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SINGLE-SEX EDUCATION AFTER *UNITED STATES V. VIRGINIA*

CATHERINE A. O'NEILL*

INTRODUCTION

Access to appropriate, quality education is crucial to human well-being. Education improves basic life prospects as well as more complex aspects of well-being. A literate and numerate person is better able to read a bus schedule, to make informed choices about nutrition, to understand warnings on hazardous household products, or to complete a job application. An educated person is better able to articulate her needs in public discussions, to comprehend the implications of his voting choices, or to participate meaningfully in a deliberative democracy.

At present, in the United States and elsewhere in the world, women are legally, socially and economically disadvantaged relative to men. In the United States, this disadvantage is rooted in historical and systemic discrimination against women, because they are women, i.e., because of sex. Justice Ruth Bader Ginsburg, writing for the Supreme Court in *United States v. Virginia*,¹ recently framed the contribution that equal protection jurisprudence makes to dismantling this sex inequality: courts must invalidate sex-based classifications that "create or perpetuate the legal, social and economic inferiority of women."²

According to the Court, sex-based classifications are, however, sometimes permissible. They are permissible to compensate women for particular economic disabilities women have suffered³ and to promote equal employment opportunity.⁴ Importantly, for the educational context, sex-based classifications are permissible "to advance full development of the talents and capacities of our Nation's people."⁵

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1. 116 S. Ct. 2264 (1996) [hereinafter *VMF*].

2. *Id.* at 2276.

3. *Id.* (citing *Califano v. Webster*, 430 U.S. 313, 320, 97 S. Ct. 1192, 1196 (1977) (per curiam)).

4. *Id.* (citing *California Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 289, 107 S. Ct. 683, 694 (1987)).

5. *Id.*

The Supreme Court has twice considered questions of educational equality in the context of single-sex higher education, most recently in *United States v. Virginia*, the Virginia Military Institute case. Applying what appears to have become a standard inquiry in Equal Protection Clause cases involving sex-based classifications, the Court in both cases invalidated single-sex admissions policies — policies that in one case excluded men and in the other excluded women. Yet in each case, the Court was careful to leave open the possibility that single-sex higher education, which necessarily entails a sex-based classification, is in some cases constitutional. However, the Court's guidance on what those cases might be is less than clear. Educators and policymakers understandably may have difficulty predicting the Court's response to some potentially effective educational arrangements.

These cases, moreover, reveal an equal protection inquiry ill-equipped to do all of the work that it has to do in the educational context. Part of the problem, in my view, is the Court's seeming preoccupation with the legislative motives behind measures that have "compensatory" features. This orientation requires the Court to be suspicious even of those measures that address the unequal social and economic position of women that is the result of systemic sex discrimination. It requires the Court to seek out sex-based classifications that appear to have been enacted in connection with traditional or stereotypical ways of thinking about women; such measures are then invalidated, irrespective of their contribution to eroding sex inequalities in social and economic position. Although improper legislative inputs deserve the Court's attention, some equal protection problems, including those posed by single-sex education, present concerns unaddressed by a focus on legislative inputs. In particular, the Court's inquiry may be incompletely conceptualized to scrutinize measures that have more complex implications for sex equality in the short- and long-terms — a problem brought to the fore by the Court's inquiry regarding the all-female school of nursing at issue in *Mississippi University for Women v. Hogan*.⁶

Given the intrinsic and instrumental value of education for well-being, we might usefully turn to philosophers, economists and policymakers whose work in the field of human development has pushed them to articulate a more nuanced conception of human well-being than the one employed by the modern Court. Recent efforts to assess countries' development in terms of quality of life and human capabilities seem especially useful. Such frameworks provide a basis for assessing aggregate well-being and for identifying inequalities in well-being. Importantly, they provide a basis for identifying inequalities along gender lines.

A capability approach might help a court to decide when, in particular cases, there is an "exceedingly persuasive justification"⁷ for a

6. 458 U.S. 718, 102 S. Ct. 3331 (1982).

7. *VMI*, 116 S. Ct. at 2274; *Hogan*, 458 U.S. at 724, 102 S. Ct. at 3336; Kirchberg

classification based on sex in the form of a publicly-funded single-sex school. It would focus inquiry through the lens of education's role in enhancing human *capabilities*, as that term is used by Amartya Sen to mean the alternative combinations of things that a person can do or be in leading his or her life.⁸ It could improve the Court's equal protection inquiry by providing a common, concrete metric for evaluating the diverse benefits of particular single-sex educational offerings, an evaluative tool that is substantively more useful and complete than a focus primarily on legislative inputs.

Part I of this essay discusses the Court's work in *Mississippi University for Women v. Hogan* and *United States v. Virginia*, the cases in which it has addressed the constitutionality of single-sex higher education. This part argues that the Court's equal protection inquiry incompletely serves the questions presented in an educational context. It begins by noting the Court's struggle to articulate a coherent means-ends test in these two cases. It questions the adequacy of an inquiry focused primarily on ferreting out inaccurate legislative stereotyping, where the measures at issue work in complex ways, at once addressing and perpetuating the systemic social and economic deprivation of one sex. It suggests that an overemphasized concern for legislative inputs might explain the underdeveloped state of the remainder of the Court's inquiry. This part then returns to *Hogan*, which presents just such a measure and introduces the special context of higher education. It argues that to evaluate questions of sex equality in higher education, the Court has more work to do than an inquiry trained on inaccurate legislative stereotypes equips it to do.

Part II describes a tool for evaluating equality that fills out the underdeveloped aspects of the Court's current inquiry, namely, a capability approach. This part sketches Amartya Sen's formulation of a capability approach, which assesses well-being and identifies individual advantage by reference to an account of a person's capabilities, that is, what a person is able to do or be. This part depicts the current gender gap in capabilities that exists in every country in the world today. It notes education's important role in enhancing human capabilities.

In Part III, this essay suggests that a capability approach of the sort outlined in Part II would fill out and give clarity to the Court's inquiry

v. Feenstra, 450 U.S. 455, 461, 101 S. Ct. 1195, 1199 (1981); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273, 99 S. Ct. 2282, 2293 (1979).

8. Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30 (Martha Nussbaum & Amartya Sen eds., 1993) [hereinafter *Capability*]; see also Amartya Sen, *Equality of What?* in *CHOICE, WELFARE AND MEASUREMENT* 353 (Amartya Sen ed., 1982) [hereinafter *Equality*]; Amartya Sen, *Gender and Cooperative Conflicts*, in *PERSISTENT INEQUALITIES: WOMEN & WORLD DEVELOPMENT* 123 (Irene Tinker ed., 1990) [hereinafter *Gender*]. A person's capabilities refer to his or her capacity or opportunity to choose valuable activities or to achieve valued states, e.g., to be well nourished, to obtain medical care, to be sheltered, to obtain education, to participate meaningfully in public life, to be able to avoid physical violence, and the like.

in cases of single-sex higher education. This part outlines the advantages of a capability approach in this context and offers a tentative framework for assessing educational arrangements that include a single-sex offering. This essay concludes that a capability approach holds promise for doing some real work in these cases by providing a concrete, substantive metric for appraisal.

I. SINGLE-SEX EDUCATION

In his dissent in *United States v. Virginia*, Justice Scalia claimed that the majority had tolled the death knell for publicly-funded single-sex education.⁹ This claim seems overstated in light of the majority's efforts to the contrary. Justice Ginsburg, writing for the Court, took pains to rule narrowly, to extol the benefits of single-sex education, to affirm the state's prerogative "evenhandedly" to support diverse educational opportunities, and to state that sex-based classifications may appropriately be used "to advance full development of the talent and capacities of our Nation's people."¹⁰ The Court does not, however, make any clear statement about permissible single-sex educational arrangements. Thus, despite the Court's assurance, the concern remains: in which cases is single-sex education appropriate?

A. *United States v. Virginia and Mississippi University for Women v. Hogan*

The Supreme Court's decision last Term in *United States v. Virginia*, together with its decision fourteen years prior, in *Mississippi University for Women v. Hogan*, provide the analytic framework for assessing whether single-sex higher education is constitutional. In these cases, the Court stated that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification."¹¹ Whether the shorthand "exceedingly persuasive justification" was meant to strengthen the foundation for an invigorated sort of "intermediate scrutiny" in the future, the Court in both cases appeared to use the ordinary version.¹² That is, under intermediate scrutiny, a measure will be found unconstitutional unless the state objectives served are "important" and the means chosen to meet the objectives

9. 116 S. Ct. at 2308 (Scalia, J., dissenting); see also *Hogan*, 458 U.S. at 734, 102 S. Ct. at 3341 (Blackmun J., dissenting) (portending "spillover" from the Court's decision placing in jeopardy any single-sex state-supported educational institution, despite the Court's express claim to be writing narrowly, addressing only the Mississippi University for Women's School of Nursing).

10. 116 S. Ct. at 2276-77 nn.7-8 and accompanying text.

11. *Hogan*, 458 U.S. at 724, 102 S. Ct. at 3336 (citing *Kirchberg*, 450 U.S. 455, 101 S. Ct. 1195 (1981); *Feeney*, 442 U.S. 256, 99 S. Ct. 2282 (1979)); accord *VMI*, 116 S. Ct. at 2274.

12. Cf. *VMI*, 116 S. Ct. at 2294-95 (Scalia, J., dissenting).

are "substantially related to the achievement of those objectives."¹³ The Court declined the opportunity to invoke the highest level of review under the Equal Protection Clause, "strict scrutiny," which is currently reserved for classifications based on race or national origin, and for fundamental rights.¹⁴ Notably, the Court stated in *Hogan* that a policy that "discriminates against males rather than against females" is not exempted from scrutiny, and that the standard of review is not reduced in these cases.¹⁵

Elaborating the intermediate level of judicial inquiry, the Court in both cases (although in response to different concerns) looked behind the proffered justification to assess its grounding in the facts. In *United States v. Virginia*, the Court was concerned that the Commonwealth of Virginia had manufactured its asserted interest in providing diverse educational offerings within the state. The Court there insisted that the justification offered "must be genuine, not hypothesized or invented post hoc in response to litigation."¹⁶ In *Hogan*, the Court sought to ensure that Mississippi's effort to "compensate[] for discrimination against women"¹⁷ was in fact warranted by an actual disadvantage in the area addressed by the classification. "It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."¹⁸ Importantly, in neither case did the Court doubt the benefits of single-sex higher education for some students, men and women alike.¹⁹

13. *Id.* at 2275; *Hogan*, 458 U.S. at 724, 102 S. Ct. at 3335.

14. In each case, however, the Court made oblique reference to the fact that the application of "strict scrutiny" might still be an open question for gender-based classifications. In *Hogan*, the Court included a qualifying footnote: "Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect." 458 U.S. at 724, 102 S. Ct. at 3335 n.9. In *VMI*, the Court arrived at the intermediate scrutiny standard through the back door: "Without equating gender classifications, for all purposes, to classifications based on race or national origin, . . . the reviewing court must determine whether the proffered justification is 'exceedingly persuasive,'" and emphasized the unsettled nature of the terrain in a footnote: "The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin, but last Term observed that strict scrutiny of such classifications is not inevitably 'fatal in fact.'" 116 S. Ct. at 2275 & n.6 (citing *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995)). Justice Scalia, in dissent, took the majority to task for what he called "irresponsible . . . Supreme Court peek-a-boo." *Id.* at 2295.

15. 458 U.S. at 723, 102 S. Ct. at 3335-36; cf. *Adarand*, 115 S. Ct. 2097 (1995); see also David A. Strauss, *Affirmative Action and the Public Interest*, 1995 Sup. Ct. Rev. 1.

16. 116 S. Ct. at 2275.

17. 458 U.S. at 727, 102 S. Ct. at 3337.

18. *Id.* at 727-28, 102 S. Ct. at 3338.

19. *VMI*, 116 S. Ct. at 2276-77 & nn.7-8; *Hogan*, 458 U.S. at 720-21, 102 S. Ct. at 3330.

Hogan involved the female-only admissions policy of the Mississippi University for Women's ("MUW") School of Nursing.²⁰ MUW offers a baccalaureate nursing program at its campus in Columbus, Mississippi. In 1979, Joe Hogan applied to the School of Nursing's baccalaureate program but was denied admission because he was male. Explicitly limiting its holding to the School of Nursing, the Court found its admissions policy invalid. The Court's result rested primarily on its conclusion that the sex-based classification maintained by the School of Nursing did not address actual barriers faced by women. "Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities."²¹ In fact, according to data before the Court, women earned 94% of the baccalaureate nursing degrees in Mississippi in 1970 (the year before MUW opened its nursing school), comprised 98.6% of the baccalaureate nursing degrees conferred nationwide, and accounted for almost 98% of all employed registered nurses; in 1980 (just prior to the Court's decision), women received more than 94% of baccalaureate nursing degrees nationwide and constituted 96.5% of the registered nurses in the labor force.²² The Court was concerned that far from compensating for barriers faced by women as a result of discrimination, the School of Nursing's policy might instead perpetuate the stereotype that nursing is exclusively a woman's job. The Court cited evidence that this exclusivity contributed to depressed nurses' wages.²³ Thus, the Court concluded, "although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."²⁴ The Court noted secondarily that Mississippi had failed to demonstrate that the means it had selected, *i.e.*, providing single-sex education for women in a baccalaureate nursing program, was substantially and directly related to its compensatory objective. Because the School of Nursing permitted men to audit classes, and because the Court had no evidence from nursing schools that teaching style, women's performance, or women's participation is affected by the presence of men in the classroom, the Court reasoned that MUW's admissions policy excluding men could not actually be necessary to reach its educational goals.²⁵

20. MUW is the only single-sex public college or university maintained by Mississippi. 458 U.S. at 720, 102 S. Ct. at 3334 n.1. Mississippi's seven public coeducational universities include two baccalaureate nursing programs. *Id.* at 735, 102 S. Ct. at 3331 (Powell, J., dissenting).

21. 458 U.S. at 729, 102 S. Ct. at 3339.

22. *Id.* at 729, 102 S. Ct. at 3339 & n.14.

23. *Id.* at 730, 102 S. Ct. at 3340 n.15.

24. *Id.* at 730, 102 S. Ct. at 3339.

25. *Id.* at 730-31, 102 S. Ct. at 3339-40.

In *United States v. Virginia*,²⁶ the Court faced a challenge by the United States to Virginia's maintenance of an "incomparable military college," the Virginia Military Institute ("VMI"), as a single-sex school for men.²⁷ VMI is noted for its use of a unique pedagogical method, "the adversative method." Established in 1839, VMI has a long tradition of producing leaders. A VMI diploma is prestigious and connects graduates to a network of well-positioned alumni throughout the nation. Focusing the first part of its equal protection inquiry on whether Virginia's justification was genuine, the Court found that "[n]either recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options."²⁸ The Court recounted Virginia's history of bitter opposition to providing educational opportunities for women at all, followed by its begrudging establishment of schools for women "far from equal in resources and stature to schools for men," and, finally, only in 1972, its admission of women on an equal basis with men to "'the most prestigious institution of higher education in Virginia,' the University of Virginia."²⁹ The Court concluded that "[a] purpose genuinely to advance an array of educational options . . . is not served by VMI's historic and constant plan — a plan to 'affor[d] a unique educational benefit only to males.' However 'liberally' this plan serves the State's sons, it makes no provision whatever for her daughters."³⁰ The Court next examined Virginia's claim that the unique educational benefits provided by the VMI method "cannot be made available, unmodified, to women."³¹ The Court rejected this claim on factual grounds, pointing out that this argument depended on just the sort of overbroad generalizations and "'fixed notions concerning the roles and abilities of males and females'" that are likely to close the "gates to opportunity" and "perpetuate historical patterns of discrimination."³² Having found an unconstitutional exclusion on the basis of sex, the Court turned its attention to the remedy fashioned by Virginia and challenged in the second phase of the litigation: Virginia created the Virginia Women's Institute for Leadership ("VWIL") as a single-sex college for women, while maintaining VMI as a single-sex college for men. The Court readily concluded that VWIL could not be said meaningfully to be VMI's equal.³³

26. 116 S. Ct. 2264 (1996).

27. VMI is the only single-sex public institution of higher learning provided by Virginia; the Commonwealth also provides fourteen coeducational public colleges and universities. *Id.* at 2269.

28. *Id.* at 2277.

29. *Id.* at 2277-78.

30. *Id.* at 2279 (second alteration in original) (citations omitted).

31. *Id.*

32. *Id.* at 2280 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725, 102 S. Ct. 3331; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139, 114 S. Ct. 1419, 1427 n.11).

33. *Id.* at 2282-86.

The Court in each of these two cases invalidated single-sex admissions policies, in one case excluding men and in the other excluding women. Both *Hogan* and *United States v. Virginia*, however, took care to emphasize that sex-based classifications favoring one sex may be justifiable in some circumstances. According to the Court in *United States v. Virginia*, “[s]ex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ [or] to advance full development of the talent and capacities of our Nation’s people.”³⁴ In *Hogan*, the Court explained that such a classification can be justified “if it intentionally and directly assists members of the sex that is disproportionately burdened.”³⁵ By way of example, the *Hogan* Court cited *Califano v. Webster*,³⁶ in which the Court upheld a statute that allowed women to eliminate more low-earning years than men for purposes of computing social security retirement benefits, noting that the statute “took into account that women ‘as such have been unfairly hindered from earning as much as men’ and ‘work[ed] directly to remedy’ the resulting economic disparity.”³⁷

But how do *Hogan* and *United States v. Virginia*, taken together, answer the question under which circumstances single-gender education is a permissible objective of government? The Court could have been more clear. Courts, policymakers and educators are understandably uncertain about the Court’s guidance.

B. The Equal Protection Inquiry in the Context of Higher Education

When is a government justified in maintaining a single-sex higher educational option for one sex and not the other? When is it justified in offering paired single-sex higher educational opportunities, one each for men and for women? *Hogan* and *United States v. Virginia* together provide a starting point. Several problems surface, however, upon trying to imagine a court’s response to some potentially useful educational arrangements. For those hoping to toe the Court’s line in the future, the guidance that emerges from these cases is unclear, and may be incompletely conceptualized to do all of the work that it has to do in the educational context.

In neither *Hogan* nor *United States v. Virginia* was the Court satisfied with the interest advanced by the state in defense of the single-sex admissions policy. And in both cases (although for different reasons) the Court was unimpressed with some aspect of the means-ends fit. The result of the Court’s equal protection inquiry in *United States v. Virginia* is not surprising, given the one-sided bent of Virginia’s higher

34. 116 S. Ct. at 2276 (citing *Califano v. Webster*, 430 U.S. 313, 320, 97 S. Ct. 1192, 1196 (1977) (per curiam)) (second alteration in original).

35. 458 U.S. at 728, 102 S. Ct. at 3338.

36. 430 U.S. 313, 97 S. Ct. 1192 (1977).

37. 458 U.S. at 728, 102 S. Ct. at 3338 (citing *Califano*, 430 U.S. at 318, 97 S. Ct. at 1195).

education offerings and the fact that the excluded sex was female, the sex bearing the social and economic costs of sex discrimination. Yet the Court gave less clear guidance than it might have in such an "easy" case, because it entertained seriously a state objective that begs the question: Virginia's claimed interest in diversity of educational choices. The dissent similarly offers little help. Justice Scalia supplied Virginia with an alternative objective: providing effective college education for its citizens. But the resulting means-ends inquiry does no work, if we accept available empirical data that single-sex higher education is in fact effective for both men and women.³⁸ The result in *Hogan* is perhaps more surprising, but the Court's approach does some useful work toward eliminating measures that perpetuate limited possibilities for women's roles and opportunities. However, it needs to be more fully conceptualized if it is to provide adequate guidance for the context of single-sex higher education.

These cases help reveal an underlying limitation in current equal protection jurisprudence: its focus on inaccurate legislative stereotyping. The primacy of this concern has resulted in an inquiry well-trained to address just one part of the problem for sex equality, but underdeveloped for its work with other parts of this problem. An inquiry designed chiefly to identify inaccurate legislative stereotyping is not sufficiently nuanced to handle the complex ways in which various measures may discriminate against women. It is not sufficiently nuanced to handle measures that may at once work to eradicate and to perpetuate the systemic social and economic deprivation of women. And, as *Hogan* illustrates, these inadequacies are a particular liability for the Court's attempt to address the problem of sex equality in the context of higher education.

1. A Coherent Means-Ends Test

As a preliminary matter, it is worth marking the Court's difficulty framing a coherent means-ends inquiry in cases examining single-sex higher education. The Court's struggle here may evidence more than a superficial quibble. Instead, there is likely real disagreement over what the problem is, that is, the wrong of sex discrimination. When the Court strains in this way to articulate a useful test, we might want to examine more carefully the adequacy of the inquiry for its task.

Between the majority and the dissent in *United States v. Virginia*, the Court entertains two formulations of the means-ends inquiry, neither of which amounts to a useful test. The first of these formulations suffers

38. The United States did not contest the district court's finding that empirical data supported the claim that "both men and women can benefit from a single-sex education." The Court accepted the district court's findings, although it noted the district court's further statement that the beneficial effects of single-sex education are "stronger among women than among men." *VMI*, 116 S. Ct. at 2276-77 & n.8. For additional empirical data regarding the benefits of single-sex education for each sex, see *infra* note 73.

because it is not falsifiable. Where the question is whether it is constitutional for the state to provide single-sex educational opportunities to one sex but not the other, the objective advanced by the state cannot be diversity of educational choices. Although this objective was suggested by Justice Powell in his dissent in *Hogan*, advanced by Virginia in *United States v. Virginia*, and championed by Justice Scalia in his dissent in that case, it requires an argument that begs the question. Any sex-based classification that provides a single-sex educational opportunity to one sex is going to increase the diversity of educational choices available for that sex — the benefited sex. The Court in *Hogan* recognized as much in response to Justice Powell's suggestion that Mississippi's objective was to provide women a choice of educational environments:

Since any gender-based classification provides one class a benefit or choice not available to the other class, however, [Justice Powell's] argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.³⁹

The test rules out nothing. David Strauss explains the work that this aspect of the Court's inquiry must do in the context of affirmative action and strict scrutiny: "The government interests needn't be compelling, in the sense of especially important, but they must be *confining*: the claim that a measure promotes that particular government interest must be falsifiable."⁴⁰ On this view, the *Hogan* Court ruled out the option of claiming an interest in "diversity of educational choices" not because this interest would not be sufficiently "important," but because it could be used to justify any single-sex school.

Interestingly, Virginia disregarded this exchange in *Hogan* and claimed that VMI was established and maintained "with a view to diversifying . . . educational opportunities within the State."⁴¹ The Court entertained Virginia's proffered justification as if it did not beg the question, urging only that "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."⁴² It rejected Virginia's argument not because it was not sufficiently important — indeed the Court conceded "it is not disputed that diversity among public educational institutions can serve the public good."⁴³ Instead, it rejected Virginia's argument because the Court found that Virginia's

39. 458 U.S. at 731, 102 S. Ct. at 3340 n.17.

40. Strauss, *supra* note 15, at 28.

41. 116 S. Ct. at 2277.

42. *Id.*

43. *Id.*

proffered interest in diversity was not and never had been its *actual* interest; rather, it was a post hoc justification adopted for litigation. However, the Court muddied the waters by proceeding as if the opposite answer would do any work toward resolving the equal protection question. *United States v. Virginia* thus gives the misimpression that a state might usefully justify providing single-sex education to one sex by reference to an interest in providing a "diversity in educational opportunities"⁴⁴ to the benefited sex. Instead, we are at square one, with an equal protection question before us.

The second formulation fails to provide a means-ends test that resolves the distributive aspect of the equal protection problem. Dissenting in *United States v. Virginia*, Justice Scalia supplied Virginia with an alternative interest: "providing effective college education for its citizens."⁴⁵ The importance of this interest, he asserted, "is beyond question."⁴⁶ He continued, "That single-sex instruction is an approach substantially related to that interest should be evident enough"⁴⁷ from both the long history in this country of single-sex education, and the lower courts' factual finding that single-sex education at the college level is beneficial to both sexes.⁴⁸ Under Justice Scalia's formulation, there is again no real test, but the infirmity is of a different sort. If Virginia's interest is in providing effective college education for its citizens, and if single-sex education has been demonstrated, as a factual matter, to be a good way to achieve the goal of effective college education for both sexes, then when is it okay for Virginia to provide such education to one sex (at VMI, males) and not the other (at VMI, females)? If we accept current empirical data on the benefits of single-sex colleges for at least some males and some females, Justice Scalia's test sets up — but supplies no apparatus to answer — the familiar, basic equal protection query: whether it is okay to give a benefit exclusively to one sex, because of sex. Thus, Justice Scalia's proposed inquiry and response provide little more guidance to educators and policymakers than that of the majority.

2. Adequacy of the Inquiry

In *Hogan*, Mississippi asserted a compensatory interest in providing to women a single-sex educational opportunity in the form of a nursing

44. *Id.* at 2276 n.7.

45. *Id.* at 2296 (Scalia, J., dissenting).

46. *Id.*

47. *Id.*

48. *Id.* Note that Justice Scalia mentioned only this first part of the lower courts' findings on the benefits of single-sex college education; he did not mention a related part of the lower courts' findings, that the benefits of single-sex college education "are stronger among women than among men," and that there is currently greater demand for single-sex higher education among women than among men. The majority, however, noted the greater benefits of single-sex education for women. See 116 S. Ct. at 2277 n.8 (citing *United States v. Commonwealth of Va.*, 766 F. Supp. 1407, 1414 (W.D. Va. 1991)).

school. The Court undertook an inquiry typical of cases in which the state's claimed objective is to compensate for past discrimination: it asked whether the benign, compensatory purpose cited was the actual purpose animating the measure under scrutiny. While an inquiry into the actual purposes of a measure or policy may be an important check on the interests asserted in many sex discrimination cases, this focus is misplaced in the context of education, as the result in *Hogan* helps illustrate. Here my claim is that the Court focused its inquiry in a way that incompletely (and therefore, dis-)serves questions in the educational context, i.e., in a way that does not fully get at the problems for sex equality posed by single-sex educational arrangements. This claim requires a bit of background in the development of equal protection doctrine for gender-based classifications.

a. *Development of Equal Protection Doctrine for Sex-Based Classifications*

Equal protection doctrine for classifications based on sex has grown up on a sampling of equality concerns.⁴⁹ In some (but not all) cases the trick has been to "smoke out" situations where women are the apparent intended beneficiaries of a measure, but where scrutiny reveals the measure instead to be a product of either intentional or accidental legislative stereotyping of women's roles and abilities. The equal protection inquiry that has evolved bears the marks of its development in these cases in particular; it may, in fact, be overly focused on this aspect of its task, while not completely conceptualized for the remainder of its work.

Commentators have observed the Court's preoccupation with impermissible "legislative inputs," even in cases where the measure in question ostensibly benefited women.⁵⁰ *Weinberger v. Wiesenfeld*⁵¹ is

49. For a discussion of the strategic and practical considerations at play in selecting and framing the issues before the Court, and the effects of the litigants' decisions, compare Hon. Ruth Bader Ginsberg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9; and Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335 (1992); with Mary Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201.

50. See, e.g., Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 303-08 (1991) (attributing focus on impermissible legislative inputs to the Burger Court's inclination toward a process-oriented understanding of equal protection); cf. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 9-14, 26-31 (1995) (explaining origins of Court's focus on distinguishing inaccurate or stereotypical differences from "real" differences as Court's conception of sex as immutable, of male and female as two different kinds of beings; "We have inherited a jurisprudence of sexual equality that seeks to distinguish, as its primary function, inaccurate myths about sexual identity from true — and therefore pre-political — characteristics of sex that are factually significant.").

51. 420 U.S. 636, 95 S. Ct. 1225 (1975).

considered to be the first such case,⁵² and is the genesis of the oft-quoted directive to look to the actual purposes animating a measure that appears to benefit women: "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."⁵³ In *Weinberger*, the Court invalidated a Social Security Act provision that entitled widows, but not widowers, to survivor's benefits. The government attempted to characterize the measure as one "designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families,"⁵⁴ thereby bringing the statute within the reach of *Kahn v. Shevin*⁵⁵ and *Schlesinger v. Ballard*.⁵⁶ When the Court looked to the statutory scheme and the legislative history, however, it found no evidence of compensatory intent "premised upon any special disadvantages of women."⁵⁷ It surmised instead that the measure "was intended to permit women beneficiaries to elect not to work and to devote themselves to the care of the children."⁵⁸ Although later courts often cast *Weinberger* and similar cases⁵⁹ as striking down measures that apparently discriminated in favor of women, given revealed stereotypical, paternalistic legislative purposes or presumptions, the Court's view of the facts in *Weinberger* is important to understanding the inquiry that developed. Before turning to address the government's argument, the Court in the first part of its analysis characterized the question before it as whether the measure improperly discriminated against women wage earners, whose widowers could not benefit from social security taxes paid by their wives. The widows of male wage earners, by contrast, could benefit fully from social security taxes paid by their husbands. The Constitution, concluded the Court, "forbids the gender-based differentiation that results in the efforts of female workers

52. Klarman, *supra* note 50, at 306.

53. *Weinberger*, 420 U.S. at 648, 95 S. Ct. at 1233.

54. *Id.*

55. 416 U.S. 351, 94 S. Ct. 1734 (1974) (In upholding Florida tax preference for widows but not widowers, the Court acknowledged that financial difficulties confronting the widowed woman exceeded those confronting the widowed man. The Court ventured that women's unequal social and economic position in this regard might be "from overt discrimination or from the socialization process of a male-dominated culture.").

56. 419 U.S. 498, 95 S. Ct. 572 (1975) (In upholding the Navy's promotion system permitting women longer tenure than men before mandatory dismissal for nonpromotion, the Court recognized differential treatment as rational response to men's and women's different opportunities for satisfying the qualifications for promotion.).

57. *Weinberger*, 420 U.S. at 648, 95 S. Ct. at 1233.

58. *Id.*

59. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199, 97 S. Ct. 1021 (1977) (striking down Social Security Act provision automatically granting survivors' benefits to widows but requiring widowers to prove dependency, the Court emphasized that the provision clearly deprived women workers of the protection for their families that men workers automatically received).

required to pay social security taxes producing less protection for their families than is produced by the efforts of men."⁶⁰ Thus, the statute that the Court struck down benefited some women, but it clearly disadvantaged other women.

Later to portray the measures involved in *Weinberger* and similar cases as having wholly "benign, compensatory" purposes, about which the Court must nonetheless be suspicious, is to mislead.⁶¹ The Court in this case needed to be and was suspicious, first, because the measure disadvantaged women — here, women wage earners.

b. Sex Inequality and the Complexities of Deprivation

An overzealous focus on ferreting out measures that are the product of intentional or accidental legislative stereotyping might have stymied the development of the rest of the equal protection inquiry. But equal protection doctrine has more work to do than to "smoke out" improper legislative motives, especially when the measures in question actually address women's deprivation. Improper legislative inputs surely deserve the Court's attention.⁶² But a more substantive task for the Court, acknowledged by scholars and sometimes the Court, is to invalidate sex-based classifications that contribute to the social and economic disadvantage of one sex that results from discrimination against that sex.⁶³ Yet some measures that are

60. *Weinberger*, 420 U.S. at 645, 95 S. Ct. at 1232.

61. See *Orr v. Orr*, 440 U.S. 268, 99 S. Ct. 1102 (1979) (invalidating Alabama statute advantaging women by requiring only men to pay alimony upon divorce); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331 (1982) (invalidating Mississippi's provision advantaging women by providing single-sex educational opportunity); see also Klarman, *supra* note 50, at 303-08 (explaining ascendancy of Court's legislative inputs understanding of equal protection).

62. Although framed as a process-focused concern, the Court's attention to improper legislative inputs is a bit of a mixed bag of substantive and process-based concerns. Justice Brennan's dissent in *Kahn*, which Michael Klarman suggests contains an inchoate version of the legislative inputs objection, refers to the substantive connections for a concern with improper process. "[A] legislative classification that distinguishes potential beneficiaries solely by reference to their gender-based status as widows or widowers . . . must be subjected to close judicial scrutiny . . . because gender-based classifications too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Kahn*, 416 U.S. at 357, 94 S. Ct. at 1738 (Brennan, J., dissenting). "No one familiar with this country's history of pervasive sex discrimination against women can doubt the need for remedial measures to correct the resulting economic imbalances." *Id.* at 359, 94 S. Ct. at 1739. "While doubtless some widowers are in financial need, no one suggests that such need results from sex discrimination as in the case of widows." *Id.* at 360, 94 S. Ct. at 1739-40; see also Klarman, *supra* note 50, at 305-06.

63. Both the majority and Justice Brennan's dissent in *Kahn* evidence this concern. 416 U.S. at 353-55, 357, 359-60, 94 S. Ct. at 1736-37, 1738, 1739-40 (Brennan, J., dissenting). See also *Schlesinger v. Ballard*, 419 U.S. 498, 95 S. Ct. 572 (1975). The Court in *VMI* defined impermissible sex-based classifications as those that "create or perpetuate the legal, social, and economic inferiority of women." 116 S. Ct. at 2276. Catharine MacKinnon has articulated this view: a measure is discriminatory if it "participates in the systemic social deprivation of one sex because of sex." CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, 116-18 (1979).

intended to and do help eradicate the systemic social deprivation of women, for example, by addressing basic needs, nonetheless could be said to contribute to the systemic social deprivation of women in the long term, in complex and subtle ways, by reinforcing and legitimating outmoded notions of women's roles.⁶⁴ The current inquiry is not completely equipped to address measures that both eradicate and contribute to women's deprivation.

A court seeking to identify discriminatory measures that "participate in the systemic social deprivation" of women is faced with a dilemma when measures at once work to eradicate and contribute to women's deprivation. The facts of *Orr v. Orr*⁶⁵ provide a useful example of this dilemma. Under the Alabama statute at issue, men but not women were required to pay alimony upon dissolution of a marriage. This and similar provisions probably reflect a particular, typical allocation of responsibilities during the marriage and after its dissolution in which women are unremunerated caretakers and homemakers and men are wage earners. As such, alimony statutes may be harmful to women to the extent that they perpetuate this allocation of responsibilities and women's resulting financial dependence on men in marriage and unequal economic status on divorce.⁶⁶ But such provisions also address the real and pressing economic inequality and deprivation that has been demonstrated to accompany divorce for most women.⁶⁷ They work directly to address the unequal economic circumstances of men and women that arguably result from aspects of the institutions of marriage and divorce in which the legal system participates. The Court's preoccupation with "smoking out" measures that are the product of inappropriate legislative notions may serve (whether purposefully or incidentally) the concern for women's deprivation in the long-term; however, it does so at the expense of the concern for women's immediate deprivation.⁶⁸ Thus, this orientation seems to do only some of the work necessary to identify measures that are the concern for equal protection.⁶⁹

64. See Mary E. Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169; accord, Klarman, *supra* note 50, at 304 n.421.

65. 440 U.S. 268, 99 S. Ct. 1102 (1979).

66. See, e.g., Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 80-85 (1987).

67. See, e.g., Karen C. Holden & Pamela J. Smock, *The Economic Costs of Marital Dissolution: Why Do Women Bear a Disproportionate Cost?* 17 ANN. REV. SOC. 52-53, 57-63, 68-70, 72-74 (1991); Becker, *supra* note 64, at 174-76.

68. Compare the Court's earlier decisions upholding measures that addressed women's immediate deprivation but arguably contributed to the perpetuation of stereotypes and thus women's longer-term deprivation, *Kahn v. Shevin*, 416 U.S. 351, 94 S. Ct. 1734 (1974); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S. Ct. 572 (1975); with the Court's more recent decisions invalidating these sorts of measures, *Orr v. Orr*, 440 U.S. 268, 99 S. Ct. 1102 (1979); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331 (1982); see generally Klarman, *supra* note 50, at 303-08.

69. Note, too, that the theory that withholding measures such as alimony will dismantle traditional roles and resulting women's financial dependency has so far not

Hogan provides another example of the dilemma for equal protection when measures work to eradicate women's deprivation in important ways but may perpetuate women's deprivation in less obvious ways, and Hogan introduces the problems particular to the educational context. The Court there concluded that providing an all-women's school of nursing does not address women's systemic disadvantage, because women are in fact overrepresented in nursing schools and in the ranks of employed nurses.⁷⁰ Moreover, the Court suggested that providing the all-women's school of nursing might actually harm women, by perpetuating "the assumption that nursing is a field for women" thereby contributing to depressed nurses' wages.⁷¹ Hogan does not attempt to balance its concern for the harm to women that comes from perpetuating the assumption that nursing is a women's field against the decided benefit that accrues to women from education in general and the benefit that accrues to women from single-sex education in particular.

C. *The Special Context of Single-Sex Education*

Single-sex education by definition requires a sex-based classification. In order to help the Court develop adequate tools for determining when a government can provide single-sex education, it may be useful to disaggregate the benefits or advantages provided to the included sex.

The included sex is advantaged in several ways denied to the excluded sex. First, the included sex is the beneficiary of education generally (assuming the offering to be within the bounds of "appropriate" education, even if not the best possible offering). The intrinsic and instrumental values of an education are difficult to deny.⁷² Second, the included sex is the beneficiary of having the single-sex educational option. Members of the benefited sex at least enjoy the ability to choose a single-sex environment. Beyond the benefits of plural educational opportunities, empirical evidence seems to largely support the claim

been borne out, and, meanwhile, plenty of women suffer real, immediate economic deprivation. See MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 510-14 (citing Pamela Smock, *The Economic Costs of Marital Disruption for Young Women in the United States: Have They Declined Over the Past Two Decades?* University of Wisconsin-Madison Institute for Research on Poverty, Discussion Paper No. 984-92 (Sept. 1992)).

70. See *supra* notes 21-24 and accompanying text.

71. 458 U.S. at 730, 102 S. Ct. at 3339.

72. The Court, most notably in *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686 (1954), has long (though not consistently) recognized the special position of education. At one time, many members of the Court viewed education as rising to the level of a fundamental right. See *Plyler v. Doe*, 457 U.S. 202, 221, 102 S. Ct. 2382 (1982) (invalidating on equal protection grounds Texas policy denying free public schooling to children of illegal aliens and noting importance of education); Klarman, *supra* note 50, at 288 n.342 (discussing Douglas Papers and other internal documents suggesting that "four of the five Justices in the *Plyler* majority were prepared forthrightly to hold education a fundamental interest for equal protection purposes").

that single-sex education is beneficial and effective for women; empirical data less clearly support the claim that single-sex education is beneficial and effective for men.⁷³ Third, the included sex is the beneficiary of the particular subject offerings (e.g., baccalaureate nursing program) and pedagogical philosophy (e.g., adversative method) of the school in question, and of the other tangible and intangible benefits of receiving an education from that school.

Although this disaggregation is crude, it readily reveals a source of myopia in *Hogan*: in evaluating whether MUW's School of Nursing actually served the compensatory purpose advanced by Mississippi, i.e., eradicating discrimination against women, the Court neglected to consider education's role in providing "intentional[] and direct[] as-

73. For recent studies supporting the claim that single-sex education is beneficial for women in terms of satisfaction and achievement, see M. Elizabeth Tidball, *Women's Colleges and Women Achievers Revisited*, in *RECONSTRUCTING THE ACADEMY: WOMEN'S EDUCATION AND WOMEN'S STUDIES* 206 (Elizabeth Minnich, et al. eds., 1988); Joy K. Rice & Annette Hemmings, *Women's Colleges and Women Achievers: An Update in RECONSTRUCTING THE ACADEMY*, *supra* at 220; M. Elizabeth Tidball, *Women's Colleges: Exceptional Conditions, Not Exceptional Talent, Produce High Achievers*, in *EDUCATING THE MAJORITY: WOMEN CHALLENGE TRADITION IN HIGHER EDUCATION* 157 (Carol S. Pearson, et al. eds., 1989) [hereinafter *Exceptional Conditions*]; ALEXANDER ASTIN, *WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED* (1992); Daryl G. Smith, Lisa E. Wolf, & Diane E. Morrison, *Paths to Success: Factors Related to the Impact of Women's Colleges*, 66 *J. HIGHER EDUC.* 245 (1995). Note, however, that there is too little evidence to determine whether this statement applies to the experiences of women of color: *See id.*; *see also* Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139 (criticizing antidiscrimination law's treatment of race and gender as mutually exclusive categories of experience and analysis). For support of the claim that single-sex education is beneficial and effective for boys and men, as well as girls and women, see Cornelius Riordan, *Reconsidering Same Gender Schools: The VMI Case and Beyond*, *EDUC. WK.*, Feb. 23, 1994, at 48 ("Single gender schools generally are more effective academically than coeducational schools. This is true at all levels of school, from elementary to higher education. . . . Single gender schools work. They work for girls and boys, women and men, whites and nonwhites. . . . [But r]esearch has demonstrated that the [beneficial] effects of single gender schools are greatest among students who have been disadvantaged historically — females and racial/ethnic/religious minorities (both males and females)."). *But cf.* Brief *Amici Curiae* in Support of Petitioner by the American Association of University Professors et al. at 26-27, *VMI*, 116 *S. Ct.* 2264 (1996) (No. 94-1941) ("[Available] data provide no support for the efficacy of single-sex education for young men. . . . Not only is there an absence of data to support the conclusion that single-sex education benefits males, some studies even demonstrate a negative effect." Among the negative effects observed in all-male learning environments were a higher incidence of sexism in writing, in classroom displays, and in class discussion.) Commentators have cautioned against the societal effects of preserving all-male colleges and universities in a world where women are still unequal to men: they are "likely to be a witting or unwitting device for preserving tacit assumptions of male superiority — assumptions for which women must eventually pay." C. JENCKS AND D. REISMAN, *THE ACADEMIC REVOLUTION* 297-98 (1968); *accord* Deborah L. Rhode, *Association and Assimilation*, 81 *Nw. U. L. REV.* 106 (1986); Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make the Grade?* 4 *DUKE J. GENDER L. & POL'Y* 69 (1997).

sist[ance to] members of the sex that is disproportionately burdened."⁷⁴ Education in general is crucial to eliminating the systemic social, political, and economic deprivation of women. Where the government has decided to provide education for women, it is going to contribute to dismantling, rather than perpetuating women's deprivation, in the sense and to the extent that education generally does. A court's inquiry in the educational context should not discount altogether the general contribution of education to dismantling stereotypes and to countering systemic social deprivation of women.

And, having found that MUW's School of Nursing was not truly single-sex,⁷⁵ the Court in *Hogan* was not required to balance the long-term detriment that it identified as stemming from the subject matter of the School of Nursing's program offerings with the benefit provided to women by the single-sex structure of the program. Given current empirical data that single-sex higher education is in fact beneficial and effective for the women who choose it,⁷⁶ the provision of a single-sex school for women is likely to contribute additionally to eliminating the systemic social, political and economic deprivation of women. Nor did the Court consider any benefits stemming from the subject matter of the School of Nursing's program offerings, as a counter to the detriments. Note that *Hogan* managed a bit of surgery here: by carefully limiting its inquiry to the School of Nursing at MUW, and leaving untouched the remaining schools and programs at MUW, the Court was able to view in isolation that school within the university that most clearly contributed to the perpetuation of traditional women's roles and, as the Court found, arguably did not open any new doors to women. Thus, even had the Court taken into account the benefits accruing to women from the single-sex nature of the program and the benefits accruing to women from the subject matter of the program offerings, it might nonetheless have found that the School of Nursing, considered alone, contributed in problematic ways to the perpetuation of stereotypes and women's longer-term deprivation. But the Court failed to discuss such tradeoffs. Whether the Court got the boundaries of the relevant package of educational opportunities right is a matter of lesser importance, to be determined on a case-by-case basis by reference to the particular facts (e.g., separation of admissions, facilities, etc.). The more important lesson is that the Court overemphasized one aspect of the equal protection concern in the higher education context, to the exclusion of other aspects.

74. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728, 102 S. Ct. 3331, 3338 (1982).

75. See *supra* note 25 and accompanying text.

76. But see David Hoffman, *Challenge to Single-Sex Schools Under Equal Protection: Mississippi University for Women v. Hogan*, 6 HARV. WOMEN'S L. J. 163, 172 (1983) ("[T]he notion that a woman's choice to attend a sex-segregated school is truly voluntary is deeply undercut by the reality . . . that one of the factors that make single-sex schools attractive to women is the sexist treatment they receive at coeducational schools.").

It is not clear why the *Hogan* Court felt compelled to give great weight to the concern for dismantling stereotypes and their contribution to women's long term disadvantage, but scant attention to the concern for education and its contribution to women's more immediate advantage. Outdated charters aside,⁷⁷ few would argue that single-sex women's colleges and universities are an important or even likely means today for relegating women to the world of "fancy, general and practical needlepoint."⁷⁸ Thus, even assuming that inaccurate stereotypes are the chief business of equal protection jurisprudence, it is not clear that we ought to be especially suspicious of the legislative motives when, today, a legislature creates or maintains single-sex higher educational opportunities for women.⁷⁹ Quite to the contrary, many single-sex women's colleges are at the center of efforts to challenge outmoded stereotypes and to enable women to dismantle systemic barriers to realizing full social and economic equality.⁸⁰ The very existence of women's colleges and universities today helps challenge the notion that assimilation into a society structured and dominated by males ought to be a goal for social policy in general, or equal protection in particular. And for single-sex schools long in existence, a focus on the presumptions of the enacting legislature under a legislative inputs orientation is similarly unuseful, given the enormous evolution in these schools' educational offerings, missions and student populations.⁸¹ While founding legislatures surely harbored very limited notions of women's place in society and so established schools where women could learn only needlepoint and other skills suitable for that place, some of these same schools are today among the leaders in challenging now outmoded ideas and in

77. See *Hogan*, 458 U.S. at 733-34, 102 S. Ct. at 3341 (Blackmun, J., dissenting) (suggesting that MUW's failure to update its charter may not only have been embarrassing to MUW, but may have in part contributed to MUW finding itself in litigation). The majority quotes the charter's outdated language at length. *Id.* at 720, 102 S. Ct. at 3334 n.1.

78. *Id.* (quoting statement of purpose from MUW charter, which includes instructing the "girls of the state" in these three sorts of needlepoint).

79. Except, of course, where the legislature's creation of a single-sex school for women is a truly transparent effort only to preserve existing single-sex opportunities for men. See, e.g., *VMI*, 116 S. Ct. at 2282-86. *But cf.* *Vojdik*, *supra* note 73; Cynthia Fuchs Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and The Citadel*, 4 *DUKE J. GENDER L. & POL'Y* 101 (1997).

80. See, e.g., Ruth Schmidt, *The Role of Women's Colleges in the Future*, in *WOMEN AND HIGHER EDUCATION IN AMERICAN HISTORY* 198 (John Mack Faragher & Florence Howe eds., 1988) ("[W]omen's colleges have a history of producing graduates in the sciences (and other disciplines where women are normally underrepresented) which far surpasses the proportion of women who study those subjects in coeducational environments." *Id.* at 200.); *Exceptional Conditions*, *supra* note 73; accord *VMI*, 116 S. Ct. at 2276 n.7 (citing Brief for Twenty-Six Private Women's Colleges as *Amici Curiae*).

81. See Klarman, *supra* note 50, at 308 ("Put briefly, [under a legislative inputs orientation,] the thoughts of the enacting legislature [are] dispositive — was the gender classification motivated by a genuinely compensatory objective or by a 'traditional way of thinking about females?'").

dismantling frameworks of inferiority. We might ask how we can better frame the equal protection concerns in the context of education.

II. CAPABILITIES AND THE QUALITY OF A HUMAN LIFE

A commitment to equality does not itself supply any particular conception of what must be equal.⁸² One theory focuses on human well-being and features capabilities as a measure of well-being, as opposed to, for example, utility or primary goods. This approach identifies inequalities in well-being by reference to what individuals are able to do and be. Beginning in 1990, the United Nations Development Program ("UNDP") adopted this focus on capabilities as a measure of well-being.⁸³ Very recently, the UNDP has begun to examine gender differentials in capabilities. In 1996, it found that women's capabilities are in every country — the United States included — currently less fully realized than are men's. Other insights from the field of development economics shed light on the close connection between education and improved capabilities. This backdrop is important for understanding the social problems of less and more developed countries alike, for examining the role of education in a particular society, and for addressing the grave situation of sex inequality.

A. Capabilities

Amartya Sen, a prominent thinker in development economics and moral philosophy, has argued persuasively that we ought to measure humans' quality of life by reference to their capabilities.⁸⁴ "The capability of a person," Sen explains, "reflects the alternative combinations of functionings the person can achieve, and from which he or she can choose one collection."⁸⁵ Functionings focus on a person's state; they are "the various things that he or she manages to do or be in leading a life."⁸⁶ Some functionings are quite basic. Among these, according to Sen, are "being adequately nourished, [and] being in good health."⁸⁷ These sorts of basic functionings are likely to be valued strongly and widely. Other functionings are less likely to be valued as strongly by as many, for example "achieving self-respect."⁸⁸ A person's capability

82. See, e.g., Peter Westen, *The Empty Idea of Equality*, 92 HARV. L. REV. 537 (1982).

83. Since 1990, the UNDP has compiled a human development index ("HDI"), a selection of indicators of achievements corresponding to basic human capabilities. In 1996, it introduced a corresponding, multidimensional measure of human deprivation, the capability poverty measure ("CPM"), which "focuses on human capabilities, [and] reflects the percentage of people who lack basic, or minimally essential, human capabilities." UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1996, at 27-30 [hereinafter UNDP REPORT].

84. *Capability*, supra note 8; *Equality*, supra note 8; *Gender*, supra note 8.

85. *Capability*, supra note 8, at 31.

86. *Id.*

87. *Id.*

88. *Id.*

might be thought of as the range of options actually or meaningfully available to that person as she decides how to live. Capability invokes notions of possibility and choice. ("His ability to be adequately nourished is unconstrained by either social conditions or personal circumstances." "She is free and able to be literate.") Capability deprivation occurs when there are constraints on a person's ability to pursue this or that way of living. Functionings, by contrast, are the states of being achieved by a person, the things a person does, the way a person lives. The life a person leads is described by a sequence or collection of functionings. ("He is nourished." "She is literate.")

For many problems of social policy, capability is important quite apart from achieved functionings.⁸⁹ Functionings — doing, being, achieving — are in a sense the building blocks of the capability approach, but they are not all that matters: "The approach is based on a view of living as a combination of various 'doings and beings,' with quality of life to be assessed in terms of the capability to achieve valuable functionings."⁹⁰ Sen illustrates the difference between one functioning (the state of being adequately nourished) and the corresponding capability (the capability to be adequately nourished):

If achieved functionings . . . were all that mattered, we might be as worried about the rich person fasting as about the starving poor. If we are more concerned to eliminate the hunger of the latter, it is primarily because the former has the *capability* to be well nourished but chooses not to, whereas the latter lacks that capability and is forced into the state of starvation.⁹¹

Importantly, the capability approach was conceived in the specific context of evaluating inequality and advantage. In his seminal essay on the subject, Sen takes as a starting point the question "equality of what?"⁹² His answer gives content to the commitment to equality. It also supplies a measure, a tool for evaluating equality. According to Sen, individual well-being and inequality in individuals' well-being are best judged by reference to an account that includes a notion of "basic capabilities": a person being able to do certain basic things.⁹³ Social advantage can likewise be assessed by reference to an aggregate of individual capabilities.⁹⁴

Sen concedes both that there will be problems with determining an index of capabilities, and that ideas about the relative importance of

89. *Id.* at 45.

90. *Id.* at 31.

91. *Id.* at 45.

92. *Equality*, *supra* note 8, at 353.

93. *Id.*, at 367.

94. *Capability*, *supra* note 8, at 30.

various capabilities are likely to be culture-dependent.⁹⁵ Nevertheless, agreement on the evaluative space (that is what the objects of value are) is itself useful.⁹⁶ The capability approach identifies a basis for evaluation and for detecting injustice in the form of inequality: human capabilities.

The UNDP, for example, has selected three capabilities as "basic," by which to measure human development. "[The capability to lead] a life free of avoidable morbidity is one such capability, [the capability to be] informed and educated is another, and [the capability to be] well-nourished is a third."⁹⁷ Notably, education is among these "foundational capabilities."⁹⁸ The UNDP defines poverty or deprivation accordingly: "Deprivation is reflected in a lack of basic capabilities — when people are unable to reach a certain level of human achievement or functioning."⁹⁹ The UNDP's capability poverty measure ("CPM") is an index of "capability shortfalls in [these] three basic dimensions of human development."¹⁰⁰

B. Women's Relative Capability Deprivation

As a group, women's capabilities are impoverished relative to men's. This disparity holds true in every society today.¹⁰¹ Because they are born female, fifty-one percent of the world's population face relative capability poverty. Whether measured in terms of basic functionings or more complex ones, women are less well off. Thus, according to the UNDP's gender-related development index ("GDI"), which examines relative achievements in life expectancy, educational attainment, and income, women suffer more than men at the level of basic needs.¹⁰² And, according to the UNDP's gender empowerment measure ("GEM"), which measures gender inequality in important areas of economic and political participation and decisionmaking, women suffer more than men at the level of full realization of their human capabilities.¹⁰³

The GDI value for the United States is 0.927 (unity would indicate the absence of a gender gap, according to the measure indexed). While high relative to other countries, this value nonetheless indicates an identifiable gender gap at the level of basic needs. Notably, although females fare as well as males in terms of the adult literacy rate (both

95. *Equality*, *supra* note 8, at 368; see generally *Capability*, *supra* note 8, at 31-32, 46-49.

96. *Capability*, *supra* note 8, at 46-49.

97. UNDP REPORT, *supra* note 83, at 109.

98. *Id.*

99. *Id.*

100. *Id.*

101. See, e.g., *id.* at 32 ("[N]o society treats its women as well as its men.").

102. *Id.* at 32-34.

103. *Id.* at 34-36; see also *id.* at 23 ("Political space has always been monopolized by men. Although women constitute half the electorate, they hold only 12% of the seats in parliaments and 6% in national cabinets.").

at 99.0%), and better than males in terms of life expectancy at birth (female life expectancy is 79.4 years; male life expectancy is 72.6 years), and "combined primary, secondary and tertiary [school] gross enrollment ratio" (98.3% of females and 93.5% of males enrolled), the gender gap is pronounced when measuring earned income share, with 40.1% of income earned by females and 59.9% of income earned by males.¹⁰⁴

Notably, in no country does the GEM equal or exceed 0.800.¹⁰⁵ And only in ten countries does the GEM exceed 0.600.¹⁰⁶ The United States ranks ninth among these ten; its GEM value is 0.645.¹⁰⁷ In the United States, although women constitute over half the electorate, women hold only 10.4% of the seats in Congress.¹⁰⁸ Women comprise only 42.0% of administrators and managers.¹⁰⁹ Women fare better in the category of professional and technical workers, with 52.7% of these positions occupied by women.¹¹⁰ And, rounding out the indicators contributing to the GEM, women's share of income is 40%.¹¹¹

C. Enhancing Capabilities Through Education

Education is crucial to enhancing human capabilities. As both an intrinsic and instrumental good, education contributes to capabilities on two levels.¹¹² Education is an intrinsic good; being educated is a valuable achievement in and of itself. Providing educational opportunities improves beneficiaries' capability of having an education or being educated. Education is also an instrumental good. Providing educational opportunities contributes to improving many other capabilities, ranging

104. *Id.* at 138 tbl.2.

105. *Id.* at 34, 141-43 tbl.3.

106. *Id.*

107. *Id.* at 141 tbl.3.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. In the context of human development in India and elsewhere in the world, Jean Dréze and Amartya Sen identify five distinct ways in which education contributes intrinsically and instrumentally to the freedom of a person, *i.e.*, a person's capability: (1) intrinsic value of education; (2) instrumental value for personal roles: education can help a person do many things that he or she values, like getting a job or more generally making use of economic opportunities; (3) instrumental value for social roles: education and improved literacy facilitate public discussion of social needs, encourage informed discussion of collective demands (*e.g.*, for health care), and contribute to better utilization of services that are available; (4) instrumental value for process roles: process of education has benefits apart from its substantive aims, *e.g.*, corresponding reduction in child labor, increased contact with peers, broadening social and cultural horizons; and (5) empowerment and distributive value: improved literacy and educational achievements of disadvantaged groups can increase their ability to resist oppression, to organize politically, and to secure a fairer deal. See JEAN DRÉZE & AMARTYA SEN, *INDIA: ECONOMIC DEVELOPMENT AND SOCIAL OPPORTUNITY* 14-15 (1995).

from such basic ones as the capability of being well nourished, the capability of being sheltered, and the capability of having remunerative work,¹¹³ to more complex ones, like the capability to participate fully in public life.¹¹⁴

In the United States, as elsewhere, education is indispensable to enhancing women's capabilities, and, importantly, to remedying sex inequality in capabilities.¹¹⁵ The connection between women's education and basic capabilities is especially dramatic in developing countries. The most fundamental challenge for health in many of these countries may still be inadequate sanitation, given people's incomplete understandings of the sources of resulting illnesses and, importantly, preventive measures.¹¹⁶ According to some development experts, education is the single most important factor for realizing gains in human health, for the ability to lead a life free of avoidable morbidity. Educating girls, they argue, is particularly crucial.¹¹⁷ Literacy and numeracy are important tools of self-reliance and self-defense: an illiterate person is much less well equipped to get on the right bus, to enforce her inheritance rights, to defend herself in court, or to obtain a bank loan.¹¹⁸ Women in Development scholars have also noted the primary role of women's education in enabling more complex capabilities in these countries:

[I]t is clear that Third World women will have very little impact on national development priorities, political ideologies, and development planning until they are literate and have the basic arithmetic skills with which to analyze their political and economic systems.¹¹⁹

113. For example, according to the UNDP, in contrast to countries experiencing economic growth without a corresponding growth in employment (let alone employment that meets the aspirations of people for job security, remunerative work, or creative work) "[h]igh employment economies have generally invested heavily in the development of human capabilities — particularly education, health and skills." *Id.* at 7-8.

114. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 140-43 (1993).

115. *Id.* at 6.

116. Nicholas D. Kristof, *For Third World, Water Is Still a Deadly Drink*, N.Y. TIMES, Jan. 9, 1997, at A1, A6.

117. *Id.* at A6 (explaining that some countries have achieved public health gains by promoting basic education and noting the particular connection between educating girls and their improved ability to understand the dangers of poor hygiene and make better health care decisions in general and for their families).

118. Dréze and Sen make these and other points in the context of India, *supra* note 112, at 109.

119. Susan C. Bourque & Kay B. Warren, *Access is Not Enough: Gender Perspectives on Technology and Education*, in *PERSISTENT INEQUALITIES: WOMEN & WORLD DEVELOPMENT* 83, 96 (Irene Tinker ed., 1990). Accord DRÉZE & SEN, *supra* note 112, at 87-92, 137-39 (pointing out that the uneducated and less well-educated are less able to ensure that their needs — including their specific educational needs and priorities — are addressed in the political process; thus there is a self-perpetuating circle); *but cf.* VMI, 116 S. Ct.

In more developed countries, too, women's education is important for realizing fully their capabilities.¹²⁰ In the United States, there is a present and historical correlation between higher education for women and enhanced vocational opportunity.¹²¹ "The more education a woman has, the more likely she is to be employed [and] . . . [t]he disparity between the proportion of men and women who are employed decreases with higher levels of education."¹²² Thus, in 1987, fifty-four percent of women with only a four-year high school education were employed, compared to seventy-four percent of men; sixty-two percent of women with only one to three years of college education were employed, compared to seventy-nine percent of men; and seventy-two percent of women with four or more years of college were employed, compared to eighty-five percent of men.¹²³ Higher levels of educational attainment for women also correspond with an increasing likelihood that women will occupy positions with decision-making authority and economic power rather than support or service positions.¹²⁴

III. THE CAPABILITY APPROACH TO ASSESSING SINGLE-SEX HIGHER EDUCATION

A capability approach — that is, some version of the approach put forth by Amartya Sen and outlined in Part II — would provide courts

at 2296 (Scalia, J., dissenting) (arguing against heightened scrutiny for sex-based classifications on theory that women, a numerical majority of the electorate, indeed enjoy political power and citing the "long list of legislation" from the Equal Pay Act of 1963 to the Violence Against Women Act of 1994 as proof of women's power in political processes).

120. While the problems of developing and developed economies may be quite different, the lessons connecting capability deprivation and solutions such as education might usefully be shared.

121. See, e.g., Barbara Sicherman, *College and Careers: Historical Perspectives on the Lives and Work Patterns of Women College Graduates*, in *WOMEN AND HIGHER EDUCATION IN AMERICAN HISTORY* 130, 134 (John Mack Farragher & Florence Howe eds., 1988).

122. JUDITH G. TOUCHTON & LYNNE DAVIS, *FACT BOOK ON WOMEN IN HIGHER EDUCATION* 29 (1991).

123. *Id.*

124. Higher levels of educational attainment for women correspond with increasing likelihood that women will occupy managerial and professional positions (40 occupations, including finance, purchasing, accounting, engineering, medicine, nursing, teaching, library science, and counseling; in 1987, 70% of employed white women and 68% of employed black women with four or more years of college were employed in these positions) over technical, sales, and administrative support positions (including technicians, cashiers, secretaries, receptionists, and clerks. In 1987, for both black and white women with a high school diploma or one to three years of college, the most likely occupation) over service occupations (including household, protective service, food preparation, and personal service occupations; in 1987, 60% of black women and 35% of white women with less than four years of high school were employed in these positions). *Id.* at 31. Notably, the ability to occupy such positions is one indicator of sex equality according to the UNDP's GEM, which assesses gender differentials beyond basic capabilities.

with a useful tool for assessing single-sex educational arrangements, particularly single-sex higher education. This approach might improve the Court's inquiry by providing a common, concrete metric for evaluating various arrangements, one that permits courts to acknowledge tradeoffs (e.g., where an educational arrangement both addresses and perpetuates women's relative capability deprivation). This approach provides a more useful, comprehensive orientation for the Court's inquiry than is supplied by a legislative inputs orientation. Although the contours of such an approach would be difficult to specify in the abstract, I offer a tentative decisional framework.

A. Frameworks for Thinking about Education: Capabilities

The capability approach is particularly well-suited for thinking about education and, therefore, for detecting inequality in this context. As noted above, it is concerned not simply with states of doing and being achieved by a person (e.g., the state of being adequately nourished), but also, more crucially, with the alternative functionings available to the person, from which she is free to choose. That is to say, it matters for analysis that a person is able to be adequately nourished, whether or not she chooses to be adequately nourished (recall the difference between the wealthy fasting person and the impoverished starving person). By taking capabilities to be the informational base for evaluation, this approach not only acknowledges education's intrinsic value, but also captures the instrumental function of education.¹²⁵

Moreover, the capability approach fills out the Court's inquiry just where it is most anemic. As the Court has recognized, sex-based classifications may not "create or perpetuate the legal, social, and economic inferiority of women."¹²⁶ But, as noted above, an arguably compensatory measure might at once eradicate and contribute to women's deprivation. Yet, as I have pointed out, the Court's equal protection inquiry provides no basis for a choice among these opposing effects, at least not one that consciously seeks to resolve this dilemma. Instead, the Court's equal protection inquiry most often skirts the dilemma, resolving it only incidentally, by reference to a concern with impermissible legislative inputs.

The capability approach might improve the Court's inquiry by providing a common metric that is both concrete and substantively more useful than a focus on legislative inputs. First, the capability approach provides a metric for appraisal. A measure may increase some capabilities, such as the capability of being adequately nourished, but diminish

125. See also SUNSTEIN, *supra* note 114, at 140-43 (recognizing that despite courts' institutional limitations, "[t]here is a close connection between education and constitutionally specified rights, and equality in basic life prospects is a clear theme of the Civil War amendments," such that a more aggressive judicial role in cases of educational equality might be warranted by the commitment to deliberative democracy).

126. VMI, 116 S. Ct. at 2276.

others, such as the capability of being socially integrated. While not purporting to give relative rankings for the various capabilities (with the possible exception of a group of "basic capabilities") the common metric of the capability approach at least allows the Court to acknowledge and discuss tradeoffs. Second, this approach supplies a concrete orientation that is more useful for actually getting at the problem, particularly in the educational context, than is abstract debate.¹²⁷ Third, the capability approach reinstates neglected substantive concerns, at least as a counterbalance to the Court's process-based concern for legislative inputs.¹²⁸ A focus on what individuals, in the aggregate, are able to do and be usefully identifies inequalities, including sex inequality.

The courts are perhaps not meant to be the chief venue for working out effective educational arrangements, or even for ensuring some sort of sex equality in educational opportunities. Courts are, however, crucially involved when the legislature decides, as it should, to undertake these tasks.¹²⁹ Even within the bounds of courts' institutional limitations, there is considerable room to develop useful evaluative tools, especially where, as here, the tools fill out underdeveloped aspects of the present inquiry.

Finally, a version of the capability approach has recently been implemented by some governmental institutions seeking to evaluate well-being and equality, demonstrating its workability in practice as well as in theory. The UNDP has recently begun to evaluate aggregate capabilities in order to assess human well-being. The UNDP's measures demonstrate how one might look to indicators to learn whether and in what areas people's capabilities are realized or impoverished. Importantly, for questions of sex inequality, the UNDP's measures can be used to assess relative capability deprivation between sexes.

The Court, within the limits of its institutional function, has also provided glimpses of what this kind of assessment might look like. It

127. See, e.g., Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to Be Equal?* 98 *ETHICS* 518, 532-33 (1988) ("If equal opportunity can mean distributing resources either equally or unequally, if it can be compatible with inequalities that favor either the initially advantaged or the initially disadvantaged, and if the relative weight of these principles can vary from one situation to the next, it is small wonder that most Americans support the idea. A skeptic might wonder, however, whether an idea that can embrace so much means anything at all.").

128. One virtue of this shift is that it examines the present, rather than past, mission and offerings of the college or university at issue. A focus on the appropriateness of the legislature's motives at the time it created the Mississippi University for Women is likely to give unhelpful (and potentially misleading) answers to the question what does the MUW do to enhance the capabilities of its students and graduates today. Single-sex schools for women in particular have evolved enormously from the time of their respective charters, from places where women went to learn "fancy, general and practical needlework" to places that challenge such limited notions of women's work. See *supra* notes 77-81 and accompanying text.

129. See SUNSTEIN, *supra* note 114, at 137-43.

has, at times, referred to indicators to learn about something like capabilities. For example, in *Kahn v. Shevin*,¹³⁰ the Court upheld a property tax exemption for widows because of the greater financial difficulties likely to be faced upon the death of a spouse by women than by men, due to sex discrimination. The Court's concern could plausibly be thought of as a concern for women's capability of having sufficiently remunerative employment: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."¹³¹ The Court referred to Department of Labor data as an indicator of women's relative earning power.¹³² The Court highlighted the fact that women at the time of the Court's inquiry earned only 57.9% of what men earned.¹³³ Women's capabilities in this regard could be said to be impoverished relative to men. Hogan's concern for what the availability of a baccalaureate nursing degree could do for women also plausibly stemmed from underpinnings consonant with a capabilities approach. Hogan's mention of the depressed wages in the field of nursing and the connection between these low wages and the high proportion of women in the field of nursing seems to signal a concern similar to that exemplified in *Kahn*, i.e., a concern for women's capability of having sufficiently remunerative employment. But Hogan failed to pursue the inquiry fully.

B. *Toward A Capability Approach for Assessing Educational Arrangements*

The contours of a capability approach for assessing educational arrangements cannot be fully specified at this point, and this is not my aim here.¹³⁴ Nonetheless a possible decisional framework follows. Along the way, I suggest some resolutions, under this understanding of a capability approach, to some of the problems identified in Part I.

As noted above, education is crucial to enhancing capabilities; this is true for both sexes. Both an intrinsic and instrumental good, education enters the capability calculus on two levels. First, given its intrinsic value, improved educational opportunities work directly to enhance an individual's capabilities. The relevant capability is that of having an education or being educated. Second, given its instrumental value, improved educational opportunities work indirectly to enhance an individual's capabilities. The relevant capabilities are many, ranging from such basic ones as the capability of being well nourished and the

130. 416 U.S. 351, 94 S. Ct. 1734 (1974).

131. *Id.* at 352, 94 S. Ct. at 1736.

132. *Id.* at 353-54, 94 S. Ct. at 1736-37.

133. *Id.* at 353, 94 S. Ct. at 1736.

134. This is due in part to the difficulties of specification in the abstract (even given a limitation to the educational context); see also *Capability*, *supra* note 8, at 31-32, 46-49.

capability of being sheltered, to more complex ones, like the capability of participating fully in public life.

Keeping in mind education's several contributions to a person's capabilities, single-sex education might be justifiable by reference to a two-part framework. Single-sex education might be permissible (1) if the benefitted sex is in a position of relative capability deprivation,¹³⁵ (2) if and only if, the particular offering addresses the capability deficit. The second part of the inquiry might itself be thought of as having two components, the first examining whether the program, viewed in terms of its curriculum, subject matter, pedagogy, and other tangible and intangible benefits, addresses the capability deficit, and the second examining the actual contribution of single-sex education to addressing the capability deficit.¹³⁶

The following sections offer a tentative application of this decisional framework. Section one applies the framework to an educational arrangement that makes a single-sex option available to one sex but not the other. This was the situation confronted by the Court in the first phase of *United States v. Virginia* and in *Hogan*.¹³⁷ Section two applies the framework to an educational arrangement that makes a single-sex option available to both sexes. This was the situation confronted by the Court in the second phase of *United States v. Virginia*, upon Virginia's construction of the Virginia Women's Institute for Leadership.¹³⁸

1. Single-Sex Educational Option for One Sex Only

Where a single-sex educational option is made available only to one sex, as was the case in *United States v. Virginia* and *Hogan*, a zero necessarily gets entered on the ledger for the other, non-benefitted sex. This is so because only members of the benefitted sex may avail themselves of the educational option provided; thus only members of the

135. "Relative" here means vis-a-vis the excluded sex. Note that some subgroups, e.g., black males, may be in a position of capability deprivation relative to other subgroups, e.g., white males (and therefore arguably warrant particular attention from educators, policymakers, and courts), but nonetheless not be in a position of capability deprivation relative to black females, a situation raised by *Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991). This question would need to be explored further but is beyond the scope of this essay. See *infra* note 137. See generally Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?* 105 HARV. L. REV. 1741 (1992).

136. Note that this second part of the inquiry resembles the form of the means-end fit required of the standard equal protection test articulated by the Court, although this approach supplies a substance that is more particularly tailored for the educational context.

137. The United States District Court for the Eastern District of Michigan faced this situation in the context of primary education in *Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991).

138. The Court faced this situation in the context of secondary education in *Vorcheimer v. School Dist. of Pa.*, 430 U.S. 703, 97 S. Ct. 1671 (1977) (*per curiam*).

benefited sex realize an improvement in their capability of having an education.¹³⁹ So we come to the point described by *Hogan's* footnote seventeen (but somewhat obfuscated by the majority and dissenting opinions in *United States v. Virginia*): we must determine when it is justifiable to provide such a benefit to one sex while excluding the other.

Because of the present relative capability deprivation of women, measures providing an educational option only for women are more likely to be justifiable, by reference to the first part of the inquiry. Measures providing an educational option only for men, on the other hand, are less likely to be justifiable. Note, of course, that this prediction is contingent: the permissibility of educational arrangements under the first part of this approach is sensitive to shifts in relative capabilities. Given the gender gap in capabilities that existed at the time of *United States v. Virginia*, the Court could have found (and could be viewed as having found) that excluding women from the capability-enhancing benefits of a VMI education, while bestowing them on men, only exacerbated the capability imbalance between men and women.¹⁴⁰ Whether an educational offering also satisfies the second part of the inquiry, however, depends on whether the particular offering addresses the capability deficit.

For the first component of the second part of the inquiry, a court would inquire whether the curriculum, subject matter, pedagogy and other tangible and intangible offerings of the program actually address the capability deprivation; a court would also be alert to the program's potential, instead or as well, to perpetuate this relative deprivation.¹⁴¹

139. This acknowledgement captures a portion of what *Hogan* missed, with respect to the contribution of education, generally, to recipients' capabilities. See *supra* notes 72-76 and accompanying text.

140. This capability differential between males and females, more than anything, might also make sense of the result in *Garrett*. Although the "at risk" male youth targeted by the Detroit Board of Education were surely themselves capability deprived relative to males privileged by race and class, the opportunity costs of providing a special, single-sex educational option for "at-risk" males only, but not for similarly "at risk" female youth might have been viewed as at least leaving the gender capability differential intact. More thinking needs to be done, however, about the application of a capability approach to the intersection of race and gender. Note, too, that subgroups may have differing capability landscapes, such that these subgroups in fact become the relevant group for purposes of assessing relative capability deprivation. See, e.g., *DRÈZE & SEN*, *supra* note 112, at 3-4, 44-56 (describing vast differences in capabilities within India, among Indian states).

141. It is interesting to note, as Chief Justice Rehnquist did, that the VMI Court had no evidence that the "adversative method" is in fact a useful pedagogical tool that might be said to contribute to graduates' capabilities. 116 S. Ct. at 2291 (Rehnquist, C.J., concurring); accord *Diane Avery, Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 *So. CAL. REV. L. & WOMEN'S STUD.* 189, 306-09 (1996). However, VMI's extensive alumni network, endowment, record for producing leaders, and the like should be viewed as contributing to graduates' capabilities. The Court emphasized these features of VMI at

This focus on the function of education in enhancing capabilities might give perspective to the ruling in *Hogan*. MUW's School of Nursing did not, in the eyes of the Court, provide to women anything that they did not already have. It did not enhance the alternative combinations of things that graduates could do and be in leading their lives. The Court had evidence before it that at the relevant times ninety-six to ninety-eight percent of nurses in the United States were women, and that nursing was stereotypically a women's profession, resulting in it being low status and low paying. Given this evidence, the Court may be understood as having determined that MUW's nursing program did not enhance — and may have actually contributed to a long-term decrease in — its graduates' capabilities.¹⁴² Yet the Court did not appear fully to engage the capability inquiry, in that it failed to account for the contribution of an MUW education to enhancing women's capabilities, including basic capabilities related to immediate needs. The Court nowhere acknowledged, for example, that MUW's nursing program surely contributed to its graduates' capabilities of being well-nourished and being sheltered. The Court would have needed to discuss both the positive and negative effects on women's capabilities to determine whether MUW's nursing program addressed the relative capability deprivation of women, thus acknowledging the tradeoffs that its result would require.

The second component of the second part of the inquiry would require a court to ask whether the single-sex structure actually worked to address the capability deficit. Current empirical data seem to demonstrate that single-sex higher education provides benefits to women, and may also demonstrate that single-sex education provides benefits to men.¹⁴³ However, the claims that single-sex education benefits men and that it benefits women are clearly contingent. Should further empirical study reveal, for example, that single-sex education (or a certain version of it) does not benefit women, single-sex arrangements for women would no longer satisfy this portion of the Court's inquiry. The historical evolution of single-sex colleges and universities, from the only places women could go (and while there, to learn only

the outset of its opinion: "VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals." *Id.* at 2269.

142. The Court might have ruled differently, on this score, if MUW had been an all-women's engineering and technical school, given evidence that women are underrepresented and have fewer opportunities in these fields. Chief Justice Burger's dissent stated that "[s]ince the Court's opinion relies heavily on its finding that women have traditionally dominated the nursing profession, it suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program." *Hogan*, 458 U.S. at 733, 102 S. Ct. at 3341 (Burger, C.J., dissenting)(internal citations omitted).

143. For studies supporting these claims, see *supra* note 73.

“women’s work”) to places that contribute to broadening graduates’ capabilities and dismantling traditional gender roles, helps to illustrate the contingent, empirical quality of the claim that single-sex schools for women enhance women’s capabilities.¹⁴⁴ This component of the inquiry might also permit courts to examine whether the particular arrangement at issue fits the more general findings on the benefits of single-sex education.

The two parts of the inquiry, taken together, position courts to recognize and assess tradeoffs in the capability-enhancing possibilities for various educational arrangements. Hogan amply illustrates the need for courts to have this facility.

2. Single-Sex Educational Option for Both Sexes (Paired Offerings)

Where a government offers single-sex educational opportunities to both sexes, in the form of “paired offerings,” a court should undertake a version of the inquiry outlined above, except that here there are non-zero entries on each ledger, with each sex being benefited by the availability of a single-sex school. Members of each sex may thereby improve their capability of having an education. Courts’ work in this situation would center on the second part of the inquiry outlined above. The question would become whether the offerings are equal in terms of the extent to which they enhance their respective students’ capabilities, and whether they address, as need be, women’s relative capability deprivation. A court would need to examine the curriculum, subject matter, and pedagogy of the program offerings at each school, attending to both the tangible and intangible benefits provided. In *United States v. Virginia*, for example, the Court examined the paired offerings of VMI and VWIL, undertaking a detailed comparison of the schools’ tangible offerings (e.g., physical plant, library holdings, student-faculty ratio, etc.), as well as “those qualities which are incapable of objective measurement but which make for greatness’ in a school, including ‘reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.’”¹⁴⁵ Of a VMI education, the Court noted that “[t]he school’s alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals.”¹⁴⁶ The Court observed that VMI’s program is particularly successful at enabling graduates to fill positions of leadership.¹⁴⁷ Virginia’s proffered remedy to the unconstitutional

144. See also Rhode, *supra* note 73, at 128-45 (discussing historical changes in the roles of single-sex schools for women and noting that the possible future roles of these institutions depend in part on the societal position of women and the shape of social structures at the time).

145. 116 S.Ct. at 2285 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S. Ct. 848, 850 (1950)).

146. *Id.* at 2269.

147. *Id.*

exclusion of women from VMI, the newly created all-female VWIL, could not similarly claim to enhance its graduates' capabilities.

The qualification that the arrangement address women's relative capability deprivation may in practice make it difficult to construct permissible paired offerings. The very existence of an institution that excludes women — at least against a backdrop of sex inequality, such as persists today — is likely to affirm or exacerbate the current capability gap between men and women.¹⁴⁸ This qualification, further, might be taken to permit or even to require paired schools whose intangible and tangible offerings are greater for the capability-deprived sex. As a practical matter, equality seems more likely where both schools are starting out at the same time to develop a complement of tangible and intangible benefits for their respective students, whereas Virginia's belated attempt to cobble together a sister school for VMI in the form of VWIL produced only a "pale shadow."¹⁴⁹ In any event, as *United States v. Virginia* illustrates, judicial fact-finding needs to be sufficiently detailed to permit real comparison of tangibles and intangibles.¹⁵⁰

Finally, a court would need to ascertain that the single-sex structure actually worked to improve the capabilities of each sex. This portion of the inquiry would proceed along the lines outlined in the second component of the second part above, in cases making single-sex educational opportunities available only to one sex. Again, the contingency of the claim that single-sex education is beneficial for either men or women makes this component of the inquiry necessary in the case of paired offerings as well.

Difficult questions for such a decisional framework, of course, remain. What, for example, should be viewed as the relevant "package of educational opportunities"? Under what circumstances may a court view in isolation a single school within a larger university, as the Court did in *Hogan*?¹⁵¹ Should a court consider the relevant geographical

148. See generally Rhode, *supra* note 73; Vojdik, *supra* note 73. In addition, if data that all-male learning environments increase sexist attitudes and behavior in male students are borne out, then the availability of a single-sex opportunity for men would also contribute to rather than address women's relative capability deprivation.

149. VMI, 116 S. Ct. at 2285.

150. The Court demonstrated this ability in comparing VMI and VWIL. But compare the Court's efforts in *Vorchheimer v. School Dist. of Pa.*, 430 U.S. 703, 97 S. Ct. 1671 (1977), in the context of paired all-boys and all-girls secondary schools, where the Third Circuit readily found that the educational offerings were "essentially equal" and the Supreme Court affirmed *per curiam*, despite evidence that with respect to academic reputation, offerings in the sciences, and computer facilities, the all-girls Girls High School was inferior to the all-boys Central High School. This case was effectively re-litigated in the state courts in *Newburg v. Board of Pub. Educ.*, 9 Phila. 556 (C.P. Phila. County 1983), *aff'd*, 478 A.2d 1352 (Pa. Super. Ct. 1984), under "higher resolution" of the sort that is a model for judicial fact-finding in comparison of "separate-but-equal" cases. See Bennett L. Safenstein, Note, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 651-52 (1993).

151. To this end, the Court noted that the School of Nursing had its own faculty and

boundaries to be those of the governing public entity, e.g., the State of Virginia? Or should it look, too, at barriers or hurdles within such a system that, as a practical matter, create internal divisions (e.g., the distance students are required to travel, an issue in *Hogan*)?¹⁵² Should private educational offerings be considered as part of the relevant "package"? Justice Scalia's dissent in *United States v. Virginia* assumes that they should, although the majority apparently disagrees. These practical considerations bear on, among other things, whether a single-sex offering will be viewed as available to one sex only or a part of a "paired offering," a determination that has important implications under the framework outlined above.

Indeed, under the capability approach as outlined, much of the hard work is left to the courts for case-by-case resolution. This is appropriate. But what is provided is important: this approach supplies a concrete, useful metric — capabilities — by which to evaluate educational arrangements' contribution to sex inequality.

CONCLUSION

Sex inequality is a grave social failure. It is insufferable that women in the United States, because they are women, are disadvantaged legally, socially and economically relative to men. The Equal Protection Clause might contribute to dismantling sex inequality, but the work that the Court has permitted it to do so far is partial.

A particular problem stems from the Court's preoccupation with measures that are the product of legislative stereotypes about women. This focus has sometimes led the Court to invalidate measures that work to address women's immediate social and economic disadvantage. Furthermore, this preoccupation with legislative inputs may have resulted in an inquiry that is well-trained to ferret out measures that are the product of stereotypes, but unequipped to address the remaining aspects of sex inequality. The inquiry that has resulted is not sufficiently nuanced to deal with measures' complex implications for women's lives. The educational context brings this problem to the fore.

Education contributes to human well-being, improving basic life prospects as well as more complex aspects of what it means to live a human life. Given current inequalities in well-being, with women being less well off, access to appropriate, quality education is indispensable

administrative officers and established its own criteria for admissions. *Hogan*, 458 U.S. at 720, 104 S. Ct. at 3334. Further, the Court pointed out that the factual underpinnings of the plaintiff's claim involved only his exclusion from the School of Nursing (despite the Court of Appeals' broader references to all schools with MUW). *Id.* at 723, 102 S. Ct. at 3335 n.7.

152. Cf. Justice Powell's characterization of Joe Hogan's claim as one of convenience, at most a hurdle, not a barrier. *Hogan*, 458 U.S. at 735, 102 S. Ct. at 3342 (Powell, J., dissenting). One could, however, imagine distance constituting a real barrier to attendance, particularly for low-income students.

for women. One option for higher education that seems effective for women is single-sex education.

Single-sex education necessarily entails a sex-based classification. The Court recently reiterated that sex-based classifications may be constitutional in some cases. Among these cases, the Court stated that sex-based classifications are permissible "to advance full development of the talents and capacities of our Nation's people." The Court's words here resonate with a conception of equality that assesses advantage by reference to well-being and to capabilities as a measure of well-being.

I suggest that courts employ a capability approach to assessing higher educational arrangements that include a single-sex offering. This approach holds greater promise than the current inquiry for enabling courts fully to evaluate inequality in this context. A capability approach improves the Court's inquiry by providing a common, concrete and substantively useful metric by which to evaluate educational arrangements.

