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INTRODUCTION

Inner-city schools have become notorious for their failure to educate. Children in these blighted areas, usually African-Americans or other minorities,[1] have little hope for a bright future.[2] School, which is commonly thought to provide a stepping-stone to a better life, merely reinforces that lack of hope.[3] The curriculum reflects the values of dominant society—

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1. Detroit's public school system, for example, is 90% African-American. Isabel Wilkerson, *Detroit's Boys-Only School Facing Bias Lawsuit*, N.Y. TIMES, Aug. 14, 1991, at A1.

2. Many inner-city children face a grim future of unemployment, incarceration, or untimely death. In Detroit, for example, murder tops the list of the causes of death for African-American boys over the tender age of 10. *Id.* Nationally, murder is the leading cause of death for African-American males between the ages of 15-24. Barbara Kantrowitz et al., *Can the Boys Be Saved?*, NEWSWEEK, Oct. 15, 1990, at 67. An African-American teenage male is 11 times more likely than a white teenage male to die of a gunshot wound, *A Special Need, a Precious Value*, CHI. TRIB., Aug. 10, 1991, § 1, at 16 [hereinafter *Special Need*], and five times as likely to be murdered. *Nightline: Detroit Black "Male Academies" Ruled Unfair* (ABC television broadcast, Aug. 15, 1991, transcript *available in* LEXIS, Nexis Library, ABCnew File [hereinafter *Nightline*] (report by Tom Foreman).

For those who survive, more will go to prison than to college. *Id.* Even though African-American males make up only 6% of the U.S. population, they constitute 46% of prison inmates. Almost one out of every four African-American men in their twenties is incarcerated or on parole. Kantrowitz, *supra* at 67. Joblessness—and hopelessness—awaits the few who escape both murder and incarceration. *See Special Need*, *supra* at 16 ("Unemployment among young black men, even in good times, is routinely twice what it is among young whites.").

Urban African-American girls, who are less likely than their brothers to be murdered or imprisoned, can look forward to a different future: teen pregnancy and single parenting. Most African-American children live in families headed by single mothers. *See* Amy Harmon, *300 Rally in Support of All-Male Schools*, L.A. TIMES, Aug. 22, 1991, at A4 (noting that 70% of Detroit schoolchildren are raised by single mothers); Kantrowitz, *supra* at 67 (reporting that in 1988, only 38.6% of African-American children nationally lived with both parents). There seems to be a self-perpetuating cycle of teenage pregnancy and single parenthood from generation to generation. "[T]he problems facing black females (teenage pregnancies, in particular) can be just as staggering" as the problems facing boys. Keith L. Thomas, *Raising Black Boys in America Part 2; Volunteers Try to Reverse the Cycle of Self-Destruction; Community Crusaders Take Mission Personally*, ATLANTA CONST., Oct. 3, 1991, at C4 (but noting that the problems facing boys are more critical).

3. Rather than encouraging upward mobility, public schooling tends to perpetuate the status quo. *See* LOIS WEIS, *Issues of Disproportionality and Social Justice in Tomorrow's Schools*, *in* 3 SPECIAL STUDIES IN TEACHING AND TEACHER EDUCATION: CURRICULUM FOR TOMORROW'S SCHOOLS 32, 33 (SUNY Buffalo, 1990) ("Although . . schooling enables some individuals to experience social mobility, it also play[s] an important role in encour-

upper-class Anglo-Americans—and implicitly rejects both the heritage and the daily experience of African-Americans and other minorities as unworthy of interest.[4] Many children perceive and accept that rejection as a rejection of themselves, destroying their sense of self-worth. Others maintain some self-esteem by spurning the messenger along with the message. The result is a school system which has failed our children.[5]

Several urban school districts have addressed the problem by establishing, or attempting to establish, all-male programs aimed at meeting the needs of African-American boys.[6] Educators hoped to improve the students'

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aging large scale structural inequalities along the lines of social class, race, and gender.") (footnote omitted).

> [S]tudents learn attitudes and behavior suited to that level of [society] which they will ultimately occupy. Thus, lower class blacks are concentrated in schools "whose repressive, arbitrary, generally chaotic internal order, coercive authority structure, and minimal possibilities for advancement mirror the characteristics of inferior job situations." Working class students attend schools that emphasize rule following, and close attention to the specification of others. In contrast, schools in affluent neighborhoods have "relatively open systems that favor greater student participation, less direct supervision, more student electives, and in general, a value system stressing internalized standards of control."

Id. at 38 (footnotes omitted). Through their very structure, inner-city, lower-class schools teach their students to become inner-city, lower-class citizens, without the hope or the skills to improve their lot.

4. A community task force in Milwaukee found that "many black students suffer because they lose their identity or become discouraged by a traditional curriculum that stresses a white, European heritage." Carol Innerst, *School Geared to Black Boys Attracts Girls*, WASH. TIMES, Sept. 3, 1991, at A3.

5. The statistics are revealing. In Detroit, for example, an urban school district where 90% of the students are African-American, 54% of boys and 45% of girls drop out of school before graduating. Elaine Ray, *All-Male Black Schools Put on Hold in Detroit: Girls Will Be Admitted After Court Challenge*, BOSTON GLOBE, Sept. 1, 1991, at A16. Some drop out as early as third grade. Laurel S. Walters, *The Plight of Black Male Schools*, CHRISTIAN SCI. MONITOR, Sept. 9, 1991, at 8. Nationally, one in five African-American males will not complete high school. *Nightline*, *supra* note 2.

Although disturbing, the dropout rates do not tell the whole story. In Milwaukee, only 2% of African-American high school boys have a "B" average or higher; the average grade is a "D." More than 11% of these boys have been held back. Kantrowitz, *supra* note 2, at 67. "[W]hile black males constitute 27.6 per cent of public school students, they make up 50 per cent of student suspensions and 94.4 per cent of expulsions." Bruce Fein & William B. Reynolds, *Don't Base Education on Race and Gender*, N.J. L.J., Nov. 22, 1990, at 9. "They are at the top of all the negative categories and at the bottom of the positive." Kantrowitz, *supra* note 2, at 67

6. Innerst, *supra* note 4, at A3; *Special Need*, *supra* note 2, at 16. Brooklyn, Baltimore, and Miami established all-male elementary school classes, although the Miami program was later made co-ed. Ray, *supra* note 5, at A16 (noting that Miami converted to the safer route of co-ed classes designed to improve self-esteem); Walters, *supra* note 5, at 8 (reporting that a Baltimore all-male elementary school program opened); John Hildebrand, *Bush Backs Inner-City Male Schools*, NEWSDAY, Sept. 10, 1991, at 17 (noting that Brooklyn established all-male third-grade class, and considered all-male high school). Detroit tried to open an all-male high school, but was ordered by a federal district court to admit girls. Garrett v. Board of Educ., 775 F Supp. 1004 (E.D. Mich. 1991). Milwaukee compromised by creating a program designed primarily to help African-American males, but open to both sexes and all races. Kantrowitz, *supra* note 2, at 67.

education by improving their sense of self-worth through an Afro-centric curriculum, male role models, special tutoring, and discipline.[7] Anecdotal information indicated that the programs were working: attendance rates and test scores went up, and behavioral problems went down.[8]

Despite their initial success, a number of the all-male programs were cancelled because of gender discrimination claims.[9] To some advocates of the all-boys schools, these claims of gender discrimination seemed to be raised only to block efforts to help eradicate the subjugation of African-American males.[10] But the claim of gender discrimination should not be so easily dismissed. Creating exclusively male schools implies that part of the problem with the current system is the presence of girls.[11] This is a dangerous

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7. *See* Fein & Reynolds, *supra* note 5, at 9 (noting that Afro-centric curriculum is intended to improve academic performance by evoking the pride of black males in their race and its achievements); Helaine Greenfeld, Note, *Some Constitutional Problems with the Resegregation of Public Schools*, 80 GEO. L.J. 363, 364 n.9 (1991).

8. *See, e.g.*, Kantrowitz, *supra* note 2, at 67 (reporting that students in all-male kindergarten and first-grade classes in Dade County, Florida, had higher attendance and test scores); Carol Innerst, *Schools Segregate Black Male Pupils*, WASH. TIMES, Oct. 19, 1990, at A1 (reporting that test scores and attitudes improved and that behavioral problems decreased in Baltimore all-male elementary school classes); Walters, *supra* note 5, at 8 (noting improved performance in Baltimore).

9. Federal district court Judge George Woods ordered Detroit to open its proposed all-male academy to girls. *Garrett*, 775 F Supp. 1004. Dade County converted its all-male program to co-ed after the Office of Civil Rights of the Department of Education advised it that the program constituted sex discrimination. Kenneth J. Cooper, *Bush, Citing Boy Scouts, Backs All-Boy Black Public Schools; President Criticizes Federal Ruling in Detroit Case*, WASH. POST, Sept. 10, 1991, at A2.

10. When the issue of sex segregation has been raised, proponents of the all-male schools have argued that sex discrimination was being used as a smokescreen to prevent focusing attention on the proper issue of race. Ray, *supra* note 5, at A16. The controversy has introduced the question of resegregating American education by creating all-male schools in urban areas where the students are all likely to be African-American. The schools are seen as an exercise in racial self-determination, an exercise blocked by those determined to perpetuate the African-American underclass. *Id.*

However, others believe that the schools themselves will perpetuate the subordination of African-American males by further isolating and stigmatizing them. Innerst, *supra* note 8, at A1 (reporting that separate schools could "send[] the message that [African-American] males are 'different' and incapable of learning alongside their peers of other races and cultures"); Ron Howell, *Fighting a Cycle of Failure*, NEWSDAY, Nov. 4, 1991, at 7 ("The schools will be viewed largely as reformatories where problem youngsters go. They're not being established for rocket scientists.") (quoting Professor Walter C. Farrell). "This is a way of stigmatizing . [I]f through the discourse of stigma we can encourage the community to draw a ring around blacks and herd them together, then the society has an easy target." *MacNeil/Lehrer NewsHour: Separate Equals Better?*, Educational Broadcasting television broadcast, May 1, 1991, transcript *available in* LEXIS, Nexis Library, Macleh File [hereinafter *MacNeil/Lehrer*] (comment by Professor Charles Willie, Harvard University). There is a "focus on [black males] for 'special treatment' which is not special treatment or special attention but is really an indictment of black males." *Id.* (comment by Michael Meyers, N.Y. Civil Rights Coalition).

11. *Garrett*, 775 F. Supp. at 1007 (noting that "[t]he primary rationale for the [male] Academies is simply that co-educational programs aimed at improving male performance have failed," and rejecting it because "there is no showing that it is the co-educational factor that results in failure.").

stance to take, for "should the male academies . . . succeed, success would be attributed to the absence of girls rather than any of the educational factors that more probably caused the outcome."[12] Girls would be left in a system that is clearly failing to meet their educational needs, while boys would be given an option to try a better program.[13] Not only would inner-city girls be faced with the same, unalleviated problems they face now, they would also face the additional stigma of discrimination.[14] This would reinforce the idea, still far too prevalent in our society, that women, especially African-American women, are second-class citizens and not entitled to the same benefits and respect as men. Are we willing to pay that price?

In all the furor over all-male urban public schools, the cost to urban females is often overlooked. This Note examines the issue of single-gender public schools by looking at both the costs and the benefits of such schools.[15] Part I explores the principles underlying current equal protection doctrine as well as a proposed modification of that doctrine. These principles form the backdrop for examining involuntary gender segregation in Part II, and voluntary separatism in Part III. This Note concludes that imposed gender separation is never permissible. Under current doctrine, voluntary all-male public schools are also impermissible, but certain all-female schools may be allowed. Under the modified framework, single-gender schools for subordinated groups are acceptable, but the price of all-male schools may be more than we are willing to pay.

I. EQUAL PROTECTION ANALYSES

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . deny to any person within its jurisdiction the equal protection of the laws."[16] The language has been construed to encompass two distinct principles.[17] The first, anti-differentiation, appears to dominate, but not control, current Supreme Court doctrine.[18] It holds that individuals

12. *Id.*

13. "Ignoring the plight of urban females institutionalizes inequality and perpetuates the myth that females are doing well in the current system." *Id.*

14. A plausible argument can be made, though, that the stigma of such schools falls on the males who attend them rather than the females who are excluded. *See supra* note 10.

15. The focus is on gender rather than race discrimination, but many of the arguments for eliminating the subordination of women can be used for eliminating the subjugation of racial minorities.

16. U.S. CONST. amend. XIV, § 1.

17. *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV 1003 (1986); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1451 (1991).

18. Colker, *supra* note 17, at 1058.

may not be treated differently on the basis of race, gender, or other immutable characteristics.[19] Under this premise, governmental actions and laws must be neutral—color-blind or gender-blind—to give individuals equal protection under the law.[20]

This vision of equality differs substantially from the anti-subordination approach,[21] where equal protection means the elimination of subordination in society.[22] The facial neutrality or specificity of actions and policies is irrelevant under this view; the focus is on their effect in perpetuating or eliminating subordination.[23] The anti-subordination approach explains why we find some classifications invidious and others harmless.[24] It is this principle which underlies the different treatment of race and gender discrimination, the differing standards in statutory and constitutional analyses, and the tension in affirmative action cases.[25]

Current Supreme Court doctrine is largely informed by the anti-differentiation principle.[26] Under this principle, the equal protection clause is implicated whenever a classification treats persons similarly situated in different ways.[27] Once the Fourteenth Amendment is implicated, most classifications need only meet a rational basis test to be found constitutional.[28] Other classifications, though, are subject to a higher level of

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19. *See id.* at 1005. This principle has been variously called anti-differentiation, anti-discrimination, the inequality approach, and the differences approach. *See id.* at 1005 n.6 (anti-differentiation); Roberts, *supra* note 17, at 1451 (anti-discrimination principle); Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2362 n.214 (1989) (inequality approach); CATHARINE A. MACKINNON, THE SEXUAL HARRASSMENT OF WORKING WOMEN 4 (1979) (differences approach).

20. Colker, *supra* note 17, at 1006.

21. This principle has also been termed anti-subjugation and the "expansive view" of equal protection. *See* Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1336 (1986); Kimberlé W Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341 (1988).

22. *See* Mari J. Matsuda, *Comment: Pragmatism Modified and the False Consciousness Theory*, 63 S. CAL. L. REV. 1763, 1768 (1990) (advocating a pragmatic methodology for redressing subordination).

23. Roberts, *supra* note 17, at 1451; Colker, *supra* note 17 at 1007.

24. Colker, *supra* note 17, at 1007.

25. *Id.* at 1010. The tension arises when the Court tries to accomplish the goal of anti-subordination with an anti-differentiation vehicle. But even though it uses anti-differentiation language, the Court remains committed to the principle of anti-subordination. *Id.* at 1048; Kennedy, *supra* note 21, at 1334-35.

26. *See supra* notes 18-20 and accompanying text.

27. *E.g.*, Reed v. Reed, 404 U.S. 71, 75 (1971). A law—such as one creating separate but equal schools—which treats similarly-situated persons alike is not discriminatory under the Equal Protection Clause, for "the benefits and detriments fall on both sexes with equal measure." Vorchheimer v. School Dist. of Phila., 532 F.2d 880, 886 (1975) (noting that use of the rational basis test rather than intermediate scrutiny is justified when restrictions or benefits apply equally to both sexes).

28. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 574 (4th ed. 1991).

scrutiny. Classifications whose very nature makes them suspect—such as race—must be necessary to serve a compelling governmental interest before they will be found constitutional.[29]

Strict scrutiny in race discrimination cases has become "fatal in fact."[30] Virtually no race-specific policy is necessary to serve a compelling governmental interest, and thus virtually no race-specific policy can be found constitutional.[31] The current doctrine, based on anti-differentiation, creates road blocks to efforts to remove more deeply ingrained barriers to racial equality. It has essentially "led to a rather awkward attempt to accommodate race-specific remedies ordered for the purpose of redressing a particularly egregious case of subordination."[32] Affirmative action is difficult to justify when people cannot be treated differently.

Gender discrimination is not subject to strict scrutiny under the anti-differentiation approach, for there are actual differences between the genders which may occasion differential treatment.[33] Problems arise, however, when gender is used as a proxy for other, more appropriate bases of classification.[34] Until 1970, legislation using gender classification was evaluated under the rational basis test.[35] Since then, it has been subject to a level of scrutiny somewhere between rational basis and strict scrutiny.[36] *Craig v Boren*

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29. *Id.* § 14.3, at 575.

30. Gerald Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972), *quoted in* Colker, *supra* note 17, at 1023.

31. Colker, *supra* note 17, at 1048. Under a strict anti-differentiation approach, race-specific, affirmative action laws would not be permissible. The Supreme Court, though, has rejected strict anti-differentiation arguments to find that affirmative action is indeed permissible under certain circumstances. *Id.* at 1016; *see also* City of Richmond v. Croson, 488 U.S. 469 (1988) (O'Connor, J., concurring) (indicating that a narrowly drawn statute showing a past history of discrimination might survive constitutional scrutiny).

32. Colker, *supra* note 17, at 1048.

33. The Supreme Court has upheld statutes which "realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances." Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) (statutory rape); *see also* Rostker v. Goldberg, 453 U.S. 57 (1981) (draft registration).

34. In *Reed*, for instance, gender was used statutorily as a proxy to determine the order in which probate courts would appoint people to administer intestate estates. The Court struck this down as an inappropriate use of gender classification. *Reed*, 404 U.S. at 76. For more examples, see Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 726 n.12 (1982).

35. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding as "rational" a jury selection system excluding women who did not affirmatively indicate a desire to serve), *overruled by* Taylor v. Louisiana, 419 U.S. 522 (1975).

36. The Court first applied something stronger than a true rational basis test in 1971. *Reed*, 404 U.S. 71. In later opinions, some Justices urged strict scrutiny, while other Justices proposed an intermediate level of scrutiny. Still others encouraged adherence to the less exacting scrutiny of the rational basis standard. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976). There is still a notable lack of consensus on the Court: in *Hogan*, the vote was only 5-4 in reaffirming the *Craig* test. *Hogan*, 458 U.S. 718. *See generally* David Hoffman, *Challenges to Single-Sex Schools Under Equal Protection*, 6 HARV. WOMEN'S L.J. 163 (1983).

defined this intermediate level of scrutiny: "[t]o withstand constitutional challenge, [explicit] classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[37] A law which expressly treats the genders differently is constitutional if it meets this reduced standard.[38]

The lower level of scrutiny in gender discrimination cases means that some gender-specific classifications can pass constitutional muster. Unlike the application of strict scrutiny in race cases, courts using intermediate scrutiny do not inevitably find gender classifications to be fatally flawed. Thus, "policies and laws that differentiate for the purpose of eliminating subordination pass muster."[39] Unfortunately, "sex-specific policies or actions serving less important, often invidious, purposes also survive."[40] Redressing subordination is not the only goal which could be termed an "important and legitimate" governmental interest.[41] Indeed, even legislation with a rationale that has the effect of subordinating a disempowered class can withstand the lowered scrutiny of gender discrimination law [42]

The tension between the results in race and gender discrimination cases can be resolved by adopting a framework based on the anti-subordination approach.[43] Under such a framework, both facially neutral and explicitly differentiating laws are subject to strict scrutiny when they treat people differently or cause disparate impact which has a subordinating effect on either women or minorities.[44] In order to prove a violation of equal protection, the plaintiff must show a policy's subordinating impact on the plaintiff's class. To defend or justify its discriminatory policy or action, the government must demonstrate the beneficial effect on the subordinated group.[45] "A strict level of scrutiny can be preserved if it is recognized that

37. *Craig*, 429 U.S. at 197

38. *Hogan* clarified the test and broke it into three parts. *Hogan*, 458 U.S. at 724. The classification "must have legitimate ends, these ends must be important, and there must be a substantial relationship between these ends and the means used to attain them." Greenfeld, *supra* note 7, at 369 (discussing *Hogan* test).

39. Colker, *supra* note 17, at 1048.

40. *Id.*

41. *Id.* at 1041; *see Michael M.*, 450 U.S. 464 (finding goal of preventing teenage pregnancy important enough to uphold statutory rape law which punished males but not females for having sexual intercourse with underage partners); *Rostker*, 453 U.S. 57 (finding goal of maintaining and supporting armies sufficient to permit draft registration requirements for men but not for women).

42. *See* Colker, *supra* note 17, at 1048.

43. Professor Ruth Colker proposed the framework which I describe and use here. Colker, *supra* note 17, at 1058-63.

44. *Id.* at 1060-61. It would not be enough to show facial differentiation or disparate impact; plaintiffs would have to show how the differentiation or disparate impact contributed to their subordination. *Id.*

45. *Id.* at 1063. Professor Colker used Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), to illustrate the effect of this distinction. Colker, *supra* note 17, at 1062-63. In

the *only* justification for race- or sex-specific policies is the redress of a prior experience or history of subordination."[46] If the courts applied this framework, both race and gender discrimination would be treated the same, and there would be no need to lower the level of scrutiny to redress subordination.

II. SEPARATE BUT EQUAL SCHOOLS

A critical distinction must be made between segregation imposed by empowered groups and separatism chosen by disempowered groups.[47] Each method carries a different symbolic and practical impact.[48] When a dominant group excludes a subordinate group, it reinforces its own privileged position and the stereotypes supporting it.[49] In contrast, "socially subordinate groups can be empowered by the exclusion of socially dominant groups."[50] The term "separate but equal" connotes the exclusion of a disempowered group by a dominant group, and will be used here to indicate imposed segregation.[51]

The issue of involuntary segregation into "separate but equal" schools was definitively resolved by the Supreme Court in *Brown v. Board of Education*: "[I]n the field of public education, the doctrine of 'separate but equal' has no place."[52] *Brown* dealt with schools separated by race, and several subsequent cases by lower courts "implicit[ly] accept[ed] the notion

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Bakke, the Court struck a race-conscious medical school admissions policy. Under Colker's framework, the white plaintiff could not have made out a prima facie case unless he could show a subordinating disparate impact on white males. Even if he passed this hurdle, the University could have defended its policy at the justification stage by showing its effect was to reduce subordination of minorities by creating opportunities in medicine where none had existed before. *Id.*

46. Colker, *supra* note 17, at 1059 (emphasis in original).

47. Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 122 (1986); *see also* Colker, *supra* note 17, at 1051 (finding an inherent difference between imposed and chosen segregation).

48. Rhode, *supra* note 47, at 122.

49. *Id.*

50. *Id.* at 118 (explaining that chosen separation may give subordinate groups opportunities for self-expression and determination that would be inhibited by the presence of the dominant group).

51. Historically, the phrase "separate but equal" has indicated an imposition and a lack of choice. In public education, separate but equal meant that students were assigned to one school and excluded from another on the basis of race or gender. Forced exclusion was a motivating factor in *Brown v. Board of Education*, 347 U.S. 483 (1954), where the Court, reacting to a history of segregation forced upon the black minority by the white majority, denounced "separate but equal" education. Colker, *supra* note 17, at 1051; *see* Kennedy, *supra* note 21, at 1335-37; David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 938 (1989).

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

that separate facilities are more justifiable in the context of sex."[53] Nevertheless, *Brown* is the standard that should be followed in evaluating separate but equal schools for boys and girls.[54] The anti-subordination basis for *Brown*'s abrogation of separate but equal schools in the racial context supports its elimination in the gender context as well. The Court in *Brown* focused on the harms resulting from segregation[55] and strove to eliminate the subordination of African-Americans.[56]

The decision in *Brown* is clearly consistent with Professor Colker's framework. *Brown*'s anti-subordination goal was evident in its conclusion that "[s]egregation . . . in public schools has a detrimental effect . . . . To

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53. Cynthia Lewis, Plessy *Revived: The Separate but Equal Doctrine and Sex-Segregated Education*, 12 HARV. C.R.-C.L. L. REV. 585, 589 (1977). The separate but equal doctrine persisted in the area of sexual discrimination long after its abrogation in the area of racial discrimination. Patricia W Lamar, Comment, *The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Educational Amendments of 1972*, 32 EMORY L.J. 1111, 1113, 1119-35 (1983). Lamar notes the persistence of the separate but equal doctrine in a number of sex discrimination cases. *Id.*, *see, e.g.*, Williams v. McNair, 316 F Supp. 134 (D.S.C. 1970) (upholding separate but equal colleges for men and women), *aff'd mem.*, 401 U.S. 951 (1971); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958) (overturning lower court's finding that gender-separate but equal schools were inherently unequal), *cert. denied*, 359 U.S. 230 (1959); Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App. 1960) (following *Bristol*).

54. Although I argue that *Brown* should be followed in gender cases as well as race cases, there are others who question whether it should be followed at all. The decision in *Brown* has been criticized for two very different reasons. First, the Court relied at least in part on Kenneth Clark's study of the effect of discrimination on African-American children. WILLIAM E. CROSS, SHADES OF BLACK 36 (1991). The validity of this study has since been seriously questioned. *See id.* at 16-38. For instance, Clark used anecdotal data gathered from clinically disturbed African-American children to hypothesize that African-Americans in general experienced self-hatred because of their race. *Id.* at 28-29. Clark saw "'Negroness' as a *stigma*," *id.* at 37 (emphasis in original), and the Supreme Court seemed to adopt his view. *See generally* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 72 CORNELL L. REV. (forthcoming 1992). Such a basis for *Brown* seems to undercut the freedom of equality that it has come to represent.

Brown has also been criticized as an act of white self-interest rather than a genuine attempt to help a subordinated minority. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW § 7.11.3 (2d ed. 1980). Professor Bell argues that *Brown* has been of "greater value to whites than [to] blacks." *Id.* It provided, among other benefits, "immediate credibility to America's struggle . to win the hearts and minds of emerging third-world peoples. Specific arguments to this effect were advanced" in the briefs for *Brown*. *Id.* Such a basis for *Brown* again appears to diminish it as a symbol of equality.

It is possible that the Justices were moved by these reasons. It is more probable, however, that their decision stemmed from a variety of motivations, conscious and subconscious, "good" and "bad." In a mixed-motive case, a common test is to see if a decision comes out the same way in the absence of the illegitimate motives. I argue that a court basing its decision solely on the principle of anti-subordination would find forced segregation by race *or* sex as impermissible as the Court in *Brown* did.

55. Lewis, *supra* note 53, at 620. "We must look to the effect of segregation itself." *Brown*, 347 U.S. at 492.

56. *See* Colker, *supra* note 17, at 1014, 1022 (noting that the central concern was remedying the subordination of blacks); Kennedy, *supra* note 21, at 1336 (asserting that *Brown* stands for the principle that any imposition of racial subjugation is unconstitutional).

separate [children] from others of similar age and qualifications solely because of race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely to ever be undone."[57] Children in a socially subordinate group—whether African-Americans or females—sense that they have been forcibly excluded from association with the dominant group because they are different and somehow less valuable. In an unequal society, the very fact of involuntary segregation stigmatizes the subordinate group.[58] That stigma generates a feeling of inferiority that is especially dangerous in school, for it is there that children form their self-identities and learn their place in society.[59] These children are handicapped in their pursuit of an education by their sense of inferiority.[60] Even when all tangible, measurable factors[61] of education are the same for both groups, the intangible factors are not.[62] As the Court in *Brown* noted, in an unequal society "[s]eparate educational facilities are inherently unequal."[63]

Even though the reasoning in *Brown* easily encompassed both race and gender, courts after *Brown* remained willing to apply the "separate but equal" analysis to uphold gender-segregated schools.[64] Indeed, *Williams v. McNair* went so far as to find a "school for young ladies," which purported to fit women for "such . . . arts as may be suitable to their sex" (such as needlework, cooking, housekeeping, and secretarial skills), equal to a prestigious men's military college.[65] *Williams* and subsequent cases illustrated

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57. *Brown*, 347 U.S. at 494.

58. "Segregation makes a reality of the belief underlying it, that the objects of the discrimination are different—indeed, separated—from humanity." James S. Liebman, *Desegregating Politics: "All-Out" Desegregation Explained*, 90 COLUM. L. REV. 1463, 1570 (1990), *quoted in* Greenfeld, *supra* note 7, at 382; *see supra* note 10 (regarding fear that separation will stigmatize African-American boys).

59. "[B]ecause of the unique importance of education in our society, the effects of sex segregation in schools may extend to many other facets of life." Lewis, *supra* note 53, at 606; *see also* Weis, *supra* note 3, at 34 ("[S]chools serve as sites whereby particular kinds of student identities are encouraged and formed.").

60. *See* McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950) (holding that by setting plaintiff, an African-American, apart from white students, the state handicapped plaintiff by impairing his ability to study and learn).

61. Tangible factors in high school can include: size of campus, number of books in library, number of faculty with graduate degrees, course offerings in math and science, extracurricular activities, and college entrance exam scores. *See* ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW 121 (1986).

62. Courts have been concerned with intangible factors in evaluating the equality of the schools; such factors may include prestige of the school, power of alumni, chance to make valuable contacts, reputation of the faculty, and experience of the administration. *See* SALOMONE, *supra* note 61, at 121, Richard W Brunette, Note, *Single-Sex Public Schools: The Last Bastion of "Separate but Equal"?*, 1977 DUKE L.J. 259, 268-69.

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

64. *See supra* note 53 and accompanying text.

65. Williams v. McNair, 316 F Supp. 134, 136 n.3 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971). This reasoning, similar to that used in race cases before *Brown*, was followed in later cases. *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), for

the courts' view that gender segregation was more justifiable than racial segregation.[66] Indeed, *Williams* has been used as authority for the idea that gender-"separate but equal" schools are permissible.[67]

While it is true that *Williams* and its ilk supported gender segregation even after *Brown*, subsequent cases and statutes have undermined the authority they might otherwise have had. Section 203(a)(1) of the Equal Education Opportunities Act of 1974 (EEOA) found that separate is not equal for the purposes of the Fourteenth Amendment;[68] Congress declared that public gender-segregated school systems violate the Constitution.[69] Subsequent decisions and legislation have compromised the case law supporting gender segregation. The court based its decision in *Williams* on the finding that the state's scheme for separate colleges was rationally related to its legitimate goal of providing education. Later cases, though, established that gender-based classifications are subject to a higher level of scrutiny than the rational basis test employed in *Williams*.[70] Such classifications must now meet the intermediate level of scrutiny described in *Craig v. Boren*: "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[71]

The difference between applying intermediate scrutiny and the rational basis test is illustrated by *Vorchheimer v. School District of Philadelphia*[72] and *Newburg v. Board of Public Education*.[73] Both cases involved challenges to Philadelphia's Central High, an all-male academic high school, and its female counterpart, Girls High. *Vorchheimer*, decided before *Craig*, used a rational basis test to uphold a "separate but equal" scheme for the academic high schools, finding that it bore a "substantial relation" to legitimate governmental objectives.[74] When the same plan was challenged again after *Craig*, the *Newburg* court struck it as a violation of the Equal Protection Clause of the Fourteenth Amendment.[75] The *Newburg* court held that the plan could not pass the substantial relationship test required under *Craig*;

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example, held that Girls High was equal to Central High, the boys school, even though Central had a stronger program in math and sciences. A later court found that the schools were not equal. Newburg v. Board of Pub. Educ., 9 Phila. Cty. Rep. 556 (1983) (criticizing *Vorchheimer*).

66. *See supra* note 53 and accompanying text; Colker, *supra* note 17, at 1024 (noting that the Court was unconcerned about women's subordination until the 1970s).

67. *See, e.g., Vorchheimer*, 532 F.2d at 887.

68. 20 U.S.C. § 1702(a)(1) (1988).

69. *Id.*, *see infra* notes 78-80 and accompanying text.

70. *See supra* notes 36-37 and accompanying text.

71. Craig v. Boren, 429 U.S. 190, 197 (1976).

72. 532 F.2d 880 (3d Cir. 1976).

73. 9 Phila. Cty. Rep. 556 (1983).

74. *Vorchheimer*, 532 F.2d at 887-88.

75. *Newburg*, 9 Phila. Cty. Rep. at 576. The court also found that the plan could not meet the strict scrutiny required under the state equal rights amendment. *Id.* Its decision, however, was based on the equal protection violation. *Id.* at 571.

it noted the absence of an "important governmental objective" and found that the separation of boys and girls was "not 'substantially related' to the 'vague, unsubstantiated theory' that adolescents may study more effectively in single-sex schools."[76] The "separate but equal" doctrine thus could not withstand the stronger scrutiny required now for sex-based classifications.[77]

Even if "separate but equal" treatment of the genders in public education is somehow found to be constitutional, it is still prohibited by federal statute. In the legislative findings of the EEOA, Congress declared that "the maintenance of dual school systems in which students are assigned to schools [on the basis of gender] denies to those students" rights guaranteed by the Constitution.[78] The EEOA thus prohibits assigning students to separate but equal school systems. It "incorporates a judgment that a sex-segregated school district . . . results in similar if not equivalent injury to children" as a racially segregated system.[79] Congress realized that the subjugation suffered by girls in a gender-segregated system was similar to the subjugation suffered by African-Americans in a racially segregated system. As the anti-subordination goal underlying *Brown* applies to both types of segregation, so should its holding. Constitutional considerations aside, under the EEOA "in the field of public education, the doctrine of 'separate but equal' has no place."[80]

III. SINGLE-GENDER SCHOOLS

"Separate but equal" schools are not the only kind of gender-segregated education. Indeed, the recent resurgence in segregated education has been of another type altogether: single-gender schools offered as a voluntary

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76. SALOMONE, *supra* note 61, at 120 (footnote omitted) (quoting the language in *Newburg*, 9 Phila. Cty. Rep. at 570). Commentators today are divided on whether such a plan could be constitutional under the intermediate scrutiny of *Craig*.

77. *See Newburg*, 9 Phila. Cty. Rep. at 570; SALOMONE, *supra* note 61, at 120.

78. 20 U.S.C. § 1702(a)(1) (1988).

79. United States v. Hinds County Sch. Bd., 560 F.2d 619, 623 (5th Cir. 1977). However, the EEOA does allow sex-segregated classes within a school. 20 U.S.C. § 1703(a) (1988). This apparent anomaly between the EEOA's declared intent and the consequence of its plain language is discussed in Part III of this Note. *See infra* notes 173-80 and accompanying text.

80. Brown v. Board of Educ., 347 U.S. 483, 495 (1954). But note that the EEOA prohibits only the *assignment* of students to sex-segregated schools; it does not expressly prohibit students or parents from voluntarily choosing a sex-segregated school. When the state offers students a choice between co-education and single-sex schools for both sexes, the proper analysis is not that for "separate but equal" schools, which implies a lack of choice, *see supra* note 51, but that for single-sex schools. It is important, then, to determine if there is truly a choice between co-ed and single-sex schools. In *Vorchheimer*, for example, the court mistakenly assumed that the plaintiff had a choice between a co-ed general high school and a single-sex academic (college-preparatory) one. *See* Caren Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The Status of Single-Sex Education for Women*, 86 W VA. L. REV 295, 312 (1984). She could not choose to attend a co-ed academic high school, however, because the district did not offer one. *Id.*, Brunette, *supra* note 62, at 272.

alternative to co-ed schools. Separatism chosen by subordinate groups carries a different significance than that chosen by dominant groups.[81] All-girls schools and all-boys schools have different impacts on subordinated groups and are therefore examined separately in this Note. Under both constitutional and statutory analysis, all-boys schools do not survive the scrutiny, while all-girls schools do.

A. Constitutionality of Single-Gender Schools

To be constitutional under current doctrine, single-gender schools must be able to withstand the intermediate scrutiny of the *Craig* test.[82] This lower standard of scrutiny, which demands only that gender classifications be related to "important and legitimate" goals, allows subordinating as well as compensatory rationales to justify gender separation. Under the anti-subordination approach, however, the only justification for gender segregation in public schools would be the elimination of subordination. By rejecting other justifications as either illegitimate or unimportant, the Supreme Court seems to be moving toward this standard.

Some statutory objectives for single-gender schools have been rejected as archaic or stereotypical, and thus illegitimate. In *Mississippi University for Women v. Hogan*, the Supreme Court noted that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."[83] Such notions help to perpetuate subordination. Immersed as we are in a culture full of "fixed notions concerning the roles and abilities of males and females," we may find it difficult to perceive some stereotypes for what they are.[84] Sometimes, of course, the stereotype may be blatant: the statutory goals for a number of historically all-female schools are quaintly archaic.[85] The mission of Winthrop College in South Carolina, for example, was to "fit [women] for teaching . . . stenography, . . . sewing, . . . art, needlework, cooking, housekeeping and such other . . arts as may be suitable to their sex . . . ."[86] These schools were designed to prepare girls for their "proper"—that is, stereotypical—role as wives, mothers, and helpmeets by teaching them culinary, domestic, and secretarial skills. Not

81. Rhode, *supra* note 47, at 122; *see also* Colker, *supra* note 17, at 1051 (noting the "inherent qualitative difference").

82. "To withstand constitutional challenge, [explicit] classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197.

83. 458 U.S. 718, 725 (1982) (striking down a nursing school's admission policy which excluded men).

84. *Id.*

85. *See, e.g., id.* at 720 n.1; Williams v. McNair, 316 F Supp. 134, 136 n.3 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971).

86. *Williams*, 316 F Supp. 134, 136 n.3.

coincidentally, these "suitable" skills prepared young women for un- or under-paid positions which men generally shunned as low-status "women's work." A statutory objective which perpetuates gender inequities by relying on stereotypes such as these cannot be legitimate.

Statutory objectives must also avoid the "proxy" label to meet the *Craig* test. The Supreme Court has rejected "the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification.'"[87] Again, careful attention is needed to perceive proxy classifications in our engendered society. Gender has often been used as a proxy for administrative convenience.[88] Rather than identifying and focusing on the real group for which the legislation is designed, it is easier for the legislature to define the group as the gender which either predominates the group or is commonly associated with it.

Detroit, for example, found that its urban youths were facing soaring drop-out, unemployment, and homicide rates. To combat the problem, the Detroit school board established all-male academies "to provide a remedial atmosphere for boys who might otherwise fall behind or be lost altogether."[89] Because many people associated the problems faced by Detroit youths with boys, the school board defined the group in need as "boys." When the academies were challenged for discrimination, the court found that the Detroit plan "inappropriately relie[d] on gender as a proxy for 'at-risk' students."[90] A more legitimate goal would be to provide a remedial atmosphere for those students at risk of falling behind or dropping out, regardless of gender. Detroit, however, used "boys" as a proxy for students, and thus created an illegitimate classification.

Other statutory objectives, while legitimate, have been rejected as insufficient. Promoting innovation and diversity in educational methods has frequently been asserted as a legitimate state interest. The court in *Williams v. McNair* justified the exclusion of men from a finishing school "for young ladies" by noting that "flexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned."[91] The reasoning in *Williams* was later given additional support by *Regents of the University of California v. Bakke*, where the Supreme Court held that "attainment of a diverse student body . . . is a clearly constitutionally permissible goal . . . ."[92] *Bakke* and *Williams* both involved collegiate education, but diver-

87. *Hogan*, 458 U.S. at 726 (quoting *Craig*, 429 U.S. at 198); *see also supra* note 34.

88. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974); Califano v. Webster, 430 U.S. 313 (1977).

89. Greenfeld, *supra* note 7, at 369.

90. Garrett v. Board of Educ., 775 F Supp. 1004, 1007 (E.D. Mich. 1991); *see Nightline*, *supra* note 2 (questioning "whether young people can be labeled as 'at-risk' or 'troubled' simply for gender [and] not [for] individual performance").

91. 316 F Supp. 134, 138 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971).

92. 438 U.S. 265, 311-12 (1978).

sity has been used to justify single-gender high schools as well.[93] Indeed, at the high school level, a lower court found "the need to allow innovation in methods and techniques . . . to be adequate justification for segregation by sex . . . ."[94] Diversity was thus both an important and legitimate goal in the lower court's view.

The Supreme Court, though, disagreed with the lower court. While it found that diversity is a legitimate and permissible state interest, it also found it to be inadequate. In *Mississippi University for Women v. Hogan*,[95] the Court indicated that diversity alone is an insufficient state interest to support a gender-based classification.

> Since any gender-based classification provides one class a benefit or choice not available to the other class, [the diverse opportunity] argument begs the question. The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class . . is substantially related to achieving a legitimate and substantial goal.[96]

The mere fact that gender segregation allows diversity in educational methods and opportunities is not enough, then, to qualify it as an important state interest under *Craig*. *Hogan* opened the door for the Supreme Court to insist upon an anti-subordination justification as a "legitimate goal."

Despite the Supreme Court's concern with the goals of anti-subordination, the reduced scrutiny in current equal protection doctrine allows other objectives to justify gender discrimination. For example, courts have recognized that convenience,[97] promoting equality of education,[98] and redressing past discrimination[99] are important and legitimate state interests.[100] Under the strict scrutiny, anti-subordination framework, only the elimination of

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93. *See, e.g.*, Vorchheimer v. School Dist. of Phila., 532 F.2d 880, 888 (3d Cir. 1976) (finding that innovation in educational methods to achieve a high-quality education is a relevant goal), *aff'd*, 430 U.S. 703 (1977).

94. Brunette, *supra* note 62, at 267 (quoting *Vorchheimer*, 532 F.2d at 888).

95. 458 U.S. 718 (1982).

96. *Id.* at 731 n.17.

97. The majority in *Hogan* noted that a woman in the male plaintiff's position "would not have been required to choose between foregoing credit and bearing that inconvenience" of driving a considerable distance to attend a nursing school. *Id.* at 724 n.8. In dissent, Justice Powell protested that "there is no constitutional right to attend a state-supported university in one's hometown." *Id.* at 736.

98. Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1132 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983).

99. *Id.* at 1128; *see also Hogan*, 458 U.S. at 728.

100. There may be at least one other important goal: providing educational opportunities for all citizens. *See Hogan*, 458 U.S. at 722. But providing a unique opportunity for one sex and not for the other is unlikely to ever be substantially related to the goal of providing education to all of its citizens. It is difficult to imagine how a state could achieve the goal of educating all of its citizens by excluding half of them from an educational institution. In *Hogan*, for example, the state failed to show that providing a unique educational opportunity for women, but not men, was related to the goal of providing education for all. *Id.*

subordination through redressing past discrimination and promoting equality would justify gender classifications.

If a governmental objective is important and legitimate, the next step of the *Craig* test is to determine if the exclusion of one gender is substantially related to accomplishing these recognized goals.[101] Providing conveniently located educational facilities for one gender, but not for the other, is not likely to ever be substantially related to the goal of providing convenient locations for all citizens.[102] But excluding one gender can be substantially related to the goals of promoting equal opportunity and redressing past discrimination. When members of one gender have been discriminated against, or have been denied equal opportunity on the basis of their gender, the state may give preferential treatment to that gender.[103] In our society, women and minorities are often denied equal opportunity with white men; providing educational opportunities free from discrimination may help them overcome their second-class status.

Voluntary single-gender schools can be substantially related to the statutory goal of redressing discrimination if they can meet a number of requirements. These conditions were set out in *Hogan*.[104] The Court there noted that the compensatory purpose doctrine will uphold gender classifications only if: (1) the group benefitting under the classification has in fact suffered a disadvantage related to the classification; (2) the single-gender policy was adopted with the intention of overcoming those disadvantages; (3) the single-gender program is not based on stereotypes, nor does it perpetuate them; and (4) the classification is substantially and directly related to the compensatory objective.[105]

Only when the first three requirements have been met does the court examine the substantiality of the relationship between the means and the end. The relationship must be direct and substantial, for this ensures "that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[106] The means need not be absolutely necessary to achieve the end; it is enough that they are closely related.[107] If a single-gender program cannot meet the necessary

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101. *Id.* at 725.

102. In *Hogan*, the state offered a female-only nursing school, but failed to provide an equally convenient location for men who wished to study nursing. *Id.*

103. *See id.* at 728.

104. *Id.* at 728-29, 730 n.16.

105. Chai R. Feldblum et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171, 210-11 (1986).

106. *Hogan*, 458 U.S. at 725-26.

107. Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131-32 (9th Cir. 1982); T. Page Johnson, *No Boys Allowed on the Volleyball Team*, 60 EDUC. L. REP. 313, 317 (1990).

criteria to invoke the compensatory doctrine, it may still be constitutional under the *Craig* test if it is substantially related to the state interest in promoting equal opportunity. Redressing discrimination is just one subset of the broader goal of promoting equality,[108] so the program will pass constitutional scrutiny if excluding one gender is directly related to promoting equal opportunity between the genders.

1. Relationship of All-Male Programs to "Important and Legitimate" Governmental Objectives

Voluntary all-male programs in public education do not promote equal opportunity between the genders, nor do they serve to redress subordination. Even all-male schools designed to help inner-city African-American boys overcome subordination fail to meet the test outlined in *Hogan*.[109] In order to do so, the school district or the state must show that boys suffer disadvantages because they are boys, and that excluding girls is directly related to redressing these disadvantages. While inner-city boys have undeniably suffered disadvantages, it is questionable whether those disadvantages are related to their gender rather than to their race or socio-economic class, or some combination of the three.[110] After all, urban African-American girls suffer many of the same disadvantages as the boys.[111] But even if the disadvantages inner-city boys suffer are related to their gender, the all-male programs designed to overcome those disadvantages are not likely to pass the third and fourth prongs of the *Hogan* test.

The third prong of the compensatory purpose doctrine outlined in *Hogan* states that single-gender programs should neither be based upon nor perpetuate stereotypes.[112] Depending upon whether all-male public schools are perceived as positive or negative can lead to the perpetuation of different stereotypes. If an all-male public school or class is viewed as benefitting the students who attend it, then excluding girls from enjoying the benefit perpetuates the stereotype of women as second-class citizens.[113] If the

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108. Virginia P. Croudace & Steven Desmarais, *Where the Boys Are: Can Separate Be Equal in School Sports?*, 58 S. CAL. L. REV. 1425, 1451 (1985).

109. *See supra* text accompanying note 105.

110. Indeed, it is questionable whether the effects of race, gender, and social class can ever be separated. *See, e.g.*, LOIS WEIS, HIGH SCHOOL AS A SITE FOR THE ENCOURAGEMENT OF WHITE MALE DOMINANCE 35 (1990).

111. The crisis facing boys, though, is perceived to be more critical than that facing girls. *See generally* Thomas, *supra* note 2.

112. *See supra* text accompanying note 105.

113. All-male public schools can perpetuate sex discrimination in two ways: by telling girls they "don't belong" and by telling boys that they are "better" than girls. *Nightline*, *supra* note 2. "[Y]ou're saying girls don't belong, girls are part of the problem [and telling boys] that they're better and that they can have special education and that girls don't deserve the special education." *Id.* (comment by Helen Newborne, National Organization for Women's Legal Defense and Education Fund). There is also "a macho behavior being established that's going to create a male superiority " *Id.* "[I]solating these boys in these male academies reinforces 'macho' behavior that hurts girls." *Id.*

program is seen as one for "problem" kids, then singling out African-American boys for special attention stigmatizes them.[114] Thus, the schools either exacerbate the troubles inner-city boys now face, or they alleviate those problems by perpetuating a stereotype of male superiority. Either way, the all-male programs fail.

Furthermore, an all-male education is not substantially related to any of the state interests which have been recognized as important and legitimate in gender classifications. While it is true that some educators believe that all-male schools can greatly benefit boys,[115] that is not at issue. Certainly providing a unique educational opportunity to one gender will benefit members of that gender. The issue is whether the exclusion of girls can be justified by showing that it is substantially related to promoting equal opportunity between the genders or to redressing past discrimination against boys.[116]

Evidence of such a nexus is unlikely.[117] Indeed, research shows that the presence of girls in the classroom "enhance[s] male achievement."[118] In co-ed classes, teachers give more time and attention to boys.[119] They direct

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114. *See supra* notes 10 and 14. The programs "institutionalize stereotypes about black males and focus on them for 'special treatment' which is not special treatment . but really is an indictment of black males It's a blaming the victim approach." *MacNeil/Lehrer*, *supra* note 10 (comments by Michael Meyers).

115. *See* Williams v. McNair, 316 F Supp. 134, 137 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971); United States v. Virginia, 766 F. Supp. 1407, 1412 (W.D. Va. 1991). *But see* Emmanuel Jimenez & Marlaine E. Lockheed, *Enhancing Girls' Learning Through Single-Sex Education*, 11(2) EDUC. EVAL. & POL'Y ANALYSIS 117, 120 (1989) (finding that evidence of benefits of single-sex schools for boys is mixed).

116. If the program excludes girls, the state must show that the "presence of girls in the classroom bears a substantial relationship to the difficulties facing urban males." Garrett v. Board of Educ., 775 F Supp. 1004, 1007 (E.D. Mich. 1991).

117. One commentator argues that because boys generally fare worse academically than girls, they suffer a disadvantage related to their sex. Greenfeld, *supra* note 7, at 369-70. The problem lies in showing that boys actually do suffer this disadvantage; one cannot rely on stereotypes. All at-risk students are not boys. The statistics cited to support the need for all-male programs demonstrate only that boys are doing poorly; no comparable statistics are given about girls except those showing that they drop out almost as often as boys. *See supra* notes 3-5 and 9. As the trial judge in the Detroit case noted, "[g]irls fail, too." Walters, *supra* note 5, at 8.

118. Jimenez & Lockheed, *supra* note 115, at 120, 125 (finding that coeducation enhances boys' academic achievement and that the effects of all-male education are mixed); *see* Valerie E. Lee & Marlaine E. Lockheed, *The Effects of Single-Sex Schooling on Achievement and Attitudes in Nigeria*, COMP. EDUC. REV., May 1990, at 209, 225 (noting that "boys who attend single-sex schools score significantly below their male coeducational school counterparts.").

119. MICHELLE STANWORTH, GENDER AND SCHOOLING: A STUDY OF SEXUAL DIVISIONS IN THE CLASSROOM 38-41 (Hutchinson Publishing Group 1983) (finding preferential treatment of boys in the classroom); Nanette Asimov, *Schools Unfair to Girls*, SAN FRANCISCO CHRON., Feb. 12, 1992, at A1 (reporting results of study by American Association of University Women (AAUW), which compiled data from "an array of research on girls and education"); Ric Burrous, *Women's Studies Conference Explores School and Girls*, I.U. NEWSPAPER, Nov. 15, 1991, at 2 (copy on file with the INDIANA LAW JOURNAL) (noting results of AAUW study).

more questions at boys than girls,[120] praise boys more often,[121] and call boys by name more often than girls.[122] "[Students] tend to see this as evidence that boys . . . are more capable, and more highly valued, than girls."[123] Boys in co-ed classes thus gain a higher opinion of themselves and of their gender, increasing their self-esteem.[124] It is the presence, not the absence, of girls which builds male self-esteem and confidence. Unless the state can prove that boys suffer an educational disadvantage due to the presence of girls in the classroom, it cannot prove a substantial relationship to the compensatory purpose.

A state is also unlikely to show that excluding girls from all-boys schools promotes equal opportunity between the genders. Males are dominant in our society; even among disempowered, inner-city African-Americans, men dominate women.[125] Creating all-male institutions "reinforce[s] [men's] privileged positions and the stereotypes underlying them."[126] Rather than promoting equal opportunity, all-boys schools preserve male dominance.[127] Such schools carry a message about the relative positions of men and women. In an unequal society, the exclusion of a subordinate group from association with the dominant group emphasizes the difference in power between them. The existence of all-boys schools inculcates girls with the message that they are not entitled to all of the privileges that boys are; they are second-class citizens.[128] The "exclusion of women, like that of racial or religious minorities, carries a stigma that affects individuals' social status and self-perception."[129] Stigmatized and excluded, girls are denied the very equality of opportunity that the gender classification is supposed to promote.

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120. STANWORTH, *supra* note 119, at 37; Feldblum et al., *supra* note 105, at 178 n.26; *see also* Burrous, *supra* note 119.

121. STANWORTH, *supra* note 119, at 37; Feldblum et al., *supra* note 105, at 175.

122. Feldblum et al., *supra* note 105, at 178 n.26.

123. STANWORTH, *supra* note 119, at 43.

124. *Id.* at 41, 51.

125. "What it means to be a woman within any specific culture blurs at the margins, but the core meaning is crystal clear. It means being subordinated to men, having less power Regardless of racial, ethnic, age or class solidarity with men, women across cultural chasms have a shared experience of subordination based on their sex " Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941, 949 (1989).

126. Rhode, *supra* note 47, at 122.

127. "[M]ale pre-eminence [was] found uniformly in the school classrooms we observed." Feldblum et al., *supra* note 105, at 175 n.17 (quoting MARLAINE E. LOCKHEED & ABAGAIL M. HARRIS, A STUDY IN SEX EQUITY IN CLASSROOM INTERACTION: FINAL REPORT (1984)). "Restrictive membership policies of all-male organizations . . have often served to keep women out of positions of power and potential growth, and to perpetuate the view of women as a weak or inferior group." *Id.* at 171.

128. *See* Bender, *supra* note 125, at 949 (Being a woman "means being subordinated to men, having less power . "); Brunette, *supra* note 62, at 271 n.61) ("[S]ingle-sex schools inculcat[e] and reinforc[e] those values which [lead] men to positions of power and women to positions of subservience."); *Nightline*, *supra* note 2 (asserting that all-male schools imply that "girls don't deserve the special education").

129. Rhode, *supra* note 47, at 108.

Creating or permitting all-boys public education is not substantially related to any of the recognized goals of gender classification. These schools and programs do not promote gender equality or redress past gender discrimination, nor do they serve to educate all of a state's citizens. Without this vital link to legitimate and important state interests, all-male public education cannot pass the *Craig* test. Such schools violate the Equal Protection Clause of the Fourteenth Amendment.

2. Relationship of All-Girls Programs to "Important and Legitimate" Governmental Objectives

All-girls public schools, on the other hand, can bear a substantial relationship to important and legitimate statutory goals. Like all-boys schools, all-girls schools can benefit their students greatly.[130] Again, though, the central issue is their ability to satisfy the *Craig* test by serving recognized state interests.[131] All-girls public education can do so by compensating for past and current discrimination and promoting equality of opportunity.

All-female education can satisfy the compensatory purpose doctrine set out in *Hogan*. Classifications benefitting girls meet the first condition of the *Hogan* test, for girls actually are discriminated against on the basis of their gender.[132] The next two conditions are harder to meet. It is unlikely, for example, that many of the all-girls public schools currently existing were established with the intent of overcoming discrimination. Indeed, most were created to prepare girls for stereotypically feminine careers as housewives, teachers, nurses, or secretaries.[133] That the school has since become devoted to preparing girls for nontraditional careers is irrelevant under *Hogan*; the inquiry focuses on the stated intent of the legislation or ordinance establishing the school.[134] These historically all-girls schools are based on stereotypical notions of the proper role of women, and therefore fail to meet the third criterion. They may also perpetuate such stereotypes by excluding men from traditionally feminine careers.[135] Perpetuation of stereotypes fosters gender discrimination and thus completely undermines the compensatory effort.

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130. *See supra* text accompanying notes 115-16.

131. *See supra* text accompanying note 116.

132. The compensation does not have to be for specific discrimination made by the compensating institution. "The fact that some of those effects may lie in social attitudes makes them no less real." Clark v. Arizona Interscholastic Ass'n, 886 F.2d 1191, 1194 (9th Cir. 1989); *see also* Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (finding it permissible to redress society's longstanding disparate treatment of women), *cert. denied*, 464 U.S. 818 (1983).

133. *See supra* text accompanying notes 84-86.

134. *See* Hoffman, *supra* note 36, at 169 (noting that if not bound by previously asserted goals, the *Craig* test loses all rigor).

135. *E.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982).

Although the compensatory purpose doctrine could not be used to uphold many existing programs, new all-female schools and programs could be established with the intent of overcoming gender discrimination and the stereotypes underlying it. Rather than being based upon or perpetuating stereotypical views of women, these programs would prepare girls for nontraditional careers and lives. Such schools would meet the first three criteria set out in *Hogan*. They would also meet the final requirement, because an all-girls school designed to overcome gender discrimination by eliminating stereotypes and preparing students for nontraditional careers would be directly related to the statutory goal of redressing the effects of discrimination.

Whether a school promotes equal opportunity for the genders is a function of the social effect that the school has. An all-girls public school creates different social consequences than does an all-boys school. "When males are excluded from all-female organizations in today's society, this exclusion does not create the same stigma or economic disadvantages as does the exclusion of females from all-male organizations."[136] "[A]ssociations of disempowered groups carry different social meanings than associations of empowered groups . . . ."[137] Students, regardless of race or socio-economic status, are taught that men are the dominant gender and that being a girl means being subordinated to men.[138] The social cost of excluding boys is not their subsequent feelings of inferiority, for their sense of power is too well entrenched. Instead they perceive that *girls* are inferior because they will not compete with boys.[139] There is a danger too that girls might choose the single-gender school over the co-ed one because they believe it must be less competitive, thus reinforcing their own sense of personal and gender inferiority.[140] These social costs must be outweighed by counteracting factors which promote equal opportunity if an all-girls school is to be substantially related to that end.[141]

Those costs are outweighed. All-girls schools promote equality of opportunity by providing girls with an educational atmosphere free of the inhibitions, restrictions, and discrimination which are the hallmark of co-

136. Feldblum et al., *supra* note 105, at 216.

137. Rhode, *supra* note 47, at 109.

138. *See* STANWORTH, *supra* note 119, at 43-44; Bender, *supra* note 125, at 949.

139. "[T]he idea of providing schools to which women may escape from male competition perpetuates stereotypes of female inferiority " Lewis, *supra* note 53, at 641. Yet there is also merit in the idea that providing a haven during critical years may be necessary to establish the self-esteem upon which later success can be based. *See infra* notes 155-63 and accompanying text.

140. *See* Lewis, *supra* note 53, at 645 (noting that girls may choose single-sex schools because they are reluctant to compete with boys).

141. "The issue is not simply whether single-sex [schools] are beneficial, but whether experiences of commensurate value are available in [co-ed settings] with fewer social costs." Rhode, *supra* note 47, at 125.

educational schools.[142] "Sex inequities characteristic of society are found in abundance in co-ed classrooms."[143] Girls in co-ed classes are subjected to "sexual harassment in forms ranging from systematic humiliation to physical abuse"[144] and to "interpersonal interactions designed to subtly reinforce sex differences and sex stereotyping."[145] "Patterns of domination and control are expressed in graffiti, sexist comments and assaults. . . Under such a regime girls' ability to think and express their thoughts independently and creatively is necessarily stifled."[146] Subtle or overt, co-ed schools contain significant gender-based discrimination which serves to limit girls' self-perception and create a sense of inferiority and second-class status.[147]

Students in co-ed classrooms are treated differently on the basis of their gender. Teachers give more time and attention to boys.[148] They will often wait longer for a boy to answer a question before going on, and they are more likely to "help" a girl by providing the answer rather than allowing her to work out the solution for herself.[149] The striking dominance of boys in the classroom has a singular effect: "[g]irls appear to boys—and more importantly, to themselves—as less capable than they 'really' are."[150] The resulting atmosphere "virtually guarantees the perpetuation of secondary status for women."[151] "Although they share the same classrooms, the experience of classroom life is clearly not the same for girls and boys. . . . The experiences they have there are an important source of evaluations of their own, and the other, sex . . ."[152] Boys and girls learn that girls are quiet, passive, and not quite as smart as boys. Co-ed schools thus perpetuate the subordination of women in our society. An all-girls school may offer

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142. *See generally* WEIS, *supra* note 110.

143. SUSAN KLEIN, HANDBOOK FOR ACHIEVING SEX EQUITY THROUGH EDUCATION 189 (1985). "[M]ale pre-eminence [was] found uniformly in the school classrooms we observed [T]he classrooms served as environments in which inequities could flourish " Feldblum et al., *supra* note 105, at 175 (quoting LOCKHEED & HARRIS, *supra* note 127, 7-4). Co-ed schools produce inequities and encourage the formation of identities which serve such inequities. Weis, *supra* note 3, at 34.

144. David Milman & Katherine de Gama, *Sexual Discrimination in Education: One Step Forward, Two Steps Back?*, J. SOC. WELFARE L., No. 1, 1989, at 4, 6.

145. KLEIN, *supra* note 143, at 189.

146. Milman & de Gama, *supra* note 144, at 21.

147. Deborah Bachrach et al., *Women and Poverty: Women's Issues in Legal Services Practice*, 14 CLEARINGHOUSE REV 1035, 1048 (1981); STANWORTH, *supra* note 119, at 43-44; *see also Women's Ass'n Report: Girls Shortchanged in School*, DAILY REPORT CARD, Feb. 12, 1992, *available in* LEXIS, Nexis Library, Rptcrd File (finding that sexual harrassment of girls in school is increasing). A 1990 study linked girls' low self-esteem to the different treatment of boys and girls, which led to a decreased interest in math and science among girls. Burrous, *supra* note 119, at 2.

148. *See supra* notes 119-22 and accompanying text.

149. Burrous, *supra* note 119, at 2.

150. STANWORTH, *supra* note 119, at 44.

151. Bachrach et al., *supra* note 147, at 1050.

152. STANWORTH, *supra* note 119, at 40-41.

an alternative to counteract this hidden curriculum.[153] Indeed, "[s]ingle-sex schooling may be a necessary . . . prerequisite for real equality."[154]

Excluding boys from the learning environment can be a critical tool in overcoming gender discrimination. All-girls schools can give girls a discrimination-free haven in which to study and develop the skills they will need to successfully compete in society.[155] So long as the school is geared toward overcoming gender-based stereotypes instead of perpetuating them, it will promote equal opportunity by giving girls a respite from daily discrimination. Such schools "have fostered greater verbal assertiveness, higher career aspirations, more intellectual self-esteem, [and] expanded leadership opportunities . . . ."[156] Without boys dominating the classroom and the teacher's attention, girls speak up, take leadership positions, and pursue nontraditional studies.[157] "Girls who attend single-sex secondary schools are more likely to choose science or mathematics . . . . [S]ubject choices in coeducational schools [are] more affected by sex stereotypes than [are] choices in single-sex schools."[158] Moreover, girls perform better in these subjects in single-gender schools.[159]

While there is no evidence that the advantages to girls attending all-female schools instead of co-ed schools are due entirely to the absence of males, it is logical to assume that there is some connection. It may be that all-girls schools provide a haven from the bombardment of subtle messages about women's proper place, and allow girls to develop some self-esteem and a higher opinion of their gender. If "self-esteem is a precondition of happiness, it is not unreasonable to value a temporary environment for some young women which might promote a more positive self-image at a very vulnerable time, and which might thereby better prepare them to face competitive realities later."[160] It may also be that all-girls schools "free [their] students of the burden of playing the mating game while attending classes . . . ."[161] Some studies have shown that girls will deliberately hold back from achievement out of fear that boys will not find them attractive

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153. "The hidden curriculum consists of messages about the status and character of individuals and groups." KLEIN, *supra* note 143, at 282. "Gender differences in patterns of achievement . are . the creation of the 'hidden curriculum' " Milman & de Gama, *supra* note 144, at 6.

154. Milman & de Gama, *supra* note 144, at 22.

155. *See* Feldblum et al., *supra* note 105, at 174.

156. Rhode, *supra* note 47, at 141.

157. *See, e.g.*, Dubnoff, *supra* note 80, at 324-25.

158. *Id.* at 326.

159. *See, e.g.*, PETER MACDONALD ET AL., THE SOCIAL CONTEXTS OF SCHOOLING 188 (Mike Cole ed., 1989).

160. Dubnoff, *supra* note 80, at 328.

161. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 739 n.5 (1982) (Powell, J., dissenting) (quoting Brief for Mississippi University for Women Alumnae Association as amicus curiae at 2-3, *Hogan* (No. 81-406)).

if they are too successful.[162] In a single-gender setting, girls can demonstrate their full abilities without fear of social rejection for being "too smart." But whatever the reason for their success, it is clear that certain all-girls learning environments are much more likely to counteract the effects of societal discrimination than are co-ed schools. Thus, a strong relationship between all-girls schools and the promotion of equal opportunity exists.

All-girls schools which encourage students to overcome stereotypes are substantially related to important and legitimate state interests. Whether promoting equal opportunity generally, or redressing discrimination specifically, single-gender schools for girls are constitutionally permissible. Indeed, they are not only permissible, but necessary. "Eliminating [sex discrimination] will take time and effort . . . In the meantime, all-female organizations can be a critical tool in overcoming the harms [it] cause[s]."[163]

Many of the arguments in favor of all-girls schools might also apply to schools for another subordinated group: African-American boys. Schools which help these boys overcome stereotypes and other obstacles which they face because of their race would meet the intermediate level of scrutiny. But racial discrimination is subject to strict rather than intermediate scrutiny, and it is unlikely that a court would find these schools "necessary to serve a compelling government objective."[164] Public education programs can avoid this issue by opening their doors to boys of all races.[165] A problem still remains, however. All-boys schools, even when designed to empower a subordinated group like African-American males, exclude yet another subordinated group: African-American females. African-American women are one of the most marginalized and disempowered groups in our society. Before we conclude that minority all-boys schools are substantially related to important and legitimate goals, we must examine their effect on the subordinated status of African-American girls.

In summary, all-female public schools which redress the effects of discrimination or promote equal opportunity are constitutional, but all-female programs which perpetuate stereotypical notions of the proper role of women are not. All-male schools which attempt to redress the effects of racial discrimination are unlikely to meet the strict scrutiny required for race cases. Nor are they likely to meet the intermediate scrutiny for gender discrimination when the effects of the school on the excluded girls are considered. All-male public education inevitably perpetuates gender inequi-

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162. *See, e.g.*, Dubnoff, *supra* note 80, at 327.

163. Feldblum et al., *supra* note 105, at 214.

164. *See supra* text accompanying note 29.

165. In school districts like Detroit's, which is 90% African-American, *see supra* note 1, schools can create minority programs without having to intentionally discriminate. For a discussion of the race issue in urban all-male public programs, see Greenfeld, *supra* note 7.

ties, and thus violates the constitutional guarantees of equal opportunity embodied in the Fourteenth Amendment.

B. *Applying Federal Statutes to Single-Gender Schools*

Those all-girls schools which do pass constitutional muster must also comply with any applicable statutes or regulations. At the federal level,[166] these schools must comply with the provisions of Title IX of the Education Amendments of 1972[167] and the Equal Educational Opportunities Act of 1974,[168] as well as the regulations promulgated under each of them.[169] So long as the provisions are followed, these all-girls schools are statutorily, as well as constitutionally, permissible.

Title IX declares that "no person . . . shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program . . . receiving Federal [funds] . . . "[170] Primary and secondary schools are exempt from the requirements of Title IX in regard to their admissions policies.[171] Thus, single-gender elementary and secondary schools can exclude members of the other gender without violating Title IX.[172] Regulations promulgated under Title IX reflect this exception for primary and secondary schools' admissions policies.[173] However, the provisions of Title IX extend beyond admissions, and it is only for admissions that elementary and secondary schools are excepted. The regulations implementing Title IX provide that students may not be given "different aid, benefits, or services" because of their sex.[174]

In reviewing the application of this section, the court in *Garrett* found that Detroit's male academy violated Title IX because the school offered subjects, special tutoring, and Saturday classes that were not available at any one school which girls could attend.[175] Girls, therefore, did not have

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166. This Note does not address the application of state laws.

167. 20 U.S.C. §§ 1681-1688 (1988).

168. 20 U.S.C. §§ 1701-1721 (1988).

169. Title IV of the Civil Rights Act may also apply, but "[a]s far as single-sex elementary and secondary schools are concerned [it] adds little, if anything, to Equal Educational Opportunities Act of 1974." Elizabeth C. Yen, *Single-Sex Schools and Sex Segregation Within Schools: Constitutional and Statutory Remedies*, 55 CONN. B. J. 387, 394 (1981).

170. 20 U.S.C. § 1681(a)(1).

171. *Id*; Yen, *supra* note 169, at 397.

172. Such an exclusion would be valid as long as the "local educational agency" provides comparable facilities and resources to students of the other gender. 34 C.F.R. § 106.35 (1991).

173. *Id.* However, the Office of Civil Rights of the Department of Education has said that *all-male* public elementary and secondary programs violate Title IX. Garrett v. Board of Educ., 775 F Supp. 1004, 1009 (E.D. Mich. 1991).

174. 34 C.F.R. § 106.31(b)(2) (1991).

175. *Garrett*, 775 F Supp. at 1009 (rejecting the school's contention "that the educational programs are no different from the individualized instruction and benefits offered in other schools throughout the system").

access to the same programs as the boys at the academy. The court's analysis suggests that so long as members of the excluded gender have access to equivalent programs and benefits at a school which they can attend, the exclusion will not violate Title IX or its regulations. A constitutionally permissible all-girls school is not likely to offer any benefit to its students, other than the absence of boys, which boys cannot obtain at co-ed schools.

All-girls schools are also subject to the Equal Educational Opportunities Act (EEOA).[176] The EEOA, though, "is an anomaly. [In it,] Congress finds that maintenance of dual school systems in which students are assigned solely on the basis of sex denies [to those students] equal protection" of the laws guaranteed by the Fourteenth Amendment.[177] While students cannot be *assigned* to schools by gender, the EEOA does not generally prohibit segregation on the basis of gender.[178]

Lower courts are divided in their interpretation of the statute.[179] The court in *Vorchheimer* found that the EEOA did not prohibit single-gender public schools,[180] while the court in *United States v. Hinds County School Board* found that it did.[181] *Hinds County*, however, involved an entire school district segregated by gender. There the assignment of students solely on the basis of gender clearly fell within the dictates of the EEOA. Does the EEOA even apply when students are not assigned to a single-gender school, but rather are given the choice between attending a co-ed school and an all-girls school?

Looking at the plain language of the Act, it appears to prohibit only the assignment of students to gender-segregated schools. Voluntary attendance at a single-gender school would not violate the declared policy that "all children enrolled in public schools are entitled to equal educational opportunity without regard to . . sex"[182] so long as equivalent opportunities were provided to all students.[183] Furthermore, segregation by gender is not a denial of equal educational opportunity under the Act.[184] When Congress deliberately omitted gender segregation from its definition of denial of equal opportunity and consistently used the word "assignment" to define prohibited segregation, it effectively exempted voluntarily attended single-gender

176. *See* 20 U.S.C. § 1701 (1988).
177. Vorchheimer v. School Dist., 532 F.2d 880, 884 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977).
178. *See* 20 U.S.C. § 1703(a).
179. Dubnoff, *supra* note 80, at 308.
180. *Vorchheimer*, 532 F.2d at 885. *But see* Yen, *supra* note 169, at 392 (noting that *Vorchheimer*'s discussion of EEOA should be considered dicta).
181. 560 F.2d 619, 624 (5th Cir. 1977).
182. 20 U.S.C. § 1703(a)(1).
183. *See supra* note 80.
184. *See* 20 U.S.C. § 1703(a).

schools.[185] So long as a school district provides all students access to educational opportunities and benefits equivalent to those provided by a single-gender school, the plan will comply with both the EEOA and Title IX and its regulations. Thus an all-female public educational program which promotes equal opportunity or compensates for the effects of gender discrimination can be both constitutionally and statutorily permitted.

V. CONCLUSION

The only public educational programs that can be restricted to members of one gender are those which (1) promote equal opportunity between the genders and (2) do not offer services which are unattainable elsewhere. All-male classes and schools such as those proposed in Detroit, Milwaukee, Baltimore, and Brooklyn do not meet this standard. They offer special tutoring and subjects for boys for which girls have no equivalent. Moreover, rather than promoting equality between the genders, these schools serve to perpetuate male dominance by creating in both boys and girls the perception that boys are more valuable or more deserving of attention. Both genders face appalling problems, but only the boys are receiving attention.

The focus on boys serves to reinforce the idea that girls take second place in our society. Looking at the problems of urban youth, we are distressed to find that boys are failing, dropping out, and being suspended and expelled, only to end up murdered or in prison. We do not notice, or perhaps we overlook, evidence that girls are also failing, dropping out, getting pregnant, and being assaulted, harassed, and intimidated in school. Girls end up as single-parent heads of households whose sons grow up to be unemployed, imprisoned, or murdered. Perhaps to solve the problems of the sons we ought first to look at preventing the problems of the mothers.

The idea behind all-male classes was to use public education as a means of combatting social ills. Yet it is that same public education which underlies many of the social ills confronting girls. Education must be reformed in a way that does not exacerbate the effects of discrimination against girls; indeed, it should be reformed to counteract these problems. Because co-ed schools are essentially boys' schools, girls should be offered an alternative. The goal in establishing all-girls programs should be to create a society in which their compensatory function is no longer needed. Any educational reform program should include both a plan for compensatory all-girls programs and a plan to eliminate the inequities currently abounding in co-

185. *But see* Garrett v. Board of Educ., 775 F Supp. 1004, 1009 n.10 (E.D. Mich. 1991) ("Exempting freedom of choice plans would have destroyed the effectiveness of the EEOA ").

ed schools. Only after these goals have been accomplished can we have true equality of opportunity.