need of special state assistance.

⁶⁸ See *supra* text accompanying notes 48–51.

⁶⁹ The initiative to create this school generated a great deal of publicity and controversy right around the time that the Supreme Court decided the VMI case. Threatened legal action never materialized, the school was established, and it has largely gotten quite favorable reviews. See SALOMONE, *supra* note 24, at 10–25 (discussing the founding and subsequent history of the school); Cerven, *supra* note 27, at 703–04, 717–19 (same). More than 90% of the students are either Hispanic or African-American, and a substantial majority fall below the poverty line. See SALOMONE, *supra* note 24, at 21; Williams, *supra* note 27, at 20 n.31. For statistics on the percentage of minority students at other single-sex schools, see *id.*

⁷⁰ See *supra* note 27 (discussing the arguments made for single-sex schools for African-American boys). For a critical perspective on the motivations for creating single-sex schools that target minorities, see Williams, *supra* note 27.

CONCLUSION

In this Article I have focused on the constitutional issues presented by public single-sex schools. In closing, I would like to underline that various of the issues discussed have important policy implications as well. Thus, even if public single-sex schools are constitutional, lawmakers should think seriously before creating new ones (or maintaining existing ones) about questions such as whether schools of this sort are apt to stigmatize girls and whether any benefits seemingly offered by existing single-sex schools are attributable to their single-sex nature or instead derive from factors that could be replicated in coed schools.

I also would like to suggest in closing that even if public single-sex schools pass constitutional muster, they represent too limited a response to the gender equity problems that, as noted earlier,⁷¹ spurred renewed interest in public single-sex education in recent years. As the American Association of University Women's widely discussed 1992 report, *How Schools Shortchange Girls*,⁷² explained in detail,⁷³ the nation's coed public schools disadvantage girls in various ways. Even though the Equal Protection Clause stands as an obvious bar to school policies, such as precluding girls from taking shop or advanced physics, that formally deny to girls educational opportunities made available to boys, many forms of more subtle—but cumulatively substantial—discrimination persist: history textbooks that pay little heed to women's accomplishments,⁷⁴ teachers who repeatedly respond with more enthusiasm and encouragement to boys' comments than girls',⁷⁵ lax enforcement of prohibitions on peer sexual harassment,⁷⁶ etc.⁷⁷

⁷¹ See *supra* text accompanying notes 25–27.

⁷² AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *supra* note 25.

⁷³ For a later summary of the results of numerous studies, see Levit, *supra* note 41, at 464–69.

⁷⁴ See AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *supra* note 25, at 62–63; Levit, *supra* note 41, at 467.

⁷⁵ See AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *supra* note 25, at 68–70; Levit, *supra* note 41, at 464–66.

⁷⁶ See AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *supra* note 25, at 73–74; Levit, *supra* note 41, at 468.

⁷⁷ Under the Supreme Court's approach under the Equal Protection Clause to disproportionate impact, state action that disproportionately disadvantages females, but does not formally single them out for disadvantage, receives very different treatment than state action formally disadvantaging them. The only basis for constitutional challenge is to show that the state would not have acted as it did but for a conscious and invidious desire to discriminate against females. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). The Court's approach essentially duplicates the one that it had developed somewhat earlier for laws disproportionately disadvantaging racial minorities. See *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

This is not the place for me to detail my objections to what I see as an unduly narrow approach to the problems of gender-based and race-based bias in lawmaking. Suffice it to say that in my view the Court's approach wrongly insulates from constitutional challenge

Even assuming, for purposes of argument, that public single-sex schools are, and will be, reasonably successful at helping their female students avoid the disadvantages widely experienced by girls in coed schools, they almost inevitably will leave the basic problems largely untouched. The great majority of girls are being, and very likely will continue to be, educated in coed schools. There is unlikely to be a proliferation of public single-sex schools. First of all, for a variety of reasons, most children and parents want a coed education.⁷⁸ In addition, establishing single-sex schools in lieu of, or in addition to, coed schools can be a costly proposition. Particularly for small communities, it may often not be a financially realistic option.⁷⁹ Finally, any school district contemplating the creation of multiple single-sex schools ought to be given considerable pause by the recognition that to the extent that public single-sex schools have been successful, their success appears to depend upon (1) a commitment of resources per child that school districts typically are not in a position to make for large numbers of children⁸⁰ and (2) a selectivity in admissions that would exclude a large proportion of the children in the district.⁸¹

Ultimately, then, if school districts are really serious about solving the gender equity problems identified by the American Association of University Women and others, they need to tackle them head-on by changing the practices and atmosphere in coed schools. Indeed, although the American Association of University Women's 1992 report was instrumental in reviving interest in public single-sex schools, the Association in 1998 issued a follow-up report, *Separated by Sex*,⁸² that

governmental indifference to, or tolerance of, disproportionate effects that the governmental actor would have taken measures to avoid if the disadvantaged group were males or the racial majority. In the context at hand, the approach assures schools that if they can only be charged with tolerating, or even unwittingly fostering, an environment that works to the disadvantage of girls, they are on constitutionally safe ground. Although, as indicated at the outset, it is beyond the scope of this Article to address the implications of Title IX, I note that at least as applied, Title IX does not appear to have had a significant impact on the types of nonformal discrimination discussed in the text above. See Levit, *supra* note 41, at 466-69.

⁷⁸ See SALOMONE, *supra* note 24, at 237 (noting the "overwhelming cultural preference for coeducation").

⁷⁹ See SHMURAK, *supra* note 23, at 6; Hasday, *supra* note 34, at 802-03.

⁸⁰ In addition to the local, state, and federal funding that any public school in the district would receive, the East Harlem school, which as of 2003 had a total of 365 students in grades 7-12, received approximately \$1,000 per student each year from the private Young Women's Leadership Foundation. The private funding finances a full-time college adviser and other support services. See SALOMONE, *supra* note 24, at 19, 21-22.

⁸¹ For the 2002-03 school year, the East Harlem school, which now has grades 7-12, received more than 550 applications for the 60 seventh-grade seats. To select among the applicants, the school interviewed them individually, had them take a written test to measure writing and math abilities, examined their school records to date (including attendance and disciplinary records), and required and reviewed teacher recommendations. See *id.* at 21.

⁸² SEPARATED BY SEX, *supra* note 48.

indicated that the Association did not (and never did) regard single-sex schools as the solution to the problems that it had detailed.⁸³ The creation of one or two single-sex schools may have symbolic value, providing visible evidence that the district is thinking about those problems. If the goal, however, is to see that all the district's children have an educational environment in which they can flourish, the district's resources—not simply money, but time, energy, and creativity as well—seem far better expended on reforming its coed schools.

⁸³ See *id.* at 1–10 (“discussion summary” of roundtable of educational scholars, various of whose contributions are printed in the remainder of the report); Maggie Ford, Editorial, *Gender-Bias Study Does Not Advocate Single-Sex Education*, WASH. TIMES, May 19, 1999, at A18 (discussion of 1992 and 1998 reports by president of American Association of University Women Educational Foundation). For commentary urging reform of coed schools, rather than the creation of single-sex schools, as the appropriate response to existing gender equity problems, see Kaminer, *supra* note 66; Lee, *supra* note 50, at 46–51; Levit, *supra* note 41, at 522–26.

