
NOTE

**CALIFORNIA SINGLE-GENDER
ACADEMIES PILOT PROGRAM:
SEPARATE BUT *REALLY* EQUAL**

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“Boys are loud, and they get all the attention.”¹

—Eloise Ayala, 6th grader

“[W]ithout girls, it’s easier to do your work.”²

—Zaid Assaf, 6th grader

“No other state is offering this kind of dual-academy approach.”³

—Karen Humphrey, California Department of Education

I. INTRODUCTION

On August 28, 1997, the school year began at Mary McLeod Bethune and Horace Mann Academies.⁴ Yet the teachers and administrators felt

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1. Tamar Lewin, *A Class of Their Own: An Old Idea—Single Sex Education—Is in the Midst of a Renaissance*, CHI. TRIB., Dec. 14, 1997, at 6.

2. *Id.*

3. Beth Reinhard, *California Opens Single-Sex Academies*, TCHR. MAG., Sept. 10, 1997, at 2.

4. Ironically, both academies were named for proponents of coeducation. Dr. Mary McLeod Bethune, the daughter of former slaves, was an early pioneer for African-American education. In 1904, she founded a school for girls in Daytona Beach, Florida, Daytona Literary and Industrial School for Training Negro Girls, which she eventually merged with a boys’ school in 1923. The resulting college still thrives today: Bethune Cookman College. For a brief history on the life and accomplish-

more than the typical first-day jitters as they ushered students into the newest schools in Stockton, California. What caused their uneasiness? Something was definitely amiss.

Did the school district neglect to hire enough teachers? Fail to purchase enough desks and chairs? Forget to stock the classrooms with enough colored chalk? Not exactly. Rather, these two new academies represented the first round of a new era of public education in the State of California. In 1996, the State earmarked funds to establish a statewide system of *public* single-gender academies;⁵ the first program of its kind in the nation's history. It is a bold experiment that had received varying levels of praise and criticism.

Many claim the program violates the rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (the "Equal Protection Clause" or the "Fourteenth Amendment")⁶ as it segregates children solely on the basis of their gender. Nevertheless, California's politicians and school administrators are confident that the Program will be a legal and pedagogical success. Their underlying objective is to improve the State's failing school system by increasing the diversity of school choices available to public school students and their parents.

Former Governor Pete Wilson first introduced California to the concept of single-gender public schools in his 1996 State of the State

ments of Dr. Mary McLeod Bethune, see Shelia Y. Flemming, *Dr. Mary M. Bethune* (last modified Apr. 7, 1997) <<http://www.bethune.cookman.edu/mmb2.html>>. Horace Mann was one of the country's earliest and greatest advocates of public or "common" school education for all children. He once wrote:

Throughout the past ages of the world, the condition of woman has been degrading and demoralizing to her own sex, and dishonorable to the other. And even at the present day, the same unqualified affirmation may be made of the worst parts of the earth, and of many grade of society, even in the best. [Women have suffered] servitude of body, nondevelopment of intellect, and the depravation of heart. Only until within a period comparatively recent, have these facts of history been acknowledged, and the duty of reform been recognized.

DAVID TYACK & ELIZABETH HANSOT, *LEARNING TOGETHER* 29 (1990) (quoting *Preface* to HORACE MANN, *A FEW THOUGHTS ON THE POWERS AND DUTIES OF WOMEN* (1853)).

5. The word "academy" is a term-of-art within the California Education Code used to describe specialized magnet schools or any other non-conventional school configuration that is permissible under section 35160 of the California Education Code, which broadly grants individual districts the ability to "create their own solutions" for educational problems. CAL. EDUC. CODE § 35160 (West 1990). The CSGAPP is a subset of this statute. For a discussion of the statutory structure see *infra* Part II.

6. See U.S. CONST. amend. XIV, § 1 ("[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws").

Address.⁷ In his speech, the Governor cited the successful results achieved by students in private single-gender schools around the country. He stated that similar schools in the public sector could help reduce violence among urban boys as well as increase girls' interest in stereotypically male-dominated academic disciplines, such as math and science.⁸ Wilson believes that parents of public school children should have the same spectrum of school choices available to them as is available to parents of private school children. In short, money should not be the dispositive factor that determines the extent of a Californian's educational choices.

In July of 1996, the California State Legislature (the "Legislature") responded to Wilson's proposal by passing the Single-Gender Academies Pilot Program Act of 1996 (the "Act"),⁹ an education trailer to the 1997-98 State Budget. The Act created the California Single-Gender Academies Pilot Program (the "CSGAPP" or the "Program") which authorizes the California State Superintendent of Public Schools (the "Superintendent") to allocate state grants to school districts to establish pairs of single-gender academies. Each set must consist of one all-female academy and one all-male academy, both of which must be equal in every respect. Assuming the approved school districts follow the letter and spirit of the Legislature's directives, the California Department of Education is confident that the CSGAPP fits within a paradigm that complies with the Equal Protection Clause.¹⁰

Ironically, the same month that California public school children made their way to gender segregated schools in Stockton, the Virginia Military Institute (the "Institute")—seen by many as the last vestige of a once male-dominated public school system in the United States—reluctantly opened its doors to women for the first time in its 158-year history.

7. Governor Pete Wilson, State of the State Address to the California State Legislature (Jan. 8, 1996) (transcript on file with author).

8. *See id.* Governor Wilson stated:

Some cities around the nation have found success with all-male classrooms for at-risk boys. There, strong male teachers serve as an alternative to gang leaders. So I propose establishing all-male Empowerment Academies as magnet schools. There boys can find the discipline and role models they'll need to escape life on the streets. In the same way, young girls and their parents should have the option of all-female schools. I'd especially like to see such a school offer the girls the opportunity to concentrate on math and science.

Id. Note that at this early date, Governor Wilson had not yet addressed the legal necessity to establish identical boys and girls academies. His original proposal even suggests that different curricula may be acceptable, yet they are not. *See* discussion *infra* Part V.A.

9. *See* CAL. EDUC. CODE §§ 58520-58524 (West 1996).

10. *See* Memorandum from Joseph R. Symkowick, General Counsel, State Superintendent of Public Instruction to Schools' Legal Counsel 3 (Apr. 18, 1997) [hereinafter Symkowick Memo].

In 1996, the Supreme Court ruled, in a 7-1 decision,¹¹ that the Institute violated the Equal Protection Clause by refusing to admit women while sustaining its existence on state funds. This decision followed a long line of judicial and legislative actions, which limit the government's ability, on any level, to intentionally segregate or classify people based upon gender alone.

This Note considers whether the CSGAPP violates the Equal Protection Clause of the Fourteenth Amendment, and concludes that, as written,¹² the narrowly tailored statute passes constitutional muster. Section II details the requirements imposed by the Act upon participating CSGAPP school districts. Section III probes Supreme Court precedent addressing the issue of segregated public schools. Specifically, this Section distinguishes the *per se* prohibition of racially segregated public schools from the specific, case-by-case analysis for gender segregated public schools. Section IV discusses the specific analysis a court undergoes when reviewing single-gender public schools such as the CSGAPP. Section V submits that the CSGAPP is a constitutionally permissible gender-based classification on two independent legal fronts. Finally, Section VI discusses the various policy considerations that favor the CSGAPP.

II. THE CALIFORNIA SINGLE-GENDER ACADEMIES PILOT PROGRAM: HOW DOES IT WORK?

In an effort to increase overall student achievement in California's declining state public school system, Former California Governor Pete Wilson advocated the enactment of various educational reforms.¹³ Among these reforms is the CSGAPP.

After Governor Wilson initially proposed the concept of single-gender public schools in his 1996 State of the State Address,¹⁴ the Legislature moved quickly¹⁵ to enact the CSGAPP.¹⁶ Co-sponsored by Assem-

11. See *United States v. Virginia*, 518 U.S. 515 (1996) (Justice Clarence Thomas recused himself from the decision because his son attended the Institute at the time the case came before the Court).

12. No party has sought to challenge the CSGAPP in court as of early 1999. Thus, an analysis of the Program entails a theoretical examination of the statute which assumes that the participating school districts are complying with the letter and spirit of the legislation.

13. California's current educational reforms can be divided into two basic categories: internal school programs and separate school choices. The CSGAPP falls into the latter category.

14. See Wilson, *supra* note 7, at 4.

15. Governor Wilson first mentioned the proposal in early January, 1996. The proposed budget was first read to the Legislature on April 10, 1996. By late July 1996, the California State Legislature had enacted the CSGAPP. See ASSEMBLY CALENDAR, 1995-96 REGULAR SESSION 2017.

bly Members Denise Ducheny and Jim Cunneen and State Senator Nick Petris, the Act provides explicit guidelines for school districts to follow when applying for a CSGAPP grant and subsequently operating a constitutionally sound set of single-gender public schools. The following paragraphs outline the various requirements imposed by the Act upon participating CSGAPP school districts.

A. STATUTORY STRUCTURE

The CSGAPP is a subset of California's preexisting programs for magnet¹⁷ and alternative¹⁸ schools. Thus, CSGAPP-approved school districts must comply with the general statutory requirements governing those programs.¹⁹

B. EQUAL FUNDING AND FACILITIES

Beginning with the 1997-98 academic year,²⁰ the State Budget earmarked \$5 million for the annual establishment of 10 pairs of single-gender academies throughout California. The State allots each approved school district a grant of \$500,000 to supplement the district's financial contribution. Funds flowing from the state budget are discontinued after a maximum of two years. Participating school districts are then expected to take appropriate steps to maintain the same funding levels for their CSGAPP academies as "other educational programs for children of the same age level operated by the district."²¹ Without exception, all state and district funds must be divided evenly between a district's boys' academy

16. See CAL. EDUC. CODE §§ 58520-58524 (West 1996). In passing the CSGAPP, the Legislature added Chapter 3.1 to the subdivision in the California Education Code that provides for "Experimental School Programs" in elementary and secondary education. *Id.*

17. See *id.* §§ 35160-35160.5. See, e.g., *id.* § 35160.1(a) ("The Legislature finds and declares that school districts . . . have the flexibility to create their own solutions."). Magnet schools offer one or two unconventional school programs to draw students with specialized talents or interests from and around the participating school district. School districts may establish magnet programs pursuant to their general autonomous powers.

18. See *id.* §§ 58500-58512. Alternative schools are "optional needs-based programs" for children with learning disabilities or disciplinary problems. These schools generally offer unique facilities and employ teachers with specialized training.

19. "The governing board of the school district receiving a [CSGAPP] grant . . . shall establish a single gender academy as a magnet school . . . or as an alternative education magnet school pursuant to [the California Education Code]." CAL. EDUC. CODE § 58523(a) (West 1998).

20. Expected apportionment for the 1998-99 budget includes allocating approximately \$2 million to the already existing academies and \$3 million to fund another round of start-up academies. See John Canalis, *Wilson Hails Same-Sex Public Schools*, L.A. TIMES, Jan. 15, 1998, at A3.

21. CAL. EDUC. CODE § 58507 (West 1998).

and the girls' academy.²² In addition, both CSGAPP academies in any given district must have equal facilities.²³

C. SELECTION OF QUALIFIED SCHOOL DISTRICTS

Administration of the CSGAPP is the exclusive responsibility of the Superintendent,²⁴ a duty that includes selecting qualified school districts through a competitive bid process.²⁵ Any school district in California that operates a middle school, intermediate school, junior high, or high school may apply for a CSGAPP funding grant.²⁶ To qualify, each applicant school district²⁷ must state its plan to comply with the CSGAPP statutory requirements.²⁸ Furthermore, applicants must demonstrate "the expected benefits of single gender education at the proposed academy and how a single gender academy will meet the unique educational needs of the pupils and communities they serve."²⁹ All things being equal, the Act directs the Superintendent to award CSGAPP grants to school districts that intend to house the boys' and girls' academies in "close geographic proximity" to each other.³⁰

D. VOLUNTARY STUDENT ENROLLMENT

As a component of Governor Wilson's strategy to provide Californians with diversified choices in the arena of public education, the CSGAPP is voluntary. Participating school districts can neither compel students to attend CSGAPP academies nor establish CSGAPP academies

22. *See id.* § 58524.

23. *See id.* § 58521(c)(3) ("It is further the intent of the Legislature that single gender academies . . . offer the following: Equal funding and facilities at both boys' and girls' academies.").

24. *See id.* § 58522(a).

25. *See id.* § 58522(b).

26. *See* Janet Canning, *Fact Sheet: Single Gender Academies Pilot Program* (last modified Apr. 12, 1997) <http://www.cde.ca.gov/spbranch/educational_options/sga_fsht.htm>.

27. The governing board of the school district may, of its own volition, apply for a CSGAPP grant. Alternatively, a parent or guardian of a pupil living in the school district may petition the governing board to apply for a CSGAPP grant. *See* CAL. EDUC. CODE § 58502 (West 1998).

28. The grant proposals must specifically address how the school district will comply with section 58522 (b) (1)-(4) of the California Education Code. *See also id.* § 58522(c).

29. *Id.* § 58522(c).

30. *Id.* In giving a preference to neighboring academies, the Legislature sought to fulfill the CSGAPP's second requirement, that of equal access, a concept that will be discussed in further detail below.

as the only educational option in the district. The statutory language reflects this fundamental objective.³¹

E. EQUAL ACCESS

The CSGAPP has three equal access features. First, the boys' and girls' academies must be geographically accessible to all students within a district.³² For example, if a school district locates one CSGAPP academy in the heart of its district and its counterpart academy in a remote area of the same district, students attending the central academy will impermissibly have greater geographic access to a single-gender public education. For this reason (and to avoid foreseeable complaints), the CSGAPP orders the Superintendent to give "preference to applicant school districts seeking to establish single gender academies for both boys and girls that will be in close geographic proximity."³³ Second, prospective students and, more importantly, their parents, shall be equally notified of the availability of the CSGAPP academies in their respective districts.³⁴ This will provide all parents with an equal opportunity to assess the merits of the Program for their children. And, third, in selecting students for the CSGAPP, participating school districts must invite all students living within the district³⁵ to

31. *See id.* § 58522(b)(1) ("Enrollment in the single gender academy must be on a voluntary basis."). *See also id.* § 58503 ("[S]tudents enrolled in the alternative school shall be selected entirely from volunteers.").

32. *See* § 58522(b)(2) ("Boys and girls enrolled in similar school must have access to the schools.")

33. *Id.* § 58522(c).

34. *See id.* § 58501. When a school district establishes any type of alternative education academy, it is required to notify all parents, legal guardians, teachers, and pupils of the pending establishment of an alternative school by March of the preceding school year.

35. *See id.* § 58505 ("A district may establish [CSGAPP academies] in each attendance area or on a district-wide basis, with enrollment open to *all* students district-wide, or any combination thereof.") (emphasis added); *id.* § 35160.5(b) ("the governing board of each school district shall, as a condition for the receipt of school apportionments from the state school fund, adopt rules and regulations establishing a policy of *open enrollment* within the district for residents of the district"). Although the statute asserts that the "primary goal" of the CSGAPP is to make the single-gender educational option available whose "unique educational needs will benefit from single gender education," *id.* § 58521(a), it does not restrict the CSGAPP to those students only—namely, students that statistics show will benefit most from single-gender education. *See Symkowick Memo, supra* note 10, at 1.

apply without consideration of a student's race, sex, ethnicity³⁶ or prior classroom achievement.³⁷

F. EQUAL AND COMPREHENSIVE CURRICULA³⁸

School districts establishing CSGAPP academies must ensure that both academies within a CSGAPP pair have identical curricula. Procedurally, a school district can accomplish this by opening CSGAPP academies simultaneously and providing each academy with equal funding. Substantively, a pair of CSGAPP academies must offer identical courses (with identical lesson plans), facilities, equipment, and extracurricular activities.

Additionally, CSGAPP academies must offer their students a comprehensive curriculum that is identical to the curriculum available to co-educational students in the same school district.³⁹ They must also maintain the minimum achievement standards required by the state.⁴⁰

G. ANNUAL EVALUATION OF ACADEMIES' EFFECTIVENESS

Administrators at all of California's magnet⁴¹ and alternative⁴² schools must annually assess the program's effectiveness in achieving their objectives. The CSGAPP academies are not exempt from this scru-

36. See CAL. EDUC. CODE § 235 (West 1999) (amending CAL. EDUC. CODE § 58508 (West 1996)) ("There shall be no racial, sex, or ethnic discrimination in any aspect of the operation of [CSGAPP].") (emphasis added). The CSGAPP, as written, complies with this specific provision because it *does not discriminate* based on "sex"; rather, the CSGAPP merely segregates children based on their gender which is not *per se* discriminatory.

37. See *id.* § 58504 ("Previous classroom performance shall not be a criterion limiting any student from the opportunity of attending a [CSGAPP academy].").

38. See *id.* § 58522(b)(3) ("In all aspects of the curricula, the educational opportunity must be equal for boys and girls.").

39. See Symkowick Memo, *supra* note 10, at 3. The CSGAPP provides for single-gender academies, not just single-gender courses in a coeducational school, because single-gender classes have been prohibited by Title IX in all but a few limited circumstances. See *id.* According to a state official, the single-gender academies will not receive anything *less* than the general curriculum offered by the district. However, some schools will implement curriculums that reduce class sizes, encourage technology oriented careers, and address gender-specific self-esteem issues via mentoring. See Telephone Interview with Karen Humphrey, Consultant, Career Development and Workforce Preparation, California Department of Education (Jan. 22, 1998).

40. A School district may, however, demand more stringent academic standards from its students. See CAL. EDUC. CODE § 35160.5(5) (West 1998); *id.* § 35160.5(9).

41. See *id.* § 35160.5(9) ("The governing board of each school district shall annually review the school district policies adopted pursuant to the requirements of [Section 35160.5]").

42. See *id.* § 58510 ("Each district operating an alternative school shall annually evaluate such school.").

tiny.⁴³ In fact, CSGAPP academies are subject to a much more exacting review.⁴⁴ CSGAPP academies are required to submit a “detailed report of the relative success of the single gender academy” before January 2000.⁴⁵ This report shall be sent not only directly to the Superintendent for review, but also to the California Department of Finance, Joint Legislative Budget Committee, Senate Committee on Education, and to the Assembly Committee on Education.⁴⁶

III. THE UNITED STATES SUPREME COURT HAS *NEVER* RULED THAT SINGLE-GENDER PUBLIC SCHOOLS ARE PER SE UNCONSTITUTIONAL

The United States Supreme Court has had several opportunities to prohibit states from establishing single-gender public schools. But instead of prohibiting single-gender public schools generally, the Court has opted to scrutinize individually challenged single-gender public schools to determine whether a unique educational opportunity is offered to one gender and not the other.

Three Supreme Court cases decided in the last 50 years support the assertion that the Court does not view single-gender public schools as per se unconstitutional. First, in *Brown v. Board of Education* (1954), the Court explicitly limited the scope of its ruling to racially segregated public schools only.⁴⁷ Second, in *Hogan v. Mississippi University for Women*, the Court ruled that Mississippi violated the Equal Protection Clause for providing a unique nursing education to women and not men.⁴⁸ Finally, in *United States v. Virginia* (“*VMI*”), the Court reaffirmed its decision in *Hogan* when it ruled that Virginia violated the Equal Protection Clause for providing a unique military-style education to men and not women.⁴⁹ In both *Hogan* and *VMI*, the Court limited its decision to the specific school at bar and expressly opted not to follow the broad approach taken in *Brown*.

43. Prior to obtaining a CSGAPP grant, the Superintendent of Public Instruction must be confident that the applicant school district has “[a] plan for conducting an evaluation of the results of the single gender academies.” *Id.* § 58522(b)(4).

44. Magnet schools need only review their policies themselves to determine that they cohere with the statutory authorities. *See id.* § 35160.5(9). Alternative schools must submit their evaluations to the Superintendent of Public Instruction who then forwards the evaluation to a subordinate for review. *See id.* §58510.

45. *Id.* § 58523(b).

46. *See id.* § 58522(b)(4).

47. 347 U.S. 483 (1954).

48. 458 U.S. 718 (1982).

49. 518 U.S. 515 (1996).

A. THE SUPREME COURT HAS NEVER IMPUTED THE PER SE PROHIBITION OF RACIALLY SEGREGATED PUBLIC SCHOOLS TO SINGLE-GENDER PUBLIC SCHOOLS

While racial segregation in public schools has been per se unconstitutional for nearly 50 years, the federal courts have not broadened their interpretation of the Equal Protection Clause to bar states and school districts from segregating public school students on the basis of gender. This subsection revisits the 1954 Supreme Court ruling in *Brown v. Board of Education* to demonstrate that the prohibition of racially segregated public schools does not control the issue of whether single-gender public schools violate the Equal Protection Clause.

Justice John Marshall Harlan,⁵⁰ the lone dissenter in the now-infamous ruling in *Plessy v. Ferguson*,⁵¹ prophetically asserted in 1896 that the “[separate but equal doctrine] will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* Case.”⁵² Harlan could not have been more correct. Not only has the Supreme Court unanimously overruled *Plessy* outright,⁵³ but for most Americans familiar with the concept, the phrase “separate but equal” evokes images of the nation’s most shameful, embarrassing, and deeply rooted historical scars: Slavery and the institutionalized mistreatment of African-Americans for nearly a century after its prohibition.⁵⁴

50. Associate Justice, United States Supreme Court, 1877-1911.

51. 163 U.S. 537 (1896).

52. *Id.* at 559. Ironically, before his appointment to the Supreme Court, Justice Harlan, a native of Kentucky, was a slave owner and staunch proponent of states’ rights and the institution of slavery. He argued, as many other politicians of his time, that outlawing slavery deprived slave owners of their personal property rights. Although he fought as a Union colonel in the Civil War, he did so to preserve the young country, not, as he said in a wartime speech, “for the purpose of giving freedom to the Negro.”

In fact, he declared the Emancipation Proclamation “unconstitutional and void” just shortly after it took effect in 1863 and did not grant his own slaves their freedom until compelled to do so by the passage of the 13th Amendment in 1865. He decried the 13th Amendment as a “flagrant invasion on the right of self-government” that he would oppose “if there were not a dozen slaves in Kentucky.” In 1871, Harlan ran for governor of Kentucky and dramatically (or politically) reversed his earlier views by joining the Republican party of Abraham Lincoln. He publicly proclaimed the error of his ways by stating “Let it be said that I am right rather than consistent The most perfect despotism that ever existed on this earth was the institution of African slavery . . . I rejoice that it is gone.” For a brief chronology on the life of Justice Harlan, see Charles Thompson, *Harlan’s Great Dissent*, COURIER-J. (Louisville, Ky.), June, 16 1996, at D1.

53. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

54. U.S. CONST. amend. XIII, § 1 (1865) (“Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”).

Racial segregation in public schools is now per se unconstitutional. However, for nearly a century after the Civil War,⁵⁵ states continued to oppress African Americans under the guise of maintaining “separate but equal” public facilities. The *Plessy* Court established the basis for this subordinate citizenship by holding that the Fourteenth Amendment was designed to bring political and civil equality of the races, not to compel their social commingling.⁵⁶ According to the Court, the doctrine of “separate but equal” did not “necessarily imply the inferiority of either race to the other.”⁵⁷ That was a “construction . . . the colored race [chose] to put . . . upon it.”⁵⁸

The most “common instance” of constitutionally permissible race divisions emerged in the nation’s public schools.⁵⁹ In theory, courts were expected to examine the relative equality of racially segregated public schools that were challenged on equal protection grounds. Separation was fine, inequality was not. In practice, however, the federal courts made little effort to verify that such schools were in fact equal.⁶⁰ The routine of

55. The “separate but equal” doctrine in regards to race was affirmed on several occasions by the Supreme Court in the years following *Plessy*. States could constitutionally require that railroads, designated as common carriers, segregate their Caucasian and non-Caucasian passengers. *See, e.g.*, *McCabe v. Atchison*, 235 U.S. 151 (1914); *Chiles v. Chesapeake & Ohio Railway Co.*, 218 U.S. 71 (1910); *Chesapeake & Ohio Railway Co. v. Kentucky*, 179 U.S. 388 (1900). *None* of these decisions discuss the issue of separating individuals on the basis of gender.

56. After arrogantly speculating that it was unlikely that African-Americans would ever control a state legislature again, the Court asserted that “[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary assent of individuals If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.” *Id.* at 551-52.

57. *Id.* at 544.

58. *Id.* at 551.

59. “The most common instance of [the separate but equal doctrine] is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.” *Id.* at 544. Even Members of Congress who had enacted the Fourteenth Amendment in 1868 voted for racially segregated schools in Washington, D.C. shortly after its passage. *See id.* at 551-52. The petitioner in *Plessy* argued that the same Congress that ratified the Fourteenth Amendment also voted to segregate schools in Washington, strongly suggesting that the framers of the Fourteenth Amendment felt that segregating public schools did not violate the Fourteenth Amendment. *See id.* at 551.

60. *See, e.g.*, *Lum v. Rice*, 275 U.S. 78 (1927) (affirming the right of states to decide whether to separate the races in public schools by permitting Mississippi to deny a Chinese-American student enrollment at a public school reserved for Caucasians); *Berea College v. Kentucky*, 211 U.S. 45 (1908) (affirming the conviction of a *private* college that violated Kentucky’s segregation statute); *Cumming v. Board of Educ.*, 175 U.S. 528 (1899) (affirming a lower court’s refusal of an injunction against a Georgia school board for failing to establish a high school for African-Americans that was available to Caucasian children; the Court, through Justice Harlan, argued that the school board made a valid decision—based upon the availability of funding—and did not have an invidious purpose). *Compare* Harlan’s dissent in *Plessy* with his majority opinion in *Cumming*, written only three years

overlooking significant disparities between racially segregated public schools continued until the Court began to retract from its staunch adherence to *Plessy* with three cases between 1938 and 1950,⁶¹ each addressing the issue of racially segregated law schools in the South.⁶²

When the issue of racially segregated public elementary and secondary schools came before the Court in 1953, two interpretive paths were available. On the one hand, the Court could have observed the obvious inequalities of “‘tangible’ factors” between the Caucasian and African-American schools and ordered them to equalize, one by one.⁶³ The Court

later. *See also supra* note 52 for a discussion on Justice Harlan’s purported change of political ideologies.

61. The National Association for the Advancement of Colored People (NAACP), lead by future Supreme Court Justice Thurgood Marshall, oversaw the legal fight for civil rights during this period. It deliberately targeted law schools first before seeking to remedy its broader public elementary and secondary school grievances. Why law schools? First, the law student population was smaller and, therefore, more manageable. Second, the number of law schools was far less than the number of elementary and secondary schools. Anticipating that some of the nation’s jurists would be swayed by some of the volatile enforcement issues associated with desegregation, the NAACP reasoned that the general social upheaval involved with desegregating law schools was not nearly as threatening as it would have been with the public secondary and elementary schools. Third, the NAACP felt that law students were more concerned with their civil liberties and, thus, would be much more cooperative with the NAACP’s agenda. Moreover, it was important for the next generation of NAACP attorneys to be proficient in the law for future legal battles and many segregated law schools did not offer the same caliber of training as their Caucasian counterparts. Finally, the NAACP felt that law schools, where the tenets of equality are taught, should be a source of, and place for, true equality. *See* MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at ch. 1 (1987).

62. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (rejecting the state of Missouri’s argument that the African-American demand for law school was so minimal that the state could not justify funding for such a small group of its residents, and requiring the state to provide facilities for legal education for African-Americans); *McLaurin v. Oklahoma States Regents*, 339 U.S. 637 (1950) (holding that statutes requiring an African-American law student to sit in designated seats in the classroom, library, and cafeteria were unconstitutional because they “impair[ed] and inhibit[ed] [the student’s] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession”); *Sweatt v. Painter*, 339 U.S. 629 (1950) (ordering an all-Caucasian law school to admit an African-American student because the African-American law school was not equal to the Caucasian school by any tangible or intangible measure—the Court’s first ever desegregation order). *See also Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (affirming *Gaines*). *Cf. United States v. Virginia*, 518 U.S. 515, 550-55 (1996) (applying analysis used in *Sweatt* to the circumstances at the Institute).

63. *Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954). The schools at bar in *Brown* clearly violated the “equal” portion of the “separate but equal” doctrine. One of the lower court cases, *Briggs v. Elliot*, 103 F. Supp. 920 (E.D.S.C. 1952), originated in South Carolina where “the white schools had one teacher for every 28 pupils; the black schools had one teacher for every 47 students. The white schools were brick and stucco; the black schools were made of rotting wood. The white schools had indoor plumbing; the black schools had outhouses.” ERWIN CHEREMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLE AND POLICIES* 560 (1997) (citing RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 257 (1977)).

took this narrow approach in *Sweatt v. Painter*. On the other hand, the Court could have acknowledged the intangible inequities arising in racially segregated schools and “determine[d] the effect of segregation itself on public education.”⁶⁴ In *Brown*, the Court took the latter, broader approach.

Citing social science research,⁶⁵ findings of the lower courts,⁶⁶ the inconclusive nature of the intent of the framers of the Fourteenth Amendment on the issue of racial segregation,⁶⁷ and the necessity of addressing the issue of racial segregation in modern terms,⁶⁸ the Court unanimously concluded:

[I]n the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the [African-American] plaintiffs and others similarly situated for whom the actions have been brought are . . . deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.⁶⁹

Without a doubt, the *Brown* Court took one of the most courageous and revolutionary steps in this country’s social, political and legal histories. But the Court’s profound ruling in *Brown* is inapposite in answering the question of whether single-gender public schools—and the CSGAPP in particular—violate the Equal Protection Clause. On the one hand, the Court took the broad approach in abolishing all racially segregated public schools, as discussed above. The Court itself recognized the “wide applicability of [its] decision” in desegregating schools.⁷⁰ On the other hand, the Court simultaneously opted for a narrow ruling by limiting its decision to the question of *racial* segregation only.

Note that the judges in two of the lower court cases leading to *Brown* acknowledged these inequalities. See *Brown*, 347 U.S. at 494 n.10.

64. *Brown*, 347 U.S. at 492.

65. See *id.* at 494-95 n.11. (“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, [the finding that racial segregation is unconstitutional] is amply supported by modern authority.”).

66. See *id.* at 494 n.10.

67. See *id.* at 489 (The rearguments heard regarding “the circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”).

68. See *id.* at 492-93. The Court stated:

In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these [African-American] plaintiffs of the equal protection of the laws.

Id.

69. *Id.* at 495.

70. *Id.*

Writing for the majority, Chief Justice Earl Warren plainly and explicitly framed the issue addressed by the *Brown* Court at the outset of the opinion: “Does segregation of children in public schools *solely on the basis of race*, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”⁷¹ Rather than ruling that segregation on any classification of children in elementary and secondary public schools is unconstitutional, the phrases “solely on the basis of race” and “children of the minority group” limit the ultimate breadth of the decision.

Moreover, in rationalizing its conclusion that “separate but equal” educational facilities are “inherently unequal,” the Court only referred to the injury suffered by African-American children in racially segregated schools.⁷² The Court never characterized segregation based upon other criteria as damaging or, for that matter, ineffective.⁷³ Assuming *arguendo*, the unanimous *Brown* Court intended to prohibit unconditionally all forms of segregated public schools, including classifications based upon gender, the Court has never applied the rule as such.⁷⁴ Thus, even though the Court asserted that “separate but equal” has “no place . . . in the field of

71. *Id.* at 493 (emphasis added).

72. *Id.* at 495. “To separate [children] 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.” *Id.* at 494 (emphasis added). “Segregation . . . has a tendency to [retard] the educational and mental development of *Negro children* and to deprive them of some of the benefits they would receive in a *racially integrated* school system.” *Id.* at 494 (emphasis added).

73. Some jurists have erroneously broadened the meaning of *Brown* to apply to single-gender public schools. Writing in dissent in *Vorchheimer v. Philadelphia*, Judge Gibbons quoted *Plessy*—substituting in the term “sex” for “race” where “appropriate”—and then declared:

No doubt had the issue in this case been presented to the Court at any time from 1896 to 1954, a “separate but equal” analysis would have carried the day. I was under the distinct impression, however, that “separate but equal” analysis, especially in the field of public education, passed from the fourteenth amendment jurisprudential scene over twenty years ago The majority opinion, in establishing a twentieth-century sexual equivalent to the *Plessy* decision, reminds us that the doctrine can and will be invoked to support sexual discrimination in the same manner that it supported racial discrimination prior to *Brown*.

Vorchheimer v. Philadelphia, 532 F.2d 880, 888-89 (3d Cir. 1976) (Gibbons, J., dissenting) (citations omitted).

Despite Judge Gibbons’ scathing remarks for the majority and expression of his internal outrage, he chose not to continue on with what he claims is such a convincing argument and abominable violation of the Constitution. Rather, he chose to evade the issue altogether: “But the resurrection of the ‘separate but equal’ analysis is not my most serious quarrel with the majority opinion.” *Id.* at 889.

74. The *Vorchheimer* majority responded to Judge Gibbons’ criticism in a footnote. “The dissent’s paraphrase of *Plessy v. Ferguson*, is an imaginative argument contending, in essence, that sex is, like race, a suspect classification. That premise, while eloquently expressed, has not been accepted by the Supreme Court.” *Vorchheimer*, 532 F.2d. at 886 n.7 (citation omitted).

public education,”⁷⁵ that assertion is limited to *racially* segregated public schools only.

B. THE SUPREME COURT HAS RULED THAT *SOME* SINGLE-GENDER
PUBLIC SCHOOLS VIOLATE THE EQUAL PROTECTION CLAUSE,
BUT NOT ALL

As discussed in the preceding subsection, the *Brown* decision is explicitly limited to the issue of racially segregated public schools. Nevertheless, the federal courts have had several opportunities to either apply the *Brown* ruling to gender segregated public schools or prohibit single-gender public schools outright. Yet, subsequent to *Brown*, the reviewing federal court has focused its analysis on the extremely narrow issue of whether the *specific* single-gender public school(s) at bar violates the Equal Protection Clause, rather than addressing whether single-gender public schools *generally* violate the Fourteenth Amendment.⁷⁶

The United States Supreme Court is no exception. On two separate occasions, the Supreme Court expressly declined to rule on the general constitutionality of “separate but equal” single-gender public schools.⁷⁷

75. *Brown*, 347 U.S. at 495.

76. See, e.g., David Hoffman, *Challenge to Single-Sex Schools Under Equal Protection: Mississippi University For Women v. Hogan*, 6 HARV. WOMEN'S L.J. 163, 173 (1983) (“*Brown v. Board of Education* struck down the ‘separate but equal’ doctrine as applied to race. As applied to sex, however, the doctrine is still alive.”); Lisa K. Hsiao, “*Separate But Equal*” Revisited: *The Detroit Male Academies Case*, 1992 & 1993 ANN. SURV. AM. L. 85, 92 (1993) (“*Brown* mandated that with regard to race . . . ‘the doctrine of “separate but equal” has no place.’ However, the Court has never extended this holding to gender-based classifications.” (citing *Brown*, 347 U.S. at 495)); Pamela J. Smith, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2016 (1992) (“[T]he Supreme Court . . . in *Brown* . . . was referring to de jure segregation by race, not separation by sex.”).

77. While the Supreme Court has only confronted this issue twice, the lower federal courts have addressed it several times, consistently framing the legal issue narrowly. Despite framing the issues identically, the outcomes have been distinctly different.

In 1970, two federal district courts first addressed the constitutionality of single-gender public universities. Both courts could have ruled on the broad issue of gender segregation in public schools, but declined to do so. A Virginia district court stated, “We need not decide on the facts of this case whether the now discountenanced principle of ‘separate but equal’ may have lingering validity in another area . . .” *Kirstein v. Rector*, 309 F. Supp. 184, 187 n.1 (E.D. Va. 1970). The “area” to which the court refers is single-gender public schools. Similarly, a South Carolina district court declined “to go further” than the ruling in *Kirstein* and framed its issue narrowly: “[T]he issue in this case is whether discrimination in admission of students, created by the statute governing the operation of [the all-female public school in question] and based on sex, is without rational justification.” *Williams v. McNair*, 316 F. Supp. 134, 137 (D. S.C. 1970). See also *Heaton v. Bristol* 317 S.W.2d 86, 98 (Tex. Civ. App. 1958) (neither party “pointed out any case wherein an appellate court of any jurisdiction has at any time held, or even intimated, that a state cannot, as part of its overall educational system, maintain one all-male or one all-female university . . .”).

Rather, in both cases, the court examined whether the state offered each gender equal educational opportunities. And although the Court ruled in favor of the petitioners and against the state in both *Hogan* and *VMI*, it deliberately left open the issue of whether single-gender public schools are generally constitutional. Following the Supreme Court precedent, therefore, a reviewing court would closely scrutinize the equality of a pair of CSGAPP academies rather than simply dismiss the Program as per se unconstitutional.

1. *Hogan v. Mississippi University for Women* (1982)

In *Hogan*, complainant Joe Hogan was a registered nurse who applied to the Mississippi University for Women's School of Nursing ("MUW") baccalaureate program. MUW, established as an all-female university in

In 1976, the Third Circuit determined the constitutionality of twin single-gender high schools—very similar to the academies authorized under the CSGAPP—in Philadelphia. Although the circuit court overruled the final conclusion of the district court, both addressed the issue of single-gender schools narrowly by discussing the (in)equality of the educational offerings at the two schools. At the very outset of the opinion, Judge Weis inquired:

Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational? Stated another way, do our Constitution and laws forbid the maintenance by a public school board, in a system otherwise coeducational, of a limited number of single-sex high schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal?

Vorchheimer v. Philadelphia, 532 F.2d. at 881. The court then answered its own question "negatively." *Id.* For a more detailed discussion of this case see *infra* Part IV.A.

In 1991, a federal district court in Michigan ordered the Detroit Board of Education to refrain from opening three all-boys elementary schools in Detroit, Michigan. The court simply followed the lead in *Hogan* by framing its issue narrowly: "[t]he Court is not presented with the question of whether the Board can provide separate but equal public school institutions for boys and girls." Garrett v. Detroit, 775 F. Supp. 1004, 1006-07 n.4 (E.D. Mich. 1991).

In 1991, a federal district court in Virginia ruled that the Institute did not violate the Equal Protection Clause by refusing to admit women. See *U.S. v. Virginia*, 766 F. Supp. 1407 (W.D.Va. 1991). The court narrowly framed "the issue to be resolved" as "whether [the Institute's] practice of excluding women can pass muster under the equal protection clause . . ." *Id.* at 1408 (emphasis added).

In 1994, a federal district court in South Carolina ruled that The Citadel, South Carolina's state military academy, violated the Equal Protection Clause for refusing to admit women. See *Faulkner v. Jones*, 858 F. Supp. 552 (D. S.C. 1994). The Fourth Circuit, in affirming the case, noted that the parties "only litigated the issue of whether *South Carolina* could sufficiently justify offering single-gender education to males and not to females." *Faulkner v. Jones*, 51 F.3d 440, 444 (4th Cir. 1995) (emphasis added). Recognizing that the *Faulkner* case directly paralleled the issues in the Institute litigation, see 858 F. Supp. at 554 n.2, which had begun in 1991, both courts and the parties decided that the "benefits of single-gender education need not be retried . . ." *Faulkner*, 51 F.3d at 444.

In 1995, Judge Phillips, dissenting in the Fourth Circuit case affirming Virginia Women's Institute for Leadership as a sufficient remedy for Virginia's constitutional violation in *VMI*, noted that the question of "whether single-gender undergraduate educational facilities are 'inherently unequal' . . . has never been addressed by the Supreme Court, or by this court, hence is an open note." *United States v. Virginia*, 44 F.3d 1229, 1245 (4th Cir. 1995) (Phillips, J., dissenting). For a detailed discussion of Judge Phillips' dissent and its bearing on the CSGAPP, see *infra* Part IV.B.

1884, refused to accept Hogan's application because he was male.⁷⁸ While the Court concluded that MUW's specific admissions process violated the Fourteenth Amendment, it declined to answer the more general question of whether single-gender public schools violate the Equal Protection Clause. In writing for the majority, Justice Sandra Day O'Connor deliberately framed the opinion's issue narrowly: "Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females."⁷⁹ By framing the issue this way, the Court neither condoned nor proscribed a state plan to offer the option of single-gender public education to its residents.

Writing in dissent, Justices Harry Blackmun and Lewis Powell expressed their concerns that *Hogan* would be read as the gender equivalent of *Brown*. They too framed the issue narrowly, but expected the majority to be more direct in doing so. Justice Blackmun argued that MUW's admissions process did not discriminate based upon gender because other nursing programs—albeit coeducational ones—were available to men elsewhere in Mississippi. More importantly, he argued that despite the majority's explicit attempt to frame the issue narrowly to avoid a *Brown*-type ruling, the "spillover" effect would "place in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex"⁸⁰

Likewise, Justice Lewis Powell echoed Blackmun's thoughts when he criticized the majority for "purport[ing] to decide this case 'narrow[ly]' . . . [with] sweepin[g] . . . logic."⁸¹ He distinguished the invidiousness of segregation based upon race with the merits of some forms of segregation based upon gender:

Sexual segregation in education differs from the tradition, typified by the decision in *Plessy v. Ferguson*, of "separate but equal" racial segregation MUW stands in sharp contrast Women consequently are free to select a coeducational education environment for themselves if they so desire; their attendance at MUW is not a matter of coercion.⁸²

Justice Powell, like Justice Blackmun, feared that the precedent in *Hogan* would be misinterpreted as the gender companion case to *Brown*

78. See *Hogan v. Mississippi Univ. for Women*, 458 U.S. 718, 720-21 (1982).

79. *Id.* at 720 n.1.

80. *Id.* at 734 (Blackmun, J., dissenting) (emphasis added). Strict scrutiny analysis, which Justice Blackmun felt was applied in the majority's opinion notwithstanding its assertion to the contrary, should be reserved for cases involving race and religion only. See *id.* at 734-35.

81. *Id.* at 745 n.18 (Powell, J., dissenting).

82. *Id.* at 742 n.9 (citation omitted).

and would later haunt states seeking to offer constitutionally permissible single-gender educational options.

While the Justices in *Hogan* may have disagreed on the outcome of this particular case, they all agreed—although the dissenters would have articulated it differently—that the issue of gender segregation is distinct from racial segregation and must be addressed on a case-by-case basis, rather than a blanket ruling as in *Brown*.

2. United States v. Virginia (1996)

In 1996, the Supreme Court followed the *Hogan* precedent when it ruled in one of its most highly publicized cases in recent history: *United States v. Virginia*.⁸³ The Court determined that the specific admissions policy at the all-male Virginia Military Institute was unconstitutional. Established in 1839 as one of the nation's first state funded military academies, the Institute earned respect and fame during the Civil War when cadets repelled invading Union troops at the Battle of New Market.⁸⁴ Its stated purpose then, as it is now, was to create "citizen-soldiers" via the "adversative, or doubting, model of education" which entails "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."⁸⁵ Virginia argued that this unique educational environment could not be replicated in a coeducational setting. Nevertheless, although the Court noted that "[the Institute's] mission is special,"⁸⁶ it ruled that its all-male admissions policy violated the Equal Protection Clause.

Writing for the majority, Justice Ruth Bader Ginsburg limited her opinion to the specific facts surrounding the Institute. She mirrored the manner in which Justice O'Connor narrowly framed the issue in *Hogan*:

We do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address *specifically and only* an educational opportunity recognized by the District Court and the Court of Appeals as 'unique,' an opportunity available only at Virginia's pre-

83. 518 U.S. 515 (1996).

84. See William Henry Hurd, *Gone With the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27, 28 (1997).

85. *Virginia*, 518 U.S. at 522 (citing the lower court decision 766 F. Supp. 1407, 1421 (W.D. Va. 1992)).

86. *Id.* at 521.

mier military institute, the State's sole single-sex public university or college.⁸⁷

Again, as in *Hogan*, the issue was narrowed to just the specific facts surrounding the Institute and, again, *all* the justices agreed on the framing of the issue, despite not agreeing upon the final outcome of the case.⁸⁸ To further support this conclusion, a close analysis of the *VMI* opinion reveals that limiting language pervades the entire opinion as Justice Ginsburg refers to the "special"⁸⁹ and "distinctive"⁹⁰ institution as an "incomparable military college" with "unique educational opportunities."⁹¹ Evidently, the Court perceived the Institute to be an anomaly. Therefore, it would be inappropriate for another court to impute this ruling to all single-gender educational institutions.

3. *If the CSGAPP Is Challenged on Equal Protection Grounds, the Reviewing Court Should Follow Precedent and Frame the Issue Narrowly*

According to the precedents set in *Hogan* and *VMI*, if the CSGAPP is challenged on equal protection grounds, the reviewing court should frame the issue narrowly. For example, suppose that a male student challenges the Lincoln Unified School District in Stockton because he was denied admission to the all-female Mary McLeod Bethune Academy solely on the basis of his gender. To determine the constitutionality of this particular school, the court would first look to whether the school district offers an all-male option to the claimant. If it hypothetically did not offer such a school, the school district would receive the same adverse ruling as the schools in *Hogan* and *VMI*. But Lincoln Unified School District does offer an all-male option. Therefore, pursuant to the requirements of the CSGAPP, the reviewing court would inquire whether the *specific* educational opportunities offered at Mary McLeod Bethune Academy are equivalent to those offered at its all-male counterpart, Horace Mann Academy.⁹²

87. *Id.* at 534 n.7 (emphasis added) (citation omitted). In acknowledging the continuity of the Court's decision to not take up the issue of single-gender public schools generally, the Court cites to *Hogan* immediately following the quote.

88. *See generally id.* at 558-603 (Rehnquist, C.J., concurring and Scalia, J., dissenting). Note that Justice Thomas recused himself from this case because his son attended the Institute.

89. *Id.* at 521.

90. *Id.* at 524.

91. *Id.* at 519-20.

92. *See discussion infra* Part V.A.

Unless the Supreme Court abandons its analysis in *Hogan* and *VMI*, there is no question that the Fourteenth Amendment permits states and school districts to establish single-gender public schools. For the following reasons, however, the Supreme Court is not likely to change its doctrinal analysis any time in the near future.

First, the Court is hesitant to tamper with the analysis in a case it so recently decided. Stare decisis, or the rule of law,⁹³ is critical to the effective functioning of the “root of American governmental power” which, in the eyes of the nation, lies “specifically upon [the United States Supreme] Court.”⁹⁴ Only principles that are shown by the “most convincing justification”⁹⁵ as no longer applicable should be overruled or modified. Otherwise, “[t]he legitimacy of the Court would fade with the frequency of its vacillation.”⁹⁶ The legitimacy of the Court is most vulnerable in politically charged and media scrutinized cases such as *VMI*.

Second, there is an abundance of research indicating the efficacy of single-gender schools for both male and female students.⁹⁷ This contrasts with the overwhelming wealth of sociological research which revealed the detrimental effects of racial segregation upon African-American children that the *Brown* Court accepted as convincing evidence.⁹⁸ As one federal court noted in 1970, single-gender education “‘has a long history’ and ‘is [currently] practiced extensively throughout the world.’”⁹⁹ Surely the federal courts would be hard pressed to argue with the “most convincing justification” that single gender schools are “unworkable.”

93. In discussing the importance of reaffirming the decision in *Roe v. Wade*, the Court in 1992 discussed at great length the significance of the doctrine of stare decisis. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-70 (1992). The Court asserted:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Id. at 854 (citations omitted). To illustrate its point, the Court fittingly and extensively referred to the overruling of *Plessy* with its decision in *Brown*.

94. *Casey*, 505 U.S. at 865.

95. *Id.* at 867.

96. *Id.* at 866.

97. See discussion *infra* Part V.B.3.

98. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 n.11 (1954).

99. *Williams v. McNair*, 316 F.Supp. 134, 137 (D. S.C. 1970) (quoting the stipulations of the plaintiff who was challenging the admission practices of Winthrop College, an all-female college in South Carolina.)

Moreover, several leading jurists have vocally acknowledged the value associated with a single-gender education. In his *VMI* concurrence, Chief Justice William Rehnquist expressed his continuing faith in the ability of single-gender schools to achieve heightened pedagogical objectives.¹⁰⁰ Justice Antonin Scalia indicated his approval for single-gender public schools by criticizing the scope of the *VMI* opinion as “sweeping.”¹⁰¹ He scolded the majority for effectively closing the door on single-gender public education, “regardless of whether the Court’s rationale leaves some small amount of room for lawyers to argue”¹⁰²

Analyzed together, *Hogan* and *VMI* support the proposition that the federal courts have not banned single-gender public schools outright as occurred with racially segregated public schools in *Brown*. In addition, the narrow issue framing in both cases indicates that the federal courts review the constitutionality of single-gender public institutions on a case-by-case basis. The following Section discusses the analytical process a reviewing court applies when reviewing single-gender public school programs such as the CSGAPP.

IV. THE FEDERAL COURTS REVIEW THE RELATIVE EQUALITY OF SINGLE-GENDER PUBLIC SCHOOLS WHEN DETERMINING IF THEY ARE IN FACT “SEPARATE BUT EQUAL”

The United States Supreme Court has not directly addressed the issue of whether single-gender public schools are generally constitutional, nor has it addressed the specific factual circumstances surrounding the CSGAPP. However, in *Vorchheimer v. Philadelphia* (1976),¹⁰³ the Third Circuit affirmatively established that identical sets of single-gender public schools are constitutional. Although the Supreme Court did not decide this case, it effectively affirmed the decision when it was announced and, in *VMI*, strongly indicated its willingness to accept the constitutionality of single-gender public schools if the factual circumstances are amenable.

100. Although Chief Justice Rehnquist believes that some students may benefit from single-gender environment, he agreed with the *VMI* majority that the Virginia Women’s Institute for Leadership (“VWIL”)—created by Virginia in response to litigation in this case—“simply [was] not, in any sense, the institution that [the Institute] is.” *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Rehnquist, C.J., concurring).

101. *Id.* at 596 (Scalia, J., dissenting).

102. *Id.* “[The Court] ensures that single-sex public education is functionally dead. The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing single-sex program.” *Id.*

103. 532 F.2d. 880 (3d Cir.1976).

A. A SUIT CHALLENGING THE CSGAPP WOULD INDUCE THE FEDERAL COURTS TO REVISIT THE ANALYSIS AND OUTCOME IN *VORCHHEIMER V. PHILADELPHIA*

In 1976, the Third Circuit ruled that a pair of single-gender public schools, like those participating in CSGAPP, is constitutional so long as they are separate but really equal. The plaintiff in that case, Susan Lynn Vorchheimer, sought admission to Central High School, an all-male public school, rather than Girls High School, an all-female alternative in her Philadelphia school district. Although both high schools were over a century old, considered “academic” in nature, maintained high admission standards, and offered college preparatory courses, Ms. Vorchheimer preferred the atmosphere at Central High. Nevertheless, she was denied admission to Central High solely on the basis of her gender.¹⁰⁴ She promptly sued Philadelphia, claiming the city violated her rights under the Equal Protection Clause.

The Third Circuit reversed the lower court’s decision to admit Ms. Vorchheimer to Central High by ruling that the separate but equal single-gender public schools in Philadelphia did not violate the Fourteenth Amendment. The court justified its decision by citing persuasive social science research indicating the benefits of a single-gender education, the availability of coeducational options to all students living within the district, and the “substantial comparability” of the two schools.¹⁰⁵ The court noted that it was not ruling “upon the wisdom” of single-gender schools, but that ruling in favor of the complainant would likely abolish all single-gender public schools nationwide,¹⁰⁶ an outcome that would rob states and school districts of their constitutionally reserved powers.

At first glance, *Vorchheimer* does not appear to be controlling or even overly persuasive in discussing the CSGAPP. The case was decided in the Third Circuit, prior to the Supreme Court’s use of the intermediate scrutiny test in cases involving gender-based classifications, and several years later, it was reversed on factual circumstances by a state court. But discounting the relevance of *Vorchheimer* to the CSGAPP would be erroneous.

First, although the Supreme Court did not decide the case, it did have the opportunity to rehear it in 1977. Instead, the Court opted to summarily

104. The finding of facts in *Vorchheimer* are concisely enumerated in the district court’s opinion. See *Vorchheimer v. Philadelphia*, 400 F. Supp. 326, 327-32 (E.D. Pa. 1975).

105. *Vorchheimer*, 532 F.2d. at 887-88 (1976).

106. *Id.* at 888. Cf. *Hogan v. Mississippi Univ. for Women*, 458 U.S. 718, 733-45 (1982) (Blackmun, J. & Powell, J., dissenting) (noting the “spillover” effect of the majority’s opinion).

affirm the Third Circuit's decision, a step signifying its approval of the underlying ruling.¹⁰⁷ If the Court had any quarrels with the rationale or outcome in *Vorchheimer*, it would have likely reconsidered the issues in a direct appeal rather than wait for a similar issue to resurface on its docket at a later date.

Second, although the case was decided just a few months prior to the landmark decision in *Craig v. Boren*,¹⁰⁸ when the Supreme Court first formally applied the intermediate scrutiny standard in cases involving gender-based classifications, the *Vorchheimer* court did not simply apply the then-prevailing rational-basis analysis. Instead, the Third Circuit anticipated the imminent heightening of scrutiny, which the Supreme Court had actually contemplated in its 1971 decision in *Reed v. Reed*,¹⁰⁹ and applied the intermediate scrutiny test as it is applied today. The court referred to its analysis as the "substantial relationship" test, recognizing that gender based classifications should be subjected to a scrutiny level that falls somewhere between strict scrutiny and rational-basis.¹¹⁰ Again, had the Supreme Court believed that the *Vorchheimer* court misapplied the then-developing intermediate scrutiny test, it surely would have reconsidered the case rather than summarily affirming it.

Finally, although the *Vorchheimer* decision was revisited and essentially reversed in 1984 by a Pennsylvania state court in *Newberg v. Philadelphia*,¹¹¹ the reversal desegregated Central High on factual grounds only, preserving the legal rationale of *Vorchheimer*.¹¹² One commentator argued that, despite its outcome, *Newberg* is actually a valuable guide for administrators at single-gender public schools like the CSGAPP academies. The case:

provides a paradigm for how courts should approach their fact-finding roles in single sex school cases . . . [T]he Pennsylvania trial court performed probably the most searching judicial comparison of two separate

107. *Vorchheimer v. Philadelphia*, 430 U.S. 703 (1977).

108. 429 U.S. 190 (1976).

109. 404 U.S. 71 (1971).

110. *See Vorchheimer*, 532 F.2d. at 886 n.7, 888.

111. *Newberg v. Philadelphia*, 478 A.2d 1352 (Pa. Super. Ct. 1984). Another female complainant presented sufficient factual evidence demonstrating the inequities between Girls' and Central High Schools. For example, the court found several factors that indicated the superiority of Central High: there were more PhD's and other experienced teachers, the campus was three times the size as that at Girls' High, there were 50% more volumes in the Central Library, and Central had more instructional facilities. *See id.* at 565.

112. Girls' High School in Philadelphia remains all-female as of 1998.

but supposedly equal schools. The earlier comparison in *Vorchheimer* stopped at a very high level of generality.¹¹³

The *Vorchheimer* court's rationale has not been lost. Single-gender public schools may exist, but they must be equal in all respects.

B. USING CIRCUIT JUDGE PHILLIPS' PARADIGM, THE COURT HAS ASSERTED THAT IT WOULD CONTINUE TO REVIEW THE RELATIVE EQUALITY OF SINGLE-GENDER PUBLIC SCHOOLS LIKE THE CSGAPP ACADEMIES

The *Vorchheimer* case furnishes today's federal courts with a sound legal precedent to follow should the CSGAPP be challenged on equal protection grounds. But *Vorchheimer* was decided more than two decades ago, a significant amount of time in the realm of constitutional law. So how do we know that *Vorchheimer* continues to be good law? The *VMI* decision tells us so.

In 1992,¹¹⁴ as the *VMI* case passed through the lower courts, the Fourth Circuit concluded that the Virginia Women's Institute for Leadership ("VWIL") sufficiently cured Virginia's equal protection violation with respect to the Institute. Senior Circuit Judge J. Dickson Phillips dissented from the majority on two legal grounds. First, he argued that Virginia failed to meet its burden under an intermediate scrutiny analysis. Second, and more germane to the CSGAPP, Phillips revisited the lessons in *Vorchheimer* and argued that VWIL and the Institute were not "separate but equal." Judge Phillips articulated a "narrowly circumscribed" standard for single-gender schools that would most likely "survive scrutiny":

113. Bennett L. Saferestein, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 652 (1993).

114. The procedural history in this case is important to note, particularly the 4th Circuit remand for remedial measures ordered in 1992 and the subsequent rejection of Virginia's response by the Supreme Court in 1996. In 1991, the District Court for the Western District of Virginia ruled that the state passed the intermediate scrutiny test in establishing an all-male "adversarial" and "barracks-oriented" educational opportunity. *See United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991). In 1992, the United States appealed to the 4th Circuit which vacated the District Court's ruling because Virginia failed to prove why a single-gender military academy "gave effect" to the state's mission of shaping the "citizen-soldier." The 4th Circuit remanded the case so that Virginia could attempt to remedy the Fourteenth Amendment violation. *See United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992). On remand, the District Court approved Virginia's remedial plan to open up a comparable facility to train women as "citizen soldiers". *See United States v. Virginia*, 852 F. Supp. 471 (4th Cir. 1994). The United States appealed this decision which was affirmed by the 4th Circuit. *See United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995). Subsequently, the United States Supreme Court granted certiorari.

[Permissible single-gender educational institutions] would involve simultaneously opened [schools] having substantially comparable curricular and extra-curricular programs, funding, physical plant, administrative and support services, and faculty and library resources. Such an arrangement would involve no gender-line discrimination in terms of tangible benefits, nor of intangible benefits such as, tradition, prestige and alumni influence—as to which each starts with none. Nor could there be any stigmatic implications arising from the substantially comparable content of its educational program.¹¹⁵

Twice,¹¹⁶ the *VMI* Court cited Judge Phillips' "paradigm," even noting the manner in which Phillips' measured the Institute and VWIL against the paradigm. These references strongly suggest that the *VMI* Court concurs with Phillips' paradigm. Arguably, had the Institute and VWIL been separate but really equal, the Court may have reached the opposite conclusion. Furthermore, because the Court in *VMI* did not dismiss the paradigm as unworkable or a violation of the Equal Protection Clause, it is likely willing to apply the Phillips paradigm to future cases involving single-gender public schools, such as the CSGAPP academies.

While the Court's approval of the Phillips paradigm is rather clear, the way it will apply the paradigm to schools like the CSGAPP academies is an open question.¹¹⁷ One commentator has offered two possible approaches.¹¹⁸ On the one hand, the Court could dissect each individual element of the single-gender schools at bar, as listed by Phillips, and examine them "microscopically." But problems with the microscopic approach arise when opponents of single-gender public schools highlight negligible differences between single-gender schools, rather than unconstitutional inequities. To address this dilemma, the Supreme Court would have to specifically define what differences are "unequal," a virtually impossible task for any jurist to undertake. Take the case of school libraries as an example. Are two schools necessarily equal if they both have libraries? Probably not. A reviewing court would likely want to know the number of volumes in each library before passing judgment on the schools' relative equality. What if the libraries have the same number of

115. *United States v. Virginia*, 44 F.3d 1229, 1250 (4th Cir. 1995).

116. *See United States v. Virginia*, 518 U.S. 515, 529-30, 534 n.7 (1996).

117. Despite the Court's component by component examination of VWIL relative to the Institute, the level of specificity it chose was ambiguous. *See Saferstein, supra* note 113, at 671 (suggesting that the comparison problem could be solved by using a greater level of specificity).

118. *See Hurd, supra* note 84, at 51-53. *See also Saferstein, supra* note 113, at 670 (commenting on the choices between levels of scrutiny: "At the highest level of generality, all educational institutions are the same; at the greatest level of detail, each school is unique in dozens of non-trivial ways.").

volumes but one has more math and science books and the other has more English and history books? Or if one has more computer resources and the other has more reference librarians? Are they still equal? It becomes a very difficult question to answer. The schools' libraries are certainly different, but one would be hard-pressed to argue which one is better. In short, these microscopic questions could potentially lead the Court down a slippery slope which would effectively gut Phillips' paradigm.

Alternatively, the Court could adopt a more comprehensive approach and examine the schools "macroscopically" as preferred by Chief Justice William Rehnquist. According to Chief Justice Rehnquist, "[i]t would be a sufficient remedy . . . if . . . two [single-gender] institutions offered the same quality of education and were of the same *overall* calibre."¹¹⁹ Under this macroscopic approach, states and school districts would only be required to make "a genuine effort to devote comparable public resources" to both the male and female schools.¹²⁰ It would be unnecessary to open the schools simultaneously, employ the "same number of faculty PhD's," admit students based on the same SAT scores, or provide "comparable athletic fields."¹²¹ Rehnquist offered the example of one school being strong in computer science while the other being equally as strong in the liberal arts.¹²²

Of course, a school district offering single-gender schools may face constitutional challenges if it attempts to hide behind a macroscopic "defense." For example, if a school district does not permit a male student to enroll in an all-female school with a far superior science program relative to its all-male counterpart, the school district may not later argue that the all-male school has a comparably superior English literature program. However, if the gap in the relative quality in the curricula is slight and the curricula are not based upon gender-role stereotypes, then a macroscopic defense should be reasonably viable for the school district.

Judge Phillips himself appeared to favor this macroscopic application of his paradigm. His dissent suggests that his paradigm was the ideal "separate-but-equal" situation, not the baseline: "If any arrangement involving separate-but-equal single-gender institutions set in place to achieve governmental objectives of system diversity . . . could survive

119. *VMI*, 518 U.S. at 565 (Rehnquist, C.J., concurring) (emphasis added).

120. *Id.* at 563.

121. *Id.* at 565.

122. *See id.*

equal protection scrutiny, it surely would be the one such as that posited.”¹²³

Using the macroscopic approach, the courts would not have to engage in elusive inquiries regarding the equality of each component of the schools. It would also permit judges to be flexible and use common sense when reviewing sets of single-gender institutions. Finally, under the macroscopic application of the Phillips paradigm, the administrators at single-gender institutions would have some autonomy to experiment with different, although not constitutionally inequitable, approaches to suit the various learning styles of male and female students and address the unique academic and social issues facing students of each gender.¹²⁴

Almost prophetically, Judge Phillips described the letter and spirit of the CSGAPP in articulating his paradigm. The *VMI* Court’s discussion of the paradigm strongly suggests both its constitutional validity as well as the Court’s willingness to continue applying the legal analysis used in *Vorchheimer*.

V. THE CSGAPP IS CONSTITUTIONALLY PERMISSIBLE ON TWO INDEPENDENT LEGAL FRONTS

The CSGAPP is constitutionally permissible on two independent legal fronts. First, each pair of CSGAPP academies are equal when considering the crucial factors first enumerated in Judge Phillips’ paradigm and then applied in *VMI*. In short, they are permissibly separate but equal. Second, the CSGAPP passes the intermediate scrutiny test used by the federal courts for the past twenty-three years when reviewing the constitutionality of gender-based classifications. The following subsections examine each of these constitutional theories in turn.

A. IN REVIEWING THE SAME FACTORS AS IN *VMI*, A COURT WOULD CONCLUDE THAT THE CSGAPP ACADEMIES ARE EQUAL IN FACT AND ARE, THEREFORE, SEPARATE BUT REALLY EQUAL

As in the *Vorchheimer* and *VMI* cases, when pairs of single-gender public schools (like the CSGAPP academies) are challenged on equal pro-

123. *United States v. Virginia*, 44 F.3d 1229, 1249 (4th Cir. 1995) (Phillips, Circuit J., dissenting).

124. *See Hurd, supra* note 84, at 52. The author of this Note does not condone this approach, but recognizes the psychological and sociological studies demonstrating that males and females learn differently. In any event, the issue should be left open for debate and revisited when and if the factual circumstances arise.

tection grounds, reviewing courts must engage in a careful examination of various tangible and intangible factors to determine whether they are separate but really equal. Although, in using this analysis, the *VMI* Court employed this analysis and concluded that the twin schools, the Institute and VWIL, were not in fact equal, a reviewing court would certainly yield an opposite conclusion if the same factors were analyzed at the various CSGAPP academy pairs.

After a number of years and a series of proceedings in the lower courts, the *VMI* Court overruled the Fourth Circuit when it concluded that the remedial measure chosen by Virginia—retaining its “exclusionary [all-male admissions] policy”¹²⁵ and creating an all-female, “parallel program”¹²⁶—was insufficient to cure its Fourteenth Amendment violation. VWIL was “different in kind from [the Institute] and unequal in tangible and intangible facilities.”¹²⁷ But the Court did not end its analysis of VWIL there; instead, it devoted a large portion of its opinion to microscopically¹²⁸ examining specific institutional shortcomings of VWIL relative to the Institute.¹²⁹ This Section will specifically compare the Court’s discussion of the differences between VWIL and the Institute with the California Legislature’s design for the CSGAPP.

1. *Equal Funding*

VWIL and the Institute were not funded equally, despite Virginia’s pledge that it would “provide equal financial support” for all Virginians attending either institution. The Court noted that “the difference between the two schools’ financial reserves [was] pronounced.”¹³⁰ VWIL’s endowment at the time of trial was \$19 million with commitments expected to raise it to \$35 million. Conversely, the Institute’s endowment at the time of trial was \$131 million with commitments expected to raise it to \$220 million, which would give the Institute the largest per-student endowment in the United States. While the size of a school’s endowment does not necessarily shed light upon the quality of education offered by the

125. *Virginia*, 518 U.S. at 547-48.

126. *Id.* at 547.

127. *Id.* See generally *id.* at 547-56.

128. Because the Institute and VWIL were so clearly unequal in every respect it is difficult to determine whether the *VMI* Court employed the microscopic or macroscopic approach discussed *supra* Part IV.B. For the purposes of this Note, the author assumes that the Court intended to employ the more stringent microscopic approach to demonstrate that the CSGAPP will pass constitutional muster under either approach.

129. Incidentally, this analysis further demonstrates the Court’s conscious decision to address the facts on a case-by-case basis when scrutinizing single-gender public schools.

130. *Virginia*, 518 U.S. at 552.

institution, a large war chest provides a school's administrators with an element of flexibility that another, less wealthy school may not have.

In contrast, any two CSGAPP academies within a district receive identical funding from the state and school district. In fact, the Legislature explicitly insisted that approved school districts allocate \$250,000 of their \$500,000 state grants to each of the CSGAPP academies it establishes.¹³¹ Additionally, any funding supplied by a CSGAPP district in excess of the \$250,000 state grant must also be shared equally by the academies. This objective was clearly articulated by the California Legislature when it required participating districts to ensure "[e]qual funding . . . at both boys' and girls' academies."¹³²

2. *Equal Student Body, Faculty, and Facilities*

Both tangibly and intangibly, the Institute's and VWIL's facilities were grossly unequal. Relying on the analysis used in *Sweatt v. Painter*,¹³³ the VMI Court stated, "[i]n myriad respect other than military training, VWIL does not qualify as [the Institute's] equal."¹³⁴ Tangibly, "VWIL's student body,¹³⁵ faculty,¹³⁶ and facilities¹³⁷ hardly match [the Institute's]."¹³⁸ Intangibly, the Institute's reputation and alumni network surpassed that of VWIL's. The "VWIL graduate [cannot] anticipate the benefits associated with the Institute's 157 year history, the school's prestige, and its influential alumni network."¹³⁹

The CSGAPP academies could not diverge more from the specific circumstances surrounding the Institute and VWIL. Approved school districts select boys and girls from a district-wide pool in an identical manner.¹⁴⁰ This ensures that each academy within a CSGAPP pair enrolls the

131. See CAL. EDUC. CODE § 58524 (West 1997).

132. *Id.* § 58521(c)(3).

133. See discussion *supra* Part V.A.

134. *Virginia*, 518 U.S. at 551.

135. VWIL "enrolls first-year women with an average combined SAT score of about 100 points lower than the average score for [Institute] freshmen." *Id.* (citing 852 F. Supp. at 501).

136. The VWIL faculty holds "significantly lower Ph.D.'s" and "receives substantially lower salaries." *Id.* (citing 852 F. Supp. at 502).

137. *Id.*

138. *Id.* at 551.

139. *Id.*

140. Students at one CSGAPP Academy, Andrew P. Hill High School, are selected among "all ninth grade students of ESUHSD [East Side Union High School District]. Students who have shown a high potential to attend college, but have not achieved academic success in middle school and the first semester of ninth grade will be targeted for enrollment." Notice Sent to Parents of East Side Union High School District (on file with author).

same caliber student body at the male and female schools. For most CSGAPP academies,¹⁴¹ the faculty members at the girls' academy are the faculty members at the boys' academy. An algebra teacher, for example, will teach in the morning to the males and in the afternoon to the females, following the same lesson plan for each academy.¹⁴² Likewise, the facilities at one academy are often the facilities at its counterpart academy. Many pairs of CSGAPP academies are housed on the same campus, utilizing the same buildings and classrooms only at different times of day. All of the academies use identical equipment, materials and books, and any field trip taken by one academy will be taken by the other.

To forestall complaints regarding the reputational or intangible inequities between CSGAPP academies, many of the approved districts are simultaneously opening their pair of academies. This was suggested by Judge Phillips, who argued that one single-gender school may become reputationally superior relative to its counterpart and that the latter would have to play the "catch-up game" with the former. No doubt, this is a central consideration with regard to undergraduate or graduate institutions, as evidenced by the Court's discussion in *VMI*. The statutory language of the CSGAPP, however, does not require simultaneity.

Notwithstanding Judge Phillips' suggestion, why would the California Legislature forgo requiring CSGAPP academies to open simultaneously? Consider the reputation of an elementary or secondary school.¹⁴³ Is "catch-up" a substantial concern at these levels? Arguably not. If it is, the impact of reputation is negligible. Furthermore, requiring all schools within CSGAPP pair to open simultaneously could lead to an inefficient use of resources (i.e., existing buildings and other facilities may go unused). Even worse, such a requirement could potentially preclude school districts from establishing single-gender schools altogether because district funding is sufficient for only one new school.

3. *Equal Curricula*

The curricula at VWIL and the Institute were substantively different. VWIL students could not "experience the rigorous military training for

141. See, e.g., Lincoln Unified School District's abstract on its CSGAPP academies (on file with the author).

142. Some teachers may employ different "instructional strategies" geared toward one gender or the other within the framework of the same lesson plan. While this may make for a slightly *different* curriculum, it by no means makes for an *unequal* curriculum. See Letter from Ken Geisick, Single-Gender Academies coordinator, East Side Union High School District, to Jonathan Reiter, University of Southern California Law Review (Feb. 3, 1998) (on file with author) [hereinafter Geisick Letter].

143. See Hurd, *supra* note 84, at 50 n.168.

which [the Institute] is famed.”¹⁴⁴ They did “not live together throughout the 4-year program, eat meals together, or wear uniforms during the school day.”¹⁴⁵ Participation in the Virginia Corps of Cadets was “largely ceremonial.”¹⁴⁶ VWIL’s “leadership training” consisted of “seminars, externships, and speaker series,” all of which lacked the “hallmark . . . adversative training” unique to the Institute.¹⁴⁷ Moreover, the Institute offered courses that were simply unavailable at VWIL.¹⁴⁸

In contrast, under the CSGAPP “if a particular program or curriculum is available to one gender, it shall also be available to those pupils in the other gender who would benefit from the particular program or curriculum.”¹⁴⁹ The cornerstone of the CSGAPP and the stated intent of the California Legislature objective is that “[i]n all aspects of the curricula, the educational opportunity must be equal for boys and girls.”¹⁵⁰ In practice, the CSGAPP-school districts must be and are actively and earnestly equalizing the twin schools in all aspects of the curricula. For example, the Andrew P. Hill High School in San Jose recently opened the first single-gender comprehensive high school in the state. To ensure that the students at each academy receive the same curriculum, teachers must assiduously follow the state and district guidelines, undergo “equity training” so as to become sensitive to the legal and normative issues surrounding single-gender public schools, and, as faculty members for both the boys and girls academies, instruct their students utilizing the same lesson plans.¹⁵¹

No specific statutory section explicitly enumerates the equal curriculum requirements of the CSGAPP. The Legislature has delegated this authority to the individual school districts pursuant to their general governing authority—which is intended to be “liberally construed”—so that they may have the “flexibility to create their own unique solutions.”¹⁵² But academy administrators and teachers are adamant about adhering to the equal opportunity and curriculum requirements of the CSGAPP. When questioned about the differences between the CSGAPP academies at

144. United States v. Virginia, 518 U.S. 515, 548 (1996).

145. The so-called “parallel program” at VWIL denied its students the “barracks life crucial to the [Institute] experience, the Spartan living arrangements designed to foster an egalitarian ethic.” *Id.* (citing 766 F. Supp. at 1423-24) (inner quotation marks omitted).

146. *Id.*

147. *Id.*

148. “[VWIL students] cannot take . . . any courses in engineering or the advanced math and physics courses [the Institute] offers.” *Id.* at 552 (citing 852 F. Supp. at 477).

149. CAL. EDUC. CODE § 58521(b) (West 1997).

150. *Id.* § 58522(b)(3) (emphasis added).

151. See Geisick Letter, *supra* note 142.

152. CAL. EDUC. CODE § 35160.1(a) & (b) (West 1997).

Brookside Middle School, Principal John Messer replied that there were “absolutely none. As far as supplies, curriculum, and teaching methodology [are concerned], they are exactly the same, down to the number of No. 2 pencils I ordered.”¹⁵³ Similarly, Pete Herman, one of six faculty members at the Fountain Valley CSGAPP academies, asserted, “[w]hatever the boys get, the girls get. Period. They get exactly the same thing, word for word, lesson to lesson.”¹⁵⁴

On balance, the CSGAPP pairs are designed to be identical in all respects, a stark contrast to the factual circumstances surrounding the Institute and VWIL. As such, the CSGAPP is constitutionally permissible under a “separate but equal” analysis.

B. THE CSGAPP PASSES INTERMEDIATE SCRUTINY ANALYSIS BECAUSE IT IS SUBSTANTIALLY RELATED TO AN IMPORTANT GOVERNMENT PURPOSE THAT DOES NOT PERPETUATE SEX ROLE STEREOTYPES OR RELY UPON OVERBROAD GENDER GENERALIZATIONS

Gender-based classifications have been subject to intermediate scrutiny since 1976. In *Craig v. Boren*, the Court ruled that to “withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achieve those objectives.”¹⁵⁵ Though the Court briefly considered designating gender an “inherently suspect” classification,¹⁵⁶ it rejected that notion in numerous cases, including, and most germane to this analysis, *VMI*.¹⁵⁷

While the *VMI* Court substantively addressed some of the specific schooling issues pertinent to the CSGAPP, it also consolidated into a singular test the issues that have developed in all gender classification cases since *Craig*. In applying the factual circumstances of the CSGAPP to the test summarized in *VMI*, the CSGAPP, as written, passes intermediate scrutiny.

153. Reinhard, *supra* note 3.

154. Nick Anderson, *In a Class of Their Own: Southland's Single-Sex Public Schools Test Theory That Isolation Helps Focus Teenagers*, L.A. TIMES, Dec. 24, 1997, at B2.

155. 429 U.S. 190, 197 (1976). The Court in this case invalidated an Oklahoma law that permitted women to purchase a “nonintoxicating” beer at a younger age than men. Although public safety was recognized as an important governmental purpose, the Court ruled that the empirical evidence was insufficient for the state to make this gender-based distinction.

156. A plurality, not a majority, of the Court agreed with the appellants’ contentions that “classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny.” *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

157. “The heightened review standard our precedent establishes does not make sex a proscribed classification.” *United States v. Virginia*, 518 U.S. 515, 533 (1996).

1. *VMI Consolidates the Issues in Gender-Based Classification Cases into a Singular Test*

In *VMI*, the Court did not articulate a new test for governmental classifications based on gender. It did, however, effectively and concisely “summarize [its] current directions for official classification based on gender,”¹⁵⁸ which fall somewhere on the judicial review spectrum between rational basis review¹⁵⁹ and strict scrutiny.¹⁶⁰ The Court, through Justice Ginsburg, restated the intermediate scrutiny test as follows:

[T]he reviewing court must determine whether the proffered justification is “exceedingly persuasive.” The burden of justification is demanding as it rests entirely on the State. The State must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.¹⁶¹

Some commentators believe that this restatement moves intermediate scrutiny analysis for gender-based classifications closer to strict scrutiny. However, a closer analysis reveals that strict scrutiny was probably not the court’s ultimate objective. Even assuming the *VMI* Court intended to devise a new level of scrutiny in gender-based classification cases, it applied the intermediate scrutiny test exactly as it has in previous gender-based classification cases, suggesting the intermediate scrutiny test has not substantially changed. Moreover, there is evidence to suggest that the “exceedingly persuasive justification” language was carefully inserted by Judge Ginsburg to reignite the debate over scrutiny levels for gender-based classification cases.

a. *The “exceedingly persuasive justification” does not alter the traditional intermediate scrutiny test:* The *VMI* Court stated that the burden to

158. *Id.* at 532.

159. Rational basis review is the “minimal level of scrutiny that all government actions challenged under equal protection must meet.” CHEMERINSKY, *supra* note 63, at 533-34. It has been phrased differently by the Court over the years, but can be succinctly summarized: a governmental action will meet rational basis review if it is “rationally related to a legitimate government purpose.” *United States. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980).

160. All classifications subject to strict scrutiny review must be necessary to achieve a compelling governmental interest. Implicit in this analysis is a requirement that the state demonstrate that it used the least restrictive alternative in achieving its compelling governmental interest. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

161. *Virginia*, 518 U.S. at 532 (citations omitted).

justify a gender-based classification “rests entirely on the state”¹⁶² which must demonstrate an “exceedingly persuasive justification”¹⁶³ for the classification. Unfortunately, the Court has never been clear about what an “exceedingly persuasive justification” actually means or implies with respect to the requirements it imposes on the state.

Some commentators have argued that an “exceedingly persuasive justification” is the functional equivalent of strict scrutiny or, in the words of the Court, “skeptical scrutiny.”¹⁶⁴ However, such an interpretation would render the *VMI* opinion internally inconsistent. The Court plainly stated that “heightened review [or intermediate scrutiny] does not make sex a proscribed classification.”¹⁶⁵ Had the Court intended to move review of gender-based classification towards strict scrutiny, it certainly would not have made this statement.

Other commentators have indicated that Justice Ginsburg, in writing for the *VMI* majority, alluded to the “exceedingly persuasive justification” language in order to reignite the debate over scrutiny levels for gender-based classification cases.¹⁶⁶ This theory is certainly possible, considering Ginsburg’s personal background and her prior Supreme Court opinions on the topic of scrutiny levels for gender-based classification cases.

In the 1970s, Ginsburg, as the head of the Women’s Rights Project for the American Civil Liberties Union, successfully persuaded a plurality of justices in *Frontiero v. Richardson*¹⁶⁷ to adopt strict scrutiny as the standard in gender classification cases. Had the Equal Rights Amendment been ratified, Ginsburg’s objective may have been realized as early as 1975.¹⁶⁸ One observer noted that “Ginsburg almost single-handedly moved the Supreme Court in the 1970s to first acknowledge and then to

162. *Id.* at 533.

163. *Id.* at 531 (citing *Hogan v. Mississippi Univ. for Women*, 458 U.S. 718, 724 (1982)). See also *Personnel Administrator of Mass. v. Feeney*, 442 US 256, 273 (1979); *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994).

164. *Virginia*, 518 U.S. at 531.

165. *Id.* at 533.

166. See Karen Lazarus Kupetz, Note, *Equal Benefits, Equal Burdens: “Skeptical Scrutiny” for Gender Classifications After United States v. Virginia*, 30 LOY. L.A. L. REV. 1333, 1364-65 (1997); Collin O. Udell, *Signaling a New Direction in Gender Classification Scrutiny: United States v. Virginia*, 29 CONN. L. REV. 521, 552 (1996).

167. 411 U.S. 677 (1973).

168. Justices Stewart, Powell, Burger, and Blackmun all concurred in *Frontiero* but wanted to wait until the proposed Equal Rights Amendment was ratified before agreeing that strict scrutiny was the appropriate test in gender classification cases. The ERA fell short of ratification by three votes. See CHEMERINSKY, *supra* note 63, at 603.

repudiate discrimination against women.”¹⁶⁹ Ginsburg’s devotion to women’s causes is well documented and was a central factor in President Clinton’s decision to nominate her to the Supreme Court in 1993.

Since joining the Supreme Court, Justice Ginsburg’s zest for women’s issues has not subsided. Almost immediately after her appointment, she strongly hinted at her interest in revisiting the issue of whether gender-based classifications are “inherently suspect.” She argued in a concurring opinion in 1993 that “even under the Court’s equal protection jurisprudence, which requires ‘an exceedingly persuasive justification’ for a gender-based classification, it remains an open question whether ‘classifications based on gender are inherently suspect.’”¹⁷⁰ In retrospect, her strategic use of this language can be viewed as a cleverly-planted seed that she anticipated cultivating in a future case, such as *VMI*.¹⁷¹

Thus, given the express assertion by the *VMI* Court that gender based classifications are not “proscribed classifications” and Justice Ginsburg’s personal political agenda, one should be extremely wary of viewing *VMI* as a case that raises the bar in gender based classification cases to strict scrutiny.

On the other hand, Chief Justice Rehnquist, in his concurring opinion in *VMI*, offers another interpretation of the “exceedingly persuasive justifi-

169. Letter from Judith Areen, Professor of Law, Georgetown University Law Center, to President Clinton (dated May 14, 1993); Amelia A. Canegaly, *The “Rats” are Stonewalled: U.S. v. Virginia*, 19 T. JEFFERSON L. REV. 177, 196-97 (1997). See also Letter from Herma Kay Hill, University of California at Berkeley School of Law, to President Clinton (Apr. 24, 1993) (“[I]t was Ruth Ginsburg’s voice, raised in oral argument before the United States Supreme Court, that opened new opportunities for women of this country [S]he built a new legal framework for the achievement of equality for women and men.”).

170. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 26 n.* (1993) (Ginsburg, J., concurring) (citations omitted).

171. Some commentators—even proponents of applying strict scrutiny in gender classification cases—have been critical of Ginsburg’s attempt to add an additional hurdle to gender classifications. They believe that she may be overly “affected by her strong and long-held fight for women’s equality.” Canegaly, *supra* note 169, at 197. Judicial activism, whatever the underlying politics, can be a dangerous precedent to set, especially at the level of the United States Supreme Court. Among Ginsburg’s critics is Robert Bork, former judge and Supreme Court nominee, who argued that the danger of judicial activism reached a peak in *VMI*. He distinguished between cultural and political movements on the one hand and legal principles on the other. See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 109 (1996). *VMI* was an example, Bork contended, of how the Court “continues to use equal protection to take basic cultural decisions out of the hands of the people. Culture is made by the fiat of a majority of nine lawyers and forced upon the nation.” *Id.* at 108. If Bork was accurate in his estimate of how personal views have become commonplace in Court opinions, it is likely that Ginsburg, imposing her personal political agenda upon the Court in *VMI*, intended to add an additional prong to the intermediate scrutiny test or to inch the test towards strict scrutiny, making programs such as the CSGAPP virtually impossible to establish.

cation” language used by Ginsburg. He first criticizes the *VMI* majority for “introducing an element of uncertainty” to an already ethereal test.¹⁷² The Chief Justice then refers to the case in which this phrase was first employed, *Personnel Administrator of Mass. v. Feeney*,¹⁷³ and suggests that the language was simply used “as an observation of the difficulty of meeting the applicable test, not as a formulation of the test itself.”¹⁷⁴ The language in *Feeney*, according to Rehnquist, stands only to describe the showing the Court expects from a state to justify its gender classification¹⁷⁵ and has no effect on the core substance of the traditional intermediate scrutiny test. One commentator agreed with Rehnquist and further demystified the “exceedingly persuasive justification” language when he described it as “simply the poetic vexing of a new justice,”¹⁷⁶ a relic from an era when justices used ornate language to convey their message.

Whichever interpretation is adopted, there is no indication that the ‘exceedingly persuasive justification’ language had any effect on the Court’s review of the Institute. In fact, the *VMI* Court applied the intermediate scrutiny test as it has for over twenty years.

b. *VMI simply incorporates additional factors into the traditional intermediate scrutiny test that have evolved since Craig v. Boren.* The *VMI* Court asserted that the “State must show ‘at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”¹⁷⁷ This is the fundamental intermediate scrutiny test as articulated in *Craig v. Boren*, which has been reaffirmed several times by the Supreme Court since 1976.¹⁷⁸

But the Court also linked two sub-issues to the basic framework of the intermediate scrutiny test, both of which evolved after the decision in *Craig*. First, a reviewing court may only consider the actual or “genuine”

172. *Virginia*, 518 U.S. 515, 559 (1996) (Rehnquist, C.J., concurring) (describing the intermediate scrutiny test for gender classification as “hardly [a] model of precision”).

173. 442 U.S. 256, 273 (1979) (the “precedents [set in previous gender classification cases] dictate that any state law overtly or covertly designed to prefer males over females . . . would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment”).

174. *Virginia*, 518 U.S. at 559 (Rehnquist, C.J., concurring).

175. For elaboration on these issues see *infra* Part V.B.1.b.

176. Raymond F. Runyon, *VMI and Virginia Lose Again*: United States v. Virginia, 32 TULSA L.J. 681, 693 (1997).

177. *Virginia*, 518 U.S. at 533 (quoting *Hogan v. Mississippi Univ. for Women*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, (1980)).

178. For a concise list of all the cases in which the intermediate scrutiny test has been applied by the Supreme Court, see *id.* at 558-59 (Rehnquist, C.J., concurring).

purpose asserted by the governmental entity that sanctioned the gender-based classification, “not [purposes] hypothesized or invented *post hoc* in response to litigation.”¹⁷⁹ This is crucial in determining the extent of the court’s deference towards the government. If the government has the opportunity to concoct any conceivable governmental purpose with perfect hindsight, it is more likely to manufacture one that fits within the parameters of the test, rendering constitutional a law initially motivated by an impermissible purpose.¹⁸⁰

For example, Virginia asserted in *VMI* that one of its objectives in establishing an all-male academy was to foster diversity of educational choice, which has been recognized by the Court as an important and constitutionally permissible government interest.¹⁸¹ However, this notion of “diversity” was clearly not contemplated by the Virginian state legislators who originally authorized the establishment of the Institute in the 1830s. Rather women were barred from the Institute and all military academies because they were believed to be incapable of withstanding the rigors of such a program. Such *post hoc* flexibility would surrender far too much discretion to governmental entities that enact gender-based classifications.

Second, a reviewing court may invalidate a gender-based classification if the means of reaching that purpose are constitutionally impermissible. That is, if the gender-based classification relies upon “overbroad generalizations,”¹⁸² “fixed notions concerning the roles and abilities of males and females,” or “perpetuat[ing] historical patterns of discrimination,”¹⁸³ then it violates the Fourteenth Amendment, even if the actual purpose is permissible. For example, part of the *Hogan* Court’s rationale in ordering the all-women’s nursing school to admit men was that Mississippi’s gen-

179. *Id.* at 533. In cases involving gender classifications, “our precedent instructs that ‘benign’ justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe *actual state purposes*, not rationalizations for actions in fact differently grounded.” *Id.* at 535-36 (emphasis added). See also *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (“the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (quoting *Weinberger*, 420 U.S. at 648); *Personnel Adm’r of Mass. v. Feeney*, 442 US 256, 286 (1979) (quoting *Weinberger*, 420 U.S. at 648); *Hogan*, 459 U.S. at 728 (quoting *Weinberger*, 420 U.S. at 648).

180. For discussion on the difference between actual and conceivable purposes, see CHEMERINSKY, *supra* note 63, at 539-41.

181. See *Virginia*, 518 U.S. at 535 (1996). For a complete discussion of diversity of educational choice, see *infra* Part V.B.2.

182. *Virginia*, 518 U.S. at 533 (citing *Weinberger*, 420 U.S. at 643).

183. *Id.* at 541 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994)).

der-based classification perpetuated the myth that nursing is a profession reserved for women.¹⁸⁴

In tying together some of the loose-ends of the case law governing gender classifications over the past twenty-two years, the *VMI* Court clarified the issues reviewing courts should address when they conduct equal protection analyses for gender-based classifications. The following Sections will apply that very same test to the CSGAPP.

2. *California's Actual Purposes in Enacting the CSGAPP Serve Two Important Governmental Objectives*

California has sought to achieve two actual purposes in enacting the CSGAPP: one implicit, one explicit. First, State politicians are desperately seeking to enhance the failing school system that recently received an "F" from the National Education Association for the general condition of its public schools.¹⁸⁵ Second, State politicians want to bring diverse educational choices to the California school system so that parents can narrowly tailor a public education to fit the needs of their children. The federal courts have recognized both of California's actual objectives as "important" pursuant to the intermediate scrutiny test.

a. *The CSGAPP's implicit objective is to enhance the quality of California's public education system:* Although the Supreme Court has expressly rejected education as a fundamental right under the Due Process Clauses of the Fifth and Fourteenth Amendments,¹⁸⁶ it recognized the gov-

184. The Court's current position stands in direct contrast to cases reaching the Court before the advent of the intermediate scrutiny test when basing gender classifications on generalizations and stereotypes was commonplace and constitutionally permissible under a rational-basis analysis. *See, e.g., Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (upholding an Illinois law that prohibited women from practicing law because the "paramount destiny and mission of woman [sic] are to fulfill the noble and benign offices of wife and mother."); *Goesert v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan law that prohibited women from tending bar unless the woman was the wife or daughter of a male bar owner). *See also Ballard v. United States*, 329 U.S. 187, 193 (1946) ("the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both . . ."). *But see Michael M. v. Superior Court*, 450 U.S. 464 (1980) (upholding statutory rape law despite being motivated by sexual stereotypes about men and women); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding regulation requiring only men to register for the selective service despite being motivated by the notion that all women were incapable in combat).

185. *See United States: Money for Pencils*, *ECONOMIST*, Feb. 7, 1998, at 30. This objective is implicit within the spirit of the CSGAPP, though not articulated in the statutory language.

186. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."). *But see Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1977) (holding that under the California state constitution, education is a fundamental right).

ernment's important interest in educating its youth to the best of its ability.¹⁸⁷ The Court in *Brown* poignantly articulated this notion when it stated:

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities It is the very foundation of good citizenship [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹⁸⁸

Unfortunately, California, by all quantifiable measures, has failed miserably at providing this "most important function" to its citizens.

The Third International Mathematics and Science Study reveals that American students are significantly below the international averages in math and science.¹⁸⁹ They demonstrate signs of consistent decline between the 4th grade—when Americans achieve high average scores in math and science relative to the twenty-one nations involved in the study—and the senior year of high school—when Americans rank near the bottom in all significant statistical categories.¹⁹⁰ President Clinton candidly reacted to the data when he responded, "There is no excuse for th[ese] [dismal scores]."¹⁹¹ In California, this international study is especially relevant, because the State educates a sizable portion of the nation's students and has lagged behind national averages in most quantifiable measures of educational effectiveness for the past several years. The combination of stagnant funding and a growing student the population has created a crisis in California's educational system, and it is in dire need of a revival.

187. See, e.g., *Plyer v. Doe*, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution . . . [b]ut neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction In sum, education has a fundamental role in maintaining the fabric of our society.") (footnote omitted).

188. 347 U.S. at 493. See also Linda L. Peter, Note, *What Remains of Public Choice and Parental Rights: Does the VMI Decision Preclude Exclusive Schools or Classes Based on Gender?*, 33 CAL. W. L. REV. 249, 253 (1997).

189. See Tom Schultz & Richard Colvin, *U.S. Students Fare Poorly in Comparison*, L.A. TIMES, Feb. 25, 1998, at A1, B2 (stating that the study was billed as "the most comprehensive international study of academic achievement ever.").

190. See *id.*

191. *Id.*

Over the past twenty years, California's public education system has deteriorated significantly relative to the rest of the nation. Two factors have contributed most to this alarming phenomenon. First, the passage of Proposition 13 in 1978¹⁹² limited the amount of property taxes that municipalities can assess their residents. With approximately 24% of public school funding being drawn from property taxes,¹⁹³ Proposition 13 is a critical encumbrance on sources of school funding.¹⁹⁴ Second, California's public school enrollment has increased by approximately 33% over the past 13 years and is expected to double by 2005.¹⁹⁵ In contrast, the national average increased approximately 17-18% over the same period, and is expected to plateau at about 21-22% in 2000.¹⁹⁶ To illustrate the extent of the burden that rests on California to educate its children, consider the following: In 1995-96, California enrolled 12% (or 1 out of 8) of the nation's students in public schools between kindergarten and 12th grade, totaling 5.4 million students at a cost of \$31 billion per year.¹⁹⁷

Funding limitations and the alarming rate of enrollment have quantifiably lowered California's national public school rank in some significant statistical categories. In 1976-77, California was slightly below the national average for per-pupil spending.¹⁹⁸ By 1996-97, the state ranked 41st overall among the 50 states and Washington DC at \$5,327 per student, a figure representing only 84% of the national average of \$6,335.¹⁹⁹ Even more significant is that California ranks last among the nine industrial

192. See CAL. CONST. art. XIII A.

193. See Education Data Partnership, *A Primer on School Finance* (last modified Jan. 29, 1999) <http://www.ed-data.k12.ca.us/Finance/SF_Prime2.asp>; *United States: Money for Pencils*, ECONOMIST, Feb. 7, 1998, at 30.

194. In 1988, another initiative was passed by the California voters in response to dwindling funds in the State's public school system. Proposition 98, also known as the "Classroom Instructional Improvement and Accountability Act" guarantees a minimum share of the state revenue to California's public schools. In addition, schools will receive a portion of any surplus in state revenue as calculated by a complex web of statutory tests. See CAL. EDUC. CODE § 41200 (West 1997). See also Education Data Partnership, *A Primer on Proposition 98* (last modified Jan. 29, 1999) <http://www.ed-data.k12.ca.us/edfact_prp.asp> (summarizing the requirements of Proposition 98).

195. See Education Data Partnership, *Enrollments* (last modified Nov. 13, 1997) <<http://www.ed-data.k12.ca.us/enrollment.asp>>.

196. See *id.* In 1994, California's enrollment grew by 2.4% while the national average increased by only 1.7%. See *id.*

197. See Education Data Partnership, *California's Rankings, 1996-97* (last modified Jan. 29, 1999) <<http://www.ed-data.k12.ca.us/calrankings.asp>>.

198. See *id.* Figure 1 graphically depicts the rapid decline of California's per-pupil spending.

199. See Education Data Partnership, *Expenditures per Pupil: California and the U.S.* (last modified Jan. 29, 1999) <<http://www.ed-data.k12.ca.us/expenditures.asp>>.

states, spending just over half of what New Jersey spends per student annually (\$10,133).²⁰⁰

California ranks next to last in teacher-per-pupil ratio in the country.²⁰¹ There are almost twenty-three students-per-teacher²⁰² in California with less than 25% of the students enrolled in classes higher than the national average of seventeen students-per-teacher.²⁰³ In contrast, New Jersey's average, which ranks first in the country, stands at approximately 13 students-per-teacher.²⁰⁴

What is most alarming (and embarrassing) about these statistics is that California, one of the nation's wealthiest states measured in per capita income,²⁰⁵ has the capacity to invest more in its students. In 1995 dollars, California ranked 17th among the 50 states and Washington DC in personal income per student.²⁰⁶ Yet, it only spends \$33 per \$1,000 earned, compared to the national average of \$40 per \$1,000 earned, placing California 48th in school finance "effort".²⁰⁷ As funding does not keep pace with the rapid growth in population, California will further lose its grasp on its ability to effectively educate its next generation of children.

While the statutory language of the CSGAPP does not explicitly reflect the State's goal of providing its public school students with the best quality of education, such a fundamental purpose is clearly implicit in the spirit of the CSGAPP. The situation in California has reached such extreme crisis levels that no legislator in Sacramento could conceivably be oblivious to the problems facing the public school system. A legislative vote for the CSGAPP is therefore a vote to improve California's public education system. Governor Wilson spoke for many of the State's politicians when he stated that "California has some outstanding schools. But

200. See Education Data Partnership, *California's Rankings, 1996-97* (last modified Jan. 29, 1999) <<http://www.ed-data.k12.ca.us/calrankings.asp>>. Nine other industrial states have had upward spending trends over the last decade. In order of per pupil spending, these state are: New Jersey, New York, Pennsylvania, Massachusetts, Michigan, Florida, Ohio, Texas, Illinois, and California. See *id.*

201. See Education Data Partnership, *Pupils per Teacher: California and the U.S.* (last modified March 8, 1999) <<http://www.ed-data.k12.ca.us/pupilsperteacher.asp>>.

202. Approximately two-thirds of California students are educated in classrooms of about this size; however, this statistic accounts for certified teachers only. See *id.*

203. See *id.*

204. See *id.*

205. In 1995, California ranked 13th nationwide in per capita income at \$24,217 compared to \$23,348 nationally. See Education Data Partnership, *California's Rankings, 1996-97* (last modified Jan. 29, 1999) <<http://www.ed-data.k12.ca.us/calrankings.asp>>.

206. Californians earn, on average, \$143,125 per student in the state. The national average is at \$139,820. These numbers are derived by dividing the aggregate of gross personal income by the number of students currently in the public school system. See *id.*

207. See *id.*

there are too many that are failing to provide our kids the education they deserve and need.”²⁰⁸

Under the present fiscal crisis, the State’s politicians have recognized that the only means to bolster the state school system is to make qualitative improvements by utilizing its current financial and personnel resources to their fullest and most efficient capacity. Illustrating the state government’s underlying education enhancing agenda are several recently enacted enhancement programs²⁰⁹ that are meant to qualitatively improve the State’s public school system. Among these programs are efforts at class size reductions,²¹⁰ the Governor’s Reading Initiative,²¹¹ and the Digital High School Initiative.²¹² These innovative programs suggest that California politicians are deeply concerned with the quality of California’s public school system. This purpose is foremost in their minds when promulgating legislation such as the CSGAPP.

b. *The CSGAPP’s explicit objective is to create diversity of educational choice:* In the context of education, the modern legal usage of the term “diversity” generally refers to the composition of a student body.²¹³ Diversified classrooms—defined by a mixture of individuals with different ethnic, gender, and socio-economic backgrounds—enable students to witness subject matter from varying levels of perception, an essential and intangibly valuable component of the classroom experience. However, with respect to the CSGAPP, the California Legislature expressly contemplated a different definition when it stated that the “primary goal of the [CSGAPP] is to increase the *diversity* of California’s public educational offering”²¹⁴ The CSGAPP diversifies the educational experience, not by changing the faces in the classroom, but by offering a school choice that deviates from the coeducational norm.

208. See Pete Wilson, *supra* note 7, at 4.

209. The reader should distinguish “enhancement programs” discussed in this Section from the “school options” discussed *infra* Part V.B.2.b.

210. Governor Wilson proposed allocating \$1.5 billion in his 1997-98 budget to enable all K-3 students to be in classes of less than 20 students. See *Governor Wilson’s Initiatives for a Better California* (on file with author).

211. In his 1997-98 budget, Governor Wilson proposed full funding, for the second year in a row, to “purchase [] a core set of reading materials” for the 1.9 million children in K-3. *Id.*

212. Because California ranks 45th out of the 50 states in student access to technology, Governor Wilson signed into law the “Digital High School” Legislation (AB 64) which allocates money for computer installation, maintenance, and upgrades for the State’s 840 public high schools. See *id.*

213. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-15 (1978).

214. CAL. EDUC. CODE § 58521(a) (West 1998) (emphasis added).

The first federal case to recognize the value of diversity of educational choice was *Williams v. McNair*.²¹⁵ In 1970, the *Williams* court permitted South Carolina to continue to maintain and operate an all-female undergraduate university. Although the decision was decided under a rational-basis standard, the Court acknowledged the value of offering students a choice between the types of schools they prefer: "After all, flexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned."²¹⁶

The Supreme Court initially addressed the issue of diversity of educational choice in *Hogan* where, arguably, the central point of contention between the majority and dissenting justices was this very issue. Justice Powell opened his dissent by lamenting, "[l]eft without honor . . . is an element of diversity that has characterized much of American education and enriched much of American life."²¹⁷ He argued that students should not be deprived of the opportunity to "choose the type of university they prefer" and that the Court, by denying women the opportunity to select an all-female option, "frustrat[ed] the liberating spirit of the Equal Protection Clause."²¹⁸ Likewise, Justice Blackmun argued that the Fourteenth Amendment permits states to offer "[one gender] a choice while not depriving [the other gender] of an alternative choice."²¹⁹

In a footnote, Justice O'Connor, writing for the majority, responded directly to Justice Powell's argument that diversity of educational choice justified Mississippi's gender-based classification. She agreed in principle with Justice Powell when she asserted that the state violated the Fourteenth Amendment, not by offering a single-gender educational option, but by offering "one [gender] a benefit or choice not available to the other [gender]."²²⁰ Justice O'Connor's statement suggests that the outcome in *Hogan* may have been different had Mississippi offered a parallel all-male nursing school within its public education system.²²¹

215. 316 F. Supp. 134 (1970).

216. *Id.* at 138.

217. *Hogan v. Miss. Univ. for Women*, 458 U.S. 718, 735 (1982) (Powell, J., dissenting).

218. *Id.* at 741.

219. *Id.* at 734 (Blackmun, J., dissenting) (referring to Justice Powell's dissent).

220. *Id.* at 731 n.17.

221. "[W]e must view the system as a whole in order to ascertain whether there is discrimination between the sexes, the entire system must be viewed, and not a single institution standing alone." Kristin S. Caplice, *The Case for Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 252 (1994) (citing *Heaton v. Bristol*, 317 S.W.2d 86, 99 (Tex. Civ. App. 1958)).

Where, then, is the disagreement between the *Hogan* Court and its dissenters? O'Connor argued that both genders must be afforded the same spectrum of single-gender options, which Mississippi failed to offer. But according to Blackmun and Powell, Mississippi did provide Joe Hogan the same benefits and choices afforded to the women at MUW. The state "elsewhere provide[d] an *equivalent* [coeducational] program"²²² offering Hogan, and other males, the same "substantive educational opportunity."²²³ Note that this is where Blackmun's and Powell's argument becomes internally inconsistent. Both dissenting justices extol the pedagogical virtues of single-gender schools but then refer to a single-gender and a coeducational nursing program as "equivalent." Thus, it appears that Powell and Blackmun misread O'Connor's articulation of why diversity of educational choice cannot be successfully asserted in *Hogan* as a rejection of that justification altogether. Ultimately, O'Connor's opinion recognizes diversity of education as an important governmental purpose, but only in the appropriate factual circumstances.

In *VMI*, the Court took the next step by expressly acknowledging the important governmental purpose served by offering diverse educational choices, including single-gender schools. Referring to arguments made by the parties, the Court noted that, "Several 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 We do not question the State's prerogative evenhandedly to support diverse educational opportunities."²²⁴ The Court later continued, "[i]t is not disputed that diversity among public educational institutions can serve the public good."²²⁵

The problem for Virginia was, as the circuit court stated, "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."²²⁶ This argument directly follows the rationale asserted by O'Connor in *Hogan*. That is, if one gender receives the benefits of being provided with an educational choice, then the other gender must also receive that same choice to comply with the Fourteenth Amendment.

222. *Hogan*, 458 U.S. at 734 (Blackmun, J., dissenting).

223. *Id.* at 741 (Powell, J., dissenting).

224. *United States v. Virginia*, 518 U.S. 515, 534 n.7 (1996).

225. *Id.* at 535.

226. *United States v. Virginia*, 976 F.2d 890, 899 (1992). See 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, 1013-14 (1997).

The Court correctly noted that Virginia could not plausibly establish that “diversity of educational opportunities” was an actual purpose when the Institute was founded in 1839, a time when “a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for women, reflecting widely held views about women’s proper place.”²²⁷ While the Court recognized the validity of diversity of educational purposes as an important governmental purpose, it would not permit Virginia to use such an argument when it clearly was not the state’s actual purpose.

The CSGAPP stands in stark contrast to the factual circumstances in both *Hogan* and *VMI*. The California Legislature’s *stated* purpose²²⁸ in enacting the CSGAPP is to provide “[d]iversity in educational opportunity”²²⁹ for the state’s public school students. This is not a feigned objective as “hypothesized or invented” by Virginia. Nor is the objective limited to one gender and not the other as in *Hogan*. The school choices offered by the CSGAPP are “equivalent,” not by Justices Powell’s and Blackmun’s flawed definition, but by Justice O’Connor’s more egalitarian definition.

California’s stated purpose of promoting diversity raises a very important question: How can a reviewing court verify the sincerity of the Legislature’s real objective of creating diversity of educational choice? One way is by showing that the CSGAPP is merely one in a series of school choices that California offers its citizens. A consistent employment of diverse school choices indicates that the State’s politicians genuinely perceive diverse educational choices as a reliable vehicle to arrive at its primary, yet implicit, goal of enhancing the quality of California’s overall educational system. In this case, there is a consensus among California’s politicians, school administrators, and teachers that children respond differently to a variety of learning environments.²³⁰

227. *Virginia*, 518 U.S. at 536-37.

228. The Legislature opens the text of the CSGAPP by “declar[ing] that a *primary goal* of the Single Gender Academies Pilot Program is to increase the *diversity* of California’s public educational offering.” (emphasis added) CAL. EDUC. CODE § 58521(a) (West 1998).

229. *Id.* § 58521(c)(1).

230. Administrators at CSGAPP academies agree upon the merits of providing diversified school environments. “I don’t think every kid needs [single-gender education]. But we tried [coeducation] for years and years, and for a lot of kids, it doesn’t work.” Tamar Lewin, *A Class of Their Own: An Old Idea—Single Sex Education—Is in the Midst of a Renaissance*, CHI. TRIB., Dec. 14, 1997, at 6 (quoting Heather Stone, counselor at Marina Middle School in San Francisco). “Different kids learn in different environments and different structures.” Claudia Rahola, *Experiment in Single-Sex Education Flourishes in California*, AGENCE FRANCE-PRESSE, Dec. 14, 1997 (quoting John Michaelson, principal at Marina Middle School in San Francisco). “[Single-gender education] is not for every-

In his last few years as Governor, Pete Governor Wilson proposed and signed into law several public school options, aside from the CSGAPP, that augment some of the enhancement programs previously discussed.²³¹ The goal of these public school options is to sufficiently diversify the public education system to parallel the options available to parents who can afford to send their children to private schools. Among the most prevalent and successful school choices in California are the magnet/alternative schools, Charter Schools, and Partnership Academies.

Standard magnet and alternative schools offer students with special talents and/or needs the option to apply to unique programs within their districts.²³² Students need not live in close proximity to such schools to enroll.

The Charter School Program²³³ began in 1993 as an experiment in district autonomy. Aside from meeting minimal procedural requirements,²³⁴ Charter Schools are, by design, completely insulated from the California public school system at-large, permitting local administrators and, more importantly, parents to manage the direction of their children's education. For example, Santiago Middle School in Orange County has fewer students per teacher than the state average, requires students to wear uniforms, imposes more stringent standards to advance to the next grade level, and enlists parents to volunteer twelve hours each year at the school.²³⁵ Unfortunately, the Charter School Program has been limited by the statute that created it. Only 134 charter schools have been established out of 8,000 public schools in the State. In addition, critics claim the Charter School Program does not permit the state to oversee whether or not the individual Charter Schools are meeting minimum academic standards.²³⁶

body. But what I like here is there will be options in public education. That's what I think is exciting. We're expanding parental choice." Nick Anderson, *California and the West Orange County to Try Single-Gender Academies: State Grant Will Create Option for 160 Students in Alternative, Correctional School System*, L.A. TIMES, Oct. 21, 1997, at A3 (quoting Ken Williams, Trustee, Orange County Board of Education).

231. See discussion *supra* Part V.B.2.a.

232. See discussion *supra* Part II.

233. CAL. EDUC. CODE §§ 47600-47616 (West 1998); SB 1448 (Hart)—Sept 21, 1992. For a thorough discussion of the Charter School Program in California, see Little Hoover Commission, *The Charter Movement: Education Reform School By School*, Report #138 (March 1996) [hereinafter Commission Report].

234. Charter schools must assure the health and safety of the students, select students on a non-discriminatory basis, and neither charge tuition nor advocate any religious beliefs. See Commission Report, *supra* note 233.

235. See Nick Anderson, *A New Lesson Plan?*, L.A. TIMES, Feb. 25, 1998, at B2.

236. See *id.*

Partnership Academies²³⁷ have been successful in establishing relationships between public schools and the private sector. This program allocates state funds—which are matched by the individual school districts and participating private sector organizations²³⁸—for vocational schools housed within a district high school. The program is designed to provide “at-risk”²³⁹ students with marketable job skills upon completion of high school.

By streamlining the public school system and focusing on qualitative improvements rather than the quantity of tax revenues available for education,²⁴⁰ California’s politicians seek to provide parents with the necessary tools to tailor a public education to the specific needs of their children. Central to that mission is the process of generating diversified parental choices in public schools, including single-gender options.

3. *The CSGAPP Is Substantially Related to California’s Important Governmental Objectives*

Since the first application of the intermediate scrutiny test in 1976, a formal definition of what renders a law “substantially related” to its objective has been elusive. As Justice Rehnquist noted, “[t]he question of whether a statute is substantially related to its asserted goals is at best an opaque one.”²⁴¹

Nevertheless, reviewing courts employing the intermediate scrutiny test have consistently asked three independent questions to determine whether a gender based classification is substantially related to its actual governmental purpose. First, is the statute narrowly tailored to achieve its purpose? Or, in simpler terms, is the gender-based classification unduly arbitrary? Second, can the government achieve its important purpose as effectively without the gender-based classification? Finally, is the gender-based classification impermissibly over- or underinclusive?

The following analysis will answer each of these questions in turn to demonstrate that the CSGAPP is substantially related to the actual governmental objectives sought by the State of California.

a. *For some of California’s public school students, the prevailing empirical research demonstrates that the CSGAPP is far from being an*

237. See CAL. EDUC. CODE §§ 54690-54697 (West 1998).

238. See *id.* § 54692(a) & (b).

239. *Id.* § 54690(d).

240. “[M]oney alone won’t fix what ails our schools.” See Wilson, *supra* note 7, at 4.

241. Michael M. v. Superior Court, 450 U.S. 464, 474 n.10 (1980).

arbitrary gender-based classification: When applying the rational-basis test, the federal courts do not engage in the debate over the relative advantages and disadvantages of a legislative action. They have candidly admitted that, as judicial bodies, they are not in a position to pass judgment unless the government's action is "clearly wrong, a display of arbitrary power, [or] not an exercise of judgment."²⁴² However, in reaching its conclusions, legislatures are permitted, even expected to turn to empirical evidence. "The value of any [governmental action] is a complex factual issue the resolution of which properly rests with the legislatures, *which can evaluate the results of statistical studies* in terms of their own local conditions and with a flexibility of approach that is not available to the courts."²⁴³

Conversely, when applying the heightened levels of scrutiny, the federal courts have been very suspicious of legislatures that rely upon purportedly authoritative social science research. The Supreme Court has termed such reliance a "dubious business."²⁴⁴ Thus, in cases where a suspect or quasi-suspect classification is at issue, the courts are willing to examine the empirical evidence and reach a conclusion regarding the wisdom of the legislation in question on their own. If that conclusion differs from that of the legislature's, the courts will invalidate the legislation.²⁴⁵ In short, what the courts will refrain from doing in a rational-basis context is considered appropriate under either of the heightened scrutiny tests.

While the courts are willing to engage in such an analysis for gender-based classifications, the inquiry is not necessarily fatal for the governmental action at bar. The outcome will depend on whether the reviewing court finds that the empirical evidence demonstrates that gender is an "accurate proxy"²⁴⁶ or whether it simply highlights "loose-fitting generalities."²⁴⁷

With education generally, gender-based classifications are far from arbitrary. It is well-documented that, by the end of high-school, males and

242. *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976) (quoting *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

243. *Gregg v. Georgia*, 428 U.S. 153, 186 (1975) (emphasis added) (holding that the death penalty is not unconstitutional and that the state legislatures must decide whether this form of punishment is valid for their state). *See also McClesky v. Kemp*, 481 U.S. 279, 319 (1987) (holding that statistics demonstrating the higher rate of death penalty convictions for African-American defendants was insufficient in proving an equal protection violation).

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

245. *See id.* at 199-204.

246. *Id.* at 204.

247. *Id.* at 209.

females in coeducational settings generally have not achieved uniform levels of pedagogical achievement. For example, in 1992, 17-year old American males outperformed their female counterparts by 4-points in math and 10-points in science. Conversely, 17-year old American females outperformed their male counterparts by 12-points in reading and 17-points in writing, an equivalent of one and a half years of schooling.²⁴⁸ The results are overall lower grades and higher drop-out rates for males²⁴⁹ as well as low rates of females pursuing science and math-based professions.²⁵⁰

But critics of single-gender schools have argued that sociological studies demonstrating the link between single-gender schools and higher pedagogical achievement have limited credibility.²⁵¹ Consequently, they argue that the CSGAPP is not substantially related to achieving California's important governmental purpose of enhancing education.

Several critics have rejected research on single-gender schools for methodological reasons. Leading studies demonstrating the effectiveness of a single-gender education are misleading because their proponents appear to have failed to control for preexisting and confounding factors which impact academic achievement. Among the most commonly cited confounding factors are the socio-economic status of the student's family, the innate ability and motivation of the student, and the role of a family in encouraging a student's academic achievement.²⁵² Moreover, these studies, which have extracted their data from private single-gender parochial schools, have failed to account for the self-selectivity of the students attending such schools as well as the selectivity of these schools in their admission processes (which attempt to eliminate the under-qualified student).²⁵³

248. See Christina H. Sommers, *Where the Boys Are*, TCHR. MAG., June 12, 1996.

249. See *id.*

250. See Jeffrey Weld, *Separate-Sex Science Shortchanges Students*, TCHR. MAG., Feb. 5, 1997 (High-school females are much less likely to enroll in calculus and physics courses, 39% and 15%, respectively. College females are less likely to seek degrees in math and science related fields. Only 30% of B.S. degrees and 21% of doctorate degrees are awarded to females, which translates into a 6 to 1 ratio of males to females in science and engineering related professions.).

251. See Cynthia F. Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and the Citadel*, 4 DUKE J. GENDER L. & POL'Y 101, 114 (1997).

252. See Emmanuel Jimenez & Marlaine E. Lockheed, *Enhancing Girls' Learning Through Single-Sex Education: Evidence and a Policy Conundrum*, 11 EDUC. EVALUATION AND POL'Y ANALYSIS 117 (1989); Herbert W. Marsh, *Effects of Attending Single-Sex and Coeducational High Schools on Achievement, Attitudes, Behaviors and Sex Differences*, 81 J. EDUC. PSYCHOL. 70 (1989).

253. See Jimenez & Lockheed, *supra* note 252, at 70; Marsh, *supra* note 252, at 70.

Other critics have offered various normative justifications for opposing single-gender schools. First, the economic pressures that plagued public school systems earlier in the country's history continue to persist, even in major metropolitan areas.²⁵⁴ California's public school system, for example, cannot afford to divert limited funds from the general educational system for experimental programs, like the CSGAPP.²⁵⁵ Second, it is ill-advised to separate children at early ages when the "real world" does not call for, or permit, such segregation.²⁵⁶ Studies show that products of single-gender schools often have difficulty interacting socially with members of the opposite gender, especially in college.²⁵⁷ Finally, students in single-gender schools may acquire gender stereotypes due to their lack of regular interaction with the opposite gender. This could lead to a resurgence of the gender roles that were prescribed by society until the Civil Rights movement in the 1960s.²⁵⁸

There is, however, an overwhelming amount of scholarly literature²⁵⁹ demonstrating the value of a single-gender education for some students. Such documentation substantially relates the decision to enact the CSGAPP with the important governmental purposes asserted by the California Legislature.²⁶⁰ One of the most extensive and frequently cited studies of the effects of single-gender education was conducted by Profes-

254. See CORNELIUS RIORDAN, *GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE?* 39-40 (1990).

255. See, e.g., Karen Sollie, Letter to the Editor, *School Offers One Choice Too Many*, L.A. TIMES, Nov. 2, 1997, at B9 ("Why are we not taking this money and placing it in the schools that are overcrowded, need more educators, crave more music, science and sports?").

256. See RIORDAN, *supra* note 254, at 40-41; Stephen Chapman, *Reality and the Trend Toward Single-Sex Schools*, LAS VEGAS REV. J., Aug. 11, 1997, at 7B.

257. See MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS* 247-50 (1994); Steve Smith, *Same-sex Education Makes Academic Sense*, ORANGE COUNTY REG., Sept. 17, 1997, at B6.

258. See SADKER & SADKER, *supra* note 257, at 240-41; RIORDAN, *supra* note 254, at 42-45.

259. The author has opted to focus exclusively on the results rather than on the *purported* psychological, biological, and societal sources of the disparities between males and females found in much of the scholarly literature.

260. As one scholar noted:

Single-gender schools generally are more effective academically than coeducational schools. This is true at all levels of school, from elementary to higher education. Over the past decade, the data consistently and persistently confirm this hard-to-accept educational fact. Single-gender schools work. They work for girls and boys, women and men, whites and nonwhites. Research has demonstrated that the effects of single-gender schools are greatest among students who have been disadvantaged historically—females and racial/ethnic/religious minorities (both males and females).

Cornelius Riordan, *Reconsidering Same Gender Schools: The VMI Case and Beyond*, EDUC. WK., Feb. 23, 1994, at 48.

sors Valerie E. Lee of the University of Michigan and Anthony S. Bryk of the University of Chicago.²⁶¹

Lee and Bryk concluded that for both males and females “[t]here were no [academic] achievement areas in which coeducational-school students surpassed their single-sex-school counterparts” in high school.²⁶² Students at single-gender schools have shown to be more academically inclined than their coeducation counterparts because they focus on their studies rather than social activities.²⁶³ This includes sexual distractions that plague many students of both genders during their adolescent years.²⁶⁴ The end result is that students in single-gender schools are more likely to attend college and have higher educational and career aspirations.²⁶⁵

Lee and Bryk also found that both males and females in single-gender schools “were less likely to evidence stereotyped sex role attitudes” than their coeducational counterparts despite the critics arguments to the contrary. Both were especially surprised to learn that the level of sex role stereotyping declined for males from their sophomore to their senior years.²⁶⁶

261. In answering criticism that their research failed to take into account confounding factors, Lee and Bryk responded that no evidence existed indicating that the single-gender schools enrolled a “superior clientele of students” relative to the coeducational schools in their sample. See Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Schools: Response to Marsh*, 81 J. EDUC. PSYCHOL. 647, 648 (1989). Thus, they concluded that with a large enough sampling of students—over 1,800 students in 45 single-gender schools—any difference in outcome between males & females was attributed to the schools’ gender composition. See Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCHOL. 381 (1986) [hereinafter Lee & Bryk I].

262. Lee & Bryk I, *supra* note 261, at 388.

263. Students at single-gender schools report spending more time on homework, are more likely to associate with academically oriented peers, spend less time engaged in extra-curricular activities, and spend less time “getting high” on the weekends. See Edison J. Trickett, Penelope K. Trickett, Julie J. Castro & Paul Schaffner, *The Independent School Experience: Aspects of the Normative Environments of Single-Sex and Coed Secondary Schools*, 74 J. EDUC. PSYCHOL. 374, 379 (1982); Lee & Bryk I, *supra* note 261, at 387; Marsh, *supra* note 252, at 73; Jimenez & Lockheed, *supra* note 252, at 121.

264. See Caplice, *supra* note 221, at 256-57. Justice Powell noted in *Hogan* that a single-gender school may “free its students of the burden of playing the mating game while attending classes, thus giving academic rather than sexual emphasis.” *Hogan v. Mississippi Univ. of Women*, 458 U.S. 718, 739 n.5 (1982) (quoting Brief for Mississippi University for Women Alumnae Association as Amicus Curiae 2-3).

265. See Lee & Bryk I, *supra* note 261; Valerie E. Lee & Helen M. Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. EDUC. PSYCHOL. 578, 584 (1990); Caplice, *supra* note 221, at 243-46; Corcoran, *supra* note 226, at 1027.

266. See Lee & Bryk I, *supra* note 261, at 389. See also Lee & Marks, *supra* note 261, at 584 (“young women who attended single-sex secondary schools held significantly less stereotypic atti-

Other scholars have found that both male and female students who receive a single-gender education have higher levels of self-esteem as well as interest in leadership roles than their coeducational counterparts. This notion is especially apparent in all-female schools, where role models are not just the predominately female teachers and counselors, but the students' peers as well.²⁶⁷ As young girls see their classmates excelling academically or embracing leadership roles, they are more likely to want to excel, as there is no stigma associated with being academically capable or assertive. Likewise, confidence levels in all-male schools increase as students are not continually compared with their female classmates by their male peers.²⁶⁸

For females, studies produced strong results indicating the effectiveness of single-gender schools. Underlying these studies is evidence demonstrating that females do not receive the level of attention that males do in coeducational schools, a phenomenon referred to in the literature as a "chilly" classroom.²⁶⁹ Without males in the classroom, females are more likely to assert themselves verbally, enabling them to interact more frequently with their teachers. Consequently, females, "more frequently pursue nontraditional courses of study, have a better self-image, including greater confidence in their own abilities, perform at a higher level, especially in courses traditionally considered in the 'male domain', and have more modern notions of sex roles."²⁷⁰

tudes about the role of women in the workplace compared with their counterparts who attended co-educational schools.").

267. See RIORDAN, *supra* note 254, at 49.

268. See Caplice, *supra* note 221, at 246.

269. See generally ROBERTA M. HALL, ASSOCIATION OF AM. COLLEGES, THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN? (1982); SADKER & SADKER, *supra* note 257; AM. ASS'N OF UNIV. WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS (1992) [hereinafter AAUW Report]. The AAUW Report examines how females in grades K-12 receive an inferior education relative to males in American schools. The AAUW attributes this phenomenon to the failure of teachers to give female students the same amount of attention in class as their male counterparts. This report was instrumental in re-opening the debate regarding sexism in America's schools. While the AAUW does not advocate the employment of single-gender schools, the AAUW Report has played a role in renewing politicians' interest in single-gender schools.

270. Corcoran, *supra* note 226, at 1027 (citing HERBERT GROSSMAN & SUZANNE H. GROSSMAN, GENDER ISSUES IN EDUCATION 143 (1994)). See also Caplice, *supra* note 221, at 244-45; Lee & Bryk I, *supra* note 261. See generally, RIORDAN, *supra* note 254, at 54-55.

To illustrate this point, consider that students graduating from all-female schools are twice as likely as the average American student, combining males and females, to pursue math, science, business, or engineering degrees in college.²⁷¹

For males, studies have not been as conclusive, but still indicate the effectiveness of a single-gender education. Boys in coeducational environments suffer from higher drop-out rates, more frequent disciplinary problems, and lower overall grades relative to their counterparts in single-gender schools.²⁷² All-male schools that rely on strict discipline and goal setting techniques have found that students are more responsive than their coeducational counterparts.²⁷³

Admittedly, despite all of the empirical research the reality is that single-gender schools do not benefit *all* students. Statistics are limited to generalities only. For some individual students, a single-gender environment may stunt their social and academic development. But the research demonstrates that for *some* students, a single-gender environment is the most effective academic setting. The authors of the CSGAPP accounted for this in the statutory language by directing the State Superintendent to carefully select those school districts that indicate “how a single gender academy will meet the unique educational needs of the pupils and communities they serve.”²⁷⁴ And who is in the best position to determine which students will benefit most from a single-gender education? California’s politicians believe parents and local school administrators are. By way of analogy, no one could plausibly argue that Partnership Academies are well-suited for all of California’s public school students. College bound students do not have much use for a vocational high school education. This, however, is not a sufficient justification to abolish the program.

Unfortunately, opponents of single-gender schools are philosophically opposed to the CSGAPP and refuse to support it, whether research shows that some students benefit from a single-gender environment or not. Through their rejection, they try to impose their beliefs regarding public education upon others. But they fail to recognize that “separate-but-equal” single-gender schools are a far cry from the single-gender schools of the 18th and 19th Centuries or the racially-segregated schools of the pre-

271. See Amy Saltzman, *Lots on Girls, Little on Boys: A Look at the Research*, U.S. NEWS AND WORLD REP., July 8, 1996, available in 1996 WL 7811087.

272. See SADKER & SADKER, *supra* note 257, at 221.

273. See Caplice, *supra* note 221, at 249.

274. CAL. EDUC. CODE § 58522(c) (1998).

Brown days. Their adherence to strict principles based is premised on fears of past relics, and, therefore, is unfounded.

Opponents of single-gender public schools also argue that the CSGAPP is premised upon antiquated notions of gender stereotypes. At the same time, they ironically rely upon research findings based on generalizations and gender-stereotyping to justify their position. They erroneously assume that all males are “X” and that all females are “Y” to conclude that single-gender schools are ineffective. This reliance, however, is categorically impermissible under the intermediate scrutiny test summarized in *VMI*.

Thus, unless research surfaces indicating that *no* students could plausibly benefit from single-gender schools, the CSGAPP is not an arbitrary gender-based classification. The statute is, in this sense, substantially related to the State’s important governmental objectives.

b. *For some Californians, the CSGAPP is a more effective alternative than coeducation:* Under a strict scrutiny analysis, courts generally require that the government prove that a less restrictive alternative could not have been employed to achieve the compelling governmental interest. As early as 1974, Professor John Ely argued that “[Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense.”²⁷⁵

But courts do not demand such a tight “fit” when reviewing gender-based classifications under intermediate scrutiny. While a least restrictive alternative is likely sufficient in proving that the law is substantially related to its important governmental purpose, it is not necessary to pass constitutional muster. Justice Scalia clearly articulated this notion when he asserted in his *VMI* dissent that “[i]ntermediate scrutiny has never required a least-restrictive-means analysis.”²⁷⁶ But courts do require that the government, in demonstrating the substantial relationship of the gender-based classification to its actual important governmental objectives, make

275. Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578-79 (1975). See also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1980) (“The term ‘narrowly tailored,’ so frequently used in our cases, has acquired a secondary meaning . . . [T]he classification at issue must ‘fit’ with greater precision than any alternative means.”) (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 n.26 (1974)).

276. *United States v. Virginia*, 518 U.S. 515, 573 (1996) (Scalia, J., dissenting).

a “showing that a gender-neutral statute would be a less effective means of achieving [its] goal.”²⁷⁷

In regard to both of California’s constitutionally—permissible objectives—enhancing the public education system and offering diverse of school choices—the CSGAPP is, for some students, a more effective means than the coeducational alternative.

i. *Enhancing the quality of education:* A single-gender public education will enable some of California’s public school students to experience school in an environment better tailored to their style of learning. As the empirical evidence demonstrates, many of California’s public school students will receive a more effective education in a single-gender environment than a coeducational setting,²⁷⁸ and therefore the CSGAPP is a more effective alternative for those students.

Critics, however, argue that there are other, less restrictive, gender-neutral, and possibly more effective means of enhancing the quality of education in California. They concede that there are disparities, in some subject matters, between the pedagogical achievement of males and females in coeducational, public school classrooms. But to rectify these problems, they believe that gender-neutral steps can be taken to revamp the male-dominated structure of California’s public schools. Specifically, recent leading studies have concluded that “whether one looks at preschool classrooms or university lecture halls, at female teachers or male teachers, research spanning the past twenty years consistently reveals that males receive more teacher attention than do females.”²⁷⁹ This phenomenon is manifest when teachers select classroom activities and lesson plans “in which boys excel or are encouraged more than girls.”²⁸⁰ The result is that some females suffer from self-esteem problems, refrain from enrolling in

277. *Michael M. v. Superior Court*, 450 U.S. 464, 490 (1980). See *Orr v. Orr*, 440 U.S. 268, 283 (1979) (“Where, as here, the [Government’s] . . . purposes are as well served by a gender-neutral classification as the one that gender classifies, . . . the [Government] cannot be permitted to classify on the basis of sex.”); *Rostker v. Goldberg*, 453 U.S. 57, 95 (1981) (Marshall, J., dissenting) (“[T]he Government cannot meet [its intermediate scrutiny] burden without showing that a gender-neutral statute would be a less effective means of attaining this end.”). See also *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (invalidating a statute that enabled widowers to reap state benefits only if they proved financial dependence on their wives’ income or were physically incapacitated, whereas widows automatically received the same benefits; ruling that the government’s justification for the gender-based classification on administrative costs grounds was insufficient).

278. See discussion *supra* Part V.B.3.a.

279. AAUW Report, *supra* note 269, at 60. See generally SADKER & SADKER, *supra* note 257.

280. AAUW Report, *supra* note 269, at 60.

stereotypically masculine subjects, and effectively become “spectators at learning.”²⁸¹

Admittedly, taking steps to reduce the gender-bias in the classroom is an approach that should be pursued, as it would greatly enhance the overall quality of public school coeducation in California, especially for females. Furthermore, revamping the coeducational classroom is arguably the least-restrictive alternative from which governmental entities can choose.

Yet, even assuming that gender-bias can be completely eliminated from the California public school system—an ideal that, if attainable, is years in the making—many students will still reap significant benefits in single-gender academies that would not otherwise be attainable in coeducational schools. Moreover, this notion of removing sexism from public schools, purportedly operative since the passage of Title IX in 1972, has been ineffective in achieving the quality of education many Californians seek for their children. Thus, the CSGAPP is an effective alternative.

ii. *Diversity of school choice*: California cannot effectively achieve its goal of creating a diversity of school choices without offering the option of single-gender to its citizens. If the State is to offer the same spectrum of choices to parents of public school students as is available to parents of private school students, it will be omitting a significant and well-respected educational alternative without the CSGAPP. Critics may argue that there are other school options that sufficiently diversify the system.²⁸² But the question is whether the diversification of the California school system can be as effective without the CSGAPP, not whether diversity of school choice is present without it. Quite simply, the policy of diversity of school choice is more effective when there are more choices.

In short, a single-gender education is more effective than a traditional coeducational environment for some of California’s public school students. In this sense, the CSGAPP is substantially related to the State’s important governmental objectives.

c. *The CSGAPP is neither impermissibly overinclusive nor impermissibly underinclusive*: In determining the ends-means nexus of a gender-based classification, the federal courts ask whether the statute at issue is either overinclusive or underinclusive.²⁸³ However, a finding of either (or both) is only fatal when determined to be excessive.

281. *Id.*

282. See discussion *supra* Part V.B.2.b.

283. See CHEMERINSKY, *supra* note 63, at 531-32 and accompanying footnotes.

i. *Overinclusive*: It is possible to view the CSGAPP as an overinclusive statute. As the research indicates, not all students benefit from single-gender environments. In fact, single-gender schools can even have a detrimental effect on academic performance and overall social interaction for some students. As such, it would be an overbroad and therefore impermissible generalization on behalf of California to assume that, for instance, all female students will achieve higher levels in math and science or that all male students will be better disciplined if placed in a single-gender environment. But the above overinclusive argument erroneously assumes that the CSGAPP mandates that *all* students attend single-gender schools, a concept that is diametrically opposed to the intent of the CSGAPP.²⁸⁴

One of the central provisions of the Program is that “[e]nrollment in the [CSGAPP] *must* be on a *voluntary* basis.”²⁸⁵ If voluntary enrollment were not the case, California would be undermining its stated objective of creating diversity of school choice. Because parents are permitted to choose whether such a program is desirable for their child, presumably *only* those students that are most inclined to benefit from the unique attributes of the CSGAPP will apply for and attend those academies. Therefore, in this sense, the CSGAPP is sufficiently narrowly-tailored (even to the extent of being perfectly-tailored) to its objectives and is not overinclusive.

ii. *Underinclusive*: It is possible to view the CSGAPP as an underinclusive statute. If the merits of a single-gender education are so pervasive, then access to such schools should be available to any student who desires the single-gender option. In other words, if the demand for the CSGAPP academies is present, then California is impermissibly denying the school choice to similarly-situated students.

However, California is permitted to proceed “one step at a time”²⁸⁶ without the risk that a court will invalidate the CSGAPP because it is impermissibly underinclusive. This concept coincides with the fundamental notion of federalism that Justice Louis Brandeis lauded in 1932: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”²⁸⁷ Justice Scalia completed Brandeis’ thoughts when he severely criticized the *VMI* Court for violating this fundamental tenet of federalism:

284. Admittedly, if all schools within a district were single-gender, then they would be unconstitutionally overinclusive.

285. CAL. EDUC. CODE § 58522(b)(1) (West Supp. 1999) (emphasis added).

286. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

287. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court acting on its Members' personal view of what would make a "more perfect Union," (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide.²⁸⁸

Due to the intrinsic complexities of a nation the size of the United States, where heterogeneity pervades every aspect of its society, it is virtually impossible to envisage or implement a uniform set of rules; this especially rings true when it comes to issues as traditionally localized as education.²⁸⁹

Brandeis' "states as laboratories" argument can be applied to California as well. The CSGAPP is an experiment—or as its title indicates, a "Pilot Program"—that should have the opportunity to demonstrate its effectiveness on a limited and localized basis. The Legislature wisely inserted provisions in the statutory language to monitor "the relative success of the single gender academ[ies]" via "detailed reports" to be submitted to the State Superintendent by 2000.²⁹⁰ These reports will help to determine whether the CSGAPP should be expanded or discontinued after a relatively short period of time. If the academies are found ineffectual in achieving their objectives, then the Program's funding and authorization will be likely withdrawn altogether. Likewise, if the participating districts find that the academies are ineffectual or that there is insufficient demand, they too can discontinue the Program within their district limits at any time.

On balance, the CSGAPP is neither overinclusive nor underinclusive. Parents, not the State of California or its various school districts, make the ultimate decision of whether or not to send their child to a CSGAPP academy. Furthermore, our federalist government is designed to permit states and localities to experiment with novel policy approaches. Thus, in this sense, the CSGAPP is substantially related to the State's important governmental objectives.

VI. WHY *SHOULD* STATES AND SCHOOL DISTRICTS OFFER SINGLE-GENDER PUBLIC SCHOOLS?

The preceding sections present the legal arguments outlining why the CSGAPP is constitutionally permissible under the Equal Protection

288. *United States v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, J. dissenting). See Kathryn Lee, *Intermediate Review 'With Teeth' in Gender Discrimination Cases: The New Standard in United States v. Virginia*, 7 TEMP. POL. & CIV. RTS. L. REV. 221, 240 (1997).

289. See Caplice, *supra* note 221, at 290-91.

290. CAL. EDUC. CODE § 58523(b) (West Supp. 1998).

Clause. But the analysis does not expressly address the policy reasons that answer the question: Why should states and school districts offer single-gender public schools like the CSGAPP to their residents?

First, students do not all perform optimally in one type of educational setting. Various factors differentiate students, rendering traditional coeducational environments ineffectual, even damaging for some. Parents and students are in the best position to select the optimal form of education for a specific child, not the government. As such, the state should provide the option of single-gender public schools that have been proven successful in this country—both historically in the public realm and currently in the private sector—as well as abroad.

Second, parents should not be deprived of the opportunity to send their children to single-gender schools because of their financial condition. Currently, in most states, if the parents determine that a single-gender education is best for their child's academic and social development, they can only turn to private school. But for many Americans, private schools are simply too costly. The result is that the child receives a sub-optimal education from the government. Meanwhile, wealthy parents have the financial means to enroll their child in a single-gender school, thereby potentially optimizing his or her education. By depriving people in lower socioeconomic classes of school choices, and single-gender schools in particular, the government is indirectly widening the rift between the rich and the poor.

Third, some students will flourish academically and/or socially in single-gender schools.²⁹¹ In short, students in single-gender schools are not distracted as much by the opposite gender, both in and out of the classroom. Moreover, single-gender schools allow some students to cultivate a sense of self-esteem, confidence and efficacy that would otherwise not develop in a coeducational environment.

Finally, states and school districts that have limited funding must make qualitative improvements to bolster the condition of their school systems. If a state or school district does not have the financial means to build new classrooms, hire qualified instructors, and/or buy new materials and supplies, then offering specialized school choices is the only way that the government can effectively educate its next generation of citizens. We must not forget that an educated citizenry is one of the best preventative safeguards against future criminal conduct. Thus, the value of education cannot be overlooked.

291. See discussion *supra* Part V.B.3.a.

VII. CONCLUSION

If challenged on equal protection grounds, the CSGAPP will pass constitutional muster on two separate theories. First, the Program establishes constitutionally—permissible “separate but equal” single-gender public schools. Second, the CSGAPP passes the current intermediate scrutiny test for gender-based classifications. Overall, the CSGAPP offers some public school students an effective educational option, which would otherwise be cost-prohibitive. Parents and students know what type of education will best serve them. Therefore, the State should strive to provide them with a full array of choices. Perhaps Professor Susan Estrich, a noted feminist and outspoken proponent of single-gender schools and universities, best articulated this notion when she wrote:

If students don't want to go to single-gender schools, or if parents don't want to send them, that's their choice. If the experiments with girls-only [schools] or boys-only [schools] should fail, then educators can be trusted to abandon them. But short of that, let the educators and the parents and the students decide, and leave the lawyers and judges out of it.²⁹²

292. Susan Estrich, *For Girls' Schools and Women's Colleges, Separate is Better*, N.Y. TIMES, May 22, 1994, § 6 (Magazine), at 39.