SEX DISCRIMINATION—SEPARATE BUT EQUAL PUBLIC HIGH SCHOOLS FOR MALES AND FEMALES FOUND NOT VIOLATIVE OF EQUAL PROTECTION CLAUSE—*Vorchheimer v. School District of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

In January of 1974, an admissions application was submitted on behalf of Susan Vorchheimer to Central High School,[1] an all-male educational facility within the Philadelphia school system.[2] Although she fully met the academic requirements for admission to Central,[3] Vorchheimer's application was rejected in February of that year because the Philadelphia school district limits Central's enrollment to scholastically qualified males.[4] Thereafter, Vorchheimer, through her parents, instituted a class action in federal district court naming the school district and its superintendent as defendants.[5] The complaint alleged that the school district's policy of denying admission to Central to otherwise qualified females violated the equal protection clause

[1] Vorchheimer v. School Dist., 400 F. Supp. 326, 328 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

At that time, Vorchheimer was an honor student at Masterman Junior High School in Philadelphia. 400 F. Supp. at 327–28. Her decision to apply to Central was "[b]ased on her observations during . . . visits" to it and other public high schools in Philadelphia, as well as "on her past experience in" this school system. *Id.* at 327.

[2] Vorchheimer v. School Dist., 400 F. Supp. 326, 327 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977). Four types of high schools were available to the plaintiff under the Philadelphia school district system: academic, comprehensive, technical and " 'magnet.' " Central High and Girls High, however, are the only academic high schools within the district. 400 F. Supp. at 327.

[3] Vorchheimer v. School Dist., 400 F. Supp. 326, 328 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977). Admission to both Central High and Girls High is competitive, requiring high performance on an aptitude test as well as above-average grades. 400 F. Supp. at 327.

[4] Vorchheimer v. School Dist., 400 F. Supp. 326, 327–28 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

Girls High, the other academic high school in the district, limits its enrollment to scholastically qualified females. 400 F. Supp. at 327. Vorchheimer decided not to attend Girls High because, "in her words . . . , '[she] didn't think [she] would be able to go there . . . and not be harmed in any way by it.' " *Id.* at 327–28. After being denied admission to Central, she enrolled at George Washington High School—a coeducational, comprehensive, neighborhood school. *Id.* At present, Vorchheimer is a student at the University of Pennsylvania. N.Y. Times, Oct. 19, 1976, at 20, col. 2.

[5] Vorchheimer v. School Dist., 400 F. Supp. 326, 333 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

of the fourteenth amendment.[6]

The district court determined that the complaint stated a claim for the denial of equal protection under 42 U.S.C. § 1983,[7] recog-

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[6] Brief of Appellants at 2, Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977) [hereinafter cited as Brief of Appellants].

U.S. CONST. amend. XIV, § 1 provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The complaint was amended to include an allegation that the school district's policy was also violative of the equal rights amendment of the Pennsylvania constitution. *See* Vorchheimer v. School Dist., 400 F. Supp. 326, 332–33 (E.D. Pa. 1975), *rev'd*, 532 F.2d 800 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977);Brief of Appellants, *supra* at 3. This amendment provides that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. 1, § 28. For a synopsis of the legislative history and the case law development of the Pennsylvania equal rights amendment, see 14 DUQ. L. REV. 101, 106–10 (1975).

When a party raises a state claim in a federal case, the court may exercise what is commonly referred to as pendent jurisdiction over that claim if both "[t]he state and federal claims . . . derive from a common nucleus of operative fact" and the federal claim is found substantial. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Because the exercise of pendent jurisdiction is discretionary rather than mandatory, the trial judge may consider principles of comity and fairness as well as judicial economy and convenience in his determination of whether or not to accept jurisdiction. *Id.* at 726. In *Vorchheimer*, the district court declined to accept pendent jurisdiction over the claim under the Pennsylvania equal rights amendment "since standards governing the applicability of this amendment in the educational field have not been clearly established by the state courts." 400 F. Supp. at 332–33.

For a more detailed explanation of pendent jurisdiction, see 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567, at 443–46 (1975) [hereinafter cited as WRIGHT].

[7] 42 U.S.C. § 1983 (1970); *see* Vorchheimer v. School Dist., 400 F. Supp. 326, 332 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977). Section 1983 provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

Although "a school district [has not been recognized as] a 'person' " for the purposes of a section 1983 action, the officers of the school district, acting in their official capacity, have been recognized as such, and a section 1983 action has been allowed when such a party was a defendant in the action. Buhr v. Buffalo School Dist., 364 F. Supp. 1225, 1226 (D.N.D. 1973), *aff'd on other grounds*, 509 F.2d 1196 (8th Cir. 1974).

Additionally, the district court recognized subject matter jurisdiction over Vorchheimer's claim by virtue of 28 U.S.C. § 1343 (1970). Vorchheimer v. School Dist., 400 F. Supp. at 332. Section 1343 grants original jurisdiction to federal district courts over actions where the plaintiff alleges a deprivation of civil rights guaranteed by the Constitution or federal law. 28 U.S.C. § 1343 (1970); *see* 13 WRIGHT, *supra* note 6, § 3573, at 484.

nized the suit as a proper class action, and certified the affected class.[8] Reaching the merits, the court found that since the school district had failed to show that its policy of excluding otherwise qualified females from Central bore a " 'fair and substantial relationship' " to its legitimate objectives, such a policy violated the equal protection clause.[9] Consequently, the court issued an order enjoining the school district from barring Vorchheimer or members of the representative class from Central "solely on the basis of sex."[10]

Following an appeal by the school district, the United States Court of Appeals for the Third Circuit, in *Vorchheimer v. School District of Philadelphia*,[11] reversed the decision of the district court.[12] A majority of the appellate judges initially determined that no federal legislation was applicable to the case at bar.[13] Addressing the equal protection claim, the majority found that since a legitimate educational policy is served by single-sex academic high schools,[14] the ex-

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For a more detailed explanation of 42 U.S.C. § 1983 and 28 U.S.C. § 1343, see 13 WRIGHT *supra*, § 3573.

[8] Vorchheimer v. School Dist., 400 F. Supp. 326, 333 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

In the federal system, FED. R. CIV. P. 23 prescribes the guidelines for class actions. Subdivision (a) lists the prerequisites for all class actions. After these requirements are met, subdivision (b) identifies the three types of class actions. *Id.* FED. R. CIV. P. 23(b)(2), which is applicable here, identifies a class action as appropriate where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." For a more extensive analysis of class actions under rule 23(b)(2) and, in particular, those dealing with civil rights, see 7a WRIGHT, *supra* note 6, §§ 1775-76.

[9] Vorchheimer v. School Dist., 400 F. Supp. 326, 333 (E.D. Pa. 1975) (citations omitted), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

[10] Vorchheimer v. School Dist., 400 F. Supp. 326, 333 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977). The defendant's application to the district court for a stay of this order pending appeal was denied. On September 3, 1975, however, a stay was granted by the court of appeals. *See* Brief of Appellants, *supra* note 6, at 4.

[11] 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

[12] 532 F.2d at 888.

[13] *Id.* at 885. Questions of federal statutory law were neither at issue at the trial level nor raised in the written briefs on appeal. *See* Vorchheimer v. School Dist., 400 F. Supp. 326 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977); Brief of Appellants, *supra* note 6; Reply Brief of Appellants, Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977); Brief of Appellees, Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

[14] 532 F.2d at 887-88.

clusion of females from Central by the school district solely on the basis of sex was constitutionally permissible.[15] In reaching such a result, the majority relied upon the fact that the school district afforded females an opportunity for admission to a school substantially equal to Central[16] and that enrollment at both schools was on a voluntary basis.[17] The dissent on the other hand, stated that the school district's policy was in violation of the Equal Educational Opportunities Act,[18] in addition to concluding, as had the district court, that excluding otherwise qualified females from Central was a direct violation of the equal protection clause.[19] On certiorari,[20] the court of appeals majority opinion was summarily affirmed by a four-to-four vote of the Supreme Court.[21]

The issue presented in the *Vorchheimer* case—whether the exclusion of an individual from a public school solely on the basis of sex constitutes a denial of equal protection of the laws[22]—is one which only recently has been litigated.[23] Historically, men and women were afforded neither statutory nor constitutional protection against differentiations based on sex.[24] The earliest challenges to gender discrim-

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[15] *Id.*

[16] *Id.* at 882.

[17] *Id.* at 886.

[18] 20 U.S.C. §§ 1701-1758 (Supp. V 1975); *see* 532 F.2d at 889.

[19] 532 F.2d at 896.

[20] Vorchheimer v. School Dist., 97 S. Ct. 252 (1976), *granting cert. to* 532 F.2d 880 (3d Cir. 1976).

[21] Vorchheimer v. School Dist., 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

A summary affirmance by an equally divided Court is conclusive as to the parties to the action, but is not itself authority for the resolution of future cases. *See* Laird v. Tatum, 409 U.S. 824, 837–38 (1972) (memorandum of Rehnquist, J.); *see* United States v. Pink, 315 U.S. 203, 216 (1942); Hertz v. Woodman, 218 U.S. 205, 213–14 (1910); United States v. Friedman, 528 F.2d 784, 788 (10th Cir. 1976). The reasoning behind this result is that since a majority of the Court has not been able to agree on the resolution of the principles of law at issue in the case, the Court's deadlock should be prevented from becoming authority for a future case. 409 U.S. at 837–38.

The Supreme Court's summary affirmance of the Third Circuit opinion in *Vorchheimer* by an equally divided Court, therefore, has no precedential value itself. The court of appeals decision, however, remains binding precedent for future cases in the Third Circuit.

[22] *See* 532 F.2d at 881. The majority framed the issue as follows: "Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational?" *Id.*

[23] The first such challenge in a state court occurred in 1958, *see* Heaton v. Bristol, 317 S.W.2d 86 (Tex. Ct. App. 1958), *cert. denied*, 359 U.S. 230 (1959), and in a federal court in 1970, *see* Kirstein v. Rector & Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970), *discussed at* notes 47–53 *infra* and accompanying text.

[24] *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 872-74 (1971) [hereinafter cited as Brown]. For the history of unsuccessful challenges to sex discrimination, see *id.* at 875–82; Johnston & Knapp, *Sex Discrimination by Law: A Study in*

ination were based primarily on either the privileges and immunities clause[25] or the due process clause of the fourteenth amendment.[26]

In 1948, the equal protection clause was first utilized as the sole basis for challenging an essentially gender-based discrimination[27] in *Goesaert v. Cleary*.[28] The plaintiffs in *Goesaert* challenged a state statute which proscribed the licensing of a female as a bartender "unless she [was] 'the wife or daughter of the male owner' of a licensed liquor establishment."[29] Although the classification was challenged on grounds that the distinction within the general class of women was arbitrary,[30] the Court assumed for the purposes of analyzing this issue that sex alone was a valid basis for classification.[31] Proceeding from the assumption that the state could exclude all women from the bartending profession, the *Goesaert* Court held that the statutory classification within the general class of women was reasonable since it might have been based upon the legitimate state interest in avoiding the "moral and social" dilemmas posed by the presence of females, other than those belonging to the male owner's immediate family, in such surroundings.[32]

Judicial Perspective, 46 N.Y.U.L. REV. 675, 678–741 (1971); Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 236–38 (1965); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1502–06 (1971); Comment, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296, 311-17 (1970).

[25] *See, e.g.*, *In re* Lockwood, 154 U.S. 116, 117–18 (1894) (denial of right of female attorney to practice law in Virginia found not violative of privileges and immunities clause); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 170–71, 178 (1874) (women's suffrage not guaranteed by privileges and immunities clause); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1872) (denial of right of female attorney to practice law in Illinois found not violative of privileges and immunities clause).

[26] *See* Muller v. Oregon, 208 U.S. 412, 422–23 (1908). In this case, the Court found that state regulation of maximum working hours for women was not violative of due process. *Id.* The Court distinguished Lochner v. New York, 198 U.S. 45 (1905), which forbade a state from setting similar regulations for bakers, *id.* at 53, 64, on grounds that the physical characteristics of women warranted special protection. 208 U.S. at 418–23.

For examples of other cases upholding gender classifications against due process attacks, see West Coast Hotel Co. v. Parrish, 300 U.S. 379, 388, 394–95 (1937); Radice v. New York, 264 U.S. 292, 295 (1924); Miller v. Wilson, 236 U.S. 373, 380–81 (1915); Riley v. Massachusetts, 232 U.S. 671, 679–81 (1914).

[27] *See* Brown, *supra* note 24, at 877.

[28] 335 U.S. 464 (1948).

[29] *Id.* at 465 (quoting from Act of Apr. 30, 1945, Pub. Act No. 133, § 19a, 1945 Mich. Pub. Acts 146).

[30] 335 U.S. at 465–66.

[31] *Id.* The *Goesaert* Court's assumption that a state "could, beyond question, forbid all women from working behind a bar," *id.* at 465, follows directly from the Supreme Court's prior declaration that a woman "is properly placed in a *class* by herself." Muller v. Oregon, 208 U.S. 412, 422 (1908) (emphasis added).

[32] 335 U.S. at 466–67. The Court added that because the statutory classification was

The equal protection analysis employed in *Goesaert* is referred to today as the rational relationship or minimum scrutiny test.[33] Under this test, the challenger bears the burden of demonstrating that the classification is wholly arbitrary or lacks a rational relationship to a legitimate state objective.[34] Such an analysis, however, is virtually pro forma in application since classifications challenged under this test consistently have been upheld.[35] In contrast, when a constitutionally suspect classification[36] is under attack, a strict scrutiny test

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"not without a basis in reason," there was no need to consider the suggestion that the true purpose behind the law may have been to restrict the occupation of bartending to males. *Id.* at 467.

[33] *See* Johnston & Knapp, *supra* note 24, at 684.

[34] *E.g.*, McGowan v. Maryland, 366 U.S. 420, 425 (1961) (a classification is unconstitutional "only if . . . wholly irrelevant to the achievement of the State's objective"); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79 (1911) (the Court will assume the existence of any statement of facts which reasonably can be conceived to justify a legislative classification, and the challenger bears the burden of demonstrating that the classification is "essentially arbitrary").

For a more detailed explanation of the minimum scrutiny test, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077–87 (1969) [hereinafter cited as *Developments*].

[35] *See Developments*, *supra* note 34, at 1077–78. For classifications which have been upheld under minimum scrutiny, see, *e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109–10 (1949) (company vehicles allowed to advertise own products but forbidden to carry advertisements for others); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 562, 564 (1947) (upholding pilotage law which in operation barred all but relatives and friends of existing pilots from entering profession).

For gender-based classifications which have been upheld under this test, see, *e.g.*, Hoyt v. Florida, 368 U.S. 57, 58, 62 (1961) (state statute calling for compulsory jury duty for males but optional jury duty for females held constitutional); Miskunas v. Union Carbide Corp., 399 F.2d 847, 850 (7th Cir. 1968) (right of recovery from loss of consortium restricted to males), *cert. denied*, 393 U.S. 1066 (1969); Gruenwald v. Gardner, 390 F.2d 591, 592–93 (2d Cir.) (differing social security benefits for men and women constitutionally permissible), *cert. denied*, 393 U.S. 982 (1968); United States v. St. Clair, 291 F. Supp. 122, 124–25 (S.D.N.Y. 1968) (constitutionally permissible to exclude women from compulsory military service because "if a nation is to survive, men must provide the first line of defense while women keep the home fires burning").

[36] Suspect classifications include race, *see* Loving v. Virginia, 388 U.S. 1, 11 (1967), and alienage, *see* Graham v. Richardson, 403 U.S. 365, 372 (1971). In Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976), and Mathews v. Diaz, 426 U.S. 67, 84–87 (1976), however, the suspect characterization of classifications based on alienage was not employed by the Court in its analysis of equal protection challenges brought against the federal government under the fifth amendment due process clause. These cases effectively limit the characterization of alienage classifications as suspect to state action challenged directly under the fourteenth amendment equal protection clause. *See* 426 U.S. at 85.

Although the Court has declared certain classes to be suspect, it has never provided a definite test for determining whether a classification should be so characterized. Traditionally, one could refer to Justice Stone's now famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938), where he suggests that the Court might give special constitutional protection to those "discrete and insular minorities"

is employed: the state must demonstrate that a compelling interest is furthered by the classification[37] and that this compelling objective cannot be met by a less restrictive course of action.[38] While racial classifications have clearly been declared suspect under such an analytical framework and therefore tested under strict scrutiny,[39] gender-based classifications have not been so classified[40] and consequently, have been traditionally tested under minimum scrutiny standards.[41]

This differing treatment of racial and gender-based classifications has been highlighted in the area of public education. Racially segregated schools were invalidated as being "inherently unequal" in *Brown v. Board of Education*,[42] but apparently since the courts have

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unable themselves to form effective political alliances. *Id.* Thus, legislation which contains such classifications would be subjected to closer judicial scrutiny than would otherwise be utilized.

More recently, the Court has noted that some indicators of a suspect class include being "subjected to . . . a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

In addition to suspect classifications, rights which the Court has found to be "fundamental" are subjected to strict scrutiny. Such rights, outside of the criminal context, include voting, *see* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964), the right to travel interstate, *see* Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969), and the right to procreate, *see* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942). The Court has recently restricted the definition of a fundamental right to one which is "explicitly or implicitly guaranteed by the Constitution." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 33–35 (declaring that education is not a fundamental right).

For a more detailed discussion of the strict scrutiny test, see *Developments, supra* note 34, at 1087–1120.

[37] *E.g.*, Loving v. Virginia, 388 U.S. 1, 9, 11 (1967) (state must demonstrate a compelling state interest to justify legislative classification based upon race); *see Developments, supra* note 34, at 1087–91.

[38] *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 637 (1969) (one-year state residency requirement for welfare benefits declared unconstitutional because there were "less drastic means" of preventing welfare fraud under strict scrutiny test); Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria*, 27 VAND. L. REV. 971, 1038 (1974). For a summary of the influence of this principle on constitutional adjudication in general, see *id.* at 1036–41.

[39] *E.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967).

[40] 532 F.2d at 886 & n.7. *But see* Frontiero v. Richardson, 411 U.S. 677, 678, 682 (1973) (plurality opinion declaring sex to be a suspect class). For a discussion of the present status of gender-based classifications, see notes 70–73 *infra* and accompanying text.

[41] *See* notes 23–35 *supra* and accompanying text.

[42] 347 U.S. 483, 495 (1954) (declaring that "[s]eparate educational facilities are inherently unequal").

Many years prior to the *Brown* decision, racial classifications had been invalidated in a number of contexts. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (enforce-

viewed gender-based classifications differently than those based upon race,[43] the *Brown* rationale has never been successfully employed in attacks upon sex segregation in the public schools.[44] Thus, a "separate but equal" approach[45] has been deemed appropriate in a number of post-*Brown* challenges to admissions policies at single-sex public schools.[46]

For example, in *Kirstein v. Rector and Visitors of the University of Virginia*,[47] female plaintiffs challenged an all-male admissions policy at the state university at Charlottesville.[48] Based on their finding that the curriculum at Charlottesville and the " 'prestige' " associated with the school were unique in the state educational system,[49] the federal district court determined that the gender-based admissions policy at Charlottesville was unconstitutional.[50] Since the court concluded that the facilities provided for males and females were un-

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ment of racially restrictive covenants by state courts held to be impermissible state action under the fourteenth amendment); Buchanan v. Warley, 245 U.S. 60, 73, 82 (1917) (ordinances prohibiting blacks from living in certain neighborhoods held unconstitutional); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (statutory exclusion of blacks from juries held unconstitutional). Racial classifications, however, had been upheld in the use and enjoyment of public facilities, including public schools. *See* Gong Lum v. Rice, 275 U.S. 78, 87 (1927) (racial segregation as practiced by public school system held to be consistent with equal protection); McCabe v. Atchison, T. & Santa Fe Ry., 235 U.S. 151, 161–62 (1914) (state may properly require racial segregation of passengers in intrastate transportation but must offer equal facilities to both races). Such segregationalist policies had been deemed permissible under the authority of Plessy v. Ferguson, 163 U.S. 537, 540, 549 (1896), as long as the public facility involved met the "separate but equal" standard. The doctrine began to erode, however, when in Sweatt v. Painter, 339 U.S. 629 (1950), the Court concluded that the separate law schools made available by the state to blacks and whites were not equal, since, in comparison to the all-black school, the all-white "[l]aw [s]chool possesse[d] to a far greater degree those qualities which are incapable of objective measurement but which make for greatness." *Id.* at 633–35.

For a general discussion of the historical background of the "separate but equal" doctrine, see Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950).

[43] *See* notes 27–35 *supra* and accompanying text.

[44] *See* notes 46–60 *infra* and accompanying text.

[45] *See* Plessy v. Ferguson, 163 U.S. 537, 540, 549 (1896).

[46] *See, e.g.*, Allred v. Heaton, 336 S.W.2d 251, 260, 262 (Tex. Civ. App.), *cert. denied*, 364 U.S. 517 (1960); Heaton v. Bristol, 317 S.W.2d 86, 91, 100 (Tex. Civ. App. 1958), *cert. denied*, 359 U.S. 230 (1959). For cases brought in federal court on this issue, see cases discussed in text accompanying notes 47–60 *infra*.

[47] 309 F. Supp. 184 (E.D. Va. 1970).

[48] *Id.* at 185–86.

[49] *Id.* at 187 & n.1.

[50] *Id.* at 187. Although the court expressed agreement with plaintiffs' constitutional claim, the suit was nevertheless dismissed for mootness, as the university was in the process of implementing a constitutionally acceptable plan for coeducation. *Id.* at 188–89.

equal in fact,[51] it was unnecessary for the court to determine whether a "separate but equal" standard was constitutionally permissible in this area.[52] Only if an equivalent all-female school had existed, would it have been necessary for the court to address that issue.[53]

Later that year another federal district court, in *Williams v. McNair*,[54] was presented with the issue not directly addressed by the *Kirstein* court.[55] Employing a "separate but equal" analysis, the *Williams* court denied relief to the male plaintiffs who sought admission to the all-female, state-run Winthrop College,[56] thereby upholding the validity of a single-sex public college.[57] The decision was based on grounds that the state provided, in addition to the college in question, a number of coeducational colleges as well as an all-male institution, and that there was no "special feature connected with Winthrop that w[ould] make it more advantageous educationally . . . than any number of other State-supported institutions."[58] Thus, the court found the state system of higher education not violative of equal protection because the facilities offered to men in the state, albeit separate in some instances from those offered to women, were substantially equivalent.[59] Accordingly, the assumption employed in the *Williams* case and in the application of the "separate but equal" doctrine in general is that equal educational opportunity should be available to both sexes, but that such opportunity may be made available in single-sex schools as long as the facilities provided for each sex are substantially equal.[60]

Subsequent to these lower court decisions concerning the consti-

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[51] *Id.* at 187 & n.1.

[52] *Id.*

[53] *See id.*

[54] 316 F. Supp. 134 (D.S.C. 1970) (three-judge district court), *aff'd mem.*, 401 U.S. 951 (1971).

[55] 316 F. Supp. at 138–39.

[56] *Id.* at 135, 138.

[57] *See id.* at 138.

[58] *Id.* at 137–38. Applying the rational relationship test to the gender-based admission policy, the court found that "a respectable body of educators . . . believe that 'a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex.' " *Id.* at 137 (quoting from trial stipulations). Additionally, the court observed that many "institutions . . . limit their enrollment to one sex . . . because they feel it offers better educational advantages." 316 F. Supp. at 137. Thus, the classification, based on rational, "respectable pedagogical opinion," was found to be constitutional. *Id.* at 138.

[59] *See* 316 F. Supp. at 137–39.

[60] *See* Comment, *Sex Discrimination in College Admissions: The Quest for Equal Educational Opportunities*, 56 IOWA L. REV. 209, 217 (1970).

tutionality of single-sex public schools, the Supreme Court moved toward recognizing the equal rights of both sexes. In 1971, in *Reed v. Reed*,[61] the Court declared that a state statute which preferred men to women as administrators of intestate estates was unconstitutional.[62] Chief Justice Burger, although not declaring sex a suspect class, noted that classifications, in addition to being reasonable, " 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' "[63] While recognizing that the statutory objective of efficient judicial administration was a legitimate one, he nevertheless concluded that to prefer males over females in attempting to effectuate this goal "is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."[64]

The *Reed* decision, along with other decisions of the Burger Court,[65] have created interest regarding the possible emergence of a new level of constitutional scrutiny.[66] Under this emerging standard,

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[61] 404 U.S. 71 (1971).

[62] *Id.* at 74. The Idaho statute at issue set priority classifications for the court appointment of individuals to administer intestate estates. *See* IDAHO CODE § 15-312 (1948). Under this statutory classification system, the surviving spouse was given first priority while creditors were given last priority. *Id.*; *see* 404 U.S. at 72-73. The statute further provided that within each classification males were to be preferred to females. IDAHO CODE § 15-314 (1948); *see* 404 U.S. at 73.

[63] 404 U.S. at 76 (quoting from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[64] 404 U.S. at 76.

[65] *See, e.g.*, United States Dept. of Agric. v. Moreno, 413 U.S. 528, 533-38 (1973) (statutory classifications limiting food-stamp distribution to households of related persons found not rationally related to the stated purpose of the legislation); Jackson v. Indiana, 406 U.S. 715, 723-30 (1972) (procedures for pretrial commitment of incompetent criminal defendants are violative of equal protection because they afford less protection than those given the civilly committed); Eisenstadt v. Baird, 405 U.S. 438, 447-55 (1972) (statute failed equal protection test because asserted governmental interest was not the true purpose of a statutory classification limiting distribution of contraceptives to married persons).

[66] *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972) (Court is using a "means-focused" model whereby "legislative means must substantially further legislative ends"); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1093-94 (1974) (when neutral classification is involved, "[t]he Court will scrutinize the factual support for the legislation to determine whether its ends are capable of withstanding analysis and whether its means are rationally related to [those] end[s]"); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 817-22 (1973) (Court employs a "substantial relationship in fact" test). *But cf.* Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163, 177-84 (when gender-based classifications are examined, Court employs the strict scrutiny test "*sub rosa*" whenever classification is viewed as detrimental to women, but employs minimum scrutiny when it views the classification as beneficial to women (emphasis in original)).

typically termed the substantial relationship or strict rationality test,[67] the challenged governmental action must be shown to substantially further legislative ends which "have [a] substantial basis in actuality [rather than] conjecture."[68] In application, this test has a two-fold effect. First, the party defending the state action will be required to demonstrate its justifying rationale; a presumption that the challenged state action is justified will not be entertained. Second, in determining the reasonableness of the classification, the court will confine itself solely to the evidence brought before it.[69]

Although, since the *Reed* decision, a plurality opinion of the Supreme Court has declared sex a suspect classification requiring examination under strict scrutiny standards,[70] this position has never been adopted by a majority of the Court.[71] As a result, it is presently unclear which standard of scrutiny is appropriate in a given case involving a gender-based classification. It seems, however, that when the Court recognizes a classification as gender-based and perceives it as adversely affecting women, it strikes down the practice in question

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[67] Vorchheimer v. School Dist., 400 F. Supp. 326, 336 (E.D. Pa. 1975) ("'strict rationality'"), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977); *See* Gunther, *supra* note 66, at 20 ("substantial relationship").

The seminal article on the substantial relationship test was authored by Professor Gerald Gunther. Professor Gunther suggests that a model for equal protection analysis could be based on a requirement that "the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends." *Id.*

[68] Gunther, *supra* note 66, at 21.

[69] *See id.* It should be noted that Gunther himself acknowledges some limitations in his model. First, it is difficult to predict when this newest level of scrutiny will be utilized. *Id.* at 36. Second, even when it may be demonstrated that the Court had used this newest test, the Court still utilized the idiom or language of minimum scrutiny, or the rational relationship test, when doing so. *Id.* Finally, the intensity of the Court's scrutiny under this test varies from case to case. *Id.* at 33.

[70] Frontiero v. Richardson, 411 U.S. 677, 682–88 (1973). Justice Brennan, author of the plurality opinion, was joined by Justices White, Marshall, and Douglas. *Id.* at 678. In declaring sex a suspect class, Justice Brennan noted that

> what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform . . . . As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Id. at 686–87 (footnote omitted). Justices Powell and Blackmun, along with Chief Justice Burger, concurred in the result, *id.* at 691, but believed that because the equal rights amendment had been submitted to the states for ratification, the plurality was "acting prematurely and unnecessarily" in declaring sex a suspect class, *id.* at 692.

[71] 532 F.2d at 886 & n.7.

under what appears to be a substantial relationship test.[72] On the other hand, when the Court perceives the challenged classification as ameliorative of past gender discrimination, it will generally uphold the practice in question.[73]

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[72] For example, in Stanton v. Stanton, 421 U.S. 7 (1975), the plaintiff challenged UTAH CODE ANN. § 15-2-1 (1953) which mandated parental financial support of sons until they reached the age of 21, while requiring parents to support daughters only until they reached the age of 18. 421 U.S. at 9-10. Finding the challenged law unconstitutional, the Court considered the *Reed* decision "controlling" because the Utah statute, like the statute in *Reed*, assigned persons to " 'classes on the basis of criteria wholly unrelated to the objective of that statute.' " *Id.* at 13 (quoting from Reed v. Reed, 404 U.S. at 75-76). Justice Blackmun, writing for the majority, concluded that the statutory distinction in parental support obligation was not warranted by the difference in the child's sex because the distinction was not, in fact, related to the objectives of the legislation. 421 U.S. at 8, 13-17. The Court added that no equal protection test could be satisfied by reliance on " 'old notions' " of stereotypes as a justification for differing treatments of males and females. *Id.* at 14, 17 (dictum).

For examples of other cases where the Court has found that a gender-based classification did not further the actual objectives of the questioned legislation, see Califano v. Goldfarb, 97 S. Ct. 1021 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975), *discussed at* note 73 *infra*.

In Geduldig v. Aiello, 417 U.S. 484 (1974), however, the Court employed a minimum scrutiny test in concluding that an insurance program for state employees which excluded normal pregnancies from its coverage was not a sex-based classification. *Id.* at 496-97 & n.20. Justice Stewart reasoned that "[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons." *Id.* at 497 n.20. Thus, the Court employed minimum scrutiny solely because it did not initially find a sex-based classification. *See id.* at 496-97 & n.20.

Recently, in General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976), the Court held that the denial of pregnancy benefits in an employer's disability plan did not violate section 703(a)(1) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (Supp. V 1975). 97 S. Ct. at 413. Although the *General Electric* case was a title VII action, Justice Rehnquist, writing for the majority, relied most heavily on the above analysis in *Geduldig* in order to determine that the classification in *General Electric* was like that in *Geduldig*—not gender-based. *See id.* at 406-10.

[73] Illustrative of this approach is the case of Kahn v. Shevin, 416 U.S. 351 (1974). In *Kahn*, a widower challenged the constitutionality of a state statute which granted a $500 tax exemption to widows on grounds that widowers should be accorded similar treatment. *Id.* at 352. Noting that there was a continuing disparity between the wages of men and women, *id.* at 353, the majority observed that "[w]hile the widower can usually continue in the occupation which preceded his spouse's death," a widow might be "forced into [an unfamilar] job market . . . in which . . . she will have fewer skills to offer." *Id.* at 354. Therefore, since widows and widowers were generally not on an equal plane with respect to economic status, their differing treatment under Florida law was deemed constitutional. *Id.* at 355. It may be noted, however, that the Court relied on the additional fact that the legislation in question was a tax law and generally, " '[w]here taxation is concerned . . . , the States have large leeway in making classifications . . . which in their judgment produce reasonable systems of taxation.' " *Id.* (quoting from Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973)) (brackets supplied by the Court).

Another case in which the Court identified a gender-based classification as

Contemporaneous with case law development in the area of gender classifications, Congress has attempted to equalize the availability of certain educational facilities by the enactment of title IX of the

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ameliorative of past discrimination against women and upheld the classification is Schlesinger v. Ballard, 419 U.S. 498, 510 (1975). In *Schlesinger*, a male officer challenged a federal statute which required he be discharged from the Navy because he had been "passed over" twice for promotion, on grounds that female officers were guaranteed several more years of service than were males. *Id.* at 499–500. *Compare* 10 U.S.C. § 6382(a) (1970) (mandatory discharge provision for males) *with id.* § 6401 (mandatory discharge provision for females). The Court found that the legislative decision to discriminate in favor of women was rational, and thus constitutional, because women were discriminated against in sea and air duty assignments. 419 U.S. at 508–09; *see* 10 U.S.C. § 6015 (1970). The Court stressed "the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional" advancement. 419 U.S. at 508 (emphasis by the Court). Thus, it seems that the Court justified gender differentiation in mandatory discharge provisions from the Navy because these provisions had the effect of ameliorating some of the effects of the discriminatory practice of excluding women from air and sea duty. *See id.* at 508–09.

The Court warned, however, in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) that "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." *Id.* at 648. In *Weinberger*, a widower with a dependent child challenged the constitutionality of a provision of the Social Security Act, 42 U.S.C. § 402(g) (1970), which provided benefits to a widow with a dependent child, but not to a similarly situated widower. 420 U.S. at 637–38. The government claimed that the purpose of the legislation in question was to provide a guaranteed income to women who might be unable to provide for themselves and their dependents because of economic discrimination. *Id.* at 646. Justice Brennan, writing for the majority, disagreed. He determined, by an examination of the statutory scheme and its history, that the true purpose of the provision in question was to allow widowed mothers the option of staying home with their minor children, rather than to mitigate the effect of economic discrimination against women. *Id.* at 648. In light of this purpose, Justice Brennan termed the challenged gender-based classification as "irrational" because there was no reason to disallow such an option to widowers. *Id.* at 651. Emphasizing the unfairness of the statutory classification to the deceased wife of the plaintiff, Justice Brennan found the challenged gender-based distinction unconstitutional since it discriminated against female workers who paid social security tax by affording such wage earners less protection for their survivors than had been afforded to similarly situated males. *Id.* at 645.

Recently, Justice Brennan authored a plurality opinion emphasizing the same points. In Califano v. Goldfarb, 97 S. Ct. 1021 (1977), a widower challenged provisions of the Federal Old-Age, Survivors, and Disability Program, 42 U.S.C. §§ 401–403 (1970). *See* 96 S. Ct. at 1024–25. The particular provisions provided for benefits to a widow on the basis of her deceased husband's earnings but provided similar benefits to "a widower . . . only if he 'was receiving at least one-half of his support' " from his wife prior to her death. 42 U.S.C. § 402(f)(1) (1970); *see* 97 S. Ct. 1024. As in *Weinberger*, the government asserted that the purpose of the statute was ameliorative. *Id.* at 1025–26. Justice Brennan, however, disagreed, concluding

> that the differential treatment of nondependent widows and widowers results not . . . from a deliberate congressional intention to remedy the arguably greater needs of the former, but rather from an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent.

Educational Amendments of 1972 (title IX).[74] Although title IX generally prohibits sex discrimination in federally assisted educational facilities,[75] it exempts, *inter alia*, the admissions policies of secondary schools.[76] Although the original proposed version of the Act applied

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Id. at 1032. Since such an assumption was based on " 'archaic and overbroad' generalizations," *id.* at 1026 (quoting from Schlesinger v. Ballard, 419 U.S. at 508), it did not justify the discrimination against the female wage earner whose survivors had less protection than a similarly situated male. *See* 97 S. Ct. at 1026–27, 1032.

On the other hand, another recent opinion, Califano v. Webster, 97 S. Ct. 1197 (1977), recognized the constitutional validity of a statute which did, in fact, ameliorate the past economic discrimination against women. *Id.* at 1094–95. The male plaintiff in this case challenged the effect of certain provisions of the Social Security Act. *Id.* at 1093–94. These provisions, before they were amended in 1972, allowed for greater old-age benefits for female workers upon retirement than males since a woman could exclude three more low-earning years from the computation than could a male worker. 42 U.S.C. § 415(b) (1970); *see* 97 S. Ct. at 1093–94. In a per curiam opinion, the Court concluded that the disparity in treatment was permissible because the purpose of the legislation was "to compensate women for past economic discrimination." *Id.* at 1195. The Court added that the 1972 amendments, equalizing the treatment of male and female retirees in this respect, was not an admission that the provisions in question here were discriminatory. *Id.* at 1196. Rather, the Court remarked that Congress may have believed that recent federal legislation in the areas of wage and job discrimination may " 'have lessened the economic justification for the [previous] more favorable benefit . . . formula.' " *Id.*

For further examination of cases involving gender-based classifications, other than those decided in the 1976–77 term, see Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A.L. REV. 235, 239–45 (1975); Note, *supra* note 66, at 173–84.

[74] Pub. L. No. 92–318, tit. IX, §§ 902–905, 907, 86 Stat. 375 (current version at 20 U.S.C. §§ 1681–1686 (Supp. V 1975)). For a general commentary on the legislative history of title IX and an analysis of its provisions, see Buek & Orleans, *Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1 (1973).

The HEW regulations concerning title IX, codified at 45 C.F.R. § 86.1–.71 (1976), became effective in July 1975, *id.* § 86.1. For an analysis of these regulations, see Comment, *Implementing Title IX: The HEW Regulations*, 124 U. PA. L. REV. 806 (1976).

Legislation furthering equality of the sexes in areas other than education includes title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–4 (1970 & Supp. V 1975) (forbidding sex discrimination in private employment), and The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970) (prohibiting wage discrimination on the basis of sex).

[75] 20 U.S.C. § 1681(a) (Supp. V 1975). This section provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*

[76] *See id.* § 1681(a)(1). Title IX applies only to the admissions policies of the following types of schools: "institutions of vocational education, professional education, and graduate higher education, and, . . . public institutions of undergraduate higher education." *Id.* For the remaining original exemptions to title IX, see *id.* § 1681(a)(2)–(5).

Amendments to title IX, enacted in December 1974, created additional exceptions to the Act's general prohibition against sex discrimination in the educational field. Act of Dec. 31, 1974, Pub. L. No. 93–568, § 3(a), 88 Stat. 1862 (codified at 20 U.S.C. § 1681 (a)(6)(A)–(B) (Supp. V 1975)).

to a broad range of educational institutions,[77] the 1972 amendments restricting title IX's coverage were proposed "because many felt that the admissions policies of too many schools were covered without sufficient study and debate."[78] A call for further hearings was made from the floor of the Senate so that questions with respect to the possibly overbroad application of title IX could be answered; it was argued that only after this data had been gathered could "Congress . . . make a fully informed decision" in the matter.[79] To date, however, Congress has taken no action regarding the advisability of including secondary school admissions policies within the mandates of title IX; rather, the Act was amended in 1974 to provide for more exemptions from its coverage.[80]

In addition to title IX, the Equal Educational Opportunities Act of 1974 (EEOA)[81] declares that "equal educational opportunity" should be afforded to "all [students] enrolled in public schools . . . without regard to race, color, sex, or national origin."[82] The EEOA was proposed originally in 1972[83] as a means of restricting the use of busing as a judicial remedy to achieve racial integration,[84] but it was not enacted.[85] At that time the EEOA did not include sex among the objectionable classifications of race, color and national origin.[86]

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[77] *See* S. 1123, 92d Cong., 1st Sess., tit. IX, § 1005 (1971) (proposed by Senator Prouty), *reprinted in Education Amendments of 1971: Hearings on S. 659 Before the Subcomm. of Educ. of the Comm. on Lab. and Pub. Welf.*, 92d Cong., 1st Sess. 227–99 (1971). Section 1001(a) of S. 1123 provided that "[n]o person in the United States shall, on the ground of sex, be discriminated against by a recipient of Federal financial assistance for any education program or activity." *Id.* at 296–97. Education was defined in section 1005 of S. 1123 as "includ[ing] preschool, elementary, secondary, and post-secondary education." *Id.* at 299.

[78] 118 CONG. REC. 5804 (1972) (remarks of Senator Bayh).

[79] *Id.* at 5807.

[80] *See* Act of Dec. 31, 1974, Pub. L. No. 93–568, § 3(a), 88 Stat. 1862 (codified at 20 U.S.C. § 1681(a)(6)(A)–(B) (Supp. V 1975)) (exempting fraternities, sororities, and voluntary youth service organizations from title IX's coverage).

[81] 20 U.S.C. §§ 1701-1758 (Supp. V 1975).

[82] *Id.* § 1701(a)(1).

[83] H.R. 13915, 92d Cong., 2d Sess. (1972), *reprinted in Equal Educational Opportunities Act: Hearing on H.R. 13915, H.R. 13983, and H.R. 15299 Before the Gen. Subcomm. on Educ. of the Comm. on Educ. and Lab.*, 92d Cong., 2d Sess. 2–19 (1972) [hereinafter cited as *Gen. Subcomm. Hearing*], *and in Equal Educational Opportunities Act: Hearings on H.R. 13915 Before the Comm. on Educ. and Lab.*, 92d Cong., 2d Sess. 1–6 (1972) [hereinafter cited as *H.R. 13915 Hearings*].

[84] President's Message to Congress on School Busing, 118 CONG. REC. 8928–34 (1972).

[85] *See* 532 F.2d at 884, 118 CONG. REC. 35329–30 (1972).

[86] *See* H.R. 13915, 92d Cong., 2d Sess. §§ 2(a)(1), 3(a)(1), 101(a)(2), 201-203, 401(c), 404, 406 (1972), *reprinted in Gen. Subcomm. Hearing, supra* note 83, at 2–19, *and in H.R. 13915 Hearings, supra* note 83, at 1–6.

Although the present EEOA, enacted in 1974,[87] prohibits the assignment of any student to a school other than the one closest to the student's home "if the assignment results in a greater degree of segregation" based on "race, color, sex, or national origin,"[88] there is no indication that the Act's primary purpose is different from that of the original bill.[89]

In light of the possible relevancy of federal legislation to gender-based admissions policies, Judge Weis, writing for the Third Circuit majority in *Vorchheimer*, examined both title IX and the EEOA to determine whether the maintenance of single-sex academic high schools by the Philadelphia school district was prohibited by either statute.[90] Judge Weis noted that not only was title IX inapplicable to secondary school admissions policies,[91] but that the record of Senate debate on the statute revealed a patent congressional intent to create such an exemption.[92] Significantly, in the process of concluding that title IX permitted single-sex secondary schools, the majority added

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[87] Act of Aug. 21, 1974, Pub. L. No. 93–380, 88 Stat. 514 (codified at 20 U.S.C. §§ 1701–1753 (Supp. V 1975).

[88] 20 U.S.C. § 1703(c) (Supp. V 1975). This section prohibits

> the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, *sex*, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student . . . .

Id. (emphasis added). Other sections which specify sex as an objectionable classification along with race, color, and national origin include *id.* §§ 1701(a)(1), 1702(a)(1), 1704, 1705, 1715, 1520(c), 1752 & 1756.

Certain subsections of section 1703, however, do not list sex as a forbidden classification. *See id.* § 1703(a), (d)–(e). Other sections of the EEOA also fail to include sex as an objectionable classification. *See id.* §§ 1713(c), 1717. There is no apparent explanation, within the statute or its legislative history, for the inclusion of sex as a prohibited classification in some sections of the Act and its omission as a prohibited classification in others.

[89] *Compare* H.R. 13915, 92d Cong., 2d Sess. §§ 401–409 (1972), *reprinted in Gen. Subcomm. Hearing, supra* note 83, at 12–18 *and in H.R. 13915 Hearings, supra* note 83, at 4–6, *with* 20 U.S.C. §§ 1751–1759 (Supp. V 1975). *See also* 120 CONG. REC. H2161 (daily ed. Mar. 26, 1974), where Representative Ford indicated that the present EEOA was proposed on the floor of the House for precisely this purpose.

[90] 532 F.2d at 881, 883–85.

[91] *Id.; see* 20 U.S.C. § 1681(a)(1) (Supp. V 1975), *quoted at* note 75 *supra*.

[92] 532 F.2d at 883–85. In the Senate debate, Senator Bayh stated that he

> believe[d] specific hearings [we]re needed to answer these questions which had not been raised at the time of the 1970 hearings. . . . After these questions have been properly addressed, then Congress can make a fully informed decision on the question of which—if any—schools should be exempted.

118 CONG. REC. 5807 (1972).

that any subsequent legislation forbidding this practice should be "clear and unequivocal," and the product of data detailing the detrimental effect of such a policy.[93]

In view of the fact that the EEOA's legislative history demonstrated that this statute was not enacted as a result of any such data regarding the effects of gender-based admissions policies at the secondary school level,[94] Judge Weis proceeded to examine the language of the Act on its face.[95] This examination led him to conclude that the EEOA was "at best ambiguous"[96] because, although the statutory policy statement proscribes the "maintenance of dual school systems" based upon sex as well as race, color or national origin,[97] the provisions of the statute do not actually "prohibit the states from" setting up such a gender-classified system.[98] Moreover, the majority found it "questionable" that the facts of *Vorchheimer* demonstrated either a dual school system or an assignment within the coverage of the statute.[99] Therefore, the majority found the EEOA inapplicable to the single-sex academic high schools maintained by the Philadelphia school district.[100]

Since no federal legislation addressed the problem authoritatively, the majority then considered the constitutional issue directly.[101] Initially, Judge Weis observed that the district court, on the basis of its analysis of Supreme Court decisions in the area of gender discrimination since 1971, had concluded that, given the facts of *Vorchheimer*, a stricter standard of scrutiny applied which it termed the " 'fair and substantial relationship test.' "[102] Tested under this standard, it was

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[93] 532 F.2d at 885.

[94] *Id.* at 884–85. *See generally* H.R. REP. NO. 1335, *supra* note 84; *H.R. 13915 Hearings*, *supra* note 83.

[95] 532 F.2d at 885.

[96] *Id.* at 884.

[97] 20 U.S.C. § 1702(a)(1) (Supp. V 1975); *see* 532 F.2d at 884.

[98] *Id.* Thus, the ambiguity arises because the provisions of the Act do not prohibit practices which its policy statement implies should be prohibited. For the policy statement of the Act, see text accompanying note 75 *supra*. For the prohibited practices which do not include sex as a prohibited classification, see note 88 *supra*.

[99] 532 F.2d at 885. For a discussion of the terms "dual school system" and "assignment," see notes 131 & 133 *infra*.

[100] 532 F.2d at 885.

[101] *Id.* at 885–86.

[102] *Id.* (quoting from Reed v. Reed, 404 U.S. at 76). In fact, the lower court had determined that "the outcome of this case depends on which standard of review is applied." Vorchheimer v. School Dist., 400 F. Supp. 326, 334 (E.D. Pa. 1976), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977). Although recognizing the traditional appropriateness of the minimum scrutiny, or rational relationship, test in the area of gender classification, Judge Newcomer

noted, the district court had found that the exclusion of Vorchheimer from Central High School solely on the basis of her sex violated the equal protection clause.[103] The Third Circuit majority proceeded, however, to distinguish *Vorchheimer* from this line of Supreme Court cases by noting that such precedent had involved the denial of a benefit to females, whereas the present case involved no such denial to the plaintiff even though she was denied admission to Central.[104] Rather, the majority concluded that the school district made available equal educational opportunity to both sexes.[105] Consequently, the court considered the Supreme Court's summary affirmance of *Williams v. McNair*,[106] which upheld the exclusion of males from an all-

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noted that the Supreme Court's more recent rulings in this area were "unclear, but the net effect . . . has been to . . . place [gender-based classifications] in a new and unchartered territory." 400 F. Supp. at 335. After reviewing all of these cases and several theories to rationalize them, the lower court ultimately concluded "that the Court is not applying a uniform standard . . . . but will apply a different standard depending on whether the classification is viewed as beneficial or adverse to women." *Id.* at 341–42. Thus, Judge Newcomer concluded that when a gender-based classification is viewed as detrimental to women, the Court applies the new substantial relationship test; otherwise, the Court applies minimum scrutiny. *Id.*

Judge Newcomer then "identified [the] classification [in this case] as adversely affecting women," therefore finding the substantial relationship test the appropriate level of scrutiny. *Id.* at 343. In employing this test, he "examin[ed] the evidence before [him] to see if it establish[ed] [that the gender-based classification bore] a 'fair and substantial relationship' to the School Board's legitimate interests" rather than "search[ing] for conceivable justifications for it." *Id.* (quoting from Reed v. Reed, 404 U.S. at 76). Employing this test, he noted that the legitimate objectives of the school district were to promote academic achievement and to provide for a "choice" of "educational alternatives." He concluded that the school district's policy did not bear a substantial relationship to these objectives, however, because the evidence presented failed to demonstrate that coeducation had an adverse impact on academic achievement and that the purported "alternative" of single-sex high schools on the academic level created essentially no choice at all on that level. 400 F. Supp. at 332–33, 343. For a discussion of the lower court's treatment of the evidence presented, see note 118 *infra*.

[103] 532 F.2d at 886.

[104] *Id.* Referring specifically to the cases of Frontiero v. Richardson, 411 U.S. 677 (1973); and Stanton v. Stanton, 421 U.S. 7 (1975), and *Reed*, Judge Weis noted that "[i]n each instance where a statute was struck down, the rights of the respective sexes conflicted, and those of the female were found to be inadequate." 532 F.2d at 886. Additionally, the majority found it "significan[t]" that "none [of these cases] occurred in an educational setting." *Id.* The majority additionally made a distinction between "[t]he nature of the discrimination" involved in the present case, *id.*, and a person's total exclusion from an academic education because of either a sex-based quota system, *see* Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1268–70 (9th Cir. 1974), or higher scholastic admissions standards for members of that individual's sex, *see* Bray v. Lee, 337 F. Supp. 934, 935 (D. Mass. 1972), noting that Vorchheimer "[had] difficulty in establishing discrimination." 532 F.2d at 886.

[105] 532 F.2d at 886.

[106] 401 U.S. 951 (1971), *aff'g mem.* 316 F. Supp. 134 (D.S.C. 1970).

female state college, "strong, if not controlling authority for" the constitutionality of the single-sex schools of equivalent quality within the Philadelphia system.[107] Judge Weis added, however, that the court need not decide whether the rational relationship or substantial relationship test should be employed, because, given the facts of *Vorchheimer*, the practice was constitutional under either test.[108]

In his dissenting opinion, Judge Gibbons characterized the majority's analysis as "a twentieth century sexual equivalent to the *Plessy* decision," employing a separate but equal rationale to support gender discrimination much as that rationale had supported racial segregation in the past.[109] The dissent's most serious dispute with the majority, however, focused on the majority's treatment of the statutory issue.[110] Simply stated, Judge Gibbons found the majority's analysis to be "a . . . blatant disregard of the plain meaning of ordinar[y] statutory words."[111] Moreover, he chided the majority for stressing the legislative history rather than the statutory language of the EEOA.[112] In addition to being critical of the majority's use of the legislative history of the EEOA as proposed in 1972 to "supercede the otherwise clear language of" the EEOA as enacted in 1974,[113] the

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[107] 532 F.2d at 887.

[108] *Id.* at 888. Without being specific, the majority believed that

> [t]he record does contain sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools. . . . [G]iven the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship.

Id. at 887-88.

[109] *Id.* at 888-89. Judge Gibbons, in fact, began his dissent with a quotation from Plessy v. Ferguson, 163 U.S. 537, 544 (1896), with applicable substitutions:

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

532 F.2d at 888 (brackets in original).

[110] 532 F.2d at 889.

[111] *Id.* at 891.

[112] *Id.*

[113] *Id.* Judge Gibbons indicated that the majority's "use of legislative history" was "novel." *Id.*

dissent contended that the majority "misread" that legislative history to support its finding of ambiguity in the statute.[114]

Examining the statutory language, Judge Gibbons concluded that the Philadelphia school district's practice was violative of the EEOA. This conclusion was based on two grounds: (1) the school district operated a dual school system, and (2) the assignment of academically qualified students to single-sex schools resulted in a greater degree of segregation by sex than if those students had been assigned to the academic high school closest to his or her home.[115]

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[114] *Id.*; *see id.* at 883–84 (majority opinion). The majority, in its finding that the EEOA of 1974 was "ambiguous," *id.* at 885, used the fact that sections 201(a) and (e) of H.R. 13915 (the EEOA of 1972) had at one point, included sex as a prohibited classification, and that it was later deleted without discussion. *Id.* at 883–84.

However, the EEOA of 1972, when first proposed, did not include sex in any of its provisions. *See* H.R. 13915, 92d Cong., 2d Sess. (1972), *reprinted in Gen. Subcomm. Hearing, supra* note 83, *and in H.R. 13915 Hearings, supra* note 83. After extensive hearings, the House Committee on Education and Labor proposed an amended version of the bill which included sex in sections 2(a), 3(a)(1), and 201(3), although the word sex had not been included in the corresponding sections of the original bill. *Compare* H.R. REP. NO. 1335, 92d Cong., 2d Sess. 1, 9, 12 (1972) *and* 118 CONG. REC. 28836 (1972) *with* H.R. 13915, 92d Cong., 2d Sess. §§ 2(a), 3(a), 201(c) (1972), *reprinted in Gen. Subcomm. Hearing, supra* note 83, at 2, 3, 9 *and in H.R. 13915 Hearings, supra* note 83, at 1, 3.

The majority's confusion, in Judge Gibbons' opinion, resulted from reliance upon Representative Pucinski's analysis of the EEOA, wherein he incorrectly inserted sex into section 201(a) and (e); his analysis "d[id] not correspond to the . . . language of the Act." 532 F.2d at 892; *see id.* at 884.

In addition, Judge Gibbons pointed out that if there was any ambiguity in the EEOA of 1974, the legislative history of this Act (limited to 1974) supported his view rather than that of the majority, *id.* at 892; "[t]here was not total silence . . . on the subject of sex" classifications in the House debate, *id.* at 893. On the floor of the House, a co-sponsor of the EEOA had stated that it "would prohibit assignment of students to a school based on race, color, *sex*, or national origin." 120 CONG. REC. H2161 (Mar. 26, 1974) (emphasis added). That same day, an amendment to the EEOA which did not include sex in any of its provisions, was defeated. *Id.* at H2166. For these reasons, the dissent concluded that "Congress expressly added sex to the list of prohibited classes for student assignment and consistently refused to delete it." 532 F.2d at 893.

[115] 532 F.2d at 890–91.

The dissent found the exclusion of females from Central violative of both section 1702(a)(1) and section 1703(c). In his opinion, section 1702(a)(1) states the "legislative finding that the maintenance of a dual school system on the basis of sex violates the equal protection clause." *Id.* at 890. Furthermore, section 1703(c) specifically forbids the assignment of

> student[s] to a school, other than the one closest to his or her place of residence . . . , if the assignment results in a greater degree of segregation . . . on the basis of race, color, sex, or national origin . . . than . . . if such student were assigned to [his neighborhood] school.

20 U.S.C. § 1703(c) (Supp. V 1975). For a discussion of the majority's and the dissent's interpretation of the terms "assignment" and "school system," see notes 131–33 *infra*.

Because Judge Gibbons, unlike the majority, found this legislation applicable to the

On the direct constitutional question, the dissent concluded that excluding females from Central does not bear a "fair and substantial relationship" to the school district's legitimate objectives.[116] Since the stated objectives of the school district are "to encourage academic

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facts of this case, he addressed an issue which the majority did not: is the EEOA " 'appropriate legislation' " to enforce the provisions of the fourteenth amendment? 532 F.2d at 893. He noted that "the wording of the E.E.O.A. strongly suggests" that it had been drafted in light of the interpretation of congressional power set out in Katzenbach v. Morgan, 384 U.S. 641 (1966). 532 F.2d at 893; *see* 118 CONG. REC. 28835-36 (1972) (remarks of Rep. Pucinski).

In *Katzenbach*, voters of New York challenged the constitutionality of section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e) (1964), on the grounds that it exceeded the power granted to Congress under section 5 of the fourteenth amendment. 384 U.S. at 643-46. This provision of the Voting Rights Act provided that no person who had completed the sixth grade in a public or accredited school in Puerto Rico could be denied the right to vote on the basis of an inability to read English. This statute directly conflicted with a New York statute requiring voters to be able to read and understand English, as well as a prior decision, Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50-54 (1959), which had upheld a state law mandating literacy in English as a condition precedent to voting. 384 U.S. at 643-45, 649. The *Katzenbach* Court found the New York literacy requirement unconstitutional since it conflicted with the federal Voting Rights Act, which the Court termed "appropriate legislation," in that the federal legislation was within Congress' power to enforce the provisions of the fourteenth amendment. 384 U.S. at 658. Thus, the Court found that by virtue of the Supremacy Clause, the state literacy requirement was unconstitutional to the extent that it conflicted with the federal legislation. *Id.* at 646-47. This decision, in Judge Gibbons' opinion, had the effect of allowing a congressional enactment to contradict a previous Supreme Court decision. 532 F.2d at 894. But Justice Brennan, in *Katzenbach*, was constrained to note that although Congress has the power to enact legislation that will expand equal protection rights further than had been done by the Court, it may not contract such rights. 384 U.S. at 651 n.10.

Thus, Judge Gibbons found the rationale of *Katzenbach* to be applicable to the facts of *Vorchheimer* inasmuch as state action was obviously involved, and the relevant provisions of the EEOA expanded rather than contracted equal protection rights. 532 F.2d at 893-94. This interpretation is ironic in light of the fact that the major portions of the EEOA were enacted to restrict the use of busing to achieve racial integration of schools. *Compare id.* at 893-94 *with* 20 U.S.C. §§ 1712-1718 (Supp. V 1975). Nothwithstanding the primary purpose of the Act, Judge Gibbons posited that the legislation "go[es] further in defining the substantive content of the equal protection clause [regarding *gender*-based admissions policies] then had the courts." 532 F.2d at 894. As a result, Judge Gibbons concluded that the EEOA was constitutional. *Id.* at 894-95.

For general interpretations of congressional power under section 5 of the fourteenth amendment, see Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

[116] 532 F.2d at 896. The dissent remarked "that the appropriate standard against which a disputed gender-based classification should be measured . . . does not spring from the pages of United States Reports with immediate clarity." *Id.* at 896 n.15 (citations omitted). He concluded, however, that the rational relationship test was inappropriate in these circumstances and, therefore, employed the substantial relationship test. *See id.* at 896.

achievement" and "to provide educational options,"[117] the dissent agreed with the lower court that the record did not contain sufficient evidence to prove "that coeducation has an adverse impact upon . . . academic achievement."[118] Indeed, the dissent wryly commented that the school district could not seriously contend that it had such an impact, since the remainder of the secondary schools in the system were, with the exception of three schools, coeducational.[119] Additionally, Judge Gibbons recognized that single-sex schools provided a choice among educational techniques; however, the policy of sexually segregating academically oriented schools was not substantially related to this objective since no coeducational alternative was available on this level.[120]

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[117] *Id.; see* Vorchheimer v. School Dist., 400 F. Supp. 326, 332 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

[118] 532 F.2d at 896. The evidence adduced at the district court level had included a study by Dr. Timball, Professor of Psychology at George Washington University. The study statistically demonstrated, by an examination of Who's Who of American Women, "a direct and positive relationship between the number of women who became career-successful . . . following graduation . . . and the number of women faculty" teaching at the institution, and "a direct negative relationship between the number of men students present at a college and the number of women 'achivers' [*sic*] graduating from the institution." Vorchheimer v. School Dist., 400 F. Supp. 326, 329–30 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

The district court had found this study inapplicable for three reasons. First, it contained no information comparing the academic caliber of the single-sex and coeducational schools so "[i]t is extremely doubtful that [these findings] can be applied to women at an academic high school such as Central." 400 F. Supp. at 333. Second, "fostering career successful women is not one of the [school district's] objectives." *Id.* Third, the study showed nothing concerning the effect of a single-sex school on males. *Id.*

In addition, Dr. Jones, Professor of Education at Bucknell University, testified concerning the results of a study he had conducted in New Zealand, in which he had found statistically significant differences between answers concerning attitudes of students attending single-sex schools and those attending coeducational schools. *Id.* at 330–31. On the average, students attending single-sex schools "have a higher regard for scholastic achievement than do the coed students, and that they are more likely . . . to spend more time at homework than the coed students." *Id.* at 332.

However, "Dr. Jones [himself] was reluctant to apply the conclusions of the New Zealand study to American single-sex schools for academically superior students." *Id.* at 331. For this reason, and because the school district did not show a substantial relationship between these factors and its stated objectives, the district court found this study inapplicable. *Id.* at 343.

[119] 532 F.2d at 896. Three comprehensive high schools in the district are also single-sex schools. Vorchheimer v. School Dist., 400 F. Supp. 326, 329 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

[120] 532 F.2d at 896.

Although the *Vorchheimer* court was presented with the opportunity to reexamine the validity of gender-based classifications in the field of public education in light of significant legislative[121] and decisional[122] constitutional developments, the majority nevertheless found, in accordance with pre-*Reed* decisions,[123] that substantially equal, separate-sex academic high schools furthered a legitimate state interest and were therefore constitutional.[124] Even though the majority's conclusion in *Vorchheimer* that no federal legislation "authoritatively address[es] the problem"[125] appears correct, the process by which the majority reached this conclusion is circuitous.

Under traditional canons of statutory construction, a court first examines the applicable statute to determine whether the language, on its face, is dispositive of the issue. If it is not, the legislative history of the enactment is examined to resolve the issue.[126] The *Vorchheimer* majority, rather than expressly adhering to such principles, examined the legislative history of both title IX and the EEOA before making an express determination that the statutory language of the EEOA was ambiguous.[127] Such a refutation of the EEOA's pertinence to the Philadelphia school district's policy was unnecessary since a more traditional analysis of the language of the legislation itself might have supported the majority's conclusion.[128]

In his dissenting opinion, Judge Gibbons found that sex segregation in Philadelphia's academic high schools was a proscribed practice under the EEOA.[129] This finding, however, must rest on at least one of two tenuous assumptions: (1) the single-sex high schools either constitute a school system, or the entire system can be considered dual by virtue of these schools;[130] or (2) the students who attend

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[121] *See* notes 74–89 *supra* and accompanying text.

[122] *See* notes 61–73 *supra* and accompanying text.

[123] *See* notes 47–59 *supra*.

[124] 532 F.2d at 881.

[125] *Id.* at 885.

[126] 2A SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §§ 46.01–.04 (4th ed. Sands 1973); *see, e.g.*, Globe Seaways, Inc. v. Panama Canal Co., 509 F.2d 969, 971 (5th Cir. 1975) (a court should "not refer to the legislative history if the statutory language is clear . . . . Congress is presumed to have meant what it said") (citations and footnote omitted).

[127] 532 F.2d at 883–84. The majority made "[a]n analysis of the statutory language, *which recognizes the background* to the legislative effort," *id.* at 885 (emphasis added), after examining the legislative history, not only of the EEOA but also of title IX—an admittedly inapplicable statute as well. *Id.* at 883–84.

[128] *See* 28 U.S.C. §§ 1702(a)(1), 1703(c) (Supp. V 1975).

[129] 532 F.2d at 890–91.

[130] *See* 28 U.S.C. § 1702(a)(1) (Supp. V 1975).

Central and Girls are assigned to their respective schools.[131] Central and Girls, however, do not themselves constitute a school system —dual or otherwise; rather, they are a part of the Philadelphia school system.[132] The fact that they constitute but a small part of this overwhelmingly coeducational school system[133] also militates against the conclusion that the entire school system should be considered dual by virtue of these two schools. Secondly, academically superior students are not assigned to the sexually segregated, academic high schools in the sense that it is mandatory they attend them.[134] Although she could have voluntarily attended Girls, Vorchheimer herself chose to attend a coeducational neighborhood school instead.[135] Although such facts make little difference to a student denied admission to a school solely on the basis of sex, one or both of these factors must be present in order for the school system's practice to fall within the EEOA's proscriptions.[136]

The dispute between the majority and the dissent on the constitutional issue, however, centered on whether the minimum scrutiny or substantial relationship test should in fact be employed.[137] Although the majority concluded that the result in this case would be

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[131] *See id.* § 1703(c).

[132] 532 F.2d at 881. The dissent, however, terms these two academic high schools within the school district as "[t]he Philadelphia dual system for scholastically superior students," and concludes that "Philadelphia operates such a [dual school] system in its senior academic high schools." *Id.* at 890–91.

[133] *See id.* at 891.

[134] *See id.* It should first be noted that the EEOA does not define the term "assignment," *see* 20 U.S.C. §§ 1701–1758 (Supp. V 1975); nor did the majority or dissent explain in what sense they were using the word, *see* 532 F.2d 881–96. It may be inferred, however, that the dissent did not view voluntary enrollment and assignment as mutually exclusive terms. Rather, Judge Gibbons seemed to have employed the term "assignment" to mean enrollment at whichever school a student ultimately decided to attend. *See id.* at 889. He noted that "[h]aving met the qualifications for admission to an academic high school, [Vorchheimer] could be *assigned* either to Girls on the basis of her sex, or to a non-academic high school . . . on the basis of her residence." *Id.* (emphasis added).

The majority, however, used these terms in a different sense. Judge Weis seemed to believe that because enrollment or attendance at a single-sex academic high school is voluntary rather than mandatory, such a voluntary enrollment does not constitute an "assignment." *See id.* at 882, 885. He remarked that the EEOA was directed against forced busing of students, and, then concludes that the practice in question was not "an attempt by a school board to *assign* 'a student to a school, other than the one closest to his or her place of residence.' " *Id.* at 885 (quoting from 20 U.S.C. § 1703(c) (Supp. V 1975)) (emphasis added).

[135] 532 F.2d at 881.

[136] *See* 20 U.S.C. § 1703(c) (Supp. V 1975).

[137] 532 F.2d at 896 (Gibbons, J., dissenting).

the same under either test,[138] it arrived at this conclusion by a misapplication of the substantial relationship test. Since under that test, the challenged action must be shown to substantially further legitimate ends having a substantial basis in actuality,[139] both the trial court and the Third Circuit dissent concluded that excluding females from Central did not bear a substantial relationship to the school district's stated objectives because the evidence presented by the school district was insufficient to demonstrate that fact.[140] In contrast, the majority summarily concluded that single-sex academic high schools did bear a substantial relationship to the objective of providing a quality education because the same evidence, deemed insufficient to demonstrate that coeducation had an adverse impact on academic achievement by the trial court and Judge Gibbons, was sufficient to establish that "adolescents *may* study more effectively in single-sex schools."[141] Such speculation concerning the relationship between the challenged classification and its relationship to legitimate objectives is appropriate under the minimum scrutiny test;[142] but under the substantial relationship test, this type of correlation must be demonstrated in fact.

In addition to determining that the exclusion of females from Central High furthered a legitimate educational policy, the majority relied upon the facts that a school academically equivalent to Central was exclusively available to females[143] and that no student in the district was compelled to attend either of these single-sex schools.[144] In relying on these two factors, the majority confused the issue presented in the case. First, by virtue of the trial court's finding that Central and Girls were substantially equal,[145] the majority began its equal protection analysis with the premise that females were denied no benefit granted to males.[146] The majority thereby assumed the

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[138] *Id.* at 888.

[139] *See* Gunther, *supra* note 66, at 21; notes 67–69 *supra* and accompanying text.

[140] 532 F.2d at 896; Vorchheimer v. School Dist., 400 F. Supp. 326, 333 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977). For discussion of the lower court's use of the substantial relationship test, see note 102 *supra*. For the lower court's discussion of the evidence presented, see note 118 *supra*.

[141] 532 F.2d at 888 (emphasis added).

[142] *See* notes 33–35 *supra* and accompanying text.

[143] 532 F.2d at 881.

[144] *Id.*

[145] Vorchheimer v. School Dist., 400 F. Supp. 326, 329, 333 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

[146] 532 F.2d at 886. The majority did not view Vorchheimer's denial of admission to

validity of "separate but equal" schools for males and females, and this assumption clouded its examination of the gender-based classification and its relationship to the goals of encouraging academic achievement and providing educational options. This position, however, only serves to obscure the real question. The central issue in this case is not whether Vorchheimer and the class of females which she represents might be able to find "equal" educational opportunity at Girls High or at any other high school in Philadelphia, but whether the denial of admission to Central solely on the basis of sex violated her constitutional right to equal protection.[147] The majority's analysis begs the question since it starts from the proposition that the equal educational opportunity required can in fact be given in sex-segregated schools of equivalent quality. In essence, the "separate but equal" analysis shifts the emphasis of any inquiry from an examination of the reasonableness of the classification and its relationship to legitimate objectives, to a determination of the quality of the educational facilities available. If the facilities are found substantially equal, the plaintiff is hard pressed to show harm; in such a circumstance, an examination of the classification and its relationship to legitimate interests becomes virtually meaningless.

Central solely on the basis of her sex as a "denial" or a discrimination at all since she could have gone to Girls High. The majority noted that Vorchheimer "submitted no factual evidence that attendance at Girls High would constitute psychological or other injury" and that "the deprivation asserted is . . . the opportunity to attend a specific school, not . . . an opportunity to obtain an education at a comparable" school. *Id.* at 882–83.

[147] *See* Comment, *supra* note 60, at 217.

Additionally, the conclusion that Central and Girls are substantially equivalent is itself questionable. Central has a science program admittedly superior to that at Girls, besides having a substantial endowment fund and extremely influential alumni. Vorchheimer v. School Dist., 400 F. Supp. 326, 328–29 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977).

See also Comment, *supra* note 24, at 312, where the author makes a convincing showing that the harms of sex segregation parallel those of race segregation. Women, like blacks, have a high social visibility and both women and blacks suffer as victims of the dominant group's reasoning, that they, as a group, possess "inferior intelligence, scarcity of genuises, freedom in instinctual gratifications, and emotionalism." *Id.* at 312–13 (citing A. MONTAGUE, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE 181 (4th ed. 1964)). In addition, both females and blacks have been "barred from education, suffrage, certain jobs, and political office [, all] in [their own] *best interest*." Comment, *supra* note 24, at 313 (emphasis added) (citation omitted). Lastly, the author points to studies showing that the detrimental psychological and educational effects of sex segregation are the same as those of race segregation. *Id.* at 315–16. For a discussion of these psychological and sociological studies, see *id.* *See also* Shaman, *College Admissions Policies Based Upon Sex and the Equal Protection Clause*, 20 BUFFALO L. REV. 609, 612–13 (1971). *Contra*, Moody, *The Constitution and the One-Sex School*, 20 CLEV. ST. L. REV. 465, 469–70 (1971).

Secondly, it is conceded that the voluntary nature of attendance at a sexually segregated school will preclude the applicability of the EEOA.[148] Although this factor is determinative of the statutory issue, it should not presumptively rise to the same dimension under the direct constitutional claim. It bears repeating that the issue is whether the denial of admission to Central solely on the basis of sex violated Vorchheimer's right to equal protection. To answer that it was not mandatory that she attend Girls and that she could attend a coeducational school of lower quality than either Central or Girls is obviously no answer at all.[149]

Admittedly, the issue presented by the *Vorchheimer* case is not of the sort which lends itself to a simple resolution. It would seem, however, that under a substantial relationship test, a gender-based classification for purposes of admission to a public school should be deemed impermissible unless the requisite showing has been made that the classification substantially furthers the legitimate objectives of the school district. Constitutional issues aside, if one accepts the proposition that equal educational opportunity should be made available to both sexes, it is submitted that the best method of assuring this opportunity to all on an equal basis is to refuse to determine admission to any public school by reference to an individual's sex.

Catherine Moore Curran

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[148] *See* notes 129–35 *supra* and accompanying text.

[149] *But see* Moody, *supra* note 146, at '469–70. The author suggests that the state may constitutionally provide a choice between *coeducational* and single-sex schools, as long as the choice is genuine. *Id.* at 469 (emphasis added). Her belief is that the conclusion that racially segregated schools are harmful to blacks "is not a constitutional conclusion but a factual one," because "if all-white schools were provided, no white would attend the non-segregated school." *Id.* at 470. Thus, no real choice can be made available in the area of race. In contrast, "where co-education is made available as an alternative, it will not fail [; therefore,] there is no constitutional reason for denying a choice to those who prefer one-sex schools." *Id.* Under such a theory, it would be constitutionally permissible for the district to offer alternatives only if the alternatives consisted of single-sex schools and coeducational schools of the same quality. The choice in the Philadelphia school district, however, is between a single-sex academic high school and a coeducational school of lower academic caliber. *See* 532 F.2d at 881.